

Title: A Bill of Rights for Australia?
Author: David M. Crawford
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Whether the Presbyterian Church's Church and Nation Committee should develop an opinion on the question of an Australian Bill of Rights has been on the agenda for some time. The seemingly endless deferrals "till the next meeting" can be largely explained by the fact that the issue of a bill of rights has not been an urgent issue within the Australian community.

However a search of the internet will reveal a sizeable number of articles that have been written in the subject from interested areas in the community, these making an appearance at regular intervals. This suggests that the matter is far from dead and could explode into public discussion at any time. This might arise from a possible change of government in 2001 or as a result of criticism from home and overseas for Australia's management of the refugee crisis.

For this reason, it should be regarded as wise for the Committee to formulate an opinion on the subject. This need not be supportive of either position. After all, it might be asked whether it is a question that rightly belongs in the domain of a church's social action program.

However, our experience with the Republic debate of 1999 should have taught us that it would be wise to have on hand material which can be published on short notice in such a way that Presbyterians can be pointed by their Church and Nation Committee to information that will assist them to make an informed decision.

Is it an issue for the Church to involve itself?

The church is a body that can potentially have its rights subjected to attack, whether from ignorant or prejudiced responses from the public, from the mass media or from interest groups. We take our rights for granted but they are not guaranteed under any law that can not be taken away, even if only in part, by a vote of one of the legislative bodies around the country.

The scenario may seem to be unlikely but a local council dominated by a factional group could enact council ordinances making it very difficult for local Christian congregations to operate as a worshipping or as an evangelizing community. At least one state government has found it easy in the past to pass a law against gathering in a public place to worship.

As well as the church's own interests, church people, professionally and casually, are frequently doing things in the service of others or in collaboration with others. This demands respect for the rights of all parties and consequently the extent to which people's rights are or can be limited, for any reason and by any agency, is a matter of interest to church people.

Of considerable significance is the church's role as a moral force for good in the community. Issues frequently explode into the news which require an ethical or moral perspective. Examples of current issues which might be seen as affecting accepted rights are ethnicity (aboriginal issues, crime and racial groups),

mandatory sentencing (state and territory legislation, getting tougher on crime) and refugees (refugee centre conditions at home and overseas, queue-jumping, boat people, immigration). The answer then to the question above is a profound *yes!*

What are the arguments for and against a Bill of Rights

The following table sets out the basic arguments for and against the establishment of a Bill of Rights. No attempt has been made to draw a conclusion. They can only be conclusive in the mind of the reader. The arguments are substantially based on those set out by Mr Justice Michael Kirby in his paper [A Bill of Rights for Australia – But Do We Need it?](#) originally given in 1994 to the Queensland Chapter of the Young Presidents Association. The address can be found at www.lawfoundation.net.au/resources/kirby/papers/19971214_austlaw.html on the internet.

However many other commentators and authorities have been read and their ideas have been incorporated into the material.

Arguments Against	Arguments For
<p>Our democratic tradition is sufficient. Parliamentary sovereignty should be maintained as the foundation of government in Australia. To enact a bill of rights is to pass a vote of no confidence in this principle. There is no basis for such a vote. Any government enacting laws eroding human rights is likely to be voted out after their term of office.</p>	<p>Democracy can be defective. Parliaments can respond to community prejudices and impose an autocracy for its term of office. Furthermore they have to enact a large range of complex legislation and breaches in human rights can be overlooked. Even the independence of the judiciary can be over-ridden.</p> <p>A bill of rights would limit these undemocratic trends.</p>
<p>It would make our courts into political forces. A bill of rights would transfer legislative authority from elected governments to a non-elected body of judges of the High Court. The experience of the USA, where its Supreme Court judges are not bound by past decisions of the court, is that the appointment of judges would become a political act.</p>	<p>The Law is political whether we like it or not, although not party political. It is the third branch of government. It already determines where power lies e.g state or federal parliaments. A bill of rights would require judges to defend human rights as its contribution to the process of government</p>
<p>By defining rights, a bill of rights would effectively limit them, creating problems for the High Court later when it seeks to interpret the confined wording of the articles in the bill.</p>	<p>A bill of rights would force action on issues that parliamentarians won't act on. Governments tend to avoid the difficult problems leaving them to be solved by the courts.g Mabo and Terra Nullius. One of the lessons of the US is that the issues of racial discrimination, electoral inequality, etc. would not have been addressed at all without the Bill of Rights.</p>

