

Parliaments and Bills of Rights: How can parliaments adapt their forms and practices to the new era of Bills of Rights?

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Introduction

The enactment of Bills of Rights poses new challenges and opportunities for parliaments. These challenges and opportunities were the subject of the Parliaments and Bills of Rights Workshop, held at Parliament House on April 24, 2009. The workshop, sponsored by the Parliamentary Studies Centre and the Centre for International and Public Law, both at ANU, gathered speakers to assess how parliaments in different jurisdictions have adjusted to working with human rights instruments. While the National Human Rights Consultation is creating debate about the advantages and disadvantages of Bills of Rights, this workshop sought to look beyond these more normative questions and assess how Bills of Rights have in fact affected parliaments' work. Given that the Terms of Reference to Fr Frank Brennan's consultation committee expressly provide that options for human rights reform should preserve parliamentary sovereignty,¹ the role of parliaments in advancing rights contained in such bills is highly pertinent.

The Comparative Experience of Parliaments under Bills of Rights

Session One of the workshop saw Professors George Williams and Brian Galligan provide an overview of the issues to be addressed. Sessions Two and Three respectively consisted of presentations about the experience of Bills of Rights internationally and domestically.

Participants in the second and third sessions of the workshop varied in their evaluations of bills of rights in different jurisdictions. Hilary Charlesworth presented the experience in the Australian Capital Territory as demonstrating that a Bill of Rights can lead to a 'fruitful dialogue'. Professor Charlesworth identified a range of mechanisms by which parliament is made responsible for human rights issues, including the requirement of a statement of compatibility, the work of the Scrutiny of Bills Committee, the requirement for the Attorney-General to table audit reports by the Human Rights Commissioner and the requirement of

¹ National Human Rights Consultation, *Terms of Reference* (2008) http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference (accessed June 29 2009).

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government departments to report on their compliance with the *Human Rights Act 2004*. Some of these mechanisms have been more effective than others, however. For example, Charlesworth noted that while the Attorney-General's requirement to table reports from the Human Rights Commissioner has caused the ACT Government embarrassment on two issues, the reports tabled by ACT Government departments have not had a great effect on bureaucratic awareness and implementation of human rights.

Brian Costar reported on developments in Victoria following the implementation of the *Charter of Human Rights and Responsibilities Act 2006*. Professor Costar's assessment was tempered by the recognition that the *Charter* has only been in full operation since the beginning of 2008 – a short period for assessment. While Costar reported the existence of a range of institutional mechanisms such as compatibility statements and Scrutiny of Acts and Regulations Committee (SARC) procedures, his description of the scrutiny procedure for *Police Integrity Bill 2006* cast doubt over the ability of SARC to conduct human rights scrutiny effectively in a highly politicised and partisan context. Despite this, Costar argued, the biggest impact of the *Charter* to date has been on the legislature, rather than the judiciary. While the *Charter* has been considered in only 35 cases, and in all of these cases, it was only an ancillary consideration. By contrast, in 2008 alone, the SARC conducted *Charter* scrutiny for 109 bills.

Australian Bills of Rights are more recent phenomena than their international counterparts in Canada and New Zealand, jurisdictions discussed by Professors James Allan and Richard Mulgan respectively. Professor Allan argued that the Canadian experience since the introduction of the *Canadian Charter of Rights and Freedoms 1982* demonstrates the futility of attempting to create human rights 'dialogue' where the courts are involved. This scepticism was echoed by Brian Galligan and Senator Brandis in their presentations. For Allan, the expansion of judicial power that has occurred in Canada under the *Charter* has seen parliament locked out of determining many of the most important social issues, which give rise to reasonable, but fundamental disagreement. While the *Charter* has frequently been invoked by the judiciary to strike down provincial and federal legislation, the federal government has never exercised its right under s 33 of the *Charter* to 'override' the judicial decision and provide that legislation should operate notwithstanding the court's ruling. In practice then, section 33 is unusable and is a 'structural flaw' in the *Charter*, Allan contended.

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Richard Mulgan was more positive about the New Zealand experience, although the differences in these instruments make direct comparison difficult. Importantly, the New Zealand *Bill of Rights Act 1990* contains no provision enabling the Court to strike down legislation. Professor Mulgan noted various ways in which parliament addressed human rights concerns in its work: by the requirement of the Attorney-General to table reports of inconsistency and the use of these reports by parliamentarians and by parliamentary select committees. In three quarters of cases where reports of inconsistency are made, the bill is amended or dropped from the legislative agenda. In the remaining quarter of cases, the bill is passed irrespective of the legal opinions issued by the Ministry of Justice. However, there is no committee in the New Zealand Parliament that is tasked solely with scrutiny of bills for compliance with the *Bill of Rights Act*. Despite this, there was evidence that the opinions and human rights concerns more broadly were used and respected in political discourse in New Zealand, Mulgan suggested.

