A STATUTE OF LIMITATIONS: THE CASE AGAINST A CHARTER OF RIGHTS

A charter of rights could expand as well as limit government, warns **Ben Jellis**

In the *Costello Diaries*, the former Treasurer a recalls a time when then Opposition Leader John Hewson came to him with what he considered to be a possibly election winning policy. The opposition should, according to Hewson, announce to the Australian people its desire to re-introduce the death penalty for rapists and child molesters. Costello recalls that he was incredulous, and later asked his colleague Ian McLachlan, 'Do you think we have an obligation to tell the Australian people that their leader is a maniac?' MacFarlane replied that he could trust the Australian people to figure it out for themselves.

Responses to this story capture both sides of the debate about an Australian charter of rights. To those who support the introduction of a charter, the ease with which a populist could reintroduce the death penalty demonstrates the vulnerability of the rights of Australian citizens who are unprotected by any sort of bill of rights. To those who oppose a charter, the response of McLachlan is apposite. The surest safeguard of rights is the wisdom of the voters. To this, it might be added, that if the voters ever did want to do something like bring back the death penalty, unelected judges shouldn't have the right to tell them that they could not.

In truth, there is some force to both views. It is, therefore, unsurprising that the question of an Australian charter of rights presents a challenge to Australian liberalism. Indeed, at first blush, a charter of rights seems directed towards the primary concerns of liberal philosophy by erecting a wall between the government and the fundamental rights of its citizens.

However, a charter can also have less favourable effects on individual rights and freedoms. It is likely to be used by litigants to claim entitlements that impose claims on others. There will be pressure to expand the list of 'rights' to include government services. Uncertainty about the meaning of legislation is created by requiring courts to interpret it in light of vague principles. Clear laws are necessary for both citizens and public authorities to know their exact rights and responsibilities. A charter would, furthermore, require judges to take essentially political decisions. Needless to say, this has serious consequences for the political neutrality of the courts.

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Endnotes for this essay can be found at www.policymagazine.com.

The path to an Australian charter

Australia is in the late stages of a debate that might lead to the introduction of a federal charter of rights. The federal government has formed a consultative committee to report to the Attorney-General as to how human rights might be better protected in Australia.

The committee comprises Jesuit priest and intellectual Father Frank Brennan, former diplomat and public servant Philip Flood, broadcaster Mary Kostakidis, former Federal Police chief Mick Palmer, and lawyer Tammy Williams. The committee is due to report on 31 August 2009 and the report will consider, and may in fact recommend, the implementation of an Australian charter of rights.

Those who support a charter argue that the time has come, as Australia is one of the only common law countries without any kind of charter (or bill) of rights. Momentum seems to have been growing behind this push—in the past few years both Victoria and the Australian Capital Territory have implemented their own charter of rights. If recommended by the federal consultative committee, such a charter is expected to take a similar form to that in force in Victoria, the Australian Capital Territory, and the United Kingdom, in that it would require any court when interpreting a law, to adopt an interpretation that makes that law 'compatible' with a list of specified human rights. If it is not possible to interpret the law in a way that is compatible with the list of rights, the court can issue a declaration of inconsistent interpretation, which requires the Minister responsible for administering the law to prepare a written response.

A new role for courts

Every law strikes a balance between competing rights and interests, including sometimes competing individual rights. In our political system, the parliament decides on this balance. So, for example, when making a law that concerns both freedom of speech and the right to privacy, elected politicians must decide where that line between those two rights should be drawn. Similarly a balance must be struck between opposing rights and interests. I might feel terribly strongly about the right to retain the property I have earned, but taxation laws will balance this against the community's interest in gathering consolidated revenue.

Once a law is made it is enforced in the courts. The courts have no democratic mandate or particular expertise in policymaking, so their role is limited to working out the meaning of the law, and then applying it to the particular facts before them.

A charter upsets this balance by requiring judges to make essentially political decisions about the meaning of the laws they apply. While no one would suggest that judging is an entirely mechanical process, judges should aspire to work out the meaning of an ambiguous law without reference to their own political or moral beliefs. A charter that asks courts to interpret every law so as to make it 'compatible' with rights constitutes a fundamental challenge to the traditional role of a judge, as it requires courts to take the focus away from asking what laws *do* mean and towards considering what they *could* or *should* mean given the judges' understanding of rights and assessment of competing considerations.

