Submission to the Legislative Council Standing Committee on Law and Justice

NSW Bill of Rights Inquiry

by The Hon Malcolm McLelland QC[1]

GENERAL SUBMISSION

1. It is neither appropriate nor in the public interest that there be enacted in New South Wales a Bill of Rights in which the enacted "rights" are intended to have controlling legal force, for four principal reasons:
    (a) It would result in an unacceptable degree of uncertainty in the law, with profound and undesirable effects on the stability of the legal system, the cost of legal advice, the volume and cost of litigation, and court congestion and delays.
    (b) It would subvert the proper role and status of Parliament by judicialising the resolution of contentious questions of social policy.
    (c) It would subvert the quality and independence of the judiciary, and public confidence in the courts, by politicising their function.
    (d) It may preclude appropriate or effective legislative or administrative response to future threats to the wellbeing of the community, not presently in contemplation or even, perhaps, foreseeable.

UNCERTAINTY

TRANSFORMING VALUES INTO "RIGHTS"

2. For the most part, the "rights" stated in Bills of Rights, and in analogous documents such as the International Covenant on Civil and Political Rights (referred to as the International Covenant), are, essentially, broad statements of social values. (There are occasional exceptions, for example Article 6 clause 5 of the International Covenant.) Such statements of values typically have the following characteristic features:

    (a) The stated values are rarely, if ever, absolute. Each value given the force of law in a Bill of Rights is likely, in some circumstances, to conflict with other widely accepted values, both stated and unstated, or with legitimate individual or societal interests. Consider, for example the relationship between "freedom of speech" and potentially competing values or interests of the following kinds:
        - the protection of personal privacy, confidential information (such as trade secrets or budget proposals or security arrangements), commercial or personal reputation (against malicious falsehoods), and the fairness of trials[2];
        - the prohibition of criminal conspiracy, incitement to crime, extortion, blackmail, threats of violence, and discrimination against (or vilification of) particular community groups;

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[2] For example see the critical discussion of the United States experience in adjusting "freedom of speech" under the 1st Amendment to the US Constitution with an accused person's "right" to a fair trial, in O'Callaghan - *The United States Experience of Unfettered Speech and Unfair Trials: A Case Against an Australian Bill of Rights* - Australian Law Journal, 1998; Vol 72, p 997.

- the regulation of advertising (injurious to children, or of dangerous goods or substances), product labelling, professional advice (eg legal, medical, financial), and offers of financial securities.

Such a list of competing values and interests could be extended very considerably. If no formula is provided in the Bill of Rights for the adjustment of competing "rights", values and interests, the courts have to devise unexpressed, and arbitrary, qualifications and limitations with the result that the "rights" not only do not mean what they say, but become little more than emotive slogans. On the other hand verbal formulae designed to deal with this problem are typically so vague as to merely add a new dimension of uncertainty and subjectivity[3].

(b) The stated values are almost invariably couched in general and vague language, involving indeterminacy in meaning and subjectivity in application. Most value-type "rights" are inherently vague. But in addition the process of formulation of a statement of such "rights" by a committee or deliberative assembly, where different interests are represented, frequently compels the adoption of expressions which are deliberately ambiguous, imprecise or open to subjective interpretation, merely to obtain the requisite level of assent, each differing interest group assenting on the basis of its own interpretation. Often, the more certain and specific the formulation of a "right" the less likely it is to command general assent, so that the "rights" which are more likely to survive the formulative process are those which are indefinite or obscure rather than precise or clear. The attempt to transpose general and indeterminate values into enforceable rules of law would invite those whose responsibility it is to ascertain and apply the law (ie individual judges) to give specific content to such a value in a concrete case by applying their own social, political or ideological inclinations.

(c) The values stated in a Bill of Rights are rarely, if ever, exhaustive. Almost invariably, some widely accepted values will be omitted. The omission may be either inadvertent, or deliberate on the (fallacious) premise that a partial Bill of Rights is better than none. If a particular value-type "right" is perceived by some sufficiently influential group as possibly having an effect, in some particular application, contrary to the teachings, attitudes or traditions of that group, it is likely that that "right" will be omitted altogether. There is a strong risk that a "right" enacted as law would be held to prevail, and prevail absolutely, over any unenacted value, in circumstances where they would otherwise be in conflict.

ADVERSE EFFECTS ON THE LEGAL SYSTEM AND THE ADMINISTRATION OF JUSTICE

3. Uncertainty in the law is the single most significant contributing factor to those deficiencies of the legal system and the administration of justice which attract the most public criticism and concern, namely cost, delay and unpredictability. It is not difficult to understand why this is so. Experience confirms what common sense suggests, that increasing the degree of legal uncertainty:
    - increases the difficulty and expense of obtaining legal advice;
    - reduces the definitive nature and reliability of such advice;
    - reduces the predictability of the outcome of litigation;
    - increases the likelihood, volume, complexity and length of litigation, at both trial and appeal levels.

