

THE CONSTITUTION (DECLARATION OF RIGHTS AND FREEDOMS) BILL 1988 (VIC.) — A DOOMED LEGISLATIVE PROPOSAL

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[This article examines the process leading to the introduction of the Constitution (Declaration of Rights and Freedoms) Bill 1988 to the Victorian Parliament, and puts the Bill into a context of State, Federal and international concern for human rights legislation. The content and probable fate of the Bill is then examined. This includes discussion of the idea that human rights would be best protected in this State if all government legislation were scrutinized by a parliamentary committee having reference to the proposed Declaration of Rights and Freedoms contained in the Bill. The reasons for rejection of this suggestion are considered, and the article concludes that the answer lies in the unfavourable attitude of the executive to any mechanism which might serve to strengthen the role of Parliament in our unbalanced system of government.]

Introduction

The protection of human rights in Australian and Victorian society is not a subject which many people see as an issue of burning importance. Whilst considerable emotion and debate can be (and has been) engendered once the subject is raised at a governmental level, many people in the Victorian community would see little reason for raising the issue in the first place. Suggesting that protection of human rights in our society needs examination carries with it the implication that abuses of the fundamental rights of individuals actually occur — a notion that many would find incompatible with the high degree of freedom and comfort which is seen as the ‘norm’ of life in this country. Abuses of human rights occur in tin pot republics and dictatorial communist regimes — in the torture chambers of the Khmer Rouge or the closed wards of Soviet ‘psychiatric’ hospitals, far removed from the comfortable, urban middle-class environment which is the lot of so many Victorians. Yet, the issue of protection of human rights in some legislative form has regularly been examined in recent political time in this country — both at the federal level and at the state government level by the Victorian Parliament.

This paper endeavours to record one instance of such examination at a state government level. Its focus is a Bill currently before the Victorian Parliament — the Constitution (Declaration of Rights and Freedoms) Bill 1988; a proposal which was preceded by an extensive inquiry conducted by the Victorian Parliament’s joint House, all party Legal and Constitutional Committee. The aim

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of this paper is to record the legislative process which led to the introduction of this Bill to Parliament, a process interesting for the range of influences which have contributed to the Bill's form, content and probable fate. This range of influences includes the Legal and Constitutional Committee's inquiry itself, with its own constraints and overriding objective of achieving a practical result; a discernible international 'fashion' for human rights legislation and the models this provided; the recent federal experience of the Bowen Bill of Rights proposal, and the Victorian Government's own attitude to the assumptions underpinning the Legal and Constitutional Committee's recommendations.

The Constitution (Declaration of Rights and Freedoms) Bill 1988 (Vic.)

The Constitution (Declaration of Rights and Freedoms) Bill¹ was introduced into the Legislative Assembly of Victoria in May 1988. A second reading speech was given by Mr Fordham, the then Minister for Industry, Technology and Resources,² but debate was adjourned, and the Bill lapsed because of the dissolution of the Assembly for the 1988 State Parliament Election.³ Following the re-election of the ALP government under the premiership of John Cain, the Bill was re-introduced in November 1988. Delivering a virtually identical second reading speech for the Bill was the then Attorney-General of Victoria, Mr McCutcheon.⁴ Debate on the Bill was resumed on 12 April 1989, but was adjourned,⁵ and has not yet re-continued. No action was taken with respect to the Bill during the 1989 Spring Session, and it is unlikely that the Bill will attract further consideration this year, since at last inquiry it was listed somewhere near the bottom of the notice paper of Assembly proceedings, and thus has little chance of coming before the House.⁶

The purpose of the Bill is expressed to be 'to recognize and declare certain human rights and fundamental freedoms'.⁷ To give effect to this aim, the Bill provides for the amendment of the Victorian Constitution Act 1975, by inserting into the Constitution a 'Declaration of Rights and Freedoms'.⁸ This Declaration consists of a statement of basic civil and political rights and freedoms which everyone in Victoria possesses, without discrimination on any basis whatsoever.⁹ Examples of such rights include the right to equality before the law,¹⁰ freedom of religion and expression,¹¹ and the right to marry and found a family.¹² It is indeed a declaration — the Bill specifically provides that the statement should

¹ Referred to in the text from here as 'the Bill'.

