The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights

Research Paper
No. 12 1996–97
This paper has been prepared for general distribution to Senators and Members of the Australian Parliament. While great care is taken to ensure that the paper is accurate and balanced, the paper is written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Readers are reminded that the paper is not an official parliamentary or Australian government document. IRS staff are available to discuss the paper's contents with Senators and Members and their staff but not with members of the public.
The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights

Mark McKenna
Consultant
Law and Bills Digest Group
18 March 1997

Research Paper
No. 12 1996–97
Acknowledgments

My thanks to Professor Hilary Charlesworth, Dr John Uhr and Professor George Winterton and to Rosemary Butt, Bill Bak, Bob Bennett and Dr June Verrier of the Parliamentary Information and Research Service.

Inquiries

Further copies of this publication may be purchased from the:

Publications Distribution Officer
Telephone: (06) 277 2711

A full list of current Information and Research Services publications is available on the ISR database. On the Internet the Information and Research Services can be found at http://library.aph.gov.au/irs/

A list of IRS publications may be obtained from the:

IRS Publications Office
Telephone: (06) 277 2760
Contents

Major Issues Summary .................................................. i
Introduction .............................................................. 1
A Chronology of Recent Reform Initiatives in Australia .......... 2
The Preamble .............................................................. 5
  Preamble to the Australian Constitution 1901....................... 5
  Symbolism ............................................................. 8
  Democracy ............................................................. 8
  Independence ......................................................... 9
  Aboriginal Reconciliation ........................................... 9
Arguments against the Introduction of a New Preamble .......... 10
Possible Responses to Arguments against the Introduction of a New Preamble .... 10
Legal Implications of the Preamble .................................. 11
Options for Change ..................................................... 13
How the Preamble Can be Altered .................................... 13
An Australian Bill of Rights ............................................ 14
  Complacency, Political Culture and the Great Australian Quilt .. 15
Arguments against a Bill of Rights ................................... 16
Arguments for a Bill of Rights ......................................... 17
Major Issues Summary

An important but often overlooked feature of the Australian Constitution is the preamble which, if nothing else, sets the tone for the remainder of the document. The preamble is not part of the Constitution, but it is a guide to the intentions of those who are responsible for it, and the High Court has referred to the current preamble for guidance on several occasions since federation.

The preamble reflects the values and priorities which were prevalent at federation. It contains no inspirational flourishes or rhetorical appeals to individual liberty. Instead, in dry, measured and calculated prose, it embodies the three unifying features of federation in Australia: loyalty to the Crown, belief in God and the shared need to provide national unity for white Australians through the introduction of a federal government. The preamble had its origins in the National Australasian Convention of 1891 and was further revised at the Australasian Federal Convention of 1897–1898 before finally being accepted in 1898, after colonial legislatures and petitioners successfully insisted on the inclusion of the blessing of ‘Almighty God’.

The majority of delegates at the federation conventions in the 1890s rejected proposals for a truncated Bill of Rights which would have ensured that Australian citizens were not to be deprived of ‘life, liberty or property without due process of law’. They preferred instead to believe that the Common Law, the good sense of Parliament, convention and the gentlemanly traditions of utilitarian political culture were sufficient to protect individual rights and freedoms in Australia.

It would probably be widely agreed that the preamble is no longer fully representative of the views or the sentiments of the majority of the Australian people. The language is arcane, the preamble neither expresses the absolute sovereignty of the Australian people as an independent nation nor refers to democratic values and aspirations, and the process of reconciliation with the original inhabitants of the continent is ignored.

Many supporters of an Australian Republic would argue that a new preamble is not only essential but could also provide symbolic support for other important initiatives such as the adoption of a Bill of Rights. There is a strong case to support the argument that the moral and political legitimacy of the Australian presidency would be enhanced by the introduction of a new preamble that was a concise, lucid and memorable articulation of the democratic aspirations and common values of the Australian people. Such a preamble would help to
The Preamble and a Bill of Rights

elevate the role of the President and the new republic above the shallow slogan of 'one of us', as well as serving as a check on presidential power.

The argument for a new preamble would not, however, go uncontested, and just what course is followed will in turn depend on other changes that are contemplated. One of those changes is the inclusion of a Bill of Rights. In the event of Australia continuing without a Bill of Rights, the legal ramifications of a new preamble (while not carrying the same legal weight as a Bill of Rights) may be more considerable.

In the event of Australia adopting a Bill of Rights which restates the legally enforceable democratic rights and freedoms held by the Australian people (some of which may appear in the form of more generalised aspirations in the preamble), the potential legal effect of the preamble may be diminished. However, this will be affected not only by its content but by considerations such as whether or not the Bill of Rights is constitutionally entrenched and possible limitations on its application. If the Bill of Rights refers only to civil and political rights while the preamble makes reference (however obtuse) to economic and social aspirations, the preamble may be referred to for guidance in those areas not covered by the Bill of Rights.

Shortly after his retirement as Prime Minister, Sir Robert Menzies, in commenting on the need for an Australian Bill of Rights, stated:

Responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of the Common Law, we have not felt the need of formality and definition. I would say, without hesitation, that the rights of individuals in Australia are as adequately protected as they are in any other country in the world.

Menzies' views are a fair reflection of the dominant thinking of that era. Thirty years later, and notwithstanding a number of failed attempts to enact an Australian Bill of Rights, faith in the common law as a guarantor of fundamental rights or of legal certainty has diminished. This shift in thinking has been accompanied by a more broadly defined interest worldwide in human rights, reinforced by the burgeoning influence of international law.

In Australia, common law protections have been bolstered by a patchwork of laws protecting defined rights in prescribed circumstances (for example, the various anti-discrimination laws), and by the incorporation or adoption of standards established under international treaties and conventions. On the other hand, the courts have continued to develop the common law and the High Court has added a new dimension to the debate by implying the existence of certain basic political rights from the democratic and representative nature of the Australian Constitution. Allied to these developments has been the interest in re-examining the Constitution itself as the new millennium and the hundredth anniversary of federalism approach.
The cases for and against a Bill of Rights have been argued in Australia and overseas, with the overwhelming majority of independent countries now having a Bill of Rights in terms of the rights enunciated in the International Covenant on Civil and Political Rights.

Recent overseas experience may be of value in exploring where the balance of argument for and against rests in contemporary Australia. In examining relevant overseas experience, Canada, New Zealand and South Africa provide useful models in asking:

• What should be the focus of any Bill of Rights?
• What should be the form and substance of any such Bill?
• Should the Bill of Rights be entrenched in the Constitution?
• Should any Bill of Rights have precedence over all other laws including otherwise valid State laws?

What would be effect of a Bill of Rights on the judiciary? Would it add to the courts’ costs and therefore actually reduce the rights of some potential litigants?

These questions, together with the associated issues raised by the introduction of a new preamble, are likely to be the focus of considerable attention at the Constitutional Convention later this year. Any discussion surrounding the constitutional alterations necessary to achieve a republic will undoubtedly raise the issue of rights and values. This paper focuses on the relevance of rights and values to Australia's 'republican' constitution.
Introduction

With a view to identifying values and overcoming objections to a Bill of Rights, some commentators have suggested that the preamble to the Constitution might be amended to recite a set of values.

Sir Anthony Mason

In the context of the post-1991 debate on the prospect of an Australian republic there have been few attempts to examine the relevance of the preamble and/or a Bill of Rights to the national discussion on constitutional reform.

In light of the approaching Constitutional Convention in 1997, it is timely to consider these issues, not only in relation to the republic debate, but also in the wake of recent constitutional and legal developments.

This paper has a threefold purpose. First, to provide an accessible and concise chronology of events relating to the post-1960 discussion in Australia on the questions of a Bill of Rights and alteration of the preamble to the Constitution; secondly, to outline the arguments for and against the alteration of the preamble and a Bill of Rights; and finally, to convey the complexity of the issues associated with these two key and related areas.

The paper draws heavily on the final Report of the Constitutional Commission of 1988 and the 1993 report of the Republic Advisory Committee. It also refers to the extensive academic literature on a Bill of Rights as well as the recent initiatives of State and Territory governments. In addition, it seeks to explore the relevance of the Canadian Charter of Rights and Freedoms (1982) and the New Zealand Bill of Rights Act (1996) to future Australian initiatives concerned with the protection of individual rights and freedoms.

It is hoped that the paper will stimulate debate on the relevance of the preamble and/or a Bill of Rights among members of Parliament, as well as participants and interested observers of the coming Constitutional Convention.
A Chronology of Recent Reform Initiatives in Australia

1963 The ALP National Conference adopts a new section in the Federal party platform. The declaration calls for both Federal and State Parliaments to pass Acts providing for civil liberties.3

1966 Eighteen years after the United Nations Declaration of Human Rights (1948) the South Australian Labor government passes the Anti-Discrimination Act, the first legislation prohibiting discrimination passed by any Australian Parliament.4

1967 The ALP National Conference unanimously endorses a proposal put forward by Senator Lionel Murphy to campaign for the entrenchment of fundamental civil rights and liberties in the Federal Constitution. Murphy invokes the French and American Revolutions:

Our goal is to rearrange our society in such a way that every person will have the opportunity to attain the utmost fulfilment of his own personality, that is the goal of democratic socialism. It was the aim of those who wrote the Declaration of the Rights of Man and the Citizen in 1789, it was the aim of those who wrote the Universal Declaration of Human Rights and it is our aim.5

1967 Shortly after his retirement as Prime Minister, Sir Robert Menzies articulates the view which would come to typify the attitude of many in the political, legal and academic elite in Australia towards a Bill of Rights:

Responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of the Common Law, we have not felt the need of formality and definition. I would say, without hesitation, that the rights of individuals in Australia are as adequately protected as they are in any other country in the world.6

1973 Senator Lionel Murphy, Attorney-General in the Whitlam government, introduces a Human Rights Bill into the Senate. Murphy’s Bill is modelled on the International Covenant on Civil and Political Rights (ICCPR) and relies on the Commonwealth’s external affairs power to ensure the compliance of the States. The Bill arouses considerable opposition, primarily characterised by ‘States rights’ concerns and the associated fear of Commonwealth centralisation of power. The Bill lapses and, despite minor amendments, fails to be placed before Parliament again.7

1975 The Racial Discrimination Act, one of the last legislative acts of the Whitlam government, binds State and Commonwealth governments to the principle of freedom from discrimination on the grounds of race, colour, descent or ethnic origin. The Act incorporates the principles of the International Covenant on the Elimination of all Forms of Racial Discrimination (1965), ratified by the Whitlam government on 30 September.8

1979 Signalling a return to State consultation on civil liberty issues, the Fraser government establishes the Ministerial Council on Human Rights, comprising the Attorneys-General of the Commonwealth, the States and Northern Territory in an effort to ensure the co-operative implementation of human rights agreements.


