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Why Australia Has No National Bill of Rights

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Several decades of advocacy have failed to produce a national bill of rights in Australia, leaving that country, as is now routinely observed, as the only mature democracy without such an instrument. The latest disappointment for advocates came in early 2010 with the Rudd Labor government's decision not to follow regional initiatives, in the form of statutory bills of rights, in the Australian Capital Territory and the state of Victoria.[1] Many supporters of a bill of rights believed the latter initiatives had laid the groundwork for the implementation in the Australian national government of approaches developed some years earlier in New Zealand and Great Britain.[2] Moreover, the Rudd government had demonstrated interest in such an initiative and had appointed a public inquiry which, after substantial community engagement, had found in favour of the 'dialogue model' involving a statutory bill of rights, a capacity of the courts to issue a 'declaration of incompatibility' where a law was found to conflict with the bill of rights, and mechanisms for enhanced scrutiny within the executive and legislative branches of the impact of legislation on rights (NHRCC 2009). The government ultimately decided to adopt only the last of these recommendations, a requirement for a statement of compatibility to accompany a bill upon its introduction to parliament and the establishment of a new parliamentary legislation committee with a human rights remit (Commonwealth of Australia 2010). A leading academic proponent of an Australian bill of rights has described the outcome as 'heartbreaking' (Williams 2010, 8).

The purpose of this paper is to explain this outcome and, more generally, Australian exceptionalism regarding a national bill of rights. The argument is that outcomes in Australia's several decades' long debate over a national bill of rights have been strongly influenced by its Constitution. This has underpinned a comparatively strong parliamentary check on the executive, thereby weakening the rationale of a bill of rights; thwarted the drive for a constitutional bill of rights; and helped delegitimize statutory approaches to a bill of rights in general and the 'dialogue model' in particular. The paper shows that these consequences of its higher law Constitution explain why Australia has not followed Canada, New Zealand and the United Kingdom in adopting a bill of rights.

Explaining the Australian Case Comparatively

Since Erdos (2012) also aims to provide a general, comparative explanation of the Rudd

[1] *Human Rights Act* 2004 (ACT); *Charter of Human Rights and Responsibilities Act* 2006 (Vic).
[2] *Bill of Rights Act* 1990 (NZ); *Human Rights Act* (UK) 1998.

government's approach to a national bill of rights, it is necessary to distinguish the analysis in this paper. Erdos (2012) applies a general framework developed elsewhere (Erdos 2007) to explain the nature and timing of national decisions in this area. Key components of this framework are 'the reaction of elites to prior negative political experiences' and 'structures that allow political entrepreneurs to function'. Consistent with this framework, the Rudd government's failure to act on its expert committee's recommendation in favour of a bill of rights, placed in the context of successive initiatives in this area by national Labor governments, is seen to be a result of the 'lack of a catalysing political trigger' – the Howard government's moderation in the use of power compared with the Thatcher and Muldoon governments in the UK and NZ respectively – and 'Australia's fragmented institutional structure', principally its strongly bicameral parliament, which constrains political entrepreneurialism in national government (Erdos 2012).

This is a plausible explanation but in it arguably underemphasizes the depth and breadth of the contribution of Australia's Constitution to the explanation. Regarding depth, the two factors identified by Erdos are much more closely related than his analysis suggests. It may be accepted that the Howard government had a less arbitrary or extreme demeanour than either the Muldoon or Thatcher governments, but this is not a factor independent of constitutional arrangements. It is well understood that the institutions of government in NZ, at least prior to the change of electoral system in 1994, and in the UK greatly concentrate power, making radical policy change easier to achieve and criticism of such change easier to dismiss. These environments are sympathetic to high-handed government. By contrast, the dispersion of power produced by Australia's Constitution tends to discourage arbitrary behaviour in governments. The relevant causal factor then is not so much the personalities of leaders but the institutions and what actions they allow leaders to get away with. This is nicely illustrated by the widely acknowledged transformation of the Howard government when it gained a Senate majority in mid-2005. Previously the need to win the support of MPs outside of the Liberal and National parties had been a force for moderation in the government's legislative program and for openness and responsiveness in its general relationship with the Senate. But subsequently the natural tendency of any government to resist changes to its legislative program and a desire to demonstrate fidelity to party ideology (and responsiveness to the party caucus) were both given free reign, producing more radical legislation with a narrower base of community support. In parallel, the government's willingness to allow parliamentary scrutiny of its actions declined dramatically and Senate

procedures for scrutiny were weakened (Evans 2009). The resulting image of a government which had become extreme and arrogant was undoubtedly a factor in its defeat at the polls in 2007.[3]

