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What is wrong with a charter of rights?

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Freedom of speech has been enshrined in the Charter of Rights and Freedoms as part of the Canadian Constitution since 1982. Ezra Levant felt confident that he was within the law in February 2006 when his Canadian magazine the *Western Standard* published the Danish cartoons of the prophet Mohammed, which have provoked so much controversy in Muslim nations during recent times.

But his confidence may have been misplaced. Mr Syed Soharwardy, a Muslim leader from Calgary, has lodged a complaint of religious discrimination against Ezra Levant and the *Western Standard*. The Alberta Human Rights Commission has agreed to hear the complaint and, like equal opportunity and anti-discrimination commissions in Australia, will assist the complainant but not the respondent. Ezra Levant has estimated legal and other expenses for his defence at $75,000. He will not be reimbursed, even if the complaint is dismissed.[1]

Does the right to free speech trump the right not to be discriminated against? The Charter of Rights and Freedoms does not say. The answer to this $75,000 question will be decided by an unelected judge or human rights commissioner who is not accountable to the people of Canada. So enshrining rights such as free speech in a charter is no guarantee that any right will be protected.

Why then are such charters seemingly so popular in Australasia today?

The Australian Capital Territory government instituted a charter of rights in 2004, following New Zealand's example in 1990 and the UK in 1998. The Victorian Bracks government is joining the club - setting up a Human Rights Consultation Committee in 2005. Legislation for a Victorian Charter of Rights and Responsibilities is due for debate in mid 2006.

Former NSW Labor premier Bob Carr strongly opposed bills of rights,[2] **but current NSW Attorney General Bob Debus has said he would recommend a charter of rights to the NSW Cabinet.**[3] **WA Labor Attorney-General Jim McGinty is considering a similar charter of rights**[4] **and a draft bill of rights was launched at a meeting in the Queensland Parliament House on 14 March 2006.**[5] **The Tasmanian government is said to be considering a similar proposal.**[6]

The following paper by Charles Francis QC, a Melbourne lawyer and former member of the Victorian parliament, examines this lemming-like rush towards the cliff.

So far in Australia there has been singularly little demand for a bill of rights from the ordinary man. The demand appears to come primarily from judicial and social activists and from some vocal minority groups. These groups frequently have agendas which are contrary to what the majority of citizens want. Far too often the groups' agendas are those of a permissive society.

Victoria's Bracks government has apparently decided it wants a Charter of Human Rights and Responsibilities to protect the basic human rights of its citizens. However the protection of human rights has never required a charter of rights.

Australia today has much the same political and judicial institutions as it had at the beginning of the twentieth century, when we became a Commonwealth. Most of our state institutions enjoy an even longer continuous life. When one compares Australia with most other countries, our institutions have not only exhibited remarkable stability, but have also constituted a most powerful force for ensuring the peaceful development of our nation within the context of maximum personal freedom.

In large measure this is due to our British heritage. It was from England we derived our democracy, our system of parliamentary government, our judicial system and the rule of law, habeas corpus, trial by jury and the common law, which underpins so well our human rights.

Although many activists and left wing academics now pour scorn on the common law, it is important to remember that the common law in fact is a vast bill of rights, which has been devised over more than 800 years by the finest legal minds in the English speaking world. As such it is incomparably better and wiser than any charter of rights prepared by some allegedly expert State government committee.

Nazi Germany and the Soviet Union

By contrast, Nazi Germany had what purported to be an excellent bill of rights, as did the Soviet Union under Joseph Stalin. These bills of rights proved of little avail, because there was no separation of powers. The judiciary (court system) was entirely subservient to the executive (government ministers) so that the only judicial rights which received any recognition were those which the executive permitted the judiciary to exercise. Thus in the 1930s democracy withered in Nazi Germany, whilst in Stalin's Soviet Union democracy never existed.

Today some of the worst abuses of rights occur in Rwanda, China and the Sudan. Yet these countries all have glossy bills of rights. China does not hesitate to abort millions of women each year against their wishes and in Tibet many thousands of women have been seized, held down and sterilised. In the Sudan hundreds of thousands of Christians have been murdered and many thousands of women and children have been kidnapped and taken into slavery. A robust democracy and a free press (both of which we have) provide a much better protection for human rights than any document of rights.