<p>It ignores the different needs of regions and contributes to centralization. A bill of rights would enforce uniformity throughout Australia making it difficult for states to enact legislation in response to the desires of their people. Many reforms nation-wide have resulted from initiatives taken by state parliaments.</p>	<p>It would set up dynamics that would guarantee equal rights to all Australians. A bill of rights would protect people from localized, i.e. state or municipal, legislation that would derogate from their rights.</p>
<p>It overlooks new problems that may arise in the future. One of the lessons of the US is that articles contained in a bill of rights can become out of date creating problems e.g right to bear arms.</p>	<p>In a changing society, it is necessary to set down in constitutional law the basic principles that represent the foundations of the unity of the nation.</p>
<p>It sets into concrete the attitudes of the past. It is unwise to commit future generations to a bill of rights that is designed for today.</p>	<p>A bill of rights would recognize the broad values of our society that are worth preserving and which would be seen as enduring through time.</p>
<p>A bill of rights will not be a sure guarantee against intrusions into fundamental rights. In the US the Bill of Rights did not protect the rights of supposed Communists against Senator McCarthy, or the coloured people of the Southern states</p>	<p>A bill of rights would effectively require each new act of parliament or local government to pass scrutiny as to how it affects community rights <i>before</i> it was enacted into law.</p>
<p>Common law is enough to guard individual rights. The record of protection for individual rights in Australia is good one. There is even provision for courts to have regard for international jurisprudence on human rights. There is no reason to believe that this won't continue.</p>	<p>A bill of rights would compensate for the limitations of common law, the most significant of which is that it is subservient to statutory law. Parliaments are sovereign and can enact laws which restrict human rights irrespective of common or international law.</p>
<p>A better way to protect rights is to enact specific laws which provide all the necessary detail to avoid ambiguity. This makes it easier for the courts in their role of interpreting legislation.</p>	<p>A bill of rights would put the values held by our society and the rights that emerge from them above party political debate</p>
<p>A bill of rights would erode the effectiveness of our current, successful constitution as it operates within a mature, parliamentary, constitutional democracy.</p>	<p>A bill of rights accepted and endorsed by the people sets a democratic foundation for both common law and statutory law. Both powers will be required to operate within the will of the people.</p>
<p>The existence of a bill of rights has the potential to change the focus to the infringements of rights rather than on whether justice needs to be done. In the US and other countries with a bill of rights, failure to follow procedures intended to ensure that criminals know their rights can enable them to be let off scot-free.</p>	<p>It would have the effect of empowering the powerless throughout Australia. These may include aborigines, the poor, the unemployed, women, gays, ethnic minorities, the physically and mentally handicapped, the mentally ill and children. These people have all too often seen the legal and government system as instruments of oppression.</p>
<p></p>	<p>Among western nations Australia is virtually alone in not having a bill of rights, a totally inconsistent situation in the face of Australia's largely enviable record on human rights.</p>
<p></p>	<p>It makes the education of school children for citizenship easier.</p>

What kind of Bill of Rights?

The US Model: The US Bill of Rights is popularly regarded as *the* model for a bill of rights. It is the example used by both proponents and opponents of a bill of rights. It is an example of one which has been incorporated into the national constitution and therefore able to protect human rights by its ability to override legislation.

However opponents point to the fact that it failed to protect the rights of people caught up in the McCarthy witch-hunts of the 1950s, that it failed the descendants of slaves for over a century and a half, and that it is failing those who want to limit the availability of guns in the community. They point out also that it has better served the interests of big business against employees, consumers and the public interest.

