

A DEMOCRATIC BILL OF RIGHTS FOR AUSTRALIA

A SUBMISSION TO THE NATIONAL HUMAN RIGHTS CONSULTATION

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Professor Tom Campbell, Convenor, Centre for Applied Philosophy and Public Ethics (CAPPE), An Australian Research Council Special Research Centre, Charles Sturt University, The Australian National University, University of Melbourne.

Dr Nicholas Barry, Research Fellow, Centre for Applied Philosophy and Public Ethics & Lecturer in Politics, School of Social Sciences and Liberal Studies, Charles Sturt University.

Executive Summary

1. Which human rights (including corresponding responsibilities) should be protected and promoted?

By adopting a “democratic bill of rights” (see section 3 below) a bill of rights can include a broad range of social, economic and cultural rights as well as civil and political rights.

2. Are these human rights currently sufficiently protected and promoted?

Australia’s human rights record is comparable to that of other liberal democratic nations. However, rights violations occur and there is still room for significant improvements in the protection and promotion of human rights (see section 1).

3. How could Australia better protect and promote human rights?

By adopting a democratic model of rights protection, as outlined in this submission, human rights goals would be better served in Australia.

A **democratic bill of rights** is an affirmation of human rights values to guide and inspire the democratic political process. A democratic bill of rights does not empower courts to “rewrite” legislation or issue “declarations of incompatibility” (throughout the submission we will use the term “rights-based judicial review” to refer to these judicial powers). The mechanisms included in a democratic bill of rights will have a greater, more lasting, and more legitimate impact on human rights than the UK-style bill of rights adopted in the ACT and Victoria.

Evidence from the UK model shows that:

- Despite some progressive court decisions, most of the model’s benefits in respect of legislative scrutiny and executive conduct could be obtained without rights-based judicial review.
- Rights-based judicial review undermines political responsibility for human rights by taking the focus away from Parliaments and turning the moral debate about human rights into a legal and court-centred discourse.

- Rights-based judicial review lacks legitimacy, is usually ineffective, and is often counter-productive.

In contrast, the democratic model deploys a range of political actors and institutions to protect and promote human rights in Australia. The key elements of the democratic model are:

- A Bill or Charter of Rights that reflects a distinctively Australian approach to human rights, including economic, social, and cultural rights as well as civil and political rights.
- Human rights impact statements by ministers.
- Strengthening the role of independent oversight agencies with developed scrutiny and investigatory powers, particularly the Human Rights Commission and the Ombudsman.
- The formation of an Australian Human Rights Committee in the Commonwealth Parliament for the scrutiny of legislation and the exploration of human rights issues.

The chief benefits of the democratic model are that:

- It strengthens Parliament's ability to formulate and scrutinise legislation, and impact on human rights policy decisions, without reducing the powers of the Parliament.
- It fosters a stronger human rights culture in the executive branch of government without encouraging a legalistic approach to human rights.
- It has a strong educative role, promoting reflection on human rights values and institutions throughout the community and in school curricula.
- It enhances the protection and promotion of human rights by strengthening rather than undermining democratic institutions and civil society.
- It marks a distinctive Australian contribution to the "rights revolution," providing an alternative model for other countries to adopt at a time when the UK model is increasingly controversial.

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INTRODUCTION

This submission proposes a democratic bill of rights for Australia that relies on political review and the democratic process to protect and promote human rights. This distinctive model involves adopting a non-justiciable bill/charter of rights that reflects Australian human rights values, including economic, social and cultural rights as well as civil and political rights. This serves as the basis for a range of political mechanisms designed to make Parliament and the community more committed to effective action with respect to the rights of minorities. The model is superior to the British model (also known as the “Commonwealth model of constitutionalism”), which results in highly controversial “rights-based judicial review” through declarations of incompatibility and judicial rewriting of legislation under the guise of “interpretation,” without significantly improving human rights outcomes.

In the first section of the submission, we investigate whether human rights are sufficiently protected in Australia. Although Australia’s human rights record is comparable to that of other liberal democratic nations, we hold that there is room for improvement, particularly because a gap has emerged between the theory and the practice of responsible government.

In the remainder of the submission we focus in depth on how better to protect and promote human rights in Australia. We argue against the dominant approach to rights protection in the parliamentary world, the British model, which has been adopted in various forms in Canada, New Zealand, the UK, the ACT, and Victoria, and in favour of a new model, which we call a democratic bill of rights. We argue that this model will strengthen Parliament’s ability to develop human rights legislation and scrutinise policies from a human rights perspective, foster the development of a stronger human rights culture within government, and prompt greater public participation in debate over human rights issues. Most importantly, it will achieve these outcomes by strengthening, rather than undermining Australia’s democratic institutions, which is the most effective and acceptable way of protecting and promoting human rights for all citizens.

1. THE CONTEXT

Historically, there have been two main approaches to the protection of human rights in the liberal democratic world (Hiebert 2006, pp. 7-8). The first form of liberal constitutionalism is characterised by a codified, higher law bill of rights, and powerful rights-based judicial review. Courts interpret the bill of rights, and if they decide that rights have been violated, they can grant remedies and potentially nullify legislation. Although this approach is used in a variety of countries, within both parliamentary and presidential systems, it is most commonly associated with the US. The US system also aims to protect rights by dispersing power between the three arms of government, which have “separate but overlapping” powers, and by sharing sovereignty between federal and state governments.

The second approach is the parliamentary model of constitutionalism which emphasises the supremacy of Parliament, rather than the courts, leading to a less juridical style of political debate. Participation in democracy – the fundamental political right – is the key to this system. The idea is that everyone participates in determining how they should be governed, rather than courts interpreting or imposing a list of rights to restrict government action. The power of the executive branch is

limited through the principle of responsible government, which means that the executive depends on the continuing support of the Parliament to remain in office. In theory, this makes it highly accountable to Parliament, which scrutinises both the actions of the executive and proposed legislation. The courts still have an important role in this process, through the rule of law, which requires that government action be in accordance with legislation and the constitution, and the common law, which can only be overturned by explicit statute. Neither of these legal institutions undermines the authority of Parliament. This approach was, in the past, associated with the British system of government and was widespread throughout the Commonwealth.

The Australian approach to rights protection has traditionally been linked to the second model. We do not have a codified national bill of rights and very few rights are explicitly protected in the Commonwealth constitution. Instead rights protection has depended on the rule of law, the common law, democracy, and the principle of responsible government. However, it is also important to recognise the ways in which the Australian approach to rights protection departs from the traditional British model (Galligan 1995, pp. 138-39). Although we lack a bill of rights which allows the courts to strike down legislation, we do not have a sovereign parliament in the way that Britain does. Rather, we have an entrenched constitution which binds Parliament, strong bicameralism, and a federal system of government which reduces the risk of tyrannical government by dispersing rather than concentrating government power.

Although many past political leaders and judges have praised Australia's human rights record, more recently the Australian approach has come under fire. One of the reasons for this is that Australia is now the only common law jurisdiction without some sort of bill of rights. This is particularly concerning because the rise of disciplined mass political parties combined with a majoritarian electoral system has undermined Parliament's ability to hold the government accountable, threatening the rights of all citizens, especially disadvantaged minorities. Because the government is usually formed by a highly disciplined party with a clear majority, the Prime Minister and Cabinet effectively control the House of Representatives, weakening the effectiveness of responsible government as a human rights safeguard (see Galligan 1995, 140-41). Critics also point to recent human rights violations in Australia, including the mandatory detention of asylum seekers, mandatory sentencing laws for juvenile offenders in Western Australian and the Northern Territory, and anti-terror laws, as well as the failure to protect adequately the right to privacy, the right to conscientious objection, and the rights of journalists to protect the identity of their sources. Most concerning is the treatment of indigenous people who were denied the most basic rights for much of Australia's European history, and who continue to suffer disproportionate levels of social disadvantage. For these reasons, critics argue that Australia needs to adopt a codified bill of rights with a stronger role for the courts to ensure that human rights are adequately protected.

These arguments suggest there is a need to reassess the adequacy of human rights protection and promotion in Australia, but they do not in themselves demonstrate that Australia should adopt a bill of rights. Firstly, although the government normally has the power to control the House of Representatives, it rarely has a majority in the Senate, which retains some capacity to keep a check on the executive. This means that responsible government is still a reasonably effective way of protecting human rights. Secondly, it is manifestly false to claim that the absence of a bill of rights points to a lack of respect for human rights. Whether or not Australia has a bill of rights tells us nothing about the extent to which rights are respected by

government, Parliament, and the people, and to suggest otherwise is to confuse processes with outcomes. Moreover, once we shift focus onto human rights outcomes, it is clear that Australia's record is comparable to that of other liberal democracies. Major human rights abuses have occurred in Australia, but they have also occurred in countries like the US which have an entrenched bill of rights and strong rights-based judicial review. For example, the basic rights of African-Americans were violated over a long period of time in the US, and the African-American community continues to suffer, on average, disproportionately high levels of social disadvantage. An entrenched bill of rights also failed to prevent McCarthyism, and it fails to prevent the use of the death penalty.

This does not mean that Australians should be complacent about human rights. The rights violations critics highlight are serious in their own right, even if there are parallel examples in other liberal democracies. However, the point is that simply highlighting these abuses does not constitute an argument for adopting a bill of rights. Supporters of reform must advance a positive case, outlining a more detailed bill of rights model and showing why it is likely to enhance the protection and promotion of human rights in Australia. In recent times, proponents of a bill of rights have focussed on the advantages of a third model of liberal constitutionalism, the British (or Commonwealth) model, which has become increasingly popular in Commonwealth nations. However, as we will demonstrate in the next section, this model is fundamentally flawed.

2. THE BRITISH/COMMONWEALTH MODEL

The Commonwealth model of constitutionalism is “an alternative or hybrid blend of political and juridical forms of constitutionalism” (Hiebert 2006, p. 9; Gardbaum 2001). It represents “a new middle ground” between the traditional British parliamentary model and an entrenched US-style bill of rights. The two key elements of the model are 1) “the ability of parliament to disagree with judicial interpretations of rights” and 2) “the adoption of political rights review, which entails new responsibilities and incentives for public and political officials to assess proposed legislation in terms of its compatibility with protected rights” (Hiebert 2006, p. 9). Parliament's ability to disagree with courts is preserved either because Parliament has the capacity to override courts when they use the bill of rights to strike down legislation, or because courts lack the capacity to invalidate legislation on rights grounds. Political rights review is achieved through a variety of mechanisms, such as parliamentary committees and an obligation on the MP/minister introducing a bill to declare whether it is compatible with the bill of rights. Because of the model's popularity, its adoption in Victoria and the A.C.T., and the fact it leaves Parliament with the ultimate authority to overturn court decisions, this approach seems the one that is most likely to be adopted at Commonwealth level in Australia.

