



**The Law Society
of New South Wales**

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10 August 2006

Mr Paul Lynch MP
Chair, Committee on the Office of the Ombudsman and the Police Integrity Commission
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Lynch

Re: Inquiry into NSW Police counter-terrorism and other powers

Further to the evidence provided to the abovementioned Inquiry on 14 June, I write to respond to the two questions taken on notice.

The Law Society has been advocating for a Bill of Rights for NSW for over 10 years. By way of background information I have enclosed an article written by members of the Law Society's Human Rights Committee published in the Law Society's Journal in August 1995 entitled "*Why are we talking about A Bill of Rights.*" Further to this, the Law Society's Council endorsed the draft Australian Charter of Rights and Freedoms Bill on 30 November 1995, and in 2000 the Human Rights Committee made a strong submission to the Legislative Council's Standing Committee on Law and Justice Inquiry into a NSW Bill of Rights.

In relation to the question regarding security authorization, under s 26ZG(6) of the Terrorism (Police Powers) Act 2002 (NSW) lawyers do not require security clearance to give advice or act in relation to the preventative detention order. However, if the person is charged with a terrorist offence (terrorist offences are contained in the Commonwealth Criminal Code Act 1995) the lawyer would then require security clearance from the Commonwealth Attorney-General's Department. Under s 39 of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), the Secretary of the Attorney-General's Department can give notice that security clearance is required in a federal criminal proceeding because disclosure of particular information in the case may prejudice national security.

I hope this information is useful. Please don't hesitate to contact myself, or Government Relations Adviser, Claire McKendrick on 99260218, if we can be of further assistance.

Yours sincerely,


Pauline Wright
Chair, Law Society Criminal Law Committee

Why are we talking about a bill of rights?



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Why are we talking about A BILL OF RIGHTS?

By Susan Gibb & Kate Eastman

Kate Eastman is a solicitor in Sydney. Susan Gibb is a solicitor with Freehill Hollingdale & Page. Both are members of the Law Society's Human Rights Committee.

BILLS OF RIGHTS TEND TO PHASE in and out of fashion in Australia. Really the question is why are we talking about a Bill of Rights again -- or now.

On each side, the advocates are familiar with their respective cases,¹ although there have been some converts, such as the former High Court Chief Justice Sir Anthony Mason and Justice Kirby.² Anti-Bill advocates quote the former High Court Chief Justice Sir Harry Gibbs: "If a society is tolerant and rational, it does not need a Bill of Rights. If it is not, no Bill of Rights will preserve it".³

The pro-Bill advocates talk about the educational value of a Bill of Rights, its function in deterring future legislative interferences with individual rights, and its role in establishing the relative positions (or supremacy) of parliament and the judiciary.⁴ Justice Wilcox reviewed the arguments for and against a bill of rights, and how a bill might work in his book *An Australian Charter of Rights?*⁵. There is little point re-visiting that debate here.

The High Court is busy finding various implied rights in the Commonwealth Constitution, even if the Court has tended to call these fundamental freedoms or implications arising from the Constitution⁶ and imply limits "derived from the liberal-democratic nature of the polity".⁷ Various writers, including Justice Kirby have already pointed out that given enough time, the High Court will find an entire Bill of Rights and render the debate completely academic.⁸ The question is why are we talking about legislating for a bill of rights?

Public opinion is shifting in favour of a bill of rights, although it has not yet consolidated behind any particular draft or style. A survey reported in July 1993 by Professors Fletcher and Galligan identified substantial support for a bill of rights -- by virtually everyone except NSW solicitors who were reported to be only 49 per cent in favour as opposed to 62 per cent of NSW barristers and 72.5 per cent of NSW citizens unchallenged by legal qualifications.⁹ The real debate is when will a bill of rights be enacted and what will it say?

Governmental and judicial actions have already laid the foundations for the statutory, or legislatively implied, recognition of rights. The Commonwealth Government has acceded to the (First) Optional Protocol to the International Covenant on Civil and Political Rights which permits people to complain to the United Nations' Human Rights Committee about interference with their rights as set out in that Covenant.¹⁰ Nick Toonen demonstrated that the Protocol has teeth when he challenged the Tasmanian criminal prohibitions on homosexual activity.¹¹ Chief Justice Brennan (then a puisne justice) emphasised the "powerful influence" of a convention which declares the existence of universal human rights in *Mabo*.¹² Earlier this year, the High Court indicated that the teeth are sharp by pointing out that ratification of a convention is a positive statement that the executive and its agencies should conform with that convention.¹³ A bill of rights has been introduced in the ACT Assembly.¹⁴ Committees of the Victorian Parliament have been considering whether to have a bill of rights since at least 1986.¹⁵ Queensland is considering whether to introduce a bill of rights and the Queensland Electoral and Administrative Review Commission proposed a Bill in August 1993.¹⁶ New Zealand enacted a bill of rights in 1990.¹⁷

Increasing public awareness of the availability of 'appeals' to the United Nations Human Rights Committees puts pressure on both the New South Wales Government and the Commonwealth Government to ensure that their respective houses -- and legal systems -- are 'in order'.

What is a bill of rights?

It is easier to say what a bill of rights is not. A bill of rights is not legislation applying to, or for the benefit of, any selected class or group of people. A bill of rights is not a means of 'equalising', promoting, or even protecting, particular groups --

be they men, women, heterosexuals, homosexuals, Karaites, members of a particular political party or refugees. It is not a means of redressing past wrongs. It is not a basis for a reconciliation.

A bill of rights applies to people generally -- and to each individual equally, regardless of whether that individual is subject to any special vulnerability. It therefore identifies the minimum legal protection required to ensure equal treatment before law.

A bill of rights articulates the balance between the exercise of power and protection of individuals from the arbitrary (or abusive) power by setting basic rules governing dealings with individuals in their public (including professional) lives, or official dealings. But a bill of rights does not intrude into the 'personal' realm or govern inter-personal relationships.