1981 The Fraser government establishes the Human Rights Commission (HRC). Given responsibility for the Racial Discrimination Act, the HRC has limited powers to investigate complaints and possesses no mandate over the States.


1981 The Senate Standing Committee for the Scrutiny of Bills is first established, primarily for the purpose of alerting the Senate ‘to the possibility of the infringement of personal rights and liberties or the erosion of the legislative power of the Parliament’.

1984 Senator Gareth Evans, Attorney-General in the Hawke government, drafts a Bill of Rights modelled on the International Covenant on Civil and Political rights which is designed to ensure the compliance of the States, act as an interpretative guide to the judiciary and allow the HRC to investigate complaints against State or Federal governments alleged to have violated the Bill. Evans’ Bill suffers the same fate as Lionel Murphy’s 1973 Bill, and is defeated on States Rights grounds without even being placed before Parliament.


1985 Lionel Bowen, Attorney-General and Deputy Prime Minster in the Hawke government, introduces a much weaker proposal for a Bill of Rights into the Parliament. Unlike the earlier attempts by Murphy and Evans, Bowen’s Bill does not attempt to bind the States and includes a five-year cooling off period before existing Commonwealth law can become inoperative. The Bill also proposes to have a new Human Rights and Equal Opportunity Commission deal with complaints against State laws. Bowen’s Bill follows the fate of its predecessors, lost in partisan debate and community concern over centralisation of power.

1986 The HRC is revamped by the Hawke government under the new title Human Rights and Equal Opportunity Commission (HREOC). Declarations by the Commission are not legally enforceable and, with minor exceptions, do not affect State laws.
1986 The Hawke government continues with its program of legislative protection of rights, passing the Affirmative Action (Equal Employment Opportunity for Women) Act. The Act further implements the principles of the International Covenant on the Elimination of All Forms of Discrimination against Women.\textsuperscript{15}

1988 The Hawke government passes the Privacy Act, which implements Australia’s obligations under Article 17 of the International Covenant on Civil and Political Rights.

1988 Lionel Bowen’s four referendum questions are put to the Australian people. Bowen proposes constitutional amendments to guarantee ‘four-year terms’ and ‘fair and democratic elections’, to ‘recognise local government’, ‘extend the right to trial by jury’ and ‘freedom of religion’ and ‘ensure fair terms for persons whose property is acquired by government’. The proposals attract only 30% support at the referendum, the worst defeat of any referendum proposal although the political context in which the proposals were put forward and the lack of government commitment in large part explain their failure.\textsuperscript{16}

1988 The Constitutional Commission (established in 1986) submits its final report, recommending the insertion of a new chapter in the Constitution—‘Rights and Freedoms’—modelled closely on the Canadian Charter of Rights and Freedoms (1982). The Commission recommends against altering or repealing the preamble to the Australian Constitution.\textsuperscript{17}

1991 A Constitutional Convention is held in Sydney to commemorate the centenary of the first National Australian Convention on Federation in 1891. The convention’s final declaration strongly supports the constitutional entrenchment of basic democratic rights.\textsuperscript{18} The Hawke government ratifies the First Optional Protocol of the International Covenant on Civil and Political Rights (1966). This effectively enables Australian citizens who have exhausted all available domestic remedies to take human rights complaints to the United Nations Human Rights Committee in Geneva and New York. The Committee’s findings are not automatically incorporated into Australian law but may be the focus of serious legal attention in the case of adverse findings.\textsuperscript{19}

1992 The Keating government passes the Disability Discrimination Act, designed to implement the central principles of the United Nations Declaration on the Rights of Disabled Persons (1975).\textsuperscript{20} The High Court hands down the Mabo decision, overturning the Common Law doctrine of \textit{terra nullius} and recognising the existence of native title in Australian law. Significantly, the judgment of Sir Gerard Brennan insists that ‘international law is a legitimate and important influence on the development of the Common Law, especially when international law declares the existence of universal human rights...’\textsuperscript{21} Brennan’s judgment is a powerful indication of the High Court’s preparedness to be influenced by International Human Rights covenants when formulating interpretations of Australian law.

In the same year a majority of the High Court in the decision in \textit{Australian Capital Television v The Commonwealth} (which rejects the Labor government’s attempts to ban political advertising in the electronic media during federal elections) finds that there is an implied right in the Australian Constitution of freedom of speech, or at the very least, freedom of political
speech. The Court’s decision is followed by others which adds further weight to the existence of an implied, but limited, freedom of political discourse in the (federal) Constitution.

1993 The Report of the Republic Advisory Committee recommends that any ‘change to a republic should include consideration of a more contemporary preamble’, and that the issue ‘is relevant to the overall objective of achieving a viable federal republic of Australia’.

1994 In a significant development, Mr Nicholas Toonen of Hobart, Tasmania, having exhausted available domestic remedies under Tasmanian law, lodges the first Australian complaint invoking the first optional protocol procedure at the United Nations Human Rights Committee in New York in 1991. In April 1994, the Human Rights Committee upholds Mr Toonen’s complaint against the Tasmanian law which criminalises homosexual acts between consenting adults in private.

The case arguably provides further evidence that the tide of globalisation and international law could force a de facto Bill of Rights on both Federal and State governments, if Australian governments do not themselves introduce domestic rights legislation.

1995 The Keating government’s response to the report of the Republic Advisory Committee (1993), delivered in the form of a parliamentary speech by Prime Minister Paul Keating (‘An Australian Republic—The Way Forward’), fails to propose any change to the preamble. This decision is in keeping with the Keating government’s ‘minimalist’ approach to the republican issue. In response, Opposition Leader, John Howard suggests a Constitutional Convention as a means of handing the debate over to the people.

The Preamble

Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Preamble to the Australian Constitution 1901

The debate on the issue of an Australian republic was invigorated by the launch of the Australian Republican Movement in July 1991, following the centenary constitutional convention held in April of that year. Since then there has been little discussion of the relevance of the preamble to the republican discussion. The preamble has been ignored or
curtly dismissed as a distraction from the central focus of minimalist republicanism—the need for a non-monarchical Australian Head of State.27 The reticence to incorporate discussion of the preamble is not surprising given that Australians have traditionally failed to rely on political or constitutional expressions of national identity. Public apathy and ignorance concerning the Constitution is the most significant obstacle facing those who wish to extend the republican debate beyond the narrow confines of nationalist rhetoric.28 The preamble, like many other features of the Constitution, may appear anachronistic and irrelevant to those who are familiar with the Constitution, but to the bulk of the Australian population, the preamble is terra incognita.

Nonetheless, among those Australians who do carry the burden of constitutional knowledge, there is considerable support for the introduction of a new preamble (see Appendix 4). At meetings convened by the Republic Advisory Committee in 1993, and in the many submissions received by the Committee, members of the public expressed strong interest in alteration of the preamble.29 The Committee’s final report also found that the issue of the preamble was ‘relevant to the overall objective of achieving a viable federal republic of Australia’.30 One way of understanding why the preamble is relevant, not just to the republican debate but to the broader agenda of constitutional reform in the 1990s, is to examine the purpose behind the formulation of the current preamble.

The preamble to the Australian Constitution is an appropriate reflection of the values and priorities which were prevalent at the time of federation. It contains no inspirational flourishes or rhetorical appeals to individual liberty. Instead, in dry, measured and calculated prose, it embodies the three unifying features of federation Australia: loyalty to the Crown, belief in God and the shared need to provide national unity for white Australians through the introduction of a federal government. The preamble had its origins in the National Australian Convention of 1891 and was further revised at the Australasian Federal Convention of 1897–1898 before finally being accepted in 1898, after colonial legislatures and petitioners successfully insisted on the inclusion of the blessing of ‘Almighty God’.31

Both the Final Report of the 1988 Constitutional Commission and the report of the Republic Advisory Committee in 1993 referred to Quick and Garran’s elucidation of the eight ‘separate and distinct affirmations or declarations in the preamble’:32

1. The agreement of the people of Australia;
2. Their reliance on the blessing of Almighty God;
3. The purpose to unite;
4. The character of the union—indissoluble;
5. The form of the union—a Federal Commonwealth;
6. The dependence of the Union under the Crown;
7. The government of the Union under the Constitution; and

8. The expediency of provision for admission of other colonies as States.

As Quick and Garran pointed out, of the above only the third, fifth, seventh and eighth are found elsewhere in the Constitution. The remaining four ‘have therefore to be regarded as promulgating principles, ideas or sentiments operating at the time of the formation of the instrument, in the minds of its framers, and by them imparted to and approved by the people to whom it was submitted’.33

If we accept Quick and Garran’s description of the remaining four affirmations as philosophical principles which represented the broad sentiment of the people in 1901, then it is clear that these principles are no longer fully representative of the sentiment of the Australian people one hundred years later. Indeed, it is now possible to acknowledge that one principle is historically inaccurate.

