

Don't Leave Us with the Bill:
The Case Against
an Australian Bill of Rights

Edited by Julian Leeser and Ryan Haddrick



Don't Leave Us with the Bill

The Case Against an
Australian Bill of Rights

Edited by Julian Leeser and Ryan Haddrick

Published by
The Menzies Research Centre Limited
RG Menzies House
Cnr Blackall and Macquarie Streets
BARTON, ACT 2600
ISBN 978-0-9806383-0-1

The Menzies Research Centre Limited is a company limited by guarantee ACN 067 379 684.

The Menzies Research Centre is supported by a grant from the Commonwealth Department of Finance and Deregulation

The views expressed in this publication are those of the authors and do not necessarily reflect the views of the Directors or staff of The Menzies Research Centre.

© 2009 The Menzies Research Centre

Project management and production: QOTE Canberra (02) 6162 1258

Foreword

THE RT HON SIR NINIAN STEPHEN, KG, AK, GCMG, GCVO, KBE, QC

The expression ‘a bill of rights’ has an immediate attraction to it; to be subject to such a measure seems at first sight inherently desirable, just the kind of legislative measure a freedom loving nation would aspire to. Only with experience of the operation of such measures do doubts arise.

The true measure of those doubts lies in the assumption, inherent in any such measure, that at a given moment in time it is possible once and for all to identify and declare, both for now and for the future, all those rights which citizens should desirably possess, secure in the knowledge that such a declaration will serve all future needs of the community.

The very enshrining of rights in a single measure of special status carries with it the consequence that its formulation is critical and that its interpretation becomes of the highest significance and confers extraordinary power upon those to whom the task of interpretation is given; yet those possessing such power will not customarily be the elected of the people but instead, almost necessarily, lawyers and appointees of government.

All this has, of course been much debated in the past; this volume now states the issues both pungently and with particular application to Australia and we citizens are fortunate indeed to have those issues expressed with such clarity and from a great variety of viewpoints. Australia’s democracy is surely the better for the publication of this work.

*Sir Ninian Stephen
Melbourne
May 2009*

Chairman's Preface

TOM HARLEY

The Menzies Research Centre is proud to publish this important collection of essays making the case for preserving liberty and against an Australian bill of rights. It is the first time such a collection has been assembled. The Centre arranged this collection of essays to respond to an imbalance in advocacy in the debate, and to demonstrate why a bill of rights is not the answer to our present challenges.

The case against a bill of rights is also the case for freedom: for freedom and flexibility, with our liberties protected by parliaments subject to the will of the people, an independent judiciary and a free and sceptical media. Our legal tradition is embodied in the principle that a person is free to do whatever he or she wishes unless it is otherwise prescribed by law. Freedom is ours unless the government gains our permission, through the ballot box, to curtail it. Our rights have developed organically through the common law and Parliament allowing maximum freedom for individuals to respond to the challenges of our age. As Menzies said '[t]o live in a common law country is, in itself, the very best guarantee of the rights of the individual.' By setting and limiting our rights a bill of rights hampers our freedom and creates uncertainties in our law.

The idea of a bill of rights in Australia is not new. Australians have rejected inserting a bill of rights in our Constitution at federation and again in 1944 and 1988. Two attempts to introduce statutory bills of rights in 1973 and 1986 were also abandoned. A statutory bill of rights neither represents new ideas nor fresh thinking.

The Menzies Research Centre saw a need for some of the many bill of rights sceptics to provide a contribution to the debate in the lead up to the report of the Brennan Committee and the Government's response to it; and to delve a little deeper into why the enthusiasm of bill of rights advocates is misplaced.

Most of the contributors to this volume are policy professionals. Many carry no partisan flag. Their contribution should not be seen as an endorsement of the Menzies Research Centre or the Liberal Party but, rather, as indicative of their policy expertise and concern that the issues raised in their papers need to be addressed.

The Menzies Research Centre has a role in bringing experts together and putting ideas on the table to improve the standard of public debate in Australia. We hope that this volume contributes in that way.

I would like to congratulate Julian Leaser, our Executive Director and co-editor Ryan Haddrick, for bringing together this timely and thoughtful collection of essays. I know this issue has been of great concern to Julian for some time. The editors have demonstrated that some of the ideas put forward by bill of rights proponents, no matter how well intentioned, can be blighted by murky and muddle-headed thinking.

Finally, the Menzies Research Centre wishes to thank the authors for their contribution to the debate and, in particular, Sir Ninian Stephen and Dr Sue Gordon who have honoured the Centre by writing the foreword and afterword respectively.

Tom Harley
Chairman, Menzies Research Centre
May 2009

Contents

Foreword	iii
<i>The Rt Hon Sir Ninian Stephen, KG, AK, GCMG, GCVO, KBE, QC</i>	
Chairman’s Preface	v
<i>Tom Harley</i>	
Introduction	ix
<i>Julian Leaser and Ryan Haddrick</i>	
The Contributors	xvii
PART I: AN OVERVIEW	
1. A Reflection on a Bill of Rights	3
<i>The Hon Chief Justice Paul de Jersey, AC</i>	
2. The Debate We Didn’t Have to Have: The Proposal for an Australian Bill of Rights	17
<i>Senator the Hon George Brandis, SC</i>	
3. Responding to Some Arguments in Favour of the Bill of Rights	31
<i>Julian Leaser</i>	
PART II: SEPARATION OF POWERS	
4. Don’t Risk What We Have	67
<i>The Hon John Howard, AC</i>	
5. In Whom We Should Trust	73
<i>The Hon Ian Callinan, AC, QC</i>	
6. What’s Wrong About a Statutory Bill of Rights	83
<i>Professor James Allan</i>	
7. Solomon’s Heirs? Dissecting the Campaign for Judicial Rule in Australia	97
<i>Alan Anderson</i>	
8. Human Rights: The Question is – Who is the Master?	111
<i>The Hon Justice Kenneth Handley, AO</i>	
PART III: SPECIFIC CHALLENGES	
9. Principles and Exceptions: Problems for Bills of Rights	119
<i>Dr David Bennett, AC, QC</i>	
10. Pluralism, Parliamentary Democracy and Bills of Rights	127
<i>The Hon Christian Porter, MLA</i>	
11. The Judicature, Bills of Rights and Chapter III	145
<i>Ryan Haddrick</i>	

