

The Sydney Morning Herald

News and Features - Opinion

Horror stories unfairly bedevil charter of rights

Richard Ackland justinian@lawpress.com.au

876 words

9 May 2008

[The Sydney Morning Herald](#)

First

13

English

© 2008 Copyright John Fairfax Holdings Limited. www.smh.com.au

In recent weeks the charter of rights "debate" has been heading largely in one direction - against. The antagonists have had longer at the megaphone than usual and have cranked up the volume. Cardinal George Pell is out on the barricades, and unsurprisingly he thinks a charter of rights is a bad thing, along with stem-cell research, contraception and abortion.

The NSW Attorney-General, John Hatzistergos, and the former premier Bob Carr have lent their voices to the anti campaign. They think you would be crazy if you let anyone other than NSW politicians look after your freedoms.

A handful of conservative provocateurs from the fourth estate keep banging away about how awful such legislation would be. These voices are relatively fresh from saying the invasion of Iraq was a good idea, which gets me thinking that surely they cannot be hugely wrong yet again.

Having culled through both the flourishes and the rhetoric against a charter, the arguments come down to two core complaints.

It is undemocratic because it would transfer power from elected politicians to unelected judges, and God knows what they will do. A sub-branch of this is that a charter will be a lawyers' picnic.

Second, our rights are well protected enough, by Parliament and the common law, so stop worrying and enjoy the splendid freedoms you have.

Both these arguments need serious attention to detail and quite a bit of reworking if they have any hope of carrying the day.

Take the transfer of power proposition. I'd like to know who first whistled up that furphy. When major pieces of legislation that presaged a realignment of forces were under consideration did we ever hear, "Oh no, that's diabolical because judges will steal all the policy moves"?

The Trade Practices Act in a sense is a charter of rights for consumers and a charter of restraints for business. The various anti-discrimination acts are charters of rights, as is the whole equal opportunity regime - all with their fair share of abstractions.

Why weren't these hugely intrusive pieces of legislation strangled at birth? In their dark hearts these laws transferred policy-making powers from elected politicians to unelected judges and gave lawyers a feast of carbs and cholesterol into the bargain.

Countless laws reassign rights and responsibilities and give lawyers and judges the job of searching for meaning and balance. Parliament grabs back a bit of the action if it doesn't like the outcome struck by the courts. That's sort of how our democratic system works and, yes, lawyers are in for their slice.

To say we should have no law that is open to serial litigation, with policy issues being determined by lawyers and judges, would be a step too far in thinning out the statute books.

Yet the horror stories keep coming. Carr has said that if there was a "right to property" in a charter of rights (and it's a pretty big "if") this would lead to judges overruling green initiatives, such as controls on the clearing of native vegetation, or the protection of forests or farmlands.

In Canada it is claimed the courts have blocked schemes to encourage doctors to move to rural and regional parts of the country because they violate the freedom of movement. In Britain the government can't block decisions of parole boards to release prisoners, and damages have to be paid to prisoners because the condition of their cells did not conform to prescribed standards of decency.

Never is the full context or the factual issues that led to these decisions discussed. What is put is that we'll be stuck with a mishmash of determinations because you cannot rely on parliaments to overturn the excesses of the courts as politicians are afraid of doing anything unpopular. An argument so dazzling that it could blind you.

In the US the hocus pocus reached such a pitch that Pat Robertson and Jerry Falwell blamed the September 11 attacks on not only feminists and gays, but lawyers from the American Civil Liberties Union.

Invariably there is an assumption the courts will embrace some awful excess in the name of cockeyed rights. Yet that is by no means clear. In Victoria, which does have a Charter of Rights and Responsibilities, the Supreme Court in March rejected the application of the charter in the Benbrika case.

The issue there was whether the trial of 12 men accused of terrorism offences was being prejudiced by the manner in which they were treated in jail. Instead, Justice Bernard Bongiorno made his determination based on well-established High Court authorities about a right to a fair trial.

Which brings us to whether we are adequately protected by the common law. Undoubtedly, sometimes we are. But not always. In the area of free speech, for instance, publishers try to defend themselves against attack in the defamation courts on the ground of "reasonable" conduct. But the common law has trashed that protection by holding that reasonableness is pretty much akin to perfection.

A charter of rights could do something about rebalancing that wonky equation.