

THE LAW INSTITUTE OF VICTORIA JOURNAL

THE NATIONAL DEBATE ABOUT A CHARTER OF RIGHTS & RESPONSIBILITIES - ANSWERING SOME OF THE CRITICS*

The Hon Justice Michael Kirby AC CMG**

RETURN TO THE FOLD

I have been privileged over the years to know many of the Presidents of the Law Institute of Victoria and very many Victorian solicitors. I pay a tribute to them as ministers of justice. In our legal system, the judges in their robes (and sometimes wigs) attract a lot of attention. However, as Australia's longest serving judge, I can affirm that the system would not work without honest, talented and courageous legal practitioners. They are essential to the maintenance of the rule of law. They play a vital role in upholding access to justice and securing basic rights in accordance with law.

* Text of an address to a President's Luncheon of the Law Institute of Victoria, Melbourne 21 August 2008.

** Justice of the High Court of Australia. Personal views.

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It is about these aspirations of our liberal democracy that I offer these remarks. No system of law and government is perfect. Ours is a whole lot better than most others in the world. Above all, our institutions are not corrupted. We must all endeavour to keep it so. An easy fault for lawyers, especially judges, to slip into is self-praise and hubris. We need to be on the lookout for defects in our institutions and ways in which we can make them respond more effectively to contemporary challenges. That is what the charter of rights debate is all about. Not the attainment of illusive perfection. But improvement and enhanced transparency in our governmental institutions.

This is a tricky area for a judge because it is one upon which there are contesting viewpoints and contradictory political stances. The contradictions have not (at least yet) settled into sharp political divisions. On the Labor side of Australian politics, there are supporters of the idea of charters of rights. Most obviously, neither the *Human Rights Act 2000* of the Australian Capital Territory nor the *Charter of Human Rights and Responsibilities Act 2006* of Victoria would have been enacted without the support of the ALP government and at least a majority of its members. On the other hand, one of the most vigorous critics of such legislation is the Hon Bob Carr MP, former Premier of New South Wales¹. He sees such measures as the work of "unelected zealots" bent on a "judicial creep" to more power for lawyers. Not far behind, but in

¹ Bob Carr, "Bill of Wrongs", *Weekend Australian*, 26 April 2008, 19.

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somewhat more temperate language, are the opinions of the Hon John Hatzistergos, Attorney-General of New South Wales. He sees such measures as "fundamentally anti-democratic"²!

On the Coalition side of politics, there appear to be definite supporters for stronger protections for basic rights. Mr Petro Georgiou and the Hon Judi Moylan recently proposed private members initiatives to counterbalance current anti-terrorism laws with more robust individual protections. Such measures were justified as necessary to "bring to the fore the very real tension between Parliament's duty to protect the community and its obligation to ensure other fundamental rights - such as due process, liberty and freedom of speech - are not unduly infringed upon or curtailed"³. The leader of the federal opposition, the Hon Brendan Nelson MP, was reported as saying that their idea "had merit"⁴. I hasten to say that this was not an endorsement of a general rights charter.

On that issue, the Shadow Federal Attorney-General, Senator the Hon George Brandis was reported as saying that a Bill of Rights would "give the judiciary too much power"⁵. The Senator's words appear under

² John Hatzistergos, "A charter of rights - Or a charter of Wrongs?", *The Sydney Papers*, Autumn, 2008, Vol 20, No 2, 103, 105.

³ *Australian Financial Review*, 12 March 2008, 16.

⁴ *Ibid.*

⁵ R Viellaris, "Bill of Rights to Create a star chamber", *Courier Mail*, 15 August 2008, 7.

a newspaper headline "Bill of Rights to create star chamber". This looks like the handiwork of a sub-editor. The words do not appear within quotes. Certainly, this is a topic which, as in the United Kingdom, has attracted some informative debate in the media but a great deal of media hostility. The media often rejoice in the sway they hold over politicians, dependent as politicians often are upon their favours. It must sometimes be frustrating for those who enjoy great power, to meet an institution (the judiciary) which does not feel obliged to dance to its tune. Yet the control of great power in transparent and accountable ways, is the ultimate genius of the system of government of liberal democracies.