12. A Legal Perspective on Bills of Rights	169
<i>Professor Helen Irving</i>	
13. A Charter of Rights will Harm Aboriginal Prospects	183
<i>The Hon Dr Gary Johns</i>	
14. Trust Me – It Will Not Be As Bad As You Think	197
<i>Major General AJ Molan, AO, DSC (Ret'd)</i>	

PART IV: HISTORICAL AND CULTURAL PERSPECTIVES

15. A Chaos of Rights	207
<i>Professor Geoffrey Blainey, AC</i>	
16. From British Rights to Human Rights	215
<i>Dr John Hirst</i>	
17. There is More to it Than Meets the Eye!	223
<i>The Hon Bronwyn Bishop, MP</i>	
18. Four Fictions: An Argument Against a Bill of Rights	233
<i>His Eminence Cardinal George Pell, AC</i>	
19. Slaves Cannot Be Free – The Biblical Roots of Our Rights	243
<i>Rabbi Dr John Levi, AM</i>	
20. Why Should Christians be Concerned About a Bill of Rights	251
<i>Brigadier Jim Wallace, AM (Ret'd)</i>	
21. Ethics and Limits of a Bill of Rights	263
<i>Amanda Fairweather</i>	

PART V: BILLS OF RIGHTS IN OPERATION

22. The Human Rights Act 1998 (UK): An Impossible Compromise	271
<i>Felicity McMahon</i>	
23. The Devil in the Detail: Lessons from the ACT Human Rights Act	287
<i>Trent Glover</i>	
24. A Reflection on the ACT Human Rights Act 2004	309
<i>Bill Stefaniak</i>	
25. Look But Don't Leap: Lessons from the Victorian Statutory Bill of Rights	319
<i>Ben Jellis</i>	

Afterword	329
<i>Dr Sue Gordon, AM</i>	

Introduction

JULIAN LEESER AND RYAN HADDRICK

Advocates of an Australian statutory bill of rights have attracted much air time in recent years. To some degree the debate on the bill of rights has been a little one sided. Five current or former governments (ACT, Victoria, Western Australia, Tasmania, and now the Commonwealth) have established and funded pro-bill of rights inquiries. Among others, Frank Brennan, George Williams, Hilary Charlesworth and Geoffrey Robertson have all written books on the subject. Yet there has been little organised intellectual opposition to these proposals. The quiet disapproval of opponents should not be taken to mean that there is not community-wide opposition to the proposal or that the arguments to be made are not strong. The purpose of this book is to join the debate and to make the case that a bill of rights is not an appropriate response to the issues facing Australia at this time.

Those pressing the case for change have the burden of proving, not only that the current system is not working, but that their model for reform provides the best method of making the system work better. The authors in this book are sceptical about whether a bill of rights can discharge these burdens. The former Chief Justice of the High Court Sir Harry Gibbs was on point when he observed ‘If society is tolerant and rational it does not need a bill of rights. If it is not, no bill of rights will preserve it.’¹

While all of the contributors to this volume are sceptical about the introduction of an Australian bill of rights, none of the authors argue that human rights are not important. This book does not provide the case for the despot and the tyrant, rather it acknowledges that the balancing of rights and responsibilities has been one of the great successes of the current Australian political and legal system. Countries which have adopted bills of rights have experienced serious problems including a loss of legislative autonomy, a politicised judiciary which experiences declining public confidence, and detrimental changes to their systems of government. Australians would be foolish not to acknowledge the potential for these shortcomings to be translated to our country especially when a bill of rights will force judges to consider the decisions of other countries when interpreting our laws consistent with human rights principles.

1 Harry Gibbs, quoted in *Sydney Morning Herald* 12 December 1984. See a reference to this quotation here < <http://www4.gu.edu.au:8080/adt-root/uploads/approved/adt-QGU20050920.163200/public/06Main.pdf> > at 20 April 2009.

The decision about whether Australia should have a statutory bill of rights is not a Labor versus Liberal/National issue. While the non-Labor side of politics is almost universally sceptical of any proposal to introduce a statutory bill of rights, there is a prominent group of current and former Labor Party figures, who are equally ill-disposed towards the idea. These figures include: the former Premier of New South Wales, Bob Carr,² former Queensland Premier Peter Beattie,³ the Attorney-General of New South Wales, John Hatzistergos,⁴ the Attorney-General of South Australia, Michael Atkinson,⁵ and former Keating Government Ministers Gary Johns (who has a paper in this collection) and Michael Tate.⁶ In June 2008, the youth wing of the Labor Party voted against a federal charter of rights.⁷

Nor is the case for or against a statutory bill of rights one of conservative versus social democrat or progressive. While conservative opposition to a bill of rights is usually based on confidence in (and a desire to protect) the distinct roles of legislators and judges, social democrats have a different reason for opposing a bill of rights. Bills of rights have the potential to frustrate the aspirations of social democrats in their endeavour to achieve social change and reform through the democratic process. The recent, albeit unsuccessful, invocation of the freedom of conscience in the Victorian *Charter of Human Rights and Responsibilities 2006* in the context of the Victorian abortion debate demonstrates how a bill of rights could potentially be used as a possible roadblock to social democratic change.⁸ Bob Carr has made many of these critiques, demonstrating how a bill of rights could undermine environmental initiatives.⁹ As the then president of Young Labor said: 'Overwhelmingly, it was the progressive case that convinced [the Young Labor Annual Conference to vote] against a charter'.¹⁰

