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National

David Haywood: Bill of Rights unlikely to grow

By Guest Columnists

Canadian political scientist Rand Dyck is very polite. He immediately proclaims his liking for New Zealanders, and professes reluctance to say anything critical about our political system.

But he does acknowledge – in the mildest possible way – that "Canadians would regard the New Zealand Bill of Rights as weak".

Lord Cooke of Thorndon puts it more forcefully. He describes it as being "regarded internationally as one of the weakest affirmations of human rights".

Even more embarrassingly, our Bill of Rights has managed to fall foul of the Human Rights Committee of the United Nations, who have condemned the ease with which it can be overridden by the New Zealand Parliament.

So is our 16-year-old Bill of Rights really the teenage delinquent that these criticisms would suggest? What went wrong to make it turn out so badly?

There is no denying it was an unwanted child. When it was proposed in 1986 there were howls of protest from the public and politicians. The Justice and Law Reform Select Committee received numerous objections – including complaints it was inspired by communism, didn't protect the New Zealand flag, and failed to acknowledge that God was the source of all rights in a Christian country.

The original idea was conceived by then Attorney-General Sir Geoffrey Palmer.

His intention was to have a single document to protect the civil and political rights of the public from encroachment by Parliament, the judiciary, and organisations such as the police.

Ursula Cheer, a senior lecturer at the University of Canterbury School of Law, explains: "The New Zealand Bill of Rights safeguards important civil liberties such as the right to vote, freedom of expression, the right to a fair trial, and freedom from discrimination (by government) on the grounds of sex, race, or religion."

As envisaged by Sir Geoffrey, the Bill of Rights would have been entrenched as supreme law, allowing the courts to strike down any existing or proposed laws that conflicted with it. For example, if Parliament passed legislation prohibiting criticism of politicians, the courts would have disqualified it on the basis that it conflicted with freedom of expression.

Unfortunately, this put the Bill of Rights on a collision course with one of New Zealand's great parliamentary traditions – the ability for the executive branch of government to do practically anything it wants. New Zealand is unusual in that it has no upper house or written constitution to provide a check on the power of its parliamentarians, a state of affairs memorably described as "executive paradise". A supreme law Bill of Rights would have diluted the absolute sovereignty of Parliament, and given judges the final stamp of approval on matters of civil liberty.

Sir Geoffrey saw this check on parliamentary sovereignty as a good thing. "I would have gone for the full-blown [Bill of Rights] if I could have got it through," he says. His fellow politicians were unconvinced, and in the end prevailed with an unusual compromise.

The Bill of Rights was enacted in 1990, but contained a new section which explicitly stated that it could not be used to strike down any other law.

In this respect it differs markedly from the European Convention on Human Rights, the United States Bill of Rights, and the Canadian Charter of Rights and Freedoms.

Because it is not supreme law, the New Zealand Bill of Rights can be overridden by our Parliament any time it chooses, which – as its detractors point out – appears to rather defeat the purpose of having a Bill of Rights in the first place.

So is our Bill of Rights a non-achiever? "The reality is that fundamental rights and freedoms in New Zealand are protected by the Bill of Rights," says Sir Geoffrey, "[It] has been effective in accomplishing its purpose despite the fact that it is not superior law."

He points out that the Attorney-General is required to report to Parliament when a new piece of legislation is inconsistent with the Bill of Rights. According to Sir Geoffrey, the negative publicity surrounding such an admission makes governments extremely reluctant to breach protected civil liberties.

"[And] the politics of repealing Bills of Rights are not good," he observes wryly.

Ursula Cheer agrees with Sir Geoffrey's assessment. She also points to the influence of another provision which states: "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 ..."

"This has had a profound effect on our judiciary," she says, and has enabled judges to "breathe life" into the Bill of Rights. "You only need to look at a few freedom of expression cases to see we are much more rights conscious than before."

Cheer and Sir Geoffrey agree that a Bill of Rights entrenched as supreme law would "clearly be better" at protecting New Zealanders' civil liberties.

This claim is roundly rejected by current Attorney-General Michael Cullen. He says critics (such as the United Nations) do not understand "the importance New Zealanders as a whole attach to Parliamentary sovereignty ... a deeply held belief that the democratically elected representatives of the people should have the final say over legislation, rather than the courts."

National Party shadow attorney-general Christopher Finlayson expresses similar faith in New Zealand's democratically elected representatives.

"I would prefer to see genuine parliamentary reform so that many of the ills that a Bill of Rights would address in the courts could be addressed by the politicians," he says.

Finlayson doesn't see a pressing need for a Bill of Rights in New Zealand, and thinks the debate is misplaced.

"Does it achieve anything practical?" he asks. "Not that I disagree with any particular outcome but I just think the discourse is a bit anally retentive."

So do Finlayson and Cullen have a point? Is it better that final decisions on civil liberties are in the hands of our democratically elected representatives?

Not according to Sir Geoffrey. "Any legislature is [subject to] majority tyranny because it has to reflect public opinion."

In other words, there is no guarantee politicians democratically elected by the majority will look after the human rights of minorities – as early Chinese immigrants to New Zealand discovered. Sir Geoffrey also dismisses the idea that a supreme law Bill of Rights would hand over power to the courts. "I think that's tripe. [Judges would] only have power to the extent that the Bill of Rights gives it."

A more compelling argument against it is that it might politicise our judiciary, says Cheer. This happens in the US, where politicians attempt to influence the courts by appointing judges of the same political leanings as themselves. "That's actually a very significant concern," warns Cheer.

The fact that a politicised judiciary is not inevitable under a supreme law Bill of Rights is demonstrated by Canada's experience. "This has not been a [for us]," says Rand Dyck. "We deliberately seek out impressive, non-partisan, non-ideological appointees for the judiciary."

Dr Rodney Harrison, QC, works at the coal face of civil liberties in New Zealand. He acknowledges concerns about politicisation of judges, but disagrees that human rights are safer in the hands of politicians. "Experience teaches otherwise," observes Harrison, who is the senior counsel for Ahmed Zaoui.

"My view is that in the post-September 11 climate of 'insecurity about security' there's probably a greater need for New Zealand to be governed by a statement of basic human rights than there has been in any other time in recent history.

"You need only to say the words 'suspected terrorist' and there's virtually no one in Parliament who is prepared to stand up for individual rights."

He thinks that the Bill of Rights should be strengthened. "It's time we went further, but this should be an incremental process."

Ursula Cheer agrees that improvements must occur gradually. "New Zealand is not yet ready for a strong Bill of Rights," she says. "Our MPs are definitely not ready, and I think we need to educate the general public a bit more before we consider anything radical such as making it supreme law."

So on the sixteenth birthday of the New Zealand Bill of Rights, even its greatest supporters don't think that it's ready to grow up. Will it ever become a fully fledged Bill of Rights?

"I don't think it will happen quickly," says Sir Geoffrey, the man who started the whole debate. "But it will happen in the end." He gives a resigned sigh. "One has to be patient with constitutional reform – [as] I have learned."

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