I embark upon this enterprise, of responding to some of the criticisms that have been voiced about the idea of Australian charters of rights, by acknowledging that, for most of my life, I was a sceptic, or at least undecided, upon the point. After all, such was the English legal tradition in which I was trained and where I learned the theories about the "sovereignty of Parliament" and the English rejection of "natural rights" as a European legal heresy.

I have changed my mind about these notions based on my very long service in the judiciary and in other bodies, in Australia and overseas. Because of my faith in the wisdom of the Australian people, I will now share my views. They are not dogmatic. I do not ram them down anyone's throat. I do not tread a partisan line. I stand on my

judicial record as a defender of the powers and privileges of parliaments⁶. I acknowledge that, whether Australia should embrace charters of rights depends very substantially upon what any such instrument contains. In any significant alteration of the institutions of government, we have to be sure that the proposed change is one for the better. There can be no blank cheques.

The federal government has committed itself to "a process of consultation which will ensure that all Australians will be given the chance to have their say on [how best to protect human rights and freedoms] for our democracy"⁷. These views are offered as a contribution to a civic debate that we, as Australians, are to be invited to join.

CRITICS AND ANSWERS

1. ***There's no need for it.*** The primary argument of the critics is that there is no need for us to change our institutions and adopt a charter of rights. The strongest voices expressing this view tend to be those of politicians and sections of the media. It is natural, that those who enjoy

⁶ *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 (NSWCA); *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 427 [61].

⁷ Australian Labor Party, 2007, ALP National Policy and Platform in Hatzistergos, above n 2, 103.

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unbridled power generally resist the attempt to impose any bridles. Why would they welcome checks or restrictions beyond those that they are presently saddled with?

There is a lot of theory in our democratic government. When it is analysed, the actual role of the people, in rendering politicians accountable to them, is pretty indirect and passive. Basically, it comes down to a visit to a polling station once every three years or so. Of course, citizens can join political parties. However, fewer and fewer now do. They can watch the television and telephone talk-back radio. But most do not. Most watch passively the game that is played out by politicians and the media.

The only proposal for a charter of rights that is presently on the table in Australia is one, like that of Victoria and the ACT, based on the statutory model accepted in Britain in the *Human Rights Act 1998* (UK) ("the charter model"). That model does not give courts a power to override or invalidate a law made by Parliament. It simply encourages courts to interpret laws made by Parliament, in so far as they can, to be consistent with the charter. If an inconsistency exists, this is brought to the attention of Parliament. It still has the final say.

Such a charter seems to enhance the operation of the elected legislature. It seems to improve responsiveness to felt concerns about injustice, inequality and departure from fundamental rights. It is ironic that the media is generally a strong supporter of freedom of information

laws (FOI) on the basis that they enhance transparency in the governmental process and thus democratic accountability. Yet most of the media commentators appear to oppose a charter. Enhanced transparency in civic discussion and decision-making about basic rights is what I take the present charter model to offer. Potentially it is, in fact, a stimulus to the democratic process which, at least some Australians may feel, has slipped substantially out of the hands of the people, party members and even elected politicians into the relatively few hands of political organisations whose focus is on winning elections and power. A true democracy is a place of many voices, including discordant voices.

A country, such as Australia, which has seen such serious injustices contrary to fundamental human rights - to women, to Aboriginals, to Asian people, to homosexuals, to religious minorities and others - can hardly say that there is no need for the democratic lawmakers to have an occasional stimulus based upon fundamental principles of equality and basic human rights. Anything that is likely to stimulate the democratic process to such ends would seem, on the face of things, to be a step in the right direction so far as the quality of our governance is concerned.