² Victoria, *Parliamentary Debates*, Legislative Assembly, 5 May 1988, 2069-70.

³ *Ibid.* 3 November 1988, 509.

⁴ *Ibid.* 509-11.

⁵ *Ibid.* 12 April 1989, 652-69.

⁶ Telephone conversation with the Legislative Assembly Papers Room, 19 April 1990.

⁷ Constitution (Declaration of Rights and Freedoms) Bill 1988 (Vic.), cl. 1.

⁸ *Ibid.* cl. 3.

⁹ Constitution (Declaration of Rights and Freedoms) Bill 1988, cl. 3; Proposed s. 74AB of Constitution Act 1975.

¹⁰ *Ibid.*; proposed s. 74AB(b) of Constitution Act 1975.

¹¹ *Ibid.*; proposed s. 74AB(c) of Constitution Act 1975.

¹² *Ibid.*; proposed s. 74AB(g) of Constitution Act 1975.

not be enforceable at law,¹³ and does not give rise to any right of action in the courts.¹⁴ As well, it provides that this statement of rights is in no way to be construed as either an exhaustive list of the rights and freedoms enjoyed by people in Victoria,¹⁵ or an exclusive list, by which the existence of other rights, not listed, is to be denied.¹⁶ Rather it is to act as a guide to Parliament in the protection of rights and freedoms of people in Victoria,¹⁷ although it is not to be construed as limiting the supremacy of Parliament.¹⁸

In his second reading speech, Mr McCutcheon referred to the Bill as the result of the government having '... adopted the key recommendations of the Parliamentary Legal and Constitutional Committee's Report on Human Rights.'¹⁹ Whilst it will be disputed that the Bill represents the key recommendations of the Legal and Constitutional Committee's Report, the Bill certainly owes its existence to the inquiry conducted by this Committee into the state of the protection of human rights in Victoria. The wording and content of the provisions of the Bill come directly from the second recommendation made by the Committee in its Report.²⁰

The genesis of the inquiry

The Legal and Constitutional Committee was given its terms of reference in this inquiry on 14 May 1985. It was required to inquire, make recommendations and give a final report to Parliament on 'the desirability of Parliament enacting legislation which defines and protects human rights in Victoria.'²¹ If appropriate, the content of such legislation and its relationship with existing Victorian and Commonwealth legislation dealing with human rights was also to be considered. In conducting the inquiry, the Committee was to have regard to any 'relevant proposals', including any considered at the federal level, and 'international instruments' — with two in particular being named — the United Nations International Covenant on Civil and Political Rights, and the European Convention on Human Rights.²²

Whence came the genesis of such an inquiry? The terms of reference of the inquiry themselves give some indication in providing for the consideration of 'any relevant proposals including those considered by the Commonwealth Parliament.'²³ The Victorian inquiry and its ultimate recommendations must be

¹³ *Ibid.*; proposed s. 74AA(c) of Constitution Act 1975.

¹⁴ *Ibid.*; proposed s. 74AD of Constitution Act 1975.

¹⁵ *Ibid.*; proposed s. 74AA(d) of Constitution Act 1975.

¹⁶ *Ibid.*; proposed s. 74AC of Constitution Act 1975.

¹⁷ *Ibid.*; proposed s. 74AA(b) of Constitution Act 1975.

¹⁸ *Ibid.*; proposed s. 74AA(a) of Constitution Act 1975.

¹⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 3 November 1988, 509.

²⁰ Legal and Constitutional Committee, *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*, April 1987, 155-8; Referred to as the *Report* in the text and footnotes from here.

²¹ *Ibid.* 1.

²² *Ibid.*

²³ *Ibid.*

seen as operating in the context of a national debate over the protection of human rights in legislative form, not just as an expression of State government concern for this issue. There is a direct link between the initiative taken by the Victorian Government in instituting this inquiry and developments at the federal level.

