CHRIS MERRITT

Renewed moves are under way federally and in NSW to create statutory charters of rights. Both initiatives are the result of private members' bills. Neither is backed by the respective governments yet at this stage neither is clearly opposed by those governments.

There are several reasons why these moves are a step in the wrong direction. The NSW scheme [1], introduced on October 23 last year by the Greens' Jenny Leong, would legitimise restrictions on fundamental rights that go beyond those permitted by the International Covenant on Civil and Political Rights.

It also opens the door to restrictions on rights that are broader than the restrictions that would be permitted under a proposed federal charter of rights.

The federal scheme[2], introduced on May 25 by independent Andrew Wilkie, has a different set of problems that makes it difficult to say which of these schemes is worst. They are both major departures from the ICCPR and they would both undermine the standing of parliament.

The Wilkie Bill takes an approach that is best described as the next step in the diminution of the nation's parliaments. It is the most constitutionally dubious of the two schemes.

As well as eroding the power of all parliaments, it would inevitably embroil the judiciary in debates that should be thrashed out in a political forum, not the courts.

The Wilkie Bill contains provisions that mean any law of the Commonwealth, the states or territories that is inconsistent with the proposed charter would have no force or effect[3] to the extent of the inconsistency.

It would empower judges, on application by a plaintiff, to declare any law has no force or effect if that judge considers it to be inconsistent with rights outlined in the charter.

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[1] Human Rights Bill 2025 (NSW)
[2] Human Rights Bill 2026 (Commonwealth)
[3] Clause 11, Human Rights Bill 2026 (Commonwealth)

One problem is that the Wilkie Bill defines rights in broad, vague terms so their reach is incapable of being known in advance. It depends on whether a judge considers it should apply in a particular circumstance.

So every law enacted by every parliament could, in theory be at risk of being challenged under the charter, struck down and discredited.

This all assumes, of course, that the constitutional over-reach implicit in the Wilkie Bill is somehow addressed.

Here's how it would work: If, for example, a judge decides that the proposed charter right to peaceful assembly[4] should prevail over a state law regulating street marches, then the state law is knocked out to the extent of the inconsistency.

It's simple really: no need for a referendum or even an implied right. Just this Bill.

It does contain an over-ride mechanism in clause 11 that permits governments to declare their laws operate notwithstanding a charter ruling, but that over-ride only applies for two years.

So if a government disagreed with a particular ruling on the charter and wanted its law to remain in place, the Wilkie Bill would require an over-ride declaration to be refreshed every two years for eternity.

Some might view this as Constitutional nonsense.

The High Court might take an interest in Wilkie's attempt to have his charter - which would be an ordinary act of federal parliament - prevail over every subsequent ordinary act of federal parliament.

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[4] Clause 30, Human Rights Bill 2026 (Commonwealth)

Even if it were somehow possible to fix the weaknesses of the Wilkie Bill, it would be a mistake to try. Both these proposed charters should be opposed on principle.

They are part of the same malaise that has damaged representative democracy in the United Kingdom. They would erode the authority of every parliament by allocating power to institutions that are beyond the reach of voters: the judiciary and statutory commissions.

One of the great misconceptions about charters of rights is that they really are ordinary statutes. Their supporters argue that because they are not constitutionalised Bills of Rights they present no threat to our system of government. They can, as their advocates tell us, be amended, repealed and if necessary, over-ridden by parliament.

The reality is that charters are not normal laws. Normal laws are characterised by precise drafting to minimise the risk they may be misconstrued by judges and applied in circumstances not foreseen by parliament.

Charters do the reverse. They avoid the precision or ordinary statutes and are expressed in broad non-specific terms that might sound wonderful but mean nothing until they are applied to specific circumstances.

Consider the right to health. Under clause 39(2) of the NSW Bill every individual "has the right to emergency treatment that is immediately necessary".

Who could argue against that?

But what does it mean? Would it oblige the NSW government to provide an emergency clinic in every suburb? Or in every town? Or merely in every region?

Sooner or later those questions would require the proposed state human rights commission, which would be created by the NSW Bill, or a judge to decide whether the government's decisions on those issues breach the right to health.

And to decide such a question they would use criteria that are so vague as to be verging on the subjective.

The right to health, along with most other rights in the Greens' charter can be subjected to "reasonable" limits that are "demonstrably justified in a free and democratic society".[5]

So what does that mean? We may as well ask how long is a piece of string?

A different problem arises with the way the Greens charter departs from international standards when it comes to religion.

Under Article 18 of the International Covenant on Civil and Political Rights, no restrictions are allowed on the freedom to have or adopt a religion. It's an absolute right.

But clause 22 of the Greens Bill includes a note that says restrictions can be imposed on the right to religious belief if those restrictions are for what the Bill says is a legitimate purpose.