The Constitution also arguably has a somewhat more comprehensive role in the explanation than is captured in Erdos' account. A strong Senate, grounded in the Constitution, is not merely an obstacle to governmental initiatives but has facilitated the development of procedures which arguably offer some of the advantages of a bill of rights. There are also more subtle influences. The existence of a higher law constitution, and one which includes a number of rights provisions, tends to create an expectation that additional protection of fundamental rights will be achieved through constitutional amendment. Further, an unsuccessful attempt to bring about such amendment, as in Australia in 1988, will tend to raise concerns about the legitimacy of any future initiative (a statutory bill of rights) to achieve a broadly similar purpose by means which bypass constitutional change. A higher law constitution also typically generates experience with judicial review which in turn may generate -- and in Australia in recent times has certainly generated -- suspicion among politicians and those they represent about the tendency of courts to usurp the role of the legislature. This will create a less receptive political environment for any initiative which promises to expand the role of the courts, however modestly. These points are elaborated below.

Governmental decisions on formal protection of rights, like other policy decisions, are a product of leadership, attitudes within the governing party, attitudes of other significant actors in the parliament, and the government's standing in public opinion. As Erdos has suggested, they are also affected by recent public policy, in particular the nature and form of policy made in the recent past by partisan opponents of the current government. Further, certain issues are especially likely to promote interest in rights protection, such as recent Australian legislative and executive action on terrorism and asylum seekers. A detailed explanation of a particular governmental decision must deal with all of these factors. However, prolonged, major differences in approach to rights protection between Australia and other nations – in particular Britain, Canada and New Zealand with which Australia has

[3] See Bean and McAllister (2009) on the role of the radical WorkChoices legislation enacted as a result of the government's control of both houses of parliament.

much in common – are most efficiently explained by reference to constitutional differences. Australia's Constitution both weakens incentives to introduce a formal bill of rights and makes this change more difficult to achieve. The remainder of the paper examines several aspects of this influence.

Strong Bicameralism

Unlike other Westminster-derived democracies, Australia has a tradition of strong second chambers at state and federal levels. That strength derives from a combination of the formal power of second chambers to modify or reject legislation, different modes of filling seats in upper and lower houses resulting in governing parties frequently lacking majority support in upper houses, and modes of filling upper house seats widely regarded as democratic and fair. As the UK House of Lords has come closer to satisfying the second and third of these criteria over the past decade or so, its ability to influence the legislative process has grown (Russell and Sciara 2007). But there remain significant limitations on that chamber's legislative power in comparison with most Australian upper houses. The same is true for the Canadian Senate, the sole remaining second chamber in federal Canada. Despite its substantial legislative power, the Canadian Senate is typically less able to exert legislative influence both because executive appointment of Senators produces a house whose partisan composition is often aligned with that of the House of Commons and because executive appointment robs the house of legitimacy (Smith 2003). Unitary New Zealand has a unicameral parliament, its second chamber, also appointed and weakened further by the unlimited size of its membership, having been abolished in 1951 (Jackson 1972). The persistence of strong bicameralism in Australia, and its absence in the other jurisdictions referred to above, is ultimately a result of constitutional design – including constitutional specification of the legislature and, very importantly, the extent to which the Constitution is entrenched. In particular, the powers of the Australian Senate and its democratic basis are not only established by the Constitution but also protected from erosion by onerous requirements for constitutional amendment.

