

Submission to the National Human Rights Consultation¹

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Summary

The adoption of a federal Bill or Charter of Rights of the type currently proposed by prominent advocates is ill-advised.

Particularly problematic are suggestions that a Bill or Charter should include socio-economic rights.

Rights and responsibilities should not be conflated. To tie rights to responsibilities would disadvantage those most in need of rights protection.

A Bill or Charter that empowered the High Court and other federal courts to make declarations of incompatibility or inconsistency between a law and the protected right is likely to be unconstitutional.

A Bill or Charter that included concrete, enforceable “due process” rights would not create the same difficulties.

¹ Sections of this submission are drawn from a paper I delivered to the 2008 Colloquium of the Judicial Conference of Australia.

As an alternative, an amendment to the Commonwealth *Acts Interpretation Act 1901*, requiring the Courts to interpret legislation in the light of specified rights would avoid many of the negative effects of a Bill or Charter.

1. Introduction

In this submission, I set out why, with a limited exception, Australia would be ill-advised to adopt a Bill (or Charter) of Rights. I make this submission, not as an opponent of rights, but in the conviction that rights are better protected by other means.

1.1 My reasons are:

- The distortion that would occur in the constitutional separation of powers, as courts are required to rule on matters that are essentially political, rather than judicial.
- The likelihood of enumerated rights becoming rigid and inflexible, making it more difficult for new rights to be identified and recognized in the future.
- The transformation of value claims into legal claims, and the consequent foreclosing of legitimate debate about contestable and controversial matters.
- The high costs associated with litigation, especially for those who are disadvantaged or oppressed.

These problems arise, I suggest, regardless of whether the Bill of Rights is statutory or constitutional.

1.2 There is a further difficulty, however, particular to a statutory Bill or Charter, if it takes the form currently advocated by many, that is, a model which does not permit judicial invalidation of laws, but only empowers courts to make declarations of “incompatibility” or “inconsistency” between laws and rights (this model is found in the U.K. *Human Rights Act 1998*; the A.C.T. *Human Rights Act 2004*, and the Victorian *Charter of Human Rights and Responsibilities 2006*):

- The Commonwealth Constitution does not permit the High Court to give advice or offer advisory opinions to government (or any other body). A declaration of incompatibility, in my view as a constitutional lawyer, has the character of an advisory opinion. A federal Act of this nature would itself be unconstitutional.

1.3 Some proponents of a statutory Bill of Rights suggest, as an alternative, that Australia might follow the *New Zealand Bill of Rights Act 1990*. This Act requires the courts to interpret laws consistently with the rights set out in the Act. It prohibits the courts from ruling that laws are invalid or unenforceable for inconsistency with these rights. Constitutional difficulties, in my view, would also arise from such a model:

- An Act that prohibited the High Court from ruling on the validity or enforceability of any laws has the potential to undermine the High Court’s constitutional powers. If so, the Act would itself be unconstitutional.

1.4 The exception

There is one body of rights, however, that should be protected from legislative erosion, and that is properly enforced by the courts. These are rights involved in the legal process and the enforcement of law: rights arising in the course of the arrest, detention, and trial of individuals. Such rights belong to the courts, and

the judicial branch of government. Most are currently protected by common law. Their protection via a “Bill” would not, in my view, be detrimental.

The above points are set out in greater detail below.

2. Background

Over the century-plus since the Commonwealth Constitution was framed, the idea that Australia should have a Bill of Rights² has been raised on many occasions. The proposed process for adopting such a Bill has varied, alternating between constitutional amendment, legislative enactment, and “discovery” through constitutional interpretation.

2.1 Historical steps include:

- During the drafting of the Constitution in the 1890s, the framers rejected a proposal to include more than a limited number of “rights.”³ Their preference lay in the common law as a protector of rights. They did, however, include several significant rights in the Constitution (see 5.3 below).
- In 1944 and 1988, the insertion of a range of “rights” provisions in the Constitution was attempted via referendums. Each was unsuccessful.⁴

² For simplification I use the term “Bill of Rights” generically, to take in the various terms used for the lists of rights proposed in the past and present.

³ What they rejected, to be accurate, was not a Bill of Rights, as is often claimed, but a clone of section 1 of the U.S. Fourteenth Amendment. See John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, 2005, pp. 208-210.

⁴ The 1944 referendum on Post-War Reconstruction and Democratic Rights asked a single question with 14 points, including an express guarantee of freedom of speech, and religion, and safeguards against the abuse of delegated legislative power. The 1988 referendum (Question 4) proposed extending to the States some of the “rights” or “freedoms” in the Constitution that bind only the Commonwealth. It sought approval on the proposal “To alter the Constitution to extend

- Statutory Bills of Rights were introduced, without success, into the Commonwealth parliament by Labor Attorney-General Lionel Murphy in 1973, and Labor Attorney-General Lionel Bowen in 1985.
- Forecasts of the imminent discovery of range of implied rights in Chapter III of the Constitution followed two landmark cases in 1992, in which the High Court held that the Constitution contained an implied freedom of political communication.⁵ The hopes of expanding this approach to a comprehensive list of rights were quickly disappointed. The prospect of the discovery of an implied constitutional “Bill of Rights” thus joined the list of failures.

