10 October 1997

The Research Director
Legal, Constitutional and Administrative
Review Committee
Parliament House, Brisbane Qld

LEGAL, CONSTITUTIONAL AND
ADMINISTRATIVE REVIEW COMMITTEE
13 OCT 1997

Dear Mr Laurie

This letter, and an accompanying document, are my submission in relation to your inquiry into the preservation and enhancement of individuals' rights and freedoms.

Your inquiry was a consequence of a report by the Electoral and Administrative Review Commission in 1993. I was, at the time the report was presented, Chair of EARC. Because of the long period since EARC ceased to exist, I believe I should provide your committee with further comments about the issue you are investigating.

I should say, however, that I believe the EARC report is the best answer to the issue you are investigating. While I would possibly put a different emphasis on one or two of the issues we covered in the report, I would resist changes to our recommendations on the basis that the commissioners, a diverse group of people, were able to agree unanimously to the recommendations. This is an important consideration, given the need for widespread support for recommendations such as those we made.

My primary submission is a speech I made in Melbourne last year, a copy of which I enclose. In it I argue that the rights of Australians will be best advanced, in the short to medium term, by the adoption by states of bills of rights of the kind proposed by EARC.

I have written a book which will be published early next year in which I devote a chapter to the same issue, in which I develop the same argument.

Could I add just a few comments on some of the questions raised in your issues paper (page 14), which I answer in accordance with the EARC report.

1. Yes, Queensland does need a Bill of Rights. The common law and statutory provisions do not provide sufficient protection.

2. None, other than changes to the Commonwealth legislation or (less desirably) a Commonwealth Bill based on the external affairs power.

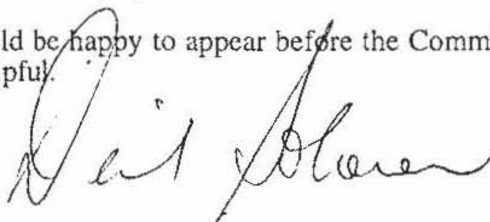
3. I support the EARC proposals.

4. Yes. See above.

5. As EARC proposed.

6. See EARC proposal.

I would be happy to appear before the Committee to give further evidence if this would be helpful.



DAVID SOLOMON

Boston, Melbourne, Oxford Conversazioni on Culture and Society

Should Australia and its States have a Bill of Rights?

The need for States' Bills of Rights

by

David Solomon

Contributing Editor, The Courier-Mail

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The story of the rise and prospective fall of the right to freedom of political expression in this country, as a right implied by the words of the Constitution and enunciated by the High Court, should teach us that we can't rely on the court system alone to provide us with an effective system of rights. While I am sure that the courts - particularly the High Court - will further develop some rights additional to those we already have, particularly legal process rights, there are considerable limitations to what the courts can achieve, even when they want to. I was tempted, when I was asked to make a contribution to this gathering, to discuss the way in which the High Court had developed the rights of Australians. Faced, however, with the knowledge that the Court may be reconsidering its decisions in the *Theophanous* and *Stephens* cases, and conscious of the fact that the composition of the Court now suggests it is less likely than it was a few years ago to explore the "rights" arena, I thought I should seek more fertile ground to explore.

You may gather from these introductory comments that I believe that developing our rights constitutes "progress". That is so, though I am a comparatively recent convert to the notion that we should have formal legislative or constitutional protections for our rights. I used to believe what we were taught in law school about the way the common law (and its development by our modern judges) provides us with protections comparable with those enjoyed by countries which have formal Bills of Rights. For the most part, this is nonsense. As we all know, the common law is no barrier to a government which controls Parliament and can pass legislation suspending or abolishing rights. Nor is popular democracy a bar to governments adopting such a course. Governments sometimes positively rely on oppressing minorities to increase their popularity - look at Queensland under Sir Joh Bjelke-Petersen.

