The case for an Australian Bill of Rights

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To be, or not to be a republic: that is *the* question for the Constitutional Convention to be held in Canberra from 2 - 13 February 1998. But delegates also have the opportunity to recommend that an Australian Bill of Rights be incorporated within our Constitution. The primary focus of the lead-up to the Convention revolved around whether or not to move towards the appointment of an Australian head of state, with debate changing direction towards the close of polling to the appropriate way in which to define, clarify and limit the powers of the head of state.

The majority of elected candidates clearly see the need for symbolic change and also that it is important for an independent Australia to state simply and unambiguously our national status in constitutional terms.[1]

Former NSW Premier Neville Wran, who describes himself as a republican "and proud of it"[2] and is one of the elected candidates on the Australian Republican Movement ticket, urged Australians prior to the close of voting to "take the final, historic march to full independence."[3]

In December, voters began this march but after the clearing house of the Convention, the next step will probably be a plebiscite or a referendum with detailed discussions about the numerous models of republic.

There are major differences between the various arms of the republican movement and these were apparent at a seminar convened by the Public Interest Advocacy Centre (PIAC) at Parliament House on 10 November 1997. Malcolm Turnbull, the head of the mainstream Australian Republican Movement (ARM), speaking at the seminar, said that the ARM had not widened the debate beyond the issue of an Australian Head of State because *"if you throw more causes on the republican cart, the prospect is that the axle will break and you will end up getting nothing"*.[4]

By contrast, Pat O Shane, who heads the more progressive *A Just Republic* ticket, accused Turnbull of setting his sights too low, arguing that Australians had *"abundant common sense and understood the sophistication of the arguments for a 'democratic constitution', one which incorporates a Bill of Rights"*.[5]

The strongly pro-republican voting in December's ballot for Convention delegates, including the election of many delegates who do not adopt the minimalist position of the ARM, seems to indicate a readiness for a republic and a once-in-a-century Constitutional stocktake.[6]

The election results show there is a growing public awareness of the issues involved, such as the need to develop the Constitution as a blueprint for how we organise ourselves as a society and the perils of stampeding towards a Republic by the year 2000. Although Ian Sinclair, the Chairman of the Constitutional Convention, said after the Electoral Commission had announced the final list of elected delegates on 24 December, that it is "more than likely" delegates will recommend a republic,[7] it now seems clear that the issues are broader than was first proposed. A simplistic switch of our Head of State, then, would not work as the retention of the monarchy is no longer the exclusive issue.

Are any rights guaranteed in Australia?

Unlike the United States' Constitution which covers individuals' rights in Amendments One to Ten and Fourteen, the Australian Constitution does not attempt to guarantee individual rights and liberties. The Constitution provides some express rights, however, such as (s51(xxiiiA)) which prevents the Commonwealth from using its power over medical services in any form which resembles civil conscription; (s51(xxxi)) the acquisition of property on just terms; (s80) the right to a trial by jury; (s116) the right to freedom of religion; and (s117) freedom from discrimination on the basis of State of residence.

In addition to those express rights, the High Court of this decade has shown a preparedness to assert that it has the ability to identify rights to be implied from the Constitution. We witnessed the beginnings of this trend during Justice Murphy's period on the bench although he was, at that time, isolated from his colleagues who did not endorse his approach. Since then, such cases as *Mabo*[8] (recognising native title), *Dietrich*[9] (requiring legal representation as an element of a fair trial) and *Theophanous*[10] (using freedom of political expression to limit defamation actions) highlight the High Court's judicial activism in the area of human rights. And increasingly s51(xxix) (the external affairs power) has been used to enact legisla[illegible] giving effect within Australia to international conventions and treaties.[11]

The most notable of these would be the 1966 Convention on the Elimination of All Forms of Racial Discrimination (which provided the basis for the *Racial Discrimination Act* 1975) and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (which provided the basis for the *Sex Discrimination Act* 1984). These statutes have provided the framework within which the rights of women and of racial groups are now recognised and protected in Australia.

More generally, an awareness of Australia's obligations as a signatory of the International Covenant on Civil and Political Rights is maintained through the

administrative and advisory functions of the Human Rights and Equal Opportunity Commission, though these functions stop short of direct enforcement of human rights obligations.