-
- 2 Bob Carr, 'Only people – not bills – protect rights' *The Australian*, 9 January 2001; Samantha Maiden, 'Carr warns on bill of rights push' *The Australian*, 26 April 2007, 2.
 - 3 Rob Davis, 'Government rejects rights consultation proposal', in 'President's Page', *Proctor*, May 2006, 3.
 - 4 Catherine Branson and John Hatzistergos, 'Rights devil is in the detail' *The Weekend Australian*, 4 April 2009, 25.
 - 5 Marcus Priest, 'Tasmania, WA join push for bill of rights' *The Australian Financial Review*, 13 January 2006, 46.
 - 6 Michael Tate, 'Submission to Human Rights Consultation Panel', <[http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)-Michael_Tate_AGWW-7PDFFE_original.pdf/\\$file/Michael_Tate_AGWW-7PDFFE_original.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)-Michael_Tate_AGWW-7PDFFE_original.pdf/$file/Michael_Tate_AGWW-7PDFFE_original.pdf)> at 16 April 2009.
 - 7 Ashleigh Wilson, 'Young Labor votes to reject charter of rights' *The Weekend Australian*, 7 June 2008, 10.
 - 8 Nick Miller, 'Abortion bill's rights "breach": Catholic lobby claims safeguards ignored' *The Age*, 6 October 2008, 1.
 - 9 Bob Carr, 'Democracy Thrives in a Free Press and Politics not in the Judiciary' *Sydney Morning Herald*, 30 April 2007 < <http://www.smh.com.au/news/opinion/democracy-in-free-press-and-politics-not-judiciary/2007/04/29/1177787967085.html>> at 20 April 2009.
 - 10 Wilson, above n 7.

Despite the Law Council's advocacy¹¹ it should not be assumed that the legal profession has a collective view on a statutory bill of rights. Apart from the distinguished jurists who have contributed a chapter in this book, a number of other senior judges and legal figures have expressed some concern about a bill of rights including: Justice Patrick Keane¹² of the Queensland Court of Appeal; Justice Peter Young¹³ of the New South Wales Court of Appeal and the Solicitor-General of New South Wales, Michael Sexton.¹⁴ The Chief Justice of New South Wales, Justice James Spigelman, has also been described as a bill of rights sceptic.¹⁵

This publication is not meant to serve as a lawyer's treatise – although many of the chapters are written by lawyers. The book is meant for those interested in considering the arguments against a bill of rights in some depth. The contributors to this book reflect that opposition to a bill of rights comes from people of different ages, different walks of life, different ethnic backgrounds, of different faiths and of no faith. There are, of course, more than just legal issues involved in the enactment of a bill of rights. There are cultural and institutional issues as well, such as, what sort of society do we want Australia to become?; and what should the balance between the legislature and the judiciary be? This collection is designed to not only make the case against a bill of rights but also to inject into the public discussion aspects of the proposal which have not yet been widely canvassed in an Australian context. For instance the extra-territorial application of a bill of rights to the Australian Defence Force, its effect on the Northern Territory Intervention, the application of bills of rights to private businesses as in the ACT, and questions surrounding the constitutional validity of a federal bill of rights all require further public discussion.

It is worth saying something about terminology. Proponents of bills of rights in the context of the current debate, are proposing a statutory bill of rights as opposed to amending the Constitution to create a constitutional bill of rights. The proponents prefer to call their bill of rights a 'charter' because they are concerned about confusion with a constitutional bill of rights like the US Bill of Rights. We think this amounts to Orwellian spin doctoring. As bill of rights advocate George Williams outlines:

-
- 11 Law Council of Australia, 'A Charter Protecting the Rights of All Australians', Law Council Policy on a Federal Charter or Bill of Human Rights, 29 November 2008 <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=A13B5BD3-1E4F-17FA-D2FE-08CEA31F53B1&siteName=lca> at 20 April 2009.
 - 12 Patrick Keane, 'In Celebration of the Constitution' (Speech delivered in the Banco Court, Brisbane, 12 June 2008) <<http://archive.sclqld.org.au/judgepub/2008/Keane120608.pdf>> at 20 April 2009.
 - 13 Peter Young, 'Do Bills of Rights Destroy Democracies' (2007) 81 ALJ 287, 288.
 - 14 Michael Sexton, 'A bill of rights is about who gets to decide' *The Australian*, 23 December 2008, 10.
 - 15 Michael Pelly, 'Top Judge questions need for rights bill' *The Australian*, 28 April 2008, 3.

The language used to describe the model is important. The debate should not be about a bill of rights at all, but a charter of rights or a human rights Act. The choice of words will signal to people whether the proposal is like the US Bill of Rights – which it isn't – or reflects a different approach.¹⁶

But referring to a statutory bill of rights as a charter can also be misleading. For instance Canada, like the United States has a constitutionally entrenched bill of rights called the *Canadian Charter of Rights and Freedoms*, conversely New Zealand has a statutory bill of rights called the *New Zealand Bill of Rights Act 1990* (NZ). We prefer the term statutory bill of rights because it provides a more accurate appraisal of what is really proposed. Nothing of substance turns on the choice of expression – save the political image that bill of rights advocates are trying to create for themselves. But it does seem a little curious that they are trying to have it both ways. On one hand, bill of rights advocates seek to evoke the magisterial language of the United States' Bill of Rights,¹⁷ to decry Australia's lack of a bill; but at the same time, they wish to assure us that the well-known excesses of the US Bill of Rights won't be visited upon Australia.¹⁸ We believe that both statutory and constitutional instruments perform similar functions. Many of the critiques are the same. The difference is formal not substantive. The main reason that bill of rights advocates are not pursuing the constitutional avenue is that they do not believe that people would embrace such a concept.¹⁹ Although a federal statutory bill of rights would not appear in the Constitution itself, in every jurisdiction in which it has been adopted it has taken on a special status as being of 'constitutional form'. Chief Justice Spigelman observed that '[t]here are many statutes which are also entitled to be characterized as quasi-constitutional... Where a jurisdiction adopts a statutory form of a bill of rights, that legislation is also entitled to be characterised as "quasiconstitutional."²⁰ Similarly the statutory bill of rights in the United Kingdom was described as 'an important constitutional Instrument'²¹ and in New Zealand as 'a critical document in the constitutional framework of this country'.²² A statutory bill of rights takes on a constitutional status because 'it conditions the legal relationship between citizen and state