In a way, a bill of rights is the ultimate lawyer's law. A bill of rights postulates a world governed by laws and populated by individuals legislatively defined to be equal and equally protected against the abusive (or arbitrary) exercise of power. In reality, a bill of rights is not such a panacea and must be complemented by specific (or 'special') legislation protecting and promoting the interest of the especially vulnerable. This latter is the province of discrimination legislation and the like.

The proposed bill of rights which accompanies this commentary deals with all decision-makers -- governmental or not. Many decisions directly affecting individuals' day to day life in New South Wales are decided by non-government bodies, pre-eminently financial institutions and superannuation, insurance or retail outlets.¹⁸ All decision-makers, governmental or not, need to be conscious of their power relative to their individuals with whom they deal. A simple, and effective way both to remind them of their relative power and to curb any tendency to abuse that power is to set some ground rules about the things they may consider and the ways they must deal with individuals.

The proposed bill of rights may reduce or restrict some things that decision-makers like to think of as their 'rights'. A bill of rights will not, for example, assist you to exercise your right to employ only white adults between 25 and 40 years of age. If you are an employer, you may think that it your 'fundamental right' to choose the age and colour of your staff. The object of a bill of rights is to prevent employers from assessing would-be employees on the basis of their age or colour. Perhaps that is an interference with the employer's rights. Your right to swing your arm is equally restricted by my standing next to you.¹⁹ By choosing to recognise certain 'universal human rights' as Justice Brennan described them in *Mabo*, we accept that these should be set above the 'right to bigotry' which the common law permitted by default.

What are rights?

Maurice Cranston suggested that human rights are by definition those things of which we may not be deprived with what he described as a grave affront to justice.²⁰ In some ways that definition does not help. But it does set a flavour -- even if it has a 'looks like, feels like' element. Justice Toohey has resorted to notions of the "fundamental principles of justice" which acknowledges resonated with echoes of natural law theories.²¹

There was a time when we identified rights by invoking notions of British tradition and resorting to evocations of natural law and theistic notions of humanity. International law mediated through the United Nations has developed more secular -- and less ethnocentric -- ways of identifying rights: treaties and declarations. The *High Court* has concluded that certain treaties declared "universal fundamental rights"²², and found "universal human rights" in the International Covenant on Civil Rights and Political Rights among other places.²³ However, they are sourced, rights are universal in two ways. They apply equally to -- or against -- all members of the society. So far as this can be identified, they reflect the 'core' values of the society.

A bill of rights does not have to be limited to the rights recognised internationally. There is nothing to stop Australia, or New South Wales, taking some initiative. So the proposed bill of rights includes freedom from discrimination on the basis of a sexual orientation (assuming that this involves consenting adults) despite doubts about formal international recognition of this.

Rights are frequently confused with aspirations (such as the 'right to have children'), special entitlements because of particular circumstances (such as the 'right to holiday bonus payments' -- a right of spectacularly little value to the unemployed) or statements of political belief, desire or conviction, such as the 'right to marry'. Aspirations may underlie rights and to a very large degree both inform and shape them. However, there is a difference between what a person would like (such as a holiday bonus and children), with what a person wants (such the services of the best criminal QC in the country to defend a criminal charge), and what a person is, or should be, entitled to -- or to which a person has a right (such as equal treatment before the law and a fair hearing before a court).

Individual rights tend to merge into statements of political belief or conviction and collective rights, such as the 'right to self-determination' or right to 'clean air' or 'clean water'.²⁴ Rights, or statements of collective entitlement, of this class, are generally called or derived from economic or social rights. They may be declarations of human rights, such as in declarations of the rights of indigenous people and the Draft Declaration of Principles on Human Rights and the Environment.²⁵ It may be possible to provide them with statutory recognition. They are nonetheless important; and in some cases may be more important, particularly in ensuring equality of access and outcome. But they cannot be asserted by any one individual against a particular decision-maker in relation to any particular transaction or decision. Civil rights are ultimately distinguished by their somewhat prosaic, or practical, focus on matters directly affected by procedure and process: the stuff of decision-making rather than goals.

Consequently the class of 'rights' in the proposed bill of rights has been limited to matters that apply universally

(regardless of membership of any particular social group or social status) and can be applied to -- and enforced against -- particular decision-makers in relation to particular decisions.

The proposed bill of rights therefore excludes aspiration style rights such as a 'right to marry', which is of relatively limited use unless at least one other person agrees. Even then it may be rather difficult to enforce when that person has a change of mind.

What are duties?

There is nothing novel about the notion of a duty. Every lawyer knows that duties are things that we can be forced to do: the flip-side of rights. This is particularly important in the context of a bill of rights. If we say that a bill of rights contains 'a person's rights', then that person must be able to force others to deliver the things which it purports to confer. If that is so, the bill of rights must impose duties.

Ignoring for the moment the debate about whether duties create rights, or rights impose duties, we know that unless there is a relevant enforceable duty, there is no legally enforceable right. In practice, the value of any right depends entirely on the capacity to require others to act to grant or protect it. If no-one else can be forced to co-operate, all we have is a privilege, or at best, an immunity arising from other people's inertia.

There is only one real test as to whether you have a legal right: can you act against anyone who prevents you from exercising your right to require them to permit you to exercise that right? If you cannot compel a person to deliver, your right is of very little practical worth. In reality, it is simply a statement of political entitlement.

Suppose, for example, you claim the right to exit the state of New South Wales. This right is set out in clause 40 of the proposed bill of rights. Suppose you live in Sydney but want to move to Perth. Suppose further that you owe your newsagent for your newspaper account and your newsagent tries to stop you leaving Sydney. If you cannot prevent the newsagent from stopping you leaving, your right is of no force. You can complain vigorously, but you are not going to get to Perth. Is there a circumstance in which anyone opposing your exit may be prevented from stopping you leaving? The answer to that depends on whether there is a duty not to prevent you leaving. This is simply a constitutional version of the usual contractual question.

If there is no duty to let you exercise a right to leave, and the way is barred, you have no grounds to complain about being unable to exit. (Of course you may have some specific cause of action for the way your exit was barred -- such as for false imprisonment.) The proposed bill of rights, however, includes an express duty in clause 27: the duty of decision-makers to permit a person to leave New South Wales. You therefore may bring action against anyone who makes a decision which prevents you from leaving Sydney. The right is secured by the ability to bring that action.

