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Let me begin by putting my cards on the table – I do not think Australia needs a Bill of Rights. What's more, I think it would be a *bad* thing for Australia to have a Bill of Rights. In this article I argue why a Bill of Rights is not necessarily a good thing and in an article to appear in the next edition of *Legal Eagle*, I argue that if we need anything at all, a Bill of *Responsibilities* is much more appropriate.

There has been a huge amount written by academics, judges, human rights activists, journalists and politicians over the past decade (and more) on whether Australia needs a Bill of Rights. Famous barrister and human rights agitator and author, Geoffrey Robertson QC, was recently reported as saying:

> 'If there were an Olympic medal for teams of judges – and why not, since there are medals for tae kwon do and beach volleyball – the Mason High Court (of the 1980s) would have won gold year after year. The quality of its jurisprudence was the best in the world at the time. But times move on and other courts are ahead. Our judges and lawyers are still of the highest calibre ... but unlike other advanced countries they have no Bill of Rights to interpret.'

According to *The Courier-Mail* newspaper, '[T]he British-based Australian QC criticised the Australian Parliament for failing to give judges the modern tools for their job.' And a Bill of Rights, Robertson argues, is just the tool that the judges need.

What is a Bill of Rights?

There are now a number of Western countries that have a Bill of Rights (sometimes called a Charter of Rights) – the most famous of course being the United States, where the first 10 amendments to the US Constitution are commonly referred to as that nation's 'Bill of Rights'.

The US rights include freedom of speech, freedom of the press, freedom of religion, the right to keep and bear arms, freedom of assembly, freedom to petition, and the rights to be free of unreasonable search and seizure. There is also a right to not be subjected to cruel and unusual punishment or to be compelled to self-incriminate.

The US Bill of Rights also restricts the power of Congress (the US equivalent of our Parliament) by prohibiting it from making any law respecting the establishment of religion and by prohibiting the federal government from depriving any person of life, liberty, or property without due process of law (commonly referred to as the 'rule of law').

The Canadian Charter of Rights and Freedoms contains a long list – with the 'fundamental' rights being freedom of conscience and religion, freedom of thought, belief, opinion and expression (including freedom of the press and other media of communication), freedom of peaceful assembly, and freedom of association.

What different ways are there to protect rights?

Many people think that Australians have similar rights to those listed above, but we actually have fewer 'constitutionally enumerated' rights than in countries like the US and Canada. This is an important point to understand – the fact that some of our rights are protected by the Australian Constitution, whereas many others are protected by 'normal' laws (ie, regular Acts of Parliament). The main difference is that rights under the Constitution are harder to change, whereas it is easier to change a right guaranteed by a regular law of Parliament.

What are rights and what are their limits?

But what do we mean by 'changing' a right? Surely 'a right is a right' – it is something we are entitled to and it can't be changed. This is where there can be difficulties of interpretation. What do we mean when we say we have a certain right and, just as importantly, how much of a particular right do we think we should have? Let's consider some examples.

Property rights have been debated for hundreds of years, and the debate comes in many shapes and sizes, and has many subtleties. But let's look at it in a simple form. Most people would agree with the general proposition that if I own a thing, I can do what I want with it. I am looking at the mug sitting on my desk as I write this, so let's use that as an example and try to express my 'rights' in relation to my mug. I own the mug – therefore I can do what I want with it. That means I can use it to drink coffee, or water. I can use it as a pen holder. If I become enraged with my computer because it stops working, I can bash the mug on the desk and even break it. I can throw it away if I do not like it anymore and replace it with another.

I can do all of these things because it is 'mine'. In other words because it is my property, I have certain 'rights' in relation to the mug. These rights 'trump' your rights – that is,

I have a better right to decide what happens to my mug than you do. In fact, you would have very few rights in relation to my mug at all.

But if we agree that I have the 'right' to do with my mug as I wish, what are the limits of that right? Because limits would have to apply. For instance, even though I might have the right to do what I want with the mug, that right would not extend to throwing the mug at your head, or to deliberately placing the mug where I know a blind person will fall over it, and so forth. So it is with any property – while we would generally accept that ownership gives us certain rights, those rights would be limited or circumscribed in different circumstances. Think of a factory that is owned by an industrialist. What rights does the industrialist have in relation to their factory? But what about workers' safety? What about pollution? What about noise and smells bothering neighbouring properties?

