

‘Beyond Australia’s First Bill of Rights: engendering public debate’¹

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The experience of the ACT Human Rights Act may be salutary for rights proponents in Australia in many ways other than the study of its text, its provisions, its interpretations and its developing jurisprudence. I want to investigate the broader context within which to consider the impact and importance of the ACT Human Rights Act. More specifically, I want to consider the question of engendering public support for explicit rights-protection mechanisms. This includes considering the framework within which we might be able to have a public debate, and existing sentiments and knowledge within the community which can be drawn upon.

The first element of this debate is clarifying the issue of whether a bill of rights may lead to better rights protection than currently exists within Australia. To what extent is it the case that the Australian system of government as a whole is able to protect rights in the absence of an explicit bill of rights? Is the traditional argument² that the doctrines and practices of responsible government and a separation of powers—in which the former maintains accountability of the executive to the parliament and in turn to the people, and maintains a transparent legislative process, and the latter ensures that the judiciary can act as an independent arbiter of government action—a viable one?

This is, after all, the first and primary argument that appears in the federal government’s National Framework for Human Rights’ National Action Plan, released in December of last year.³

Considerable evidence exists to suggest that the current system is far from effective. Some of the reasons for this include the increasing involvement of arguably less

¹ Paper presented at ‘*Assessing the First Year of the ACT Human Rights Act*’, Australian National University, Canberra, 29 June 2005.

² Galligan, Brian 1995. *A Federal Republic*. Cambridge University Press, Melbourne, p. 135.

³ Commonwealth of Australia (CofA) 2004. *Australia’s National Framework for Human Rights: National Action Plan*. Attorney-General’s Department, Canberra, p. 5.

accountable non-government actors in carrying out delivery of public policy⁴, and an increased ability for politicians to deceive the public in relation to ethical issues and even abuse their ministerial responsibilities without being held accountable in the forms of a ministerial resignation or an election loss.⁵

Furthermore, significant shortcomings in rights protection are evidenced in specific areas in the Australian contemporary environment. These are too numerous to specify, but include restrictions on indigenous land title and consultation with indigenous peoples over land, for which the United Nations has criticised Australia⁶; ongoing discrimination against same-sex couples including recent amendments to the *Marriage Act*; the mandatory detention of asylum seekers including children⁷; and government attempts to amend the *Sex Discrimination Act* to allow discrimination on a currently prohibited ground, that of marital status.⁸

In the longer term if these rights issues are to be addressed, better protections are required including at Commonwealth level. Furthermore, the ACT model simultaneously overcomes some other important objections to a bill of rights; namely that a bill of rights would render many decisions on important political issues the prerogative of the courts instead of elected legislatures, and that a bill of rights locks communities into definitions of rights that may be unable to change over time to reflect changing community values. It does so with its preservation of parliamentary sovereignty, a model which retains flexibility while simultaneously setting a standard against which governments may be held accountable.

⁴ Vromen, Ariadne & Gelber, Katharine 2005. *Powerscape: Contemporary Australian Political Practice*. Allen & Unwin, Sydney, pp. 130-135.

⁵ Uhr, John 2005. *Terms of Trust: Arguments over Ethics in Australian Government*. UNSW Press, Sydney, pp. 121-122.

⁶ Vromen & Gelber, *Powerscape*, p. 167. These are omitted from the National Action Plan's coverage of how the Australian legal system recognises native title (CofA, *National Action Plan*, p. 41).

⁷ Gelber, Katharine 2005. 'High Court Review 2004: Limits on the Judicial Protection of Rights', *Australian Journal of Political Science*, Vol. 40, No. 2, pp. 311-316. The National Action Plan's reference to this, and to the controversy surrounding the powers of indefinite detention of asylum seekers whose applications have been denied but who cannot be returned to their place of origin, in the section discussing the robustness of prohibitions on arbitrary arrest and detention, is simply to note that 'the High Court has recently found that detention may continue until removal is reasonably practicable' (CofA, *National Action Plan*, p. 83).

⁸ Johnson, Carol 2003. 'Heteronormative Citizenship: The Howard Government's Views on Gay and Lesbian Issues', *Australian Journal of Political Science*, Vol. 38, No. 1, pp. 49-54.