The notion of federal legislation to protect human rights, particularly in the form of a judicially enforceable Bill of Rights modelled along U.S. lines, is not new in Australian federal politics. Indeed it has been a concern of both of the two Labor governments which have held office at a federal level since 1972. In 1973, the then Attorney-General, Lionel Murphy, introduced a comprehensive Human Rights Bill into the Senate, which would have incorporated a set of civil and political rights, based on the United Nations International Covenant on Civil and Political Rights, into Australian domestic law. Although this Bill was not pursued following the double dissolution and election of 1974, the idea had been introduced to Australian political debate.²⁴ It was given further impetus in 1980 by Australia's ratification of the International Covenant on Civil and Political Rights by the Fraser government. This document imposes international obligations on Australia to implement whatever legislation is required domestically to give effect to the rights recognized in the Covenant.²⁵ The Hawke Government announced in 1983 its intention to enact a Bill of Rights,²⁶ and a Bill prepared by Senator Gareth Evans was given Cabinet approval in 1984, although its introduction was to be deferred until after the December 1984 election.²⁷ In April 1985, the Senate Standing Committee on Constitutional and Legal Affairs was given a reference to inquire into the desirability of a national Bill of Rights for Australia. In October 1985, the much debated and eventually unsuccessful Australian Bill of Rights Bill 1984 (Cth), (the 'Bowen Bill'), which had been modelled on Senator Evans' Bill, was introduced to the House of Representatives.²⁸

These proposals, particularly the Bowen Bill, produced an extraordinary degree of debate and emotion regarding human rights legislation. Whilst the effects of this debate on the inquiry will be discussed further on in this paper, the point here is to demonstrate that the issue was very much a 'live' one at the time of the reference to the Victorian Committee. This is especially so because of the content of the Bowen Bill. The Victorian Attorney-General of the time, Jim Kennan, expressed the view that:

the proposals in the federal Bill, as it is presently drafted, allow an appropriate amount of room for a state to consider legislation for a state Bill of Rights.²⁹

The Bowen Bill did not propose to bind the States, and Mr Kennan clearly saw this as a substantial reason for giving the human rights reference to the Legal and Constitutional Committee. As he stated:

²⁴ O'Neill, N., 'A Never Ending Journey', in Spender, L. (ed.), *Human Rights — the Australian Debate* (1987) 8.

²⁵ Art. 2(2), International Covenant on Civil and Political Rights, U.K.T.S. 6 (1977).

²⁶ Bowen, L., 'An Overview of the Bill and Response to Critics', in Baker, K. (ed.), *An Australian Bill of Rights: Pro and Contra* (1986) 19.

²⁷ O'Neill, N., *op. cit.* 9.

²⁸ *Ibid.* 11.

²⁹ Kennan, J., 'Politics, Economics and Law Reform', in Spender, L.(ed.), *op. cit.* 114.

If there was federal legislation in place that did not affect state law, then there is a strong argument for state legislation which gives mirror image effect to the provisions which are desirable and relevant to be enshrined in a state Bill of Rights . . .³⁰

The conclusion is an obvious one — that the federal debate was a significant motivation for the Victorian inquiry, both because it raised the issue in the political consciousness of the Victorian Government, and because of the specific content of the federal proposal at the time. As Joan Cocksedge, one of the members of the Committee puts it:

It was a relevant time . . . because the federal Bill only went so far . . . and there were big holes . . . it was a good idea to look at the holes to see where Victoria could try to fill them up.³¹

It would be wrong however, merely to explain the motivation for the inquiry in terms of jumping on a federal bandwagon. Indeed, Lou Hill, chairperson of the Human Rights Sub-Committee of the inquiry, described the timing of the federal and state debates as a 'co-incident', seeking rather to locate the impetus for human rights legislation in ALP policy and the personal commitment of certain people to the Social Justice platform adopted by the Victorian Government in 1985.³² This would seem a valid explanation — the August 1987 'Social Justice Strategy', which reiterates the principles adopted in 1985, states that:

One of the key concepts of social justice is that all people should be assured of equal basic rights, and that the ability to exercise these rights should not depend on social or economic circumstances.³³

The adoption of measures which seek to investigate the legal protection of human rights is cognizant with such a position. Joan Cocksedge pointed out that concern for human rights has been a 'long and ongoing concern' within the Labor Party, both in and outside of Parliament.³⁴ Lou Hill in particular spoke of a 'concern by the Attorney of the time, Jim Kennan, to ensure that anything that the legislature can do to protect human rights ought to be done',³⁵ and it would seem fair to consider this as a motivation for the reference also — the personal commitment of Jim Kennan to the idea of human rights legislation. Whatever subsequent attitude to the Bill has been displayed by the Cain Government, it would be incomplete not to acknowledge the sincerity of Jim Kennan's own statement that:

