

page 4 of 5

Lawyers are already drunk with power

<http://www.theaustralian.news.com.au/story/0,25197,23588943-7583,00.html>

Bob Carr was premier of NSW from 1995 to 2005.

CALL it the first swallow of summer. Last week I met a lawyer who said while she opposed a charter of rights, all the barristers on her floor supported it, and for the obvious reason: the intoxicating whiff of litigation.

A bill of rights, or a charter, will lay out abstractions like the right to life, or privacy, or property, and thus enable judges to determine - after deliciously drawn-out litigation - what these mean.

A shift in power from elected parliaments to unelected judges, by a process of "judicial creep", is part of the bill of rights package.

Canada has had its Charter of Rights and Freedoms since 1982, planted in the constitution. Before that there was only a legislative version.

Clearly this is something the zealots want to see happen here: the first step only a law, but followed by constitutional entrenchment.

Like Australia, Canada also has a shortage of doctors in rural areas. British Columbia came up with a scheme to encourage doctors to practise there, with a finely tuned system of incentives.

The provincial Supreme Court struck it down, citing section 6 ("mobility rights") and section 7 (the "right to life, liberty and security") of the Canadian Charter of Rights and Freedoms. Canada's rural population is still under-served by doctors, thanks to judges who want to write society's rules.

That's the trouble. A menu of abstractions - that is, any attempt to list rights - wrenches from the cabinet table and the legislature and delivers to the courtroom things that ought to be determined by governments.

Thus, in the most recent burst of judicial activism, judges in Britain have determined that the justice secretary can no longer block a parole board decision to release a dangerous prisoner. Judges also determined that failed asylum-seekers in Britain could have access to the National Health Scheme, again something that should be a matter for elected politicians.

In Scotland, because of a delay in placing toilets in prison cells, the Scottish Law Reporter estimates that prisoners may be entitled to awards totalling pound stg. 76 million (\$158.7 million) because their cells violated the European Charter of Fundamental Rights. The Government had been caught up with another priority, expanding drug rehabilitation programs for inmates.

Last year, pound stg. 750,000 was paid to 197 heroin-addicted prisoners who successfully argued that cutting short their treatment while in prison breached their human rights.

But there's another phenomenon that perverts proper process: police and bureaucrats in Britain anticipate getting overruled on human rights grounds and start to shape their responses.

page 5 of 5

Pity the factory owner who, this month, had to pay pound stg. 20,000 to bailiffs to remove 40 Gypsies who had torn down a 2.4m fence and occupied his factory land. The police refused to act so as not to breach the travellers' human rights.

A friend of mine who sits in the House of Commons says when his constituents talk about loutish behaviour in the streets or around housing estates, they say: "I suppose the police can't do anything about it because of their human rights."

Thus creeping judicial activism around a charter of abstractions renders negative a concept that should sit nobly and proudly in the lexicon.

When Kevin Rudd looks at the 2020 Summit's endorsement of a bill or charter, he'll be politically astute enough to know a move to enact a charter or bill in any form would meet the same commonsense opposition that doomed it in 1988, when Australians voted it down 69 per cent to 31 per cent.

Consider the objectors. Business knows it just represents another layer of uncertainty; what judges will do with "a right to property" is anyone's guess.

Churches are becoming aware their immunity from anti-discrimination laws - a justified immunity - will end with a charter or a bill of rights.

Church leaders can democratically lobby parliaments and cabinets, but not non-elected, tenured judges. The most obvious effect of a charter is to add opportunities to defence lawyers in criminal matters.

I look forward to advising victims of crime groups of the consequences of a bill or charter. The power of police to stop and search people for a knife, and remove the knife, which we enacted in NSW in 1998, would not survive judicial activism based on freewheeling interpretations. And the decisive life sentences imposed on the state's worst killers (who were originally given indeterminate "never to be released" sentences) would also be found to contravene prisoners' rights, as in Britain.

Perhaps, as former justice minister Michael Tate seemed to foreshadow in The Australian last week, we will see a proposal for a list of rights to be overseen by a parliamentary committee, not by judges. A big retreat, but it will still be objectionable.

I and others will take issue with any attempt by a group of zealots to arrogate to themselves the power to define, codify and nail down their definition at this time of what they think ought to be our rights. Talk about elitism.

Rights count. So much so they need the give and take of the common law, rowdy parliaments and the ebb and flow of public opinion.

It's the commonsensical ethos of a people - temper democratic, bias offensively Australian - not a declaration of abstractions that will keep us free.