[3] As for example in Canada – "… *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*" – Canadian Charter of Rights and Freedoms, s 1; and under the International Covenant – Articles 12.3, 18.3, 19.3, 21 and 22.2.

Although it is impossible to remove all uncertainty from the law, it is an important element of the rule of law, and conducive to the stability of the legal system, that the content of the law be, so far as possible, reasonably ascertainable without the need to resort to litigation. The law should be "capable of application in solicitors' offices" rather than "have to await definition in litigation"[4]. The system will manifestly fail to meet the needs of the community, and the community's confidence in the system will diminish, to the extent:

- that the law can be determined or clarified only by litigation,
- that people cannot find out where they stand legally without the strain, delay and expense of a court case (with possible appeals),
- that lawyers can advise their clients only by doing the professional equivalent of gazing into a cloudy crystal ball.

5. The enactment of a Bill of Rights would add an entirely new dimension of uncertainty to the law across a wide spectrum of subject matter. Legislation against which a Bill of Rights challenge might conceivably be mounted could never be treated as certain law unless and until such a challenge was actually made, and determined, and appealed as far as the High Court. Such a challenge might be made in, and determined by, a lower court and not reach the High Court, in which case the uncertainty would remain until, in some future case, the same question did reach the High Court. Even a High Court decision would not remove the uncertainty, since the High Court is not bound by its own decisions and on a later occasion, with a differently constituted bench (perhaps produced as a result of ideologically motivated appointments), a different result might be reached. What to one judge may appear to be a basic enduring value may to another be a temporary aberration[5]. Where adjudication on social or political values becomes a major function of the courts, ideological manipulation of the Bench would be a powerful temptation for government.

6. Uncertainty in the law invites speculative arguments, either on the "might as well give it a run" principle, or as a tactical manoeuvre. The practical effects are that:
   - cases go to trial which would otherwise never have reached that stage;
   - issues are raised and litigated which ultimately turn out to have no significance;
   - appeals are instituted and pursued which would otherwise not have been brought.

   This may be illustrated by experience in the civil courts over the last 25 years, during which there has been a huge increase in the volume, complexity, length and cost of proceedings, particularly those with a commercial or contractual element, in large measure attributable to increased uncertainty in the law arising from legislation establishing new laws based on vague criteria, and vesting wide discretionary powers in courts to over-ride established rules of law. Notorious examples are s 42[6], read with ss 65,68 and 72 of the Fair Trading Act 1987 (modelled on ss 52, 80, 82 and 87 of the Trade Practices Act 1974), and s 7[7] of the Contracts Review Act 1980. There are many others. Such provisions represent a dramatic shift from principle to palm-tree. The Fair Trading (or Trade Practices) Act, and Contracts Review Act provisions are invoked in commercial or contract cases both by plaintiffs and by defendants with great frequency, and it has not proved difficult for lawyers to discover some conduct of the opposite party which might in some way be said to have been "misleading", or some contractual provision which might in some way be argued to have been "unjust", opening up a virtually limitless range of possible outcomes. Such claims are frequently unsuccessful, and are often

[4] Bryan v Maloney (1995) 182 Commonwealth Law Reports p 609 @ p 653 per Justice Brennan.
[5] Differences of approach to some issues under the Canadian Charter of Rights and Freedoms have produced deep and enduring divisions within the Canadian Supreme Court: see eg Singleton – *The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter* – 1995; 74 Canadian Bar Review p 446.
[6] Referring to "*conduct that is misleading or deceptive or is likely to mislead or deceive*".
[7] Referring to "*a contract or a provision of a contract [found] to have been unjust in the circumstances relating to the contract at the time it was made*".

made as a makeweight, or as a negotiating tactic. There is also a view that if there is a bare possibility of a claim or argument succeeding, it may be negligent for a legal adviser not to run it. The inclusion of such a claim, however tenuous it may ultimately turn out to be, will almost certainly expand the scope and complexity of the proceedings, and increase their duration and cost.

