

Introduction

1. The focus of this submission will be upon the interplay between a NSW Bill of Rights and the criminal justice system of this State.
2. The Public Defenders support the creation of a Bill of Rights. Experience has shown that parliaments are subject to very great pressures to undermine fundamental principles of criminal justice. That is especially so whenever a “law and order crisis” erupts. Unless the absolute sovereignty of parliament is inhibited in some effective way, or exposed to checks and balances, those fundamental principles will continue to be vulnerable and, on occasion, damaged or destroyed.
3. Two examples in criminal law spring readily to mind. The first is topical: mandatory sentencing. It is easy to see that mandatory sentencing undermines a fundamental concept, the separation of the judiciary from the legislature, and respect for the individual’s right to liberty. It also results in the imposition of sentences by courts not appropriately reflective of all the facts of the cases before them. That is also surely inconsistent with our fundamental notions about the nature of a mature criminal justice system. A Bill of Rights protecting the right to an independent judiciary, the right to liberty and the right to a fair hearing would have prevented mandatory sentencing being legislated in the jurisdictions in question.
4. The second example that springs readily to mind is the legislation passed by this parliament some years ago pertaining to the indefinite detention of one individual only. That legislation was egregiously inconsistent with the previously well-settled concept of equality before the law for all citizens. It also infringed the principle against a retrospective increase in sentences. It was debated and passed in an atmosphere of fear and outrage induced by the media. It is interesting to note that in the years since the hue and

cry was initially raised, no harm has come to the children who were said to be overwhelmingly threatened by the release of that man.

5. As members of your Committee would know, the legislation stood until the time when the High Court of Australia struck it down as invalid on Constitutional grounds. It is worth noting for the present that the invalidity was not based upon any aspect of the Constitution, or legal system, or polity of New South Wales. Rather, the invalidity found was based upon the interpretation of the Commonwealth Constitution. In other words, had it not been for the Commonwealth Constitution, that legislation may well have stood as a permanent scar on the body politic of this State.
6. Those examples are raised not in order to fight or re-fight battles about matters of policy in the areas of criminal law, but rather to demonstrate that successful attacks upon fundamental concepts underpinning our democracy and rule of law are by no means hypothetical. Governments of every political persuasion are under constant pressure from their electors, the media, and concerned and well-meaning citizens to take measures regarding crime and criminals, regardless of the systemic impact that may result. Often, governments bow to those pressures. Although there arguably may be some short-term gain, as a result of oppressive legislation, the long-term damage is profound and may be permanent.

State-Based Bill of Rights

7. The creation of a Bill of Rights pertaining only to New South Wales is not to be regarded as a draw-back. Overseas, many States, as parts of a larger Federation, have their own Bill of Rights. This is particularly true in the United States, but can also be found in other Federations.
8. Those interested in a national Bill of Rights may well argue that in the context of the Australian Constitutional scene, Constitutional change is so

hard to achieve in this country that the need for the protection of human rights in the interim can only be achieved by a local or State-based Bill of Rights. Once that is seen to be working well, then a consensus may emerge from four States having a majority of voters sufficient to have a national Bill of Rights introduced.

9. In our Federal system, it is not uncommon for one jurisdiction to experiment with a new idea and then, upon success of the experiment, for other jurisdictions to follow. The way that can be done with a Bill of Rights is for one State to introduce a Bill of Rights as part of its State's Constitution. There are many reasons why New South Wales should be that State. We were the founding State of this nation, we have the largest population in Australia, and recently the Woods Royal Commission exposed wide-spread corruption in New South Wales by our Police Force. Significantly, that corruption involved abuse of the rights of citizens being investigated for criminal activity. The criminal and Constitutional laws of the disparate jurisdictions within Australia currently are by no means uniform. Indeed, in the area of criminal law, there are important divergences between the jurisdictions. Thus, it may be important for other States to see how a State-based Bill of Rights impacts upon the criminal justice system as we have it in New South Wales.