All this lends itself to the answer that a bill of rights—when qualified in particular ways—might be a better way to protect rights in the Australian system of government, given the weaknesses that exist in the systems currently in place. If the answer to this question is at least a qualified yes, then how might the debate be carried forward?

It seems clear that the context in which this debate is to be held in Australia is one of generally low levels of public knowledge about the specificities of our system of government. Yet at the same time, there is reason for some optimism regarding public support for ideals that relate to rights, in particular for Brenton's notion of 'democracy as an ideal'.⁹

In 1994 the Civics Expert Group undertook a large-scale survey, as an element of their task which was to 'improve Australians' knowledge of the system of government in Australia so that their rights and responsibilities as citizens are understood'.¹⁰ Their survey showed that only 18 per cent of Australians had some understanding of the contents of the Constitution. In terms of how informed people felt about the rights and responsibilities of Australian citizens, 27 per cent felt moderately informed, 33 per cent felt a 'little bit' informed, and 28 per cent had only a vague idea. These are clearly quite low figures in relation to knowledge of the system.

Yet the responses towards the ideal qualities people felt they wished to see in their community were more positive, albeit inconsistent. 26 per cent of people perceived that the main rights and responsibilities of citizens related to civil rights, over a quarter. Yet nearly as many (21 per cent) said the main rights and responsibilities of citizens related to obeying the law. A further 10 per cent thought freedom was important (a figure higher than those who thought being patriotic was the main right and responsibility, at eight per cent).

It was interesting that in relation to questions not obviously rights-based but with implications for rights issues, the response rate could be quite high. For example,

⁹ Brenton, Scott 2005. 'Public Confidence in Australian Democracy', *Democratic Audit of Australia*, May, p. 6. Available <http://democratic.audit.anu.edu.au/BrentonConfidenceMay05.pdf>

¹⁰ Civics Expert Group 1994. *Whereas the People: Civics and Citizenship Education*. Report of the Civics Expert Group, AGPS, Canberra, pp. 130, 133, 155, 156.

38 per cent believed that care and consideration for others was the main attribute of being a good citizen (in contrast to the higher figure for rights and responsibilities).

Ten years later a new survey was conducted. One might reasonably expect that the results of this survey—undertaken ten years later and following seven years of a new federal government—might reveal quite different results. Yet in some ways perhaps they didn't.

The Australian Survey of Social Attitudes is a new biennial survey beginning in 2003 which provides data on the social attitudes and behaviour of Australians and is based on a mail survey of 5 000 Australians aged 18 and over.¹¹

Some results of this study are revealing.¹² When asked what they thought the main aims of Australia should be for the next ten years, and given a choice between maintaining order, giving people more of a say in government decisions, fighting rising prices, or protecting freedom of speech, 13.6 per cent of respondents ranked freedom of speech first.¹³

Moreover, respondents in the ACT consistently ranked rights-type issues more highly than other states in the survey. In relation to this question, 21 per cent of ACT residents listed free speech as their first choice, the highest of any state or Territory, with both Victoria and Queensland having 15 per cent of people who ranked it first.

In a related question, when asked to choose between a stable economy, progress towards a less impersonal and more humane society, ideas counting more than money and fighting crime, 21 per cent of people voted the rights-type question first, ranking moving towards a less impersonal and more humane society highest. This is over one-fifth of respondents. Young people were more likely to rank it highest with 28 per

¹¹ Wilson, Sean & Gibson, Rachel. 2003a. *Australian Survey of Social Attitudes, Version A*. The Australian National University, ACSPRI Centre for Social Research. Wilson, Sean & Gibson, Rachel 2003b. *Australian Survey of Social Attitudes, Version B*. The Australian National University: ACSPRI Centre for Social Research.

¹² I would very much like to thank Ariadne Vromen for her assistance with processing original data from the Australian Survey of Social Attitudes 2003. The data were derived from questions A9, A11, C3, D1 in Wilson & Gibson 2003a and question E5 in Wilson & Gibson 2003b.