Why does this bill of rights talk about duties?

The proposed bill of rights is formulated in terms of duties and recognising corresponding rights because, ultimately, it is easier to analyse what our rights should be by first deciding what others should be required to do: it concentrates the mind.²⁶ We are less inclined to be precise about the things that we want.

The proposed bill of rights imposes duties to make it quite clear what we expect decision-makers to do when they are making decisions about individuals. This simultaneously draws our attention to the need to balance between our individual wishes and the needs (or requirements) of our society. If employers should not be prevented from considering your gender when they employ you; perhaps you should not have a right to be free from discrimination on the grounds of gender.

Imposing duties alone might be sufficient. Part 4 of the proposed bill of rights, which discusses rights and freedoms is tautological once the duties have been ascertained. However, bills of rights do have an educational and persuasive role. You may know that others have a duty not to interfere with your freedom of religion. But that alone may not satisfy you that you are entitled to choose your religion. In order to have that assurance, you need to be affirmatively assured that you have a right to your freedom of or from religion. The assurance does not change your legal position: it may change your perspective.

The same, of course, is true of listing duties. As a matter of law, it may follow from the existence of your right to freedom of religion that others cannot interfere with your freedom of religion. But the express statement of the duty not to interfere with your religion is, in a political sense, more inclined to focus others' attention on their actions from the beginning, rather than leaving it until you challenge others ex post facto about some alleged interference.

Fixing the focus of the bill of rights by duties also shapes the content of the bill. We talked earlier about the difficulties of identifying the relevant duty for the ACT Bill of Rights' 'right to marry'. It is even more difficult to frame the duty which would match a 'right to life'. It could be a duty not to take life, or not to decide to take life. That could be a statement of the usual criminal law, and therefore would need to be hedged around with all the exceptions and qualifications which attend the law of murder, manslaughter, accidental death, etc. Alternatively, it is an affirmative duty to protect and preserve life, which runs into debates about a duty to rescue, suicide, abortion and euthanasia. However, there is no particular need to enmesh a bill of rights in these debates.

Why does breaching a duty nullify a decision?

There has to be some consequence of breaching a duty: otherwise no-one will take it seriously. However, a bill of rights is simply one of the constitutional documents defining the balance between our society's rights and individual rights, by setting the decision-making framework. A bill of rights therefore should not -- and cannot -- replace the existing law or create a code of rights of personal action.

The possibility that one's decision will be void if made improperly tends to focus the mind. This is all the more compelling where statutory power is exercised to something which, but for that statute, would be actionable by the individual affected. If you do exercise the statutory power improperly, and your exercise of power is nullified by a bill of rights, you lose your statutory protection from suit by the individual affected.

In many cases, annulment is the most effective solution to a wrong decision. Sometimes annulment has other consequences. For example, it may remove a statutory protection from suit. Suppose, for example, that you are detained in circumstances which breach the "cruel and unusual" prohibitions in the proposed bill. If the bill of rights operates to annul any authority to treat you like this, the statutory protection for that treatment also will be nullified: you were detained under law -- but the treatment was not pursuant to a statutory power. So the statutory bar to tortious, or even criminal, action drops away and you may be able to sue for the unlawful treatment -- say for negligence or assault.

Why have a bill of rights?

The opponents of bills of rights are right in many ways: the common law has provided considerable protection to individuals -- even if only by default. However, there is no certainty about default protections. Nor do default provisions provide any coherent or comprehensive protection. Quite apart from issues of adequacy, common law protections have an element of the chancellor's foot about them. Not all judges are equally persuaded of the importance of individual rights. Finally, there is always scope for debate about rights created in court rooms removed from public debate or parliamentary deliberation.

If we want to specify rights with any precision -- or at least certainty -- we need to do this by legislation.²⁷ If we want a single code identifying those rights, we need a statute which is not bogged down in administrative detail and mechanical process requirements. If we want those rights to embody our society's views, we need the imprimatur of the Parliament. Bluntly put, that is the case for a bill of rights. It is equally the case for differentiating between a legislative statement of decision-making framework -- a bill of rights -- and the legal prescription of individuals' rights or remedies against those who injure them.

Is discrimination legislation enough?

No: Discrimination legislation is aimed to provide specific protection to particularly vulnerable people or groups and providing for remedies where rights have been infringed. A bill of rights identifies the rights and duties for which remedies are or should be provided.

A bill of rights may operate to annul a decision to fire you because of your gender -- because of the duty not to make decisions by reference to gender. That protects -- and promotes -- the right to be free from discrimination on the grounds of gender. It may set the basis for an action for unfair dismissal because of the legislative prohibition on the discrimination.

A bill of rights identifies the decision-making structure applying to all of us but does nothing about the injury which you suffered when you lost your job. That is the province of discrimination legislation, and rights of action for unfair dismissal and the like. A judgement about your rights may be made by abstract -- or socially universal -- criteria. We can decide whether the discrimination was lawful without having to work out what should be done to compensate the victim. Judgements about remedies need very specific and individual treatment. This is provided by detailed regimes such as anti-discrimination laws.

Why have a NSW bill of rights?

New South Wales has long prided itself on its leadership in anti-discrimination and other human rights legislation, but it is in grave danger of being left behind as the judiciary and other state legislatures rush ahead -- not that that is necessarily a bad thing. Nonetheless, two of the independent members of the NSW Legislative Assembly have announced their commitment to enactment of a bill of rights,²⁸ and the composition of the Assembly is finely balanced. So the odds are that a bill of rights will come before in New South Wales Parliament within the next couple of Parliamentary terms.

A bill of rights is simply a constitutional document -- it goes with having a government. We choose to apply a Commonwealth bill of rights in New South Wales -- and use this as a foundation statement of the decision-making framework in NSW -- or the NSW Parliament -- could enact its own bill of rights. There is no Commonwealth bill of rights -- or at least not one created by the Commonwealth Parliament.

So why not have a State bill of rights?

Why should lawyers engage in this debate?

