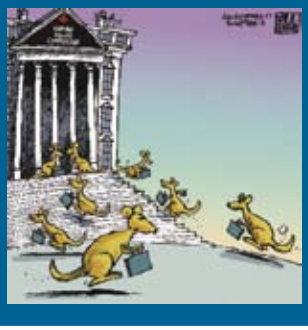
Human rights charters: Do they protect our rights?



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The Rudd Labor government of Australia elected in 2007, like the earlier Whitlam and Hawke Labor governments, soon began pushing for a national bill or charter of rights.

Nearly $3 million over two years was set aside in the May 2008 federal budget to pay for a nationwide consultation on human rights and the best way to protect them.[1] This move followed a decision by the Australian Labor Party at its 2007 national conference to "initiate a public inquiry about how best to recognise and protect the human rights and freedoms enjoyed by all Australians".[2]

One of the ideas receiving greatest support from carefully selected delegates[3] at Prime Minister Kevin Rudd's 2020 Summit in April 2008 was "a statutory Bill or Charter of Rights, with minority support for a parliamentary Charter".[4]

Federal Attorney-General Robert McClelland is a keen supporter of human rights charters, adopted in recent times by Canada, Ireland, New Zealand, UK, ACT and Victoria. Even before he was sworn into office on 3 December 2007, he revealed his plan for nationwide consultations on an Australian charter of rights and responsibilities. With a straight face he told a Sydney Morning Herald journalist that such a charter would be "written, if at all, by all of us".[5]

The only valid reason for having a charter of human rights would be actually to protect human rights. It is useful then to inquire whether, in those countries which have a charter of human rights, such basic rights as religious freedom are, in practice, protected by the charter.

Canadian pastor ordered to renounce his faith

On 30 May 2008, a human rights tribunal in Alberta, Canada, handed down a penalty against a Christian pastor for stating his opposition to homosexual behaviour in a letter to a newspaper. He was ordered to pay compensation of $5000; to make a public apology; and never again to criticise "gays and homosexuals" in private emails, public speeches or sermons.[6]

Rev Stephen Boissoin's 2002 letter to the editor of the *Red Deer Advocate* in his home town of Red Deer, Alberta, had strongly denounced homosexual activism: "Children as young as five and six years of age are being subjected to psychologically and physiologically damaging pro-homosexual literature and guidance in the public school system; all under the fraudulent guise of equal rights."

A homosexual activist, Dr Darren Lund, lodged a complaint against Pastor Boissoin with the Alberta Human Rights and Citizenship Commission. The case dragged on for six years, ending in a decision against Pastor Boissoin on 30 November 2007, followed by the May 2008 penalty.

Panel chair, Lori Andreachuk, noted that there was no evidence that anyone – not even Dr Lund – had been a "direct victim" of Pastor Boissoin's letter. Nevertheless she ordered the pastor to pay Dr Lund $5000 in damages to compensate for his "pain and suffering". She also said that in future, Pastor Boissoin and his Concerned Christian Coalition must not publish "in newspapers, by email, on the radio, in public speeches, or on the Internet … disparaging remarks about gays and homosexuals." She also ordered him to make a public apology in the *Red Deer Advocate*.

Catholic journalist Pete Vere wrote: "In essence, the Alberta human rights tribunal is ordering to the minister to renounce his Christian faith, since his opposition to homosexuality is based upon the Judeo-Christian Bible."[7]

Charter fails to protect fundamental freedoms

A key lesson from this case is that Pastor Boissoin relied in his defence on Canada's constitutionally-entrenched Charter of Rights and Freedoms[8] – but it failed to protect him.

The Canadian Charter states in section 2: "Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.[9]

Tribunal chair Lori Andreachuk did indeed note these "fundamental freedoms" in her decision – but she decided they did not apply in Pastor Boisson's case. She said (in part):

"Having considered the Charter and the balancing of the freedoms set out in the Charter, ... [in] this case, the publication's exposure of homosexuals to hatred and contempt **trumps** the freedom of speech afforded in the Charter" [*emphasis added*].[10]

In effect, the Alberta tribunal has ruled that the right to free speech, deemed "fundamental" in the Canadian Charter, comes a poor second to the right of a homosexual activist not to be offended by critical words in a newspaper.