In contrast with Canada, New Zealand and Britain, Australia's powerful Senate has been a significant obstacle to the introduction of a statutory bill of rights. From the late 1960s the Federal Labor Party has combined its traditional commitment to the concentration of governmental power with a concern to check that power by means of some form of a bill of rights (see Galligan, Knopff and Uhr 1990, 65-66). Each time the party has come to office

since that time – in 1972, 1983 and 2007 – it has at some stage shown interest in a statutory bill of rights. But over this period Labor has always lacked a majority in the Senate. It has either faced a Senate with a majority hostile to a bill of rights, as in the case of the 'Murphy Bill' introduced in 1973, or has been unable to gain the agreement of potential or in principle supporters, as in the case of the Australian Democrats and the 'Bowen Bill' introduced in 1985. One likely consideration behind the Rudd government's decision not to proceed with a statutory bill of rights in 2010 was the presence, at a minimum, of a 'blocking majority' of opponents of the measure in the Senate (Liberal, National and Family First). Several attempts in the 1980s and 2000s by the Australian Democrats to gain support in the Senate for statutory bills of rights also failed (NHRCC 2009, 235-36). Strong bicameralism means that in Australia a broad consensus is required for a major change, such as the introduction of a bill of rights, whereas in the other jurisdictions discussed above a bare single-party, single-house majority would normally be sufficient. It is noteworthy that both the New Zealand National Party and the British Conservative Party, like the Australia Liberal and National Parties, opposed legislation introducing a bill of rights. (As explained below, parliament was not relevant to the adoption of the Canadian Charter.)

There is a less obvious but no less important way in which strong bicameralism has impeded the introduction of an Australian bill of rights. Westminster tradition has always looked to parliament as a primary institutional guarantor of individual rights, with the courts providing remedies for violation of common law and particular statutory rights. As parliament has, over the past century, become less of a bottom-up institution for representing the interests of local communities and more a top-down instrument for enacting executive policy, its traditional rights protecting role has become less credible. A major underlying reason for the growth of interest in bills of rights in countries with parliamentary government, especially Westminster-derived systems, has been a desire to substitute new checks on the executive for the weakening legislative check. Note, for example, Palmer (1992, 53), father of New Zealand's bill of rights:

'We have no second House of Parliament. And we have a small parliament. We are lacking in most of the safeguards which many other countries take for granted… a bill of rights will place new limits on the powers of Government… It will restrain the abuse of power by the Executive branch of Government and Parliament itself.'

The perceived need to empower the courts through a bill of rights to restrain an executive-dominated parliament has also been a major rationale for the Canadian Charter of Rights (see Banfield and Knopff 2009, 18-19).

However, as Canadian political scientists, Banfield and Knopff, have observed, Australia is in a different situation because strong bicameralism means that 'other avenues of moderating inter-institutional 'dialogue' remain plausible there' (2009, 19). Strong bicameralism enables a significant separation of executive and legislative power – and the notion of a parliamentary check on the executive -- to be sustained in modern parliaments where party discipline typically enables executives to dominate lower houses. This is cashed out in frequent amendment of executive-sponsored legislation, including on rights-related grounds, and strong oversight of executive action. Banfield and Knopff (19) highlight the rhetorical value of this institutional reality for opponents of bills of rights in debates over specific proposals, such as that in 1988 to extend the rights protected by the Constitution. In Australia, the argument that parliament is not broken as a mechanism of rights protection, and hence that a judicial fix is not required, is thus likely to fare better than elsewhere simply due to the basic structure of parliament.

The case is strengthened by the fact that Australian upper houses have well-developed mechanisms for scrutinizing both primary and delegated legislation against rights criteria. The Senate has possessed a 'standing' committee to examine delegated legislation since 1932 and one for primary legislation since 1982[4]; state upper houses have acquired similar machinery in recent decades (see Stone 2005). Further, the Senate Legal and Constitutional Affairs Legislation Committee enquires into specific pieces of legislation referred to it by the Senate/ Selection of Bills Committee, including legislation which raises rights issues of any kind.

It is true that these committees are not designed to bring the full range of rights in contemporary bills or charters of rights systematically to bear in the scrutiny of legislation. Their terms of reference lack detail and privilege process-oriented liberal rights over rights oriented to social outcomes. Their overriding concern is with the rule of law and the prevention of arbitrary government. The Senate's Scrutiny of Bills Committee (state

[4] Senate Standing Committee on Regulations and Ordinances; Senate Standing Committee for the Scrutiny of Bills

committees have similar remits) is required to report on legislation, either currently before the parliament or enacted, which '(i) trespasses unduly on personal rights and liberties; (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions; inappropriately delegates legislative powers; (iv) inappropriately delegates legislative powers; or (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny' (Senate Standing Order 24). In a recent report it gave as examples of the rights issues it had raised under its first term of reference: the use of coercive powers, breaches of the privacy of individuals, the right to vote, the use of strict liability provisions, and the abrogation of the privilege against self-incrimination (SSCSB 2012, 15-16).