2. ***The Soviets and Zimbabwe's Bills of Rights:*** A common criticism is that a charter of rights will not protect the people from the wrongs of unjust laws. The shocking abuses in the Soviets and in countries like Zimbabwe despite their impressive Bills of Rights are often

mentioned. All of this is fair rhetoric. Laws are written on paper. Alone they are no guarantess. More is needed than fine flowing prose.

On the other hand, Australia is not really in the same category as such serial abusers of fundamental rights. Our need is not protection against the grossest oppressions. Addressing the minds of our elected representatives to fundamental rights is arguably a legitimate aspiration in a democracy. Opponents of charters of rights sometimes point to the *Mabo* decision which upheld the rights of Aboriginal Australians to claim native title to their traditional land. That decision was based on common law not a charter of rights. I suspect that most Australians, certainly the young, would hold the view (as I do) that the *Mabo* case was rightly decided by the High Court. If we had had a principle of equality and non-racism in our Constitution or even in a charter , we might never had needed the decision in *Mabo*. A statement of basic rights, constantly before Parliament and the citizens, could encourage legislation that is respectful of the fundamental human dignity of all citizens. Would that be such a bad thing?

3. ***It's alien and completely new:*** The Australian Constitution contains a few fundamental rights (such as to jury trial in federal offences; and protection from compulsory federal acquisition of property without payment of just terms). But it is true that the founders rejected a Bill of Rights copying the United States model. That was done in a highly monochrome society, 98% of whom were Anglo-Celts. The dangers for lawmaking in Australia today derive from what is, at once,

the large challenge and great opportunity of life in Australia: its racial, religious and cultural diversity. It is when a society becomes so diverse that a need may present to collect and state the basic values that the society accepts as being held in common. Such principles then become part of a nation's narrative. They become the source of the idea that helps to forge a shared identity in the nation and indeed links with human beings everywhere.

Human rights are not new to Australia. They are deeply enshrined in common law principles given effect by the judges. However, such principles can all too easily be overridden, including thoughtlessly, by the legislature. The current charter model affords an opportunity to remind Parliament of any serious departures from fundamentals.

Australia is a party to most of the important human rights treaties adopted by the United Nations since the Second World War. Moreover, with some such treaties such as the *International Covenant on Civil and Political Rights*, Australians can now bring their complaints about alleged Australian derogations to the United Nations Human Rights Committee in Geneva. When we look at treaties of this kind, we immediately see ideas that are entirely familiar to us. This is no accident. It is because the treaties were profoundly influenced by Anglo-American lawyers. They state principles which have a long history in the millennium-old tradition of English law. At least it is arguable that we should bring these rights home so as to avoid or diminish the necessity to send disappointed citizens overseas to ventilate their complaints. We should

institute our own means of checking and improving our nation's compliance with the international standards that we accept before the international community.

4. ***We can leave it to Parliament:*** When I was first appointed a judge in 1975, I believed that we could leave all necessary reforms to Parliament. How naïve. Years of experience, as a Law Reform Commissioner, judge and citizen, has convinced me this is simply not true. Sometimes Parliament acts with astonishing speed. Recently we saw this in the High Court where legislation to protect the governmental interest in the Luna Park site in Sydney was passed through State Parliament within a couple of days⁸. However, a more fundamental change to update and modernise the law of contempt of court (which had been recommended by the Australian Law Reform Commission), relevant to the case, has been lying in the too-hard basket for twenty years. The plain fact is that unless legislation has powerful supporters; involves political or special interests; has grabbed a headline or two; or looks after popular majority interests, it will often not attract precious parliamentary time.