Entrenchment

10. The level of entrenchment for any Bill of Rights must be predicated upon a clear understanding of what that Bill of Rights is expected to achieve. If it is expected to secure permanent protection against government encroachment of an individual's rights and liberties then the level of entrenchment needs be great. If it is expected to be no more than a sign-post saying it is desirable to have regard to the individual's rights and liberties then its entrenchment may be shallow.

11. "The most fully entrenched provision is a Bill of Rights, incorporated in the Constitution, which overrides legislation. The level of entrenchment somewhat below that form is found in the Canadian Charter of Rights and Freedoms. That Charter provides Constitution protection that does allow the legislature to exempt a particular enactment by means of a "notwithstanding" clause.

The next level down in terms of entrenchment is to incorporate human rights values in legislation in a form which does give direct rights (such as the *Racial Discrimination Act* of the Commonwealth) and which, in a Federal system, has significance by overriding State legislation.

Finally there is the model of ordinary legislation, capable of amendment by the parliament. Such legislation affects other acts of the same parliament by a process of reconciliation or inconsistency through statutory interpretation. Models of general application include the Canadian Bill of Rights of 1960 and the New Zealand Bill of Rights of 1990."

(Hon CJ Spigelman, *Rule of Law : Human Rights Protection* address to the 50th Anniversary of Universal Declaration of Human Rights National Conference, Sydney, 10 December 1998)

12. At the outset, it was indicated that this submission focussed upon the interplay of a Bill of Rights and the New South Wales criminal justice system. The rights the Public Defenders seek to have entrenched are generally known as the common law rights. Examples of common law rights include the right to be protected against self-incrimination and its associated right; the right to be presumed innocent until proven guilty; the right to personal liberty unless taken away by due process of law; the right to a trial by jury; the right to natural justice; the right to require proof of guilt beyond reasonable doubt; and the right of access to a court system that is independent and impartial.
13. The Public Defenders position is that these rights must be securely entrenched. However, given the needs for checks and balances, the price

for entrenching these rights must not be so high as to lose the benefits of the checks and balances. In a democracy, there is always need for checks and balances between the arms of government. It must be understood that the will of the people is demonstrated in varying degrees through each of the arms of government: the Executive, the parliament, and the judiciary. No branch of government is immune from input by members of the public. Each branch of government is sensitive to the needs of the public as it receives feed-back from its various decisions and actions.

14. A deeply-entrenched Bill of Rights, incapable of review by parliament, would be open to criticism on the basis that sovereignty of the elected parliament is not being given the weight required in a democratic system.
15. In more recent times, Constitutional devices have been contained in the modern drafts of Bills of Rights which permit government to respond to the court's consideration of rights issues. The Canadian Charter of Rights and Freedoms, for example, permits both the Executive arms of government and the Legislative arm of government to respond to a court's consideration of a claimed breach of right.
16. When a Canadian litigant claims a breach of a right, the court is required by s.1 of the Charter of Rights and Freedoms to:-

“[guarantee] the rights and freedoms set out [in the Charter] only to such reasonable limits prescribed by the law as **can be demonstrably justified in a free and democratic society**.” (Emphasis added)
17. Clearly, such a provision gives to the Executive arm of government (with all the resources that the Executive arm of government has available) to mount an argument which would seek reasonable limits put on rights in the circumstances of the case before it. Further, the Executive arm of

government has the opportunity of challenging whether the claimant has succeeded in satisfying the onus of proof which he/she bears in seeking to prove that a right has been breached.

18. In criminal trials, in particular, s.24(2) of the Canadian Charter provides:

“Where in [a Constitutional challenge] a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded **if it is established that, having regard to all the circumstances the admission of [that evidence] would bring the administration of justice into disrepute.**” (Emphasis added)

19. This leaves the court in a criminal trial with a discretion. The onus appears to be on the accused (assuming he/she alleges the breach of a right) to go further and show that the admission of the evidence obtained through the breach would bring the administration of justice into disrepute. Importantly, the Executive arm of government (through the DPP) has the option of arguing that the administration of justice would not be brought into disrepute by the admission of such evidence.
20. Put another way, a decision by a court that a Charter right had been violated would not necessarily further entrench that right. It would depend upon the nature of the case being argued. On the Canadian model, it is conceivable the breach of the right may not even result in the exclusion of evidence obtained through that breach. On the Canadian model, the accused has to go one step further and show that justice will be brought into disrepute by the trampling of the relevant right.
21. The other way the Canadian Charter recognises the input of other arms of government (in this case, the legislature) is the recognition it gives to the sovereignty of parliament by permitting the relevant provincial or national

parliament to override the court's decision. S.33(1) of the Charter provides:-

“(1)Parliament ... may expressly declare in an Act of parliament ... that the Act or provision thereof shall operate notwithstanding a provision [that breached the Charter of Rights and Freedoms].