¹³ The answers with the highest results were maintaining order (36.5 per cent) and giving people more say (37.5 per cent), with roughly equal numbers ranking these issues first.

cent of 18-34 year olds ranking it first, compared with 14 per cent of those aged 65 and over. Again the ACT ranked highest of all states and Territories, with 35 per cent of respondents choosing progress towards a less impersonal and more humane society.

These questions, while not producing a majority, do indicate significant support for the kinds of ideals associated with rights protection. Keep in mind also that respondents were asked to rank these ideals against big-ticket items like a stable economy. In this light, the results can be seen as very positive from a rights-protection point of view. They indicate a latent but strong level of support for placing ideals such as a more humane society and freedom of speech highly.

Some questions in the survey considered more specific rights issues. For example, respondents were asked to say whether they agreed or disagreed with the statement that ‘censorship of films and magazines has no place in a free society’. Overall, 23 per cent of respondents either agreed or strongly agreed. Among 18-34 year olds this figure increased to 29 per cent (among those aged 65 and over it was only 22 per cent). Again the ACT was the most liberal, with 29 per cent agreeing or strongly agreeing.

Respondents were asked to say whether they agreed or disagreed that the law should recognise same-sex relationships. A total of 44 per cent agreed or strongly agreed with this proposition. Among 18-34 year olds the figure was 49 per cent (but among 65 year olds and over it was only 19 per cent). The ACT again had the strongest result, with 48 per cent agreeing or strongly agreeing.

On these questions which relate to specific human rights issues, then, the results are (perhaps surprisingly) optimistic. While still falling short of absolute majorities, significant numbers of Australians have clearly moved position on the question of recognition of same sex relationships, and a decent proportion are cautious of censorship also. This indicates a significant level of support in the community for the protection of some specific rights.

Combining these results with the knowledge gained from the ACT Bill of Rights Deliberative Poll produces even more interesting results. In the ACT Deliberative Poll it was found that, given an opportunity to learn more about the issues at stake, a significant number of people moved from being undecided or against a bill of rights to supporting the idea. Furthermore, the deliberative poll produced ‘major improvements’ in political knowledge amongst its participants.¹⁴ This means that it might be possible to move from minority—but significant—levels of support on specific issues to a higher level of support, *if* the context within which information is provided to Australians about a bill of rights is both well informed and well targeted.

So the question of targeting the information is important. In terms of how to target such information, further information from the Australian Survey of Social Attitudes again points the way. Australians responded most positively of all to ideals-type questions in the survey. Fifty-eight per cent of respondents felt very or somewhat proud of Australia’s record in fair and equal treatment of all groups in society. In relation to their pride in how democracy works, the figure rose to 78 per cent. This means that there is a 20 point discrepancy between pride in democracy, and pride in fair and equal treatment. This indicates an awareness among a significant section of the community—1 in 5 according to this survey—that fair and equal treatment is not always forthcoming in the Australian system.

Brenton’s own analysis of the Australian Survey of Social Attitudes dovetails with these findings. He has suggested that most of the survey respondents did not express confidence in the federal parliament, defined in terms of their evaluation of the effectiveness of the institution in performing its designated role. As an institution, they found the parliament ineffective, although this analysis didn’t clarify what an ‘effective’ parliament might have looked like. By contrast, Brenton cites the same results I have here—that most respondents were ‘at least ‘somewhat proud’ of the way democracy works in Australia’. Brenton argues this indicates a differentiation between the ideals of democracy and its institutions. To the extent that it is possible to argue that protection of fundamental rights is an ideal towards which we can work,

¹⁴ ACT Bill of Rights Deliberative Poll 2002. *The ACT Deliberates an ACT Bill of Rights: A Territory Deliberative Poll Report*, December 11, pp. 2-3. Available <http://www.jcs.act.gov.au/prd/rights/documents/DPFINAL.doc>.

this indicates a possibly relatively high level of support for rights ideals, if not at this time the institutions which might take action to secure them.

Taken together, what we appear to have is quite a strong level of support for ideals, combined with a low level of trust in existing institutions to maintain and embody those ideals. We also have a significant, although still lower than a majority, support on specific rights questions and simultaneously an awareness that not all people are treated fairly and equally in Australian society.