The preamble indicates the agreement of the people of Australia to federation. Yet as we now know, Aboriginal and Torres Strait Islander people were not consulted and did not give their consent to federation. Furthermore, except for the colonies of South Australia and Western Australia, Australian women were unable to vote in the federation referendums.34 While it is true that both these features of Australian Federation reflected the spirit of the age, it is surely untenable that what today would be seen to be a spirit of racism and sexism should remain unchallenged as a fundamental constitutional principle in the 21st Century. On a more practical level, the preamble might also include reference to Western Australia and the territories. There is no good reason to exclude from formal recognition in the preamble the more than two million Australian citizens who reside in these areas.35 Thus, with or without the ‘inevitable republic’, there is a strong case for alteration of the preamble on the above grounds.

For republicans, there is the added incongruity of the current preamble’s expression of the dependence of the union ‘under the Crown of the United Kingdom of Great Britain and Ireland’. Although it would not be necessary to alter the preamble in the case of the declaration of an Australian republic, it would hardly be appropriate to remove the British monarch as Australian Head of State while retaining the language of monarchical deference contained in the preamble.36

The majority of the arguments which can be mounted in support of altering the preamble revolve around three issues—the republic, Aboriginal reconciliation and the need to make the Constitution more accurately reflect the language, values and democratic aspirations of contemporary Australia. They can be summarised as follows.
Symbolism

For over two centuries, the British monarchy has provided the central symbolic force of colonial, state and federal Constitutions in Australia. In addition, the monarchy has served as the legitimising symbol of our legal and public institutions as well as providing an important bond in Australia's social fabric.

In the event of Australia becoming a republic, the symbolic role of the British monarchy in Australia’s public culture would cease or at very least be severely curtailed. The question therefore arises: what would replace it? Is it sufficient to replace the power mystique and pageantry of the monarchy merely with ‘one of us’, an Australian Head of State? There is a strong case to support the argument that the moral and political legitimacy of the Australian presidency and the Australian form of Government would be enhanced by the introduction of a new preamble. A preamble that was both poetic and pragmatic—a concise, lucid and memorable articulation of the democratic aspirations and common values which an Australian President would seek to represent to the people. A new preamble would offer the President a totem of purpose and definition. This totem would help to elevate the role of the President and the new republic above the shallow slogan of ‘one of us’ as well as serving as a check on presidential power. In other words, it would clothe the emperor in more than nationalist dress.

Democracy

The current preamble does not express the sovereignty of the Australian people. It contains no statement of the basic democratic principles which characterise Australian civil society. In the event of a republic, it would be beneficial to articulate these principles in a manner which explained in some small way the positive ideals which give force to the new republican Constitution. There is evidence to suggest that these ideals have already been identified in many of the submissions made to the 1988 Constitutional Commission and the 1993 Republic Advisory Committee:

- Equality of all Australians under the law;
- Tolerance of cultural diversity;
- The equality of men and women;
- Equality of opportunity; and
- Respect for the Constitution and the rule of law.37

Rather than relying on the High Court to ‘discover’ the democratic values in the Constitution, perhaps it is preferable that the people endorse a simple statement of the democratic principles which they wish to affirm in the move to a republic. From this perspective, relying on
The Preamble and a Bill of Rights

convention, tradition and the Common Law is no longer appropriate once the protective cloak of monarchy is removed from the Constitution. If the 'magic' of monarchy is to be replaced by republican ‘daylight’ then the democratic elements of the new Constitution need to be spelt out. The aristocratic symbolism of monarchy would then be replaced by the practical symbolism of democratic sovereignty.

Independence

The present preamble does not reflect the status of Australia as an independent nation. Instead it reflects 'the origins of the Constitution as an Act of the British parliament'. The same arguments which form the raison d'etre of minimalist republicanism—that the British monarchy is anachronistic in the Australian context and inappropriate for democratic, multicultural and contemporary Australia—also apply to the preamble. The current preamble’s expression of Australia’s dependence 'under the Crown' (as described by Quick and Garran) was appropriate in 1901 but is not so the 1990s. Thus, updating the preamble to more accurately reflect Australia's status as an independent nation is fully in keeping with the rationale of modern republican philosophy.

Aboriginal Reconciliation

In the last decade, an extensive body of literature has grown up around the notion of Aboriginal reconciliation. While the focus and conclusions of this literature vary remarkably, there has been frequent mention of the role a new preamble might play as a formal instrument in the process of reconciliation. The complications of any such move are discussed below, but there appears to be a broad consensus amongst proponents of change (ATSIC, the Constitutional Centenary Foundation, sections of the Labor Party and prominent public intellectuals) that any alteration of the current preamble may include reference to:

- Prior occupation of Australia by Aboriginal and Torres Strait Islander people;
- Dispossession of traditional lands suffered by Aboriginal and Torres Strait Islander people after 1788; and
- Recognition of Aboriginal and Torres Strait Islander people as having distinct cultural status.

In the light of the High Court’s Mabo decision in 1992, it would be difficult to see the process of Aboriginal reconciliation advancing if the recognition of Aboriginal and Torres Strait Islander people was not included in any new preamble. In its response to the report of the Republic Advisory Committee, the Keating government implied that this recognition should be the main focus of a new preamble.
Arguments against the Introduction of a New Preamble

In 1988, the Constitutional Commission refused to support the alteration of the preamble on the following grounds:

- The difficulty of isolating the fundamental sentiments which Australians of all origins hold in common;

- Any attempt to mention one form of equality in the preamble (for example, sexual equality) would lead to immediate calls for the inclusion of other equalities (for example, racial, cultural etc.);

- Debate about a preamble would be divisive and a distraction from other more important issues;

- It is undesirable to graft a preamble on the Constitution so long after federation. Only if writing a new Constitution would the Committee countenance drafting a new preamble; and

- The ‘real difficulties’ in preparing an appropriate recital, especially with regard to recognition of prior Aboriginal ownership.42

While the Committee itself was not overly perturbed by the possible legal ramifications of a preamble, many submissions indicated their concerns in this area. Keeping in mind that the political context of the debate on the preamble has shifted significantly since 1988 (the Committee’s fourth objection, for example, is no longer as persuasive in light of the constitutional alteration necessary to achieve a republic), it is now possible to reassess the Committee’s objections.

Possible Responses to Arguments against the Introduction of a New Preamble

In the decade since the Committee’s report was handed down, Australia has witnessed a sustained and extensive debate on the issue of an Australian republic—the High Court has become more activist especially in politically sensitive areas (for example, the Mabo decision of 1992 and the Nationwide News decision of 1993).43 In 1988, the Constitutional Commission feared a debate on the republic would be divisive, yet this has not proven to be the case.44

The difficulties associated with isolating the fundamental sentiments which Australians hold in common are certainly real and have been acknowledged in the Report of the Republic Advisory Committee (1993) and the Civics Expert Group (1994).45 On one level, it is patently absurd to suggest that 18 million people of different cultural backgrounds all share the same common values. Yet they do share the same continent, the same media, the same liberal democratic institutions and the same citizenship; and it is in this area of citizenship that the
preamble can play a positive, educative and unifying role. To some extent the difficulty of articulating shared values and democratic aspirations is a circular debate. The difficulty exists because there is no articulation available. If an articulation were available the difficulty might not exist. One way to overcome the difficulty is to articulate the basic ideals of Australian democracy, regardless of the inevitable criticism from various interest groups, and by so doing provide a pole for the people to clutch—a point of reference, a meaningful expression of the declaration of a democratic republic. To do this successfully, the preamble must be couched in simple language. It should not be too long (the longer it is the more forgettable it will be) and it should pay attention to the cadences of language. Nor should it attempt to summarise Australian history, indulge in turgid prose, or provide a panacea for every social ill. Many of the preambles submitted to the Constitutional Commission in 1988 and the Republic Advisory committee in 1993 failed to avoid these mistakes. Seven alternative preambles written by prominent Australians are included in Appendix 4.

The Constitutional Commission’s concerns regarding the recognition of Aboriginal prior presence in the preamble carry more weight, although they too have been affected by events since 1988. In 1993 the Republic Advisory Committee noted that several Commonwealth laws have acknowledged a prior Aboriginal presence. In 1988 a motion was passed in each chamber recognising prior occupation, dispossession and dispersal from traditional lands. The Mabo decision of 1992 overturned the legal foundation upon which white settlement had taken place in Australia—terra nullius. Recognition of prior Aboriginal ownership and dispossession in a new preamble would merely formally acknowledge that which has already been acknowledged in Parliament and the High Court. Recognition in the preamble of Aboriginal and Torres Strait Islander people having a distinct cultural status is more complex. Any recognition may have legal implications relating to associated issues not directly within the terms of reference of the preamble such as Aboriginal sovereignty, self-determination, and the concept of a treaty.

Legal Implications of the Preamble

The legal implications of the preamble, present or new, is one of the more vexed issues of the preamble debate. The High Court has referred to the current preamble for guidance on several occasions since federation. The preamble is not part of the Constitution, it is merely a guide to the intentions of those who are responsible for it. In the words of Quick and Garran it can be ‘legitimately consulted for the purpose of solving an ambiguity or fixing the connotation of words which may possibly have more than one meaning, or determining the scope or limiting the effect of the Act whenever the enacting parts are, in any of these respects, open to doubt’.

In his advice to the Republic Advisory Committee in 1993 the Acting Solicitor-General stated that in the light of recent High Court decisions [in particular Leeth v the Commonwealth (1992) 174 CLR 455], preambular declarations undoubtedly carry ‘potential legal significance’.
That said, it is also important to recognise that the future legal significance of a new preamble is contingent upon the course of other reform initiatives in particular a Bill of Rights. Several scenarios are foreseeable.