A bill of rights ultimately defines the balance of power between the decision-makers and individuals: the ultimate question of constitutional law. A bill of rights is about rights and duties: what is more central to our trade?

You cannot enact a bill of rights without having decided a number of technical legal matters. For example:

- * Should a bill of rights be entrenched like the Canadian Charter of Rights and Freedoms, or should it be an ordinary act of parliament like the New Zealand bill of rights?
- * How should individual rights be balanced against society's rights?
- * What should a bill of rights cover -- or who should have what duty?
- * Should there be an enforceable right of free speech, and if so how and for what?
- * How should those duties be enforced, and by whom?
- * What justifies a breach of a bill of rights?
- * How should a bill of rights relate to other laws?

Why aren't lawyers engaging in this debate?

ENDNOTES

1. See Baker, K. (ed), "An Australian Bill of Rights: Pro and Contra" [1986. Institute of Public Affairs, IPA Policy Issues No. 4]; Knopff, R., "Parliament vs The Courts: Making sense of the Bill of Rights Debate" (1988) 3(2) Legislative Studies 3; Galligan D.J., "Judicial Review and Democratic Principles: Two Theories" (1983) 57 ALJ 69 for a brief discussion of the traditional arguments written before the High Court began to discover the range of "fundamental freedoms" in the Commonwealth Constitution.
2. Eg Mason, A.F., "A Bill of Rights for Australia?", (1989) 5(1) Aust Bar Review 79; Kirby, M., "Mechanisms for the Recognition and Protection of Rights in Australia", (1995) 4(1) Constitutional Centenary 8.
3. Quoted in the Sydney Morning Herald (newspaper), 12 December 1984 and noted in the Senate Standing Committee on Constitutional and Legal Affairs Committee's Exposure Report "A bill of rights for Australia?" [1985. AGPS. Canberra] @ para 1.4.
4. Eg. Queensland Electoral and Administrative Review Commission, Report on "Review of the Preservation and Enhancement of Individuals' Rights and Freedoms [1993. Electoral and Administrative Review Commission. Brisbane], especially chapter 5;
5. [1993. Law Book Co. Sydney].
6. Eg: Australian Capital Television v the Commonwealth (1992) 177 CLR 106; New South Wales v the Commonwealth (1990) 169 CLR 482; Dietrich v the Queen (1993) 67 ALR 1; Nationwide News Pty Ltd v Wills (1992) 177 CLR 1; Harvey Holland Cheate v the Queen (1993) 177 CLR 542; Secretary, Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218; Leeth v the Commonwealth (1992) 174 CLR 455; Theophanous v Herald & Weekly Times Limited, (1994) 124 ALR 1; and Justice Toohey's speech, "A Government of Laws, and Not of Men?" at the conference on Constitutional Change in Darwin, 4-6 October 1992, reproduced in an abridged form in (1992) 27(10) Aust. L News 7. See also Zines, L, "A Judicially Created Bill of Rights?" (1994) 16 Syd L Rev 166; Rose, D., "Judicial Reasoning and Responsibilities in Constitutional Cases", (1994) 20 Monash L R 195; Smallbone, D.A., "Recent Suggestions of an Implied 'Bill of Rights' in the Constitution: Considered as Part of a General Trend in Constitutional Interpretation", (1993) 21 Fed L Rev 254; Bailey, P., "'Righting' The Constitution without a Bill of Rights", (1995) 23 Fed L Rev 1.
7. This was foreshadowed in a extra curial speech by Justice Toohey's speech supra n.6. See especially pp 17-21 and 23-26 of the conference paper.
8. Eg Kirby M., "Human Rights -- the International Dimension". Occasional Lecture at the Senate, February 1995; See also references in note 6 above.
9. See "The Australian Rights Project Presentation to the Law Foundation of NSW" by Fletcher, J.F. & Galligan, B., 23 July 1993. See also Galligan, B., "Parliamentary Responsible Government and the Protection of Rights", (1992) 18 Senate Papers on Parliament, "Parliament: Achievements and Challenges", 53
10. Australia accession to effect on 25 December 1991. See (1991) 39 Aust. Treaty Series for the accession to the Protocol and (1980) 23 Aust. Treaty Series, (1981) 24 Aust. Treaty Series and (1984) 1 Aust. Treaty Series for the signature and ratification of the Convention for Australia.
11. Tonnen v Australia, United Nations' Human Rights Committee decision 31 March 1993, UN Doc CCPR/C/50/D/488/1992. See generally Charlesworth, H., "Protecting Human Rights", (1994) 68(6) Law Institute J 462; Morgan, W., "Identifying Evil for What it is: Tasmania, Sexual Perversity and the United Nations", (1994) 19 M.U.L.R. 640; Joseph, S., "Gay Rights under the ICCPR -- Commentary on Tonnen v Australia", (1994) 14 U. Tas. L.R. 392;

Selvanera, G., "Gays in Private: The Problems with the Privacy Analysis in Furthering Human Rights", (1994) 16 Adel. LR 331.

12. Mabo v Queensland [No. 2] (1992) 175 CLR 1, per Brennan J @42.

13. Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 69 ALJR 423, per Mason CJ and Deane J, @ 432. But note that justice McHugh provided a strong dissent.

14. ACT Bill of Rights 1995 introduced by Mr Connolly, now shadow Attorney-General.

15. Eg Legal and Constitutional Committee, Human Rights Reference, Discussion Paper No. 1: "A Bill of Rights for Victoria? Some Issues" [1986 Victorian Government Printer. Melbourne]. The research paper was written by Greg Craven, now the senior adviser to the Victorian Attorney-General.

16. See Queensland Electoral and Administrative Review Commission, Report on "Review of the Preservation and Enhancement of Individuals' Rights and Freedoms" [1993. Electoral and Administrative Review Commission. Brisbane], Appendix A.

17. See Craig, J., "The 'Bill of Rights' Debates in Australian and New Zealand: A comparative analysis", (1994) 8(2) Legislative Studies 67 for a discussion of the Australian and New Zealand debates.

18. This was not so when the traditional bills of rights were formulated, and not surprisingly those bills of rights tended to focus on government action. The proposed bill of rights is therefore cast in rather more expansive terms than is tradition.

