Should New South Wales have a Bill of Rights?

Report of the Legislative Council Standing Committee on Law and Justice A NSW Bill of Rights: Report 17, October 2001

By Christopher O'Donnell

In October 2001 the Standing Committee on Law and Justice of the New South Wales Legislative Council released the report resulting from its inquiry into whether it is appropriate and in the public interest to enact a statutory NSW Bill of Rights and/or whether amendments should be made to the *Interpretation Act 1987* to require courts to take into account rights contained in international conventions. In a majority report, four members of the Committee found that it is not in the public interest for the NSW Government to enact a statutory Bill of Rights[1]. The dissenting committee member, The Hon. Peter Breen MLC, disagreed with this finding[2].

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The Committee's terms of reference were wide-ranging in some respects. Importantly, however, the principal term was limited to the question of whether a *statutory* Bill, such as those found in New Zealand and the United Kingdom, should be enacted. The suitability of a *constitutionally* entrenched Bill such as the United States Bill of Rights or the Canadian Charter of Rights and Freedoms was not referred to the Committee. Nevertheless, the Committee considered arguments on the relative merits of the statutory and the constitutional models, as a number of submissions argued strongly that a statutory Bill provided insufficient protection. The majority report clearly shows that it found the constitutional model even less acceptable than the statutory model.

The choice between these opposing models raises the central question of where to place the balance between parliamentary supremacy and the power of judicial review. Some arguments about the effectiveness of limitation clauses in protecting the supremacy of Parliament, such as the Canadian 'reasonable limits' provision, were considered. But the narrow reference on the question of a proposed model pre-empted a full debate on the question in evidence and submissions before the Committee. Because of its finding on the principal term of reference – whether there should be a statutory Bill of Rights – the majority of the Committee did not make findings on the nine terms of reference dealing with specific aspects of a Bill.

The majority of the Committee found the most significant arguments in favour of a NSW statutory Bill of Rights to be:

- at present there are inadequate protections of human rights for the community, due to gaps in current legislation and the uncertainty of the common law;
- at present there is inadequate protection of minorities in society in the absence of a Bill;
- a Bill of Rights would have educative value in political debates, thereby developing greater understanding of human rights within the community;
- there is a risk of international isolation of the development of domestic law in the absence of a Bill of Rights; and
- a Bill of Rights can facilitate a constructive dialogue between the Judiciary and the parliament.

The majority found the most important arguments raised by opponents of a Bill to be:

- a Bill would increase the power of the courts at the expense of Parliament, undermining Parliamentary supremacy and leading to a politicisation of the Judiciary;
- a Bill would increase uncertainty in the law because rights are widely defined, requiring judicial interpretation to give them content;
- there is no consensus as to which rights should be protected;
- a Bill could lead to an increase in litigation and associated costs;
- a Bill could be used to intrude on the activities of private businesses and associations; and
- a focus on rights can lead to a lack of acceptance of responsibilities.

Despite acknowledging the existence of examples of the neglect of human rights of minority groups and individuals and agreeing that the common law is not a sufficient protection of individual rights in the absence of legislative action, the majority of the Committee did not support the solution proposed for the principal reason that[3]:

> A statutory Bill could lead to some improvement in human rights protections in some instances. However, the cost of this uncertain marginal improvement is a fundamental change in the relationship between representative democracy, through an elected Parliament, and the judicial system. The independence of the Judiciary and the supremacy of Parliament are the foundations of the current system; the Committee is particularly concerned at the change over time that a Bill would make to these respective roles. The Committee believes a Bill of Rights could undermine the legitimacy of both institutions.

A significant underpinning for this belief is the majority's fear that increasing the scope for judicial decision-making into an area of broadly defined rights would lead to an increasing politicisation of the unelected Judiciary and increase conflict, rather than facilitate dialogue, between the Judiciary and the legislature. The majority expressed fears that a Bill would see politically active judges make decisions with a substantial impact on the allocation

of resources within the community. This type of resource allocation is something the Judiciary are neither trained nor elected to undertake.

The majority also found that an inevitable consequence of the enactment of a Bill would be increasing uncertainty in the law for an extended period as a result of 'speculative litigation' based on the Bill, particularly in the criminal jurisdiction. The problem of what rights to include in a Bill troubled the majority. Should a Bill of Rights be confined to the fundamental human rights enumerated in the 1948 United Nations Declaration of Human Rights? Or should a Bill more comprehensively include the civil and political rights set out in the 1966 International Covenant on Civil and Political Rights (ICCPR) or the economic, social and cultural rights declared in the International Covenant on Economic, Social and Cultural Rights (ICESR) of the same year? The majority chose not to answer these fundamental questions, concluding that[4]:

> Inadequacies in the protection of human rights may exist in New South Wales but the Committee believes the Bill of Rights as a solution raises more problems than it resolves. It is preferable that Parliament become a more effective guardian of human rights rather than handing over this role.