Are these guarantees sufficient?

Of the express rights guaranteed in the Constitution, s117 has developed most effectively in eliminating discrimination against out-of-state residents, though only since 1989.[12]

The other express rights have been applied only sporadically, and then in a very limited way. Section 80 has been read as requiring that there be a jury trial only when Parliament decides that there should be.[13]

Section 116 has rarely been tested, when, for example, in 1943 the Jehovah's Witnesses were outlawed and the propagation of their doctrines forbidden, it was held that this was not an interference with freedom of religion.[14]

Further, s41 of the Constitution, which might be read as guaranteeing a right to vote, has been held to have no such effect.[15]

The High Court has done little to promote the express rights, and where it has found implied rights in the Constitution, these have been met with considerable criticism from the executive government. Politicians, past and present, continue to publicly deride the Court for "acting like an unelected and unauthorised third chamber in the Parliament."[16]

The suggestion that it is the present Federal government s intention to appoint political conservatives to the High Court,[17] who are more likely to adopt a narrow interpretation of the role to be played by the Court in determining cases involving wide social, political and economic questions and adhere to a strict view of precedent and separation of powers, may signal a change of direction. However, even before the most recent appointments, the dissension within the Court over any extensive resort to constitutional implications had been manifest. In 1997, after much uncertainty, the Court finally united in reaffirming the implied freedom of political discussion as a limit to defamation actions,[18] but three weeks later was unable to give majority support to any one of a wide range of arguments that the taking of "stolen" Aboriginal children had been unconstitutional.[19]

In any event, the criticism of a judicial strategy resting only on implications is not without substance. The criteria of implication remain uncertain and unpredictable, and can never be systematic or comprehensive.

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This is not to say that the protection of rights should remain solely in the hands of the Parliament. Through the use of the external affairs power the Australian Parliament has implemented rights-based legislation. But this method has severe limitations, primarily because Parliaments and governments have unlimited power to decide which international obligations should be taken seriously and which should not. While the immediate decision in the *Teoh* case[20] drew attention to the need for greater awareness of Australia's obligations under the 1989 Convention on the Rights of the Child, the ensuing controversy highlighted the number of other instances in which Australia has signed or ratified international conventions without any meaningful acceptance of the obligations involved. At the same time, the rejection by successive governments of the Court's approach in Teoh showed the determination of politicians from both the established political parties that the choice of which obligations should be given effect to was to be a matter for government and Parliament alone.

The recent interaction between the two arms of government clearly indicates that whilst judge-made law, the common law has shown at times a great capacity to adapt to social change, we cannot rely upon it exclusively as the means of protection of individual rights. Yet it also indicates that self-regulation by government cannot be relied upon, either. Though it may be the will of the people that a particular party should govern, the policies pursued by any party in government can often claim no such mandate. And in relation to rights, the most important objective is usually to ensure that those not in a majority are still protected within the community.

Advantages of a Bill of Rights

The inadequacy of the existing guarantees, whether express, implied or internationalised, and of methods for their enforcement, shows that the Constitution itself does not have sufficient internal mechanisms for the protection of human rights. The fabric of human rights in Australia resembles more of a patchwork quilt, frayed at the edges, than a secure and comprehensive regime of rights and freedoms.

Although no one mechanism can solve all human rights problems, the introduction of a Bill of Rights would be an improvement. The standard argument against a Bill of Rights has been that it would function to usurp the power of Parliament in favour of the High Court. So far both arms of government, in one way or another, have fallen short of full protection for our rights. An argument in favour of a Bill of Rights would be that while it would empower the High Court, it would also direct and control it. The Bill of Rights would serve as a directive to the High Court as to which rights were to be enforced, and could also give directives as to how conflicts were to be resolved. To locate such directives in the Constitution would not usurp anybody's rights. The directive would be given by the Australian people through a referendum.

