Date introduced: 9 October 1985
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P., Attorney-General

DIGEST OF BILL

Purpose

The Bill will state the fundamental civil and political rights and freedoms that should apply to Australian citizens and implement the International Covenant on Civil and Political Rights.

Background

The United Nations Universal Declaration of Human Rights came into effect in 1948 and set out the human, civil, political, social and economic rights that should apply to all people in the world. However, this Declaration was not legally binding on the members of the United Nations. Negotiations between the members resulted in a treaty that could be ratified and adopted by them and would have legal force in those countries adopting the treaty. The Commission on Human Rights, a United Nations body, was established to formulate the treaty and Australia was elected to this body in the 1950s. The text of the International Covenant on Civil and Political Rights (the Covenant) was unanimously agreed to by 106 countries, including Australia, on 16 December 1966.

However, though Australia had played a role in negotiating the Covenant, it was not signed by Australia until December 1972 when the Labor Party came to Government. However, that Government failed to ratify the Convention. Ratification had to wait until 1980, when the Fraser Liberal Government was in power.

The first attempt at implementing the Covenant occurred in 1973 when a Federal Bill of Rights was introduced by the then Attorney-General, Lionel Murphy. The Bill was to bind the Federal and State Parliaments and
establish a Human Rights Commission to investigate complaints under the Bill. However, the Bill lapsed with the dissolution of Parliament for the 1974 election and was not re-introduced.

With the change in Government in 1975 came a new approach on the most appropriate way to ensure human rights. The then Government decided that human rights could best be secured through administrative action and introduced a Human Rights Commission Bill in 1977. The Commission to be created by this Bill was to be principally concerned with the review of legislation and the conciliation of disputes. Its powers were to be restricted to Commonwealth and Territory legislation. However, this Bill also lapsed with the dissolution of Parliament, this time for the 1977 election.

Another attempt to pass a Human Rights Commission Bill occurred in 1979. This Bill was slightly wider than the 1977 version but debate centered on anti-abortion amendments introduced in the House of Representatives. The Bill passed the House but was rejected in the Senate after a conscience vote. The major reason for its rejection was the unacceptability of the anti-abortion amendments introduced in the House. A Human Rights Commission Bill was finally passed and proclaimed in 1981, substantially in accordance with the Bill suggested by the Senate in 1979. The main function of the Commission, established by the 1981 Act, was to report to the Minister on whether Commonwealth or Territory laws, acts and practices conform with the Covenant or with certain International Declarations (e.g. the Declaration of the Rights of the Child and the Declaration on the Rights of Disabled Persons).

Following the election of a Labor Government in 1983, the Labor Party re-affirmed its intention to introduce a Bill of Rights. In his Second Reading Speech for the present Bill, the Minister gave three reasons for the introduction of a Bill of Rights. These were:

- the Government was not satisfied that administrative mechanisms were the only means by which the Covenant could be implemented;

- that a strategy which does not involve legislative definitions of rights 'must be half-hearted and hollow'; and
that the Covenant specifically commits Australia to adopting legislative measures to give effect to the rights it contains.[1]

In regard to the last point, the Minister referred to Article 2.2 of the Covenant, which states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

A Bill of Rights was drafted in 1984 but was not introduced, largely due to protests from the 'States Rights' and 'Right to Life' groups.[2] Following further negotiations with various groups, this Bill was introduced.

The general question of a Bill of Rights was referred to the Senate Standing Committee on Constitutional and Legal Affairs on 19 April 1985. The Committee, which comprised 3 Labor and 3 Liberal Party representatives, was asked to examine the desirability, feasibility and possible content of a Bill of Rights. The Committee's report was delivered on 5 November 1985.[3] The major features of the Report are:

- the Committee noted the educative and symbolic value of a Bill of Rights (para. 1.7);
- it found that certain rights and freedoms are breached in Australia (para. 1.12);
- it examined the executive and judicial enforcement models and suggested the dominance of legislative over judicial powers (para. 1.36);
- the current methods for protecting rights and freedoms were examined (chapter 2).

In chapter 3, the Committee examined the possible content of a Bill of Rights. Its major findings were:

- that any Bill of Rights should be based on those rights and freedoms contained in the Covenant (para. 3.24);
the Bill should not displace existing common law rights (para. 3.26);

the Committee was inclined to the view that limits to rights should be prescribed by law and be demonstrably justified (para. 3.57).

The effect a Bill of Rights should have on Commonwealth and State laws was examined in chapter 4. The major findings were:

- that, subject to a phasing in period (3 years was suggested), all inconsistent Commonwealth laws should be invalid to the extent of the inconsistency (para. 4.12);

- on the area of future Commonwealth law, the Committee thought it desirable that the Bill of Rights should only be excluded by an express declaration. However, the Committee noted possible legal problems in this approach and concluded that the Bill of Rights should be able to be excluded by an express or implied intention (paras 4.13 to 4.21);

- in relation to State law, the Committee was of the view that there should be a presumption that the Bill of Rights applies to all State law but that this presumption could be displaced by sufficiently clear State legislation. As a result the State governments would take political responsibility for excluding the Bill of Rights (paras 4.37 and 4.38);

- the Committee was of the view that the Bill of Rights should not deal with electoral laws (paras 4.46 to 4.54);

- the Bill of Rights should alter the rules of evidence to exclude evidence gained through infringement of the Bill of Rights unless such an exclusion would bring the administration of justice into disrepute. The onus to prove this would rest with the party seeking to use such evidence (para. 5.21).
On the question of what remedies should be available to enforce a Bill of Rights, the Committee was of the opinion that the same remedies should be available as where legislation is invalid, i.e. principally through injunctions and declarations.