This is illustrated by the way judges in Victoria now go about interpreting laws under the Victorian Charter of Human Rights and Responsibilities (the Charter). This process was examined by Justice Bell in the self-described test case of *Kracke v Mental Health Review Board*.[1] His Honour observed that whenever it is established that a law may limit a person's human right, the onus will be on the other party, usually the government, to establish that the limit on the law is justifiable. This would require the government to prove that its preferred interpretation of the law constitutes a reasonable limitation on rights. As his Honour said:

> The onus is on the government or other party seeking demonstrably to justify the limitation to identify the purpose relied on with clarity and evidence if necessary.[2]

Presumably, if the government cannot prove to the judge's satisfaction that a law is necessary, that law will be 'interpreted' so that it doesn't interfere with the judge's assessment of individual rights. History suggests that the philosophy of judges will

be very important in how these cases are decided.

The influence of an individual judge's philosophy is demonstrated by a series of cases decided in the US Supreme Court in the early 1900s. There, under the Constitution, the Supreme Court has the power to strike down any law that is inconsistent with a constitutional right. A majority of the court, at that time, was strongly influenced by theories of economic liberalism. It consequentially took every opportunity to strike down any attempt by the federal government to intervene in the labour market. The high-water mark of this is considered to be the decision in a case known as *Lochner* where, when faced with a workplace safety law that mandated a maximum working week for bakers, the Supreme Court found a constitutional reason to declare the law invalid on the basis that it interfered with an implied right to 'freedom to contract.'[3]

So far so good for a person who agrees with the economic philosophy of the court, but relying on the philosophy of the judges who happen to preside on the court has an obvious expiry date. So it was in the United States when the Great Depression and the interventionist government of Franklin D Roosevelt brought the *Lochner* era of the Supreme Court to an end, forever expanding the ability of the federal government to regulate every part of the economy.

In the current debate, there is confusion about how courts might interpret rights. Warning of the dangers of a bill of rights, Bob Carr has asked members of the Labor Party to consider how a conservative court might use the right to 'freedom of association' to strike down laws relating to trade unionism in the workplace.[4] Charter supporter Geoffrey Robertson takes a different view. In a recent book, he described the failure of WorkChoices legislation to meet the standards of an ILO convention as an example of the kind of law a charter might affect if it was in force in Australia.[5] How these political issues are resolved could, under a charter, depend on the views of judges rather than elected politicians.

The consequences of a charter are unpredictable

There will always be cases in which the precise meaning of a law, or its application to a particular set of facts, is unclear. However, lawmakers should aspire to as much certainty as possible so that both citizens and public authorities (who often represent the interests of citizens) know their legal rights and responsibilities, without being exposed to the risk, costs and delays of legal action.

To understand the possible uncertainties, consider a law that banned the body piercing of minors. It could be argued that such a ban is a limit on the right to freedom of expression. If this limitation is shown, the government could consequentially be required to spend time and money in proving to the courts the necessity of a law that limited this right. This exercise must be repeated in case where a lawyer can show that a right that has been limited. Victorian lawyers are now routinely encouraged to develop 'creative' human rights arguments.

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Although the Victorian Charter has only been in force for a brief period, already it has been used to cast doubt on the law in a very broad range of cases, including an attempt to increase the burden on the state to justify bail and to improve the conditions of terrorism suspects. Just recently, an appeals court judge in Victoria considered himself bound by the Charter to find that a law that restricted the movement of convicted sexual offenders should be understood as having a different meaning to that intended by the Parliament. The charter bound the judge to find that the law might have meant one thing to the Parliament that passed it, but that the law now meant something different.

The drafters of the Victorian Charter well understood that they could not predict how existing laws would be applied under the charter. They therefore included a provision that prevents the charter from applying to the law of abortion. This law was considered too settled to be exposed to the uncertainty of a charter challenge. To those who favour certainty, this was obviously a sensible decision, but it begs the question as to why hundreds of other less politically sensitive areas should be placed in a fog of uncertainty.