2.2 Recent international developments, however, have generated renewed interest in a Bill of Rights, and renewed pressure upon the Australian government to adopt a Bill:

- In the last decades of the twentieth century other comparable countries, including the United Kingdom, Canada, New Zealand and South Africa, have adopted their own Bills or Charters.
- Global concerns about civil liberties and natural justice have been significantly heightened, in particular since September 2001, stimulating an increased interest in the legal protection of rights. New laws for deterring unlawful immigrants and combating terrorism or averting

the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government.”

⁵ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. See George Winterton, “The Separation of Judicial Power as an Implied Bill of Rights” in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994).

terrorist acts, have been adopted in many countries including Australia. These laws have generated the bulk of the examples upon which recent Australian rights advocacy rests.⁶

2.3 We should seriously consider what is signified by Australia's reluctance to adopt a Bill of Rights in the past. This has not been, as is sometimes implied, due to a disregard or contempt for rights. It signals, rather, an Australian preference for protecting rights in other ways, in particular through our democratic institutions and culture. It should not be thought that the rejection of a Bill of Rights means that Australia has a poorer record of rights protection than other countries. The record (discussed below) is no worse, and in some cases, is better than in countries with a Bill.

3. The separation of powers

Those who question the Bill of Rights agenda are rarely contemptuous of rights, or of the law, or of the integrity of the judiciary or the judicial system. Most are concerned, rather, about the *best means* of protecting rights, while retaining Australia's democracy. The central issue is whether the best means revolves around judicial review.

3.1 Judicial review is not in itself objectionable. Constitutionalism means limitations on legislative power. Elections and electoral accountability are central to a democracy, but elections are neither sufficient nor exhaustive of the processes a democracy requires. The complex political-legal system that characterizes any modern democracy will necessarily involve many institutions

⁶ See, for example, the New Matilda campaign for a Commonwealth Human Rights Act. In its rebuttal of the claim that the Australian human rights record is exemplary, it lists seven examples of recent violations of rights, three of which directly, and two indirectly, refer to border protection or anti-terrorist laws or procedures.
<http://www.humanrightsact.com.au/2008/about-a-hr-act>

and processes in which officials, elected and unelected, make critical decisions that do not have popular support (or would not have popular support, if a poll were taken).

3.3 A system such as Australia's involves three arms of government. Each plays its part in balancing diverse and conflicting interests, in maintaining and protecting our fundamental institutions, in developing our standards and values, and in preventing the other arms of government from accumulating or monopolizing power. These are the purposes of the separation of powers.

3.4 Judges do not wantonly strike down laws in the course of judicial review, and opponents of a Bill who suggest they do are either ignorant or misguided. Legislation is rarely ruled unconstitutional. People outside the legal profession are likely to be surprised, even disappointed, to learn this.

3.5 Indeed, one of the first problems with proposals for Bills of Rights is their tendency to create false expectations on the part of those who are not familiar with judicial history. This was evident in, for example, the deliberative poll forums held prior to the adoption of the ACT's *Human Rights Act* (and in many other public forums on this question at which I have spoken). There is a common, and popular perception that individual grievances can be simply redressed through access to the courts, and that claims of denial or breach of rights will invariably be vindicated. The record is that challenges to the validity of laws fail just as often as, if not more often, than they succeed.

3.6 Regardless of whether or not the courts are empowered to strike down laws or merely to advise on whether they are incompatible or inconsistent with a Bill of Rights, the problem arises where a Bill of Rights demands that judges

answer political questions and provide legal remedies for controversies concerning policy. This means the erosion of the separation of powers.

3.7 To give an example, the New Matilda campaign, chaired by Susan Ryan, AO (former Commonwealth Minister for Education) is a prominent lobby group. Its draft Human Rights Bill of 2006 includes provisions covering civil and political rights, but also rights that extend well beyond these. It includes the right to primary and higher level education, to “the highest standard of physical and mental health,” to adequate food, clothing and housing, the right to work and the free choice of work, among others. This list, I believe, would command the support of many who currently propose a Bill of Rights.

3.8 The New Matilda campaign recognizes that socio-economic rights are costly and have major resource implications. Its draft Bill therefore includes a provision governing the interpretation of economic and social rights, and requiring courts to take into account, among others, the estimated cost and the financial capacity of governments or public authorities in enforcing a socio-economic right.⁷

3.9 This interpretive provision (which closely resembles provisions of the South African Bill of Rights⁸) may appear to act as a reasonable brake on what might otherwise be an uncontrollable demand for judicial review of living standards and quality of life. The appearance of reasonableness, however, is deceptive.

⁷ See <http://www.humanrightsact.com.au/2008/>

⁸ For example, section 26 (1) “Everyone has the right to have access to adequate housing” (2) “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

3.10 Such a provision, if adopted, would empower the courts to order governments to submit financial statements, budget papers, and justifications for fiscal policy. The courts would become, effectively, tribunals where judges challenged budget decisions or the costing of public programs. The separation of powers would be severely damaged. The time and cost involved in this process would also seriously hinder the normal work of the courts.