The Committee's concluding paragraph states:

The Committee is of the view that the incorporation of ICCPR (the Covenant) rights and freedoms in a national Bill of Rights would have important international effects and would send a clear message to other nations of Australia's regard for such values and of Australia's regard for its international treaty obligations.

Outline

This Bill incorporates the Bill of Rights in Part II and defines its operation and available remedies. The rights and freedoms contained in the Bill of Rights are expressed in clear language and generally state broad principles. The Bill also amends the functions of the Human Rights and Equal Opportunity Commission as a consequence of the introduction of the Bill of Rights.

Main Provisions

Clause 3 of the Bill states the objects of the Bill. These include to give effect to certain provisions of the Covenant and to give effective remedies to people whose rights and freedoms, as contained in the Bill of Rights, are infringed.

Sub-clause 4(5) deals with situations where, legally, there is a conflict between rights or freedoms contained in the Bill of Rights (e.g. free speech and privacy). In such circumstances the law is to be interpreted to implement the objects of the Act.

Clause 8 incorporates the Bill of Rights. Some of the provisions which may require a more detailed analysis are:

- Article 2: existing rights and freedoms are to be preserved;
Article 3: the rights and freedoms conferred by the Bill of Rights are only to be limited where this 'can be demonstrably justified in a free and democratic society';

Article 5: the right of minority groups to enjoy and practice their own culture, religion and language;

Article 16: the right for citizens to enter Australia and Article 17 which contains the right for all persons to leave Australia;

Article 18: the right to life of all human beings. Human being is not defined;

Article 22: the right for any person in custody to remain silent and to consult a lawyer;

Article 28: there are to be no retrospective criminal offences or penalties;

Article 32: no person is to be subjected to torture or cruel, inhuman or degrading treatment or punishment. As well, the article states that there is to be no medical or scientific experimentation on persons without their consent. Person is not defined.

The laws to which the Bill of Rights is to apply and when the Bill of Rights may be used are dealt with in Part III of the Bill.

The Bill of Rights is to apply, as a 'rule of construction' for interpretation, to Commonwealth and Territory, other than Northern Territory, laws (clause 10).

Such laws enacted before the Bill of Rights comes into force are to be deemed repealed (only to the extent of the conflict) where inconsistent with the Bill of Rights (clause 11). This provision is to operate 5 years after the Bill of Rights comes into force (sub-clause 2(3)).

Acts passed after the Bill of Rights comes into force will be inoperative to the extent that they are inconsistent with the Bill of Rights except where an Act provides, by express words of plain intention, that it is to override the Bill of Rights (clause 12).
Clause 14 deals with cases where a Court rules an Act inoperative. If grave public inconvenience or hardship will be caused by the Act being declared inoperative since it came into force, the Court may declare that the Act is only inoperative from the date of the decision and that the law is to operate for a further 3 months. This will allow Parliament time to alter such Acts.

The use of evidence gained through a contravention of the Bill of Rights is dealt with by clause 16. The party trying to use such evidence must show that the public benefit in using it will outweigh the harm caused to the individual.

An infringement of the Bill of Rights is not, by itself, to be a ground for any action (clause 17).

Clause 23 will allow the Attorney-General to intervene in proceedings involving the Bill of Rights.

Amendments to the functions of the Human Rights and Equal Opportunity Commission are contained in Part V of the Bill.

The Commission's functions are to be extended by clause 25 to allow it to inquire into any Act or practice that may infringe the Bill of Rights. In such an inquiry, the Commission may attempt to rectify the situation through conciliation. The clause will also enable the Commission to examine proposed Acts when requested to do so, and require the Commission to report to the Minister. (Also see the effect of clauses 41 and 42 below).

Clause 26 will require the Commission, subject to clause 27, to conduct inquiries where it has received a written complaint.

Clause 27 will prohibit the Commission from inquiring into State Acts or practices without the Minister's consent.

The inquiries are generally to be held in such manner as the Commission thinks fit (clause 29).

The Commission's power to obtain information and documents is contained in clause 31, while clause 32 gives the Commission power to examine witnesses. The disclosure of information gained is dealt with by clause 36. The
Attorney-General may issue a certificate to prevent disclosure. The grounds for the issue of a certificate are listed in the clause.

The Commission is to be empowered to call compulsory conferences in an attempt to settle matters (clause 33). The procedure at such conferences is to be regulated by clause 34.

Clause 41 concerns the content of reports to be made to the Minister under clause 25. Where the Commission has enquired into an Act or proposed Act and found a conflict with the Bill of Rights, its report must include any results of an examination of the amendments recommended by the Commission to enable the Act or proposed Act to conform with the Bill of Rights (sub-clause 41(1)). Where the Commission has inquired into practices that contravene the Bill of Rights it will have a discretion as to whether to include any recommendations in its report (sub-clause 41(2)). Sub-clause 41(3) will require the Commission to deliver a second report if, after 60 days of its first report, it is satisfied that no reasonable steps have been taken to stop the breach.

Clause 42 will require the Minister to table in Parliament, within 15 sitting days after the report is received, a copy of all reports received pursuant to clauses 25(d), 25(e) and 41(3).

For further information, if required, contact the Law and Government Group.

14 November 1985

Bills Digest Service
LEGISLATIVE RESEARCH SERVICE
References


3. A Bill of Rights for Australia? An Exposure Report for the Consideration of Senators, Senate Standing Committee on Constitutional and Legal Affairs.

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