

The Australian Bill of Rights Bill 2000

An Overview

Background

In 1973, Lionel Murphy introduced a proposed bill of rights in the Commonwealth Parliament. It was based on the *International Covenant on Civil and Political Rights* ('the Covenant'), to which Australia is a signatory. That bill lapsed when the Parliament was dissolved in 1974. In 1983, Gareth Evans again attempted to implement the Covenant, overseeing the drafting of another bill of rights. That Bill was given Cabinet approval but was never introduced into Parliament. After the 1984 election, Lionel Bowen replaced Gareth Evans as Attorney-General. He had the bill redrafted to water down its legal effect, and it was introduced into Parliament in 1985.

Labor's *Australian Bill of Rights Bill 1985* ('the ABR 85') encountered strong opposition in the Senate and from certain community groups. Ultimately, the Government abandoned the legislation.

The *Australian Bill of Rights Bill 2000* ('the ABR'), soon to be introduced by the Australian Democrats, is based on Labor's ABR 85. However, the legal effect of our proposed Bill has been significantly enhanced to ensure that it is effective in protecting fundamental rights. The ABR 85 did not apply to the laws or actions of the States and left the common law largely untouched. Our ABR has a much broader operation. It applies to the laws and actions of State, Federal and Territory Governments, to the common law and to delegated legislation.

The Bill of Rights

The Bill of Rights itself is a schedule to the ABR and consists of 32 articles prohibiting the infringement of various civil and political freedoms. It is closely modelled on the ABR 85 which, in turn, was modelled on the International Covenant on Civil and Political Rights.

Limitations on Rights

Article 3 of the ABR sets out the permissible limitations on the various rights and freedoms established by the bill. The Covenant itself contains some limitations on the various rights in the name of national security, public safety, public order and public health. These limitations are carried through into the ABR.

Other rights are entirely unqualified and appear to be 'absolute'. Some are stated very broadly, such as the right to freedom from arbitrary or unlawful interference. In all cases, the rights are subject to 'such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society.' This mirrors the provision in the 1982 Canadian Charter of Rights and Freedoms. There are a number of conditions that must be fulfilled for such a limitation to be permissible:

- it must be 'reasonable';

- it may *limit*, but cannot wholly *deny*, the right in question;
- it must be ‘prescribed by law’: a specific law is required;
- the justification must be ‘demonstrable’: a court must be satisfied that the limits *are* justified; and
- the justification must be compatible with the basic values of a ‘free and democratic society’.

Rights Against Whom?

The Bill protects individuals against violations of their rights arising from the actions of governmental institutions or from the impact of State, Federal or Territory laws, the common law or delegated legislation.

As it stands, it does not affect the rights of individuals in relation to each other except when such rights flow from an impugned law. There is a case for extending the operation of the bill so that it applies as between private citizens. Constitutional law and human rights academic George Williams points out that there are more private police (such as security guards) than public police in Australia. Why should fundamental rights be enforceable against one but not the other? Williams suggests that the right to privacy may be in greater peril from corporations than from government, indicative of an emerging need for a broader approach to rights protection.¹

This would be quite a significant change to the Bill. As it stands, it is one of the important principles of the Bill that it is a shield and not a sword. It protects against governmental excesses by restraining the government in various ways. It does not create personal rights to be asserted against other private citizens. This is consistent with the approach taken to establishing rights protection regimes in other parts of the world. As Williams states, it may be the case that in “the longer term fundamental freedoms should also be guaranteed in specified contexts against non-governmental action.”

Effect in law

Interpretation

When constructing Commonwealth, State and Territory legislation the courts will give preference to a construction that would result in the legislation not being inconsistent with the ABR, or would further the objects of the ABR.

Invalidity

Any existing legislation that is inconsistent with the ABR (despite attempts to construct the legislation consistently) will be invalid to the extent of the inconsistency. This provision will have a delayed effect. State, Federal and Territory governments will have three years to examine their laws for compliance.

Any future legislation that is inconsistent with the ABR will be invalid to the extent of the inconsistency unless it contains an express declaration that it is to operate notwithstanding the bill of rights. This will take effect immediately.

¹ Williams, G, *A Bill of Rights for Australia*, University of New South Wales Press 2000

The Human Rights and Equal Opportunity Commission

The Bill confers upon the Human Rights and Equal Opportunity Commission various functions relating to the ABR. The Commission may inquire into any act or practice of any governmental agency or authority that may infringe the ABR. It also has promotional and educational functions.

Conclusion

If passed, the proposed Bill would be the biggest single step forward in the protection of fundamental rights that this country has ever seen. It would protect a broad range of fundamental rights recognised in international law. Those rights would not only be protected by force of law, but any alleged abuses would also be subject to investigation by the Human Rights and Equal Opportunity Commission.

It remains to be seen whether the ABR is capable of attracting the necessary political support. It is certainly more ambitious than the failed 1985 Bill. The watered down ABR 85 did not take the critical (but politically difficult) step of making the rights enforceable at a state level. This must be done to establish an effective regime for the protection of fundamental rights.