So we'd probably all agree that any 'right' we propose must also have limits. The 'right to free speech' is another right that people like to assume they have (often without really articulating what it means), but this right too is limited. For instance, although I may have a right to free speech, this is unlikely to extend to a right to stand outside your house with a bullhorn at 2 o'clock in the morning, telling you about my political opinions.

Protecting rights by law

So I have rights, but we agree that those rights are limited. Now, as mentioned above, there are generally two ways you can 'protect' a right by law – you can 'entrench' that right in the Constitution as a 'fundamental' right, or you can pass a law that protects the right.

In this country, a change to the Australian Constitution requires a referendum – a special vote of all Australian citizens. A proposal to amend the Constitution must first take the form of a Bill submitted to the Commonwealth Parliament. Between two to six months after its passage through Parliament, the proposal 'shall be submitted' to voters in the States and Territories in the form of a referendum.[1]

Moreover, Bills to alter the Constitution must be approved in a majority of States and by a majority of all electors voting, including electors in the Territories. The vote of a Territory is not counted as part of a 'majority of the States' in determining the result of a referendum, but it is included in the majority of electors total.[2]

James McConville suggests that the whole process of holding referenda does not really work:

> 'Since federation, there have been 44 referenda in Australia of which only eight have been successful. Despite consistent commentary that proposed referenda have been rejected because the public are protective of their Constitution, this is far from true. Rather, Australians are a conservative bunch who when faced with change – even positive change – that they don't fully understand, vote to maintain or restore the *status quo*. No more is this true than when it comes to referenda in Australia.'[3]

Looking at the process, it's plain that it is *hard* to change the Australian Constitution. In contrast, a regular Act of Parliament can be changed by another Act of Parliament, which only needs the approval of a simple majority in both Houses of Parliament.

Unintended consequences

An important point to remember about legislation is that, despite the best efforts of parliamentary drafters, it is ultimately up to the Courts to *interpret* what was meant by Parliament when it passed a law phrased in a certain way. Therefore, it is possible that Parliament may have intended a law to mean one thing, but for a Court to decide that the words of the law mean another thing altogether.

This does not happen a great deal – as there are many interpretive procedures in place that Courts use to try to determine 'what Parliament meant' when it passed a particular statute – but nonetheless, it does happen.

Another important point to keep in mind about legislation is that it can have *unintended* consequences. Writing in *The Sydney Morning Herald* earlier this year, Commonwealth Attorney-General Philip Ruddock gave some stark examples of the 'unintended' consequences of words in various Bills of Rights. He said:

> 'In Canada, for example, without direction from the parliament, judges have decided that all asylum seekers are entitled to an oral hearing, that there should be gay marriage, that persons awaiting trial must be released after eight months on remand, no matter how serious the crimes involved (this position was later reversed), and that tobacco advertising is free speech.
>
> In Britain last year a suspected car thief climbed onto the roof of a home and threw bricks and tiles at police. Officers provided him with Kentucky Fried Chicken and cigarettes, just to be sure that his "human right" to sustenance while being "detained" could not be called into question.
>
> In 2001 the European Court of Human Rights held that certain tenants who were behind in their rental payments could not be evicted because of their "right" to "their" home. In 2006 the House of Lords followed and applied that decision.
>
> I doubt that many Australians would welcome these outcomes.'

And here's the thing ... if Australians approve a constitutionally entrenched Bill of Rights, and the Courts interpret that Bill of Rights – with absurd or unforseen or unacceptable consequences – and it's as hard to change the Bill of Rights through a referendum as McConville suggests, then this means we're stuck with those unintended consequences. It's much harder to deal with them than it would be if the rights were contained in a normal Act of Parliament. In the latter case, a simple majority of the Parliament can correct any 'unintended' consequences.

What rights do Australians have?