Supporters of the model generally argue that it has three major advantages:

- 1) It enhances the protection of rights because rights are codified in a bill/charter of rights, and courts draw attention to laws and government actions that violate these rights.
- 2) It encourages a human rights dialogue between the different branches of government and within the community, fostering a culture of rights (Charlesworth 2006, p. 290; Williams 2006, pp. 901-903; see also Gardbaum, pp. 746-48).

- 3) It achieves these objectives whilst preserving parliamentary sovereignty (Byrnes, Charlesworth & McKinnon 2009, pp. 59-60; Williams 2006, p.893) see also Gardbaum 2001, p. 748).

In essence, its supporters claim that the model enhances rights protection whilst avoiding the major pitfalls of the US model, which transfers too much power to the courts and stifles broader debate on human rights. However, closer analysis suggests that it does not achieve these objectives satisfactorily.

2.1 The lack of democratic legitimacy and the dominance of a legal approach to rights

One problem with the model is that it transfers too much power to the courts (Manfredi 2006; Allan 2006, 914-16). Although the courts do not have the power to invalidate legislation (except in Canada, where Parliamentary authority is only preserved through the “notwithstanding” provision), governments will feel obliged to respond to declarations of incompatibility because the model creates an expectation that court rulings will be taken seriously. To ignore a declaration of incompatibility seems out of keeping with the spirit of the model, and will lead to an impression that the government is arrogant, out-of-touch, and cavalier when it comes to human rights issues.

Democratically elected governments are highly sensitive to these sorts of criticisms, and consequently, they will feel obliged to respond to declarations of incompatibility by modifying legislation to overcome the problems identified. Technically, parliamentary sovereignty is not undermined because Parliament retains ultimate legal authority and can ignore the declaration. However, in practice, its reluctance to exercise this authority means that there will be a significant transfer of power to the unelected judiciary. This leads us back towards the sorts of democracy-based objections that confront an entrenched US-style bill of rights.

Defenders of the model say that these criticisms are exaggerated. In practice, governments will stand up to the court when they disagree about whether legislation is human rights-compatible. Whilst the empirical evidence that bears on this issue is complex, the clearest illustration of the power potentially exercised by courts is in Canada, where courts have the power to strike down legislation they believe conflicts with the Charter of Rights and Freedoms. Although Parliament can use the “notwithstanding clause” to override such decisions, it is severely constrained by political considerations, as governments are reluctant to use a mechanism which allows them to legislate contrary to the court’s interpretation of the Charter (Hiebert 2006, pp. 19-20). Similarly, in the UK, Parliament has generally amended legislation declared to be incompatible with the ECHR, or has promised to do so (Masterman 2009, p. 123). Whilst the model has not generally produced such extreme outcomes in other jurisdictions, the Canadian and British experience suggests that it can facilitate a significant transfer of power towards the courts and away from elected officials.

As well as undermining the democratic credentials of the model, this transfer of power would be likely to stifle the intergovernmental human rights dialogue that is supposed to be one of its strengths. If the government simply submits to the court’s interpretation of rights then genuine dialogue about conflicting interpretations of rights will not take place (Debeljak 2007, pp. 38-9). The political review mechanisms will also become less effective, as governments focus on heading off criticism from the courts when formulating legislation. Instead of developing and defending their own approach to human rights, which may clash with judicial interpretations, the government will rely on advice from lawyers to anticipate how the courts are likely to

interpret the bill of rights, and ensure that their legislation is in keeping with this. This sort of “charter-proofing” has occurred in Canada and it undermines the idea of genuine dialogue about human rights (Hiebert 2006, pp. 12-13, 17, 19). This also seems to be occurring in Britain where ministers follow highly legalistic guidelines based on court precedents to determine when proposed laws are rights-compatible (Hiebert 2006, pp. 23-24).

Proponents of the British model might respond to this objection by insisting that we have no reason to be concerned about the dominance of judicial approaches to human rights. Powerful courts simply mean that governments are forced to take human rights seriously. This response assumes that courts have superior insight into how human rights are best understood and applied. However, it is misleading to suggest that the judiciary have special insight into human rights. One of the long-standing criticisms of rights-based judicial review is that the sorts of rights entrenched in a bill of rights tend to be abstract and open-ended. Thus, when judges apply these rights to complex cases, difficult and contestable decisions will have to be made about what specific rights should mean in practice, and how they are to be weighed against each other and other competing moral principles (see also van Mill 2006, pp. 162-64). It is wrong to expect any one group in the community to have a superior understanding of moral and political rights to the rest of the community. Further, judges are drawn from a narrow section of society and they do not represent the diverse range of reasonable views about human rights that exist in Australia. Different groups in the community have different values, and resolving the conflict between these competing values should be a matter for public debate and the democratic process, not the courts (Waldron 1999; Bellamy 2007).

This proposition should be embraced by supporters of rights because two of the most important political rights are the right to political equality and the right to self-determination. Democratic institutions are an embodiment of these rights and thus, when the power to decide controversial policy questions is transferred from elected representatives to the courts, fundamental political rights are being violated (Waldron 1993). This is why “charter-proofing” and the failure to challenge declarations of incompatibility are so concerning. It is also why we should be wary of giving citizens a direct right of action to courts if they think that a public authority has failed to act consistently with the bill of rights. Once again, this gives courts the responsibility for resolving complex moral questions about how to apply rights, and this is not a function they should be asked to perform.

The British model also helps to foster a misleading view of political institutions in which governments are viewed as rights violators and courts as rights protectors. The phrase “declaration of incompatibility” is misleading because it gives the false impression that the laws in question clearly violate rights. In fact, the government may simply have a different interpretation of what abstract moral rights should be taken to mean in a particular context, and how they should be balanced and applied. This point is recognised by supporters of the British model in the emphasis they place on the idea of intergovernmental rights dialogue. However, supporters of the model also believe that the ability of courts to issue a declaration of incompatibility is crucial because it makes governments take the bill of rights seriously. Underlying this claim is the assumption that it will be politically costly to ignore or reject such a declaration. The problem is that this political cost makes it unlikely that the government will participate in intergovernmental dialogue. This contradiction at the heart of the model means that it is unlikely to achieve the lofty outcomes its supporters anticipate.

2.2 Rewriting statutes through judicial interpretation

A second and more far-reaching way in which courts can exercise greater-than-expected power is through their interpretation of statute law (Hiebert 2006, p. 18; see also Debeljak 2007, pp. 39-56). The British model normally includes an “interpretation requirement” or “reading down provision.” This means that when courts interpret Acts, they must “read such Acts, ‘so far as it is possible to do so’, in a way which renders” them compatible with the bill of rights (Campbell 2001, p. 80). This could produce a fundamental shift in the way courts interpret legislation. They will assume that all Acts of Parliament are intended to be consistent with the bill of rights, and as a result, they will depart from their literal meaning, adopting creative interpretations to ensure that they cohere with the court’s understanding of the bill of rights (Campbell 2001, pp. 82-84). Taken to its extreme, this could result in courts “rewriting” clear legislation, turning “legal reasoning... into a form of legally legitimated moral discourse” (Campbell 2001, p. 86).

The empirical evidence suggests that these fears are also well-grounded (see especially Allan 2001, pp. 377-85). A recent example from the UK is the case of *Ghaidan v Godin-Mendoza* (see Allan 2006, pp. 910-11). In this case, the House of Lords held that the reading down provision may require the court to give legislation a different meaning, “[e]ven if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt” (Lord Nicholls, cited in Allan 2006, p. 910). In New Zealand, the reading down provision brought the court to within one vote of setting aside the doctrine of implied repeal (Allan 2006, p. 911). In *R v Pora*, three of seven judges held that an older statute could be preferred to a new statute, if the two statutes were in conflict, and the more recent statute was deemed to violate the bill of rights. These cases illustrate the potentially radical consequences of the British model. Using the reading down provision in this way, courts could essentially ignore clear legislation passed by the Parliament, interpreting it with reference to an open-ended bill of rights. This undermines the separation of powers between the legislative and judicial arms of government.

2.3 Ineffective and counter-productive

The most powerful objection to the British model is that it is unlikely to be an effective way of protecting human rights. If the political review mechanisms and intergovernmental dialogue do not work properly, a culture of rights is unlikely to emerge in the executive branch of government beyond “court-proofing” draft legislation. In Britain, many supporters of human rights are disappointed with the outcomes of the Human Rights Act, and there are real questions over its future. One of the major concerns is that the Act has failed adequately to protect civil liberties. This is evidenced by the existence of strict libel laws, restrictions on press freedom, a large DNA database, and the extensive use of CCTV cameras (Ewing 2009). Courts have also focused excessively on criminal justice issues, which has resulted in a narrow approach to human rights that neglects other important areas of public policy.

A related problem is that courts are often reluctant to exercise their power to issue declarations of incompatibility because they feel constrained by their lack of democratic legitimacy, particularly when dealing with important issues such as national security. An example of this is the House of Lords’ response to the control orders that were introduced as part of the British Prevention of Terrorism Act in 2005. These control orders impose obligations on an individual “for purposes connected with protecting members of the public from a risk of terrorism” (cited in Ewing &

Tham 2008, p. 671). The court adopted a weak approach to the curfews associated with these control orders, despite the fact they seem to be a clear breach of human rights.

If courts are reluctant to issue declarations of incompatibility, then the British model can actually facilitate the violation of human rights. When a law is challenged and the court fails to issue a declaration of incompatibility, it creates the false impression that the law in question is consistent with human rights. This strengthens the position of those who defend the law, and emasculates political resistance to it on rights grounds. For example, the failure of the House of Lords to take a stronger stance on the issue of curfews added legitimacy to aspects of the government's counter-terrorism policy, and undermined the efforts of those who were attempting to highlight its concerning human rights implications (Ewing & Tham 2008, pp. 691-92).