What we are talking about here is not just a Bill that could lead to an attack on organised religion.

We are dealing with schemes that would transfer responsibility for significant public policy decisions away from elected parliaments and vest it with human rights commissions and, unfortunately, the judiciary.

The assumption is that there is something wrong with parliament - that judges and public servants are better placed to make these decisions.

Take another example. The NSW parliament has already grappled with the question of whether the freedom to assemble and protest should extend to the area just outside synagogues and other places of worship. It lost that fight due to the impact of the implied constitutional freedom to discusss matters of politics and government.

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[5] Clause 12(1), Human Rights Bill 2025 (NSW)

Instead NSW had to settle for a narrower law preventing protests that affect the ability to enter or leave places of worship.

Under the proposed charter, NSW would face additional problems. The courts could be required to second guess restrictions on the right to freedom of movement, [6]freedom of assembly,[7] and freedom of expression[8] were "reasonable".[9]

Here's the problem: who should make those decisions? The elected parliament or the courts?

Even though any new law would not be struck down, the NSW charter would require the judiciary to determine whether those restrictions were reasonable - which is, in essence, a political question that would already have been made by parliament.

It is difficult to imagine anything that would bring parliament, the law and the judiciary into greater disrepute. That, unfortunately, is the obvious consequence of such a procedure.

Drawing boundaries between conflicting rights and allocating limited state resources is a political function that is uniquely suited to parliament. Parliament can consider the views of a range of stakeholders and design laws that strike a balance in the broader public interest.

Courts and human rights commissions, by contrast, make decisions based on the case before them.

They are incapable of considering the full range of factors that are part of democratic law-making

[6] Section 21, Human Rights Bill 2025 (NSW)
[7] Section 23, Human Rights Bill 2025 (NSW)
[8] Section 24(1) Human Rights Bill 2025 (NSW)
[9] Section 12(1) Human Rights Bill 2025 (NSW)

When parliaments balance conflicting rights their decisions have democratic legitimacy. Judges settle disputes according to law. Their decisions deserve respect precisely because they are not political.

So while both these Bills would erode the standing of parliament and the judiciary, it is also worth considering the cost they would impose on taxpayers and whether they would, in fact, improve the protection of human rights.

Which brings us to Victoria where a charter of rights has been in operation since 2006.

One of the great benefits of a federation is that experiments in public policy that take place in one state can help other states decide if they wish to follow suit.

With the utmost respect to Victoria, the benefits of its charter would need to be enormous in order to justify the cost this mechanism has imposed on taxpayers.

The legislation establishing Victoria's charter required two comprehensive reviews of its operation.

The first was in 2011, when the state Coalition was in office. That government conceded that the first five years of the charter had cost the government alone $13.5 million.

That figure is from the report on the charter that was undertaken by the Victorian parliament's Scrutiny of Acts and Regulations Committee. It does not include all costs associated with the charter, only those borne directly by the government.

That review had recommended that the Victorian government develop a framework for assessing all costs and benefits associated with the charter. But that does not appear to have been done.

The second and final review required by statute took place in 2015 when Daniel Andrews was premier. It was not undertaken by the scrutiny of acts committee but by Michael Brett-

Young, a former head of the Law Institute of Victoria and former managing partner of Maurice Blackburn.

That inquiry appears to have received no information about the overall cost of the charter[10]. The terms of reference did not require analysis of the charter's costs .

So while the Victorian charter has been in force for 20 years we have limited data about its cost to taxpayers. All that can be said for certain is that the first five years of operation - that is one quarter of the time it has been in force - cost the state government $13.5 million.

So the question then becomes do these charters work? Do they protect the rights of ordinary people? Victoria is not the only jurisdiction with a charter. They have also been in effect in Queensland since 2020 and in the ACT since 2019.

So if charters provide superior protection for human rights there should be some evidence of that by now.

In 2024 when this society's annual conference was held on the Gold Coast, Deakin University's Ben Saunders presented a research paper[11] on the impact of the charters during the pandemic.

He examined the outcome of litigation about what he described as the most severe restrictions on rights in living memory.

After examining what happened in jurisdictions with and without charters he concluded that these statutes had made almost no difference.

He accepted that this did not mean there was no value in a national charter of rights. Such a document might prompt policy makers to give greater attention to rights. And he did find one

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[10] Gans, J.; Australian Public Law blog, October 22, 2015

[11] Saunders, Ben*;* Protection of Rights During Covid: Did Human Rights Acts Make a Difference? https://www.samuelgriffith.org/papers-by-author

Queensland case in which a regulation was invalidated because a commissioner failed to consider human rights.

Let's take a broader measure. It's worth considering Australia's performance on human rights alongside that of comparable countries that have gone beyond Australia's system and now have statutory charters or even constitutional Bills of Rights.