It would be naïve indeed to expect that a Bill of Rights would not add an enormous impetus to this tendency and generate a great range of speculative arguments. Professor Morissette, Professor of Law at McGill University, Montreal, with reference to the Canadian Charter of Rights and Freedoms, reports[8] that in Canada (*op cit* @ 299):

> "*…we now observe that judges and advocates appropriate all sorts of issues that formerly fell into general debate. They do so at the behest of parties, individuals and groups, who, informed by lawyers, think that the law will vindicate their "rights" understood from a subjective and one-sided point of view (their very own and thus the best there is). And they think that the law, which includes the Constitution, entitles them to an improved human condition. In this context, litigation becomes a means of expression[,] and even unfocused grumpiness about the drift of political events may generate court actions; we saw it in recent years when the Charter was repeatedly used in attempts to derail the process of constitutional amendment.*"

Justice Strayer of the Federal Court of Canada had recorded such a tendency in 1988[9]:

> "*There is [a] belief shared by some academics, lawyers, journalists and an increasing number of other citizens, that every ill must have a Charter cure. In other words it is assumed in some quarters that the Charter is a total guarantee of good government and that the courts must act wherever legislators are negligent, indolent, or downright wrong-headed in the legislation they pass or refrain from passing. This creates a certain temptation for many of us on the bench to try to set aright all injustices brought to our attention. But it was never understood by those who gave the Charter the necessary approval that it was to be a substitute for the primary responsibility of elected representatives to provide good government for Canadians.*"

Although in general speculative arguments based on a Bill of Rights are of their nature more likely ultimately to fail than to succeed, there remains the prospect that from time to time idiosyncratic decisions will be given with unanticipated and undesirable consequences, which would be beyond the power of Parliament to remedy.

7. The degree of legal uncertainty which would result from a Bill of Rights would be much greater than that to which the Australian community, and governments responsible for funding courts and legal aid, have so far grown accustomed. The range of subjects within the reach of a Bill of Rights would be extensive, the scope of potential arguments which it would open up would be broad, and the public interest in the question of the validity of legislation, and the influence of interest groups attracted to the particular issue, would tend to create an imperative that validity arguments based on human rights be appealed as far as possible. It would be difficult to confine representation in a case involving a Bill of Rights to the parties to the original dispute: there would be applications by interest groups, together with governments, to intervene and present submissions to the court at each stage of the proceedings. In short, there would be an explosion in the complexity, duration and cost of any litigation attracting a Bill of Rights argument, and the kinds of dispute which might attract such an argument would be wide. The Canadian Charter came into force on 17 April 1982, with the exception of s 15 ("equality

[8] Morissette - *Canada as a Post-Modern Kritarchy* - Australian Law Journal 1998; vol 72, p 294 @ p 229.
[9] Strayer – *Life under the Canadian Charter: adjusting the balance between legislature and courts* – Commonwealth Law Bulletin 1989 p 1016 @ p 1032 (originally published in 1988 Public Law p 347).

rights") which did not come into force until three years later. An analysis down to the end of 1985[10] found that there had been 1,991 reported cases involving issues under the Charter[11], with the annual number gradually increasing (558 in 1985). By the end of 1988 there had been nearly 5,000 reported Charter decisions[12], an average of about 1,000 per year during the period 1986-8.

The financial resources necessary to engage in, or even to contemplate in an informed way, litigation in which a Bill of Rights argument arises or might arise, would be very considerable. Moreover any substantial increase in the number, complexity, length, and unpredictability of court proceedings will inevitably require more judges to be appointed to deal with them, and to the extent that there is a shortfall in the necessary judicial strength, delays will blow out. In the case of litigation driven by a Bill of Rights, this effect will be felt at trial level and at all appellate levels.

8. Unlike the Supreme Court of the United States, the High Court of Australia is a general court of appeal for the whole country. This is a highly significant unifying role which gives the High Court a pre-eminent function in authoritatively declaring and settling the common law throughout Australia and providing consistency in the interpretation of State legislation. Consequently in Australia there is a single common law, whereas in the United States, where there is no court having a similar function, each State has its own common law which may vary from that of other States. The litigation explosion which would accompany a Bill of Rights would involve risks
    - that the High Court's potential workload in Bill of Rights cases would reduce the number of other appeals it could hear, and impair its unifying role as a national court of appeal; and
    - that under the influence of their increased "political" role in Bill of Rights cases, the practical criteria for selection of High Court judges would change, to the detriment of the traditional standards of competence and suitability.

WHAT IS A LEGAL "RIGHT" ?

The word "right" in a legal sense is inherently ambiguous, and distinctions abound. For example, to say that A has a "right" to do X may mean:

- that A has no obligation not to do X;
- that others have an obligation not to interfere with A's doing X; or
- that others have an obligation to facilitate or assist A's doing X.

