

Submission to Human Rights Consultation Panel

I wish to start with the final sentence of the Terms of Reference given to this Committee:
“The options identified should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights.”

In this context, that sentence endorses what is not often realised. Parliament’s intention to respect and make allowance for personal human rights, whether derived from the Common Law or Statute, is a rebuttable presumption. At least, this has been the case since the English constitutional settlements of the 17th and 18th centuries.

However revered, however provable the pedigree, however ordinarily observed, rights and liberties can be modified in their exercise, or even extinguished, by sufficiently clear expression of the will of the Parliament.

It is obvious that in Australia that last proposition is itself subject to modification in so far as a right or liberty identified as based in the Australian Constitution prevails over any contrary will of the Parliament. And the High Court will ensure that it does.

As the Committee will be aware, the number of such rights and liberties is rather small, certainly as expressly provided for. When an attempt was made in 1988 to expand their number, the referenda were defeated by the astonishing margins of 60-70%. There were various reasons for this, including very clumsy bundling of the questions, but the defeat was resounding and significant.

Even though the referenda were put 20 years ago, I think the result contains a warning: Australians seem not favourably disposed to conferring enhanced judicial oversight of Parliament’s dealing with human rights issues.

Judicial Oversight

I emphasise I am not speaking of the usual judicial function of applying the canons of interpretation to ensure that, if Parliament is to modify a human right, it should do so in the clearest terms. I am speaking of the enhanced role proposed to be given to judges such as by declaring a clearly worded statute to be incompatible with a Charter of Rights.

Such enhanced power may take various forms, but the aim is to give overriding pre-eminence to a presumption that Parliament intends a Charter of Rights to be observed by itself in subsequent legislation. The committee will be regaled with cautionary tales of experience from British Columbia, to the House of Lords, to the Supreme Court of the ACT. No need for me to repeat them, but I do make two comments.

Advisory Opinions

First, I take it as given that to purport to vest judges of the High or Federal Courts with a capacity to give advisory opinions would be unconstitutional. It is said that some models (such as the Victorian) appear to confer such a capacity rather than true judicial power. I am attracted to that suggestion, but am not entirely sure.

Certainly, a power to make a judgement of incompatibility which had no legal consequences would seem to be purely advisory. However, even a duty to respond self-imposed by the Parliament on one of its members who happens to be a Minister, could arguably be described as a legal consequence. After all, the consequence is provided for by statute! The fact that it is unenforceable

by the Court simply reminds us that that is the fate of many declaratory judgements. There is a controversy amenable to judicial determination according to law as to whether the Charter is being observed by the Parliament, i.e. there is 'a matter' important for the Constitutional exercise of judicial power.

So I cannot take the shortcut of dismissing some models as providing simply for advisory opinions.

Judicial and Parliamentary Combat

Second, should the Committee conclude it can find an 'enhanced judicial role' model requiring the exercise of true judicial power, the combat is on! I mean the contest between Parliament on the one hand and the judiciary on the other. The intensity of the combat will depend on the model adopted.

Some rights-compliant or rights-compatible interpretation provisions, such as in the UK, can lead a Court to conclude that the clear and unambiguous intention of Parliament in legislation subsequent to the provision is to be displaced in favour of the Charter of Rights. This is so akin to constitutional entrenchment as to be ruled out of political consideration.

But, even a moderate model requiring the Parliament to reconsider a judicially-noted failure of its legislation to measure up to a provision of a Charter of Rights, could well be a catalyst for a *de facto* change in our constitutional arrangements.

It would not take too many such declarations for Parliament to react. And the reaction will find its focus in the appointment of judges.

It is not difficult to foresee a Committee being established (perhaps initially by a Standing Order of the Senate) asserting a role in the vetting and selecting of judges of the High and Federal Courts. Without amending the Constitution to provide for the **necessity** of Senate endorsement (*a la* USA) the *de facto* power accruing to such a Committee would be considerable (especially if supported by the media).