19. Judge Cooley's classic illustration of the restriction on the right "to be let alone" which he postulated as underlying the law of torts in his text "A Treatise on the Law of Torts", [1888. 2nd ed. Callaghan & Co. Chicago] @ 2, has been applied to much of the human rights analysis, particularly privacy.

20. Cranston, M., "What Are Human Rights?" [1973. Bodley Head. London] @ 9..

21. Toohey, supra n. 6, @ 18 and concluding @ 33 that "some principles are fundamental and it is the tole of an independent judiciary to give effect to those principles, within the rule of law, as best it can."

22. Teoh, supra n. 13 per Mason CJ and Dean J @ 11, especially at their footnote 9.

23. Brennan J, supra n. 12

24. Eg clause 39 of the Law Council draft Bill of Rights as published in (1995) 30 (4) Australian lawyer, 29 @ 32

25. See the Draft Declaration of Principles on Human Rights and the Environment at the meeting of Experts on Human Rights and the Environment at Geneva, 16-18 May 1994, published at San Francisco 13 June 1994.

26. This my be most easily illustrated by Minister of State for Immigration and Ethnic Affairs v Teoh, supra n. 13 and Peter Bailey's brief but prophetic "The Bill of Rights Debate: A Comment" (1988) 3(2) Legislative Studies 17.

27. See for example the discussion in volume 1, chapter 9 of Final Report of the Constitution Commission [1988. AGPS Canberra] for a about enactment of a legislative bill of rights.

28. Clover Moore, member for Bligh, and Peter Macdonald, member for Manly.

Proposal for a Bill of Rights for New South Wales

Bill for the Constitutional Recognition of Duties, Rights and Freedoms under the Constitution of the State of New South Wales

A Bill for

An Act to alter the Constitution of the State of New South Wales so as to impose certain constitutional duties and guarantee certain rights and freedoms in the interests of the peace, welfare and good government of New South Wales.

Preamble

This Act provides for the recognition of duties owed to individuals and individual rights and freedoms. It does not derogate from or detrimentally affect any duty owed to, or any right or freedom of, the Aboriginal people or Torres Strait islanders or any collective rights of any community or group.

Part 1: Preliminary

Short title

1.

This Act may be cited as the Constitution Recognition of Duties, Rights and Freedoms Act 1995.

Commencement

2.

This Act shall come into operation on a date fixed by proclamation being a date not later than six months after the date on which it receives Assent.

Object of Act

3.

The object of this Act is to:

(a)

establish a single statutory charter to:

(1)

provide for the legal recognition of; and

(2)

require that laws enacted by the Legislature do not arbitrarily fail to accord with; and

(b)

require that decisions affecting or otherwise influencing any individual's access or entitlement to goods, services, facilities, rights or interests do not breach or otherwise interfere with;

certain constitutional duties, rights and freedoms which are binding on the Commonwealth of Australia and therefore the State of New South Wales.

Act binds the Crown

4.

This Act binds the Crown in rights of the State of New South Wales and, in so far as the legislative of Parliament permits, the Crown in all of its other capacities.

Interpretation

5.

In this Act,

(a)

"constitutional duties, rights and freedoms" means certain duties, rights and freedoms identified in Parts 3 and 4 or which are recognised in relevant international instruments;

(b)

"decision-maker" means any person (including a public official and the Government) who makes or relies on any decision (including in trade or commerce) in any way affecting or otherwise influencing any individual or any individual's access or entitlement to any good, service, facility, right or interest, whether or not that individual has any right to that good, service, right or interest, and, unless the context so precludes, includes the Legislature;

(c)

"individual aggrieved" means an individual whose rights or freedoms under this Act have been interfered with, infringed or denied by a decision-maker;

(d)

"person" includes an individual, partnership, corporation, association or other body corporate or politic;

(e)

"Presiding Officer" means, in the case of the Legislative Assembly, the Speaker of the Legislative Assembly and in the case of the Legislative Council, the President of the Legislative Council;

(f)

"public official" means any person exercising legislative, executive or judicial functions or making any decision for or on behalf of the State of New South Wales, including in the performance of any public function, power or duty conferred or imposed on any person or body by law; and

(g)

"relevant international instruments" means any one or more of the international declarations, treaties, conventions, covenants and other instruments listed in Schedule 1 according to the terms of their ratification by and on behalf of the Commonwealth of Australia.

Part 2: Application and Effect of Act

Peace, welfare and good government

6.

Recognition of the constitutional duties, rights and freedoms in interests of the peace, welfare and good government of New South Wales unless the contrary is reasonably required having regard to the needs of a free and democratic society.

Application of Act

7.(1)

The Act applies to all Acts and instruments (including this Act) whether enacted or made before or after the commencement of this Act.

(2)

This Act applies to an Act or instrument except in so far as the contrary intention appears in this Act or in the Act or instrument concerned.

(3)

Where appropriate, this Act applies to a portion of an Act or instrument in the same way as it applies to the whole of an Act or instrument.

(4)

Nothing in this Act excludes the application to an Act or instrument of a rule of construction applicable to it and not inconsistent with this Act.

Construction of Acts and instruments

8(1)

Unless the contrary intention is stated in an Act or instrument, each Act or instrument, whether enacted before or after the enactment of this Act, is to be construed as being, to the maximum extent possible, consistent with this Act.

(2)

Where an Act or instrument imposes a duty, power, right or freedom, each decision-maker is required in the exercise of that duty, power, right or freedom to comply with the duties listed in Part 3 except to the extent that Act or instrument expressly authorises non-compliance with a relevant duty imposed under this Act.

(3)

Notwithstanding subsections 8(1) and 8(2), this Act has no effect on any Act or instrument enacted prior to the date on which this Act entered into force until the eighteen months after the date on which this Act entered into force.

Legislature not to interfere arbitrarily with duties rights and freedoms

9.

No law of the Legislature arbitrarily may interfere with or abrogate the constitutional duties, rights and freedoms.

Duty to have regard to duties, rights and freedoms

10.(1)

Each decision-maker has the duty to have regard to the constitutional duties, rights and freedoms.

