Comments

Editor: Dan Meagher

OF NEWSPAPERS AND LAW REVIEWS

I am a bill of rights sceptic. A good number of the peer reviewed law journal articles I have written in the last decade or so, plus a bunch of book chapters, have been related to the issue of bills of rights, about a couple of dozen such pieces.[1] Since arriving in Australia four years ago, I have also written dozens and dozens of newspaper opinion pieces, many of them arguing against enacting a bill of rights.[2] Then, in late May 2009, it was pointed out to me that in the most recent issue of the *Alternative Law Journal* Nicola McGarrity of the Gilbert & Tobin Public Law Centre had written a piece taking issue with my and former New South Wales Premier Bob Carr's views.[3] In criticising me McGarrity cites but three pieces of mine, namely one newspaper piece, a radio interview and a talk I gave at Parliament – though in the case of the last of these she appears merely to refer to the title of my talk there (a catchy one, I confess) with only a single passing quote from that talk and no analysis or refutation of the substantive claims in that talk. Meanwhile not a single one of my peer reviewed articles or book chapters is mentioned, cited or discussed.

I find this all somewhat baffling or at least odd. Perhaps I am old-fashioned or the victim of some out-dated notion of what academic debate is about, but demanding the standards of the law review in a radio talk or a newspaper opinion piece seems bizarre to me. Worse than that, when the person attacking you chooses to publish in a law review and uses phrases such as "deliberately ignored",[4] "campaign of misinformation",[5] and "the need to present the public with factually correct and clearly reasoned arguments",[6] I would have expected a detailed examination of everything the accused had written to backup such claims, not mention of only one (of many) newspaper columns and a radio chat that constitute at most a small fraction of 1% of his output on the topic in the last decade. And I most definitely would have expected reference to his peer reviewed writings. That said, and whatever you might think about this focus on a single newspaper column in a peer review article, you still might wonder at how McGarrity had the temerity to claim about herself that "[m]y present concern … is not an ideological one".[7] If McGarrity can say that with a straight face I would be mightily surprised.

Now if this strikes you as an overly defensive response by me let me clarify. I have never walked away from a debate and do not intend to do so here. Indeed on this topic of bills of rights I have recently had quite strenuous debates in peer reviewed law journals, most recently with Jeremy Waldron in the *San Diego Law Review* and with Dan Meagher in the *King's Law Journal*. In those cases all of us have applied the standards applicable to the peer reviewed law journal. And as any reader of *The Australian* may know, I have had a number of back-and-forth debates on this topic with

[1] See, as a sample of my work, "Bills of Rights and Judicial Power – A Liberal's Quandary?" (1996) 16 OJLS 337; *Sympathy and Antipathy: Essays Legal and Philosophical* (Ashgate, 2002); "Rights, Paternalism, Constitutions and Judges" in Huscroft G and Rishworth P (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002) p 29; "Oh That I Were Made Judge in the Land" (2002) 30 Fed LR 561; "Paying for the Comfort of Dogma" (2003) 25 Syd LR 63; "A Modest Proposal" (2003) 23 OJLS 197; "An Unashamed Majoritarian" (2004) 27 Dal LJ 537; "Rights Internationalism Coming Home to Roost?" (2006) San Diego L Rev 1 (co-written with Grant Huscroft); "Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century" (2006) 17 KCLJ 1; "Thin Beats Fat Yet Again – Conceptions of Democracy" (2006) 25 L & Phil 533; "The Victorian Charter of Human Rights And Responsibilities" (2006) 30 MULR 906; "Jeremy Waldron and the Philosopher's Stone" (2008) 45 San Diego L Rev 133; "Meagher's Mischaracterisations of Majoritarianism: A Reply" (2009) 20 KLJ 115.

[2] Mostly in *The Australian*, but also in *The Sydney Morning Herald*, *The Age*, *The Australian Finanical Review* and others.

[3] McGarrity N, "Errors in the Anti-Charter Campaign" (2009) 34 Alt LJ 11. Bob Carr is more than capable of defending himself and so I here focus on the claims against me.