We have already seen such a process with respect to the operations of the Joint Standing Committees on Treaties. There is no Constitutional requirement that Parliamentary endorsement is necessary for the ratification of treaties negotiated by the Executive. Yet governments are now wary of ratifying without obtaining the approval of, or at least allowing for a very full process of public hearings by, the Committee.

Do we want this change in the balance between Parliament and the judiciary to arise as a result of pique rather than referendum?

Why take this risk when there is an existing mechanism which, over a period of some 26 years, has established a reputation for great integrity in alerting the Parliament to possible conflicts between proposed legislation and personal rights and liberties. In effect, this mechanism provides for non-judicial declarations of incompatibility which the Parliament takes seriously.

Parliamentary Oversight – Senate Scrutiny of Bills Committee

Senate Standing Order 24 provides:

- '(1)(a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;

- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.'

It has six members operating by consensus in a non-partisan way, the Chair being appointed on the nomination of the Leader of the Opposition in the Senate!

At the end of each sitting week, Bills introduced into either Chamber are provided to the Committee's legal advisor who assesses them against the five principles noted above. On the following Wednesday morning, the Committee examines that report and composes an 'Alert Digest' usually tabled that afternoon, which alerts Senators (and the relevant Ministers) to any clause which may be considered to, eg. 'trespass unduly on personal rights and liberties'. Ministers are encouraged to respond in timely fashion so that the Chamber can debate and vote on the clause with the benefit of the Committee's observation and the Minister's response.

Example of Operation

For example, in the area of anti-terrorism legislation, the Committee in its Alert Digest No. 13/05 of 9 November 2005, spends some nine pages commenting on various provisions of the Anti-terrorism Bill (No. 2) 2005, giving the Senate (and indirectly the Government and the House of Representatives) the opportunity to consider whether the particular provisions so unduly trespassed on personal rights and liberties as to merit withdrawal or defeat.

To give a particular example, in relation to the abrogation of legal professional privilege which is a Common Law right, the Scrutiny of Bills Committee:

"considers that, while the clause clearly trespasses on the rights of those affected, the Committee leaves for the Senate as a whole the question of whether it trespasses on those rights *unduly*".

In respectful but clear language this section of the Alert Digest concludes:

"The Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principal 1(a)(i) of the Committee's terms of reference."

This is equivalent to a **Declaration of Incompatibility** ultimately deferential to the judgement of the Parliament as to the balance between respecting the right and achieving a policy objective – which is all that most models of judicial oversight seek to achieve.

Possible Objections

It may be objected that a parliamentary committee would not be as independent as the judiciary and may be reluctant to put such a Declaration to the Parliament. There is no evidence whatsoever that the Scrutiny of Bills Committee has acted other than with the greatest integrity in this regard.

A more substantial objection might be that the Committee may work very well on the introduction of a Bill, but once it is passed into law, "the horse has bolted".

What is often not noted is that the Committee can examine 'Acts'. Whilst originally inserted, as I recall, to cover the situation where a Bill was rushed through Parliament and enacted before a

Digest could be readied, nevertheless it does provide an opportunity for review, not only of such 'quick passage' legislation, but of **any** Act on the Statute Book.

The Tate Submission

My submission, which I first suggested at a seminar held at the University of Queensland on 11 August 2006, is that the Scrutiny of Bills Committee be given a mandate which clarifies the first principle of its terms of reference to indicate that it encompasses personal rights and liberties whether recognised or expressed under the Australian Constitution, in the Common Law, in Statutes of the Parliament, or in Treaties ratified by the Government of Australia and incorporated into law.

I would change the verb 'report' to 'declare', thus equating its function closer to the making of declarations of compatibility or incompatibility beloved by some.

I would retain the adverb 'unduly' as it has proved to perfectly focus the question proper to the Parliament.

I would change the name of the Committee to the 'Scrutiny of Bills and Acts Committee', as the examination of existing legislation will become a more important part of its function.