In 1988 Sir Anthony Mason, then the Chief Justice of the High Court, succinctly summarised the primary advantages of a Bill of Rights, as customarily advanced,[21] as follows:

- It deters Parliament from abrogating the rule of law, thereby presenting a constitutional obstacle to the use of parliamentary power as a means of a totalitarian system;
- It ensures that the power of the majority in Parliament cannot be used to override the rights of minorities and individuals; ▶

- It offers more secure protection of individual and minority rights from the exercise of power by institutions and pressure groups operating through government machinery;
- It offers principled and reasoned decision-making on fundamental issues;
- It reinforces the legal foundations of society, thereby enhancing the role of law in society;
- It has a major educative role in promoting greater awareness of, and respect for, human rights.[22]

Just as the momentum for Australia's conversion from constitutional monarchy to republic has gathered pace in the last decade, there is also a wider realisation in contemporary Australian society of the value of a Bill of Rights.[23]

The Constitution itself does not have sufficient internal mechanisms for the protection of human rights.

Historically, those who oppose have argued that a Bill of Rights would achieve no useful purpose in a country a free society in which the citizen is said to enjoy basic democratic and individual rights:[24] an application of the old adage, "if it ain't broke, don't fix it".[25]

This somewhat simplistic analysis ignores the fact that a primary purpose of a Bill of Rights is to provide a safety valve whereby those who wield power within a democratic society are subjected to a code of conduct in accordance with the rule of law which operates to prevent them exercising power in such a way as would infringe the basic rights of that society's citizens. Thus, a Bill of Rights is a powerful tool not only in keeping a society tolerant and democratic but as an essential adjunct to the institutions of parliamentary democracy and the common law in the way that they serve to protect the rights of the most vulnerable groups of society. Overseas experience suggests that the existence of a Bill of Rights can hold a significant place in the national psyche[26] and those who have either worked in or visited the United States, in particular, give accounts of local residents being unable to conceive that a free and democratic country might lack an enforceable charter of constitutional rights.[27]

Which rights?

Even in a democratic nation, governments exercising their parliamentary majority are easily able to remove hard-fought-for rights and entitlements. Witness, for example, the moves towards the repeal of unfair dismissal legislation, the recent removal of common law entitlements for work injuries in Victoria and the introduction of unfair workplace agreements. Increasingly, governments, with the encouragement and backing of insurers and business groups, have started to do this with balance sheet bottom lines being promoted at the expense of the individual.

The inclusion of such rights as the right to work, the right to an adequate standard of living, the right to health and even the right to rest and leisure (generally characterised as economic, social and cultural rights) in a formal charter of rights is somewhat problematic. In countries where Bills of Rights have recently been introduced [supra], there has been sustained and informed debate as to the appropriateness of including economic and social rights.[28]

Conventional human rights issues such as freedom of speech and from discrimination, vilification, torture and slavery are traditionally the stuff of Bills of Rights. In Australia, the debate as to which rights would be appropriately included is markedly less sophisticated but we can certainly draw on the experience of comparable countries to ensure that proper consideration is given to the inclusion of a broad range of rights and protected freedoms necessary to ensure a just and equitable society.

Conclusion

Clearly, the scope and content of the Constitution concern all Australians. In the first instance, however, it is up to those who will participate in the Convention: laypeople, including lawyers, and politicians who, because of their knowledge and expertise in particular relevant areas have been entrusted with this responsibility, to argue the case for substantial constitutional reform. It is important that within the context of the people's convention, the legal profession stand behind the Convention participants and seize this unprecedented opportunity to overhaul the Constitution and draft an appropriately considered Australian Bill of Rights. Unless this is done, it is unlikely that Australians in future generations will be able to enjoy an independent, well-ordered and just society. ■

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8. *Mabo v Queensland* (No 2) (1992) 175 CLR 1
9. *Dietrich v R* (1992) 177 CLR 292
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11. As at 31 May 1997 UNESCO reported that of 52 international human rights instruments, Australia was a party to all but 12. See also Hilary Charlesworth, Human Rights in Harry Reicher (ed), *Australian International Law: Cases and Materials*, LBC, 1995, pp 629-30.
12. *Street v Queensland Bar Association* (1989) 168 CLR 461; see also *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463.