3.11 Every good society *should* provide the best levels of health and education and housing, the best opportunities for decent and well-paid employment, a clean and healthy environment, and much more. But according to which criteria are we to decide whether these claims have been met? How are we to know whether the resources available have been optimally or equitably allocated?

3.12 These are not questions that courts should be expected to answer, nor are they matters for which judicial remedies should apply. Such matters should be the subject of political campaigns. Those who consider the government to fall short in their delivery should be encouraged to campaign for a change in policy or in government, not for a resolution in the courts.

3.13 Even the sort of Bill of Rights that does not permit the invalidation of legislation, but empowers the courts instead to make a determination or declaration of “incompatibility” or “inconsistency” between laws and rights, does not avoid these questions. The Victorian *Charter of Human Rights and Responsibilities* is such a Bill. Section 19 (1), for example, requires courts, when the issue arises, to assess whether a person who has what it describes as “a particular cultural, religious, racial or linguistic background” has been denied “the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.”

3.14 To determine whether a person has a “particular” background, and whether such a denial has occurred, require detailed knowledge of cultural particularities, practices and expectations, in a context where these operate alongside other practices, both “particular” and mainstream. These are sociological and historical matters, not judicial matters of inquiry.

3.15 Section 11 (1) of the ACT *Human Rights Act*, to give another example, states that “[t]he family is the natural and basic group unit of society and is entitled to be protected by society.” This provision requires the courts to resolve questions about the identity of the family and the indicia of its integrity, notwithstanding the fact that the family is social institution, the character of which has long fascinated and taxed ethnographers and social historians. Again, these are not judicial inquiries.

3.16 It is said that the type of remedy found in the UK *Human Rights Act 1998*, and copied in the ACT and Victoria, whereby the courts are empowered to make declarations of incompatibility or inconsistency, rather than invalidity, takes account of such objections by creating a “dialogic” process - an opportunity for judicial criticism to be followed by governmental response or legislative override, in a dialogue or “conversation” between the arms of government.

3.17 In his evidence to the parliamentary inquiry into a NSW Bill of Rights, Bret Walker, representing the Bar Association of NSW, responded to such a view with scepticism:

“The notion that you remove difficulties by giving to the courts a power to say to the legislature ‘Do it again, and do it better’ is, to my mind, politically a very frightening one.... It is not democratic if some judge ... can say, ‘Your program, whatever that is, requires X. Your enactment does

not quite get to X, it is only seven-eighths of X. I am going to hold things and send it back, because I think you should move in this direction more solidly...' " 9

This objection remains valid

4. The example of indigenous rights

Many who advocate a national Bill of Rights hold up indigenous disadvantage as one of the most pressing areas for legal reform, and among the strongest arguments for a Bill. They point to indigenous poor health, lower life expectancy, high rates of unemployment, "third world" living conditions, and other measures of disadvantage, that remain unalleviated due either to neglect on the part of governments or failure of government policy. In addition, the Constitution's "races power"¹⁰ appears to empower the Commonwealth to pass laws that are adverse both to aboriginal people and to indigenous rights. A Bill or Charter of Rights, proponents suggest, would help address these forms of disadvantage.

4.1 For example, in the NSW government's inquiry into a Bill of Rights (which reported in 2001) prominent legal academics made submissions that the 1998 *Native Title Amendment* (which, among other things, permitted pastoral leases to override native title) would not have been possible if Australia had had in place a Bill of Rights protecting indigenous rights.

⁹ NSW Parliament, Standing Committee on Law and Justice, Report 17, October 2001, *A NSW Bill of Rights*, p. 85.

¹⁰ Section 51 (xxvi): "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... the people of any race for whom it is deemed necessary to make special laws."

4.2 More recently, the New Matilda campaign listed “[a]n acute lack of safety, health and adequate living conditions of Indigenous Australians” among its reasons for promoting a Bill, and suggested that mandatory sentencing laws in the Northern Territory, and the recent Northern Territory “Intervention” would not be permitted under a national Bill of Rights.

4.3 Here, with respect, is a confusion of policy and law. Whether laws or official action or programs are adverse is rarely a simple matter, rarely one that may be dealt with in the “either-or” manner of a legal decision. Is the Commonwealth’s Intervention adverse or beneficial? Indigenous people are themselves divided on this question. It may have adverse effects for some and beneficial effects for others. It may be adverse in the immediate term and beneficial in the long term (or vice versa). A court is not well-placed to decide which.

4.4 A court cannot determine whether a highly-complex set of processes and actions, based on detailed legislative and administrative schemes, with reference to conduct that is ongoing and future-oriented, is or is not “adverse.” This is a matter for political debate, for public discussion and input, for fine-tuning, for long-term planning, for compromise, for balancing of interests, for hard decisions about means and ends and resources. In short, the sorts of things that are done in the political realm.