2.4 Summary

In sum, there is a contradiction at the heart of the British model. It claims to be able to strengthen the ability of courts to guard against human rights abuses, whilst preserving the power of Parliament, and fostering an intergovernmental human rights dialogue. The theoretical arguments in this section, and the empirical evidence presented, suggest that the model will not achieve these objectives. Rather, it is likely that 1) courts will sometimes exercise too much power because political imperatives prevent governments from ignoring or challenging declarations of incompatibility, thereby undermining the power of Parliament and the chances of meaningful human rights dialogue; 2) courts will steadily undermine the separation of powers by adopting the radical interpretive practices that arise from reading down provisions; and 3) that courts will frequently be too weak to stand up to governments on important issues such as national security, and may in fact undermine human rights by adding legitimacy to morally dubious policies.

Which of these trends eventuates in Australia will depend on our political and legal culture, and it may change over time, but regardless of how the model develops, it is unlikely to balance satisfactorily the objectives that it sets itself. This lack of balance means that Australia has little to gain from adopting the British model, which is under increasing attack in the UK. In the next section, we argue for an alternative approach that avoids these problems, whilst enhancing the protection and promotion of human rights.

3. A DEMOCRATIC BILL OF RIGHTS

We propose that Australia adopt a democratic bill of rights (see also Campbell 2006 which is attached as an appendix). This model reflects the fundamental belief that rights are best protected and promoted through a healthy democracy, a robust civil society, and strong oversight mechanisms, rather than rights-based judicial review. To this end, the democratic model involves four key elements – 1) a democratically endorsed bill of rights; 2) human rights impact statements by the executive; 3) stronger human rights oversight mechanisms, particularly through reforms to the Human Rights Commission and the Ombudsman; and 4) improved parliamentary procedures, particularly the establishment of an Australian Human Rights Committee. Although some of these institutions and mechanisms are associated with the British model, they will work more effectively without the stultifying effects of rights-based judicial review.

3.1 A democratic bill of rights

The first element of the model is a bill/charter of rights that expresses human rights in light of Australia's international obligations and the best ideals and values animating Australian political life. The bill of rights could draw on the many international human rights agreements to which Australia is a signatory, including the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political rights. It could also include more distinctively Australian rights such as equality of opportunity, which reflect a commitment to egalitarianism and a "fair go." Most importantly, the bill of rights should be developed and endorsed through democratic procedures to ensure that it reflects the views of the Australian people and enjoys a high level of public legitimacy. It will provide the basis for a stronger human rights focus in and beyond Parliament as citizens engage in discussion over the rights that should be included, and become more focussed on human rights issues.

A distinctive feature of the model is that the bill of rights will be non-justiciable, although it will lead to specific human rights legislation which will be enforced by the courts. Instead of judicial review based on abstract, vague statements of rights, the emphasis will be on strengthening political and social institutions to enhance their capacity to protect and promote rights in concrete ways. As part of this process, Parliament will evaluate Australia's existing human rights legislation, such as the Racial Discrimination Act and the Disability Discrimination Act, and pass new laws and amendments to ensure that rights are adequately protected in Australia. Courts will be involved in enforcing these laws, but because legislation is more detailed and prescriptive than a bill or charter of rights, there will be less scope for judicial discretion. This will improve the protection of human rights in Australia and promote a more robust human rights culture, whilst avoiding the legitimacy problems associated with the British model and the doubt over whether it would be constitutional for the High Court to issue declarations of incompatibility. The democratic model also recognises that democratic institutions embody human rights, particularly the right to political equality and self-determination. By strengthening rather than undermining democratic institutions, it protects and promotes these important political rights.

The democratic model is also better able to protect and promote socioeconomic rights than alternative models. In modern liberal democracies, there is widespread support for the idea that all citizens have a right to the basic necessities of life, to healthcare, to a quality education, and to a fair share of social resources, but courts are unable to protect such rights effectively (see Ewing 2001; Fudge 2001). This is because courts have a bias towards negative rights, which protect the individual from interference by the state. Because ensuring the protection of socioeconomic rights requires positive action by the state, it involves decisions about the allocation of state resources which courts do not have the expertise or information to make. Under the democratic model, human rights are to be protected and promoted through the political process, not the courts, and the central political actors – the government, the Human Rights Committee, the Human Rights Commission, and the Parliament -- are much better placed to ensure the protection and promotion of socioeconomic rights than the judiciary.

A democratic bill of rights provides the basis for a stronger civil society, rights-based educational goals, greater parliamentary and media scrutiny, and a

stronger human rights culture in government, through a variety of mechanisms set out below.

3.2 Human rights impact statements

Human rights impact statements are one of the key ways the model will foster a strong rights-culture in the executive branch of government (see Evans 2005). When a bill is introduced to Parliament, the MP who introduces it (who will in most cases be a Cabinet minister) must explain its human rights implications. This encourages the government to take human rights issues into account when formulating legislation. It is also a way of freeing human rights discourse from the narrow confines of the judicial approach. The idea of human rights impact statements is that the executive can develop and articulate its own understanding of human rights, leading to a broader moral and political human rights discourse.

One of the problems with the British model is that governments do not properly engage in this process (see section 2.1). Although governments must state whether bills are consistent with the bill/charter of rights, they simply rely on legal advice to second-guess the courts, trying at all costs to avoid a declaration of incompatibility. They rarely develop and defend their own approach to human rights and as a result, there is no genuine inter-governmental dialogue. Instead of a diversity of view points, we end up with the dominance of a narrow judicial approach. This leads to an impoverished understanding of human rights and hinders the development of a robust rights culture within government.

The democratic model avoids this problem because courts will not be empowered to issue declarations of incompatibility. This prevents impact statements from becoming an exercise in court-avoidance, and encourages governments to engage genuinely with human rights issues. Impact statements also provide an opportunity for the Opposition, the media, and human rights organisations to focus more closely on the human rights implications of legislation, engendering a stronger human rights culture within government and in civil society.

3.3 Oversight Agencies

Independent statutory agencies which protect and promote human rights will also be strengthened in the democratic model. In order to establish a stronger human rights culture within government, the Human Rights Commission will be required to conduct regular reviews of Australian laws and human rights audits of government departments. It will also have an important educative role, promoting awareness of human rights issues and providing training to government departments to ensure that they are cognisant of their human rights obligations. The Ombudsman will also play an important role, with expanded powers to investigate alleged human rights violations. The aim of doing this is to promote a stronger human rights culture within both the executive branch of government and the community. Both the Human Rights Commission and the Ombudsman will receive more resources to enable them to carry out these activities effectively.

These reforms are a natural evolution of Australia's existing approach to rights protection, which already gives a key role to oversight agencies such as the Human Rights Commission and the Ombudsman (McMillan 2006). Similar reforms have already occurred in the ACT and Victoria where equivalent agencies have been given powers of audit, review and education, in order to promote a stronger human rights culture within and beyond government (ACT Bill of Rights Consultative Committee 2003, pp. 83-84; Victorian Human Rights Consultation Committee 2005, pp. 101-

108). Britain has also established an Equality and Human Rights Commission with similar objectives in mind (Spencer 2008).

Despite their links to the British model, these reforms are essentially concerned with training, promotion, and administrative review, not rights-based judicial review. They demonstrate that we can raise human rights awareness within and beyond government without involving the courts. In fact, the operation of the UK HRA prior to the establishment of the Equality Commission suggests that solely relying on courts will not lead to a cultural change within government departments and agencies. Right from the start, NGOs warned that “without a Commission, developing a culture will be left to lawyers and the courts – not an optimistic prospect” (NGO representatives on the Human Rights Taskforce, cited in Spencer 2008, p. 7, quotation abridged). In a 2003 report, the British Joint Committee on Human Rights suggested that these fears were well-grounded (JCHR 2003; see also Spencer 2008, p. 8).

The on-going use of human rights audits will be a particularly important way of bringing about a stronger human rights culture within the executive branch. When conducting an audit, the Human Rights Commission will examine existing practices and procedures within the relevant government agency, evaluate areas of strength and weakness, and, if necessary, propose reforms that will improve human rights performance. In this way, the Commission will also have an important agenda-setting role. By drawing attention to human rights violations which would otherwise receive little attention, the audits will lead to greater scrutiny by Parliament, the government, the media, and the public.

An example of the potential benefits associated with human rights audits is the ACT Human Rights Commission’s audit of the Quamby juvenile detention facility in 2005. The audit resulted in a number of reforms which improved human rights practices at the Centre (Watchirs 2007, p. 13; Byrnes, Charlesworth, & McKinnon 2009, pp. 92-93). It also conducted an audit of other corrections facilities which resulted in 98 recommendations, most of which were accepted by the government. The reforms came about because the Commission had the ability to closely scrutinise the operations of these organisations, and to draw attention to questionable practices.

The oversight agency reforms that will occur under a democratic bill of rights will be particularly important in protecting and promoting the rights of disadvantaged minorities. The Ombudsman’s power to investigate individual complaints will provide a way of providing human rights assistance to those whose rights are most at risk. The reforms to the Human Rights Commission will also help to bring about broader changes that are in the interests of disadvantaged groups, who normally lack the resources and clout needed to lobby governments effectively. Human rights audits and regular reviews of legislation will draw attention to systemic human rights failures within government, placing the interests of the disadvantaged squarely at the forefront of the political agenda (Victorian Human Rights Consultation Committee 2005, pp. 104-5).

3.4 Strengthening parliament

In the democratic model, the Commonwealth Parliament’s capacity to protect human rights will also be enhanced through the establishment of the Australian Human Rights Committee, a joint parliamentary committee along the lines of the British Joint Committee on Human Rights. This committee will scrutinise bills presented to Parliament to consider whether they raise human rights issues, and it will be involved in pre-legislative human rights scrutiny.

In its early years, the British JCHR adopted a limited role, largely concerned with judicial review and providing legal advice as to what courts might decide. More recently, it has adopted a more pro-active view of its role, producing detailed reports on the legislative reforms before the Parliament and insisting on the importance of evidence-based policy. The committee expects the government to substantiate its case for legislative reform, and if it refuses to do this, it will gather information itself by calling on public servants and other experts. In this way, the JCHR serves as an alternative source of information to the government, producing a large amount of material upon which ministers, parliamentarians, the media and pressure groups can draw. In fact, recent research shows that the JCHR's work is frequently referred to in parliamentary debates and the media (Tolley 2009, pp. 46-48), enhancing the ability of Parliament and civil society to keep a check on the government, and providing an alternative perspective on human rights. The committee also provides an opportunity for the community to have greater involvement in human rights issues because it can draw on evidence from a broader range of experts and community organisations than the courts. The Australian Human Rights Committee will function in a similar way to the JCHR, and will significantly strengthen the Commonwealth Parliament's capacity to protect human rights.