It is also important to remember that in the Western world the roots of our individual rights and freedoms and the recognition of the rule of law had their origins in Christianity. It was the Christian Church which first proclaimed that no one was above the law. The Franciscans in the 15th Century were the first to elaborate legal theories of God-given rights and that individual rights derived from a natural order sustained by God's immutable laws of reason.

In England the Lord Chancellor played an important part in the development of common law rights. Those chancellors were

all Christians; some were ordained clergymen. Consequently the common law which evolved had a strong Christian basis. Even as late as 1932 in discussing the common law of negligence in England's highest court, Lord Atkin referred to the biblical question, "Who is my neighbour?" He said in law the answer seems to be "... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."[7]

The United States inherited the English common law. Most Americans do not believe that individual rights originate with the government, but rather that they are inalienable rights coming from our Creator and most rights may not be impaired without due process of law. This philosophy of government was spelled out in the American Declaration of Independence and also by implication in the United States Constitution. Even the somewhat secular-minded Thomas Jefferson payed homage to this principle when he said that the only firm basis of a nation's freedom is "a conviction in the minds of the people that [their] liberties are the gift of God".[8]

In 1948 the United Nations produced the Universal Declaration of Human Rights[9] which acts as an excellent guide. Most countries participating in its drafting were inspired by a Christian ethos. The rights recognised by the Declaration are natural to us as human beings and were not some supposedly generous gift from an external political power - unlike inferior bills of rights based on current liberal ideologies.

No referendum on 'rights'

In a significant article in the Melbourne *Herald-Sun*,[10] Peter Faris, a distinguished QC, claimed that if Victorians were allowed a referendum on the proposed Charter of Rights and Responsibilities, the majority would oppose it. "One right that Victorians will not have is the right to vote on the Bill of Rights," he said. "You will have it, whether you want it or not ...

"The Government actually promised to consult with the people of Victoria. How then did it carry out this promise? By appointing a committee to do it - the Human Rights Consultation Committee! They 'consulted' with maybe 3,000 Victorians out of 5 million and found that an overwhelming majority wanted a Bill of Rights ... This has enabled the Government to announce that it will legislate the Charter because that is what Victorians overwhelmingly want ...

"The title [of the Consultation Committee] is Orwellian - there was no intention that the people of Victoria should be consulted - only a few special interest groups," Peter Faris said.

He pointed out that all Australian referendums on rights or bills of rights have been soundly defeated. The most recent, in 1988, proposed the incorporation into the Australian Constitution of certain supposed rights. However the proposal could have removed important existing rights. A constitutional lawyer described it as a "confidence trick".[11] This referendum question was defeated by a massive 69% NO vote, which was the strongest defeat of a referendum proposal in Australian history.[12]

Revolutionary effect on laws

Peter Faris went on to say the effect of the proposed charter of rights on Victorian laws would be revolutionary. All existing state legislation and the common law would be interpreted by the courts to comply with the Charter. The Chairman of the Consultation Committee Professor George Williams denies this. However the Consultation Committee's Report states: "Victorian courts and tribunals would be required to interpret all legislation, so far as it is possible to do so, in a way that is consistent with the Charter. In doing so they would need to take account of why the law was passed in the first place."[13]

This statement suggests that courts and tribunals would be free to interpret the law in accordance with their own beliefs as to what the philosophy of the Charter ought to be. This represents a very serious transfer of power from the legislature to activist judges and activist tribunals. Much of the Charter is expressed in vague terms, which would further increase the opportunity for activist judges and tribunals to mould the law in accordance with their own philosophy. This leads to what in the United States is now referred to as the problem of judicial supremacy.

In the Western world in the past, a system of checks and balances has usually been an important part of the protection of our human rights. Free nations establish a constitutional division of powers between the legislature, the executive and the judiciary. As the late Sir Harry Gibbs, one of the greatest Chief Justices of the High Court of Australia, pointed out, the most effective way to curb political power is to divide it. He said that "a Federal constitution which brings about a division of power in actual practice, is a more secure protection for basic political freedom than a bill of rights, which means those who have power to interpret it say what it means."[14]

The Report of the Victorian Consultation Committee says expressly on its first page: "The Charter would also play an important role ... in the way in which courts and tribunals interpret laws ..."[15]

Recent US 'rights' problems

What has happened in the United States in the last 50 years not only lends strong support to what Sir Harry Gibbs says but also stands as a strong warning of the problems which may be created by bills or charters of rights. The United States inherited the common law of England but also set out a Bill of Rights in its Constitution. Whilst the common law has functioned effectively in the United States for more than 220 years, in the last 50 years its Bill of Rights has created problems never envisaged when it was adopted in 1791.