A danger with such charters is that these key determinations are not made by elected governments, but by judges who cannot be voted out by the people at the next election.

Three models for charters

Broadly speaking, there are three models for charters supposedly to protect human rights and freedoms:

- a constitutionally-entrenched charter, as in Canada, Ireland and South Africa;
- a statutory charter of rights, ie an act of parliament, as in the UK, NZ, Victoria and the ACT;
- a parliamentary charter, which may provide for a parliamentary committee to scrutinise all future legislation for compliance with a charter of rights.

Constitutional charters

The US is well known for its constitutionally-entrenched rights, including the right of all citizens to "bear arms". The first ten amendments to the US Constitution are commonly referred to as

the "Bill of Rights".

This is also the model adopted by Canada where the Canadian Charter of Rights and Freedoms forms Part 1 of the Constitution Act 1982. This act can only be amended by a complex process including a referendum.[11] Canada first implemented the second model – an ordinary act of parliament – five years earlier.

In a constitutionally-entrenched model the judiciary, especially the highest court in the country, has the authority to interpret the bill or charter of rights and declare any law wholly or partly invalid, if the court believes it violates the bill or charter of rights.

When this happens, a parliament can do nothing to overturn the court decision. Notorious examples of this absolute power held by the courts are the respective decisions of the United States Supreme Court[12] and the Supreme Court of Canada[13] to strike down all laws prohibiting abortion at any stage of pregnancy.

The only way to remedy these decisions would be to amend the respective constitutions (an enormously complex, difficult process) or for the same court to revoke its earlier decision.

Clearly this model shifts important decision-making power from elected parliaments to unelected judges. Unless we believe that judges are elite human beings, endowed with wisdom far superior to that of other humans, why we would entrust decision making on policy matters to the courts?

One Chief Justice - Beverley McLachlin of the Supreme Court of Canada – does claim such superior wisdom. In a speech delivered in New Zealand on 1 December 2005, she said: "Confronted with a new situation requiring a new norm, judges must look to the written constitution for the values that capture the ethos of the nation… Determining whether these sources disclose such principles is quintessential judicial work." [14]

The ALP's 2007 national conference specified that "any proposal for legislative change in this area must maintain sovereignty of the Parliament and shall not be based on the United States Bill of Rights".[15] While this explicit rejection of a constitutionally-entrenched model is welcome, other models also pose a threat to democracy and good government.

Statutory charters

The second model for "protecting human rights" is a statutory charter of rights that, as an ordinary act of parliament, can be amended following the usual parliamentary processes.

Examples of such charters of rights include the United Kingdom's Human Rights Act 1998,[16] New Zealand's Bill of Rights Act 1990,[17] Victoria's Charter of Human Rights and Responsibilities Act 2006[18] and the Australian Capital Territory's Human Rights Act 2004.[19]

Generally statutory charters do not empower courts to declare a law invalid. Instead, the courts may declare a law to be inconsistent with the charter. This puts considerable pressure on the parliament to amend the law as proposed by the court.

Changing the meaning of words

The courts are also required, whenever possible, to interpret statutes in such a way as to make them compatible with the charter. This can lead to some very "creative" judicial reasoning.

For example, the ACT's Human Rights Act 2004 provides in Section 30(1) that: "In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred."

In a 2005 case,[20] Chief Justice Higgins exercised this power to interpret Section 51A(3)(b) of the Domestic Violence and Protection Orders Act 2001 in a way contrary to its plain and unambiguous meaning. The provision states that an "interim order ***becomes*** a final order against the respondent if the respondent does not return the endorsement copy to the Magistrates Court at least 7 days before the return date for the application for the final order" [*emphasis added*].

Higgins CJ thought that this provision violated the rights to liberty and freedom of movement guaranteed by the Human Rights Act 2004. He therefore declared that it should properly be interpreted to "empower but not mandate the making of a final order in the absence of a conforming objection".