Simon Bronnitt presented the *Charter of the Fundamental Rights of the European Union* as a very different, yet nonetheless, potentially effective human rights instrument. The EU Charter, unlike the other human rights acts discussed at the Workshop, is not a legally binding document. Instead, it combines elements of the *European Convention on Human Rights* with some codification of European Union practice on social rights (for example the rights of workers) as these have developed over time. Professor Bronnitt noted that while the EU Charter does not have the legal force of a treaty, it may nonetheless have an impact on the law making processes of the EU, as could be demonstrated by a recent anti-terrorism measure, which displayed sensitivity to the human rights dimension.

Themes and Areas for Future Research

Throughout the workshop, several gaps were identified in existing human rights legislation. The first of these was the requirement to provide reasons for compatibility or incompatibility. In the ACT, there is no requirement to provide reasons for compatibility, but as Professor Charlesworth noted, these are often provided in Explanatory Statements. She further reported that since the 2008 election in the ACT, the Parliamentary Agreement between the ACT Labor Party and the ACT Greens imposes a more onerous obligation on the Government to provide reasons. In New Zealand, reasons must only be provided where legislation is incompatible with the Bill of Rights. The Victorian Charter, implemented more recently, was

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framed in the context of these institutional experiences, Williams suggested, and therefore contains a requirement for reasons for both compatibility and incompatibility to be provided.

A second gap noted arises in relation to delegated legislation – neither the ACT nor NZ instruments requires compatibility statements or scrutiny of delegated legislation, which Charlesworth noted may lead to anomalous results. Further, major amendments to legislation can be made after they have been introduced to Parliament, which may alter or increase the level of human rights scrutiny required. None of the bills of rights discussed at the workshop contains a provision to deal with this situation. Richard Mulgan demonstrated how significant this may be, citing an example of a NZ bill which was amended only after introduction to provide for retrospective effect for a criminal law matter.

While these gaps result from inadequacies in the *text* of Bills of Rights, other challenges arise out of political practice and partisanship. Williams noted that parliaments' workloads are frequently high in volume and speed. In particular, where policies are of high priority to the executive government, such as the Northern Territory Intervention in 2007, or anti-terrorism legislation, parliaments may be placed under pressure to pass bills quickly, allowing little opportunity for scrutiny. Participants also debated the adequacy of current parliamentary standing orders. George Williams argued that Standing Order 24 of the (Commonwealth) Senate Scrutiny of Bills Committee is broad and vague, contributing to the Committee's ineffectiveness. Senator Brandis contested this characterisation, pointing out that Standing Order 24 makes reference to various specific matters to which the Committee should have regard when discharging its scrutiny function. For example, the Committee must consider whether bills trespass unduly on personal rights and liberties, insufficiently define administrative power or inappropriately delegate legislative power, among other matters.

Beyond the contrasting experiences of parliaments working with new Bills of Rights, a broader methodological problem associated with determining the consequences of bills of rights, was raised. To what extent can we assess changes in parliamentary behaviour or political debate, following the introduction of bills of rights? More than one participant used anecdotal evidence to suggest that changes had occurred or not occurred. However, it is clear that more research is needed to investigate these claims. For example, Galligan suggested that Victorian public servants regard the *Charter* compatibility process as just another 'box to tick', whereas Williams referred to the extensive use of the *Charter* in reframing the

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Victorian *Mental Health Act 1986* and in the area of human services. Likewise, Mulgan gave anecdotal evidence of the changes to public discourse in NZ, following the Bill of Rights. More specifically, participants sought to identify the impact of the judicial review component of Bills of Rights. Would a Bill of Rights without a mechanism for court review still be effective? Williams argued that the experience of the Queensland *Legislative Standards Act 1992* demonstrates that without enforceability, charters seeking to change parliamentary behaviour are ineffective. Charlesworth supported this contention, with the suggestion that the threat of enforceability has been an important factor in the ACT, even if few matters are actually litigated. This question is clearly part of the larger question of measuring the impact of the human rights instruments.