4.5 Even if there were a Bill of Rights in place, it cannot be assumed that a challenge to current Commonwealth legislation alleging breach of rights would inevitably succeed. The litigants may find, after a long, complex and expensive process, that the Court favours the government’s case.¹¹

¹¹ As happened recently in *Wurridgal v The Commonwealth* [2009] HCA 2 (2 February 2009), where an unsuccessful challenge to provisions of the Act governing the NT Intervention was based on an actual

5. The rights record

There appears to be a popular conception that, in the absence of a Bill of Rights, Australia lacks laws protecting rights. This is partly a matter of ignorance about Australia's constitutional and legislative record. It also arises because many people outside legal and political circles do not fully understand the distinction between courts applying and enforcing laws, and courts exercising judicial review.¹² This distinction needs to be made clearer.

5.1 Australia is far from deficient in laws protecting rights. There is a wide range of Commonwealth legislation; for example, the *Race Discrimination Act 1975*; *Ombudsman Act 1976*; *Freedom of Information Act 1982*; *Sex Discrimination Act 1984*; *HREOC Act 1986*, *Human Rights (Sexual Conduct Act) 1994*; *Equal Employment Opportunity Acts 1987 and 1999*, anti-slavery laws, and privacy laws, among others. These laws outlaw discriminatory conduct, and allow individual redress for breaches or denial of rights. They are enforced in tribunals and courts. There are counterparts in State legislation.

5.2 Australia also has a range of common law rights, and a network of administrative review tribunals, through which administrative and executive decisions can be challenged and remedies sought.

5.3 The Commonwealth Constitution includes a number of rights provisions: a right to "just terms" for property compulsorily acquired by the Commonwealth (s 51 (xxxii)); the right to trial by jury for indictable Commonwealth offences (s

constitutional right - to "just terms" for the compulsory acquisition of property by the Commonwealth. Furthermore, this particular right is not a "toothless tiger". It has been successfully invoked by litigants on many previous occasions.

¹² Using this expression to refer to courts' ruling on the constitutionality of the laws, or on their compatibility or consistency with an overriding instrument, such as a Charter or Bill of Rights.

80); freedom of interstate “intercourse” or personal movement, including the movement of ideas (s 92); freedom of religious worship and freedom from imposed religious worship (s 116); a prohibition against State laws that discriminate on the ground of out-of-state residency (s 117); an implied protection from legislative or executive punitive detention; an implied freedom of political communication, and an implied protection of the democratic franchise.¹³

5.4 The fact that some of the above rights function imperfectly is not in itself a case for an alternative Bill of Rights. Bills of Rights, however well expressed, do not function on their own. They require judicial interpretation and enforcement. The rights they protect are subject to limitations. Judicial decisions concerning the interpretation of rights may prove controversial or disappointing to parties alleging a breach of rights. A Bill of Rights cannot guarantee a particular outcome in the courts.

5.5 Australia’s record in protecting rights goes beyond the legal sphere, however. This is commonly overlooked in debates about the merits of a Bill of Rights. A strong democracy and an active civil society are critical in the protection of rights and freedoms. Australia has a democratic political culture, along with practices and institutions that support it. It has a complex democratic infrastructure, for example, the Australian Electoral Commission which not only administers elections, but performs numerous other democratic functions, including public education.

5.6 Australia’s long-standing system of compulsory voting serves not only to ensure that a genuine majority records its voice at election time. It also requires governments to make active provision for exercising the vote, creating maximum

¹³ *Roach v Electoral Commissioner* (2007) 239 ALR 1

opportunities for every eligible person (including the homeless, those in remote communities, in hospitals, and prisons) to cast a vote, and thus take part in shaping the laws under which Australians live. Again, this system is not perfect, but it is part of a matrix of democratic laws and practices that are valued in modern rule-of-law democracies and promoted in international law.

5.7 Our parliaments have a complex committee system. The Senate Scrutiny of Bills Committee, for example, assesses and regularly reports on proposed legislation with respect to, among other things, whether bills “trespass unduly on personal rights and liberties”; “make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers”; or “make rights, liberties or obligations unduly dependent upon non-reviewable decisions”.¹⁴ Other standing and select parliamentary committees conduct inquiries into the status of rights protection more broadly. The Joint Standing Committee on Foreign Affairs, Defence and Trade, for example, announced an inquiry into Human Rights Mechanisms and the Asia-Pacific in 2008.¹⁵

5.8 In many of these legal and political initiatives, Australia has been a pioneer. Australians did not feel uncomfortable standing alone, or with few companions in the common law or democratic world, when these initiatives were first adopted. Our record is not perfect, but it is far from the stark picture that is conveyed in the claim that Australia, alone among democratic countries, lacks a Bill of Rights.

6. Inflexibility of rights

¹⁴ Parliament of Australia, Senate
<http://www.aph.gov.au/Senate/committee/scrutiny/cominfo.htm>

¹⁵ Parliament of Australia,
http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/tor.htm

Much is made by proponents of the difference between a constitutional and a statutory Bill of Rights. The former, being entrenched, is more difficult to amend and more likely therefore to remain quarantined from progressive shifts in values and conceptions of rights. The latter, in contrast, is said to be amenable to alteration by ordinary parliamentary processes and more flexible and adaptable. The difference, however, may be more apparent than real.