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A notable model for a 'minimalist' Bill with enhanced prospects of gaining community acceptance was proposed to the Committee by Professor George Williams of the University of New South Wales. Williams argued that a statutory Bill should initially only include those few rights for which there was widespread community support[5]. He suggested consolidating existing anti-discrimination legislation and other commonly accepted rights such as freedom of speech, freedom of association and the right to vote in a minimalist Bill. Rights affecting the criminal law, such as those in the ICCPR, could be deferred to ensure an initial Bill maximum support. Williams did not advocate the inclusion of economic, cultural and social rights in a Bill because of the difficulty of formulating these to avoid intruding into the role of elected governments in determining resource and policy issues. The majority's concerns about the impact of any Bill on the existing balance of power between the legislature and the Judiciary led it to reject even this minimalist and gradualist approach to enacting a Bill of Rights.

In his dissenting report Peter Breen MLC disagreed with the primary finding of the majority of the Committee that the public would not be served by a statutory Bill of Rights[6]. Two areas of particular concern to Breen were the lack of any effective existing provisions to ensure access to justice and the protection of minorities. He was also concerned about the level of protection from discrimination on the grounds of race. However, Breen's assertion that 'one right that the Australian Constitution does preserve (although hardly a 'human' right) is the right of state governments to pass racist laws'[7] is questionable in the light of the *Racial Discrimination Act 1975* (Cth) and the High Court's decisions in *Koowarta v Bjelke-Petersen*[8] and *Tasmanian Dams*[9]. Interestingly, Breen reports that the draft of the Australian Constitution prepared by Tasmania's Inglis Clark included twelve citizens' rights but that 'most of these rights had to be removed from the draft Constitution because they contradicted our racist factory and immigration laws, not to mention laws discriminating against Aboriginal people'[10].

Breen did not share the Committee majority's pessimism about the effect a Bill might have on the certainty of the law, the volume of litigation, the intrusion of judges into questions of resource allocation and tension between politicians and judges over their respective powers. His dissenting report includes some analysis of how the structure of a Bill of Rights might deal with these concerns[11]. Importantly, he notes that all of these concerns can be met by the inclusion of guidelines in a Bill of Rights requiring judges to refer back to Parliament any question of incompatibility between the objectives of the impugned legislation and its application in particular circumstances asserted to be contrary to rights enumerated in the Bill. In this way Parliament retains its primacy, but the ante is upped on the question of protecting rights.

The Committee referred to a number of overseas models where the potential conflict between judicial review and parliamentary supremacy has been resolved in favour of Parliament. The Canadian Charter allows the legislature, by express declaration in a statute, to override rights enshrined in the Charter. The extent of any override is confined, however, by the 'reasonable limits' clause, which guarantees the rights and freedoms set out in the Charter 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'[12]. There has been considerable judicial discussion of what constitutes 'reasonable limits' in the Canadian courts.

Another interesting compromise on this issue was achieved in the United Kingdom on 2 October 2000, when the British *Human Rights Act* came into effect. The Act was introduced by the Blair Government in 1997 for the purpose of incorporating into British domestic law the major rights and freedoms set out in the European Convention on Human Rights and Fundamental Freedoms (ECHR). The UK Government's acceptance of the compulsory jurisdiction of the European Court of Human Rights in 1966 had led to a string of embarrassing findings by that Court in the 1980s and 1990s that decisions of English courts were in breach of ECHR standards. The Blair Labour Government responded with a White Paper entitled *Rights Brought Home* and the *Human Rights Act* followed. The *Human Rights Act* preserves the validity of primary legislation but permits a higher court to make a declaration that the legislation is incompatible with ECHR rights. This then initiates a 'dialogue' between the Judiciary, Parliament and the Executive. A Minister may seek parliamentary approval for a remedial order to amend the legislation to make it compatible. Alternately, the executive arm of government may ignore the declaration of incompatibility.