16 George Williams, *A Charter of Rights for Australia* (2007) 88.

17 Ibid 15-16.

18 Ibid 88.

19 George Williams, *A Bill of Rights for Australia* (2000) 54.

20 James Spigelman, 'The Application of Quasi-Constitutional Laws' (Second Lecture in The 2008 McPherson Lectures Statutory Interpretation & Human Rights University Of Queensland, Brisbane 11 March 2008) <[http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman110308.pdf/\\$file/spigelman110308.pdf](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman110308.pdf/$file/spigelman110308.pdf)> at 20 April 2009.

21 *Brown v Stott* [2001] 2 WLR 817, 835 (Lord Bingham).

22 *R v Whareumu* [2001] 1 NZLR 655, 656 (Thomas J).

in a general, overarching manner and enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.²³

This book is being published in the context of a national debate about a bill of rights. Last year the Rudd government announced that it would spend \$2.8 million on public consultations on ‘how human rights and responsibilities can be better recognised and protected’.²⁴ In December 2008, the government commissioned Father Frank Brennan to chair a committee to undertake the public consultation, and provide recommendations to the government on how to best achieve greater rights protection. The committee’s pro-bill of rights terms of reference, similar to those in the states, may lead the committee to support the adoption of a bill of rights.

In Father Brennan, the Government has chosen a distinguished Australian, but not someone who comes to this issue without well-developed ideas. Father Brennan has been a public commentator on this debate for more than a decade. And whilst he claims to be a ‘fence sitter’,²⁵ in his book *Legislating Liberty: A Bill of Rights for Australia?* he declared himself in favour of a statutory bill of rights:

The shortfall in Australia’s machinery for the protection and enhancement of individual rights could be rectified by the passage of a statutory bill of rights which could be overridden by specific later enactment of the Commonwealth parliament.²⁶

By giving judges a participative role through a legislative bill of rights, you improve the accountability of the politicians and you allow the disaffected individuals to utilise litigation as one part of a political strategy.²⁷

Another member of the committee, retired newsreader Mary Kostakidis,²⁸ has also declared her support for a statutory bill of rights. Just as the state consultative committees were headed by prominent bill of rights advocates (George Williams, Hilary Charlesworth and Fred Chaney) the same pattern has been repeated at the federal level. The process for manufacturing consent was outlined by George Williams in his book *A Charter of Rights for Australia*. Williams suggest the importance of an ‘independent [sic] panel rather than a parliamentary inquiry in order to dispel concerns about the motivation for

23 John Wadham, Helen Mountfield and Anna Edmundson, *Blackstone’s Guide to the Human Rights Act 1998* (2003) 8.

24 Robert McClelland, ‘Rudd Government Announces National Human Rights Consultation’ (press release 10 December 2008).

25 Michelle Grattan, ‘Priest to head panel on bill of rights’ *The Age*, 10 December 2008.

26 Frank Brennan, *Legislating Liberty* (1998) 177.

27 *Ibid* 186.

28 Paul Maley, ‘Kostakidis named on Human Rights Panel’ *The Courier Mail*, 10 December 2008 < <http://www.news.com.au/couriermail/story/0,23739,24780101-601,00.html> > at 20 April 2009.

change being a self-serving one on the part of politicians.²⁹ He also sees the need for speed in the process to maximise 'the chances of maintaining energy, commitment and discipline around the issue.'³⁰ 'Momentum is critical and interest can dissipate quickly'³¹ In an example of double talk Williams acknowledges that human rights can provoke negative reactions for some people and so the concept needs to be sugar coated.

Human rights can work well as a concept for some people, but a broader set of concepts needs to be used in talking to the community at large. For many people, human rights make the best sense in tandem with ideas like respect and responsibility.³²

As outlined above Williams believes that the federal bill of rights should be called a charter and based on the Victorian Charter.³³ He also said that he sees the statutory bill of rights as merely the first step to achieving a constitutionally entrenched bill of rights.³⁴ The government has accepted Williams' model of consultation and it appears that the Brennan Committee's work is designed to soften the community up and to create the justification for the future enactment of a statutory bill of rights.

The essays in this collection seek to canvass a range of arguments against the bill of rights. At the root of these concerns is the way in which bills of rights (including statutory bills of rights) change the respective roles of Parliament and the judiciary. Drawing from international and Australian experience, a number of essays point out the negative effect a bill of rights has on both institutions, with potential damage to public confidence in the impartiality of the judiciary. Bill of rights advocates suggest that interpreting a bill of rights is no different to interpreting the *Trade Practices Act 1974* (Cth) or determining what is 'reasonably foreseeable'.³⁵ But this is not true. The experience with statutory bills of rights in final courts of appeal indicates that strained interpretation clauses force courts, not to read language with its plain and ordinary meaning or according to the intention of Parliament, as they would with the *Trade Practices Act*, but to twist the language of statutes

29 George Williams, above n 16, 87.

30 Ibid.

31 Ibid.

32 Ibid.

33 Ibid 88.

34 Ibid.

35 See for example Carolyn Evans, 'State Charters Of Human Rights: The Seven Deadly Sins Of Statutory Bills Of Rights Opponents' (Paper delivered to Gilbert+Tobin Centre Conference 2007, The University Of New South Wales, 16 February 2007) 6-7 < http://www.gtcentre.unsw.edu.au/publications/papers/docs/2007/153_CarolynEvans.pdf > at 20 April 2009 and Ben Saul, 'Submission to the Western Australian Human Rights Act Consultation Committee' 17 July 2007 < <http://pandora.nla.gov.au/pan/76143/20080816-0012/www.humanrights.wa.gov.au/documents/Submission2.pdf> > at 20 April 2009.

to comply with human rights principles. This is a very different sort of activity to determining what is or is not foreseeable or ‘misleading and deceptive’ and has produced some disturbing results as papers in this collection point out.