Furthermore, the entity to or by whom, as the case may be, the obligation is owed may the State, or other persons, or both. Possibly the existence of "rights" vis-à-vis the State might require Parliamentary action dictated by the courts to give effect to them. More complex analyses of "rights" have been made, and there is a considerable literature exploring differences between such concepts as "rights", "privileges", "liberties", "immunities" and their correlatives. Unless these distinctions are thought through, and the nature of each "right" in a Bill of Rights appropriately specified, there will be a further, and prolific, source of uncertainty.

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[10] Morton & Withey - *Charting the Charter, 1982-1985: A Statistical Analysis* - 1987 Canadian Human Rights Yearbook p 65.

[11] There had been numerous additional unreported cases – see *ibid* @ pp 68-9, footnote 6.

[12] Morton *et al – Judicial Nullification of Statutes under the Charter of Rights and Freedoms, 1982-1988* – Alberta Law Review 1990; vol 28, p 396 @ p 398.

THE ROLE AND STATUS OF PARLIAMENT AND THE COURTS

10. The identification and accommodation of competing societal values and interests in the development and formulation of legislation relating to particular subjects is basic to the function of Parliament as an elected representative legislature, and intrinsic to the political process. A Bill of Rights, by transforming social or political questions into legal questions, would require courts to exercise a similar function in cases coming before them and empower them (if the Bill of Rights were entrenched) to retrospectively invalidate Acts of Parliament on social or political grounds. This would both derogate from the proper role and status of Parliament and be harmful to the legal and judicial systems and to the administration of justice. Members of Parliament are elected by, and are supposed to represent, the people. Judges are neither elected nor supposed to represent anyone. Any increasing tendency for judicial decisions to be, or to be perceived to be, determined by judges' views on social policy, would result in a corresponding increase in pressure to select as judges those whose views on policy questions reflect the views of the selectors. Selection of judges on political grounds would stimulate even more political decision-making, and so on. In this way, both judicial independence and the quality of the judiciary would suffer. To the extent that social or political attitudes tend to be considered as appropriate criteria of suitability for appointment to the bench, the likelihood is that the traditional qualities of intellectual competence, independence of mind, integrity, legal knowledge and ability, courtesy and a sense of fairness will tend to be displaced in importance. If this were to happen to any substantial degree, the present high reputation of Australian courts, both within Australia and internationally, would suffer, as would public confidence in the administration of justice.

    In the United States the polarisation of a large part of society on issues relating to abortion, represented by the slogans "pro-life" and "pro-choice", provides a good illustration. Since 1973, when the US Supreme Court held that a Texas statute prohibiting abortion except when necessary to save the woman's life infringed the US Bill of Rights[13], a large part of the American public appears to regard as the single most important question in assessing the suitability of a proposed appointee to the Supreme Court, his or her personal views on abortion. This preoccupation seems to be reflected in the press and to be influential among Senators who must confirm any nomination to the Supreme Court bench. One gains the impression that the views of potential appointees on other social policy issues (eg gun control, affirmative action, race relations, capital punishment) has also been influential in the selection and confirmation process. Ideological and political conflict has affected the Supreme Court of the United States from earliest times[14].
    Professor Morissette notes that in Canada since the adoption in 1982 of the Canadian Charter of Rights and Freedoms[15]:

    > "*We see a pronounced devolution of power from legislatures to the courts – at the request of almost anyone, really, every provision of every enactment may be subjected to review by the lawyers and by the judges, themselves all former lawyers, on grounds which are broader and vaguer than ever before. …With this devolution comes the inevitable politicisation of the judiciary. Concerns are now expressed about judicial appointment which previously were only heard in the electoral process. If we continue along this route, every ideology in the country, and perhaps every pressure group in existence, will eventually insist that it has a right to representation on the Bench.*"

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[13] Rowe v Wade 410 US 113, based on a problematic interpretation of the words "*nor shall any State deprive any person of life, liberty or property, without due process of law*" in the 14th Amendment to the US Constitution.
[14] There is a useful summary and discussion in Cox – *The Court and the Constitution* – 1987, Houghton Mifflin; see particularly Part 4: *Constitutionalism and the Rule of Law*.
[15] Morissette – op cit @ pp296-7.

FUTURE DANGERS

11. The future is unpredictable. There are potential events which could bring about great changes, temporary or permanent, in the condition of humanity in general or Australian society in particular. These include unsustainable population growth, severe environmental changes, technological developments, diseases of novel kinds, natural disasters, economic collapse, severe social conflict or other internal instability, and external threats or aggression. In such altered circumstances, the safety or protection of the community may require legislative or administrative responses, perhaps of an urgent nature, which would not be consistent with the provisions of a Bill of Rights referable to quite different conditions.

29 March 2000 (Malcolm McLelland)