Despite dissension on the fundamental question, the NSW Legislative Council's Standing Committee on Law and Justice made two unanimous recommendations. The first was for the establishment of a Scrutiny of Legislation Committee, similar to the Senate Scrutiny of Bills Committee established in 1981. The purpose of the recommended committee is to review systematically NSW legislation upon its introduction to

detect and alert the Parliament to possible breaches of individual rights and liberties, and to provide ministers with the opportunity to argue why they consider such breaches to be necessary. The second recommendation of the Committee is the amendment of the *Interpretation Act 1987* so as to allow judges to consider international human rights instruments in trying to understand legislation where the meaning is ambiguous. The majority of the Committee noted in relation to this recommendation that[13]:

> Judges currently have this option in any case under common law statutory rules of interpretation. This amendment provides parliamentary endorsement of the common law position.

Peter Breen MLC, while supporting the recommendation, made these comments[14]:

> I wonder about the value of such a provision in the absence of a Bill of Rights. What benchmark would the judges use to decide a question of human rights that was not part of domestic law for example? Many treaty laws are subscribed to by the executive government with little or no scrutiny by the legislature.

The Committee's report would appear to have moved the question of a Bill of Rights off the present NSW Parliament's agenda. Advocates for a Bill of Rights may now have to look to the federal sphere to achieve their aims.

1 NSW Legislative Council: Standing Committee on Law and Justice, Report 17 'A NSW Bill of Rights', October 2001, p 114.

2 Peter Breen's Dissenting Report is published as Appendix 9 to the Report.

3 Ibid p xiii.

4 Ibid, p xiv.

5 Ibid, p 43.

6 Ibid, Appendix 9, p 1.

7 Ibid, Appendix 9, p 3.

8 (1982) 153 CLR 168.

9 (1983) 158 CLR 1.

10 NSW Legislative Council: Standing Committee on Law and Justice, Report 17 'A NSW Bill of Rights', October 2001, Appendix 9, pp 3-4.

11 Ibid, pp 5-9.

12 *Canadian Charter of Rights and Freedoms*, section 1.

13 NSW Legislative Council: Standing Committee on Law and Justice, Report 17 'A NSW Bill of Rights', October 2001, p xiv.

14 Ibid, Appendix 9, p 1.

Recent High Court criminal cases

by Christopher O'Donnell

Adam v The Queen – [2001] HCA 57 (11 October 2001)

The appellant was charged with the murder of an off-duty police constable, David Carty. During the trial the prosecution led evidence from Thaier Sako, who had been wounded during the events that culminated in Carty's death. Three days after the murder Sako declined to be interviewed by police. He was charged with Carty's murder the next day. Six weeks later he requested an interview with police, which took place shortly afterwards. The interview was recorded and about a fortnight later the appellant was charged with Carty's murder. Some time afterwards Sako participated in another recorded interview with police and two weeks later the murder charge against Sako was dropped.

During the eighth week of the appellant's trial the prosecution granted Sako a conditional immunity from prosecution for any common assault or 'any associated offence' *except* murder in relation to evidence he might give in the trial. By the time Sako was called as a witness in the trial itself it was apparent that his testimony would be that his evidence of the events was based on what he had been told by others after those events. During his first full interview with the police he had stated that he was recalling his own observations. The trial judge granted Sako a certificate under s128 of the *Evidence Act 1995* preventing any evidence he gave from being used against him in a prosecution for offences other than perjury. He also allowed the prosecution to cross-examine Sako as an unfavourable witness pursuant to s38 of the Evidence Act. The trial judge admitted as evidence of the truth of their contents Sako's prior inconsistent statements to police during his first full interview.

A majority of the High Court, comprising Gleeson CJ, McHugh, Kirby and Hayne JJ. held that the prior inconsistent statements in the interview were properly admitted. Although the prior inconsistent statements were relevant to Sako's credibility they could also rationally affect (in at least some respects directly, and in others indirectly) the assessment of the probability of the existence of several of the facts in issue in the trial. Consequently they were relevant to issues apart from Sako's credibility. As the statements were relevant not *only* to Sako's credibility the credibility rule in s102 of the Evidence Act did not exclude the statements. As the evidence was relevant to Sako's credibility and to some of the facts in issue, it was relevant for a non-hearsay purpose. It therefore fell within the exception to the hearsay rule provided by s60 of the Evidence Act and was admissible as evidence of the truth of the contents of the statements.

In her dissenting judgment Gaudron J held that because the trial judge did not consider that Sako's prior inconsistent statements were potentially unreliable, his Honour erred in the exercise of his power to grant leave to the prosecution under s38 of the Evidence Act to cross-examine Sako. Further, because the grant of leave necessarily resulted in the admission of potentially unreliable evidence that could not effectively be tested, leave should not have been granted.