Bill of rights advocates also seek to create the judicial machinery for a ‘dialogue’ between the courts and parliament, in hope that a constant flow of judicial opinion will somehow help put the parliament on the straight and narrow. As John Hatzistergos said, ‘...the necessary dialogue should be between the parliament and the people’.³⁶ In Australia, the experience of dialogue theory in the area of native title does not suggest that it should be embraced. The poor, expensive and divisive outcomes for indigenous people demonstrate the problems that can eventuate when courts lead parliaments in national debate.³⁷

It is not only the effect of bills of rights on the courts which has been a problem. Some Canadian commentators suggests that the bill of rights has had a negative effect on the role of legislators. Bills of rights offer ‘a convenient refuge for politicians to avoid difficult political and moral decisions.’³⁸ This leads to less legislative scrutiny and a weakening of the parliamentary role in protecting rights.

Such is the effect that a bill of rights would have on our institutions that we believe no bill of rights should be introduced without a vote of the Australian people. If a bill of rights has the community support which its proponents suggest then they should have no hesitation in supporting the issue being put to a vote in a national plebiscite. A plebiscite is the proper way to consult the Australian people on a law which, despite not being part of the Constitution would, as outlined above, at least have quasi-constitutional status.

36 John Hatzistergos, ‘Rights Devil is in the Detail’ *The Australian* 4 April 2009 < <http://m.theaustralian.com.au/business/LegalAffairs/fi28429.htm> > at 20 April 2009.

37 A dialogue commenced with the High Court’s decision in *Mabo v Queensland* (1992) 175 CLR 1, continued through the *Native Title Act 1993* to the *Wik Peoples v Queensland* (1996) 187 CLR 1 and then to the amendments to the *Native Title Act* – creating the longest and one of the most divisive debate in the Parliament’s history. Rather than creating better outcomes for Aboriginal people Native Title has created serious internal divisions in Aboriginal communities when more than one group tries to establish their claim to be the rightful native title owner. For information on the cost of the native title system and the low number of determinations see: Graham Hiley and Ken Levy, *Claims Resolution Review*, (2006) 15, <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(756EDFD270AD704EF00C15CF396D6111\)-Report+of+the+Native+Title+Claims+Resolution+Review+-+31+March+2006.pdf/\\$file/Report+of+the+Native+Title+Claims+Resolution+Review+-+31+March+2006.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(756EDFD270AD704EF00C15CF396D6111)-Report+of+the+Native+Title+Claims+Resolution+Review+-+31+March+2006.pdf/$file/Report+of+the+Native+Title+Claims+Resolution+Review+-+31+March+2006.pdf)> at 20 April 2009; and National Native Title Tribunal, *Talking Native Title*, (March 2009) <http://www.nntt.gov.au/News-and-Communications/Newsletters/Talking-Native-Title-Archive/Documents/TNT_13_March_2009.pdf> at 20 April 2009.

38 Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1989) cited in Janet Hiebert *Charter Conflicts: What is Parliament’s Role* (2002) x.

The Contributors

Professor James Allan is the Garrick Professor of Law at the University of Queensland. He has practised law in Toronto and London. He has taught in Hong Kong, Sydney and, from 1993 to 2004, in Dunedin, New Zealand at the University of Otago. He has had sabbaticals at Cornell Law School and at Dalhousie Law School, the latter as the Bertha Wilson Visiting Professor in Human Rights.

Alan Anderson is a Melbourne-based lawyer. He previously practised law with Allens Arthur Robinson, and was a regular opinion columnist in *The Sydney Morning Herald*. He was a senior adviser to Treasurer Peter Costello and Attorney-General Philip Ruddock.

Dr David Bennett, AC, QC, was the Commonwealth Solicitor-General from 1998 to 2008. Dr Bennett has served as President of the New South Wales Bar Association and President of the Australian Bar Association. He is a past president of the Medico-Legal Society of New South Wales and the Australian Academy of Forensic Sciences.

The Hon Bronwyn Bishop, MP has been the Federal Member for Mackellar since 1994 and was a Senator for New South Wales from 1987 to 1994. She was Minister for Defence Industry, Science and Personnel from 1996–98 and Minister for Aged Care from 1998 to 2001. She was a member of the Coalition's Task Force for the 1988 Referendum Campaign.

Professor Geoffrey Blainey, AC was from 1968 to 1977 Professor of Economic History, and from 1977 to 1988 the Ernest Scott Professor of History, both at the University of Melbourne. He is the author of over thirty-five books on Australian history, and was the Chancellor of the University of Ballarat from 1994–98.

Senator the Hon George Brandis, SC is the Shadow Attorney-General, and was a minister in the Howard Government. Senator Brandis has been a Senator for Queensland since 2000. From 1985 until being elected to the Senate he practised at the Brisbane Bar. He also lectured in jurisprudence at the University of Queensland and is a graduate of Queensland and Oxford Universities.