I have long been a supporter of the notion of a Bill of Rights, and the experience of being Attorney-General has very much strengthened my conviction that a Bill of Rights is necessary at both federal level and at state level.³⁶

The Committee concluded its inquiry in April 1987 when it submitted to Parliament its Report entitled *Report on the Desirability of Legislation Defining and Protecting Human Rights*. The Report was approved by all members of the Committee with the exception of one dissident, Tom Evans.³⁷ The inquiry

³⁰ *Ibid.*

³¹ Interview with Joan Cocksedge M.L.C., member of the Legal and Constitutional Committee, 7 August 1989.

³² Interview with Lou Hill former M.P., former member of the Legal and Constitutional Committee, 21 August 1989.

³³ Government of Victoria, *Victoria's Social Justice Strategy; People and Opportunities*, August 1987, 13.

³⁴ Interview with Joan Cocksedge, 7 August 1989.

³⁵ Interview with Lou Hill, 21 August 1989.

³⁶ Kennan, J., *op. cit.* 110.

³⁷ It should also be noted, for the sake of completeness, that Mr Evans, former M.P., former member of the Legal and Constitutional Committee, (Interview, 31 July 1989), could find no explanation for the reference to the Committee, regarding it as having 'been sprung on us' by the Government.

spanned nearly two years, and involved a great deal of work on behalf of the politicians and staff involved. The inquiry was largely conducted by the Human Rights Sub-Committee of the Committee. Considerable effort was made to maximise public participation in the inquiry in recognition of the fact that 'the proper protection of the human rights of Victorians is a matter of profound importance.'³⁸ Debate within the community was encouraged by the publication of three Discussion Papers — the first designed to raise issues connected with the notion of a Bill of Rights, the second focusing on the state of the protection of human rights in Victoria, and the third examining a particular right, that of freedom of expression, as an illustrative example of the position of certain rights in this State.³⁹

Written submissions to the inquiry were invited through these Discussion Papers, and the Human Rights Sub-Committee also heard a significant amount of oral evidence. These oral hearings were conducted in rural Victoria and Melbourne, as well as within three of Melbourne's main prisons. This last forum for hearings was aimed at addressing the Committee's particular concern that prisoners be given adequate access to the inquiry, largely because of the obvious significance of its subject matter to such people. The Committee also commissioned regional consultations in four representational areas of Victoria, and a report from the Victorian Youth Advocacy Network.⁴⁰

Course of the inquiry

The Legal and Constitutional Committee's inquiry into human rights legislation must, of course, be considered in the context in which it operated. The recommendations arrived at by the Committee, and thus ultimately the Constitution (Declaration of Rights and Freedoms) Bill, need to be viewed as the result of a number of factors which shaped the course of the inquiry. Having already alluded to the context of the national debate into which the inquiry must be placed, the effects of this on the inquiry will now be considered, as well as the impact of developments at an international level, the results of the Committee's research and hearings, and the self-imposed limitations which the Committee assumed at a very early stage of its proceedings.

It is these self-imposed limitations which need to be considered first, since they effectively set the parameters of the inquiry. Obviously the terms of reference of the inquiry were determinative in this matter, and the Report shows that a number of limitations were assumed to flow from the terms of reference by the Committee. Firstly, the inquiry was considered to be narrow in its focus. The Committee recognized that 'any reference which has as its essential subject the topic of "Human Rights in Victoria" is potentially of almost unlimited breadth',⁴¹ but rejected such a sweeping scope of exploration on the basis that its terms of reference called specifically for it to answer a more limited question, namely:

³⁸ Report, 3.

³⁹ Legal and Constitutional Committee, *Discussion Paper No.1, A Bill of Rights for Victoria? Some Issues.*, February 1986; *Discussion Paper No.2, Are Human Rights Adequately Protected in Victoria? Some Preliminary Examples.*, March 1986; *Discussion Paper No.3, Freedom of Expression in Victoria.*, May 1986.

⁴⁰ Report, 3-4.