So, by way of amendment to Standing Order 24, that order would now provide:

At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills and Acts shall be appointed to declare, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise:

- (i) trespass unduly on personal rights and liberties recognised or expressed under the Australian Constitution, in the Common Law, in statutes of the Parliament, or in treaties ratified by the Government of Australia and incorporated into law.**

This has the merit of being politically uncontroversial in that it refers to the sources of law with which we are familiar. And is ambulatory: able to encompass any changes made by the electorate in referenda, by the judiciary expounding Constitutional and Common Law, by the Parliament passing legislation, or by the Government ratifying treaties incorporated into law.

I am sure the Committee would find a formula to present its conclusion in a way which preserves the respectful language which has enabled it to operate so well to this point.

Immediate Implementation

The greatest merit of the proposal is that it could, with sufficient resourcing of the Committee's secretariat and legal advice capacity, be implemented tomorrow (*Senatus vultus!*).

Any attempt to compose a Charter of Rights, clause by clause from scratch will invite such lobbying for additions, deletions or modifications as to require several more years of political consideration. It is not impossible that an impasse could be reached in the Senate such as to stymie the whole project.

Nevertheless, should it be thought necessary to do so, perhaps it should run as simply as possible.

Charter of Rights

Every person within the jurisdiction of Australia possesses those personal rights and liberties recognised or expressed under the Australian Constitution, in the Common Law, in statutes of the Parliament, or in treaties ratified by the Government of Australia and incorporated into law.

Their exercise is subject to the ordinary legislative power of the Australian Parliament as provided for in the Constitution of the Commonwealth of Australia.

If it is thought necessary to be a little more elaborate, perhaps a list indicating in a non-exhaustive way some of those rights and liberties thought to be of particular importance, could be attempted but it would be surprisingly extensive.

For example, I note without endorsing every item, that in a paper delivered as the 2008 McPherson Lecture, Chief Justice Spigelman identified 18 principles of statutory interpretation which could be expressed as a common law bill of rights. The listing of constitutional, statutory and treaty based human rights would, I am sure, be remarkably long. It would have to be modified or added to from time to time depending on activity in the four sources of law identified. No doubt this could be done on the advice of the Scrutiny Committee.

Resources

I have mentioned resource implications (which are also made of concern to this Committee). The Scrutiny Committee secretariat may need 'beefing up'. The practice of appointing ANU professors as legal advisors (I think invariably with professional expertise and reputation outside the human rights field) has proved wonderfully successful. It may be that that method of securing timely advice would need to be supplemented. Whatever the call on the Federal budget on that score, the cost would be minuscule compared with the cost of Commonwealth participation in litigation and of the extra workload in the Federal Court system should an enhanced judicial role be favoured.

Parliamentary Sovereignty

This proposal may be thought to put too much trust in the Parliament. But we are speaking of the Parliament of the Commonwealth of Australia whose legislative power is legitimated by the observance of many different democratic norms of which the extent of the franchise is but one, though crucial.

The electorate can pass judgement on the Parliament's handling of human rights issues at general elections. Although it is outside this Committee's terms of reference, I would argue that in the absence of an enhanced role for judges, the three yearly subjection of the Parliament to scrutiny by the electors is about right.

This Committee's terms of reference do speak of 'corresponding obligations'. There is a fundamental obligation corresponding to the role of the parliament I have outlined – the exercise of the duty to vote, i.e. to participate in the democratic election of representative parliamentarians. Of course, this is a legal duty provided for in Section 245 of the Commonwealth Electoral Act 1918. If the Committee were to draw up a Charter of Responsibilities or Obligations, this should be amongst those given the most eminent status.

Conclusion

This submission advocates the enhancement of an existing, well-proven mechanism for ensuring that Parliament is fully aware of the need for it to expressly choose, in a transparent way accountable to the electorate, those occasions when the achieving of a policy objective overrides the presumption that the Parliament intends to respect and allow for the exercise of personal rights and liberties.

Together with such review of the operation of the Human Rights Commission as may be thought desirable, and with the activity of other relevant Parliamentary Committees, there is every reason to be confident that our Australian democracy will continue to be characterised as one in which human rights are greatly valued and respected.

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