By the same token, we must certainly strengthen and not weaken the democratic elements in our system of government. This is where Sir Gerard Brennan, past Chief Justice of the High Court, correctly saw

⁸ *Hearne v Street* [2008] HCA 36.

what he called the "genius" of the current charter model. There would be an arguable danger if courts were given, suddenly, a large mandate to override and invalidate parliamentary legislation on human rights grounds. However, the charter model does not give courts such power. It encourages a rights-based interpretation of legislation. But this is something the common law itself does, presuming that Parliament (unless it makes things very clear) does not intend to override fundamental rights. The most that the charter model permits, where inconsistency is shown, is that a Court draws the inconsistency to the specific attention to the democratic lawmakers. They may decide to leave their law stand. As in the case of the long-term detention of children as a first resort in the families of refugee applicants, this might indeed have been Parliament's considered will⁹. But a judicial reminder that an Australian law appears inconsistent with a fundamental principle of human rights, could occasionally stimulate the process of reconsideration, reflection and change.

If you are not a foreign child, locked up in a remote detention centre, you might not see this as an urgent priority. If you have never tasted discrimination, unequal treatment or perceived injustice, you might wonder what the fuss is about. If you control the levels of power, you may think that action is unnecessary, or a low priority. As Chief Justice Sir John Latham once said, in Australia, the popular minorities

⁹ cf *Minister for Immigration, Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365.

can generally look after themselves. Protective laws are commonly needed for minorities, and especially unpopular minorities¹⁰.

5. ***It can't be done piece-meal:*** There are some who say that we could not achieve a proper approach to the protection of fundamental rights on a piece-meal basis. It is true that there would be some advantages, especially for community education, in achieving a national consensus, as was done in Canada, New Zealand and South Africa (as well as Britain) - countries with whom we share a common legal culture with a traditional hostility to Bills of Rights. Those countries have all changed. Now, in effect, we in Australia stand alone. This does not mean that we are wrong in doing so. But it does mean that it is timely for us to engage in a national debate to reconsider our position.

When, in the olden days, we were more enthusiastic federalists in Australia, it used to be said that one of the advantages of our system of government was that it encouraged experimentation and diversity and laws reflecting novel ideas¹¹. Thus, there was a time when Australia was truly imaginative and experimental in lawmaking. We were one of the first countries to embrace universal suffrage for women; industrial arbitration and "fair play"; entitlements for dependants to challenge

¹⁰ *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 124.

¹¹ *New South Wales v The Commonwealth (Work Choices Case)* (2007) 229 CLR 1 at 229 [557]-[559].

unjust wills etc. Many of the big reforms of the 1960s and '70s - on environmental law, on consumer protection, on homosexual reform - were first introduced in South Australia and then copied elsewhere in Australia. So the notion of proceeding with variations of the charter model in different States before embracing a federal model is not antithetical to federation. It is part of the very genius of a federal system of government.

6. ***It will encourage judicial activism:*** But will such a charter model encourage judicial adventurism with the spectre of unelected judges, drunk with power, constantly treading on political toes and thereby damaging the hard-won reputations of their courts?

This is a very frequent assertion. Sometimes it is put forward in a thoughtful and truly concerned way¹². I know that there are many Australians who look with horror at the United States Constitution. Certainly, I too find the protection of the right to bear arms, appearing there, abhorrent and anachronistic. However, that is not the charter model that is on anyone's table in Australia. Nor is there any chance that an Australian charter of rights would include bearing arms. It does not appear in any of the international statements of fundamental rights. In truth, it is a relic of eighteenth century.

¹² E J Debeljak, "Parliamentary Sovereignty and Dialogue Under the Victorian charter of Human Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making" (2007) 33 *Monash University Law Review* 9.

The experience of the English judiciary since the *Human Rights Act* came into force has been one of prudence and wisdom in calling to attention suggested parliamentary departures from basic rights. Sometimes the call has been beneficial and has been answered. In one notable case, the House of Lords pointed to the fact that indefinite detention of people, simply because they were foreigners, was inconsistent with basic principle¹³. The British Government and Parliament agreed. They accepted the judges' reminder.