1. In the event of Australia continuing without a Bill of Rights, the legal ramifications of a new preamble (while not carrying the same legal weight as a Bill of Rights) may be more considerable. The nature of any legal interpretation will be affected by:
   - the composition of the High Court;
   - the content of the preamble; and
   - public familiarity and identification with the preamble.

2. In the event of Australia adopting a Bill of Rights which restates the legally enforceable democratic rights and freedoms held by the Australian people, (some of which may appear in the form of more generalised aspirations in the preamble) the potential legal effect of the preamble may be diminished. However, this will in turn be affected by:
   - the composition of the High Court, the wording of the preamble and public familiarity with the preamble;
   - whether the new Bill of Rights is constitutionally entrenched or merely an act of Parliament;
   - the limitations placed on the application of the Bill of Rights (for example, parliamentary override) and whether the Bill applies only to the actions of government and public institutions;
   - the content of the Bill of Rights—if the Bill of Rights refers only to civil and political rights while the preamble makes reference (however obtuse) to economic and social aspirations, the preamble may be referred to for guidance in those areas not covered by the Bill of Rights;
   - the intentions, timing and political context associated with the framing of both documents; and
   - the unforeseen.
Options for Change

As the Republic Advisory Committee stated in 1993, the options for the preamble are as follows:

1. remove the preamble;
2. leave the preamble as it is;
3. leave the present preamble as it is but insert a new preamble to the Constitution itself; and
4. bring the preamble up to date.

Option 1 would appear to be unacceptable both politically and philosophically. There is a strong case for the ‘old’ preamble to remain out of respect for the founding fathers and as a means of emphasising the evolutionary nature of the Constitution. Option 2 could be rejected for reasons which have been outlined earlier in this paper. Especially in the event of an Australian republic, to leave the preamble unchanged would in the words of the Republic Advisory Committee be ‘leaving an anachronistic and misleading introduction to the Constitution’. Option 4 involves the deletion of certain words and phrases from the existing preamble and the addition of others. Perhaps this option would be preferable should the Australian Republic remain ‘inevitable’, primarily because it would signify the minor changes involved in bringing the preamble up to date. However, in the context of a consensus on the republic and Aboriginal reconciliation, option 3 may be preferable. This option allows the original preamble to be preserved in full, yet adds those changes deemed to be representative of the democratic principles which will have (at least partially) motivated the people to vote in favour of a republic.

How the Preamble Can be Altered

To date there appears little chance of bipartisan support on initiatives associated with the introduction of a new preamble. There are several obstacles blocking the path, including the divide between the major parties on the appropriate processes to ensure Aboriginal reconciliation, including the traditional reticence of the conservative parties in Australia to endorse the constitutional articulation of democratic principles and the likely disapproval of certain State governments. If a consensus were to emerge on the republican issue either before or after the Constitutional Convention in 1997, there would be a greater likelihood of achieving consensus on the question of the preamble.

The process of altering the preamble is also complicated by various legal technicalities. There is considerable doubt as to whether Section 128 can be employed to alter the preamble.
Indeed, any attempt to do so would go against the orthodox view that Section 128 can only be used to amend the Constitution itself. 54

Aside from relying on the unlikely request and consent of all State governments to Commonwealth amendment of the Constitution Act [under Sub-Section 15(1) of the Australia Act 1986] or risking a High Court challenge to the employment of Section 128, the advice tendered to the Republic Advisory Committee by the Acting Solicitor-General in 1993 indicated there was one remaining alternative. This would involve a referendum under Section 128 requesting the people to confer upon the Commonwealth the power to amend the Constitution Act via amendment of the Statute of Westminster. Essentially this would mean that the proposed alterations to the existing preamble would also be included in the referendum question. This method, while risking States’ rights objections, still seems the most viable and least complicated means of altering the preamble.55

An Australian Bill of Rights

Have any of the colonies ... ever attempted to deprive any person of life, liberty or property with due process of law? ... People would say, "Pretty things these states of Australia; they have (to be) prevented by a provision in the Constitution from doing the grossest injustice." [Sir John Cockburn, speaking at the 1897 Convention on Federation]56

When Andrew Inglis Clark (Tas) and Richard O’Connor (NSW) proposed the inclusion of a truncated Bill of Rights at the federal conventions in Adelaide in 1897 and Melbourne in 1898, both motions were lost, albeit narrowly.57 From a contemporary perspective, Clark and O’Connor’s proposal to ensure that Australian citizens were not to be deprived of ‘life, liberty or property without due process of law’ appears innocuous enough, but the reasons for its rejection reveal as much about the federation of Australia as they do about traditional Australian attitudes to the protection of individual rights and freedoms.

After the American Declaration of Independence in 1776 and the French Declaration of the Rights of Man and the Citizen in 1791, British perceptions of the constitutional protection of rights were tainted heavily by images of violence, anarchy and excessive individualism. The majority of delegates at the federation conventions in the 1890s were reluctant to endorse a Bill of Rights, preferring instead to believe that the Common Law, the good sense of Parliament, convention and the gentlemanly traditions of utilitarian political culture were sufficient to protect individual rights and freedoms in Australia.58 These beliefs were the foundation of the dominant political and legal view concerning civil liberties in Australia at least for the first 60 years of federation.59

Yet there was also a darker motivation for the founding fathers’ rejection of a Bill of Rights. Delegates were aware that the acceptance of a Bill of Rights would threaten the legitimacy of existing colonial legislation discriminating against Chinese. In the words of Sir John Forrest, this was legislation which prevented ‘coloured persons’ and ‘Asiatic’ or ‘African aliens’ from
The Preamble and a Bill of Rights

'enjoying the rights of Europeans'. In other words, federation was contingent upon racial discrimination—White Australia was unable to countenance enlightenment notions of human equality lest the opportunity of federation be lost. Until 1967, when the Australian people voted to end constitutional discrimination against Aboriginal Australians, a Bill of Rights was, at least in a formal sense, at odds with one of the fundamental unifying forces of federation—the racial superiority of white British stock.

Complacency, Political Culture and the Great Australian Quilt

Some critics would argue that because of the dominance of traditional British views concerning the protection of individual rights and freedoms in Australia, a complacent attitude towards civil liberties has become entrenched in Australian political culture. Most often this complacency takes the form of assertions concerning Australia's history of 'peaceful' progress and the 'extraordinary solidity and general pervasiveness of civil liberties' in the post-federation era. Such statements naturally exclude the well-documented oppression of Aboriginal and Torres Strait Islander peoples, South Sea Islanders, Chinese and other ethnic groups at particular periods in Australia's past. One further reason for the complacency in Australia towards rights protection is the powerful myth of the pervasive benevolence of the Common Law—enunciated most successfully by Sir Owen Dixon and Sir Robert Menzies (see chronology). Senator Lionel Murphy's response to this belief in 1974 probably has not been bettered, and has since been endorsed by other commentators:

The Common Law does not say we have freedom of speech; it says we may speak as we wish, so long as what we say is not unlawful. The Common Law does not say we have the right to freedom of assembly; it says that people may not be prevented from meeting together unless the law forbids that meeting.

Murphy's comment suggests that the Common Law is dependent upon parliament and the individual inclinations of the judiciary. Human rights are 'residual' concerns subject to prevailing political and social ideology. The Common Law can be seen to have failed to protect Australian Aborigines from oppression. Instead, Aboriginal and Torres Strait Islander peoples have been forced to wait for the Common Law to wake from its slumber. In more recent times, satisfaction with rights vigilance in Australia has developed due to the emergence of a patchwork of various State and Federal initiatives—what might otherwise be called the great Australian quilt of rights protection.

This quilt of questionable warmth (at least in terms of uniformity) includes anti-discrimination legislation such as the Racial Discrimination Act (1975), various Law Reform Commissions, the office of the Ombudsman, the establishment of special commissions to monitor the observance of human rights such as the Human Rights and Equal Opportunity Commission, the Federal Administrative Appeals Tribunal and particular United Nations instruments on human rights which have been ratified by Australian Federal governments.
Although these initiatives have considerable significance they are not comprehensive sources of protection for several reasons:

- The exemption of many areas of activity from their scope;\(^68\)
- Limitations placed on their terms of reference;\(^69\)
- Most are not legally enforceable and their promises are frequently threatened by executive interference;\(^70\) and
- Their failure to provide consistent normative rules for the judiciary.\(^71\)

While the shortcomings of existing sources of rights protection are now widely acknowledged, there has been considerable interest shown in the formulation of a Bill of Rights by the Queensland, Victorian, Northern Territory and ACT governments.\(^72\) Renewed interest in the Bill of Rights debate in academic circles has been followed closely by leading judges. As recently as 1994, Justice Michael Kirby, outlined the most common arguments for and against the introduction of a Bill of Rights. Kirby's outline provides a tidy summation of the major strands of the debate on a Bill of Rights:

**Arguments against a Bill of Rights**

- The introduction of a Bill of Rights goes against the Australian tradition of parliamentary sovereignty and the protection of individual rights through the Common Law;
- A Bill of Rights would politicise the courts;
- A Bill of Rights, by defining rights, would limit rights and soon be out of date;
- A Federal Bill of Rights may ignore regional differences;
- A Bill of Rights is no guarantee against intrusions into fundamental rights. The American Bill of Rights, for example, did not protect US communists from discriminatory legislation in the 1950s; and
- Parliamentary legislation is the most flexible and the most democratic means of ensuring the protection of individual rights and freedoms.
Arguments for a Bill of Rights

- Historically, parliamentary democracy has proven to be an imperfect mechanism for the protection of rights in Australia especially minority rights (for example Australian Aborigines);