⁴¹ *Ibid.* 4.

. . . would the enactment by the Victorian Parliament of legislation containing a general statement of basic human rights, which sought to define and protect those rights, be a desirable initiative, and if so, what form should such legislation take?⁴²

The inquiry was thus directed purely at an examination of the value and formulation of a particular legislative measure.

Accordingly, the inquiry gave little attention to the more profound philosophical questions which can be raised in relation to the concept of human rights. The Committee rightly saw its main area of concern as a pragmatic issue, to be approached and resolved in practical terms. Thus in answering what was a central question in the inquiry — are human rights adequately protected in Victoria? — the Committee was always guided by the ideal of practicality rather than what it termed an 'abstract form of philosophical calculus'.⁴³

This concern for the practicality, as well as the specific content of the terms of reference, led the Committee to make a second choice in the way the inquiry would progress. The Committee considered that it should restrict itself to a consideration of the need for legislation which would define and protect so called 'civil and political' rights. That is, rights such as freedom of expression or the right to the presumption of innocence, rights which can be characterized as 'essentially negative, operating as restraints upon governmental action, rather than requiring any positive action by government to secure their observance.'⁴⁴ Rights of this type were considered to be the main focus of the inquiry in contradistinction to so-called 'socio-economic' rights, such as the right to health or the right to work. This division and subsequent abandonment of consideration of socio-economic rights was based firmly on the terms of reference, which directed the Committee to consider international instruments which are statements of civil and political rights. The regard which the Committee was to have for Commonwealth proposals also pointed to a consideration of civil and political rights, since it was these rights with which the federal debate was concerned.⁴⁵

Although the Report explicitly acknowledges its rejection of socio-economic rights on the basis of its terms of reference, it must also be seen as a consequence of the emphasis on practicality in the inquiry. This is the logical conclusion of the statement that, 'any government pledged to observe [socio-economic rights] . . . would be obliged to take positive steps . . . to secure their implementation.'⁴⁶ The protection of such rights cannot be enhanced by the means of legislation — as the Report itself points out, the right not to live in poverty, for example, is a social problem which is 'by definition insoluble through the adoption of mere legislative guarantees.'⁴⁷ Refusing to consider legislation which tries to guarantee socio-economic rights is thus entirely consonant with a desire to consider only pragmatic legislation.

How did these assumed limitations influence the Committee's recommendations? Chiefly, it enabled the Committee to identify what it considered to be a

⁴² *Ibid.* 5.

⁴³ *Ibid.* 5-8.

⁴⁴ *Ibid.* 9.

⁴⁵ *Ibid.* 9-11.

⁴⁶ *Ibid.* 9.

⁴⁷ *Ibid.* 6.

'common core' list of rights. Examination of every basic statement in legislative form of civil and political rights revealed a consensus of opinion as to what those rights were, to an extent that the Committee saw to be 'remarkable'.⁴⁸ The Committee considered this to be a significant stage in the process of recognition and protection of human rights in Victoria. This was especially so since the content of the list was strikingly similar to the rights which most Victorians would point to when asked to describe what they considered to be fundamental human rights, a fact considered to be very important by the Committee.⁴⁹ Since this common core of rights formed the basis for the Declaration of Rights and Freedoms recommended by the Committee, and hence the Bill under examination, it is suggested that this identification was a crucial stage in the inquiry. The Report itself recognizes the importance of the role played by this core list in formulating the content of its recommended Declaration,⁵⁰ a recommendation which could not have been made without the initial restrictions imposed by the Committee on its scope of inquiry.

Having identified this common core of rights, the Committee then proceeded to determine whether these rights were in fact adequately protected in Victoria. This was essential since continuing on to the formulation of legislation to protect those rights was predicated in the terms of reference on a negative answer to this question. The inquiry received extensive evidence on this matter, as well as making it the subject of two of its Discussion Papers. The Committee did not reach any firm conclusions in Discussion Paper No. 2, but did note a significant number of qualifications to and infringements upon several fundamental civil and political rights.⁵¹ These included over 600 statutory instances of the reversal of the burden of proof⁵² and such archaic laws as the restrictions on the right to peaceful assembly in the Unlawful Assemblies and Processions Act 1958 (Vic.).⁵³ In its third Discussion Paper it focused on the state of freedom of expression in Victoria, and concluded that 'Victorians are subject to a chaotic multitude of laws impinging upon their freedom of expression.'⁵⁴