[13] See Kingswell v R (1985) 159 CLR 264
[14] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116
[15] *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254
[16] Former Liberal Prime Minister Sir John Gorton who attacked the High Court and the Senate in a lecture at Old Parliament House on 12 November 1997, the former particularly for its finding in *Mabo; Sydney Morning Herald*, 11 November 1997; see also Howard rejects High Court's lawmaker role in *The Australian*, 25 February 1997
[17] See "Judges now picked for their political bias, says Kirby", *Sydney Morning Herald*, 6 January 1998
[18] *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96
[19] *Kruger v Commonwealth* (1997) 146 ALR 126
[20] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273
[21] See Murray Wilcox, "The North American Experience: A Personal Reflection", in Philip Alston (ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law, Human Rights and Equal Opportunity Commission, Canberra 1994, p 189
[22] The Hon Sir Anthony Mason, "A Bill of Rights for Australia", in *Australian Bar Review*, 1988, p 88
[23] This was a central finding of the Australian Rights Project survey conducted by Brian Galligan and Ian McAllister and which is reported in Citizen and Elite Attitudes Towards an Australian Bill of Rights, in Brian Galligan and Charles Sampford (eds), Rethinking Human Rights, The Federation Press, Sydney, 1997, pp 144-153
[24] Sir Anthony Mason, op cit. p 79
[25] This is often expressed another way by means of an oft quoted statement of Sir Harry Gibbs: *"...if society is tolerant and rational, it does not need a Bill of Rights. If it is not, no Bill of Rights will make it so"*. This statement has been condemned as a neat aphorism by the Constitutional Commission and the Senate Standing Committee on Constitutional and Legal Affairs, who considered it insufficient to deny the desirability of a Bill of Rights: see Brian Burdekin, "The Impact of a Bill of Rights on those who Need it Most" in Alston (ed), op cit. pp 148-149
[26] The pride of United States governments in their Bill of Rights has been one of the primary reasons the United States has long resisted becoming party to United Nations human rights instruments even while urging other nations to comply with those instruments: see Brian Burdekin in Alston (ed), op cit. pp 148-149
[27] This was the experience of His Honour Justice Wilcox of the Federal Court during his time as Visiting Fellow at Harvard Law School in 1991 talking to Americans about the Bill of Rights: see Wilcox, op cit., p 191
[28] See the account given by Philip Alston in Alston, op cit. pp 14-16

Costs orders in the NSW District Court

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The writer recently encountered a problem concerning the application of Part 39A Rule 31 (4) of the District Court Rules in relation to costs on re-hearing of a District Court Arbitration.

A brief summary is as follows:-

1 The plaintiff commenced proceedings following personal injuries arising out of a motor vehicle accident on 1 December 1995.

2 The matter was referred to arbitration and the Arbitrator made an award in the plaintiff's favour for approximately $23,000 plus costs. The component of the award relating to non-economic loss was in the sum of $16,000 representing 25% of a most extreme case. The Arbitrator awarded this following a deduction from 30% having regard to the plaintiff's age, who was at that time 82 years old.

3 Prior to the arbitration, the defendant had made an offer of approximately $9,000 inclusive of costs and did not offer any sum in relation to non-economic loss.

4 The defendant applied for a re-hearing.

5 The plaintiff filed an offer of compromise of $15,000 plus costs.

6 At the re-hearing, the Judge awarded the sum of $2,500 for non-economic loss based on 15% of a most extreme case, after making an unspecified deduction for the plaintiff's age. The total verdict was in the sum of approximately $11,000. The defendant asked for an order for costs on the basis that as a result of the verdict the defendant had substantially improved its position from the arbitrator's award.

7 The Judge ordered that the defendant pay the plaintiff's costs up to and including the arbitration. However, in relation to costs subsequent to the arbitration each party was to pay its own costs. The Judge's reasoning was that based on Part 39A Rule 31 (4) and practice note 14 the defendant had substantially improved its position from the arbitrator's award.

Upon the writer's reading of practice note 14, **the intention of the rule appears to be to impose a burden on the party who makes unnecessary applications for re-hearing.**

The writer has since discussed this problem with other personal injury practitioners and has learned of other judicial interpretations of this rule which have adversely affected plaintiffs by ordering the plaintiff to pay all or some of the defendant's costs from the arbitration or that the plaintiff is not to recover party/party costs in circumstances similar to the facts set out above.

The impact of this is that the plaintiffs are being penalised by what may or may ▶