If the charter advocates are right, you might expect that all those countries would clearly out-perform Australia. But they don't. Let's look at the data.

Every year the World Justice Project produces rankings on the rule of law in 143 countries. It should come as no surprise that Australia is consistently ranked close to the top - much closer than many countries that have Bills of Rights.

That report is based on an index that is made up of a range of factors such as constraints on government powers, the absence of corruption, open government, order and security, regulatory enforcement, civil justice, criminal justice as well as fundamental rights.

Last year's report[12] had Australia in eleventh position on that broad measure of the rule of law.

When all other factors are removed and the protection of fundamental rights is considered in isolation Australia was in 17th position, the United States was ranked 42 and Britain was ranked 14 - three positions ahead of Australia.

The same rankings which had Australia in 17th position on the protection of fundamental rights also had Japan in 19th position, Spain in 20th position, France in 28th position and Italy in 31st position.

[12] https://worldjusticeproject.org/rule-of-law-index/

If there is a link between the protection of rights and the existence of a charter or a constitutionalised bill of rights, Australia could be expected to be in a much worse position on these rankings. Instead, we are out-performing many countries with charters or bills of rights.

That seems to suggest a country's performance on the protection of fundamental rights does not depend on whether it has a bill of rights or a statutory charter.

The thing to remember about the push for a charter of rights is that it is not the end game.

Charters are a stepping stone towards overturning the decisions taken at the federation conventions of the 1890s and inserting a US-style bill of rights in the Constitution.

This stepping-stone approach was made explicit by my friend George Williams in his 2004 publication "The Case for an Australian Bill of Rights". He wrote:

" . . . any move to bring about a Bill of Rights should be gradual. Certain rights should be protected initially in legislation, with further rights added over time, before any constitutional change in the longer term. This was the path followed in Canada, where a statutory Bill of Rights was introduced in 1960 and a broader constitutional version in 1982."[13]

That is what these Bills amount to - a stepping stone aimed at leading us away from the original intentions of those who drafted the Constitution.

As well as being vice-chancellor of the University of Western Sydney George Williams is a world-class legal scholar. His assessment of what actually happened at the federation debates can be trusted.

In 1999 he wrote that many of the framers of the Constitution were clearly influenced by English constitutional commentators J. Bryce and A.V. Dicey who were sceptical about the need

[13] Williams, George; "The Case for an Australian Bill of Rights - Freedom in the war on terror", UNSW Press, 2004, page 78.

to expressly guarantee rights in written constitutions[14]. Dicey had argued that civil liberties could be adequately protected through the common law and political processes.

"The desire of the delegates that the Australian Constitution reflect the British inheritance was clearly manifested in the convention debates," Williams wrote.[15]

Former Chief Justice Robert French has explained that the absence of a Bill of Rights in our Constitution is in part a function of our history.

In a paper he delivered in Chicago, French wrote: "There was no desire to assert against government generally, or the British government in particular, rights and freedoms for colonists."[16]

French cited another former Chief Justice, Sir Owen Dixon, who attributed the omission of a Bill of Rights to the readiness on the part of the framers to leave the protection of rights to the legislature and the processes of responsible government.

Dixon wrote in Jesting Pilate that the framers were not prepared to place fetters upon legislative action except in so far as it was necessary for the purpose of distributing power between the states and the central government.

It is, therefore, simply wrong to view the push for these new charters as a way of fixing something that was overlooked at federation. There was no mistake.

The founders of our federation intended to leave our parliaments with the ability to respond flexibly to changing circumstances. That includes the ability to balance conflicting rights and freedoms.

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[14] Williams, George.; Human Rights Under the Australian Constitution, Oxford, 1999, page 39.
[15] Williams 1999, ibid, page 39
[16] French, Robert; "Protecting Human Rights Without a Bill of Rights", paper delivered at the John Marshall Law School, Chicago, January 26, 2010

This does not need to be remedied. The decision of the framers to omit a Bill of Rights deserves just as much respect as their decisions about what to include in the Constitution.

We need to keep in mind why the Americans went one way on Bills of Rights and we went the other.

The founders of the American republic had just fought a revolution against what they viewed as a foreign tyrant. They drew up a Bill of Rights as a response to what they feared was another potential tyrant: their own government.

The delegates at our federation conventions in the 1890s had a very different view of the world. They had no argument with the Westminster system and believed democratic legislatures would continue to be the guardians of their liberties.

The intentions of the founders of the Australian federation could not be more different to those in America who drafted the Bill of Rights. Given our different histories, differences over the method of protecting rights were inevitable.

It would be wrong to disavow the intentions of our founders in order to embrace a system that was the result of a different history. To do so would be the ultimate in cultural cringe.

Chris Merritt is vice-president of the Rule of Law Institute of Australia