AUSTRALIA-NEW ZEALAND SCRUTINY OF LEGISLATION CONFERENCE

Parliament House
Canberra

6-8 July 2009

Bills of Rights and Legislative Scrutiny: Two different worlds

Paper by

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hl.pap.16727
July 2009

BILLS OF RIGHTS AND LEGISLATIVE SCRUTINY: TWO DIFFERENT WORLDS

At a recent discussion on bills and charters of rights, a participant wanted to know whether any future bill or charter would safeguard the right to health. The right to health, it turned out, would encompass the specific right not to be subjected to compulsory medical treatment without consent. It further turned out that this right to health, once enacted, was intended to put a stop to the fluoridation of water supplies. This raised a scenario of a court ordering the halting of all fluoridation of water supplies on the basis of a right to health in a charter of rights. More alarmingly, it raised the vision of a legislative scrutiny committee trying to come to agreement on whether fluoridation of water supplies could constitute a breach of the right to health.

Legislative scrutiny committees and bills of rights advocacy have come to operate in two different worlds, because the former has traditionally been, and continues to be, focussed on concrete, process-oriented rights, while the latter is more and more focussed on nebulous socio-economic rights.

The difference between the two kinds of rights may be illustrated by choosing two admittedly diverse examples. The sixth amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

This is a concrete, clear right to certain minimum processes designed to ensure that criminal defendants are not wrongly convicted. Above all, this right is eminently suitable for enforcement by judicial interpretation and decision. There is room for interpretation, but most legislators, and people generally, would probably be happy to let judges determine the requirements of “speedy” and “impartial”.

(It is instructive that the right of trial by jury, thought to be sacred in the past, does not appear in modern charters, such as that of Victoria, and has been considerably abrogated without much protest by rights advocates.)

By contrast, article 1 of the Universal Declaration of Human Rights provides:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

This provision is nebulous, unclear, provides no process, and is wide open to an enormous variation of interpretation. What it would mean to either a legislature or a judge in any specific instance would depend entirely on the political and socio-economic opinions of the legislator or the judge.

All of the provisions of the US Bill of Rights were originally concrete and process-oriented. The right of freedom of speech and of the press, for example, originally meant simply the absence of any legislative pre-publication restraint, such as prior approval or licensing by a censor. It did not attempt to prohibit post-publication restraints, such as defamation laws. Similarly, the mid-nineteenth century amendment about "equal protection of the laws" originally simply meant that the state governments would legislate and enforce the law regardless of the identity of the victim or the offender, the plaintiff or the defendant. It was only by subsequent political action and politically-pressured creative judicial interpretation, in the midst of difficult cases, that the provisions of this historic document came to be the subject of such widely differing, contradictory and politically-disputed interpretations.[1] That, however, as they say, is another story.

Partly inspired by these creative American interpretations, proposed bills of rights have come more and more to be expressed in vague language, to depart from process-oriented rights, and to concentrate on socio-economic rights. Modern charters of course include provisions like the sixth amendment, but they are not the provisions that cause the difficulty.

Also, advocacy of bills of rights tends to start with particular cases and particular desired outcomes and to work backwards, as it were, to achieve a statement of rights that will secure the desired outcomes. This reinforces the departure from process-oriented rights.

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[1] The historical shifts in the interpretation of these provisiosn are succinctly analysed in N.Devis and L. Fisher, *The Democratic Constitution*, 2004, pp 173-5, and L. Fisher, *Constitutional Rights: Civil Rights and Civil Liberties*, 1990, pp 948-51.

By contrast, legislative scrutiny committees usually do not have any particular cases in mind when they scrutinise legislation to assess its likely effect on individuals. They also tend to concentrate on concrete, process-oriented rights about which there is a large measure of agreement. They then assess whether there is any undue infringement of those rights in the legislation, having regard to the purpose of the legislation and the objects of the legislature. Whether there is any undue infringement of those rights is ultimately a matter for the essentially political judgment of the legislature.

In any adoption at the federal level in Australia of a bill or charter of rights, one of two outcomes would be likely. In order to achieve the necessary level of agreement to secure its adoption, a bill or charter of rights would perhaps be narrowed down to traditional agreed rights, and would contain a series of provisions like the sixth amendment of the US Constitution. The opponents of such a bill or charter would say that those traditional agreed rights are not seriously under threat and therefore there is no real need for the bill or charter. The alternative and more likely outcome would be that, in order to get a sufficient number of diverse opinions and interest groups "on board" to secure the adoption of the bill or charter, it would incorporate the favourite agendas of those various groups, and thereby be expanded to inordinate lengths and contain a great many less than concrete socio-economic rights. Opponents of such a bill or charter would mobilise all the people who object to particular provisions in it, and all those who fear unelected judges making political and socio-economic judgments on the basis of vaguely worded provisions.

The case of the Catholic doctors and referral to abortion providers in Victoria provides a cautionary tale. The Victorian Scrutiny of Acts and Regulations Committee raised the question of whether the provisions of the Abortion Law Reform Bill 2008 about referrals to other health practitioners could be regarded as contrary to the freedom of religion clause in the Victorian charter. The committee was fortunate to achieve sufficient agreement to raise the matter as one for parliamentary consideration. To one side of the argument it is self-evident that the provisions are contrary to the charter, to the other side it is equally self-evident that they are not, and that their amendment would violate the charter.[2] The issue about referrals is a policy issue pure and simple, of the kind that scrutiny committees had hitherto avoided. It is no advance to have it debated in the context of the charter and its mechanisms, or to have it intrude on the work of the committee.

The point is that to require legislative scrutiny committees to conduct their scrutiny on the basis of a bill or charter containing non-concrete and non-process-oriented declarations of rights inevitably involves those committees in the very thing that they have avoided, and

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[2] Alert Digest no. 11 of 2008, 9 September 2008, p. 3. 'Charter a tool of soft Left', *The Australian*, 27 February 2009, p. 2.

the avoidance of which has led to their effectiveness, judgments about socio-economic policy issues. This could well destroy the effectiveness of those committees.

Our delegates from Victoria and the ACT might well tell us that this has not happened yet under their charters. Those instruments, however, have not been long enough in force for pressure groups to realise their full potential as weapons in political contests. If they are expanded to include rights to health, education and housing, as has been suggested, that potential will greatly increase. The disputes over the Victorian abortion law and the claim that fluoridation is compulsory medical treatment indicates the scenarios that will open before us. There is bound to be political dispute abut these matters. Such disputation, however, is best conducted on the basis of policy issues resolved through the normal political processes, rather than litigation and quasi-litigation under a charter of rights. Conducting these disputes as a "dialogue" about rights, jumping between parliament, the judiciary and other forums, only confuses the issues, and in the midst of that confusion, the danger is that the valuable work of legislative scrutiny will be overwhelmed.

Regardless of whether a bill or charter of rights is adopted, it would be best to allow the legislative scrutiny committees to continue the work that they do now.

Whether they would be able to continue to do so in the context of much more headline-worthy litigation and political disputation based on a charter of rights may be doubted.

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