The Hon Ian Callinan, AC, QC was a justice of the High Court of Australia from 1998 to 2007. He was President of the Bar Association of Queensland from 1984 to 1987 and the Australian Bar Association 1984–85. He has been a director of the Australian Broadcasting Corporation. From 2000–2007 he was the Chairman of the Australian Defence Force Academy.

The Hon Chief Justice Paul de Jersey, AC is the Chief Justice of the Supreme Court of Queensland. He was first appointed to the Supreme Court in 1985 and appointed Chief Justice in 1998. Between 1996–97 he was both the President of the Queensland Industrial Court and the Chairman of the Law Reform Commission of Queensland. He has been the Chancellor of the Anglican Diocese of Brisbane since 1991.

Amanda Fairweather is a second-year medical student at the University of Newcastle. She has had opinion pieces published in *The Sydney Morning Herald* and in *Online Opinion*. As Vice President of the global health group at her university, she is involved in raising awareness of and facilitating student involvement in developing world medicine, and raising funds for a variety of medical NGOs.

Trent Glover is a Canberra-based lawyer. He has appeared as counsel in the ACT Supreme Court in proceedings which concerned the *Human Rights Act 2004* (ACT). He holds the rank of Captain in the Australian Army Legal Corps (Reserves). During 2002–04, he was a casual lecturer at the School of Law at James Cook University.

Dr Sue Gordon, AM is a retired Western Australian magistrate. She was appointed as Commissioner for Aboriginal Planning in 1986, and became the first Aboriginal person to head a government department in Western Australia. In 2002, she headed an inquiry into family violence and child abuse in Western Australian Aboriginal communities. She was the original Chair of the Northern Territory Emergency Task Force.

Ryan Haddrick is a legal practitioner and was a ministerial adviser to two Howard Government ministers, and an adviser to a number of other parliamentarians. He was a member of the Council of James Cook University.

The Hon Justice Kenneth Handley, AO was a Judge of the New South Wales Court of Appeal from 1990 until his retirement in 2007. He continues to serve in an acting capacity. He was President of the NSW Bar Association from 1987 to 1989 and President of the Australian Bar Association 1988 – 89. From 1980 until 2003 he was Chancellor of the Anglican Diocese of Sydney, and in 1986 he became a member of Lincoln's Inn (London).

Tom Harley has been Chairman of the Menzies Research Centre since 2004 and a Director since 2002. He was formerly President of Corporate Development at BHP Billiton and has been the Chairman of the Australian Heritage Council since 2004. He is a Director of the Centre for Arab and Islamic Studies at the Australian National University. He is currently the Chairman of Dow Chemical (Australia).

Dr John Hirst is an Emeritus Scholar at La Trobe University. He has written many books on Australian history, including *The Sentimental Nation: the Making of the Australian Commonwealth* in 2000; *Sense and Nonsense in Australian History* in 2006; and *The Australians: Insiders & Outsiders on the National Character Since 1770* in 2007. He is a regular commentator on national affairs.

The Hon John Howard, AC was Prime Minister of Australia from 1996 to 2007. In 1975 he was appointed Minister for Business and Consumer Affairs in the Fraser Government, and then Federal Treasurer from 1977 to 1983. He was the Federal Member for Bennelong from 1974 to 2007. Mr Howard is the Chairman of the International Democrat Union.

Professor Helen Irving is a Professor of Law at the University of Sydney, where she teaches Federal Constitutional Law, Comparative Constitutionalism and Gender, and Constitution-making. In 2005–06, she held the Chair of Australian Studies at Harvard University, and is a Visiting Professor at Harvard Law School.

Ben Jellis is a Melbourne-based lawyer whose writings on legal affairs have appeared in a number of publications including *Policy* magazine, *The Australian* newspaper and the *Law Institute Journal* of Victoria.

The Hon Dr Gary Johns is the President of the Bennelong Society and was the Special Minister of State in the Keating Government. He was also Assistant Minister for Industrial Relations, Parliamentary Secretary to the Treasurer, and to the Deputy Prime Minister. He was an Associate Commissioner of the Commonwealth Productivity Commission from 2002–04. In 2002 he won the inaugural Fulbright Professional Award in Australian-United States Alliance Studies, and served at Georgetown University.

Julian Leaser has been Executive Director of the Menzies Research Centre since February 2006. After a year as an Associate to a High Court judge, he practised as a solicitor and has been an advisor to two federal cabinet ministers. He was a Visiting Fellow at the John F Kennedy School of Government at Harvard University in 2006–07.

Rabbi Dr John Levi, AM, was the first Australian to be ordained as a rabbi and to return to work in the land of his birth. He was named Rabbi Emeritus of Temple Beth Israel in 1997 following 37 years of distinguished leadership. He was elected Deputy President of the Executive Council of Australian Jewry in 2005. He is the author of four books on Australian Jewish history.

Felicity McMahon is an Australian lawyer and currently works for a London-based commercial law firm, practicing in competition and anti-trust law. She is a former President of the UTS Union Limited. During her time at UTS,

she studied an international trade law and economics at the University of Bern, Switzerland. She is also a former staffer to a Liberal Senator.

Major General Andrew James (Jim) Molan, AO, DSC (Ret'd) held a number of leadership appointments in the Australian Army, including command of units from a 30 man platoon to a 15,000 strong division, and Commander of the Australian Defence Colleges. He served as the Army Attache (1992–94) and Defence Attache (1998–99) in Jakarta, and served in East Timor. In April 2004, he deployed for a year to Iraq as the Chief of Operations, Headquarters Multinational force in Iraq (MNF-I) during continuous and intense combat operations.