Critics argue that political review mechanisms, particularly the Human Rights Committee will be ineffective without a court-based bill of rights. They suggest that governments will ignore the bill of rights without judicial oversight. After all, despite the amount of material produced by the JCHR, it has only influenced legislation in 3% of cases (Tolley 2009, pp. 48-49). However, the JCHR's influence should not simply be measured in terms of amendments to bills as a result of reports (as Tolley recognises). It also has a more subtle impact on legislation, because the government anticipates the reactions of the JCHR when it is forming policy and drafting legislation. The JCHR has also reformed its working practices in recent years, providing advice to the government at earlier stages of the legislative process (JCHR 2006, p. 26). By strengthening its role in pre-legislative scrutiny, the JCHR has strengthened its impact on policy.

The criticism that governments and Parliament would not take the bill of rights seriously unless there was a prospect of judicial declarations of incompatibility is also flawed. It reflects an undue scepticism regarding the moral commitments of politicians from all parties; it underestimates their awareness of the importance of enhancing Australia's human rights reputation; and it underestimates their aversion to the bad publicity which results when they ignore the moral concerns of the electorate. Moreover, the experience of the ACT clearly illustrates that the major benefits of a bill of rights do not depend on courts issuing declarations of incompatibility.

It is also important to bear in mind that there are important differences between Australia and Britain. Despite the successes of the JCHR, it has been weakened by the need to depend upon court decisions both in the UK and Strasbourg. Without such limitations, the Australian Human Rights Committee would be able to accommodate more of the moral and political, as well as legal human rights issues that arise. Moreover, the existence of a powerful Senate that is directly elected, highly regarded, and rarely controlled by the government puts Australia in a different position to Britain, Canada, and New Zealand, and it means that the Australian Human Rights Committee will have a greater impact on legislative outcomes than the JCHR. In general, governments are more likely to take rights-based objections to a bill seriously if these objections threaten the safe passage of the bill through Parliament. This is more likely to occur in Australia where the Senate is normally

controlled by non-government Senators who place a high value on the thorough scrutiny of proposed legislation. If the government fails to make genuine statements of compatibility and ignores adverse findings by the Human Rights Committee, it will alienate the Senators whose support it needs to pass legislation. This in turn will attract the attention of pressure groups and the media, leading to further public scrutiny of the bill. This will give the government a strong incentive to take the bill of rights and political review mechanisms seriously, and to engage in the public debate over human rights. This does not mean that it will follow the Human Rights Committee's recommendations on every occasion, but it will respond to the Committee's findings, and consult with groups in the community who highlight major concerns. In this way, human rights can be protected by strengthening rather than undermining the democratic process.

3.5 The advantages of the democratic model

One of the chief advantages of the democratic model is that it builds on the existing approach to rights protection in Australia. Over the last twenty years, Australia has developed an array of human rights legislation, such as the Racial Discrimination Act, the Disability Discrimination Act, and bodies such as the Human Rights Commission (see Galligan & Morton 2006). Strong bicameralism and a well-developed committee system have also ensured that Parliament retains some capacity to hold the executive accountable and to scrutinise legislation in an era of disciplined mass parties (Evans 1999).

Adopting a democratic bill of rights will ensure that there is a more systematic statement of rights for these institutions to draw upon. This will help overcome one of the problems confronting existing scrutiny of bills committees in Australia, which tend to adopt a narrow and ad hoc approach to the interpretation of rights (Evans & Evans 2006). Combined with the establishment of a new Australian Human Rights Committee, this will significantly enhance Parliament's ability to scrutinise legislation and government actions. Enhanced parliamentary scrutiny, human rights impact statements and a stronger role for agencies such as the Human Rights Commission will also foster the development of a more robust human rights culture in the executive branch. These mechanisms and institutions will work more effectively precisely because rights-based judicial review is absent.

A further advantage of the democratic model is its educative value. Debate over the sorts of rights which should be included in the bill of rights will raise public awareness of human rights issues, and encourage reflection on our international rights obligations and the ideals and values that are of greatest importance to Australians. The very fact the bill of rights has been democratically endorsed will also ensure that it enjoys a high level of legitimacy, and a central place in Australian political life. A wide variety of pressure groups will be able to draw on these rights when conducting political campaigns, and they will also be able to make use of Human Rights Committee hearings to further their case. Students will also be encouraged to think about the democratic model and its underlying principles and values through changes to the school curricula. This will result in a more robust, rights-conscious civil society.

A growing awareness of human rights issues will also improve the delivery of government services, particularly to vulnerable members of the community. Although the HRA has not been successful in spreading a culture of rights at the upper levels of government in the UK, there is evidence that the ideas and language of human rights are making a difference on the ground, without citizens having to resort to the courts.

A recent report by The British Institute of Human Rights concludes that “a culture of respect for human rights [is] beginning to take root, supported by the Human Rights Act... The language and ideas of human rights have a real and tangible impact for many people in a wide range of everyday situations” (BIHR 2008, p. 26). The report cites a large number of cases where citizens or citizens’ advocates have successfully drawn on ECHR rights to lobby for better treatment by public authorities. For example, the department of social services was using CCTV cameras to monitor the parenting skills of a learning disabled couple who were living in a residential assessment centre (BIHR 2008, p. 18). After the couple invoked their right to respect for family life, social services agreed not to use the bedroom cameras at night. In another case, residents at a nursing home who were capable of walking unaided were being prevented from doing so because of a blanket policy regarding the use of wheelchairs (BIHR 2008, p. 15). This policy was changed after a consultant highlighted its concerning human rights implications. These examples and the other case studies in the report “demonstrate that ordinary people going about their day-to-day lives are benefiting *from* the law, without resorting *to* the law” (BIHR 2008, p. 5).

These advantages are all consistent with the broader aim of the democratic model, which is to protect and promote rights by strengthening, rather than undermining Australian democracy. The model will not shift political power to the courts, or lead to the dominance of a narrow, judicial approach to rights. It recognises that human rights are central to democratic life, but also that we can disagree over the meaning of rights and their legislative and policy implications. The best way of resolving these issues is through robust political debate. This does not mean simply opting for the institutional status quo, but adopting reforms that will enhance our access to information about what the government is doing, strengthen Parliament, and foster a stronger human rights culture. At a time when many are disillusioned with the British approach, the democratic model is Australia’s chance to make a distinctive contribution to the “rights revolution”.

CONCLUSION

Although Australia’s human rights record is comparable to that of other liberal democratic nations, we argue that there is still significant room for improvement in Australia’s approach to the protection and promotion of human rights. However, the dominant alternative in the parliamentary world, the controversial British model of constitutionalism, will not achieve the objectives it sets for itself, producing courts that are by turn too powerful and too weak. Instead, we propose an alternative model that enhances the protection and promotion of rights through political review mechanisms such as impact statements, an Australian Human Rights Committee, and through strengthening the role of the Human Rights Commission and the Ombudsman. A democratic bill of rights will foster a culture of rights in executive bodies, strengthen Parliament’s ability to scrutinise legislation, and facilitate greater public awareness of human rights issues. The model upholds the key political rights which are embodied in democratic institutions, and it recognises that these institutions are ultimately the best way of protecting and promoting the civil, economic, and social rights that are essential goals of the Australian state.

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APPENDIX

The appendix is the final chapter in Tom Campbell, Jeffrey Goldsworth and Adrienne Stone (eds), *Protecting Human Rights Without a Bill of Rights: Institutional Protection and Reform in Australia*, Aldershot: Ashgate, 2006.

HUMAN RIGHTS STRATEGIES: AN AUSTRALIAN ALTERNATIVE

Tom Campbell

The remarkable rise of human rights discourse and human rights institutions over the last fifty years (Bobbio 1996, Loughlin 197-214) is under threat through a number of recent trends. One such threat derives from the selective intervention by militarily powerful nations in the affairs of sovereign states on the grounds (or pretext) that these rogue states are particularly heinous human rights violators (Ignatieff 2001). Another threat is the increasing identification of the human rights that really matter with the economic policies and rhetoric of global economic powers to the neglect of alternative systems of social values (Held 1989). A third threat to the standing of human rights, and the one with which this book is principally concerned, is the utilisation of human rights discourse to promote the power of courts to override legislation on the basis of their interpretation of constitutionalised human rights, a form of juristocratic power that undermines those tradition of discursive electoral democracy which seeks to operationalise a commitment to the political and moral equality of all citizens within a polity (Tushnet 1999). These three trends combine to damage the reputation of institutionalised 'human rights', particularly in the eyes of those people who combine a genuine concern for the wellbeing of the impoverished and oppressed peoples of the world with a belief in democratic mechanisms that manifests equal respect for all human beings.

Rights and Bills of Rights

The extent to which supporting human rights has come to be identified with championing court centred bills of rights is reflected in the incomprehension that often greets the contention that there are human rights reasons for opposing bills of rights (Waldron 1993). It is now a common assumption that a bill of rights, interpreted and applied by courts, is in itself an embodiment of human rights, so that, absence such a system of governance, a polity is, for that reason alone, defective in human rights terms. Thus a principal argument put forward by influential commentators on the Australian human rights scene is that Australia is a human rights backwater because of the fact that it does not have a bill of rights (Charlesworth 2002, 14; William 2004).

Similar assumptions underlie the standard response to critics of US style bills of rights to the effect that they are naive about democracy (both in theory and practice) and about law and legal theory (which have moved far beyond the fairytale of legal formalism to a general acceptance of the inevitability of judicial law making.) Those who oppose judicial review through bills of right are held to have a crude 'majoritarian' conception of democracy that ignores the problem of minorities (by which is meant oppressed not powerful minorities) (Dworkin 1990), and are simply

uninformed about the fact that judges actually make law as a matter of daily practice (Charlesworth 2004, 71-74). Such dismissive reactions to human rights critiques of court centred bills of rights underestimate both the deliberative developments in democratic theory that address the task of extending political participation in other ways (Barber 1984, Fishkin 1991, Habermas 1996, Held 1996, Bohamn and Rehg 1997, Koh and Slye 1999)), and the painstaking work done to expound and defend systems of political theory and jurisprudence that can sustain in practice the distinction between law making and law application on which democracy and the rule of law depend (Schauer 1991, Goldsworthy 1997).

These tactics are, however, often rhetorically successful because they resonate with their audiences' (sometimes justified) contempt for politicians, and the (often justified) admiration which many educated people, especially lawyers and law students, feel for high profile activist judges who champion undoubtedly progressive causes. Given these predispositions, it is sailing against the wind in human rights waters to argue against the view that human rights are better served when judges rather than elected representatives determined what our basic rights and duties amount to in practice.