- Individual rights and freedoms should be placed ‘above politics’ and enshrined in the Constitution;

- The judiciary is the only body which is sufficiently removed from party politics to protect rights and tackle those difficult and sometimes divisive issues associated with individual rights which Parliament may prefer to avoid (the 1992 Mabo decision is one example);

- In multicultural Australia it is desirable, perhaps even urgent, to articulate ‘the basic principles that represent the foundation of the unity of the nation’ in a constitutional Bill of Rights;

- A Bill of Rights would act as a powerful educative tool and, after a successful referendum, would assist in endorsing the affirmation of individual rights and freedoms with the legitimacy of the people;

- A Bill of Rights serves to ‘empower the powerless’ providing a means whereby minority groups can assert and uphold their rights; and

- Australia is now one of the few countries not to have a Bill of Rights.\(^{73}\)

In addition, there are signs that the political context of the Bill of Rights debate has shifted significantly in the last decade—so much so that many of the juxtapositions which previously characterised the partisan nature of the debate might now be challenged. There is now a rational if not political basis for the achievement of bipartisan support on a Bill of Rights, largely due to the action of three interrelated forces—the internationalisation of human rights law, a High Court which may continue to be activist, and as a consequence, the shared need to assert Australian sovereignty. Developments in other countries such as South Africa, which has recently embraced a new Constitution, may also provide the impetus for renewed interest in Australia.\(^{74}\)

The Internationalisation of Human Rights Law

Our domestic law is increasingly affected by international law and international conventions... The phenomenon is not confined to Australia; it is world-wide. And it is associated with the growth of international or world opinion made possible by the existence of the United Nations, the proliferation of other world and regional bodies and the sophistication of modern communications systems. The rise of international opinion has
played a large part in the emergence of fundamental rights as the dominating political and legal concept in recent decades. [Sir Anthony Mason, 1992]

In the post-war period, the notion of individual rights has re-surfaced as a dominant force in international politics for the first time since the late 18th century. Spurred on by various United Nations instruments on human rights which were a belated response to the horrors perpetrated by fascist governments during the Second World War, as well as the American Civil Rights movement and the globalisation of economies and mass communication networks in the late twentieth century, human rights issues have been entrenched in many constitutions throughout the world. Particularly relevant to Australia is the establishment of Bills of Rights in the constitutions of fellow common law countries such as Canada, New Zealand, South Africa and Papua New Guinea.

Interestingly, moves to create a Bill of Rights in Britain have also gained ground since the United Kingdom became a party to the European Convention on Human Rights. Few countries have remained immune to the pressures of globalisation, yet Australia remains outside the mainstream. Australia, as Justice Michael Kirby reminds us, is the ‘sleeping continent’, somehow pretending that it can remain immune to the trends of internationalisation which ‘basically stem from the opening provisions of the United Nations Charter’. It had been thought that Australia’s adherence to the first Optional Protocol of the International Covenant on Civil and Political Rights in 1991 would be the catalyst for a bipartisan approach to a Bill of Rights.

As a result of Australia’s becoming a party to the Optional Protocol, Australian citizens who allege that they have been denied particular civil and political rights can, after all domestic remedies have been exhausted, take their case to the United Nations Human Rights Committee in Geneva and New York. A successful case was undertaken in 1992 by Mr Nicholas Toonen of Hobart after he alleged violation of his right to privacy under Tasmania’s anti-sodomy laws. On other occasions, both State and Federal governments have recently been advised that particular legislation breaches Australia’s obligations under the ICCPR. After the Toonen decision was handed down the then leader of the Opposition, Alexander Downer, together with other conservative commentators, criticised Labor for ceding Australian sovereignty to the United Nations. Downer told the National Press Club that Australian laws should be interpreted in Australian courts and Australian parliaments and not through United Nations agencies in New York.

In the light of Downer’s comments, it is worth remembering that the Fraser government also contributed to the ‘ceding of Australian sovereignty’ through its ratification of the two major United Nations Human Rights covenants. Furthermore, now that Australia is a party to various UN human rights conventions there is one solution to the sovereignty dilemma, as explained by Philip Alston in 1994:

The most effective and certainly the most principled way of diminishing the extent to which Australia is called upon to account to international supervisory bodies is through the
adoption of a Bill of Rights which enables all alleged violations of international standards to be adjudicated upon in domestic courts. 87

Justice (now Chief Justice) Brennan’s judgment in the Mabo case [Mabo v Queensland (No. 2) 1992 175 CLR 1 at 42] implicitly pointed to a willingness to create a Bill of Rights by default. Brennan emphasised that ‘international law is a legitimate and important influence on the development of the Common Law, especially when international law declares the existence of universal human rights’88

At the time, Justice Brennan’s judgement was a powerful indication that if the High Court was not provided with a democratically endorsed Bill of Rights it might create a de facto judicial Bill of Rights. 89 For those who oppose such a development, it is worth while remembering that for an ‘activist High Court’, international human rights law may well become an even more important point of reference for the High Court, thereby threatening Australian ‘sovereignty’ to a greater degree. 90

High Court Activism

...The (High Court’s) new emphasis on individual rights ... I attribute to a conscious belief ...

... by the Court that it must undertake in a more active way the task of protecting the individual against the state. The Court must have been influenced by the increasing emphasis on individual rights in other legal systems and by the failure of Parliament (by statute) and the Australian people (by referendum) to establish a Bill of Rights. [John Doyle (then Solicitor General of South Australia) 1993]91

While the High Court has always had philosophical concerns it has not always sought to express these concerns explicitly. The response of the High Court of Australia to the internationalisation of human rights jurisprudence has been decisive. In the early 1990s, the Court shifted from the old doctrines of legalism to a more active, interpretative realism. 92 This approach has been characterised by a willingness to assess and explicitly incorporate prevailing community values in decision making as well as the stated determination to be guided by International Law in the protection of civil liberties. 93 As a result, the Court has found implied rights in the Australian Constitution; which, as Brian Galligan has noted, parallels an approach championed by Justice Lionel Murphy in dissent a decade earlier. 94 Murphy had argued for the existence of implied constitutional rights and spoke openly of the law-making role of High Court judges. Although there are signs that the present Court may be arresting this trend, it is likely that the Court’s inclination towards implied rights will oscillate.

Concerns that the introduction of a Bill of Rights would result in the politicisation of the judiciary, the subversion of parliamentary supremacy and majoritarian democracy and the increase of judicial subjectivism may have been valid in the era of strict legalism, but after the change in the role of the High Court, they carry less weight. 95 In fact, many of these criticisms have been levelled at the Court today and it is not a Bill of Rights which has been the catalyst
but the increased activism of the High Court. Judges have openly acknowledged their 'political' role—one which is not 'party political' but which impinges upon the function of the executive and the legislature by interpreting the law in new ways.

The High Court's insistence on implied rights in the Australian Constitution has led to uncertainty and division both within and outside the Court as to the future course of rights protection in Australia. There are now calls from the judiciary and leading political scientists for the Court to be provided with a 'defensible methodology', a more 'proper guide' and 'general normative rules' which would provide clarity and democratic legitimacy in human rights jurisprudence in Australia. Australia's ratification of the United Nations instruments and developments in international law will continue to play an important role in shaping Australian Common Law. Adopting a Bill of Rights is one way of ensuring consistency in human rights protection and might also serve to safeguard Australia's legal sovereignty.

The Relevance of the Canadian and New Zealand Experience to Australia

The Canadian Charter of Rights and Freedoms (1982) and the New Zealand Bill of Rights Act (1990), included as Appendices 1 and 2, are interesting examples from common law countries which have adopted a Bill of Rights. While the Canadian Charter is entrenched in the Constitution, the New Zealand Bill of Rights is statutory: in the words of one commentator, theoretically on a par with the Dog Act 'or any other act of Parliament'. It is also worth noting that the new South African Constitution (1996) has incorporated a Bill of Rights. While it is still too early to assess the impact of the South African Bill, in the light of the coming Constitutional Convention in Australia in 1997 it is interesting that the South African people have endorsed a Bill of Rights as a central feature of their process of constitutional reform.

The different experiences associated with the Bill of Rights in Canada and New Zealand, however, throw considerable light on the possible ramifications of a Bill of Rights in Australia. There are several broad areas where the Canadian and New Zealand experience seems particularly pertinent to Australia: the focus, content and wording of a Bill of Rights, the issue of entrenchment and associated limitations on a Bill of Rights, and finally, the effects of a Bill of Rights on the judiciary, minorities and the 'civic deficit'.

Focus, Content and Wording

Both the Canadian Charter and the New Zealand rights legislation are modelled closely on the International Covenant on Civil and Political Rights. They are concerned only with the actions of government and governmental bodies and not with the actions of private companies or individuals. In other words, their aim is to protect the individual from the actions of the State. Neither charter includes economic, social or community rights or makes reference to
The Preamble and a Bill of Rights

‘duties’. Recent debate in Australia has revealed a degree of support for variation from this model in three key areas: the inclusion of ‘duties’, the inclusion of economic, social and cultural rights, and the broadening of the bill to extend beyond governmental bodies to the private sector. In 1994, the issue of ‘duties’ was raised by the Civics Expert Report which argued that any articulation of citizens’ rights in Australia should also mention citizens’ duties. The NSW Legal Convention’s Bill of Rights recently formulated its draft bill in terms of duties and corresponding rights. Therefore the Convention’s bill includes both the right to freedom from discrimination and the duty not to discriminate.

Discussion concerning the inclusion of economic, social and community rights is usually centred on the issue of legal enforcement. Economic and social rights are not legally enforceable—at least not in the same manner as civil and political rights. At the moment, participants in the Australian debate are equally divided over this particular issue. One compromise, not often considered, is to refer to economic and social rights as aspirations rather than rights in a new preamble. This would have the advantage of separating rights from aspirations, using the preamble and Bill of Rights in tandem.