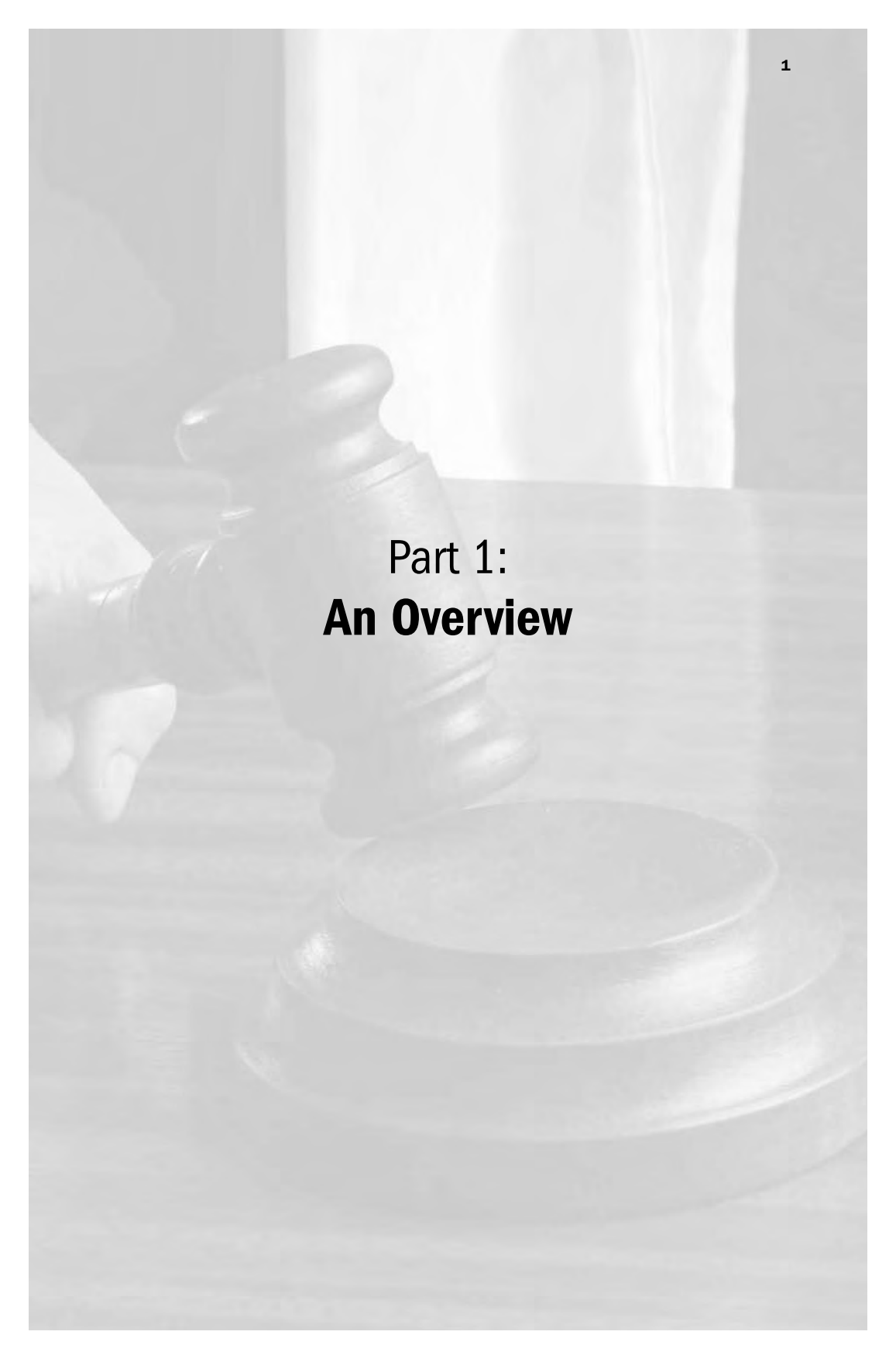
His Eminence Cardinal George Pell, AC, has been the Catholic Archbishop of Sydney since 2001. From 1996 to 2001, he was Archbishop of Melbourne, and from 1987 he was an Auxiliary Bishop of the Archdiocese of Melbourne and Titular Bishop of Scala. He was ordained a Catholic priest in 1966. In 2007 *God and Caesar*, a selection of Cardinal Pell's essays on religion, politics and society was published.

The Hon Christian Porter, MLA is the Western Australian Attorney-General and Minister for Corrective Services. Prior to being elected to State Parliament in 2008 he was a Senior Lecturer at the University of Western Australia. He was also a Senior State Prosecutor in the Office of the Director of Public Prosecutions (WA).

Mr Bill Stefaniak is the Appeals President of the Australian Capital Territory's Civil and Administrative Tribunal. He was a member of the Territory's Legislative Assembly for 19 years, and held many ministerial appointments, including Attorney-General. A lawyer by training, he has worked in private practise and as a crown prosecutor.

The Rt Hon Sir Ninian Stephen, KG, AK, GCMG, GCVO, KBE, QC was the Governor-General of Australia from 1982–89. He was a justice of the High Court of Australia from 1972 to 1982, and was a justice of the Supreme Court of Victoria. Sir Ninian was a judge of the International Tribunals for former Yugoslavia and Rwanda from 1993–97, and the Chairman of the Second Strand Northern Ireland Peace Talks in 1992.

Brigadier Jim Wallace, AM, (Ret'd) is the Managing Director of the Australian Christian Lobby. He served with distinction in the Australian Army for many years after graduating from Duntroon, the British Army Staff College and the Australian College of Defence and Strategic Studies. He commanded the Special Air Services Regiment and the Army's mechanised brigade, and served with the United Nations in the Middle East. He served in Vietnam.

A grayscale photograph of a hand holding a wooden gavel over a wooden block on a desk. The gavel is positioned as if about to strike the block. The background is slightly blurred, showing a person in a white coat.

Part 1:
An Overview

Chapter One

A Reflection on a Bill of Rights

THE HON CHIEF JUSTICE PAUL DE JERSEY, AC

Whether Australia adopts a bill of rights is of course an issue for the people: directly by way of constitutional amendment; or indirectly through the parliament in the case of a statutory charter.