A further difficulty in persuading people that there must be better ways of promoting human rights than the transfer of significant political power to judiciaries is that opposition to court centred bills of rights is assumed to stem from the conservative assumption that human rights are currently adequately protected in Australia. The thesis that, in human rights terms, things are far from perfect but that the situation will be made worse overall by such constitutional changes is simply not heard. Many opponents to court centred bills of rights are indeed complacent about Australia's currently disappointing human rights politics, but the human rights case against such bills of rights does not depend on this complacency.

In this context it is important that two lines of argument be developed. The first, which is stated rather than argued in this chapter, is the warning that human rights are diminished when we seek to cure democratic deficiencies by anti-democratic devices. This is a warning that could be accompanied by a reminder of the historically weak performance of courts in the protection of rights, and the achievements of democratic systems in implementing political rights, such as the universal right to vote, basic rights of association in the employment sphere, anti-discrimination legislation, and the fundamental social and economic rights provided for by the now at risk welfare states, all of which can be illustrated by identifying the human rights provisions that exist in contemporary Australian law (Kinley 1998).

The second line of argument, which is the main focus of this chapter, is the articulation of alternative political and constitutional strategies for improving the human rights performance of democratic systems without resort to an enlargement of the law making power of courts. This requires a constructive, imaginative and radical response which acknowledges the fact that electoral democracy, while itself an institutionalisation of human rights, has its own human rights weaknesses, particularly where political debate and decision making either fails to reflect the views of the electorate or the democratic process is captured by illegitimate self preferences of statistical majorities or, more frequently, powerful minorities.

In developing this second theme, this chapter outlines why democracies require to be engaged with human rights, identify the chief human rights problems of modern democracies and the deficiencies of currently fashionable human rights regimes, before going on to suggest ways these may be addressed by cultural and constitutional changes that build on the strengths of the Australian political tradition. One of these strengths is the relatively non-partisan role of parliamentary committees in a bicameral federal system, particularly the Senate Standing Committee for the Scrutiny of Bills, which examines draft legislation to see whether or not it conflicts with individual rights. The powers, membership and functions of this widely admired committee could be developed to provide a strong parliamentary platform for the furtherance of human rights. A second strength is the comparatively good Australian record of human rights legislation, such as the Racial Discrimination Act 1975, the Sex Discrimination Act 1984 and the Disability Discrimination Act 1992. This is an important type of legislation that could be given heightened legal status above that of ordinary legislation by the assumption that human rights legislation takes priority over ordinary legislation in any apparent conflict between the two types of law. A third strength of the Australian polity is the historically significant popular support for human rights at home and abroad and for fair play generally. While some governments are (much) more aware than others of human rights, Australians generally are highly supportive of what they stand for, domestically and internationally. This ingrained rights awareness provides a basis for developing an Australian human rights regime that enjoys the sort of wide popular support that cannot easily be ignored by governments.

Drawing on and developing these existing human rights strengths, I propose that, Australia adopt a ‘democratic bill of rights’. This declaration would affirm the basic interests that set down social, political and economic goals, against which the performance of governments and other organisations could be assessed. The mere existence of such a bill would have educational and cultural advantages, but its political effectiveness would depend on the institutional mechanisms that are needed to enlist the support of the human rights strengths of the Australian polity. In order to keep human rights on the political agenda and generate the political will to implement a bill of rights, ways would have to be found to make it difficult for governments to side line the human rights issues of the day. The mechanisms for implementing such a bill would have to embed in the political system ways of encouraging collective responsibility for articulating and achieving human rights objectives.

From the range of Australian institutions that currently concern themselves with human rights (see Kinley and Martin 2004) I focus here on the idea of developing the role and powers of the Parliament in promoting human rights protection. In particular, it is suggested that a joint Parliamentary Committee on Human Rights could be created not only to scrutinise draft legislation, but also to hold inquiries, and bring forward propose reforms that contribute to a comprehensive set of human rights legislation with an enhanced legal status that would be respected and enforced by Australian courts. The proposal for a constitutionally entrenched democratic bill of rights supported by radically reformed Parliamentary procedures is presented as an exemplar of the sort political arrangements that could serve as an effective alternative to court-centred bills of rights. This line of thought takes up and develops proposals made by David Kinley for pre-legislative scrutiny of legislation, in his proposal, directed towards achieving legislative compliance with the International Covenant on

Civil and Political Rights (Kinley 2000; also Hiebert 1998). I suggest a more radical form of this suggestion which writes an Australian Bill of Rights into the terms of reference of a Human Rights Committee composed of members of both Houses of Parliament and all parties with a minimal representation in either House. Enhancing the protection of human rights through changes in the political system and curtailing the tendency of courts to take on de facto legislative role in creating human rights law, opens the prospect of a distinctive path towards a more effective human rights regime that respects the human right to political equality.

Institutional alternatives

To design and evaluate the institutional alternatives for implementing human rights, we have to be aware of the political function of human rights discourse and the historical weaknesses of standard types of human rights regime. This section outlines the critical assumptions I am making in this regard that prompt the proposal to promote a democratic bill of rights.

The need for human rights in a democracy

The idea of human rights is to identify those aspects of the life of all human beings whose protection and furtherance ought to be guaranteed in all political systems. They are affirmations of what is valuable about all human beings and the institutional requirements for the realisation of these values that both legitimate and limit the powers of governments, businesses and other social institutions. Human rights establish standards against which to measure social, economic and political arrangements. They enable us to locate and correct individual and systemic injustice, oppression, inequality and suffering and establish priority goals that ought to be attained in any tolerably humane and enlightened society.

While human rights have direct application as to how individuals ought to treat each other they are particularly directed at the conduct of governments and other powerful organisations. Political power is necessary to secure the wellbeing of human beings because they are social beings who require to live together in an organised and relatively peaceful manner. The paradox of politics is that the powers that governments must have to promote well-being can and are used by those who hold political power to benefit themselves at the expense of those they are meant to protect and support.

The rationale for democratic government is to enable the detection and correction of such abuses and provide motivation for those who hold or seek power to govern in the general interest.. This is achieved by a symbiotic mixture of free elections for government office, freedom of speech, information and association, and the development of a culture in which individuals have an informed concern for all members of society and not just for themselves and their families.

In such societies there are considerable conflicts based on clashes of individual interests, and also significant disagreement about what is in the general interest, both in terms of conflicting values (what constitutes well being, autonomy, justice and equality, and how such values as are agreed can best be implemented, and who should

have the right to make decisions about these contentious matters. The basic democratic method is that issues be widely debated and then settled through the election of representatives whose duty is to form a government to implement the policies that they believe to embody the policies that promote their preferred instantiations of the values and methods endorsed by the electorate.

This process enables decisions to be made in ways that formally recognise that each person's view has equal political weight. It also enables individuals to protect their self interest against the misuse of government power. This is a somewhat crude but relatively effective method of ensuring that government does not neglect the perceived interests of a majority of the population. While some theories of democracy take the matter no further, in that elections are seen purely as ways to protect the self-interest of the voters, most theories ascribe to the voter the capacity and the will to be influenced also by their judgment as to what is fair and just for the population as a whole, so that the electoral decision reflects a variable mix of calculated self-interests and impartial moral judgment.

The reality of particular democracies is, of course, often quite different. Often democracies fail to curtail the influence of powerful economic and military minorities, sometimes through corruption and often through the manipulation of public opinion. Majority decision-making is often ill-informed, narrowly self-interested and short-sighted. Sometimes the majority decisions reached are clearly unfair to minorities whose interests are unjustly sacrificed to those of the majority. Historical examples are not hard to come by. On the Australian political scene we might cite as current examples the continuing relative deprivations of indigenous people and the lack of substantial recognition of their interests as the original inhabitants, oppressive laws against voluntary euthanasia, inadequate services for disabled people, particularly those suffering from mental illness, failure to protect children at risk, harsh treatment of asylum seekers, acquiescence in child poverty and gross economic inequality, readiness to introduce potentially oppressive anti-terrorist legislation, the use of mandatory sentencing for juvenile offenders, and the Commonwealth government's repeated and forceful rejection of quite reasonable criticism of these policies by the UN Committee on Human Rights.

As democratic theory itself posits, governments have an inevitable tendency to promote sectional interests and neglect the wellbeing of their citizens. This is a major reason for instituting democratic institutions. But democracies themselves remain prone to these same tendencies. They can readily be manipulated by powerful groups, and don't work when a society is divided into major groupings with perceived conflicting interests. No democratic institutions can guarantee that they will work as their justifying rationales dictate that they should. Democratic governments have a built-in bias towards the abuse of the power that it is designed to control. This means that there is a perpetual imperative to reassert human rights values and to work out how they may be better protected. The articulation and promotion of human rights is an important part of the endeavour to make democracies more democratic and protect both majorities and minorities against every present internal and external threats to their wellbeing.

Bills of rights, as affirmations of the core values and institutions of a democracy can be seen as part of a set of measures designed to protect democracy against its

undemocratic tendencies. They do this first by making public declaration of the justifying ideology of the society in question, and by implication of all justified systems of government. In so doing they provide a set of criteria by which voters can evaluate to performances of governments, and so register their consent, dissent, and, in extreme cases, their legitimate rebellion. More positively, bills of rights set goal for governments of a sort that can be used to justify the use of force in the enforcement of their laws and decisions.

To fulfil these functions bills of rights must be regarded primarily as moral declarations, statements of those aspects of human existence to which we ascribe the highest intrinsic value or deem to be essential for the realisation of these values. The intrinsic values include life itself, and the elements of a worthwhile existence: liberty, happiness and security, and those features of social life that are instrumentally essential to their realisation: law, democratic government, health care, family life, personal property, and economic opportunity. The rights that bills of rights seek to promote - human rights - are essentially moral rights, rights that stand in judgment above all actual laws, customs and social practices. As such, human rights provide a major part of the moral basis both for the justification of the constitution and practice of government and for placing limitations on the power of governments and other potential sources of harm. Human rights discourse articulates the moral groundings of the duties of political and social obligation including the duty to rebel against political, social and economic tyranny and oppression (Nagel 2002).