(2)

No decision-maker arbitrarily may disregard, fail to discharge or act contrary to the constitutional duties, rights and freedoms.

Onus of justifying interference on decision-maker

11.(1)

The constitutional duties, rights and freedoms may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society and consistently with international obligations as expressed in the relevant international instruments.

(2)

The onus of demonstrating that a limit reasonably should be imposed on a constitutional duty, right or freedom rests with the decision-maker, or in the case of an Act authorising such a limit, the Legislature.

Other rights and freedoms

12.

The constitutional duties, rights and freedoms guaranteed by this Act do not abrogate or restrict any other duty, right or freedom of a person or the Legislature.

Standing

13.(1)

Subject to subsection 13(2):

(a)

any person may bring action under this Act; but

(b)

notwithstanding section 42, the sole remedy available to a person who is not the individual aggrieved by the decision challenged is a declaration.

(2)

Where the person who brings action under this Act:

(a)

is not an individual aggrieved by the decision challenged; but

(b)

is supported in that application by an individual aggrieved by that decision,

a court or tribunal may, at its discretion, award any or all of the remedies provided for by section 42.

Part 3: Duties

Duty to provide equal treatment before and under law

14.

Each decision-maker has the duty to treat each individual equally before and under the law.

Duty not to interfere with individual's freedom

15.

Each decision-maker has the duty not to interfere arbitrarily or unreasonably with an individual's:

(a)

freedom of and from religion;

(b)

freedom of thought, belief and opinion;

(c)

freedom of peaceful assembly;

(d)

freedom of expression under law; or

(e)

freedom of association under law.

Duty not to discriminate

16.(1)

It is the duty of each decision-maker not to discriminate against an individual on the grounds of the individual's:

(a)

race or colour;

(b)

ethnic or national origin;

(c)

age;

(d)

disability (including physical or intellectual impairment or incapacity);

(e)

sex or gender;

(f)

sexual orientation or preference (provided that this does not involve any act or omission involving a child or non-consenting adult);

(g)

marital status, choice of partner or associate, or relative; or

(h)

political, philosophical, religious or ethical conviction, or lack of such conviction (provided that such conviction does not involve interference with any other individual's rights or freedoms under this Act).

(2)

The duty in section 16(1) is not infringed where the decision-maker demonstrates that:

(a)

the decision made was otherwise in accordance with law; and

(b)

the information considered about the characteristic listed in subsection 16(1) was acquired lawfully and was:

(1)

relevant and reasonably proportionate to the decision being made; or

(2)

used with the consent of the individual affected to take a measure to overcome a disadvantage arising from any such characteristic.

Duty not to interfere with privacy

17.(1)

Each decision-maker has the duty not to interfere arbitrarily or unlawfully with the privacy of an individual by recording or retaining information relating to the individual's:

(a)

race or colour;

(b)

ethnic or national origin;

(c)

age;

(d)

disability (including physical or intellectual impairment or incapacity);

(e)

sex or gender;

(f)

sexual orientation or preference (provided that this does not involve any act or omission involving a child or non-consenting adult);

(g)

marital status, choice of partner or associate, or relative; or

(h)

political, philosophical, religious or ethical conviction, or lack of such conviction (provided that such conviction does not involve interference with any other individual's rights or freedoms under this Act).

(2)

The duty in section 17(1) is not infringed where the decision-maker demonstrates that:

(a)

the record was created and is maintained otherwise in accordance with law; and

(b)

the information about the characteristic listed in subsection 17(1) was acquired lawfully and was:

(1)

relevant and reasonably proportionate to the purpose for which the record was created and maintained; or

(2)

recorded and/or retained with the consent of the individual affected to take a measure to overcome a disadvantage arising from any such characteristic.

Duty not to search or seize without cause

18.

Each decision-maker has the duty not to undertake or permit unreasonable or unauthorised search or seizure of an individual or any individual's residence or personal effects.

Duty not to interfere with liberty and security under law

19.

Each decision-maker has the duty not to interfere with an individual's liberty or security except on grounds established by laws that are consistent with the principles of fundamental justice which conform with the principles set out in the relevant international instruments.

Duty to detain or arrest only where lawful charge

20.

Each decision-maker involved in the arrest or detention of any individual has the duty :

(a)

not to arrest or detain an individual without specific criminal charge under law;

(b)

to inform an individual arrested or detained, at the time of that arrest or detention, of the reason for it;

(c)

without delay to inform an arrested or detained individual of the right:

(1)

not to answer any questions or make any statement;

(2)

to obtain legal advice and to instruct a lawyer; and

(3)

to have the lawfulness of the arrest or detention determined;

(d)

without delay to permit an individual arrested or detained:

(1)

to obtain legal advice, in confidence to consult with and instruct a lawyer; and

(2)

to have the lawfulness of the arrest or detention determined by a court or tribunal of competent jurisdiction;

(e)

without delay to release an individual arrested or detained if the arrest or detention is not lawful;

(f)

without delay to cause the individual to be brought before a competent court or tribunal for trial; and

(g)

to ensure that no individual is detained in circumstances which otherwise breach this Act.

Duty not to charge retrospectively

21.

Each decision-maker has the duty not to prosecute or cause to be prosecuted or convicted any individual for any act or omission which did not constitute an offence when the act or omission occurred.

Duty to presume innocence of arrested or detained person

22.

Each decision-maker has the duty to treat any individual arrested or detained as innocent of the charge informing that arrest or detention until the individual is convicted of that charge by a competent court or tribunal.

Duty to provide fair, public trial

23.

Each decision-maker involved in the arrest or detention of any individual has the duty to cause that individual to be brought before a competent court or tribunal to be provided with a fair, public trial subject only to the need to preserve confidentiality or to protect the interests of that or another individual (not being a decision-maker involved in the arrest or detention).

Duty not to impose cruel or inhuman punishment

24.

Each decision-maker has the duty not to subject any individual to cruel, degrading or inhuman treatment or punishment (including capital punishment).

Duty not to impose treatment or experiments

25.