[4] McGarrity, n 3 at 11.

[5] McGarrity, n 3 at 11.

[6] McGarrity, n 3 at 11.

[7] McGarrity, n 3 at 11.

barristers and even government officers. The standards there, of course, have been those of the opinion piece set out above. And I have no objection whatsoever to people taking issue with me in however strong terms they wish. I believe in wide, open and vigorous free speech with next to no limits.

Nor do I expect others to agree with me about the undesirability of bills of rights. Indeed I have many legal academic friends in the United States (US) and Canada who are supporters of bills of rights. Some, like Larry Alexander and Rick Kay, do so on the basis that for them some matters can count for more, sometimes, than democratic participation in decision-making. It is an honesty one rarely finds amongst Australian proponents of a bill of rights.

Now if those starting paragraphs give you the impression that I am being precious then just ignore them all. In the remainder of this piece I will respond to the substance of McGarrity's claims.

McGarrity purports to be concerned about misrepresentation. We need an informed debate about the merits and demerits of a bill of rights for Australia, she says, and the public needs solid information. She alleges that Carr and I mislead the public (though she is less restrained in the way she puts it). That is the gist of her article, focusing as it does in my case on a single newspaper column and a radio interview.

I think her general claim or grievance is ridiculous. Even worse than that, her objection applies much more powerfully to her own position in favour of a bill of rights than to the anti-position. To make that case I will do four things. First, I will take you briefly through the premises on which she relies in her article. Secondly, I will show you how the charge of "misrepresentation" applies to the pro-bill of rights position here in Australia at a deep and fundamental level (as opposed to the level of quibbling with the interpretation put on a couple of cases in a newspaper column). Thirdly, I will respond to the two specific charges she levels against me. And finally, I will set out a series of "yes/no" questions for her and for all pro-bill of rights advocates here in Australia to answer – though on past form I recognise there is virtually no chance of her or them taking up this challenge to provide clear, unequivocal indications of what they think as regards the key issues in this debate.

McGarrity starts by claiming Australians are uninformed about what is at stake in the bill of rights debate. They need educating. "'Ordinary' Australians have been prevented by their lack of knowledge from directly and individually participating in the debate."[8] Her evidence for this is a single Amnesty International survey from 2006 in which three-fifths of those who answered thought Australia already has a charter of rights. That is the basis for all that follows, including her allegation about the "deficiency of the human rights debate in Australia".[9]

Now as that survey took place in 2006, and the newspaper column of mine and radio interview took place years after that, I am not clear how she can hold me responsible for the supposed lack of knowledge out there amongst ordinary Australians. Presumably, if she is to rest her entire claim to widespread ignorance on a single survey commissioned by a group strongly in favour of bills of rights, and then blame me (in part) for that ignorance, then what I did had to precede the survey.

But that is a mere quibble.[10] The larger point here is that McGarrity provides nothing like a solid basis for her claims to systemic ignorance. A 2001 survey in Canada with the same survey size as McGarrity's showed that only 29% of Canadians knew which part of their *Constitution* protected rights and freedoms (the answer being the *Charter of Rights and Freedoms*).[11] Does that imply that Canadians, with their powerful, constitutionalised bill of rights, are ignorant about human rights too? Or does it imply that they think they do not need it? Of course it implies nothing. Surveys of a few hundred or thousand people appear all the time showing entertaining things. A recent one in Canada

[8] McGarrity, n 3 at 11.

[9] McGarrity, n 3 at 11.

[10] One might make others. Surveyors spoke to respondents for almost 10 minutes; they conveyed information to the respondents in a back-and-forth manner; the margin of error on the point on which McGarrity premises her entire argument is not made clear, if one exists at all for this sort of poll; and she omits to point out that ordinary Australians answering this question in this survey were better informed than what might be described as "elites".