My recent interest in the idea of a Bill of Rights resulted from my experiences in Queensland, when I was appointed as Chairman of the Electoral and Administrative Review Commission (EARC), one of the two post-Fitzgerald commissions which were established to try to ensure that Queensland was given better government and a corruption-free(!) police force and public administration.

When I joined EARC in June 1992, virtually my first task was to open the proceedings of a two-day seminar "A Bill of Rights for Queensland?" As I stressed at the time, and many times subsequently, there was a question mark in the title. We were asking a question and at that stage the Commissioners of EARC did not have a formed view on what the answer was (though our staff had very firm views).

EARC was required to consider the issue because it was part of the agenda laid down by Parliament in establishing EARC to examine and report on more than 20 matters raised specifically in the Fitzgerald Report. Curiously enough, the Fitzgerald Report did not refer directly to this issue, though the question of civil liberties was very much to the forefront in the report. However the legislation which created EARC and was the joint work of Fitzgerald and the National Party government of the day included as the first item in the schedule of matters which EARC was required to review:

"Preservation and enhancement of individuals' rights and freedoms."

That, of course, does not necessarily imply a Bill of Rights. By 1992 EARC had already made a series of recommendations falling under this heading, recommendations which had in fact resulted in positive, beneficial legislation. Not the least of these were

provisions in the Legislative Standards Act which required that laws considered by Parliament be drafted so as not to damage existing rights and freedoms of various kinds. But these standards are not mandatory. Ministers and the Parliament can ignore them and overrule them.

EARC's processes required us to invite public submissions and comments on submissions and to engage in a fairly vigorous debate with protagonists on every side by means of public hearings. Some people expressed concern that EARC had a secret agenda to undermine the rights of private property. We answered these people by pointing out that we were required to inquire into and report upon the rights of individuals, not on moves to remove or reduce existing rights. Property rights were among those rights which get less protection at the state level than at the Commonwealth level, as we were to point out in our report. There is no equivalent in most State constitutions of the provision in the Commonwealth Constitution requiring acquisition of property to be "on just terms".

Others raised concerns that we would undermine the protections given to Queenslanders by Magna Carta and the Bill of Rights of 1688-9. Alternatively it was argued that those English rights were all that we needed, and that they were in any event superior to any "international" rights we might want to impose on Queensland.

I should say I found this debate useful, even if it was frustrating dealing with people who did not want to listen to any argument which, if accepted, would have undermined their cherished beliefs.

The question of Magna Carta and the English Bill of Rights may be dealt with on the basis of Australian legal authority, and everyday logic. Both those great enactments are part of Queensland law, as a result of the Queensland 1984 Imperial Acts Application Act. But several Justices of the High Court have said there are no rights of any substance arising from Magna Carta. And the Bill of Rights was an assertion of parliament's rights against the Crown - the real basis of the sovereign British parliament. It had little or nothing to say about the rights of people vis-a-vis parliament. The gun lobby (even four years ago) sought to rely, in submissions to us, on the Bill of Rights because it states

"citizens which are Protestants may have arms for their defence suitable to their condition and as allowed by law"

Three points emerge just from the text. First, it is a right which seems to be given only to Protestants. Second, the right varies with the "quality" of the person - i.e. suitable to their social condition. And third, and most important, it is a right which can be regulated by parliament - and regulated virtually out of existence if that is the law made by parliament, as is proposed currently in Britain in the wake of the Dunblane tragedy, at least in relation to hand-guns.

That third point arises as the central issue in relation to the most respectable of the arguments which are put against a Bill of Rights - namely that Australia has no need for Bills of Rights: it is well served by the political process which ensures that parliaments do not infringe on individual rights and freedoms, and if they do, the people can change the government. The argument usually includes some mention of the importance of the common law, and of the judges in upholding our rights through the common law. The problem is that when parliaments do subvert common law rights, they rarely have to answer for their actions at the polls. At least in Australia, the hip pocket nerve is far more sensitive that a pricked conscience resulting from an injury to civil liberties.