Delegated legislation committees have a similar rights-protecting role. The Senate Regulations and Ordinances Committee is authorized to investigate inter alia whether delegated legislation trespasses unduly on personal rights and liberties (Principle B) and whether delegated legislation makes rights unduly dependent on administrative decisions which are not subject to independent review of their merits (Principle C). The Committee has published Guidelines on its interpretation of its principles. In the case of the first of the aforementioned principles these include: 'must not lessen the operation of provisions protecting human rights; sensitivity must be shown in relation to personal matters; privacy must be protected; property rights, if interfered with, must be adequately protected; excessive fees or penalties should be avoided; criminal offences should normally provide a defence of reasonable excuse; onus of proof should normally be on the prosecutor; retrospectivity should not disadvantage anyone except the Commonwealth' (SSCSB n.d.).

As well as their narrow focus, the scrutiny committees have been criticized for other limitations (see Evans and Evans 2007). The Scrutiny of Bills Committee has not sought to catalogue the rights and liberties captured in its first term of reference. Further, avoiding conflict with ministers and officials on policy matters by confining itself to technical criteria for scrutiny has been a long term preoccupation of the Committee, though it has become somewhat bolder over time in broaching policy matters (such as entry, search and seizure powers) and matters of legislative policy (such as reversal of the onus of proof, and the use of strict liability offences) and in its preparedness to suggest amendments rather than leaving this task to the Senate floor (SSCSB 2012, 21-22). Nevertheless, unwillingness to go beyond identification and analysis of issues to reach a 'concluded view' as to whether legislation violates the Committee's criteria continues to be the norm. Further, even where scrutiny

committees produce strong reports, their influence on parliamentary debate 'can be hard to identify' (Evans and Evans 2007, 28).'

Notwithstanding such limitations, Australian upper houses have, on the basis of their political independence, developed active committees with major roles in the scrutiny of primary and delegated legislation on core human rights grounds. The work of these bodies does much to support the claim that Australian parliaments continue to perform a significant rights-protective role despite the presence within them of a large and active executive.[5]

Procedure for Constitutional Change

Like Canada and the United States, but unlike New Zealand and the United Kingdom, Australia has a higher law constitution. This creates an expectation within the political culture that important institutional change is appropriately effected by change to the Constitution. Until quite recently debate about a bill of rights in Australia has proceeded on the assumption that those rights should be part of the Constitution. That assumption was also a consequence of several particular influences: that the Constitution already contained some statements of rights (other rights had been proposed to be included but had not received sufficient support at the Constitutional Conventions of the 1890s); that the great reference point for all debate on the subject was and is the constitutional Bill of Rights in the USA; and the basic sense that if individual rights were to receive special protection they should be part of the highest body of law in the land. This view of the appropriate legal status of a bill of rights was not confined to Australia. Indeed, in Britain up to the 1990s it was widely argued that a modern bill of rights could not be adopted in that country because it could not be given higher law status and/or was incompatible with parliamentary sovereignty (Brazier 1991:130-36).

When it became interested in introducing formal protections for individual rights in the 1960s, the Australian Labor Party aimed at constitutional embodiment of such rights. Introducing the first of Labor's statutory bills of rights in 1973, Attorney-General Lionel Murphy presented this as a step towards a constitutionally entrenched bill (Galligan 1995:151) – as did his counterpart in the first Hawke Labor government when presenting that government's bill in 1983. Canada took just such a path: the statutory bill of rights enacted in 1960 was succeeded in 1982 by a constitutional Charter of Rights and Freedoms. Institutional

[5] This is not to deny that, overall, committees make ' limited contributions' which could be greatly improved (Evans and Evans 2007, 29; see also Department of the Senate 2010)

logic suggests that a constitutional bill of rights would be the preferred choice for Australian proponents, just as it was in Canada; whereas, in countries like the UK and New Zealand which lack higher law constitutions, statutory bills were almost necessarily preferred. However, Australian initiatives of this type have run into unique difficulties created by the Constitution's procedure for its amendment.