The fundamentally moral status of human rights tends to be obscured in those aspects of the contemporary human rights movement that look upon human rights as a type of legal right which is to be found in certain instruments of international law, such as the International Covenant on Civil and Political Rights (1966), and in the constitutions of those states that have identifiable bills of rights that are interpreted and enforced by courts. Thus it is common for a country's human rights record to be assessed by whether or not it is a signatory to certain international conventions, whether it has been criticised by various U.N. committees, and whether it has a constitution with a court-centred bill of rights, that is a statement of rights that is interpreted and applied by courts with the power of judicial review of legislation, enabling the courts to invalidate otherwise binding legislation in so far as, in the opinion of the courts, it violates human rights. While these facts provide important evidence about the actual circumstances of the inhabitants of the countries concerned, they do not in themselves constitute the enjoyment of human rights.

For instance, as has been pointed out, it is commonly argued that Australia is backward or reluctant about human rights simply because it has not implemented all its international human rights treaty obligations or does not have such a bill of rights. This mistakes an assessment of means for an assessment of ends. Signing up to international 'human rights' treaties and adopting a court-centred bill of rights are possible ways of promoting of human rights, but they should not be identified with having and enjoying the rights themselves. There are other ways of protecting and furthering the interests at stake. Indeed, it is evident that sometimes international conventions and bills of rights can serve to diminish human rights, legitimating violations of human rights, including the rights and freedoms of democratic governance. It is therefore a conceptual and practical mistake to accept the often

assumed identity of human rights and the international law of human rights or the constitutional rights within particular states.

Despite the fundamentally moral nature of human rights, the bills of rights and other institutional devices that give expression to human rights are necessary for the realization of the fundamental moral commitments embedded in human rights discourse. Indeed, the discourse of 'bills' and 'rights' has an irreducibly institutional flavour and the moral significance of human rights discourse includes a commitment to provide effective mechanisms for the protection and furtherance of the basic values that feature in declarations of human rights and these must evidently include legal mechanisms. The language of rights is a language of entitlements, and this is a notion that makes little sense where there is no way of securing that to which one is entitled when it is under threat (O'Neill 1996, 131-14). Affirmations of rights give rise to the legitimate expectation that there are or should be ways of securing that certain human interests are adequately protected. In fact, where there is in general no way of securing a 'right' then there is no such right in that society, even though there ought to be.

This inherent demand for effective protection implicit in the concept of rights gives some credence to the claim that without a judicially enforced bill of rights, human rights are not protected. While equating human rights protection with having a court enforced bill of rights is a mistake, the concept of human rights does contain an implicit assumption that the interests identified by such rights are deserving of effective and priority implementation. To have a human right gives rise, amongst other things, to a legitimate claim for relevant protections, either through legislation, judicial intervention, improved economic policies or simply better management. This is why rejection of direct application of bills of rights by courts requires supplementation by proposals for alternative mechanisms for securing rights' objectives.

Judicial Review and Human Rights

Given the above scenario it is not, perhaps, surprising that those who see the democratic importance of human rights favour having a bill of rights that courts can use to limit the power of elected government to counterbalance the tendency of democracies to lose their way. This appears an obvious solution to an ongoing problem that democracy ameliorates but does not exclude. They note the special interests of elected politicians who neglect human rights in order to retain or gain power, the capacity of homogeneous majorities to dominate the rest of society, and the vulnerability of disadvantaged groups under any political system. It is argued these evident threats call for a balancing political force with a special brief to guard against these standing dangers. The relative detachment of courts from everyday political disputes and the competition for political power, make them an obvious choice for the role of an impartial umpire to oversee the democratic political process to keep it democratic both in process and in outcome (Freeman 1990).

The diagnosis of the democratic weaknesses of actual democracies is not in doubt. Indeed they are what gives rise to the need for human rights to be declared and enforced. But there are grave objections to the proposed cure for the ailments in question. Most of these derive from the evident fact that general statements of abstract

human rights, while they may have the ring of moral self-evidence, are compatible with a wide array of different particular social circumstances which radically conflict with each other. Given the disagreements to which I have drawn attention as to the implications of such values as 'freedom of speech' and how these values are best promoted, by giving a power of judicial review we are in effect handing over controversial political issues for determination by a small group of people who are not directly accountable to the people whose human right it is to make their own decisions (Campbell 1999).

These objections relate both to the effectiveness of outcomes and to the process or methods of entrenched judicially enforced bills of rights. Most of these objections involve emphasising one core feature of all bills of rights: they are very simple and highly general statements of rights, cast in abstract terms. Such statements can have great value in providing a sense of direction and promoting social cohesion, but they engender enormous disagreement when it comes down to saying what they are to mean in practice and are applied to concrete decisions that actually affect social outcomes (Waldron 1994)

The 'interpretation' which courts, exercising a power of judicial review on the basis of bills of rights that contain simple statements of rights, often accompanied in modern bills by a list of considerations that may override these rights, is quite unlike the interpretation of ordinary laws. To decide what does and what does not unduly interfere with the privacy of the citizen, for instance, is a complex political and controversial matter that cannot be achieved without drawing on debateable political values and beliefs. Bills of rights are in general so vague that they do not have meaning at the level of specificity required to determine whether any actual type of conduct or rule is or is not a violation of human rights. The abstraction of general statements of human rights is such that in the application of a bill of rights to an actual case in a court of law it is necessary in effect to legislate what the rights in question are to mean in concrete terms, or to draw on the previous decisions of courts that have, individually or collectively, legislated in this way. A court centred bill of rights leaves it to judiciaries to translate such general principles as 'the right to life' into the sort of specific decisions that outlaw capital punishment, or restrict access to abortion services, that allow or permit voluntary euthanasia, or sanction or prohibit rationing of health care, or permit the production of human embryos for stem-cell research. We may agree on general human rights principles, such as the dignity of human existence, the basic equality of all human beings and the wickedness of inflicting unnecessary human suffering, we disagree what these fundamental principles require in practice. Even when we do agree on more specific points, such as the right to vote, the right to express our opinions and our right to equality of opportunity, there is enormous and reasonable disagreement about the content and limitations to be placed on such rights (Waldron 1999, Part III).

Common law jurisdictions have a long history of courts developing the law, albeit in modern times within the limits set by pre-existing legislation. There is frequently no harm and often much good in courts developing and updating the law on the basis of the real life cases that come before them. Courts have the advantage of seeing how general laws impact on a perhaps untypical sample of individual cases. Crucially for democracy, parliaments have been able to assert their authority by countermanding such judicial developments with new legislation. Legislatures and the governments

that dominate them have a broader vision than that provided by a perhaps untypical sample of individual cases, more resources to work through the implications of legislation and usually some sort of mandate for the policies that lie behind it.

Entrenched and court enforced bills of rights are defended principally on the grounds that they are necessary to protect vulnerable minorities against persistent majorities. Certainly, no one can deny that individuals and groups are capable of acting with extreme selfishness. Indeed the main argument in favour of majority rule is that rich and powerful minorities will otherwise use the instruments of government to feather their own nests. But note how the cure - giving power to judges to override majorities - contradicts the justification for that cure - respecting the equality and dignity of the individual human being (Waldron 1993) If we are not all equal when it comes to having an opinion on justice, rights and the common good, then what is left of the ideal of human equality on which human rights are founded? It removes such contentious matters of moral opinion from the democratic process, so that citizens are excluded from having any power to determine the specific rights that are to apply in their society. This is in clear contravention of the idea that the moral views of every human being are to be given equal respect. It is a violation of our autonomy, our dignity and our self-respect. Inevitably majorities can get it wrong, as do judges and politicians, bureaucrats and minorities. But a democratic system, with its emphasis on representation, freedom of speech and assembly, transparency, accountability and the rule of law is designed to minimise and correct the mistakes that we make in governing ourselves. Moreover, in the light of legitimate disagreement as to what the 'right' answer is with respect to the specific content of human rights, there are strong grounds for using a decision-making mechanism that gives equal weight to the opinions of everyone.

In practice, few human rights goals can be achieved by law making alone and many human rights objectives do not require passing and implementing laws. Yet, a crucial aspect of the debate about bills of rights, including what form, content and mode of implementation they should have, is whether legal implementation of such rights should be by way of democratically endorsed legislation alone or also by way of judicial law making whereby general statements of human rights are rendered specific by the decisions of (unelected) judges rather than by (elected) legislatures. The choice between these approaches can be viewed as simply a matter of deciding which mechanism, or combination of mechanisms, best protects human rights. That is a complicated and difficult question of fact, the answer to which depends to a considerable extent on the nature and circumstances of the societies in question and how their institutions operate. Legal mechanisms and democratic process can have unpredictable results and are quite capable of legitimating as 'human rights' practices that are in fact gross violations of human rights.

However, the alternative means on offer (human rights legislation or judicial review) are not themselves on equal terms with respect to human rights. Democratic ways of deciding what the law is to be are an invariable constituent of any contemporary list of human rights. Autonomy, self-determination, the right to debate and vote on the laws that bind us, these are paradigm human rights. This means that, in choosing between achieving human rights objectives through human rights legislation or through human rights based judicial review we are not choosing between mechanisms that are in themselves neutral with respect to human rights, but between one

mechanism which is itself an expression of at least some human rights and another mechanism which is not. For these reasons it is argued that judiciaries should feature in democratic human rights regimes as independent adjudicators of those facts that are relevant to the application of existing human rights law to particular circumstances, but not as makers of this law. This is not, of course, the end of the matter. Human rights have to do with more than democratic rights. It may be that we have to sacrifice some human rights in order to protect others. Autonomy may have to give way to life, to security, to wellbeing, or vice versa. Nevertheless, other things being equal, it is clearly preferable, from the human rights point of view, to adopt a democratic means of governance.

It is often argued that these ‘counter-majoritarian’ objections to judicial review are exaggerated because in practice courts do not stray far from majority opinion. This is indeed, generally how things work out over significant periods of time, with courts sometimes being ahead and sometimes behind the prevailing opinions. This is in part because judges are appointed by the executives whose actions they are meant to control. Security of tenure protects their independence from immediate political pressure but does not often alter the political views they had on appointment (Edwards 2002; Atrill 2002). But if this is the case then a bill of rights is likely to be of little help in countering the views of majorities who are neglectful of the well being of vulnerable minorities (Ewing 2004). Further, courts are likely to block reforms as societies change thereby entrenching conservative opinion.

Moreover, court centred bills of rights can be used to undermine the capacity of majorities to defend their legitimate interests against powerful minorities. Bills of rights of a sort capable of being implemented by courts inevitably emphasise liberty over wellbeing, thus giving the opportunity for those with appropriate resources to counter reforms that promote the general wellbeing by reducing property rights, including the right to use money to manipulate political opinion and serve the interests of business over consumers. Court-centred bills of rights have frequently been used to stall progressive policies aimed at general wellbeing and have rarely been of much assistance with respect to wellbeing of the majority of citizens.