Each decision-maker has the duty not to subject any individual to:

(a)

medical treatment; or

(b)

medical or scientific experimentation

without that individual's consent (whether express or implied, including by prior act or word) except to the extent that where treatment is required urgently for that or another individual's well-being such consent may be implied by for the duration of that emergency.

Duty to permit citizen to vote

26.

Each decision-maker has the duty to permit each adult citizen of the Commonwealth of Australia within the State to vote freely, in secrecy and according to conscience:

(a)

for the selection of one member of the House of Representatives and Senators according to the entitlement of the State under the Constitution of the Commonwealth of Australia; and

(b)

where ordinarily resident in the State, for the selection of one member of each of the Legislative Assembly and members of the Legislative Council equally with the entitlement of all such residents of the State to elect such members of the Legislative Council.

Duty to permit citizen's freedom of movement and residence

27.

Each decision-maker has the duty to permit each adult individual lawfully within the jurisdiction of the Commonwealth of Australia freely to:

(a)

enter, remain in and leave; or

(b)

move within or about:

the State except that this freedom is not interfered with by a lawful detention or other order made or penalty imposed by a court exercising jurisdiction in the State.

Part 4: Rights and Freedoms

Right to equal treatment before and under law

28.

Every individual has the right to equal treatment before and under the law.

Freedoms

29.

Every individual has the right to freedom from arbitrary or unreasonable interference with that individual's:

(a)

freedom of and from religion;

(b)

freedom of thought, belief and opinion;

(c)

freedom of peaceful assembly;

(d)

freedom of expression under law; and

(e)

freedom of association under law.

Right to freedom from discrimination

30.(1)

Every individual has the right to freedom from discrimination on the ground of that individual's:

(a)

race or colour;

(b)

ethnic or national origin;

(c)

age;

(d)

disability (including physical or intellectual impairment or incapacity);

(e)

sex or gender;

(f)

sexual orientation or preference (provided that this does not involve any act or omission involving a child or non-consenting adult);

(g)

marital status, choice of partner or associate, or relative; or

(h)

political, philosophical, religious or ethical conviction, or lack of such conviction (provided that such conviction does not involve interference with any other individual's rights or freedoms under this Act).

(2)

The right in section 30(1) is not infringed where the decision-maker demonstrates that:

(a)

the decision made was otherwise in accordance with law; and

(b)

the information considered about the characteristic listed in subsection 30(1) was acquired lawfully and was:

(1)

relevant and reasonably proportionate to the decision being made; or

(2)

used with the consent of the individual affected to take a measure to overcome a disadvantage arising from any such characteristic.

Right to privacy

31.(1)

Every individual has the right not to be subjected to arbitrary or unlawful interference with privacy by the recording or retention of information relating to the individual's:

(a)

race or colour;

(b)

ethnic or national origin;

(c)

age;

(d)

disability (including physical or intellectual impairment or incapacity);

(e)

sex or gender;

(f)

sexual orientation or preference (provided that this does not involve any act or omission involving a child or non-consenting adult);

(g)

marital status, choice of partner or associate, or relative; or

(h)

political, philosophical, religious or ethical conviction, or lack of such conviction (provided that such conviction does not involve interference with any other individual's rights or freedoms under this Act).

(2)

The right in section 31(1) is not infringed where the decision-maker demonstrates that:

(a)

the record was created and is maintained otherwise in accordance with law; and

(b)

the information about the characteristic listed in subsection 31(1) was acquired lawfully and was:

(1)

relevant and reasonably proportionate to the purpose for which the record was created and maintained; or

(2)

recorded and/or retained with the consent of the individual affected to take a measure to overcome a disadvantage arising from any such characteristic.

Right to freedom from search or seizure without cause

32.

Every individual has the right not to be subjected to unreasonable or unauthorised search or seizure of that individual or that individual's residence or personal effects.

Right to liberty and security under law

33.

Every individual has the right to individual liberty and security except on grounds established by law that are consistent with the principles of fundamental justice which conform with the principles set out in the relevant international instruments.

Right not to be arrested or detained without lawful charge

34.

Every individual has the right:

(a)

not to be arrested or detained without specific criminal charge under law;

(b)

to be informed at the time of arrest or detention of the reason for it;

(c)

without delay to be informed of the right:

(1)

not to answer any questions or make any statement;

(2)

to obtain legal advice and to instruct a lawyer; and

(3)

to have the lawfulness of the arrest or detention determined;

(d)

without delay:

(1)

to seek legal advice and in confidence to consult with and instruct a lawyer; and

(2)

to have the lawfulness of the arrest or detention determined by a court or tribunal of competent jurisdiction; and

(e)

to be brought without delay before a competent court or tribunal and tried without delay;

(f)

without delay to be released if :

(1)

not promptly charged; or

(2)

the arrest or detention is not lawful;

(g)

to be released from custody on reasonable terms and conditions unless there is reasonable cause for the continued detention; and

(h)

to be detained only in circumstances which otherwise comply with this Act.

No retrospective offences

35.

No individual is liable to prosecution or conviction for any act or omission which did not constitute an offence when the act or omission occurred.

Right to fair trial

36.

Every individual arrested or detained has the right:

(a)

to be presumed innocent of the charge for which the individual was arrested or detained until convicted of that charge by a competent court or tribunal;

(b)

to be provided with a fair public trial subject only to the need to preserve confidentiality or to protect the interests of that or another individual (not being a decision-maker involved in the arrest or detention);

(c)

to have adequate time and facilities to prepare a defence including to consult with legal advisers;

(d)

to have legal assistance both in the preparation of a defence and during the trial;

(e)

to be present at the trial and to present a defence;

(f)

to the assistance of an interpreter if the person cannot understand or speak the language used in the court;

(g)

not to be compelled to be a witness against herself or himself or to confess guilt;

(h)

to examine witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the witnesses for the prosecution;

(i)

to appeal according to law against conviction and any sentence;

(j)

if finally found guilty of an offence and punished for it, not to be tried or punished for it again; and

(k)

if finally acquitted of an offence or pardoned for it, not to be tried for it again.

Right to freedom from cruel or inhuman punishment

37.