In addition, results are most positive in the ACT. The ASSA survey from which many of these results have been drawn was undertaken in 2003, the year before the *Human Rights Act* 2004 was enacted. These consistently more positive results (from a rights perspective) in the ACT mean that Australian Capital Territorians already possessed more beneficent attitudes towards rights issues than other States and Territories before the bill of rights came into being. It is possible that these attitudes may have contributed to creating a political climate in the ACT within which a bill of rights was able to be enacted, although other speakers at this conference have emphasised that the process of enacting the bill of rights was led in this case by the parliament (and in particular by the Chief Minister). A causal relationship between public attitudes and the enactment of the bill of rights in the ACT has clearly not been established by these very limited results, but they do at least indicate that if one Territory can produce a climate within which positive results are achievable, perhaps other States and Territories might be able to follow suit.

In addition to this we know that provision of information to the public can enhance the public's understanding of what a bill of rights entails, its potential pitfalls and its potential benefits, if that information is accurate. But these survey results indicate that more than just accuracy is needed—they indicate that pitching the rights debate to draw on the existing strengths within public opinion in relation rights-type principles and ideals might be a way of building broader community support for a bill of rights.

These findings give us indications about where and how any campaign for bills of rights in Australia could be pitched to engender and create further public support. Some people are concerned about rights protection, but many are not confident that

existing institutions and systems can deliver on their expectations. There is an awareness of lack of rights protection in some areas, but simultaneously a desire to see Australia as a democratic and ideal place to live. Generating the kind of leadership required to move the debate forward will be complex. But building on the idealism and critique of existing institutions, while promoting rights as central to the democratic ideals which many Australians hold dear may be a way forward in this debate.

This framework for pitching the debate to engender public support also links with a final point I want to consider about the context within which bills of rights in Australia are debated. The federal system in Australia may from some perspectives be seen as hostile to principles of rights protection, because it allows for inconsistencies which, when read against universal human rights principles, are not justifiable, it allows for responsiveness to law-and-order campaigns by state politicians, and it produces a lack of centralised consistency and control. However federalism can also be seen as providing advantages for rights protection, due to its institutionalisation of greater checks and balances on governmental power.¹⁵

The ACT experience gives us the ability to test the waters, to experiment with the generation of public support for a bill of rights through regional governments, in anticipation of a federal bill at some point in the future. Federalism allows for diversity and experimentation. This can be used to the advantage of rights advocates who can point out that the alleged difficulties and constraints which are said to arise from a bill of rights do not always arise, and that where they do these may be addressed and thus be seen as constructive as they assist in clarifying how a bill of rights might work, and what its implications might be. This may assist in reducing fears about the unintended effects of a bill of rights.

This also enables us to overcome the shortcoming of not having an institutional framework like that enjoyed by, for example, the UK. The UK has had the advantage for many years of being subject to the jurisdiction of the European Court and the European Convention on Human Rights, which provided a framework they could

¹⁵ Galligan, *A Federal Republic*, pp. 158-159.

easily incorporate. In Australia the closest we come to an international framework is the Optional Protocol to the ICCPR. However, experience has shown us that even adverse findings against Australia within this system lack enforcement and traction within the Australian governmental processes.¹⁶

The Australian federal system and its opportunities for diversity and experimentation may provide us with an institutional framework that allows the Australian debate to move forward in a unique way. They may allow us to build domestic support for explicit rights protection, within a context that overcomes the lack of an external institutional framework which we can clearly adopt, and which simultaneously informs the Australian public around human rights standards. The procedures here are clearly different, but the experimentation allowed by federalism provides room for movement. Perhaps the introduction of state and territory-based bills of rights in Australia could provide an institutional framework within which to develop the consciousness of what a bill of rights entails, the gains it may offer, and any potential pitfalls it may have.

In sum, the context within which debates on further bills of rights in Australia is to move forward is complex but achievable. There is room for political leadership in the debate which points out the areas in which rights protection in Australia can be improved. Such leadership also needs to take on board both existing lack of information within the community, and concurrent support for democratic ideals and principles which make people proud in their own system of government. The protection of human rights needs to be seen as integral to this.

¹⁶ Williams, George 2004. *The Case for an Australian Bill of Rights: Freedom in the War on Terror*. UNSW Press, Sydney, p. 10.