A charter is just as likely to expand as to limit government

Constitutional rights in Australia have traditionally been viewed as limiting the ability of the state, especially in its capacity to interfere with aspects of the economy. A key purpose of federation was the establishment of an Australian common market. The Australian Constitution consequentially guarantees that trade among the states should be absolutely free and that the government cannot take an individual's property without just compensation. It was for this reason that in 1961 Gough Whitlam, in an interesting echo of today's charter of rights debate, spoke of frustration that the Australian constitution prevented the nationalisation of Australian industry, observing:

> In most countries socialist parties merely have the task of persuading the electorate of the virtues of their policies. The Australian Labor Party has to devise policies which will secure not only the approval of electors but also the approval of judges. In Australia, socialists are often demoralised because no parliamentary means have been found to nationalise private industries and services while inadequate means exist to plan them.[6]

So, could the introduction of a national charter be a boon for Australian liberalism? A charter restricted solely to the traditional individual freedoms would affect the occasional limits placed on them by the government. However, it is likely that there will be pressure to expand the list of 'rights' in the charter and to move beyond individual freedoms to include other claims on the state and other citizens.

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Indeed, the public seems already alive to the idea that a charter won't just stop the government from doing things but might be used to force the government to give them things as well. This is demonstrated by the matters addressed by the government's consultative committee during its community forums about human rights. The committee has posted a number of reports about the matters raised at these forums. Forum participants often seem more concerned about what the government isn't doing than with preventing breaches of their human rights. After their consultations in Broken Hill, the committee observed:

- access to justice in industrial relations matters was … an area which concerned people, and
- the issue most passionately discussed was equal access to health care. Hearing about the lack of services in rural Australia is confronting.[7]

The community consultation in Bourke raised more issues:

- the high number of young Indigenous kids being suspended from school
- a health system that did not meet their needs, and
- the difficulties faced by Indigenous people looking for work.[8]

These are quintessentially governmental concerns. The Victorian Charter, however, clearly foreshadows a growing list of 'rights' that are traditionally the subject of democratic political decision. The charter legislation requires a review after four years to consider whether additional rights should be added, including rights under the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the International Covenant on Economic, Social and Cultural Rights. This latter covenant includes such 'rights' as 'fair' wages, paid maternity leave, 'continuous improvement of living standards,' and the progressive introduction of free higher education.

The foreign experience with Charters of Rights demonstrates that dangers exist when such concerns become equated with the concept of rights. A gripping account is provided in lawyer Dominic Raab's review of the *Human Rights Act* (UK). He observes that in just more than 10 years

of the *Human Rights Act* (the law most likely to be used as a model for an Australian charter), human rights claims 'are now just as likely to press the government for some new category of social support as to seek the limits of its power.'[9]

Citizens who believe the government isn't doing enough, such as those in Broken Hill and Bourke, might see that as being a positive thing, but as Raab warns:

> In effect, any human interest, need, desire claim or want can be formulated as a human right. Yet there is a law of diminishing returns. If rights exercise trump card status, in that other collective interests—whether economic social or security—cannot override them, then their value is relative to those interest. But not every claim can have trump card status, without reducing all claims back to the ordinary level. Inflation risk debasing the very currency of rights, including our most fundamental of liberties.[10]

Courts should not be involved in public policy

A further problem with charters of rights is that courts may best protect rights when they are detached from the political consequences of the decisions they make. The flexibility that courts acquire under charters will inevitably make them subject to political controversy, as they face the same kind of criticism that politicians attract when they make decisions on contentious issues.

Every day, in courts across the country, some of Australia's smartest minds work tirelessly to ensure that the law is not incorrectly applied to some of Australia's worst criminals. The power of courts as the protector of rights in the criminal justice system doesn't come from sympathy for the accused but from the independent duty of the courts to apply the law accurately to every person that comes before them. If the law is wrong, that is a matter for the Parliament. It is not the fault of judges, who are performing the task they have been given under the law.