So what is the meaning of "**becomes a final order**" in the ACT domestic violence legislation? The ACT charter enabled Chief Justice Higgins to declare that the term "**becomes**" means "**does not become** unless a judge thinks it should". Thus the ACT Human Rights Act has rendered uncertain the meaning of an ACT law previously considered absolutely clear.

Chief Justice Higgins is in good company with Humpty Dumpty in Lewis Carroll's 19th century children's novel, *Through the Looking Glass*. A famous passage states:

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean - neither more nor less."[21]

More changed meanings

Another example of a charter being used by judges to change the clear meaning of words is a case heard by the UK House of Lords Judicial Committee in 2004.

UK's Human Rights Act 1998 gives effect to "rights and freedoms guaranteed under the European Convention on Human Rights".[22] Section 3 (1) of the Act provides that: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

In the case of *Ghaidan v. Godin-Mendoza*[23] Lord Nicholls of Birkenhead observed: "Section3 … is also apt to require a court to **read in words which change the meaning of the enacted legislation**, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that … **a court can modify the meaning, and hence the effect**, of primary and secondary legislation" [*emphases added*].

This case arose when a protected tenant in a rental house died and his surviving homosexual partner wanted the right of a *spouse* to continue living in the house. The UK Rent Act 1977 guaranteed a person the right to continue renting a house previously rented by his or her deceased *spouse*, or "a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant".[24]

Lord Nicholls noted that the "**ordinary reading**" is "**unambiguous**" and draws a distinction between a heterosexual couple and a homosexual couple: "The survivor of a heterosexual couple may become a statutory tenant by succession, the survivor of a homosexual couple cannot." Nevertheless he concluded that the provision should be read differently: "as though the survivor of such a homosexual couple were the surviving spouse of the original tenant." This view prevailed in the 4-1 judgement.

In this case the judges have clearly taken upon themselves the role of enacting social policy by means of declaring the meaning of a law passed by the parliament to be quite different from its plain meaning. It was not left to the parliament to make this change. The judges made it on their own authority.

The rule of law

In his book on *The Rule of Law: Foundation of Constitutional Democracy*,[25] Geoffrey Walker lists twelve fundamental principles of the rule of law, one of which is "certainty, generality and equality". He adds: "The certainty principle condemns the enactment of excessively vague laws that delegate to administrators and judges the power to deal arbitrarily with the citizen."[26]

A charter enabling judges to change the clear meaning of words undermines one of the great benefits of the rule of law: certainty. People need to know what is lawful in order to live their lives in a law-abiding manner. If the clear meaning of the law can be changed at the whim of a judge, people cannot know how to live lawfully.

Victoria's Charter of Human Rights

and Responsibilities states: "So far as it is possible to do so **consistently with their purpose**, all statutory provisions must be interpreted in a way that is compatible with human rights"[27] [*emphasis added*].

However Queensland law professor James Allan has commented that while the words "consistently with their purpose" should act as a restraint to judicial creativity in interpreting statutes, he is not confident of such restraint. He says: "Any judge inclined to fancy himself or herself a latter day philosopher king – an arbiter for the rest of us of what is and is not in keeping with the amorphous notion of fundamental human rights – will not in the least be prevented from doing so by these four extra words ..."[28]

Australian or "international" values?

Recent statutory bills of rights have derived the package of rights they purport to protect more or less directly from international human rights instruments.

The UK's Human Rights Act 1998, for example, was specifically designed to "bring human rights home" by enshrining in UK domestic laws the rights already supposedly protected under European human rights law.[29]

The ACT and Victorian human rights statutes are based on the International Covenant of Civil and Political Rights. Section 32(2) of Victoria's Charter of Human Rights and Responsibilities Act 2006 states: "International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision." Section 31(1) of the ACT's Human Rights Act 2004 is similar.