Such conclusions may appear depressing to advocates of human rights. It seems that no one can be trusted to do the right thing in politics or in law. It would, however, be naïve to think otherwise. The eternal problem of political philosophy and political science is how we can guard the guardians. In every political system someone or some body must have the final say. If we seek to supervise that body then the supervising institution has the final say. If we respond by dividing power between different centres, then this either amounts to a negation of power or an uncoordinated number of ‘final’ authorities between whom conflict is inevitable. To admit that democratic procedures do not always get it right does not mean that there must be a better way. And, in the case of democracy we can always know that at least something is right, namely the maximisation of individual autonomy with respect to collective decision-making and showing respect for the views of everyone equally, but we cannot ensure, or even know, whether the decisions taken are the outcome of honest moral opinions or foolishness or selfishness, or some mixture of these and more. In a democracy we can always argue, persuade and hope to change the decisions with which we disagree.

There are other, more subsidiary arguments against a court-centred bill of rights to the effect that they create uncertainty, increase litigation, and raise expectations that are bound to be disappointed. A further problem, is the very broad approach that is taken to 'interpretation' in the human rights context and the way in which this becomes generalised throughout the legal system, thus weakening democratic control and the rule of law (Campbell, Ewing and Tomkins 2001). Together such arguments have had sufficient force to give rise to compromise solutions to the problem of protecting human rights without undermining democracy that seek to combine the virtues of judicial review with the ultimate rights of a people to self-determination.

Compromise solutions

It is generally agreed that a purely declaratory bill of rights cannot address the crucial problem of limiting the powers of governments. On the other hand, full judicial review is widely regarded as democratically problematic. Hence the search for some compromise that allows for partial or correctable forms of judicial review of legislation (IACT Bill of Rights Consultative Committee, 2003).

There are many strategies on offer. Some of these are briefly analysed here in order to distinguish them from the proposed democratic bill of rights. This critical overview of compromise solutions suggests that, as far as the compromise is achieved, this is because courts take care not to come into conflict with legislatures, thus undermining the alleged point of having a bill of rights, namely to constrain governments. However, the compromises do not in fact sufficiently constrain courts because of the many interpretive devices open to courts and the political difficulty of challenging judicial activism so that courts are able to go beyond the limits set for them by the compromise solutions. From time to time they do so, with unpredictable consequences.

One compromise solution to the tension between judicial review and democracy is to opt for a statutory rather than a constitutional bill of rights. A statutory bill of rights is not entrenched, and is therefore subject to alteration or repeal by normal democratic process, thereby giving the elected legislature the last word. In theory a statutory bill could be used for the purposes of judicial review that allows for the override of other legislation but in practice such bills tend only to license courts to interpreting legislation so as to render it compatible with the enacted bill of rights. New Zealand (Bill of Rights Act 1990) and the UK (Human Rights Act 1998) are key examples of this type of statutory bill, recently joined by the Australian Capital Territory (*Human Rights Act 2004* (ACT)).

Such arrangements appear to have the evident advantage that, if legislatures don't like what the judges do with their interpretive powers then they can change the bill to bring the courts into line. However, in practice this not easy to do since this would appear to undermine the publicly perceived purpose of having a bill of rights, namely to circumscribe legislatures. Hence countering court decisions that favour particular individuals and groups by legislation is something that is rarely feasible (Huscroft, 2004).

This may not seem to matter if a court's use of a bill of rights is confined to an interpretive role of resolving ambiguities in favour of a reading that they regard as

most compatible with the rights enumerated in the bill. However courts who see themselves as guardians of human rights have a number of strategies which go under the name of 'interpretation' which enable them to make what they will, not only of bills of rights but also of the legislation that may be said to conflict with such bills. Taking the moral high ground that an institution designed to protect human rights should not be construed narrowly and legalistically, they are in effect free to ignore the words of the relevant legal texts to achieve what they consider to be just. Even where the text and legislative history of a bill may be absolutely clear, they can get round this by reading in exceptions.

New Zealand provides the best examples of what has been done by judiciaries in the name of human rights contrary to the express intentions of a statutory 'interpretive' bill of rights. There, the courts have become skilled at finding unclarity and ambiguities on which to hang the opportunity to override what would otherwise be plain enough texts. The mere fact that a provision seems to conflict with a court's current understanding of some element in a bill of rights is itself sufficient to trigger 'interpretation', a process that can extend to in effect deleting or adding certain words in order to make the legislation accord with their reading of the bill. This works by saying that it is to be assumed that Parliaments do not intend to legislate contrary to a bill of rights, therefore the laws they enact can be modified in whatever way is necessary to ensure that they do not violate the bill or charter (as interpreted by the courts). This is sometimes justified in terms of what is grandly referred to as a 'principle of legality' whereby ordinary legislation is in effect displaced if it is judged to be in conflict with 'fundamental rights' (Griffith 2000). Similar points can be made in relation to empowering or requiring courts to pay attention to international law when 'interpreting' legislation.

In practice the outcome of such compromise solutions is an unpredictable mix of decisions in which courts subordinate their views in the human rights in question to the more democratically legitimate authority, or overstep their interpretive powers to intervene in ways to which it is difficult for legislatures to respond. In other words they are either ineffective or, in terms of the purpose of the compromise strategies, over ambitious.

A somewhat different compromise solution is used in Canada where there is an entrenched Charter of Rights and Freedoms that is used to the purpose of judicial review. The Charter's s.33 is a 'notwithstanding' clause whereby a Parliament can override a bill or charter of rights by indicating that a statutory provision is to apply 'notwithstanding' the provisions of the Charter. There had been hopes of thereby retaining a serious political input into the determination of specific Charter rights (Russell 1991, 293-309). Yes, clearly if the notwithstanding override were routinely used, the Charter would be ineffective. Moreover, this device has the unfortunate effect of presenting genuine disagreements about what constitutes the right in question as a situation in which the courts stand for rights and the parliament stands against rights when what is in fact going on is a disagreement about what these rights are. In Canada, for one reason or another, the notwithstanding provision is rarely used. This means that there is in reality little 'dialogue' between courts and Parliament, and little sense that Parliament is a source of legitimate interpretations of the Charter (Huscroft and Brodie, 2004).

Less problematic, in theory, is the device utilised in the UK Human Rights Act 1998 whereby courts can issue 'statements of incompatibility' which do not invalidate legislation that they deem incompatible with the European Convention on Human Rights, but enable Parliament to adopt a fast-track procedure for amending such legislation, should it choose to do so. In practice courts prefer to use their power to 'interpret' the legislation so as to make it 'compatible' thus evading the less effective device of declaring an incompatibility. Parliament can reject such rewritings in subsequent legislation but this in turn can be evaded through creative interpretation. Moreover, in this process, it is the legal not the political definition of the human rights at issue that is the focus of the debate. The UK *Human Rights Act* makes the assumption that it is a Parliament's duty to legislate in accordance with prior legal definitions of human rights rather than in accordance with its own concretizations of the abstract rights contained in the European Convention..

It would appear that all of these devices, in so far as they are designed to limit the powers of courts, come up against the capacity of courts to circumvent legislative provisions that seek to protect democratic rights by having recourse to a broadly worded bill of rights. However, this happens only sporadically. In so far as the compromise arrangements make governments more human rights conscious, they are disappointing in that courts rarely take an unpopular line. In either case they take responsibility for the pursuit of rights away from the democratic process without being providing much that is tangible in return..

A Democratic Bill of Rights

If the compromise solutions tried so far are either ineffective or undemocratic, there are the grounds for commending the idea of having a democratic bill of rights with associated political institutions to work out democratically the meaning and application of the bill. The aim would be to retain responsibility for the formulation of human rights with elected governments, but bring pressure on these governments to resist their inherent tendency to negate the norms that justify democracy as a system of government.

A democratic bill of rights is not simply a bill of democratic rights. Rather, it is a democratically adopted, articulated and applied bill of rights covering all areas of human wellbeing. A bill of rights is democratic if, in the first place, it is directly endorsed by the electorate, and in the second place, if it is institutionalised through constitutional provisions that relate primarily to the democratic political process. The thesis is that it is desirable to adopt democratic bills of rights as a basis for the stimulation and assessment of legislative and policy proposals. The idea is to replace the idea of an entrenched judicially enforced bill of rights with an entrenched democratic bill of rights.

The challenge is to work out how to give such a democratic bill of rights sufficient leverage to counter those aspects of democratic polities that are potentially antithetical to human rights without unduly compromising the democratic principle of the sovereignty of the people. A democratic bill of rights is a bill that is institutionalised so as to affect the legislative and governmental activities of state with the courts being involved only in the enforcement of the human rights legislation that is enacted by the Parliament and enforcing any constitutional provisions relating to the bill of rights.

The objective of a democratic bill of rights is to bring pressure on the system to make it more responsive to human rights considerations.

The key institutions involved, comprising a democratic bill of rights, a Human Rights Committee, and human rights legislation, would be supported by other instruments and institutions also being required to draw upon the entrenched bill, such as the office of the Ombudsman, and an independent Human Rights Commission whose role would be to investigate complaints, conduct inquiries and promote human rights educationally. This in turn requires the support of an active civil society invigorated by a variety of non-governmental organisations with a focus on specific human rights issues.

Ideally, a democratic bill of rights would be entrenched through constitutional amendment, which would give the Australian people full ownership of the bill and greatly enhance its legitimacy and hence its political status and operative force. Alternatively, the bill could be enacted by Parliament after endorsement in a nation wide referendum, which would be easier than constitutional amendment but sufficiently potent to make it politically very difficult to be amended by Parliament without further referenda. The democratic bill of rights would not be directly enforceable by courts, except with respect to certain constitutive and procedural requirements relating to the function of the Human Rights Committee and, perhaps also, the Human Rights Commission and the enhanced legal standing of human rights legislation.

Entrenchment itself has considerable significance when considering the symbolic and educational functions of a bill of rights. At its best, such a bill could be a unifying ideology on the basis of which is developed a culture of rights that impacts on both national politics and international relations. However, there is no doubt that human rights are taken more seriously when they are accompanied by judicial review of legislation. It is important, therefore, to underpin a democratic bill of rights with some constitutional basis that will lead seasoned political players as well as morally concerned citizens to take it seriously.