This task becomes complicated when judges are given a significant policy role in shaping the rules that they apply. It is politically more difficult for courts to stubbornly uphold the rights of the unpopular, when those same judges first need to decide what those rights should be. It is revealing to observe the blithe way that charter advocates assume that it may be a positive development, that the charter could radically replace traditional rules for the protection of rights. After drawing attention to the complexity of court decisions, Geoffrey Robertson, for example, says that under a charter:

> No longer would cases be decided by reliance on old precedents, they would be decided on first principles. Decisions based on first principles are more comprehensible: people who are not lawyers can understand the reasoning. Adjudication by reference to the principles in a bill of rights is better adjudication: more logical, more commonsensical and more satisfactory in result.[11]

The enduring strength of existing protections of rights in Australia, and the politically neutral position of the courts that enforce them, should not be shoved aside in the name of simplicity. Particularly in the criminal law, these protections are some of the strongest in the world, and are fiercely protected by the courts. Indeed, it is worth reflecting on the fact that the terrorism-related conviction of the man described by the press as 'Jihad' Jack Thomas was overturned by the Victorian Supreme Court of Appeal just weeks *before* the Victorian Charter came into force.

An Australian charter would not be placed into a vacuum but would instead be thrown on top of rights and protections that have accumulated over centuries of English and Australian law. The consequences of this are unpredictable, and anyone who suggests that a charter could, or should, sweep aside 'old precedents' massively downplays the powerful rights and protections currently enjoyed by Australian citizens.

A charter can't stop bad government

The strongest argument in support of a charter is that a majority of voters shouldn't be able to affect the human rights of a minority. No democratic

mandate could justify genocide, persecution or torture. Without a charter to prevent these things from occurring the rights of Australians are flimsy.

The response is to observe that a charter is only effective if it can in fact limit the power of the government, and that no government that would torture or persecute is going to be prevented by a charter from doing so.

This point has been picked up in the debate about an Australian charter. Most prominently Cardinal George Pell has observed that comparison between the current situation in Zimbabwe and the constitutional bill of rights in that country demonstrates the inherent weakness of a bill of rights.[12] Geoffrey Robertson has criticised this view saying:

> This is absolutely true, but misses the point. The reason that constitutional rights are so fragile in Zimbabwe is that Robert Mugabe has terrorized and replaced the judges.[13]

The point that Pell doesn't miss, however, is that terrorising and replacing judges will be the first step for any government that wishes to attack the rights of citizens. It is well accepted that an effective charter requires the existence of a number of conditions. The first is a judiciary that is independent of the government, and the second is the existence of the rule of law whereby the government considers itself bound by the decisions of the judiciary under that law.

To this might be added a third condition—that the charter doesn't contain within its provisions a process that allows the government to ignore it. Any Australian charter is, however, likely to be along the same lines as that in Victoria, whereby the government can ignore it provided it states its express intention to do so. This is the necessary consequence of parliamentary sovereignty that provides that a government retains the power to pass a law inconsistent with any law it has passed before. So, even with a charter, a government can pass laws that limit rights, provided that it makes it clear that it wants to do so.

To an Australian government that wanted to commit a fundamental breach of human rights, a charter would therefore be as effective as a sign in a bank that says 'please do not rob.' Only heaven could help the man who stands in the way of the *Torture and Genocide Act 2015* with a copy of an Australian Charter of Freedoms. Indeed, as Robertson eventually concludes:

> [N]o one suggests that bills of rights are proof against murderous dictatorships, although they can serve as warning beacons against a slide into tyranny. They are designed to improve society and governance in stable democracies.[14]

This is a concession that should alarm anybody who thinks that a charter is about protecting the fundamental rights of citizens. When people speak of improving 'society,' they often really mean improving the laws that govern society. But what constitutes the improvement of a law? Is a law relating to industrial relations improved by making it consistent with the rights of individual workers, or is it improved by making it serve the rights of union members?

It is also difficult to see how a court will contribute to 'governance.' Surely this is the last thing courts should be involved in. Making courts a partner to a dialogue about the meaning of laws means that courts will be required to make decisions about the balance between rights in society. As courts are accountable to nobody, these decisions are unlikely to be representative or responsive. Respect for the courts and their decisions is also likely to suffer as courts would, rightly, be viewed as taking part in the process of political decision making.

Conclusion

Advocates of an Australian charter often make lofty promises about protecting the freedoms that are fundamental to the Australian way of life. The surest protection of these freedoms is, however, the integrity of the institutions charged with their protection, and the vigilance and decency of the democratic population. The likely consequence of an Australian charter is no great increase in protection of rights, but rather the tawdry (and expensive) spectacle of lawyers challenging governments to justify their policies to the courts. Australia may be a constitutional outpost in its continued refusal to enact a charter of rights, but in this way, it continues to be uniquely blessed.