These problems in the United States are analysed very well by Phyllis Schlafly in her recent book *The Supremacists*.[16] She asserts that judicial supremacy in its present form emerged with the appointment of Earl Warren as Chief Justice of the Supreme Court in 1953. Although Warren had been the Attorney-General of California (1939 - 1943) and Governor (1943 - 1953), he had no judicial experience and seems to have had no understanding of the principle of the separation of powers. From the moment of his appointment Warren was an activist judge acting as a politician rather than a judge. From the US Bill of Rights Warren began to spell out new rights which overturned established laws about criminal procedures, prayer in schools, internal security, obscenity and legislative reappointments.

The US public spoke out against what was occurring, and the American Bar Association was presented with a stinging criticism of some fifteen decisions in which the Warren Court had ruled against the US internal security - to little avail. Thereafter US judges allowed a torrent of obscenity to engulf the movies, television, the theatre, books and even classroom curricula. This was achieved by an entirely new interpretation of the First Amendment's free speech clause which was originally designed only to protect freedom of political speech. The US Supreme Court suddenly discovered in this amendment that pornography and a wide variety of other assaults on decency were to be elevated to a first amendment right. Obscenity dealers were delighted.

A bill of rights can thus contribute to the erosion of the rule of law and its replacement by the "rule of judges". Professor James Allan has pointed out that "bills of rights are usually accompanied by interpretive techniques" (as is the case with the proposed 2006 Victorian charter) "which do not constrain judges to deciding in accordance with the original intent of the enactors nor to the original understanding at the time of the passage. Instead, such instruments are often interpreted as 'living trees' where judges pay heed to what they think are 'contemporary values'. The result is an interpretive regime that places few if any constraints on the judiciary".[17] Some judges may tend to accept the values of a "political elite" rather than those of the community as a whole.

A charter of rights, if enacted in Victoria, would give judges the undemocratic power to decide many of the most important social issues in this State. Such a power is given under the guise that State judges are neutral entities who uphold human rights

and freedoms. Overseas experience has shown that the supposed moderation of some judges can be entirely illusory.

Canadian 'rights' problems

Because the Canadian Charter of Rights and Freedoms has been held up by the Victorian Human Rights Consultation Committee as a model,[18] it is important to note what has happened in Canada under its liberal government and this Charter.

Just as Attorney-General Rob Hulls is now doing in Victoria, a number of appointments were made to the Canadian judiciary from amongst those liberal activists who had supported the Canadian government. In November last year, liberal feminist Canadian Chief Justice Beverley McLachlin delivered a quite extraordinary lecture in New Zealand.[19] Chief Justice McLachlin implied that when a person is appointed to the bench he or she acquires a unique wisdom and knowledge conferring an ability to determine with certainty how Canadians must live. She said that judges must not feel bound by the precise words of Canada's Charter of Rights and Freedoms. Even in the face of a hostile public opinion, the judge must establish "norms" which are "essential to the nation's history, identity, values and legal system. The judge is able to discern these norms," McLachlin said, "and confer on them the force of the law where necessary. Only judges know how to accurately interpret these unwritten concepts."

What Chief Justice McLachlin said is arrant nonsense, but we must assume she and other activist judges actually believe they have this God-like discernment. The Canadian Charter of Rights and Freedoms has enabled judges in Canada to strike down all statutory prohibitions on abortion - leading to the legalising of such horrors as partial birth abortion where a viable human being of as much as nine months gestation may be killed by suctioning out its brains and crushing its skull just before the baby's head is born. Could this be why the Victorian Human Rights Consultation Committee, in section 8 of its draft bill, defined the "right to life" to begin only after birth?

The Canadian homosexual lobby considers the Charter of Rights and Freedoms a stunning success, because since its enactment same-sex marriage has been validated by legislation and same sex-couples have been allowed to adopt children.

Where laws are created by parliament there is at least the opportunity to vote out the government at the next election, but where the laws are created by activist judges there is no ready solution. We are unable to rid ourselves of these judges until death or retirement.