In contrast to the Committee's own preliminary research, the bulk of the evidence received from the general public indicated that most people considered that their fundamental rights were adequately protected.⁵⁵ It should be noted that for one member of the Committee at least this was decisive in concluding the inquiry at this stage. Tom Evans, in his Minority Report, states:

. . . at the end of several months of receiving evidence . . . in my opinion, no evidence of any substance had been produced which revealed any major deficiencies in the present forms of protection of Human Rights in Victoria; therefore, there was no need or demand for a Bill of Rights or Declaration of Rights and Freedoms.⁵⁶

⁴⁸ *Ibid.* 13.

⁴⁹ *Ibid.* 14-5.

⁵⁰ *Ibid.* 142.

⁵¹ *Discussion Paper No. 2, 2.*

⁵² *Ibid.* 38.

⁵³ *Ibid.* 16.

⁵⁴ *Discussion Paper No. 3, 90.*

⁵⁵ *Report, 45.*

⁵⁶ Evans, T., 'Minority Report to Parliament on Human Rights', in *Report, 219.*

Yet as the majority of the Committee realized, public perception in some way begs the question. Whilst the Report acknowledges that 'the civil and political rights of the average Victorian are, on the whole, reasonably well protected',⁵⁷ it went on to note that disadvantaged groups in our society do suffer from abuses of human rights. This accords with the personal views of some of the Committee members, views which were only reinforced by the inquiry. Lou Hill spoke of his work as a barrister having contributed to his own view that human rights in Victoria needed further protection,⁵⁸ Joan Coxsedge commented that the people in her constituency were, 'terrified of bureaucrats . . . they're also terrified of private people . . . as far as their housing is concerned . . . a whole lot of basic needs.'⁵⁹

Indeed it should be noted that public perceptions regarding the protection of human rights in Victoria in large part rested on complete misunderstanding of the way in which our political and legal systems operate.⁶⁰ One of the most revealing features of the inquiry was the degree to which the 'average' Victorian displayed 'gross ignorance' of such notions as the supremacy of Parliament, the role of the judiciary, and the interaction between legislation and the common law.⁶¹ A common misconception was the idea that the common law stood above the actions of the legislature, and that somehow fundamental human rights were 'entrenched' in common law guarantees. The Lutheran Church, for example, earnestly informed the Committee that the 'much appreciated freedom of religion' was the product of 'existing legal provisions.'⁶² No such right to freedom of religion is contained in the common law,⁶³ or under any existing legislative provisions. In response, the Committee concluded that

. . . it is imperative that the community be further educated, both on the subject of human rights, and upon the subject of the wide legal process, an understanding of which is vitally necessary before issues of human rights may be understood . . .⁶⁴

The Committee's Sixth Recommendation is directed at increasing the level of education received in these matters.⁶⁵

A more significant reason for the Committee concluding that human rights in Victoria are not adequately protected was its examination of the institutions which purport to fill the role of the guardians of our human rights. Most people would cite Parliament and the common law, as expounded by the judiciary, as examples of the effective institutions we possess in this state which enforce respect for human rights. The Committee, however, identified limitations in

⁵⁷ *Report*, 61.

⁵⁸ Interview with Lou Hill, 21 August 1989.

⁵⁹ Interview with Joan Coxsedge, 7 August 1989.

⁶⁰ *Report*, 174.

⁶¹ Interview with Lou Hill, 21 August, 1989. Joan Coxsedge (Interview 7th August 1989) and Lou Lieberman M.P., former member of the Legal and Constitutional Committee, (Interview 6th September 1989) also commented on the disturbing degree of ignorance encountered in the course of the inquiry.

⁶² Written submission of the Lutheran Church to the inquiry. Access to the written submissions received by the Committee, as well as the transcripts of the oral evidence received, was kindly provided by the secretary to the Committee, Mr Marcus Bromley.

⁶³ *Grace Bible Church Inc. v. Reedman* (1984) 36 S.A.S.R. 376.

⁶⁴ *Report*, 174.

⁶⁵ *Ibid.* 175.