6.1 Technically, a statute is more easily amended or repealed than a constitution. But a statute may be less amendable than is often thought. Key statutes become entrenched over time (in Britain, the *Bill of Rights* 1689 and the *Act of Union* 1707, to give just a couple of examples, are in the form of “ordinary” statutes, but are effectively entrenched; that is to say, they are still in operation after several hundred years, and would be exceptionally difficult to alter, much less repeal). The *New Zealand Bill of Rights Act* of 1990 has become effectively entrenched. The UK *Human Rights Act* of 1998 is on its way.

6.2 It is, in my view, disingenuous of those proponents of an Australian Bill of Rights who claim that they want rights to be flexible and amendable. The point of recognizing rights in a Bill is, I believe, to give those rights a higher level of legal security, making them less flexible than rights in individual pieces of legislation. The argument put by proponents is one, indeed, that revolves around the inalienability of certain rights.

6.2 The reality is that, regardless of the legal form (statutory or constitutional) in which the Bill appears, inflexibility is likely to be the outcome. After a time, statutory Bills become effectively constitutionalized, as do the rights they include. Once rights are named and listed, and remedies are identified for their breach, those rights in time become reified. They are regarded as definitive, as an exhaustive statement of rights, occupying the space available for claims for

justice. It has certainly been my experience, when living in the United States, that the language of rights is almost exclusively tailored to those rights that were historically enumerated in the U.S. Constitution.

6.3 Many people do not know that the framers of the United States Constitution were initially reluctant to adopt a Bill of Rights, in part because they recognized this tendency. When in 1791 (four years after the Constitution was completed) they finally yielded, they included the Ninth Amendment, stating that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Such a provision has become commonplace in later constitutions or rights Acts.¹⁶

6.4 This may appear to settle concerns. In practice, however, the meaning of the Ninth Amendment has never been clear. United States Courts do not rely on it to identify or uncover missing or silent rights. Commentators continue to debate what it means.¹⁷ There is virtually no Ninth Amendment jurisprudence. The enumerated rights have always had the upper hand, and rights that are the subject of later claims have struggled to gain recognition.

6.5 That entrenched rights may become a fetter is exemplified by the notorious Second Amendment of the United States Constitution,¹⁸ a right that continues to live long past its historical use-by date, constraining current laws

¹⁶ Section 7 of the ACT *Human Rights Act* states: “This Act is not exhaustive of the rights an individual may have under domestic or international law.” Section 5 of the Victorian *Charter of Human Rights and Responsibilities* states: “A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.”

¹⁷ See, for example, Randy E. Barnett, “Who’s Afraid of Unenumerated Rights?” (2006) 9 *University of Pennsylvania Journal of Constitutional Law* 1

¹⁸ “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

(and other rights) through the values and interests of the distant past. A recent case has confirmed that it is real and alive.¹⁹

6.5 No legal provision can be framed in such a way as to cover all circumstances, in particular those that arise and change over time. Neither definitions contained in the Bill, nor the inclusion of express limitations on particular rights can account for or anticipate the concrete claims that will arise in the future and will be made in reliance on particular provisions. In contrast, individual pieces of legislation (rather than an over-arching Bill) are open to amendment and adaptation.

7. Value claims versus legal claims

Many proponents, in my view, have not given adequate consideration to what they mean by “rights.” Many of what are described as “rights” or “human rights” are actually interests or values cast in the language of law. By self-definition or self-classification, this language asserts a claim to legal recognition and protection. It turns a value claim into a legal claim, and by doing so seeks to remove it from the realm of contestation and controversy.

7.1 Many new rights, in particular, have this character. For example, what are known as “sexuality rights,” “reproductive rights,” “the right to die with dignity,” and “environmental rights,” among others, rest upon values or claims that are still controversial, and still open to reasonable disagreement. They are current topics of public debate. In casting these values as “rights,” their supporters seek to make them unassailable and foreclose debate. This is not merely inconsiderate towards those with different perspectives, it is also detrimental to the democratic process which requires open and robust debate about competing values.

¹⁹ *District of Columbia v. Heller* 554 U.S. _ (2008)

7.2 Even where it is clear that a matter is a “right” rather than value claim, it needs to be recognized that different rights derive from, and belong to, different fields. Some arise from the natural law tradition. Others are creatures purely of legislation. Some rights are available to the individual alone, others to groups or classes of person; some rest on a distinction between citizens and non-citizens; others are enjoyed by natural persons only, and still others extend also to corporate persons; some are enforceable only against governments, others against private actors as well. Some rights are “negative,” taking the form of prohibitions on legislation. Others are “positive,” expressed as guarantees that can be asserted against governments.

7.3 The field of rights, in other words, is not consistent, uniform, or settled. Because of this complexity, the protection of rights is best served by treating rights individually and separately, and by legislating for rights (or freedoms) when there is a clear public consensus on a matter, not by attempting to incorporate all in a single Bill.

8 Some rights *are* suited to a “Bill”

Not all rights are political or contestable, however. *Legal process* rights - the rights that surround the arrest, charge, trial and detention of persons suspected of, or convicted of, having committed an offense - belong, properly to the judicial arm of government. They concern the judicial process. They concern justice. They are necessary components of the rule of law, essential protections against arbitrary rule. They should extend to all persons without distinction, and are thus appropriately quarantined from legislative or executive impairment.