Greatly increased litigation

What has happened in Canada should serve as a warning to Australians. Among other things, Bob Carr has noted that the Canadian Charter of Rights and Freedoms has led to greatly increased litigation. By 1990, just eight years after the Charter was established, there had been over 4000 rights disputes, over 100 of which were decided by the Canadian Supreme Court. Delays in handing down Supreme Court judgements increased significantly.[20]

New Zealand has had similar problems. Bob Carr wrote: "In the first seven years after the [NZ] Bill of Rights Act was enacted, it was invoked by the accused in literally thousands of criminal law cases, a large number of which were appealed to the Court of Appeal (the highest court in New Zealand) ... the Bill of Rights continues to be routinely used as a ground for attempting to overturn the admissibility of evidence, including confessions, evidence obtained under search warrants and breath testing of drunk drivers. It gives lawyers a new source of technicalities to allow the guilty ... to go free.

"Bills of rights are notorious for being the last ground of the desperate in litigation. The broad terms of 'rights' can be used to cover almost anything. For example, the NZ courts have considered the case of a man who claimed that the Bill of Rights protected his right to walk down his suburban street naked (on the grounds of freedom of expression, belief and religion), and a case where it was claimed that a rise in rent for public housing breached the 'right to life' in section 8 of the Bill of Rights."[21]

Charters or bills of rights may also be used to achieve social agendas without majority approval. Gabriel Moens, Garrick Professor of Law at the University of Queensland, said in 1994: "Those who favour a bill of rights may delight in the vagueness of these documents for they sometimes assume that its very ambiguity will enable them to achieve, through judicial decision, what they have been unable to achieve through Parliament."[22]

Complex and expensive administration

The Victorian Human Rights Consultation Committee's proposed Charter of Human Rights and Responsibilities Act 2006 gives further cause for concern. The Consultation Committee's Report of December 2005 - which includes the draft legislation[23] - makes it apparent that the administration of the Charter would be both complex and expensive.

New requirements arising from the proposed Victorian Charter include:

(i) Human Rights Impact Statements which must accompany submissions to Cabinet on new laws or major policies;

(ii) Statements of Compatibility presented by the Attorney-General setting out reasons why the Bill complies with the Charter - these must accompany any bill introduced or regulation tabled in the Victorian parliament;

(iii) examination by the Parliament's Human Rights Scrutiny Committee of all Statements of Compatibility in order to advise parliament on the human rights implications of any legislation - thus requiring a larger Committee and/or additional staff;

(iv) scrutiny by both the Attorney-General and the Victorian Human Rights Commissioner of all proceedings under the proposed Charter, since the Attorney and the Commissioner would have the right to intervene to put submissions on behalf of the government and the public interest where a court or tribunal is applying the Charter - again, requiring more staff, equipment and office space;

(v) resources provided to the Scrutiny of Acts and Regulations Committee which would have additional terms of reference in order to consider and advise parliament on matters arising under the Charter - as well as allowing input and submissions from the public, a requirement involving expenditure on advertising and administration;

(vi) human rights training and education for judges, tribunal members, public servants, parliamentarians and their staff;

(vii) appointment of a Victorian Human Rights Commissioner;

(viii) creation of a Human Rights Unit in the Victorian Department of Justice;

(ix) regular reviews of the operation of the Charter.

It is clear that the Charter of Rights will involve the setting up of new bodies and bureaucracies with vast scope for further expansion - at a cost to Victorian taxpayers of many millions of dollars each year.

Libertarian agenda?

Even more worrying is the proposed creation of a new Human Rights Commissioner. The proposed Charter implies that such a Commissioner could become one of the most powerful persons in Victoria. Yet why is the position needed? There is no reason why human rights could not be enforced through the law courts just as many of our rights have been the subject of judicial adjudication in the past.

Does the government want a Commissioner whose determinations would be made in accordance with particular liberal philosophies? This question has already been raised by Andrew Bolt in a *Herald Sun* article, "A small tribe of friends".[24] Mr Bolt notes that three judicial appointments made by Victorian Attorney-General Rob Hulls were all from members of Liberty Victoria - a body with a strong left-wing activist agenda in relation to such matters as drugs, euthanasia, abortion and feminism. Would a future Human Rights Commissioner be appointed from a similar background?

The Consultation Committee's proposed legislation to be put before the Victorian parliament - the draft Charter of Rights and

Responsibilities Act 2006[25] - includes some of the rights outlined in the 1966 International Covenant of Civil and Political Rights, but not others. The "right to life" does not include life before birth, and parents are not given the right to determine their children's education. The reasons given by the Consultation Committee for excluding certain rights are not convincing, and demonstrate a fundamental problem with bills or charters of rights - they always leave out some rights and they fail to state which rights are more important than others.