The other possible variation from the Canadian and New Zealand models concerns the extension of the Bill’s frame of reference beyond government and public bodies to include the actions of the private sector. The draft Bill of Rights proposed by the NSW Legal Convention extended to all ‘decision makers’ who had the capacity to affect or otherwise influence any individual’s access or entitlement to goods, services, facilities, rights or interests. While it is true that many decisions affecting the everyday lives of citizens are made by non-government bodies, the extension of the bill beyond government would be a significant departure from the American, Canadian and New Zealand models, and may be much harder to sell politically.

An Entrenched Bill of Rights?

One of the central features of the Bill of Rights debate is the issue of entrenchment. In New Zealand, although a Select Committee suggested a constitutionally entrenched Bill of Rights in 1985, this proposal was defeated due to the fear of increased judicial power. The prospect of judges invalidating laws passed by an elected parliament was rejected largely because of the ‘entrenched’ doctrine of parliamentary supremacy in New Zealand’s political culture. There is an obvious lesson here for Australia, no matter how strong the arguments for entrenchment may be (see below): in political terms it will be much easier, at least initially, to market the greater ‘flexibility’ of a statutory Bill of Rights. In New Zealand’s case, the ‘lower’ status of a legislative Bill of Rights has not proven to be an obstacle to the judiciary’s perception of the Bill of Rights as a ‘fundamental constitutional document’ which is deserving of a ‘purposive interpretation’. Thus, because of the societal values which underpin the inherently lofty and aspirational nature of a Bill of Rights, although the Bill is not constitutionally entrenched it is unlikely to be perceived as an ordinary statute. The point is perhaps best made by Paul Rishworth in reference to New Zealand:
The Preamble and a Bill of Rights

The statutory affirmation (of rights and freedoms) by Parliament has required a judicial response in the context of specific disputes between citizen and state. That judicial response has a symbolic value. For, as with other constitutional cases, bill of rights litigation is ultimately about the type of society we aspire to have.109

In a changed international climate, the 'majestic' tone of a statutory Bill of Rights may be accorded considerable significance in Australia by the High Court.

In Australia, under Section 109 of the Constitution, in the case of any inconsistency, a Commonwealth Bill of Rights (unless it specifically excluded State laws) would also 'prevail over all state laws', a fact which would be likely to accord it even greater status.110

The most powerful argument for the constitutional entrenchment of a Bill of Rights is that entrenchment protects fundamental rights from the caprice of parliament, as any alteration to the Bill of Rights can only be sanctioned by the people through referendum. (In 1988, the Constitutional Commission recommended that an entrenched Bill of Rights not commence until three years from the date of royal assent, thereby allowing for a prior period of adjustment and review.111) The evidence in Canada is certainly suggestive of strong public support for the entrenched Charter of Rights and Freedoms, although Section 33 of the Charter allows Parliament, when drafting legislation, to override (for a five-year period) those parts of the Charter which relate to fundamental rights and freedoms.112

Opinion on the merits of an override clause is divided, both in Canada and Australia.113 The inclusion of a parliamentary override clause may make an entrenched Bill of Rights more palatable at a referendum but its effectiveness is questionable. For example, in Canada and in New Zealand (where Section 4 of the Bill of Rights theoretically stipulates that any statute which conflicts with the Bill of Rights Act should prevail) override clauses have rarely been used, and their insertion sits at odds with the anti-majoritarian purpose of an entrenched Bill of Rights—namely that human rights should be beyond the reach of parliamentary majorities seeking to intrude upon rights for political expedience. It is also worth noting that override clauses may be invoked by Parliament at the very moment protection of human rights is most under threat.114

The Judiciary and a Bill of Rights

Contrary to the scenario painted by the traditional Bill of Rights critique, the Canadian and New Zealand experience suggests that there has been no subversion of parliamentary supremacy by the judiciary. In the view of one of the leading analysts in Canada, Professor Peter Russell, the Charter 'has not meant that appointed judges have supplanted elected politicians (or their official advisers) as Canadians principal law makers'.115 In New Zealand the courts have interpreted the Bill of Rights Act 'generously', yet there are no conspicuous examples of this threatening parliamentary supremacy.116
The Preamble and a Bill of Rights

There are, however, several lessons to be learnt from Canada and New Zealand in relation to the effect of a Bill of Rights on the judiciary. First, the nature of rights litigation will provide 'a sumptuous smorgasbord' of 'political, sociological and ethical considerations' for the judiciary—this is likely to have a stimulating and invigorating effect on the judiciary. Consequently it is likely that court congestion and delays will increase, especially in the area of criminal law, where consideration of rights issues is likely to complicate litigation. The introduction of a Bill of Rights in Australia would require readjustment of the distribution of litigation throughout the judicial system, with allowances made in some areas for greater workload. As Chief Justice Brennan has noted, a Bill of Rights along Canadian lines would require new 'judicial skills' with an added emphasis on constitutional issues and consideration of more complex evidence. In addition the public profile of the judiciary is likely to be enhanced—although one could argue that this has already begun in Australia, especially after the Mabo (No. 2) decision in 1992 and the Wik decision on 23 December 1996. Appointments to the High Court, especially in the case of an entrenched Bill of Rights, may become more significant and more prone to political exploitation and public criticism. To avoid these controversies, it may be preferable that a new method of appointment be countenanced—perhaps along the lines suggested by Justice Murray Wilcox, whereby any citizen 'could suggest names to a broadly based committee, containing people able to judge not only legal excellence but also candidates' community achievements and attitudes'.

Minorities and a Bill of Rights

One of the main arguments employed by 'proponents of a Bill of Rights' is that the bill would result in greater protection for minority groups in society. Significantly, when Australia is reviewed, or mentioned in the context of world human rights, the one consistent criticism is our failure to adequately protect the rights of Aboriginal Australians. Chief Justice Brennan, for example, has referred to the greater likelihood of minority rights being placed at risk in a more ethnically diverse society such as Australia. A Bill of Rights might therefore be necessary to protect minorities and the weak against the 'discriminatory exercise of power by the political branches of government'. Undoubtedly, the symbolic value of rights can offer a significant source of empowerment to those who perceive themselves to be outside of the 'mainstream'. In part, this explains the calls by Father Frank Brennan, ATSIC and prominent supporters of Aboriginal reconciliation for the inclusion of (collective) Aboriginal rights in any future Australian Bill of Rights. The special status of Aboriginal and Torres Strait Islander peoples as indigenous peoples would then be recognised in both the preamble and the Constitution. However, the experience in Canada and New Zealand indicates that Australians should be mindful of one potential pitfall in the protection of minority rights—the danger that access to the Charter (and the courts) will be dominated by socially powerful groups wealthy enough to afford the cost of litigation.

As in Canada, major interest groups and particular organisations representing women, Aboriginal groups and ethnic minorities should be involved in the public discussion surrounding the formulation of the Bill of Rights. Furthermore, funding could be provided
for the establishment of a ‘Court Challenges Program’ similar to that which exists in Canada. This would allow citizens from disadvantaged sections of society greater access to litigation procedures involving equality concerns. In Canada, evidence suggests that the existence of the Court Challenges Program has substantially increased interest, expertise and sophistication in the exercise of legal rights by minority groups.

Conclusion

The Preamble, an Australian Bill of Rights and the Civic Deficit

With the development of mass consumption and mass systems of information, social styles and cultural practices become mixed into an indefinite medley of tastes and outlooks. With this fragmentation of culture there also goes a fragmentation of sensibilities, a mixing of lifestyles and the erosion of any sense of a cogent political project or coherent political programme, as the lives of individuals become increasingly merely a collection of discontinuous happenings. [Bryan Turner, 1989]

The civic deficit in Australia is widely acknowledged. Australian citizens are largely ignorant about their Constitution and deeply suspicious of the political process. Aside from civics education, one means of reducing these tendencies is to reform the Constitution in a way which makes it relevant, comprehensible and useful to the concerns of contemporary Australians.

The introduction of a new preamble to the Australian Constitution and the formulation of an Australian Bill of Rights may assist in breaking down the political detachment and cynicism of the Australian people.

At the very least, the debate surrounding these proposals would be invigorating. Politicians, judges, academics, the media, university tutorials and school classrooms would be focused on the associated issues of rights, freedoms, duties and shared values. In short, through extensive discussion of the many features of Australian democracy the community may ‘discover’ what it has in common.

The debate on rights and freedoms would be expanded by the debate on aspirations and values in the preamble. If successful, both proposals would ensure continuous public debate—especially when particular litigation attracted prominence in the media. In this way, a new ‘forum’ for political awareness and discussion may be created.

Although the major political parties have quite conflicting views on these issues, they may be able to agree that the time for formally debating the various proposals discussed in this paper has arrived. At a time when judges on the High Court have called for greater uniformity, clarity and direction in the area of civil liberties there is an ideal opportunity for a formal
bipartisan response. The increasing prominence of human rights issues in international relations also indicates that Australia's standing overseas may be enhanced by the introduction of uniform domestic rights legislation.

The introduction of a new preamble and a national Bill of Rights is not a panacea for society's ills, but both proposals are deserving of consideration at the proposed Constitutional Convention in 1997.