(2) An Act or provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the Declaration.”

22. Thereafter, there is provision for the Declaration to have a renewable five year life-span.
23. Thus, on the Canadian model, parliament remains supreme. If the Canadian model were adopted here, a court may rule a New South Wales Act as infringing the State Bill of Rights. Nevertheless, the New South Wales parliament may override the court's decision by passing an Act which provides that the so-called “tainted” Act shall continue to operate as before. On the Canadian model, parliament must review its position every five years.
24. The Public Defenders favour the Canadian model. It strikes a balance between the pressures put on parliament to “do something” in a perceived “law and order crisis” and the need for restraint in tampering with existing rights. The courts have an opportunity after hearing calm and rational argument from all sides in the courtroom to make a ruling. In the light of that ruling, parliament then has the further opportunity, after reflection and debate, of expressing its will. The level of entrenchment of a right in such a situation, while not absolute, remains strong. In such a system, the right would only be vulnerable if parliament had good reason for “overruling” the court.

Language Expressing the Rights

25. Rights contained in any document labelled Bill of Rights should be readily identifiable rather than nebulous. This will occur if the language used to identify each right is the traditional language used by the common law to identify the right. See, for example, ss.7-15, Canadian Charter of Rights and Freedoms.
26. There is force in the criticism that the creation of open-ended Bills of Rights transfers political power from elected parliaments to unelected judges who end up interpreting those rights by relying upon a broad discretion so that the right as interpreted or applied by the court may appear to have little relationship to the expression of the source right in the original Bill of Rights. See, for example, *Osman v The United Kingdom*, European Court of Human Rights, 28 October 1998. See also the keynote address by Spigelman CJ to the National Conference of the Australian Plaintiff Lawyers Association, 22 October 1999.
27. Unless the rights contained in a Bill of Rights are clear and explicit, citizens and governments will not know the nature and extent of the right, they will not know their duties and obligations created by the right, nor will they be aware of the extent of the protection provided by the right. Such a situation would bring uncertainty into the investigation of crime, particularly in the dealing of suspects and the conducting of searches.
28. If the rights contained in a Bill of Rights are not readily identifiable, enormous amounts of time and money will be spent on litigation determining what are the parameters of each of the rights. Ambiguity and inconsistency in the interpretation will occur at the lower levels of the judicial hierarchy, contributing to the uncertainty referred to above. Continually, those involved in the criminal justice system will be looking to guidance from the Court of Criminal Appeal and the High Court, adding to

the workload of those already over—burdened jurisdictions. More importantly, those involved in the day-to-day work of the criminal justice system - suspects, clients, police officers, prosecutors and defence lawyers - will be uncertain whether a right has been violated and, if so, the consequences of that violation.

Fundamental Rights

29. Any Bill of Rights must seek to declare at least the fundamental rights that are to be enjoyed by all persons (including visitors and temporary residents of New South Wales). The Bill of Rights should make it clear that all who are dealt with by the various arms of government - whether Executive, Judicial or Legislative - will enjoy certain fundamental rights in respect of those dealings. There cannot be two standards - one for New South Wales' citizens and an inferior standard or treatment for non-New South Wales' citizens. Whether the Bill of Rights should extend beyond the government's treatment of individuals to, say, employers, department stores or the like, is a moot point and need not be discussed here.