[11] See survey findings of the Dominion Institute and Ipsos-Reid poll (1 July 2001), http://www.ipsos-na.com/news/client/actdsp_pdf.cfm?name=mr010629.pdf&id=1255 viewed 4 November 2009.

showed that two-thirds of respondents wanted to elect their judges.[12] (And why would they not, I would say, given how powerful the *Charter of Rights and Freedoms* there has made those judges.) At the very least we would need immensely more empirical evidence from a host of sources (not just something commissioned by Amnesty International), with plenty of statistical expertise brought to bear too, before we could come close to the sort of sweeping generalisation with which McGarrity founds the entirety of her article. Even then the claims would have to be extremely tentative – or accompanied with a robust defence of the scope and reliability of social science research generally and of that which McGarrity would rely on in particular. None of that, nothing remotely close to that, is provided in this article.

This "you all just need educating" ploy, of course, is in keeping with the general refusal of those in favour of bills of rights to acknowledge that issues surrounding rights – when they ought to apply, how they ought to be balanced against one another, what limits on them are reasonable, and a lot more – are highly contentious and debatable. There are no self-evident answers and Australians from across the political spectrum – all of them smart, nice, reasonable people whose views are no less worthy of respect than McGarrity's – simply disagree about the host of issues that rights questions raise. And all such people who are disagreeing believe in good faith that their own views are the morally best and rights-respecting ones. But faced with that empirical fact of widespread disagreement, many proponents of a bill of rights lapse into painting those who disagree with them as either morally wicked and deficient or in need of education.

McGarrity opts for the second of these strategies. If people do not agree with her, they need educating. Actually, she is a tad more charitable than that. In an incredibly patronising and condescending passage, at least that is how I read it, she says: "While I disagree with their opposition to a Charter of Rights, I clearly must recognise that they have a right to, *at least in principle*, hold that view."[13] I am sure the reader will be uttering "phew" along with me, after being granted that assurance.

McGarrity's other premise is that opponents focus on constitutionalised versions instead of statutory ones. "The model to which anti-Charter campaigners chiefly refer in describing a Charter of Rights as 'undemocratic' is the United States Bill of Rights."[14] But this is an out-and-out falsehood as applied to me. All my recent peer reviewed articles on bills of rights – including an in-depth look at the Victorian *Charter of Human Rights and Responsibilities Act 2006* in the *Melbourne University Law Review* – have focused on statutory models and how those models are undemocratic, including a detailed analysis of why McGarrity is wrong when she repeats, yet again, that "these arguments about democracy are not applicable to statutory Charters of Rights",[15] not to mention being wrong in substance about the power afforded judges under a declarations provision.[16] I have even made these points in all my recent newspaper pieces, so you might have thought that would increase the chances she would read and respond to them, rather than baldly stating something that I have repeatedly argued is simply not true. On these crucial matters McGarrity is the one distorting the debate.

This leads into my second main response, namely that McGarrity is the one who misrepresents things. Bill of rights opponents know full well that the live debate in Australia is about a statutory version rather than an entrenched constitutional bill of rights. And they say, or I certainly do, that statutory versions undermine democracy. And I say why in plenty of detail, starting with the open ended nature of reading down provisions that lead to *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 type outcomes, and moving on to looking at the track record of declarations of incompatibility and the lawyer-driven co-opting of statements of compatibility, so that the latter collapses into a giant exercise

[12] See Makin K, "Two-thirds Back Electing Judges", *The Globe and Mail* (9 April 2007), http://www.theglobeandmail.com/news/national/article751496.ece viewed 4 November 2009.

[13] McGarrity, n 3 at 11 (emphasis added).

[14] McGarrity, n 3 at 11.

[15] McGarrity, n 3 at 11.

[16] McGarrity, n 3 at 11.

of guessing what the judges will think.[17] If McGarrity disagrees she can engage in a debate on those terms, not make bald statements that have nothing to do with what I have written (though I accept that this might be missed if you focus on one single opinion piece in a newspaper) while claiming supposed ideological neutrality.