As I mentioned before, these negative arguments were very useful. They certainly helped persuade me that a Bill of Rights was both necessary and desirable. But they also persuaded me that we should have a home-grown Bill of Rights, and not simply pick one up off the international shelf. That is important, because of the limitations on any Commonwealth legislation. I shall return to that point later.

I was particularly impressed by the need to take account of developments in Canada and New Zealand, rather than to begin work on the basis of a UN-type statement of rights, because we could also take account of the way the courts of those other Commonwealth countries had interpreted and applied their Charter and their Bill. In any event there are particular features of both the Canadian and New Zealand approaches which I think are a good approach and will be more acceptable to a wider range of people - including politicians. In particular there is the provision found in both those countries that rights are subject to such "reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic society." (see s. 1 of the Canadian Charter and s. 5 of the New Zealand Bill)

But on the more fundamental question of how well we had done without a Bill of Rights, one had only to turn to the reason we were engaging in this whole exercise. We were conducting our inquiry because Tony Fitzgerald QC had concluded that human rights in Queensland had not been protected by the parliament and the courts. Parliament itself had to be reformed, along with the public service. The problems in Queensland arose because the unicameral Parliament could not be trusted to protect the rights of individuals against the dictates of the government which controlled (rather than was controlled by) the majority of MPs. A Bill of Rights was needed to limit the powers of government and the parliament, to protect the rights and freedoms of individuals, because those rights could not be secured through the electoral process (which might also be corrupted by the politicians, as indeed it was) and parliament. Besides, the greater risk to individual liberties arises when the majority approves of the minority being deprived of their rights. Oppression by the majority will not often be reversed by parliament, before or after an election. Minorities need Bills of Rights even more than do majorities. The common law, the judges and for many centuries the House of Commons did nothing to right the wrongs done against Catholics and Jews in Britain - or Scots or Irish.

I should say something about the kind of rights which I believe should be protected. Essentially they are those which EARC proposed. Our draft Queensland Bill of Rights if adopted would constitute a recognition by the Parliament of certain fundamental rights and freedoms as being essential to the dignity of the human person. The Bill we put forward encompassed three groups of fundamental rights and freedoms:

(a) civil and political rights;

(b) economic and social rights; and

(c) community and cultural rights.

We proposed that only the enumerated civil and political rights would be enforceable against the State in the courts, while the other rights were stated as ideals which should be observed by the Queensland Government and the community generally.

Some of the enforceable civil and political rights included in the proposed Bill of Rights include:

(a) right to life, liberty and security of the person;

(b) right to legal recognition and equality;

(c) voting rights;

(d) right to privacy;

(e) rights related to the criminal justice process, including prisoners' rights, right to legal assistance and right to fair trial;

(f) victim's rights;

(g) freedom of religion, thought, conscience, belief, speech, association, peaceful assembly, movement and residence;

(h) freedom from discrimination, slavery and torture;

(i) medical rights;

(j) property rights;

(k) right to education; and

(l) children's rights.

The non-enforceable but interrelated essential economic, social, cultural and community rights include:

(a) right to adequate standard of living;

(b) right to work;

(c) right to legal assistance;

(d) right to adequate childcare;

(e) right to personal autonomy over reproductive matters;

(f) family rights;

(g) Aboriginal and Torres Strait Islander rights;

(h) authors' rights; and

(i) environmental rights.

One reason for setting out a Bill of Rights is to clarify what those rights are or should be. We proposed a series of measures which should apply while the Bill had only legislative (rather than constitutional) status, largely picking up provisions in the New Zealand Bill of Rights. For example we suggested that it should be mandatory that legislation inconsistent with any provision of the Bill of Rights should require a notice to that effect to be given to parliament by the Attorney-General.