Endnotes

2. I refer here specifically to notable 'public' attempts. The debate on a Bill of Rights has been extensively canvassed in academic and political circles, though not always in relation to the republic debate.
5. Galligan, op. cit.: 149.
6. ibid: 140.
7. ibid: 152.
9. Charlesworth, op. cit.: 42.
15. Kirby, op. cit.: 270.
The Preamble and a Bill of Rights

19 Duffy op. cil.: 307.
20 ibid: 303.
21 Kirby, op. cit.: 296.
23 ibid.
25 Kirby, op. cit.: 286–8.
26 An Australian Republic—The Way Forward, Questions and Answers, Canberra, Department of the Prime Minister and Cabinet, 1995: 19.
27 This refers particularly to the leading proponents of minimalist republicanism, the Australian Republican Movement and the Keating government. See, for example, An Australian Republic—The Way Forward, Questions and Answers.
30 ibid.
32 ibid.:101.
33 ibid.:102.
35 'The Western Australian referendum took place on 31 July 1900, after the Constitution had already been enacted by the Imperial Parliament, but before it came into force.' ibid.: 36.
37 See, for example, ibid.: 139–41; and Final Report of the Constitutional Commission, vol. 1: 104–9.
38 This refers indirectly to Walter Bagehot's English Constitution (1867), in which Bagehot suggested that to ensure the survival of monarchy daylight should not be let in upon magic.
The Preamble and a Bill of Rights


45 *An Australian Republic—The Options*, vol. 1, *The Report*: 141; and ‘Whereas the People...’: *Civics and Citizenship Education*: 14.

46 See in particular *An Australian Republic—The Options*, vol. 1, *The Report*: 136. The Constitutional Commission’s Advisory Committee on Individual and Democratic Rights produced a preamble which included unnecessary phrases such as ‘Australia is an ancient land’ and ‘Australia is a continent of immense extent and unique in the world’. See also *The Report*: 140 where the preamble submitted by ATSIC (modified from Frank Brennan’s original) provides an example of a preamble which is simply too long; or *The Report*: 141 where the submission of a preamble by Graham Bradley lapses into paternalism with its assumption that the people of Australia have enjoyed a century of ‘peace and prosperity’—this was not the case for Aboriginal Australians. See Appendix 3 ‘Alternative preambles’.


51 ibid.: 136.

52 ibid.: 138.

53 loc. cit.

54 ibid.: 119.


The Preamble and a Bill of Rights


59 J. Goldsworthy, 'The Constitutional Protection of Rights in Australia' in G. Craven (ed.), *Australian Federation: Towards the Second Century*, Carlton, Melbourne University Press, 1992: 152–8. The Constitution did, however, guarantee freedom of religion (Section 116), freedom from discrimination based on state of residence (Section 117), trial by jury for any offence against the Commonwealth (Section 80) and the guarantee of just acquisition of property by the Commonwealth (Section 51).


64 Murphy, op. cit.: 3.

65 Charlesworth, op. cit.: 26; and S. Gibb and K. Eastman, 'Why are we talking about a bill of rights?', *Law Society Journal*, vol. 33, no. 7 1995: 51. Murphy's view was also supported by the Final Report of the *Constitutional Commission*, vol. 1: 418.

66 For a recent example of faith placed in the evolutionary nature of the common law see J. Doyle and B. Wells, 'How Far Can the Common Law Go towards Protecting Human Rights?' in Alston, *Towards an Australian Bill of Rights*: 121.


68 Charlesworth, op. cit.: 38.


70 Sackville, op. cit.: 24.

71 Kirby in Alston, op. cit.: 270; and M. Kirby, 'Mechanisms for the Recognition and Protection of Rights in Australia', *Constitutional Centenary*, vol. 4, no. 1, April 1995: 8.
The Preamble and a Bill of Rights


74 See Appendix 3 for the Preamble to the Constitution of the Republic of South Africa. Note also that A Bill of Rights forms Chapter 2 to that Constitution.


76 Goldsworthy, op. cit.: 160–1.


79 Mason, op. cit.: 14; and see, for example, the work of Charter 88 in Britain.

80 Kirby in Alston, op. cit.: 268–70.

81 It is worth noting that treaties give rise to international, not domestic, legal obligations. For a treaty to have effect it must be formally incorporated into law by an Act of Parliament.

82 Kirby in Alston, op. cit.: 286.

83 ibid.: 285–96; and B. Burdekin, ‘The Impact of a Bill of Rights on Those Who Need it Most’ in Alston, *Towards an Australian Bill of Rights*: 151, 160–2. Particular examples of legislation which has been alleged to have breached Australia’s international obligations include:

- Crimes (Serious and Repeat Offenders) Sentencing Act 1992 (Western Australia)
- longstanding anti-sodomy laws (Tasmania)
- 1994 Amendments to the Commonwealth Migration Act

As recently as September 1996, the Western Australian parliament refused to pass legislation prohibiting discrimination on the grounds of sexual preference.

84 Alston, op. cit.: 4.

85 ibid.


87 Alston, op. cit.: 10.

88 Brennan quoted by Kirby in Alston, op. cit.: 296.

89 Alston, for example, refers to this as a Bill of Rights by ‘default’ in Alston, op. cit.: 1. Also see Galligan, *A Federal Republic*: 180.

90 See, for example, A. Mason, ‘A Bill of Rights for Australia?’, *Australian Bar Review*, vol. 5, 1989: 79–90; Kirby in Alston, op. cit.: 296–8; G. Brennan, op. cit.: 177–86, and the majority of contributions to Alston, *Towards an Australian Bill of Rights*. Also see Final Report of the
The Preamble and a Bill of Rights


92 See, for example, Mason quoted in Galligan, *A Federal Republic*: 161.

93 *ibid.*: 184.

94 Murphy argued for the existence of implied Constitutional rights and spoke openly of the ‘law making’ role of High Court judges.

95 Examples are Moens, *op. cit.* 233–53, note 6; and Gibbs, *op. cit.*: 26–8, note 9.


102 Also relevant to the Australian debate is the fact that the Canadian Charter has failed to adequately protect the rights of prisoners and provide for fair acquisition of property. See Wilcox, *op. cit.*: 212; and B. Carson, *Charter of Rights and Freedoms and the Bill of Rights: A Comparison*, Research Branch of the Canadian Library of Parliament, May 1988: 7.

103 ‘NSW Legal Convention Draft Proposal for a Bill of Rights for NSW’: i–iv.

104 See, for example, *Final Report of the Constitutional Commission*, vol. I: 479; Gibb & Eastman, *op. cit.*: 50; Charlesworth, *op. cit.*: 40; *Individual Rights and Freedoms*, *op. cit.*: 408–9; and *A Northern Territory Bill of Rights*, *op. cit.*: 29.

105 ‘NSW Legal Convention Draft Proposal for a Bill of Rights for NSW’: i.

106 See for example *Final Report of the Constitutional Commission*, vol. I: 476, 483. Others such as Charlesworth, *op. cit.*: 51 conclude that the Canadian experience suggests an Australian Bill of Rights should be entrenched.


108 *ibid.*: 252. New Zealand also introduced the Human Rights Act in 1993.

The Preamble and a Bill of Rights

110 Elkind, op. cit.: 253. The 1960 Canadian (Statutory) Bill of Rights failed to apply to all levels of government, but the 1982 Charter did not make the same mistake. See also Carson, op. cit.: 3.


114 Rishworth, op. cit.: 72; Elkind, op. cit.: 252; and Final Report of the Constitutional Commission, vol. 1: 494. Of course, both the New Zealand and the Canadian Charter limit the guarantee of rights and freedoms to reasonable limits as prescribed by law and a democratic society.


117 G. Ferguson quoted by G. Brennan, op. cit.: 181.

118 Wilcox, op. cit.: 223; and Russell, op. cit.: 386.

119 G. Brennan, op. cit.: 182; and Wilcox, op. cit.: 224.

120 G. Brennan, op. cit.: 181.

121 Wik Peoples v Queensland; Thayorre People v Queensland, High Court of Australia. (unreported).

122 Wilcox, op. cit.: 226.

123 See for example Individual Rights and Freedoms, op. cit.: 10; and A Northern Territory Bill of Rights?, op. cit.: 26. Also Charlesworth, op. cit.: 45, 53.


125 G. Brennan, op. cit.: 179.

126 Charlesworth, op. cit.: 50.


128 Russell, op. cit.: 399; and Goldsworthy, op. cit.: 171.

129 Wilcox, op. cit.: 220.

130 ibid.: 221.

131 Quoted in ‘Whereas the People... ’: Civics and Citizenship Education: 15.

132 ibid.: 19.

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:
   (a) freedom of conscience and religion;
   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
   (c) freedom of peaceful assembly; and
   (d) freedom of association.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.
   
   (2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

   (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
      (a) to move to and take up residence in any province; and
      (b) to pursue the gaining of a livelihood in any province.
(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) & (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations;
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. Any witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.
(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by the legislature of New Brunswick.

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
   (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
   (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

   (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
   (a) any rights or freedoms that have been recognised by the Royal Proclamation of October 7, 1763; and
   (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

31. Nothing in this Charter extends the legislative powers of any body or authority.
32. 1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection 1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

34. This Part may be cited as the Canadian Charter of Rights and Freedoms.
Appendix 2: New Zealand Bill of Rights Act 1990

1. Short Title and commencement—

(1) This Act may be cited as the New Zealand Bill of Rights Act 1990.

(2) This Act shall come into force on the 28th day after the date on which it receives the Royal assent.

PART 1

GENERAL PROVISIONS

2. Rights affirmed—The rights and freedoms contained in this Bill of Rights are affirmed.

3. Application—This Bill of Rights applies only to acts done—

(a) By the legislative, executive, or judicial branches of the government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

4. Other enactments not affected—No court shall, in relation to any enactment (whether passed or made before or after the commencement this Bill of Rights),—

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5. Justified limitations—Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. Interpretation consistent with Bill of Rights to be preferred—Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

7. Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights—Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—

(a) In the case of a Government Bill, on the introduction of that Bill; or

(b) In any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.
PART II
CIVIL AND POLITICAL RIGHTS

Life and Security of the Person

8. Right not to be deprived of life—No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9. Right not to be subjected to torture or cruel treatment—Everyone has the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment.