Many Australians think they have a wide range of rights that are protected by constitutional entrenchment in the same way that such rights are protected in countries like the US. However, the rights that are found in the Australian Constitution are actually quite limited.

There is a *limited* right to freedom of religion, a *limited* right to trial by jury, a contingent right to be compensated on just terms for any property taken by the Commonwealth, a *limited* right to vote, and an *implied* (but *limited*) right to freedom of communication on political issues.

As you can see, there is no freedom from arbitrary arrest, no general freedom of speech, no freedom of assembly, no

freedom from self-incrimination, and so on.

But most of these 'non-constitutional' freedoms can be found in other Acts of Parliament. There is an array of statutes that specifically gives rights and protections, and a number of others, though they are not laws 'about' rights, nonetheless provide for dozens, or scores or hundreds, of rights within their sections.

Why are our rights not in a Bill of Rights?

Why is it that many other countries have certain rights entrenched in a Constitution, but we do not? The reason is summed up by Professor Greg Craven in his excellent book, *Conversations with the Constitution: Not Just a Piece of Paper*. He says:

> 'The morbid disinclination of the founders to entrench rights derived from their fervent love affair with the British Constitution. Rights are the business of parliaments and majorities, not constitutions and judges. If parliament gets the question wrong, then the electorate will extract its usual vague-minded and bloody vengeance at the next election. Fortunately, parliament being as fractious as two yabbies in a burrow, the people will be alerted to any controversy.'[4]

And that, in a nutshell, is why we should dictate what our rights are in 'normal' Acts of Parliament – not in the Constitution.

Changing laws – changing rights

There are many reasons why we citizens might want to change a law and might want to change it quickly, and why we should be considered mature and sensible enough to do so ourselves. Contrary to this argument, most proponents of a Bill of Rights consider that Parliament (comprising the elected representatives of the people) is *not* responsible and mature enough to ensure that we are afforded the rights to which we are entitled. Instead, they say, this job should be entrusted to judges.

But there are plenty of practical reasons why the *people* are better judges of rights than, well, judges.

In particular, judges are not elected to their positions, and in our Westminster system, the 'separation of powers' doctrine very rightly insists that the Executive and Parliament have no influence on judges once appointed. This means that once a right is constitutionally entrenched, the people have very little say on what that right means or how its limits should be set. It is a big administrative job to change a constitutionally entrenched right. History has shown that even though most people may be in favour of a change, it is easy to run a scare campaign to muddy the waters in relation to any particular referendum.

It is also a fact that there generally needs to be more than a majority of people voting for a change in order to get that change made. A referendum can be lost where significantly more than half the voting population is in favour of the proposed change, but a majority in smaller States is not.

Furthermore, there may be instances where people's perceptions of rights change – either because the community's circumstances have changed, or because people's views of rights have changed. For instance, in times of war people may consider that the ordinary person has a much more constrained right to free speech than in times of peace. Similarly, most citizens are willing to accept a certain diminution of their rights (although how much is, of course, a trickier question) when their nation is threatened by terrorism.

What then should be the people's responsibility in relation to their own rights? The people elect their parliamentarians to protect their rights (they don't elect judges), and if the people have a changing view of what it is important to protect – it is, after all, their community, their polity, their country – it is appropriate that they take responsibility for their own laws.

It follows, therefore, that Parliament is the most appropriate and most efficient way of amending laws to counter unintended consequences. It should not be the job of judges to 'make policy' for the Parliament when the actions of the Parliament have somehow failed to achieve what the Parliament intended. In simple terms, if the Parliament makes a mistake (and unintended consequences are not necessarily the result of a mistake) Parliament is the most appropriate body to fix that mistake.

References

1. Department of the Parliamentary Library – available at http://www.aph.gov.au/library/elect/referend/rintrod.htm.
2. Ibid.
3. J McConville, 'Australia's Constitution is Constrained by People Power' – available at http://www.onlineopinion.com.au/view.asp?article=5062.
4. G Craven, Conversations with the Constitution: Not Just a Piece of Paper (UNSW Press, Sydney, 2004) 167-8.

Where do you stand?

Are you persuaded by the views expressed in this article, or do you think Australia should have a Bill of Rights? Explain your position.