At the conclusion of our report we referred briefly to some interim results of a survey conducted at the Australian National University on public attitudes towards Bills of Rights - and the attitudes of some elites as well. Professor Brian Galligan, one of the authors of the survey, has subsequently published a book called "A Federal Republic" in which he devotes a chapter to the Bill of Rights issue and to the findings of his survey. I would like to refer to some of the findings.

First, the survey found that 72.6 percent of respondents favoured a Bill of Rights, 7.8 percent were opposed, while almost 20 percent had no opinion. About 58 percent of the total sample thought the Bill of Rights should be or might be entrenched in the Constitution, while 10 percent favoured a legislative Bill of Rights only.

Among members of Parliament, those from the ALP were even more strongly in favour of a Bill of Rights (89 percent), while two thirds of National Party MPs and three quarters of Liberal MPs were against a Bill. Overall, a third of MPs were opposed to any Bill of Rights and another third would only support a legislative Bill of Rights.

Among lawyers, between a quarter and a third were opposed to a Bill of Rights.

These figures help explain why there are no Bills of Rights in Australia today.

The Hawke Labor Government did introduce legislation for an Australian Bill of Rights, but was unable to get it through the Senate. The contents of that legislation helped persuade me why Bills of Rights are more likely to emerge at State and Territory levels than they are at the Commonwealth level.

The central problem is constitutional. The only relevant constitutional head of power available for a legislative Bill of Rights is the external affairs power. (I leave aside, for the moment, the issue of a constitutional Bill of Rights, where there would be no restriction on content.) Thus the 1985 Commonwealth Bill explains that its objects include:

(a) to promote universal respect for, and observance of, human rights and fundamental freedoms for all persons without discrimination;

(b) to that end, to give effect to certain provisions of the International Covenant on Civil and Political Rights by enacting an Australian Bill of Rights ...

The Bill picks up most of the provisions of the rights enumerated in the International Covenant, which is printed as a schedule to the Bill.

This is not the place to analyse the provisions in the Covenant, which are broadly but carefully expressed to attract maximum approval in the international sphere. But its very nature suggests that it is built on compromises. It is not as simply worded, nor as definitive, as Bills of Rights which individual nations have drawn up for their own use - for example, as the New Zealand Bill of Rights or the Canadian Charter of Rights and Freedoms, both of which came into being after the International Covenant came into force. An Australian Bill of Rights - of the legislative variety - must be based on an international agreement if it is to be valid as an exercise of the external affairs power. Its provisions must not go further than those of the international agreement if they are to be valid, though not all the rights enumerated in the international agreement have to be included in the Australian legislation.

The States and Territories are not so restricted. They don't have to engage in the artifice of spelling out rights which have to accord with a pre-existing set of values determined by an international convention. They are free to determine for themselves what rights or freedoms they wish to assert for the benefit of their own peoples (so long as those rights are not inconsistent with Commonwealth constitutional or legislative provisions). They can pick up whichever rights and freedoms appeal to them, and phrase them to suit their own needs. They can experiment, for example, by exploring new rights, such as a right of the terminally ill to seek medical assistance to hasten their deaths, and the associated right of consenting doctors to provide the requested aid without penalty. The complication in the current debate over the Northern Territory's legislation governing euthanasia is that the Commonwealth Parliament has power under section 122 of the Constitution to override legislation made by the two Territories. It would have no similar power if a State were to pass legislation along the lines of the Northern Territory Act.

Aside from this very special case, proposals for Bills of Rights are currently circulating or are under active discussion in several States and Territories: in the Northern Territory, as part of the proposed constitution by which it hopes to attain statehood, in the ACT and in NSW and Queensland. EARC's proposed Bill of Rights (a copy of which is attached to this paper) will be considered next year by the Queensland Parliament's Legal, Constitutional and Administrative Affairs Committee. Despite the generally negative attitude of politicians towards Bills of Rights, as shown by Galligan, the Queensland Bill may not be killed off at that stage. In recent years the Queensland State Convention of the Liberal Party has passed a resolution supporting a national Bill of Rights, and parts of the EARC Bill were adopted from submissions made by senior officers of the Queensland National Party, including its current president, David Russell QC.