This may be true in parts but proponents argue firstly that it should be possible to develop a constitutional bill of rights by learning from the mistakes that were made in the American model. Besides, they say, the constitutional model is not the only one that can be adopted for a bill of rights.

The Canadian Model: Canada passed a bill of rights in 1960 as a legislative act, not as part of its constitution. In 1982 it chose to incorporate a Charter of Rights and Freedoms into its constitution but with two special features.

- It includes an instruction that rights may be limited under reasonable laws that *can be demonstrably justified in a free and democratic society*.
- It allows for certain rights to be directly overridden where parliament expressly states that its law is to operate notwithstanding the particular right.

Within this model, the affected right is not removed from the constitution and thereby ensures that the operation of any acts of parliament passed under the exception provisions remain under the scrutiny of the constitution.

In addition Canada has developed a sophisticated process for scrutinizing all bills before enactment which ultimately leads the Attorney General's Department to advise the parliament that the bill conforms to the Canadian Charter of Rights and Freedoms.

To date Canada's model appears to have been accepted as successful and has been adopted by other countries such as South Africa. It is also possible to argue that Canada's example of allowing for an evolutionary process for the constitutional entrenchment of a bill of rights is worth considering.

The New Zealand Model: New Zealand has developed a bill of rights which is basically a legislative model but it incorporates the special features mentioned earlier as part of the Canadian model.

The Need for Action in the Area of a Bill of Rights

Some form of Bill of Rights for Australia is overdue for the following reasons.

- The trend in Australia is for rights to be whittled away despite the fact that international law is being incorporated more and more into domestic law through anti-discrimination legislation. Examples include mandatory sentencing, the treatment of aboriginal issues, the treatment of illegal immigrants

and refugees, anti-union legislation, the action of the Australian government to override the Federal Court's decision to allow single women access to IVF treatment. Naturally opinions vary on these issues and some Christian opinion will always look with suspicion at perceived moral or gender questions. However it is arguable that we best protect our own rights when we defend the rights of others even when we disagree strongly with what they believe.

- Common law is not sufficient to protect human rights. In the words of former High Court Judge, Lionel Murphy, *The common law does not say we have freedom of speech. It says that we may speak as we wish so long as what we say is not unlawful. The common law does not say that we have freedom of assembly. It says that people may not be prevented from meeting together unless the law forbids that meeting.*
- The enacting of a bill of rights will advance our international image on human rights which has been subject to considerable international criticism on many of the issues mentioned earlier. This is ironic as Australia's record on human rights is probably the equal of the best in the world. Australia is one of the few countries which has not enacted a bill of rights. In the words of Sir Anthony Mason, *Australia's adoption of a bill of rights would bring Australia in from the cold, so to speak, and make directly applicable the human rights jurisprudence which has been developed internationally and elsewhere.*
- Australia's ambivalence on human rights is weakening our international standing. Australia was one of the first signatories of the Universal Declaration of Human Rights yet we have no bill of rights of our own. We expose ourselves to criticism even from countries which have passed their own bill of rights yet have largely ignored it in dealing with their own people.

Whatever the reasons and whatever the final outcome, the process of development of a bill of rights for Australia should be one which involves all levels of Australian society and should not be left to constitutional lawyers and politicians. What is necessary is that the final outcome should be accepted by all in the community and should be a means by which the public generally can be educated as to their rights and the Australian values that underlie them.

A Bill of Rights is not, on its own, a guarantee of the protection of our rights as Australians. Perhaps more than anything else this guarantee will be found in the enduring attitudes and values of the Australian people, formed over the long period of our history, often after great struggle, agony and sacrifice. However a bill of rights will put those values and notions into words which can be taught, even memorised, and will have the ability to arouse and inspire Australians today and in the future.

The major question for debate is what form the bill of rights will take.