Section 33 of a draft Human Rights Act for Western Australia went further, stating: "In interpreting a human right, any international jurisprudence that is relevant to the human right may be considered in addition to any judgment of an Australian court or tribunal." Furthermore, "international jurisprudence" is defined to include "general comments and views of the United Nations bodies that monitor treaties about the rights of people…"

Many Australians may not realise that United Nations treaty monitoring bodies have expressed the view that among other things, governments should protect human rights by:

- prohibiting parents from withdrawing their children from a sex education class;
- ensuring that at least 30 percent of children under age three are in full time day care;
- denying doctors or hospitals the right to conscientiously object to participation in abortion;
- denying economic support to mothers who choose to stay at home;
- allowing children to access medical or legal counselling without parental consent;
- allowing teenagers to access to abortion without parental knowledge; and
- denying religious bodies any exemptions from anti-discrimination laws. [30]

One can only imagine what an Australian judge could do with a statutory charter when directed to interpret it in accordance with the findings of these United Nations treaty monitoring bodies!

Whose rights would be protected?

Section 9 of the ACT Human Rights Act 2004 notoriously limits the right to life to "a person from the time of birth", even though the International Covenant on Civil and Political Rights gives every person an unqualified right to life.

In Victoria, the draft Charter of Human Rights and Responsibilities had a similar limitation to the ACT act – provoking many objections during the consultation process. The drafters acknowledged these concerns by granting an unqualified right to life in section 9 of the final version of Victoria's Charter of Human Rights and Responsibilities Act 2006: "Every person has the right to life and has the right not to be arbitrarily deprived of life." However Section 48 greatly limits this provision, stating: "Nothing in this Charter affects any law applicable to abortion or child destruction."

Thus Victoria's charter of rights – while appearing to affirm a person's unfettered right to life – would nevertheless allow the Victorian parliament to legalise abortion on demand right up to the point of birth. The Victorian parliament has already legalised the creation and destruction of human embryo clones in 2007, notwithstanding the right to life clause in section 9 of the Charter.

Threat to religious liberty

Sydney's Cardinal George Pell has expressed serious doubts about the proposal for a charter of rights that emerged from Prime Minister Kevin Rudd's 2020 Summit on 19-20 April 2008. In particular Cardinal Pell warned of the potential threat to religious liberty such a charter could pose:

"The experience of human rights instruments overseas makes it very clear that some rights will be interpreted narrowly and some expansively ... one should fear further restrictions on Christian comments in public life as anti-religious elements use the fear of Islamic violence to place limits on all religious groups...

"Presently such issues touch on sexuality, marriage, family and life. In the near future, given the likely developments in biotechnology, we shall be battling against involuntary euthanasia and even compulsory eugenics, as well as human cloning ... [UK cases show] how little protection religious people can expect from anything like the UK Human Rights Act if it were to be implemented in Australia." [31]

Parliamentary charters

The 2020 Summit proceedings noted some support for the third model of human rights protection – a parliamentary charter – but did not mention what form such a charter might take.

It could simply involve a parliamentary committee scrutinising legislation for compatibility with a list of human rights. This third model would avoid a transfer of power to unelected judges: a transfer inherent in a bill or charter of rights, whether constitutionally enshrined or an ordinary statute. However the ambiguity of some human rights, and the difficulties of balancing competing rights, would give a parliamentary committee some of the same problems of interpretation faced by courts.

The division of power

Sir Harry Gibbs, a former Chief Justice of the High Court of Australia, once commented on bills of rights in an article on *Re-writing the Constitution*.

He said (in part): "Bills of rights are in fashion at the moment. The Australian Constitution does give constitutional protection to the democratic institutions of the Commonwealth, but otherwise contains only a rudimentary guarantee of rights. Nevertheless, the people of Australia enjoy as much freedom as exists in any country whose constitution contains an elaborate guarantee of rights.

"At first sight it might appear that a bill of rights could do nothing but good, securing liberty and justice. A little thought will show that it would have disadvantages as well as advantages. Perhaps the greatest disadvantage is that no human mind can foresee the effect which a court may ultimately give to general words intended to guarantee a right.

"The enforcement of a bill of rights often means that criminal proceedings fail for purely technical reasons: witness the release of [alleged Australian murderer] Trimbole by the Irish courts.