Section 7 (4) of the draft legislation is similar to Section 19 (2) of the New Zealand Bill of Rights 1990, which provides that special measures taken to assist "disadvantaged" groups do not constitute discrimination. In other words, the legislation would allow discrimination against the ordinary Victorian. The injustices of affirmative action would continue.

Recommendation 4 of the Consultation Committee's Report is very vague and proposes that the preamble to the Charter recognise the special significance of human rights to indigenous peoples as the traditional owners of the land. The Oxford dictionary defines "indigenous" to mean something naturally produced in a region. Where members of a caucasian family have lived on land which they have owned or exercised control over for generations, they are, strictly speaking, indigenous to that area. However the Committee presumably does not have in mind any recognition of the rights of such white-skinned traditional owners.

Peter Faris QC suggests the whole purpose of the proposed Charter is to give more rights and privileges to minority groups including people of aboriginal descent.[26] Section 18 (2) of the proposed draft legislation would give "indigenous" persons "cultural" rights which could entitle them to invade the existing property rights of other Victorians.

No rights for unborn children

Section 8 of the draft legislation negates any rights of unborn children by defining the right to life to begin only after birth. Although many Australians believe that a mother's rights supersede those of the unborn child in certain circumstances, they still recognise that the child has rights which should be considered. However section 8 implies that the unborn child is not a human person, thereby breaching Australia's obligations under the Universal Declaration of Human Rights 1948, the Convention on the Prevention and Punishment of the Crime of Genocide 1948, the International Covenant on Civil and Political Rights 1966, the Declaration of the Rights of the Child 1959 and the Convention on the Rights of the Child 1989.

Recommendation 7 envisages that the Victorian Equal Opportunity Act and its Commission would play a significant part in the functioning of the proposed Charter. Recommendation 23 would make a Victorian Human Rights Commissioner a member or chair of the Equal Opportunity Commission. This would not reassure those familiar with injustices perpetrated by the Equal Opportunity Commission since its inception in1977 - such as the 2002 religious vilification complaint against two pastors, Daniel Scot and Danny Nalliah, whose 2004 conviction is being appealed despite enormous legal costs.[27]

Recommendation 12 proposes human rights training and education for public servants, judges and tribunal members, parliamentarians and their staff and members of the legal profession. During their legal careers judges will often have dealt with rights issues and would be more knowledgeable in this area than the government which now proposes to "educate" them. The sudden requirement for such training reeks of some vast social engineering program.

Section 3 of the draft charter bill defines "discrimination" to include "discrimination on the ground of sexual orientation". Would future Commissioners or tribunals disregard the right of a child to be brought up by a male and female parent in a normal environment? Would they insist that lesbians be provided with assisted reproductive technology in order to bear children with no fathers? Could clergy and marriage celebrants be prosecuted under this proposed law if they refuse to "marry" homosexual couples? Yet most Victorians recognise it is not in the best interest of our state to deliberately create a class of children who either have no father or no mother. A 2001 Morgan Poll found that Australians disapproved of assisted reproductive technology for lesbians by a two to one majority.[28]

Section 12 of the draft charter bill says vaguely that a person has the right not to have his or her privacy unlawfully or arbitrarily interfered with. Such a provision could imperil the safety of a community. For example, most paedophiles are incurable repeat offenders. They should not have a "right to privacy" in relation to past offences.

Conclusion

Human rights are best protected when there is a separation of the parliament (which makes laws) from the judiciary (which applies them). A charter of rights has the effect of transferring decisions on major policy issues from an elected parliament to judges who are not directly accountable to the people.

The proposed Victorian Charter of Rights and Responsibilities would lead to costly expansion of the bureaucracy, increased litigation - as has occurred in Canada and New Zealand. The proposed Victorian Charter omits important rights; those included are vague and uncertain. Experience elsewhere suggests that the interpretation of such a charter would be placed in the hands of libertarian zealots who would impose their prejudices against the wishes of the people.

As the late Sir Harry Gibbs once said, "If society is tolerant and rational, it does not need a bill of rights. If it is not, no bill of rights will preserve it."[29] We should oppose any moves for charters of rights in Australia.

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