10. Right not to be subjected to medical or scientific experimentation—Everyone has the right not to be subjected to medical or scientific experimentation without that person's consent.

11. Right to refuse to undergo medical treatment—Everyone has the right to refuse to undergo any medical treatment.

Democratic and Civil Rights

12. Electoral rights—Every New Zealand citizen who is of or over the age of 18 years—
   (a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
   (b) Is qualified for membership of the House of Representatives.

13. Freedom of thought, conscience, and religion—Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

14. Freedom of expression—Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

15. Manifestation of religion and belief—Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

16. Freedom of peaceful assembly—Everyone has the right to freedom of peaceful assembly.

17. Freedom of association—Everyone has the right to freedom of association.

18. Freedom of movement—
   (1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
   (2) Every New Zealand citizen has the right to enter New Zealand.
   (3) Everyone has the right to leave New Zealand.
   (4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under decision taken on grounds prescribed by law.
The Preamble and a Bill of Rights

Non-Discrimination and Minority Rights

19. Freedom from discrimination—

(1) Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief do not constitute discrimination.

20. Rights of minorities—A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

Search, Arrest and Detention

21. Unreasonable search and seizure—Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property or correspondence or otherwise.

22. Liberty of the person—Everyone has the right not to be arbitrarily arrested or detained.

23. Rights of persons arrested or detained—

(1) Everyone who is arrested or who is detained under any enactment—

(a) Shall be informed at the time of the arrest or detention of the reason for it; and

(b) Shall have the right consult and instruct a lawyer without delay and to be informed of that right; and

(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is—

(a) Arrested; or

(b) Detained under any enactment —

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.
24. Rights of persons charged—Everyone who is charge with an offence—

(a) Shall be informed promptly and in detail of the nature and cause of the charge; and

(b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and

(c) Shall have the right to consult and instruct a lawyer; and

(d) Shall have the right to adequate time and facilities to prepare a defence; and

(e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial jury when the penalty for the offence is or includes imprisonment for more than 3 months; and

(f) Shall have the right to receive legal assistance without cost if the interests of justice so require, and the person does not have sufficient means to provide for that assistance; and

(g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

25. Minimum standards of criminal procedure—Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) The right to a fair and public hearing by an independent and impartial court;

(b) The right to be tried without undue delay;

(c) The right to be presumed innocent until proved guilty according to law;

(d) The right not to be compelled to be a witness or to confess guilt;

(e) The right to be present at the trial and to present a defence;

(f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution;

(g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty;

(h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both;

(i) The right, in the case of a child, to be dealt with in a manner that takes account of the child’s age.

26. Retroactive penalties and double jeopardy—

(I) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.
(2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

27. Right to justice—

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

PART III
MISCELLANEOUS PROVISIONS

28. Other rights and freedoms not affected—An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

29. Application to legal persons—Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.
Appendix 3: The Preamble to the Constitution of the Republic of South Africa

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all those who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -

Heal the Divisions of the past and establish a society based on democratic values, social justice and fundamental human rights:

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person;

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikeleli' Afrika. Morena boloka setjhaba sa heso.

God seen Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika.
Appendix 4: Alternative Preambles

1. Malcolm Fraser

Australians freely enter this solemn covenant to establish democratic government for the advancement of all citizens, and for the protection of the State.

This covenant guarantees basic freedoms essential to a civilised society, in particular it guarantees freedom of association, freedom of religion and freedom of speech.

This covenant establishes abiding rules which can only be changed by the decision of all Australians through the defined process of referendum.

The High Court of Australia will be the custodian of this covenant and the ultimate authority for the resolution of disputes. Stability and clarity of interpretation of this covenant and of laws established in accordance with its provisions will be the court’s full responsibility.

Accordingly, the parliament, alone, with the executive government is established to protect and advance the purposes of this covenant, and to make laws for the safety and well being of all Australians.

The fundamental principles of such laws shall embrace universality and non-discrimination. Laws may be made to relieve hardship, to address adversity. Indeed a basic objective of this covenant is to advance an egalitarian society where all people are equal before the law, with equal access to the law.

This covenant recognises that Australia is irreversibly multicultural, containing citizens from many diverse countries representing all creeds. Laws based on race or religion are essentially discriminatory and are thus forbidden by this covenant.

Through this covenant Australians unite, to establish both government and judiciary, recognising that the good order and conduct of society requires laws applicable to all with just and humane administration.

This covenant is based on sovereignty residing irrevocably with each citizen. Institutions established by citizens freely joining together, exist by the will of the people with whose government they are entrusted.

Government established by the rules of this covenant is to be representative of the people, responsible at all times through the Parliament to the people.

2. Malcolm Turnbull

Whereas the people of NSW, Victoria, South Australia, Queensland, Tasmania and Western Australia, humbly relying on the blessing of Almighty God agreed to unite in one indissoluble Federal Commonwealth under the Crown of Great Britain and Ireland and under the Constitution hereby established: And whereas that Federal Commonwealth, the Commonwealth of Australia, evolved into an independent nation under the Crown of Australia: We, the people of Australia, united in an indissoluble Commonwealth of States, acknowledging the equality of all under the law regardless of colour, race, sex or creed declaring ourselves to be free, sovereign and independent, agree to be bound by these principles of equality and by the provisions of this Constitution.


3. George Winterton

Whereas the original, indigenous Australians held in trust this continent of which all Australians are now trustees: And whereas the people of NSW, Victoria, South Australia, Queensland, Tasmania and Western Australia, humbly relying on the blessing of Almighty God, agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established: And whereas that Federal Commonwealth, the Commonwealth of Australia, evolved into an independent nation under the Crown of Australia: And whereas the people of Australia have decided to constitute the Commonwealth of Australia as an independent federal republic founded upon democratic government, the rule of law and the equality of all citizens before the law, and dedicated to the principle of the equal worth and dignity of every human being: We, the people of Australia, do hereby enact and give to ourselves this Constitution.

George Winterton is Professor of Law at the University of NSW. *Australian*, Jan 27-28, 1996: 7.

4. Zita Antonios

And whereas Aboriginal and Torres Strait Islander people have a distinct cultural status as indigenous peoples, with traditional laws, customs and ways of life that have evolved over thousands of years: And whereas the people of Australia now include its indigenous peoples, together with peoples drawn from many nations and of many cultures, who live together in a multicultural society: And whereas Australia is established as a democratic State, subject to the rule of law and embracing the values of equality, liberty, justice, and the human dignity of all people: And whereas the people of Australia are united in an indissoluble Commonwealth: We, the people of Australia, agree to be bound by the provisions of this Constitution.

The Preamble and a Bill of Rights

5. Lois O’Donoghue

Australians affirm their Constitution as the foundation of their commitment to, and their aspirations for, constitutional government. Our nation dedicates itself to a responsible and representative system of government that is inclusive of all its people, upholds fundamental human rights, respects and cherishes diversity, and ensures full participation in its social, cultural and economic life. Australia recognises the Aboriginal peoples and Torres Strait Islanders as its indigenous peoples with continuous rights by virtue of that status. We seek a united Australia that respects and protects the land and the indigenous heritage, values the cultures of its peoples, and provides justice and equity for all. The authority for this Constitution derives from all Australians.


6. Aboriginal and Torres Strait Islander Commission

Whereas the territory of Australia has long been occupied by Aboriginal peoples and Torres Strait Islanders whose ancestors inhabited Australia and maintained traditional titles to the land for thousands of years before British settlement;

And whereas many Aboriginal peoples and Torres Strait Islanders suffered dispossession and dispersal upon exclusion from their traditional lands by the authority of the Crown;

And whereas Aboriginal peoples and Torres Strait Islanders, whose traditional laws, customs and ways of life have evolved over thousands of years, have a distinct cultural status as indigenous peoples;

And whereas the people of Australia now include Aboriginal people, Torres Strait Islanders, migrants and refugees from many nations, and their descendants seeking peace, freedom, equality and good government for all citizens under law;

And whereas the people of Australia drawn from diverse cultures and races have agreed to live in one indissoluble federal Commonwealth under the Constitution established a century ago and approved with amendment by the will of the people of Australia;

Be it therefore enacted ...

Aboriginal and Torres Strait Islander Commission (Proposed Preamble to the Australian Constitution, submission to the Republic Advisory Committee 1993)
7 Joan Kirner

Whereas the people of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia, humbly relying on the blessing of Almighty God, agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.

And whereas the Federal Commonwealth, the Commonwealth of Australia, has evolved into an independent nation under the Crown of Australia: We the people of Australia, now a Commonwealth of states, acknowledge: the prior ownership of this land by its indigenous people and respect the spirit of this land:

The equality of all before the law, regardless of colour, race, gender or belief and the right to freedom of speech and association. The right of all to food, employment, education, housing, and transport and freedom from fear and violence. And we declare ourselves to be free, sovereign and independent and bound by the provisions of this Constitution.

The Preamble and a Bill of Rights

Bibliography

Reports and Discussion Papers

*ACT Bill of Rights 1995* (Introduced into the ACT Assembly by Mr Connolly as a Private Member’s Bill).

*A Bill of Rights for the ACT?*, Canberra, ACT Attorney-General’s Department, 1993.


*A Northern Territory Bill of Rights?*, Sessional Committee on Constitutional Development, Discussion Paper No.8, Legislative Assembly of the Northern Territory, March 1995.


Articles


**Monographs and collections**


Murphy, L., *Why Australia needs a Bill of Rights* (Reply by the Attorney-General, Senator Lionel Murphy, QC, to a series of articles by Sir Robert Menzies on the Human Rights Bill 1974).