8.2 Judicial or legal process rights include:

- The right to be informed of the reason for one's arrest or detention.
- The right to be informed of one's legal rights, including the right to silence.
- If arrested, the right to be charged expeditiously or released.
- The right not to be detained without charge for more than a limited time, subject to judicial oversight.
- If arrested and/or charged, the right to legal counsel before questioning.
- The right to silence following arrest and during trial.
- The right to confront one's accuser(s).
- The right to judicial discretion in sentencing.
- The right to trial by jury for indictable offences.
- A prohibition on the classification of an offence as summary, where the offence carries a penalty of more than a brief term of imprisonment
- A prohibition on retrospective criminal laws.

8.2 These are specific, concrete rights. It is important to note that they are not the equivalent of concepts such as "a fair trial" or "due process" or "equality before the law." Such concepts are often imprecise and abstract, and may be subjective. Their interpretation is likely to vary from case to case, creating indeterminacy or uncertainty in the law in general. Imprecise and abstract concepts or "rights" have the potential to undermine the principle of equality before the law. In contrast, specific, concrete and clearly-measurable rights would avoid these dangers.

8.3 Questions concerning the legitimacy of legislative limitations on these rights are appropriately answered in the courts. If the claim made by proponents of a Bill of Rights were confined to such rights, then agreement might be secured with those who are otherwise sceptical.

8.4 It is very unlikely, however, that most proponents would be satisfied with confining a Bill of Rights to legal process rights. Most advocates seek much more extensive entrenchment, and many are motivated precisely by the goal of greater equality in social and economic conditions that they believe a Bill of Rights will deliver.

8.5 It is to be noted that the bulk of criminal procedures in which the above rights will be relevant are State matters. The field of Commonwealth criminal law is relatively small. Constitutionally the Commonwealth's constitutional power to create criminal laws arises in a limited number of ways, principally as an incidental and necessary aspect of the regulation of other subjects over which the Commonwealth has power. Some Commonwealth criminal laws may also be enacted in order to put into effect international treaty obligations, or pursuant to powers referred to the Commonwealth by the States.

8.6 It should also be noted that these rights relate to arrest, trial and detention for the purpose of punishment (or, in some cases, for the purpose of preventing the commission of a crime). The Commonwealth is constitutionally able to hold persons in detention for administrative purposes (for example, while awaiting deportation) or other purposes for which it has a legislative head of power (for example, quarantine) without engaging due process rights. Punitive (or criminal preventive) detention, however, can only be ordered (or supervised) by a Court.

8.7 The rights listed above would protect persons subject to punitive detention. They would not affect the Commonwealth's legitimate power to detain persons for other reasons. They would, however, require a Commonwealth officer to inform any person detained of the reason for their detention, and inform them of their legal rights.

9 What of responsibilities?

Many people link rights and responsibilities, believing these to be reciprocal. Many proponents of a Bill of Rights also believe that greater respect for, and compliance with our “responsibilities” will follow from the adoption of a Bill. There are several difficulties with this view.

9.1 The point of adopting a Bill is not merely to encourage good behaviour. A Bill of Rights rests ultimately upon legal enforcement, either directly or indirectly (via an opinion of the court about the compatibility or consistency of the law). If responsibilities are added to the enumerated rights, we must be prepared for legal enforcement of responsibilities. But what are these?

9.2 We may have in mind, for example, the responsibility to obey the law. This is scarcely new or special. Everyone is required to obey the law, and penalties follow from failure to do so. It is not a matter of “responsibility” to obey the law; it is a legal duty. To connect this duty to rights, and to suggest that rights and responsibilities are reciprocal, is problematic.

9.3 For example, should persons who fail to pay their taxes be penalized by being deprived of a right? If so, which one? Wouldn't this constitute a double penalty, in addition to the legal penalty already in force? Would persons who failed to vote be deprived of the right to vote? This would constitute a fundamental assault on democracy. It would undermine the democratic will, and prevent individuals from correcting their own behaviour over time. In any case, exercising the vote is a legal duty in Australia. It is only a “responsibility” in a normative (or “soft”) sense that is not relevant to the question of whether Australia should adopt a Bill of Rights.

9.4 We do not have legal “responsibilities” in the normative sense in Australian law. It is revealing that, despite its title, the Victorian *Charter of Human Rights and Responsibilities* does not include a list of “responsibilities”. It does not even list “responsibilities” in its definitions at the head of the Act.

9.5 One of the greatest objections to linking rights and responsibilities is the suggestion that rights are contingent, and that their availability should depend upon good behaviour. If individuals have legal rights, it is a fundamental aspect of the rule of law that these should not depend upon measures of personal or individual conduct unrelated to the right.

9.6 Even if what we mean by “responsibilities” is simply worthy conduct, voluntary work or community participation, this is still problematic. Those who are most in need of rights protection - the poor, disadvantaged, and deprived - are often those who are least well-placed to perform voluntary or community work. They are often the very people who are, or should be, the beneficiaries of such work, performed by those who are better off, and better placed to exercise their “responsibilities”. To tie their rights to responsibilities is doubly to disadvantage the disadvantaged.