"In truth, an actual division of power, such as exists under a federal system [of government], affords a more effective protection of human rights than mere words can do."[32]

The threat of elitism

Some leading figures in the Australian Labor movement have also expressed concerns about the unpredictability of the meaning and application of charters of rights.

In a speech in April 2008, NSW

Attorney-General John Hatzistergos said that a charter of rights "is wrong because it generates uncertainty about the meaning of laws and deprives legislation of its finality … rather than being a simple educative tool, it creates a new level of interpretation over and above the vernacular meaning of the legal text. This distances non-lawyers from the legal and political process, depriving them of the ability to read and understand a law without applying the complex apparatus of the court's interpretation." [33]

Former NSW premier Bob Carr observed on 24 April 2008: "Last week I met a lawyer who said while she opposed a bill of rights, all the barristers on her floor supported it, and for the obvious reason: the intoxicating whiff of litigation."

He continued: "A shift in power from elected parliaments to unelected judges, by a process of 'judicial creep', is part of the bill of rights package. Canada has had its Charter of Rights and Freedoms since 1982, planted in the constitution. Before that there was only the legislative version. Clearly this is something the zealots want to see happen here: the first step only a law, but followed by constitutional entrenchment.

"Like Australia, Canada also has a shortage of doctors in rural areas. British Columbia came up with a scheme to encourage doctors to practise there, with a finely tuned system of incentives. The provincial Supreme Court struck it down, citing section 6 ("mobility rights") and section 7 (the "right to life, liberty and security") of the Canadian Charter of Rights and Freedoms. Canada's rural population is still under-served by doctors, thanks to judges who write society's rules...

"Churches are becoming aware their immunity from anti-discrimination laws – a justified immunity – will end with a charter or bill of rights. Churches can democratically lobby parliaments or cabinets, but not non-elected, tenured judges."

Bob Carr said the "parliamentary committee" model suggested by former Labor federal justice minister Michael Tate is preferable to some other rights charter models, but still "objectionable". He and others "take issue with any attempt by a group of zealots to arrogate for themselves the power to define, codify and nail down their definition at this time of what they think ought to be our rights. Talk about elitism!"[34]

'Consultation' dangers

On 23 April 2008, media commentator Janet Albrechtsen warned of the dangers of a consultation process on "how best to recognise and protect the human rights and freedoms enjoyed by all Australians." She said (in part):

Here is their strategy. First, promise public consultation, as Kevin Rudd has done. If genuine debate follows, that will be a fine thing. Unfortunately, as we know from Victoria and the ACT, the so-called independent committees entrusted to consult with the people were stacked with so many charter supporters, they operated like one-way steering committees. Neither Victoria nor the ACT trusted the people's view enough to put the charter to a referendum.

That "debate" goes something like this. "How can a reasonable person be against a charter of human rights?" they ask. "Human rights are not controversial, right?" Wrong. A moment's reflection reveals that rights are as diverse as people themselves. And this exposes one of the greatest con jobs practised on us by the modern human rights industry: the assertion that human rights are universal, clear and immutable.

Even that most basic right - the right to life - is highly contestable. Defining what is a right and the ambit of those rights is where reasonable people can and do disagree.

The charter raises one simple question: when deciding these contestable issues, should we count the votes of the Australian people or those of a handful of judges? [35]

Conclusion

Despite claims that bills or charters of rights are needed to protect fundamental rights such as freedom of speech and religion, the experience of Western nations with such charters – including Canada and the UK – is that these freedoms may be restricted rather than enhanced.

A constitutional charter – such as in Canada or Ireland – is not currently being canvassed by the federal government. However the adoption of any national rights charter model (such as the statutory charters in UK, Victoria or the ACT), may well be the first step towards entrenching such a charter in the Australian Constitution.

Any type of rights charter would undermine the clarity and certainty of all legislation – which could be "second-guessed" at a later stage by unelected judges.

Thinking Australians need to affirm that we do not need a charter of rights because the best model for protecting our rights is our current democratic Westminster parliamentary system.

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