One way of achieving this objective is to include in a Human Rights Amendment to the Constitution the requirement that there be a joint standing committee of both house – the Joint Standing Committee on Human Rights – with certain constitutionally guaranteed powers. Building on the model of existing parliamentary committees, in particular the Senate Standing Committee for the Scrutiny of Bills, the Human Rights Committee would have the right and the duty examine all proposed legislation and requiring new legislation to be brought forward on the basis of its understanding of the bill of rights. The prime focus of the committee would be on achieving a comprehensive set of human rights legislation, that is legislation directed at the implementation of specific human rights objectives, such as non-discrimination and freedom of expression (Campbell 2004).

Scrutiny mechanisms already exists in the Australian Parliament and in four States and one Territory. For instance the Senate the Scrutiny of Bills Committee has the task of analysing proposed legislation to see whether it ‘trespasses unduly on personal rights and freedoms’ (Senate Standing Committee for the Scrutiny of Bills 2003,

1)and bringing such matters to the attention of the Senate. This committee operates in a relatively non-partisan way and can be quite forceful in its dealings with ministers and in its reports to the Senate with respect to elements in proposed legislation that might affect individual rights. Similar arrangements are in place in Queensland, Victoria, New South Wales and the Australian Capital Territory.

A Human Rights Committee could have much wider powers and responsibilities than existing scrutiny committees. What I have in mind are specific enforceable procedural requirements. How this can be done is a constitutionally tricky issue, that cannot be adequately address here, since parliamentary procedures are not traditionally justiciable. The procedures I have in mind include the publication of the Committee's reports and recommendations. It includes the power of the Committee to delay the legislative process to give it time to consider bills that it considers to have potential human rights implications. It includes the power of the Committee to require that legislation be brought forward within a particular time frame to deal with what it perceives to be human rights deficits, and to hold public enquiries on these matters.

While the Human Rights Committee could ultimately not block legislation and would be unable to require that legislation be passed, it would have the power to obtain responses of points it raises with the government department that is sponsoring the legislation, cross examine the government minister concerned and be able to make available to the Parliament as a whole any material on which the bill's sponsors rely, call witnesses, receive submissions and obtain expert advice. It might even be given powers of delay, to ensure that time is given to the scrutiny of legislation. The idea is to give such a committee a position that is similar to but politically stronger than that enjoyed by powerful Congressional Committees in the USA.

All this could involves both a shift of power from governments to Parliament and an opportunity to provide the basis for much wider public debate than current Parliamentary procedure facilitates. The purpose and powers of this committee, can be seen as part of a wider development to give more effective and less adversarial tasks for members of the parliament who are not government ministers, thus making the Parliamentary system more thoughtful and forward looking (Marsh and Yencken 2004).

An obvious parallel here is the joint committee on Human Rights introduced into the UK Parliament following on the Human Rights Act 1998, itself modelled to some extent on the Australian Senate Standing Committee for the Scrutiny of Bills.

The UK Human Rights Committee has already made some impact on the extent and quality of debates in the British Parliament, although little by way of significant change in the substance of legislation has resulted. It could be expected that the more extensive powers of the proposed Australian Committee on Human Rights, together with the existing constitutional powers of the Senate, a much more powerful body than the House of Lords in the UK, would give it considerably more influence.

In addition to the somewhat negative role of scrutinising proposed legislation, the committee would have the power and resources to draw on the bill of rights to investigate possible human rights failures both in domestic situations and in foreign policy. Moreover a process could be designed to give members of the assembly the

right to bring what they view as human rights deficits to the notice of the Human Rights Committee in which a minority vote would be sufficient to generate a constitutional requirement for legislative time being given over to addressing the issue. In this way all ambitious politicians would have an incentive to become human rights advocates.

Currently such committees as exist tend to scrutinise legislation in the light of what are perceived to be fundamental common law rights, international treaty obligations and the human rights jurisprudence deriving from court-centred bills of rights around the globe. This is a large rag-bag of data, much of it deriving from earlier times and other places from which much of value can be gleaned in a haphazard way. Having a popularly endorsed bill of rights to act as a framework for its deliberations, the Committee will be freed from the legal contexts from which the decisions of constitutional courts in different jurisdictions have emerged, and will legitimate recourse to a much wider, more ethical corpus of literature that approaches the articulation of human rights as a moral rather than a legal matter, albeit one that has legal consequences through the enactment of human rights legislation.

The sources that the Human Rights Committee would be entitled and expected to take into account in its deliberations on the bill of rights would include domestic and international human rights documents and jurisprudence, as well as philosophical, political, economic and social writing on human rights. In addition, the Committee would be bound to receive petitions and hold hearings, and powers to require the cooperation of government departments and ministers and to compel witnesses and evidence in dealing with the full range of its business. The objective would not be to anticipate possible legal decisions but to determine important moral questions.

Inevitable, the Human Rights Committee would be significantly affected by the demands of party politics, although this could be considerably muted by arrangements to ensure some continuing of membership, drawn from both Houses, and disproportionately high representation of minor parties and other ways of bolstering the non-partisan traditions of key standing committees. Moreover, the work of the Human Rights Committee would be supplemented by an independent Human Rights Commission, along the lines of a broader and better resourced version of existing Australian Human Rights Commission, whose independence from government would be guaranteed by constitutional amendment or backed by a referendum held prior to the adoption of the democratic bill of rights. The Commission would have extensive powers of investigation and mediation and a particular role in the scrutiny of legislation and procedures that have bearing on the rights and duties of Members of Parliament as well as broad educational goals.

The crucial difference between a democratic bill of rights and the various compromise solutions outlined above is that no power would be given to courts to interpret legislation in the light of the bill of rights, international law or foreign precedents, other than those that have been adopted into Australian law via statute. Rather the duty of courts with respect to human rights would be to apply such human rights provisions as have been enacted by Parliament in the process of implementing the bill of rights or implementing international human rights treaties. Courts would be required to give such human rights legislation priority over subsequent ordinary legislation unless this is clearly negated by the explicit words of the enactment.

Human rights legislation would thus have the status of a ‘constitutional statutes’ⁱ or ‘super statutes’ (Eskridge and Ferejohn 2001) that are not liable to implied repeal by later statutes.

The objective of such constitutional and other related changes would be to provide both a symbolic and practical focus for the human rights aspirations of the Australian people, and to create powerful institutional mechanisms for ensuring that human rights issues are more adequately addressed and resolved, without undermining key democratic human rights. One advantage of this approach is that it would enable the adoption of a bill of rights that was not only straightforward and non-legalistic in content but which incorporates a broad range of economic, social and cultural rights as well as the more traditional civil and political rights that are central in court centred bills of rights. This offers the prospect of a more politically balanced bill of rights than is likely to emerge in the context of judicial review.

A second advantage is the type of consideration that would feature in the difficult choices that arise when rights clash or require more detailed specification, or have to be balanced against public goods such as economic progress and national security. These choices can be couched and debated in the moral and political terms that are appropriate to these matters, rather than in technical legal terms that inevitably distort the moral issues at stake and are accessible only to legal elites (Mandel 1989). Further, the human rights advantage of a democratic bill of rights is its superior democratic legitimacy and its potential for garnering broad consensual support for human rights objectives.

The progressive potential of such a broadly conceived bill of rights is considerable. Courts are aware of their lack of democratic legitimacy in striking down legislation and their lack of competence in developing laws with social and economic ends. As a result they rarely stray beyond what they see as their business with respect to human rights, concentrating on those matters with which they are familiar, such as criminal law and process. A democratic bill of rights need not be restricted in content or application by such fears of illegitimacy and incompetence and is in a position to encourage more dramatic moral ship than courts can supply.

Another major advantage of a democratic bill of rights is that it would focus not just on the dangers of government overactivity (in which bills of rights originally featured), but would also address the other sources of human rights violations. In particular it can address the dangers of corporate power, the power without responsibility enjoyed by those who control our major corporations and operate under the continual temptation to use productive enterprises as if they were their personal possessions. Human rights at work and in business could thus become a major ingredient of a democratic bill of rights. The human rights of workers, consumers, suppliers, customers and investors could feature centrally in such a bill.

Conclusion

Australia is in need of some fresh human rights initiatives. Whether or not we think it desirable, it is highly unlikely that the Constitution will be amended to include a bill of rights for the purposes of judicial review of legislation. The Australian Capital Territory has recently enacted an interpretive bill of rights along the lines of the UK

Human Rights Act 1998. It may be that other Australian Territories or States may adopt similar compromise versions of bills of rights that will (perhaps unintentionally) transfer significant legislative power to courts or else have little in the way of significant outcomes. Either way, this is likely to engender either disillusionment about human rights if it leads to more legal activity with little tangible result, or more hostility to human rights if these powers are exercised to further the preferred values of activist judges. It is hard to imagine, for instance, the Australian public accepting their abortion laws being determined by judicial opinions as to the 'right to life'.

In these circumstances it seems appropriate to seek to build on the strong Australian record with respect to human rights legislation and the Australian experience of using Parliamentary committees to raise and press human rights issues in the political arena. These traditions give a basis for the adoption of a non-justiciable but entrenched bill of rights that would serve to unite the aspirations of those who are committed to human rights goals, and which fits with the democratic sensibilities of the Australian people.

A democratic bill of rights could be seen as an Australian alternative to court centred bills of rights which has much greater potential to realise tangible and lasting human rights outcomes. Given popular endorsement and a consensual commitment of executive government and elected representatives, sometimes referred to as a 'culture of rights', such a constitutional arrangement would also go some way towards satisfying the aspirations of all those who appreciate the need to emphasise the role of human rights in a democracy. Its impact could be important, particularly with respect to community education in human rights and the formal recognition of the moral duty of majorities not simply to protect their own interests but to have regard to the equal rights of all citizens. Such attitudes cannot be legislated into existence but, given the right institutions, they could readily emerge within a developed democracy such as Australia, and, in so far as this is achieved, this provides the strongest possible basis for the protection and furtherance of human rights.

Were a democratic bill of rights to materialize, 'Australian exceptionalism' over human rights institutions could be transformed from a negative and critical label for human rights backwardness, to a positive factor, identifying a distinctive alternative to current domestic human rights regimes, one which gives responsibility for human rights articulation and oversight to those who have the human right to make such decisions.

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ⁱ This model can be adapted to State and Territory use as well (New South Wales Parliament Standing Committee on Law and Justice 2001).

ⁱ Thoburn [2002] 3 WLR 247 at 63: Per Laws L: 'A constitutional statute can only be repealed, or amended in a way that significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and State, by unambiguous words on the face of the later statute'.