A defining feature of a higher law constitution is a procedure for changing the text of the constitution which is more onerous than that required to make ordinary law. Under the Canadian Constitution (s. 38) most amendments require House of Commons and Senate approval, and two-thirds of provincial legislative assemblies representing at least 50 per cent of the national population. But the Charter didn't achieve constitutional status in this way. Instead, it formed part of the 'patriated' Constitution of 1982, which was produced by an act of parliament at Westminster since the previous Constitution, the British North America Act 1867, lacked an alternative amending formula. The politics of constitutional change prior to, and including, the changes of 1982 were more complicated than this suggests, because the consent of provincial legislatures was conventionally required before Westminster was requested to legislate. Consequently, there was compromise over the contents of the new Constitution, including the addition of s. 33 to the Charter, allowing a provincial legislature to pass legislation 'notwithstanding' the rights specified in a number of sections of the Charter. But the ultimate explanation of the adoption of the Charter was that Trudeau and the national government held superior cards, namely the legal ability to proceed unilaterally with Westminster legislation and the public popularity of the Charter (Knopff and Morton 1992, 15-18).

Proponents of a bill of rights in Australia have not had the advantages possessed by the Canadian government in 1982. Australia's Constitution was patriated at birth. S. 128 requires amendments to be approved by absolute majorities in the House of Representatives and the Senate and also by a national majority of electors and majorities of electors in a majority of states. The referendum requirement is a very strict test of public support for a proposal. While the Swiss have added rights provisions to their Constitution by referendum in recent times (1999), this is in a context where citizens can also initiate changes to the Constitution (to eliminate or modify provisions which produce unpopular results) and in which judicial review does not apply to national laws (reducing the uncertainty about consequences). In Australia, due to the design of s. 128, the process of initiating change is monopolised by the national executive, and this tends to breed suspicion in state governments and among citizens

about the interests being served. Such suspicion breeds 'no' votes (Galligan 1995, 110-32; Sharman and Stuart 1981).

Two proposals put to referendum, both unsuccessfully, have involved the addition of individual rights to the Constitution. In 1944, two rights provisions – a guarantee of freedom of speech and expression at both state and federal levels and the extension to the states of the Constitution's freedom of religion guarantee in s. 116 – were tacked onto a proposal to transfer a large list of legislative powers from the states to the federal government. The proposal, marketed by the government as permitting a continuation of wartime controls for postwar reconstruction, was carried in only two of the six states and failed to gain a national majority. At the 1988 referendum, citizens cast separate votes on four proposals, one of which was a set of three rights. These included strengthening the constitutional right to trial by jury, currently applicable at the Commonwealth level to indictable offences, so that it would be available throughout Australia for those charged with an offence carrying a maximum penalty of two years' imprisonment; extending the constitutional guarantee of freedom of religion to the states; and similarly extending the constitutional requirement for acquisition of property to be on just terms.[6]

The rights proposal of 1988, originally seen by the government as uncontroversial and a means of generating interest in and providing reassurance about constitutional change, proved very controversial (Sharman 1989, 108, 112). The chief source of complaint was the provision on religious freedom, whose wording, it was argued, might invite a successful challenge to the constitutionality of state aid to church schools. As a result Catholic bishops and many private schools publicly opposed the rights proposal (Sharman 1989, 113). Like the other proposals put to referendum in 1988, the rights and freedoms proposal was not carried at the national level or in any state. It was the most poorly supported of all the proposals put to the vote that year (30.79% in favour at the national level).

There is little likelihood that future proposals to add rights to the Australian Constitution would fare much better. Constitutions comprise fundamental rules which are not usually the subject of public discussion. It is often difficult even for experts to predict the effect of proposed changes to these rules. This is especially the case with constitutional rights which are typically more abstract and general – and hence more open to interpretation by the courts

[6] A separate proposal about electoral principles included, as a minor theme, giving constitutional status to the right to vote in all state and federal jurisdictions.