- 30 The fundamental rights contained in a Bill of Rights should include:-
 - The right to life.
 - The right to property.
 - The right to personal liberty unless denied by due process of law.
 - The right to equality before the law.
 - The right to be presumed innocent of any wrongdoing unless proven guilty beyond reasonable doubt.
 - The right not to be compelled to give evidence against or incriminate oneself.
 - The right to trial by jury for a serious offence.
 - The right to access to independent and impartial courts.
 - The right to natural justice and due process of the law.

- The right to be secure against unreasonable search and seizure.
- The right to bail unless denied by due process of the law.
- The right to a trial without unreasonable delay.
- The right to retain legal representation in a criminal trial where the liberty of a person is in peril.
- The right not to be subject to cruel and unusual punishment.
- The right to know the terms of any charge preferred against oneself.
- The right not to be discriminated against on the basis of race, colour, religion or sexual preference.
- The right to freedom from arbitrary or unlawful arrest and detention.

Rights Declared by the ICCPR

31. Treaties such as the ICCPR, to which the Australian government is a signatory, deserve particular regard. By its signature to such a Treaty, the Australian government is declaring not only to the world at large, but to the citizens of Australia, and in the context of this submission the citizens of New South Wales, that the standards reflected in the Treaty are standards to which the Australian community should aspire. They are standards which the Australian community should respect. The Australian government is saying in effect to Australians and the world at large “these treaty rights are basic fundamental standards of human rights”.
32. There are two ways in which that particular regard can be demonstrated. Firstly, by the incorporation verbatim of the rights into our own Bill of Rights. This is not the preferred course because the way in which some of those rights have been declared in the ICCPR instrument may lack clarity and thereby fail the test earlier suggested of being a “readily identifiable” rights.

33. The better course is to have regard to the ICCPR instrument, adumbrate each of the readily identifiable rights that would arise from a fair reading of the document and to include into the proposed State Bill of Rights, rights that reflect those rights arising from a fair reading of the ICCPR instrument.

Indigenous People and Other Cultures and the Bill of Rights

34. As earlier stated, the Bill of Rights should contain a clause recognising the right not to be discriminated against by virtue of race or colour of skin.
35. The proposed Bill of Rights should also recognise the prior occupation of New South Wales by indigenous peoples and the rights of the descendants of those peoples to the enjoyment of Native Title and of the indigenous culture where these have not been extinguished by application of introduced law.

Individual Responsibilities in the Bill of Rights

36. It is difficult to see how individual responsibilities could be included in an enforceable and overarching document.
37. The public Defenders recognise that there are duties imposed upon citizens (but not visitors and, perhaps, not temporary residents) such as the obligation to vote, the obligation to be available to sit on juries, and the obligation to pay taxes and levies imposed by the government. It would only be in the situation where it could be said that the obligation imposed by the government conflicted with or was inconsistent with the exercise of a right contained within the Bill of Rights that that obligation should also be included in the Bill of Rights. The Public Defenders cannot envisage any situation where such a conflict or inconsistency could arise.

Impact Upon the Common Law of Bills of Rights in the United Kingdom, Canada and New Zealand

38. The Chief Justice has already observed:-

“I note that one of the great strengths of Australian common law is that it has been able to draw on a vast body of experience from other common law jurisdictions. Now both Canada and England, and to a lesser extent New Zealand, will progressively be removed as sources of influence and inspiration.

This is a transition of great significance for Australian lawyers. At the present time, for the vast majority of us, American Bill of Rights jurisprudence is virtually incomprehensible. Within a decade, it is quite likely that in substantial areas of the law, British and Canadian cases will be equally incomprehensible to Australian lawyers. The Australian common law tradition is threatened with a degree of intellectual isolation that many would find disturbing.”
(Spigelman CJ, to the National Conference of the Australian Plaintiff Lawyers Association, 22 October 1999)

39. Elsewhere in these submissions, reference was made to the level of entrenchment. The greater the level of entrenchment, the greater the impact upon the common law, particularly where the right under consideration goes beyond a recognised common law right, for example, the right to retain and instruct counsel without delay upon arrest; the right to be informed of the right to retain counsel (s.10 of the Canadian Charter of Rights and Freedoms *cf Dietrich*).