10 The cost of rights

Bills of Rights are enforced through legal action. Litigation is a poor substitute for political campaigns. It is individualized; it is confined to a concrete legal controversy, and it is expensive. Even where rights-based claims may only be raised in existing proceedings (as in the A.C.T. and Victoria), the demand for additional legal expertise, and the likely increase in the length and complexity of proceedings will add to costs.

10.1 The cost of litigation is commonly borne by the very individuals who are already disadvantaged, and whose expectation of success, is (statistically at least) unlikely to be matched by reality. Political campaigns, in contrast, are not necessarily costly. They may be collective, cheap, and conducted in multiple forms and media. Unlike a legal action, they may be repeated, again and again, if they fail.

10.2 The cost of litigation may be met by free or subsidized legal aid, offered by public interest advocacy groups or pro-bono lawyers. Bills of Rights indeed generate a demand for such aid. In Canada, for example, groups like the Canadian Legal Education Action Fund (LEAF) were set up as civil society initiatives to support challenges to breaches of constitutional rights, following the adoption of the Canadian Charter of Rights and Freedoms in 1982. Such programs are worthy. However, they depend upon private good will, private philanthropy, and a community of supporters who remain favorable to the party alleging a breach of rights, in a context of deep asymmetry between the typical individual plaintiff and the typical official defendant.

10.3 The asymmetry is more than financial. It lies in knowledge, access to information and advice, cultural familiarity, confidence, time and energy. These are typically in short supply among the socially and economically disadvantaged.

10.4 The protection of rights should not have to rely upon access to funds or the good will of individuals. This reliance is inherently unstable and potentially risky. Political campaigns, in contrast, minimize the costs to individuals, as well as avoiding a simple win-or-lose scenario. Where governments respond with positive legislation and programs, both the cost and the fruits of social progress are spread across the community.

10.5 Even if legal aid to support rights litigation could be assured, there is a further difficulty. Proponents of a Bill of Rights appear to assume that the path of justiciable rights is automatically and always progressive. This assumption needs to be questioned. Judicial review may result in the defeat or invalidation of progressive laws or programs. In Canada again, to give a well-known example, advertisements warning of the health risks in smoking were ruled in breach of the Canadian Charter, following a challenge brought by a tobacco company, relying on the Charter's right to freedom of expression.²⁰ While a statutory Bill, conferring on the courts only the power to make declarations of incompatibility, would not lead to invalidation, such a declaration may have a chilling effect on laws of this nature.

11 Constitutional problems

For many proponents of a Bill of Rights, the problems that lie in constitutional entrenchment and legislative invalidation have been satisfactorily addressed in the ACT *Human Rights Act* and the Victorian *Charter*. Rather than empowering the courts to invalidate legislation, they permit the courts only to make declarations of incompatibility or inconsistency between legislation and rights. These Acts are potential models for the Commonwealth. An issue arises, however, for a proposed Commonwealth Bill that does not arise in the States and territories.

11.1 Chapter III of the Constitution confers original jurisdiction on the High Court in a range of what it calls "matters," and permits the Parliament to vest jurisdiction in the Court in a further range of matters.²¹ The High Court ruled in 1921 that a "matter" meant a concrete controversy between parties, and could

²⁰ *RJR -McDonald Inc v Canada* [1995] 3 S.C.R.

²¹ Sections 75 and 76.

not extend to giving advice or opinions in the absence of “some immediate right, duty or liability to be established by the determination of the Court.”²²

11.2 As the tests for standing have loosened over the years, the identification of a “matter” has moved toward the identification of remedy.²³ In 2000, in *Truth About Motorways*,²⁴ the High Court held that so long as there was a remedy “appropriate to the asserted wrong,”²⁵ there was a matter within the meaning of Chapter III of the Constitution. A concrete legal controversy, in other words, requires a remedy that affects the rights or liabilities of the parties. Advisory opinions and hypothetical controversies do not have this character.²⁶

11.3 In a speech delivered to the Human Rights Law Resource Centre in 2008, former Chief Justice of the High Court, Sir Gerard Brennan, commented that “if a judicial declaration of incompatibility had no effect on a litigant’s rights or liabilities, there would be a question whether such a declaration can be made in the exercise of federal jurisdiction.”²⁷

²² *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

²³ See Helen Irving, “Advisory Opinions, the Rule of Law, and the Separation of Powers” (2004) 4 *Macquarie Law Journal* 105

²⁴ *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 2000 CLR 591.

²⁵ *Ibid*, at 612 (per Gaudron J).

²⁶ While the Constitution does not expressly describe the jurisdiction of courts other than the High Court, section 71 states that “[t]he judicial power of the Commonwealth shall be vested in ...the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.” The “federal power of the Commonwealth” is confined to the “matters” listed in Chapter III. In *McBain; Ex parte Australian Catholic Bishops Conference* (2002) 188 ALR 1, at 4, Gleeson CJ stated that pronouncements made in the “exercise of judicial power conferred by or under Ch III...are made in an adversarial context, where there is an issue concerning some right, duty or liability...” The parliament could not, therefore, confer advisory opinion jurisdiction on the Federal Court of Australia, or other “Chapter III” courts.