Every individual has the right not be subjected to cruel, degrading or inhuman treatment or punishment (including capital punishment).

Right to refuse treatment and freedom from experiment

38.

Every individual has the right:

(a)

to refuse to undergo any medical treatment; and

(b)

not be subjected to medical or scientific experimentation

without that individual's consent (whether express or implied, including by prior act or word) except to the extent that where treatment is required urgently for that or another individual's well-being such consent may be implied for the duration of that emergency.

Citizen's right to vote

39.

Every adult citizen of the Commonwealth of Australia within the State has the right to vote freely, in secrecy and according to conscience:

(a)

for the selection of one member of the House of Representatives and Senators according to the entitlement of the State under the Constitution of the Commonwealth of Australia; and

(b)

where ordinarily resident in the State, for the selection of one member of the Legislative Assembly and members of the Legislative Council equally with the entitlement of all such residents of the State to elect such members of the Legislative Council.

Citizen's freedom of movement and residence

40.

Every individual lawfully within the jurisdiction of the Commonwealth of Australia has the right freely to:

(a)

enter, remain in and leave; or

(b)

move within or about:

the State except that this freedom is not interfered with by a lawful detention or other order made or penalty imposed by a court exercising jurisdiction in the State.

Part 5: Consequences of Breach of Duty

Presumption of breach of duty by decision-maker

41.

There is a rebuttable presumption that the decision-maker has breached the duty in Part 3 of this Act where, contrary to this Act:

(a)

an individual's access or entitlement to a good, service, facility, right or interest is denied or otherwise interfered with by a decision-maker; or

(b)

a decision-maker obtains, records or uses information about an individual of a type listed in section 30(1).

Right to apply for a prerogative writ or declaration

42.

Subject to section 13, in respect of any decision made by a decision-maker, a court or tribunal of competent jurisdiction may (at the discretion of that court or tribunal) issue a declaration or order that:

(a)

the decision is contrary to this Act; and/or

(b)

the decision be quashed - either ab initio or with effect from a subsequent date determined at the discretion of the court or tribunal; and/or

(c)

the decision-maker make the decision again in compliance with this Act; and/or

(d)

evidence which has been obtained as a result of a breach of this Act not be admitted into evidence in any proceedings;

(e)

in the case of a breach of section 20, 21 or 22, no further criminal proceedings be instituted against the applicant in respect of an event forming part of the circumstances of the arrest, detention, prosecution or conviction breaching this Act;

and may make such other declaration or order as the court or tribunal thinks fit.

Jurisdiction

43.

The jurisdiction of the court or tribunal for the purposes of this Part is determined according:

(a)

to the value and type of the good, service, facility, right or interest denied or otherwise interfered with by the decision-maker, or

(b)

in the case of an action for a breach of section 20, 21 or 22, to the jurisdiction in which the relevant proceedings were or should have been initiated;

and may, in appropriate circumstances, include a court or tribunal exercising federal jurisdiction.

Defence to action

44.

It is a defence to an action under this Act, the burden of which lies on the defendant, that:

(a)

the decision-maker acted otherwise in accordance with law;

(b)

the decision challenged was made:

(1)

in good faith; and

(2)

on reasonable grounds;

having regard to both the object of this Act and the public interest; and

(c)

in the opinion of a court or tribunal of competent jurisdiction, the decision challenged is justifiable in the public interest notwithstanding the breach of this Act.

No defence that decision-maker does not agree with duty

45.

It is not a defence to an action under this Act or any other proceeding that the decision-maker does not agree with or accept any duty, right or freedom recognised under this Act.

Bill deemed to be inconsistent with this Act

46.

A Bill is deemed to contain provisions which are inconsistent with the any of the duties, rights or freedoms set out in this Act if:

(a)

the leader or portfolio spokesperson of any party represented in the Legislature and comprising more than five per centum (5%) of the membership of either chamber of the Legislature;

(b)

the Attorney-General or any other Minister; or

(c)

any combination of members of either chamber, provided that that combination comprises not less than five per centum (5%) of the membership of the chamber of the Legislature of which they are members or, where the group comprises members from both chambers, not less than five per centum (5%) of the total membership of both chambers of the Legislature;

asserts the view that there is such an inconsistency.

Legislature to consider breaches by Bill

47.

Where either chamber of the Legislature passes a Bill which contains any provision that appears to be inconsistent with any of the duties, rights or freedoms set out in this Act, then before that Bill is introduced in to the other chamber of the Legislature:

(a)

the Presiding Officer of the chamber which has passed the Bill must report to the Presiding Officer of the other chamber on the extent to which that Bill contains provisions which are inconsistent with any of the duties, rights or freedoms set out in this Act and the justification for that inconsistency (the "Legislative Report"); and

(b)

the other chamber must consider and vote to adopt the Legislative Report before the Bill is introduced into that other chamber.

Statutory rules and instruments to comply with this Act

48.(1)

No statutory rule or instrument may contain any provision which is inconsistent with this Act unless that provision is expressly authorised by the relevant empowering Act.

(2)

Any provision in statutory rule or instrument which does not comply with section 48(1) is, to the extent of that inconsistency, void.

Action under this Act additional to any other right

49. (1)

Action under this Act is without prejudice to any other right or cause of action which an individual has or may have in respect of the circumstances in which the individual's rights or freedoms were interfered with, infringed or denied.

(2)

A determination pursuant to the Act is conclusive proof of the facts stated in that determination for the purposes of any other right or cause of action.

Schedule 1: Relevant International Instruments

Charter of the United Nations

Convention against Discrimination in Education

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Convention on the Elimination of all Forms of Discrimination against Women

Convention on the Political Rights of Women

Convention on the Prevention and Punishment of the Crime of Genocide

Convention on the Rights of the Child

Convention Relating to the Status of Refugees

Declaration of the Rights of Disabled Persons

Declaration of the Rights of the Mentally Retarded Persons

First Optional Protocol to the International Covenant on Civil and Political Rights

International Covenant on Civil and Political Rights

International Covenant on Economic Social and Cultural Rights

International Convention on the Elimination of all Forms of Racial Discrimination

Universal Declaration of Human Rights

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