

PARLIAMENTS AND THE PROTECTION OF RIGHTS

Those who are critical of a Bill of Rights often are concerned with the undemocratic nature of such a Bill. They argue that a Bill of Rights saps democratic culture by undermining the role of the legislature and giving too much power to judges. Some even argue that this is the case with statutory Bills of Rights or constitutional provisions such as Canada's that give the legislature the option of passing legislation notwithstanding the Charter of Rights. They argue that parliaments have better capacity (in terms of the full range of required expertise) and the democratic legitimacy to make difficult decisions about how to weigh rights against other important interests such as national security.

Whether parliaments are adequate protectors of human rights is a complex question. It is often a question that both sides of the Bill of Rights debate in Australia are prepared to assume the answer to: those against a Bill arguing in favour of parliament's capacity; and those in favour of a Bill arguing that parliament is too concerned with populism and party politics to adequately protect rights.

Yet whatever the outcome of the Bill of Rights debate in Australia, it is important that the central role of parliament as a protector of human rights is not forgotten. If we move towards a Bill of Rights, it should not simply be a document directed at the judiciary and perceived as a way of keeping wayward parliamentarians in line. Rather it should set a standard for all branches of Australian government and involve them as full participants in achieving these standards. The recent *Human Rights Act 2004* (ACT) is an interesting example of a Bill of Rights that is moving towards this goal. While the courts have a role in protecting rights, the ACT legislature has the final word on whether an inconsistency between an Act and human rights identified by judges will be remedied. And all branches of the ACT government are given some responsibility for rights protection.

Even if Australia maintains its current position of not having a bill of rights, we need to assess the ways in which parliaments go about the protection of human rights. What is the best practice in this area in Australia and overseas? How do parliamentarians perceive their role in the protection of rights and what do they think that rights are? What are the most effective terms of reference for scrutiny committees? Do scrutiny committees have adequate resources to match the rhetorical commitment to parliamentary protection of rights? Would it be useful to require legislative drafters, government

departments or even Cabinet to take human rights into account and to explain when and why they act to limit rights?

These questions are important whether there is a Bill of Rights or not. Parliaments can be the most significant ally or enemy of human rights. It is far better for a parliament to refuse to pass legislation that abuses rights than for a judge to declare such legislation invalid. Parliament can nip rights abuses in the bud; judicial proceedings are often protracted and expensive and almost inevitably come after rights have already been abused. In addition, parliament is in a far better position than the courts to act proactively to enhance the protection of rights in Australia by, for example, creating a body such as the Human Rights and Equal Opportunity Commission or engaging in large-scale projects for the improvement of social or economic rights.

In the short term, it appears that a Bill of Rights is not on the agenda for the Commonwealth level of government; nor is it on the agenda in most states. Prominent parliamentarians of all political stripes appear content to defend the current parliamentary mechanisms as sufficient for the protection of human rights. But if they are to do so, we all need to take the central role of parliaments in that protection more seriously.

For this reason, in 2004 we began a project funded by the Australian Research Council to evaluate the role of Australian parliaments and the protection of human rights. This project involves assessing both the procedures in place and their effectiveness in practice. The outcome of this research should provide valuable information for the Bill of Rights debate. The adequacy of existing parliamentary mechanisms and the extent to which those mechanisms can be improved without resorting to a Bill of Rights is central to the question of whether a Bill of Rights is needed. And, whatever the answer to that question, the issue of how parliaments can most constructively and effectively participate in protecting and promoting human rights is one in which all who are represented in parliament should have an on-going interest.

CAROLYN EVANS and SIMON EVANS teach law at Melbourne University. They would be interested in speaking to anyone directly involved in parliamentary processes who has a view on these issues.

© 2005 CAROLYN EVANS and SIMON EVANS

email: c.evans@unimelb.edu.au

email: s.evans@unimelb.edu.au