Related to that regularly heard, but false, claim about opponents being stuck in a time-warp of opposition to US-style bills of rights are similar prevarications about how Parliament will remain undiminished in its powers and how judges do not become more powerful if the statutory version is enacted. I have argued at length on why such assurances are false, and have done so by pointing to New Zealand's (NZ) experience (where I was a legal academic for 11 years) and to the United Kingdom's (UK) experience. What is a significant misrepresentation, in my view, is to pretend that judges do not become more powerful in the wake of the enactment of a statutory bill of rights. Even whole-hearted supporters of the UK's statutory bill of rights, the *Human Rights Act 1998*, concede this has happened over there.[19] Indeed such people and I agree that the judges are virtually as powerful now as in Canada. We only disagree on whether this is desirable.

These equivocations on reading down provisions and declarations powers, on where the focus of disagreement actually lies, and on how powerful the judges will or will not become after a statutory bill of rights comes into force are the real misrepresentations in this debate. They are misrepresentations that occur frequently from the pro-bill of rights side of this debate, and indeed in McGarrity's own article. And they are massively more distorting of this debate, and at a more fundamental level, than what McGarrity says I am responsible for in some one-off newspaper piece – though I must say I am flattered to be told that a single newspaper column of mine might fundamentally unbalance the entire debate here in Australia and win over the plurality of Australians to my side of the argument.

But let me turn briefly to the specific charges McGarrity actually lays against me. There are only two. Both relate to case examples I pointed to, one in a radio interview and one in a newspaper piece. What McGarrity does not tell the reader is that I regularly note (in those peer review pieces and some of my newspaper pieces) that the problem with a bill of rights is largely one of legitimacy. Committees of ex-lawyers making these sort of rights-based decisions have no democratic legitimacy (and in my view, too, no greater moral expertise). Of course, all of us can point to legislation we dislike, just as we can point to judicial decisions we dislike. Your list will differ from mine. But even if the judges happen to agree with me in some instance, I think it illegitimate for them to be making these calls under a bill of rights. And when they make calls I think few voters would have made, that can sometimes usefully be pointed out too.

So one example I used in a radio interview was about tobacco advertising and how the Canadian Supreme Court overruled the elected Parliament there 15 years ago and struck down an advertising ban. McGarrity does not dispute that the judges had the last word and overruled Canada's elected Parliament which, in my view, makes the point. Instead she complains about how I discussed the case. This is flat-out preposterous. It was a radio interview she cites! And anyway, is she saying it is somehow acceptable for unelected judges to overrule legislators on some bases, but not on others – on the basis of a "minimal impairment" test, but not on the basis of the judges' view of the proper scope of rights? I would very much enjoy hearing that argument fleshed out. And I would be sure to say in response that any minimal impairment test is every bit as contestable and debatable as deciding the

[17] Of the last six pieces cited in n 1, four make these points in different ways. Other pieces of mine do too.

[19] The UK legal academic Aileen Kavanagh is one such person. In email correspondence with me on 16 March 2009 (on file with the author) she wrote: "For example, I agree with you that the *Human Rights Act* is tantamount to a Bill of Rights, that the judges exercise strong form constitutional review when interpreting it, and that the declaration of incompatibility is akin to a strike-down power. So, we merely disagree on the moral issue of whether all of this is justified." See, too, Kavanagh A, *Constitutional Review under the UK Human Rights Act* (CUP, 2009) pp 307-309 (for the view that the *Human Rights Act* is tantamount to a strong form bill of rights), pp 416-420 (for the view that judges exercise strong form review when interpreting it), pp 281-292 (for the view that the declaration of incompatibility power is not all that dissimilar to a striking down power).

scope of rights or what constitutes a reasonable limit on them. The fact McGarrity goes on[19] to point out that other jurisdictions have come to different conclusions on tobacco advertising, and that the Canadian judges changed their minds 12 years later, makes my point – *not hers*! With a bill of rights you are buying the views of judges, full stop. You are buying the rights-based views of whoever happens to be on the court at a particular time, and can form a majority of judges in support of a particular outcome. And these judicial views will differ between jurisdictions and over time. All we can say for sure going in is that they are not democratically accountable and cannot be voted out for making these sort of decisions. So how this two-page exegetical analysis by her of the Canadian tobacco case actually helps her pro-bill of rights position is a bit of a mystery to me. In fact I think she wholly misses the point.