Participants also sought to characterise the quality of parliamentary deliberation about rights. The Canadian *Charter* scrutiny process has been criticised by Janet Hiebert, among others, for its tendency to focus on ‘*Charter* proofing’ legislation – that is, to anticipate the likely judgment of the Supreme Court, rather than to engage in independent, political debate about the human rights aspects of legislation.² James Allan argued that ‘*Charter* proofing’ was one of the main impacts of the *Charter*. In Canada and New Zealand, such scrutiny occurs through legal advisers in the Ministries of Justice. While there was strong agreement that, as Galligan put it, rights should not only be ‘lawyers’ business’, the extent to which scrutiny in parliamentary committees, in the ACT, Victoria and United Kingdom is qualitatively different is unclear. Another theme about the nature of debate was the role of international agreements and standards. Both the ACT and Victorian documents draw heavily on the *International Covenant on Civil and Political Rights 1966* (ICCPR). For Charlesworth, having an international ‘benchmark’ is an important standard for parliaments. However, Williams suggested that international standards alone are insufficient – a domestic legal document increases the legitimacy of human rights arguments in parliament. Simon Bronitt’s description of the EU Charter as having codified some existing EU law raised the question of the extent to which an Australian Bill of Rights should reflect Australian understandings of rights, as opposed to being derived solely from international instruments. Where international legal standards are introduced into domestic legislation, parliaments may have a role in mediating Australian understandings of international law.

² Janet Hiebert, *Charter Conflicts: What is Parliament’s Role?* (2002); Janet Hiebert, ‘Parliamentary Bills of Rights: An Alternative Model?’ (2006) 69 *Modern Law Review* 7.

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While institutional design was the main subject of the workshop, several participants also noted that parliamentarians of high calibre, who are themselves committed to the values of human rights, are essential for effective human rights scrutiny. Senator George Brandis argued that in federal parliament, commitment to human rights values among members of parliament is widespread and that human rights considerations are debated extensively. This deliberation occurs in the Senate, Senate Committees and more particularly, in forums such as party room meetings and cabinet. Brandis cited the active work of the Attorney-General Committee within the Coalition Government, which debated the impact of anti-terrorism legislation on human rights with Cabinet at length. However, the 'closed-door' nature of this deliberation again raises the methodological question identified: how can the existence of a human rights culture be measured and debated?

Another non-institutional element considered was the capacity of Bills of Rights to involve the broader community in the process of government. Reference was made to the ability of parliament to act as an 'interlocutor', as Charlesworth expressed it, between the community and government. Williams suggested that by locating human rights debate in parliament, rather than courts, disadvantaged community groups are more likely to have their voices heard. Charlesworth pointed to examples of community consultation on human rights relevant legislation in the ACT, for example on the *Children and Young People Bill 2007*. And in New Zealand, Mulgan suggested that the legal opinions of the Ministry of Justice have been adopted by civil society groups, and resulted in an elevation of public discourse. Pragmatically, Brandis noted that parliamentarians remain accountable at the ballot box, where the public has an opportunity to express their views. This question, like that of assessing the impact of Bills of Rights, can clearly only be answered following more empirical research. The importance of community participation may be underscored by the belief advocated by Williams, that the most important human rights issues in Australia today are welfare rights. Arguably, debates about positive rights to education, health and other services necessitate community participation, which may be an important task for parliaments in working with Bills of Rights.

Finally, it could be argued that, in general, the experiences of parliaments working with human rights instruments are marked by a disparity between the processes and expectations set down in the formal, legal instruments and parliamentary practice as it operates. In Canada,

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section 33 of the *Charter* fundamentally alters the balance of power in favour of the legislature, and away from the courts. Yet, as Allan noted, it has never been used by federal parliament – in practical terms, it is a dead letter. A recurring issue in Charlesworth's presentation was the changes brought about in the ACT, not by any amendment to the *Human Rights Act*, but by the Greens-ALP Memorandum of Understanding, which has forced the Government to alter its human rights scrutiny practices. This is perhaps unsurprising – the existence of important conventions that do not have their origin in the text of the Constitution is a hallmark of all the jurisdictions discussed at the workshop.

However, the disparity between constitutionally entrenched processes and parliamentary practice under Bills of Rights may have a more specific cause – the degree of respect and authority which judicial opinions on human rights matters command. While human rights deliberation requires the balancing of rights against other political priorities and resource availability, matters which seem well-suited for parliamentary deliberation, experience shows that it is difficult for parliaments to 'stand up' to courts, as James Allan expressed it, even when they have a legal entitlement to do so. A question from the audience, noting the low public confidence in elected politicians may hold part of the answer to this question. However, it is clear that in order for parliament to discharge its functions under the new human rights instruments, (and to be an effective rights guardian more broadly), parliaments must reclaim some of the moral authority to interpret and decide on rights, which has been ceded to the judiciary.