In Australia, there is no similar enacted law of basic rights that judges can point to so as to provide a check against excessive infractions upon liberty, whether in the case of refugee claimants or alleged terrorists. In a liberal democracy, we usually try to balance the scales of justice. At least it is sometimes helpful to call our lawmakers back to fundamental principles and to our basic legal traditions. If parliaments always have the last say, I hardly think that there is much risk of judges being "drunk with too much power". Much of the discourse of Australian critics in this respect has been borrowed from the United States and Canada where, the courts have the power to invalidate laws

¹³ *A (FC) v Secretary of State for the Home Department* [2004] UKHL 5 per Baroness Hale of Richmond. In H Charlesworth, "Who Wins Under a Bill of Rights?" (2007) 25 *University of Queensland Law Journal* 39 at 48, Professor Charlesworth contrasts that decision, illustrating the impact of the *Human Rights Act* 1998 (UK), with the decision of the majority of the High Court of Australia in *Al-Kateb v Godwin* (2004) 219 CLR 562.

that infringe Bills of Rights. No one at this time is suggesting similar measures in Australia.

7. ***Too many borderline decisions:*** Occasionally, critics reach down into particular cases - toilet paper for prisoners and children's rights against parents - to instil alarm about the dangers of charters of rights¹⁴. Sometimes they get the facts wrong and overlook the unpleasant truth that the laws which they criticise were actually enacted by a legislature, not derived from a charter. The critics sometimes get so carried away with their enthusiasm that do not trouble to check their facts.

Nevertheless, it has to be conceded that any application of a statement of fundamental principles is bound to present borderline cases. Upon such cases intelligent people can often disagree. Drawing lines is something that judges do every day of their lives. The appellate process and academic and civic criticisms demonstrate that the lines are often disputed. Sometimes they are strongly contested. That is just the nature of a rule of law society. Against the suggested horror stories of particular cases can be mentioned others which will be praised as constituting useful reminders to Parliament (where fundamental interests are affected) of the need to avoid bandwagons and to be wary of embracing populist initiatives to take away basic rights.

¹⁴ The misstatement of the decision of Justice S Tessiere of the Quebec Superior Court of 18 June 2008 is a case in point.

In any case, under the current charter model in Australia the elected lawmakers have the last say. The most that is done is that society gets a chance, in certain circumstances, to enliven a civic debate. Basically, that is what FOI laws promote. It appears also to be an objective of the charter model presently adopted in Australia. On the whole, we should be welcoming anything that reduces the rigidities of our governmental institutions and promotes within them greater responsiveness and transparency. In that way, we might help the theory of electoral democracy to catch up with the current pallid reality.

8. ***It is electorally unpopular:*** Some critics see as a serious flaw in the idea of a charter of rights the fact that they say that it is electorally unpopular. It is true that the attempt in 1988 to include some basic rights in respect of State legislation in the federal Constitution was overwhelmingly rejected at referendum. However, that referendum was poorly promoted and explained. Subsequent national surveys, conducted by the Australian National University, have found that 70.6% of Australians wanted a Bill of Rights. A further 21.8% were undecided. Only 7.4% were opposed¹⁵.

I do not put much store on any of these statistics. They simply point to the importance of getting the content of any charter of rights in

¹⁵ See R Jory, "Bill of Rights Will Protect Fair Treatment", *Adelaide Advertiser*, 22 April 2008, 18.

the best possible shape for operation in the Australian setting. Nothing revolutionary would be acceptable. That is just not the Australian way. On the other hand, there is now a huge body of substantially consistent international knowledge about fundamental principles of human rights. It is no coincidence that these statements of rights grew out of the suffering of the Second World War and the revelations of the Holocaust.