-- than other components of a constitution. Constitutional changes are particularly hard to unpick in Australia, given the tight control of the national executive over initiation of change; consequently, it quite reasonable for voters to require an overwhelmingly convincing case. But inherent uncertainty about the effect of constitutional rights makes such a case virtually impossible to mount.

The 1988 referendum is a standing rebuttal of survey evidence, such as that produced by the Rudd government's National Human Rights Consultation (Brennan) Committee (2009, 263-65), that Australian citizens support enshrining human rights in law. It assists opponents in making the point that, in the absence of information provided to citizens about the consequences that might be expected to flow from the appealing but abstract provisions of a bill of rights – information which is elicited, albeit selectively and often in distorted fashion, by a referendum campaign – such survey evidence is quite meaningless.

Statutory Bills and Federalism

Due in part to the major obstacle posed by s.128, proponents have come to view a statutory bill of rights with growing favour. Further, enthusiasm in Australia for a statutory bill has been strengthened as a result of the potency demonstrated by the New Zealand and United Kingdom bills – such that a statutory bill, in the contemporary packaging of 'the dialogue model', is now more likely to be promoted as an end in itself rather than an interim measure en route to a constitutional bill. However, a statutory bill is likely to be more problematic in the context of a federal system, and so it has proved in Australia. A basic difficulty is that the Commonwealth parliament lacks authority to enact a bill of rights, unless it is able to utilize s.51(xxix), the external affairs power, to import into Australian law international rights agreements ratified by Australia. While the High Court's permissive interpretation of the scope of s.51(xxix) guarantees sufficient authority as long as legislation does not depart from the content of international agreements, a statutory bill sits ill with Australia's federal system. A statutory bill is not amendable by state parliaments and, due to the Constitution's paramountcy clause, s.109, state law which is inconsistent with the federal bill is invalid. In other words, while a statutory bill would be ordinary legislation for the Commonwealth it would be de facto constitutional law for the states. As constitutional lawyer, Twomey (2009, 8), has noted: 'The fundamental problem with a dialogue model enacted by Commonwealth legislation is that it is not capable of treating the states and the Commonwealth equally.'

This suggests a major political objection and source of opposition to statutory bills in Australia. But it also indicates the attraction of the approach. Labor's first statutory bill was introduced by a government notorious for seeking to transform federal-state relations by means other than formal change to the Constitution. Attorney-General Murphy's Human Rights Bill 1973 could be seen as a neat fit with this overarching objective of the Whitlam government. Both the Murphy bill and that introduced in 1983 by Attorney General Evans in the first Hawke government applied fully to the states; that introduced in 1985 by Evans' successor, Bowen, merely permitted the new federal Human Rights and Equal Opportunities Commission to investigate and report on breaches of rights by state authorities with the consent of the federal attorney-general. All of these bills raised opposition based on federal sensitivities and such opposition has been seen as a primary cause of their failure (Twomey 2009, 8; NHRCC 2009, 236).

The latest high profile proposal for a statutory bill, that recommended by the Brennan Committee in 2009, went out of its way to attempt to restrict its scope to the federal sphere, leaving the states and territories to determine their own approaches to rights protection (NHRCC 2009, 364). In these efforts, however, it demonstrated just how difficult such an outcome is to achieve with certainty. It was advised that the encompassing language of a bill of rights ('everyone has a right to…') would require jurisdictional limitations to be formulated very carefully and explicitly in order to prevent the courts from applying the bill to state authorities (NHRCC 2009, 305; Twomey 2009, 9). Similarly, where state authorities 'exercise public functions on behalf of the federal government' – and, given the extent of federal funding of state activities, they might be found to be extensively involved in such activity – they may be subject to the federal bill (NHRCC 2009, 306). Ultimately, of course, no matter what efforts are made to restrict its scope, the application of a federal bill of rights is somewhat unpredictable because it will be determined by the courts.

The Judiciary and the Dialogue Model

After objections based on federalism, the Brennan Committee identified the power that Labor's statutory bills gave the courts to invalidate inconsistent legislation as the major reason for their failure to win support (NHRCC 2009, 237). This is at first blush curious since judicial review is a long term feature of constitutional politics in Australia. However, as Galligan (1987) has argued, the courts have generally felt the need to proceed cautiously, hiding the creative element in their jurisprudence under a protective veneer of legalism.