²⁷ “The Constitution, Good Government and Human Rights,” Human Rights Law Resource Centre, Melbourne, 12 March 2008.

11.4 It has been suggested that a declaration of incompatibility or inconsistency resembles declaratory relief, as a form of remedy.²⁸ However, if the declaration of incompatibility or inconsistency merely took the form of a statement directed at government to the effect that a law was incompatible or inconsistent with a right, then the declaration would have no legal effect, and could not therefore constitute a remedy.

12 Other constitutional difficulties

It has also been suggested that, as an alternative, a Commonwealth Bill or Charter of Rights might be modeled on the New Zealand *Bill of Rights Act* (1990). This Act only empowers the courts to interpret legislation in the light of the rights protected by the Act. Section 4 prohibits courts from invalidating any provision of an Act, or declining to apply it “by reason only that the provision is inconsistent with any provision of this Bill of Rights.”

12.1 There is no Commonwealth constitutional impediment, of which I am aware, to amending the *Acts Interpretation Act 1901* (Cth) to include a provision requiring courts, as far as possible (and, presumably, consistent with the purpose of the legislation in question) to interpret an Act in the light of particular rights and freedoms.

12.2 A provision resembling section 4 of the New Zealand *Bill of Rights Act*, however, would be constitutionally problematic. Such a provision would be a “privative clause” - one that deprives or “ousts” the courts from hearing a particular type of case or exercising a particular jurisdiction. While jurisdiction conferred on the High Court by the Parliament under s 76 of the Constitution can be restricted or modified, the Court’s jurisdiction conferred by the Constitution

²⁸ Dominique Dalla-Pozza and George Williams, “The Constitutional Validity of Declarations of Incompatibility in Australian Charter of Rights” (2007) 12 *Deakin Law Review* 1.

under s 75 cannot be. No Act can deprive the Court of its power, among other things, to exercise jurisdiction with respect to matters “in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth” (s 75 (v)). The likelihood that such a provision would purport to deprive the High Court of its jurisdiction needs serious consideration.

12.3 If a Bill or Charter of Rights with a privative clause were in adopted, and current rights legislation remained in force, conflict between these laws may arise. For example, the Federal Court’s power to enforce the *Sex Discrimination Act 1984* (Cth), by finding a State law invalid for inconsistency with the Commonwealth Act, may be curtailed by the privative clause. The Charter would override the *Sex Discrimination Act*, and would potentially render much of the Act incapable of application. If so, the effect would be to *reduce*, rather than enhance the rights protection available in Australia.

12.4 In addition, such a provision would restrict the High Court from hearing appeals from State courts regarding provisions of State Bills or Charters of Rights. The High Court’s function as the final appellate Court for Australia would be compromised.

These are not necessarily insuperable difficulties, but they suggest that the model for a federal Bill or Charter of Rights, as currently proposed by leading advocates, may not be capable of implementation. Furthermore, by their very difficulties, they reveal a potential for distortion of our constitutional system.

13. Conclusion

To maintain and, where necessary, enhance the protection of rights in Australia, is a worthy goal. But much of what is included in the *ACT Human Rights Act* and

the Victorian *Charter* already exists at the Commonwealth level, in legislation and in parliamentary bodies and practices.

13.1 There is more to protecting rights, however, than official action, whether by government or the courts. Continuous, robust *debate* about rights, both in political and civil society remains critical. Those who advocate a Bill of Rights often seem to want to close debate, to set rights in concrete so that they are fixed and final. They seek “dialogue” between the arms of government, not about the nature of the right as such, but only about the legality of limitations on rights.

13.2 People are fearful – quite reasonably at times – of the potential for erosion *unless* rights are protected from alteration. This very goal, however, may have perverse effects, taking the struggle for rights out of the political realm, making it uni-dimensional and uni-directional, encouraging the disadvantaged to think primarily in terms of legal avenues for redress. These avenues are costly and uncertain.

13.3 The vesting of policy decisions, especially with resource implications, in the judiciary is certain to politicize the judicial arm of government. The “dialogic” process has the potential for creating antagonism between the judiciary and the government, as much as – perhaps even more than – constructive exchange. If so, it cannot fail to have a corrosive effect upon the independence of the judiciary.

13.4 To tie rights to responsibilities confuses legal duties with worthy behaviour. It also has the potential to “penalise” those who are most in need of rights protection.

13.5 That Australia is unique in not having a Bill or Charter of Rights is held up by proponents as a defect, even a matter for shame. But unless and until Australia's record in protecting rights is manifestly and consistently weaker than in other comparable countries, there is no cause for shame. Currently we have a robust, complex system of rights protection, and an effective separation of powers. We should work on improving them, not supplanting them.

14 Recommendations

- A Bill or Charter of Rights (not responsibilities) confined to concrete, enforceable "due process" rights, as listed above.
- As a preferred alternative, an amendment to the Commonwealth *Acts Interpretation Act 1901*, requiring the Courts to interpret legislation in the light of specified rights.