That leaves only one other basis for her sweeping claim that I am part of a "campaign of misinformation".[20] It comes from a case example I mentioned only once, in a newspaper column back in 2008. I read about the case while visiting in Canada and understood it to involve the Quebec *Charter of Human Rights and Freedoms*.[21] It turns out it was, in fact, a case about the Quebec *Civil Code*. I am happy to admit this was an error by me. And indeed that error was pointed out immediately after my column was published, in what I would say is the appropriate forum, namely the newspaper. Hillary Charlesworth was one such person pointing out my mistake back then in *The Australian*. Having conceded that, I stand by the larger point. I can come up with scores and scores of other examples where judges under a bill of rights are in essence making moral decisions under the aegis of telling the rest of us what is rights-respecting, decisions that are highly contestable and often the result of 5-4 or 3-2 disagreements (dare I say "votes"?) amongst the judges themselves. I could do this pointing to jurisdictions such as NZ or the UK, with statutory bills of rights, or Canada, with an entrenched version but a parliamentary override that has never once been used in 27 years at the federal level, and never once have to draw on the US ("the model to which [I am alleged without a single shred of evidence offered to back up the claim] chiefly [to] refer").[22]

This brings me to the end and to several questions McGarrity and other bill of rights proponents should be made to answer, if we are to have a serious, informed debate.

1. Does she think so-called reading down provisions in statutory bills of rights afford judges more leeway in interpreting statutes?
2. Does she think it is possible this can become the functional equivalent of rewriting statutes?
3. Does she think this has in fact happened in the UK? If not, how does she understand the *Ghaidan v Godin-Mendoza* case?
4. If the answer to any of the above is "yes", why does she think judges' views about what is rights respecting is better than voters' and legislators'? Is it because of their legal education or life as a top barrister or because she reckons their moral views, on average, more closely align with hers than do those of voters and parliamentarians?
5. Does she admit that not one single time to date have legislators stood up to judges when the latter issue declarations of incompatibility in the UK, that judges always get their way (as a matter of substance rather than form)?
6. Does she concede that statements of compatibility have collapsed in NZ and the UK into lawyer driven, legalised debates about what the judges will think, not tools for legislators to think more about rights?
7. Does she suspect the pro-bill of rights position would, as in the past, lose a plebiscite or referendum? If so, is that why she prefers the statutory option? Is that the real basis for thinking Australians "lack knowledge"?

I say the substantive answers to all of the above are "yes" and have argued at length on all of them. If McGarrity disagrees, that is a debate worth having, and one that would be a refreshing change

[19] McGarrity, n 3 at 13.

[20] McGarrity, n 3 at 11.

[21] See, eg *Vancouver Sun* (18 June 2008); *Ottawa Citizen* (19 June 2008); *Canwest News* (18 June 2008).

[22] McGarrity, n 3 at 11.

from "don't you want your rights respected" type platitudes one often encounters, tied to implicit charges that those opposed to bills of rights are wicked or in need of further education.

Of course I could go on and point out that McGarrity's subtle suggestion that the consultative committees will remedy "the lack of knowledge of Australians about their human rights"[23] and result in an "impartial … conclusion"[24] is debatable at best and laughable at worst. Neither the Commonwealth version of this committee nor the earlier Victorian one has, or had, a single known sceptic as a member, while both had chairmen who had gone on the record in favour of a statutory bill of rights before being appointed. And I have detailed my charges against these bodies at length, but McGarrity chooses not to engage with those criticisms.

So I simply ask for a clear "yes" or "no" answer to the above questions. If it would help to get such answers, I am prepared to rewrite this piece in the form of a 900 word newspaper column.

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[23] McGarrity, n 3 at 11.

[24] McGarrity, n 3 at 11.