40. There may also be an impact upon common law in Australia in the absence of any legislative Bill of Rights. There may evolve a piece-meal court-based Bill of Rights, for example, *Dietrich*. That has the disadvantage from the parliament’s point of view of parliament not being “in the driver’s seat”. There is the further disadvantage from the community’s viewpoint that the piece-meal court based Bill of Rights develops in reaction to government (usually, but not exclusively, to the Executive government) actions. It has the further disadvantage of not

being collected in a single document readily identifiable and easily understood by community, Executive and judiciary.

41. Judges (see the cited example of the Chief Justice's speech above) are becoming conscious that Australian jurisprudence is being left behind, so far as its recognition of the rights of individuals. Not only do the Bills of Rights of the United Kingdom, Canada, New Zealand, USA, South Africa and other Commonwealth countries add to this perception, but the existence of International Covenants and Treaties inspired by the United Nations, International Labor Organisations, UNESCO and other international forums, fortify the judges in this opinion. Not surprisingly, judges will be overtly and subvertly inventive in declaring common law rights. However, different judges will express differently rights that might otherwise have been thought to be similar or identical. Such a situation hardly makes for clarity or certainty in what the rights are. Clearly, the better alternative is a promulgated Bill of Rights by parliament.

Parliament's Ultimate Authority to Override

42. Parliament should have the authority to override basic rights. That authority should be circumscribed. The Canadian model, referred to above, is the concept supported by the Public Defenders.

Bill of Rights Binding Upon the Individual as Agent for Government

43. Where an individual is acting as agent for the government, for example, private security officers in prison, security staff at public functions carrying the status of special constable, contractors foreclosing at the behest of the New South Wales Sheriff (if such persons exist), then, as agents of the New South Wales government, they should be bound to recognise the rights of those they are dealing with.

44. Similarly, where through the actions of the individual, the government stands to gain as a result of the loss, breach or violation of a right of a person, then the Bill of Rights should be binding, even though that individual may not be a direct agent of the government.

Extent and Manner of Enforcement

45. The method of enforcement of a Bill of Rights would very much depend upon the nature of the right that was breached or was held to be in peril. The remedy may vary. However, whatever the remedy, it should be one announced by the Judicial arm of government after a hearing by a court on the merits. The remedy may be the exclusion of evidence obtained in breach of the right (e.g. at a criminal trial); it may be a declaration that the action of the government amounts to a breach of a right; it may amount to the striking down of an Act or a portion of an Act of parliament that is held to be a breach of the right of individuals. The method of enforcement will depend upon whether the court action seeking enforcement is an action of an individual or an action by a group of individuals. It will also depend upon whether the breach is alleged to have occurred through the act of an individual (say police officer) or the existence of an Act of the parliament.
46. The extent of the limits of enforcement of that right thereafter will depend upon the response of the legislature, assuming (as is advocated elsewhere in this submission) there is a power by parliament to override a court's decision.

Should the Bill of Rights be Subject to Reasonable Limits?

47. As earlier stated, modern Constitutions contain devices that permit those who have opposed interests in the exercise of a specific right to advance in court their cause or argument for a curtailing of that right. Reasonable limits prescribed by what is demonstrably justified in a free a democratic

society is an important and proper limitation of a right. For example, in the circumstance of the right to freedom of speech, to shout “fire” in a crowded theatre may be an exercise of the right to freedom of speech. However, the exercise of that right for fun or mischief must be circumscribed in a free and democratic society when to so exercise the right is a threat to the safety and well-being of others.

48. The reasonable limits concept permits interveners who may have a community interest (e.g. Local Government, law enforcers) to argue in courts when a breach of right is claimed for the circumscription of right in certain circumstances.

Construing Legislation in a Manner Compatible with International Human Rights Instruments

49. Requiring courts to construe legislation in a manner compatible with International Human Rights instruments is a less powerful alternative to a Bill of Rights. However, requiring courts to have regard to international covenants when construing legislation would certainly significantly change the domestic criminal law of this State. Court decisions under such a regime would impact, not only upon government and government instrumentalities, but also upon the private sector, such as employers, private schools, private hospitals and the like. It is a less attractive alternative to having a State Bill of Rights standing expressly above the State legal system.