Protection of fundamental human rights is one of the three pillars upon which the United Nations Organisation was built. Indeed, the attempt to achieve global human rights is essential to the achievement of the other two objectives: peace and security and economic equity. We should not be proud of being outside the loop of these developments. Australians, who have so much to contribute in legal thinking and about political governance, should be playing an active and constructive part in this dialogue. Human beings everywhere have fundamental things in common. Substantially, the way we overcame the White Australia mentality was by opening a dialogue with Asian Australians and discovering the fundamental realities that we all shared. So it has also been with indigenous Australians, with gays and with other minority groups.

9. ***It is constitutionally impossible:*** Finally, there are those who say that protecting rights in a charter is constitutionally impossible in Australia.

Certainly, our nation's experience with attempts to amend the federal Constitution would make even the most optimistic are very cautious about attempting to secure the adoption of a federal constitutional Bill of Rights. Other nations may have it - most do- but no one is suggesting this for Australia at this time. Without a constitutional charter, judicial techniques have afforded protection, on occasion, to particular vulnerable groups in Australia: unrepresented accused on trial¹⁶; communists¹⁷; journalists and others engaged in political speech¹⁸ and so forth. But such achievements are very chancy as many other cases have shown¹⁹

Some respected commentators²⁰ have pointed to a possible constitutional problem with the charter model, in so far as it attempts to instruct courts to adopt an artificial interpretation of legislation or to make a declaration of incompatibility having no immediate outcome for the legal rights of the parties. This is not the occasion to resolve these issues. But deft drafting could probably overcome the first of these difficulties, given that the common law already adopts a principle

¹⁶ *Dietrich v The Queen* (1992) 177 CLR 292; *Roach v Australian Electoral Commission* (2007) 81 ALJR 183...

¹⁷ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

¹⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹⁹ *Al-Kateb v Godwin* (2004) 219 CLR 562.

²⁰ M Pelly, "Brennan Foresees Constitutional Glitch with Rights charter" in *The Australian*, 14 March 2008, 33.

favouring the interpretation of parliamentary law in a way consistent with fundamental rights²¹.

As to the second supposed obstacle, this too would seem to depend upon the drafting of the measure. In any case, it might not create a problem for State laws which are not subject to the strictures of federal judicial power. And in any case, recent decisions of the High Court might possibly be interpreted as softening those strictures somewhat²². The lesson of the past century has been that the Constitution has proved remarkably adaptable to the ever-changing realities and needs of the society in which it has to operate.

None of what I have said pretends to be a knock-out blow at the critics of the idea of a charter of rights in Australia. Nor is it intended to reflect any disrespect for those who are hesitant or doubtful, or for that matter, opposed to a charter. In such matters, we need to engage in a true national dialogue that is mutually respectful. We surely need to avoid the hot-button phrases that parade "power drunk judges", "do-gooder academics" and "star chamber" dangers.

A PRIVILEGED DISCOURSE

²¹ *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 at 92 [111].

²² cf *Attorney-General (Cth) v Alinta Ltd* (2008) 82 ALJR 382 at 391 [32]-[33].

When it comes to an attempt to think through the basic features of the way Australians are governed today, and how we can improve our present system and make it more accountable, responsive and transparent, Australians should be able to rise above name-calling. In the end, we may reject the modest charter model that has now been adopted in the UK, ACT and Victoria. We may elect to stand outside a broad movement that has now embraced most countries of the world, including most that have advanced legal systems like our own. However, if we are to go this way, let us do so rationally, seriously and with eyes wide open to the realities of our democracy, not as starry-eyed victims of a theory of democratic accountability that might be improved with new measures for stimulating public debate with just action and outcomes. The shape of democracy and the true attainment of equal justice under law for all Australians is at stake. So the issue is pretty important.

It is not often that Australians are invited to pause and think about the fundamental values of the way they are governed. As citizens, we should be able to do so with open minds, mutual respect and realism. The founders of the Australian Constitution in the 1890s approached the challenge before them in that spirit. We, who follow, should aspire to a similar rational dialogue to serve Australia in the very different circumstances of the contemporary world.

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