When in recent times they sought to offer bolder interpretations of either common law or constitutional law – departing in the latter area from making only those implications which are necessary to render meaningful the express terms of the Constitution and embracing more general underlying principles – they attracted intense criticism. It was thought by some in the early 1990s that the courts might be able to develop a de facto bill of rights on the basis of inferences from the Constitution (Patapan 2000, 47-61). When that was rejected as unacceptable activism, supporters of rights jurisprudence looked to a bill of rights as a means of legitimizing the application of broad rights principles in the courts. But it is highly likely that the wide discretion that rights principles would give the courts, whether backed by a formal bill of rights or not, would transgress Australian democratic norms. Judicial supremacy is far from an accepted feature of Australian government; frequent, if technically incorrect, references to the sovereignty of Australian parliaments in academic literature and public discourse bears this out.[7] A bill of rights, enforceable by the courts, would lead judges to venture deeply into the making of public policy, displacing representative institutions which are both accountable to citizens and arguably better suited to this task. This is a telling criticism in Australia.[8]

In acknowledgement of these points, Australian proponents have most recently tended to embrace versions of the United Kingdom's statutory model (*Human Rights Act* 1998), now commonly referred to as the 'dialogue model.' The key features of that model, in relation to the courts, are a broad power of interpretation of existing legislation to render it compatible with designated rights, and the ability to issue a 'declaration of incompatibility', effectively inviting the minister and parliament to have another look at the legislation, where the court is unable to interpret legislation in a manner consistent with those rights. The interpretive power, shared with the New Zealand Bill of Rights Act 1990, is not qualified by any requirement to interpret in accordance with the object and purpose of the legislation – and the courts have been ambiguous regarding their need to recognize constraints of this kind for primary legislation (NHRCC 2009, 249; McHugh 2009, 24-26). A declaration of incompatibility has no legal effect on 'the validity, continuing operation or enforcement of the provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made' (*Human Rights Act* 1998, s. 4(6)) The two jurisdictions

[7] It is worth noting that the National Human Rights Consultation (Brennan) Committee's terms of reference stated that 'options identified should preserve the sovereignty of the Parliament' (NHRCC 2009, 383).
[8] The Brennan Committee formed the impression, following extensive community consultation, that, if a bill of rights were to be adopted, '… most Australians would prefer parliament to express a final view, once it had received a further opinion from the executive in response to an adverse court finding.' (NHRCC 2009, 363-64)

which have introduced a bill of rights in Australia, the Australian Capital Territory and Victoria, have broadly adopted this model.[9] The Brennan Committee also recommended, albeit far more tentatively than other proponents, a statutory bill of rights along the same lines.

By the time the Brennan Committee had finished its deliberations, however, it was clear that insufficient attention had hitherto been given to the compatibility of the dialogue model with the Australian Constitution. The UK regime has relied heavily on the interpretive power and only marginally on declarations of incompatibility (McHugh 2009, 26-27). However, experts in constitutional law told the Committee that the High Court's view of the separation of powers in the Australian Constitution makes it likely that an interpretive power would be tightly circumscribed (NHRCC 2009, 325; Twomey 2009, 10-11). According to former High Court justice Michael McHugh (2009, 28-29), in order to satisfy this principle, the court would probably require interpretation of legislation to be restricted to meanings consistent with the purpose of the legislation. If so, when the purpose is clear and seemingly incompatible with the designated rights at stake, the court would, under the dialogue model, be constrained to issue a declaration of incompatibility (McHugh 2009, 30).

It is likely, then, that an Australian version of this model would place greater reliance than elsewhere on declarations of incompatibility. This may be no bad thing, declarations being the clearest manifestation of dialogue between the courts and the parliament. The problem is that weighty legal opinion holds that declarations would most likely be found to be unconstitutional (Irving 2009; McHugh 2009; Twomey 2009).[10] One reason is that a declaration, on the British model, which does not bind parties to the legal proceedings would be unlikely to be considered an exercise of judicial power – and hence not available to a court, given judicial understanding of the separation of powers – in light of the way judicial power has been defined in case law. Further, this characteristic of a declaration is also likely to lead the High Court to find that there is no 'matter' for determination within the meaning of that term in Chapter III of the Constitution and hence no jurisdiction for the courts in this area since federal judicial power can only be exercised with regard to 'matters' (McHugh

[9] An important difference is that the Australian legislation does not create new causes of legal action. As McHugh (2009) puts it the legislation does not create rights but immunity from the operation of laws that are inconsistent with the designated rights.