EARC proposed that the Queensland Bill of Rights should operate as ordinary legislation for a period of five years, after which the question of entrenching the Bill of Rights as part of the State Constitution should be put to the people of Queensland by way of referendum. A similar course was adopted in Canada, prior to the entrenching of its Charter. In New Zealand the Bill of Rights still has only legislative force (though the courts tend to treat it as very superior legislation). Strictly speaking, Queensland and other States could give a Bill of Rights constitutional status without resort to a referendum (in this regard the States are different from the Commonwealth) in reliance upon the Australia Act, section 6. As a matter of democratic propriety, however, it seemed to us that the States should not entrench further parts of their constitutions without the consent of voters. This principle seemed particularly applicable in relation to such fundamental principles as Bills of Rights, which are intended to limit the law-making powers of parliaments.

I haven't so far mentioned the States Rights argument. One of the conservative political objections to proposals for national Bill of Rights laws has been the fact that the intention of those wanting to create a Commonwealth Bill was to use the external affairs power so as to override and control State laws and limit the law-making ability of State parliaments. The Commonwealth's proposals were aimed not just at enhancing the rights of people in relation to Commonwealth legislation and executive actions. They would also put constitutional fetters on the States - and it was considered by many (perhaps with some justification) that that was their primary aim.

As we have seen in the euthanasia debate, the States Rights issue is turned on its head when the Commonwealth seeks to restrict a Territory's assertion of rights for its citizens.

One of the supposed advantages of the federal system is that it allows the different units of the federation to experiment with different political, legal and social solutions,

appropriate to their respective problems and political cultures. In the late '80s and early '90s, many Australian States experienced problems in their administrations, problems of corruption, lack of adequate control by governments of administration, and so on. We have seen the growth of independent commissions like the Criminal Justice Commission in Queensland, the Independent Commission Against Corruption in NSW, and various commissions in Western Australia. Governments have used developments in other States as the basis for developing their own initiatives.

The same is likely to happen in the human rights field, in my view. It only needs one State to tap the latent public support which shows up in Professor Galligan's survey, for the issue to sweep across other States and Territories. There is a strongly attractive political argument in favour of Bills of Rights along the lines that such Bills limit the powers of politicians. Politicians are aware of the fact that their powers would be curtailed by Bills of rights. As yet, Australian politicians have not been prepared to try to win electoral support by promising to embrace such a popular proposition. But it will happen somewhere in Australia, and when it does, the movement will take off in other States as well. And after it has been tried in the States, it will become acceptable at the Commonwealth level also.

But it can't happen at the Commonwealth level until there is bipartisan support for a change in the Constitution. That isn't going to happen easily or quickly. It won't happen just because all the countries with which Australia compares itself have adopted, or perhaps attached themselves to, bills of rights. Perhaps if the United Kingdom adopts its own Bill or Rights (as may happen under a Labour Government, with the encouragement of many Conservatives) it will be easier to persuade Australian politicians of the merits of a Bill or Rights.

More and more people in prominent places who used to be against the very notion of a Bill of Rights are changing their minds. About a year ago, for example, the Law Council of Australia helped sponsor a conference to promote the acceptance of a Bill of Rights. It has to be said that it did not carry all its members with it. But what is remarkable is that the Law Council was able to get away with such a radical (for Australian lawyers) proposal, without creating a storm in the profession. In 1988 it was thought quite revolutionary for Sir Anthony Mason to tell the Australian Bar Association that he no longer opposed the idea of a Bill of Rights. More recently, other judges and lawyers have gone so far as to advocate adoption of a bill of rights.

Nevertheless, achieving the necessary consensus about the desirability for a national constitutional bill of rights is going to take time. It will be much easier for a bill of rights to be achieved at the state level, and more productive.