[10] Helen Irving and Anne Twomey are full professors, specializing in constitutional law, at the University of Sydney. As noted below, the Brennan Committee received other legal opinion supporting the viability of a declaration of incompatibility in a national bill of rights (NHRCC 2009, 327-29).

2009, 15-16). In general, in the words of McHugh, a supporter of a stronger statutory bill of rights, 'what may work effectively in a jurisdiction with an unwritten constitution and a single legislature, as in the United Kingdom and New Zealand, may not work as effectively in a federal jurisdiction with a written constitution that incorporates the political doctrine of the separation of powers (2009: 35).'

So the model which was the most politically attractive to proponents because it seemed most benign and saleable turned out to be the most problematic in terms of its compatibility with the Constitution. The Brennan Committee did nonetheless recommend a bill of rights based on the dialogue model, but with a more restrictive interpretive provision, explicitly tied to the purpose of the legislation to be interpreted (NHRCC 2009, 373). With regard to declarations of incompatibility, the Committee accepted the advice of the Solicitor-General that since a declaration could, under the dialogue model, be made only in proceedings for some other relief or remedy (i.e. where a binding determination were to be made), it would be likely to be held constitutional. Curiously, it showed more concern about possible practical difficulties, given Australia's plurality of federal courts, in restricting the issuing of declarations to the High Court, in line with the approach in other jurisdictions which have adopted the dialogue model. The Committee was ultimately equivocal about the inclusion of a judicial power to make a declaration of incompatibility: it was in favour of restricting the power to the High Court but if this proved 'impractical', it recommended not giving any court this power.

The equivocal nature of the Committee's recommendation on the declaration, together with the harm done in the inquiry process to the credibility of the dialogue model in Australian circumstances, undoubtedly played a role in the government's decision not to seek to replicate the ACT and Victorian experiments at the national level.

Conclusion

That seemingly comparable jurisdictions have adopted bills of rights has energized proponents in Australia who, in turn, have been successful in putting the issue on the agenda of recent state and federal Labor governments. The ability to characterize Australia as a laggard on this issue has been important to the persuasive efforts of proponents. However, the laggard thesis is simplistic, not least because it implies the adoption of a bill of rights is primarily dependent on political will whereas there are major constitutional constraints in play. The paper has made the case that constitutional differences provide an efficient

explanation as to why Australia has not moved with Canada, New Zealand and the United Kingdom to create a national bill of rights. Constitutional obstacles to adopting foreign models off the shelf have prompted greater recognition of the distinctiveness of Australian political institutions and interest in the development of more complementary means of enhancing rights' protection (e.g. Barry and Campbell 2011). Decisions taken by the Rudd government in 2010 (Commonwealth of Australia 2010), aimed at creating a more rights sensitive law making process, arguably represent a move in that direction.

The constitutional barriers discussed in this paper, by delaying adoption of an Australian bill of rights, may also have helped indirectly to strengthen the arguments of opponents. Opponents, critical of the shift of power from legislatures to courts arguably entailed in statutory as well as constitutional bills of rights, are now able to trawl the growing body of case law in jurisdictions which have bills of rights (including Victoria and the ACT) for examples of judicial overreach or questionable decision making (e.g. Leeser and Haddrick 2009). Whatever the merits of bills of rights, it is arguably easier to find evidence to support such claims than to find evidence of the courts protecting or advancing fundamental rights. Most of the disputes about rights in developed liberal democracies concern what may be described as 'second order' rights, matters that look more like the balancing of rights which is intrinsic to mainstream public policy (see e.g. Knopff 1988). Critics are often able to use resulting case law to question the wisdom of involving the courts to such an extent in the policy process. It may be, then, that delay, based in the Constitution's regulation of Australian politics, has assisted the mobilization of bias against a national bill of rights in Australia by allowing opponents to draw upon experience with recently adopted bills of rights.

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