The drafters of the Constitution rejected the inclusion of a bill of rights. The basis for that rejection would not be regarded as valid today. It was then argued that some of the due process guarantees would be inconsistent with then current laws which, as we would now acknowledge, prejudiced Aborigines and Asians.

Discussion in recent years whether there should be a constitutional bill of rights was overshadowed by the debate as to whether Australia should become a republic. That meant the issue was not comprehensively canvassed.

The driver for those who promote a bill of rights is, in general, not party political. It should be examined in a non-political context – not only whether one should be adopted, but also in what form. Practicalities would vary considerably depending on whether it were to be constitutionally entrenched (and therefore dependant on a referendum), or established as ordinary legislation. The former process may be felt to impinge on the sovereignty of Parliament – it would take precedence over other legislation and place with the courts, not Parliament, the power to determine the scope and application of the rights. The latter however would have the same status as other legislation, susceptible of amendment and repeal without the need for any referendum.

In the United States, courts have the power to strike down legislation inconsistent with the Bill of Rights. Canadian courts have the same power, but in most areas subject to the possibility of legislative override. Courts of the United Kingdom and New Zealand are simply called upon to interpret statutes consistently so far as possible with their respective bills of rights.

At this stage, it would seem a statutory bill of rights would be the more likely option for Australia, in view of our history at referendums.

The *Human Rights Act 2004* (ACT) was the first statutory bill of rights to have been passed in Australia. It derives from the *International Covenant on Civil and Political Rights* and protects a wide array of generally cast rights: to movement (s 13), thought, conscience, religion and belief (s 14), peaceful assembly and freedom of association (s 15), speech and expression (s 16), and fair trial by an independent and impartial court or tribunal (s 21). The Act does not invest rights in individuals as such. Rather, before Territory

statutes come into force, the Attorney-General must issue a compatibility statement which is presented to the Legislative Assembly to prompt scrutiny for human rights implications (s 37). Courts are required, where possible, to interpret Territory legislation consistently with the Act (s 30). The court has no power to strike down legislation. If a judge finds it inconsistent with the Act, the judge issues a 'declaration of incompatibility' which is sent to the Attorney-General, who then tables it in the Legislative Assembly and prepares a written response. The legislation remains valid and the declaration does not affect the rights of the parties (s 32).

Victoria followed with a *Charter of Rights and Responsibilities*, enacted in 2006. New South Wales has, at least for the time being, struck the adoption of a bill of rights from the agenda. The New South Wales Standing Committee on Law and Justice in 2001 expressed this view:

... it is ultimately against the public interest for Parliament to hand over primary responsibility for the protection of human rights to an unelected Judiciary who are not directly accountable to the community for the consequences of their decisions. The Committee believes an increased politicisation of the Judiciary, and particularly the judicial appointment process, is an inevitable consequence of the introduction of a bill of rights.¹

There is also the question to what extent the rights guaranteed in a bill of rights should be limited. While individual rights would be stated in absolute terms, their exercise would necessarily be qualified by the rights of others. I may activate my leaf blower on Saturday morning, but before 9 o'clock? The rights guaranteed in the Canadian *Charter of Fundamental Rights and Freedoms* are said to be 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' (art 1). Before finding a law contrary to the Charter, Canadian courts may first have to examine whether the law is justified on this ground. One immediately notes its utter generality.

And finally, before I canvas arguments against a bill of rights, I note the debate here is not so much about *whether* human rights should be protected, but about the best means of achieving that protection. Should courts, for example, be the monitors?

Sir Gerard Brennan has pointed to the impact this would have on the judiciary: after all, 'the very object of a bill of rights is to create a new role for the judiciary – by exercise of a new jurisdiction, the Courts are to protect

1 New South Wales Standing Committee on Law and Justice, 'A NSW bill of rights', 3 October 2001, <[http://www.parliament.nsw.gov.au/prod/parlment/Committee.nsf/0/8569eddf131da5dbca256ad90082a3d3/\\$FILE/A%20NSW%20Bill%20of%20Rights%20Report%20October%202001.pdf](http://www.parliament.nsw.gov.au/prod/parlment/Committee.nsf/0/8569eddf131da5dbca256ad90082a3d3/$FILE/A%20NSW%20Bill%20of%20Rights%20Report%20October%202001.pdf)>, at on 17 October 2005.

human rights and fundamental freedoms.²² ‘Over time, the function and significance of the third branch of Government will be substantially changed and the relationship between the Courts and the political branches of Government will be altered.’²³ Before the Australian people made an informed decision they wanted a bill of rights, they would need to appreciate the likely shift in dynamics among the three branches of government.

I turn now to the arguments against a bill of rights for Australia, arguments which I embrace.

I Parliamentary Sovereignty

The most commonly articulated argument against a bill of rights concerns the sovereignty of parliament: whether the consequently necessary adjudications should be reserved to the non-elected judiciary.

The Parliament represents the people. If the people are unhappy with decisions, they can bring the government down at the next election. A bill of rights, at least one constitutionally entrenched, would effectively empower courts to prevent the legislature from maintaining laws in breach of the protected rights. A major purpose of a bill of rights is to protect the people from the oppressive use of political power. From this perspective there is some circularity in the argument of those who support a bill of rights. That is because in a democratic society where the right to vote is protected, the counter to despotism or oppression is already there.

To some extent, this argument ignores the position of an abused minority. Those who place their trust completely in the operation of democracy and its institutions argue, however, that there is a point where people should be prepared to ‘make do’ with the system. A former federal Minister of State, the Hon Dr Gary Johns, has been quoted as saying that:

the debate about the rights of individuals and the rights of minority groups ... has now reached a point of diminishing returns. ... [there are] no more great gains that can be made in the battle for rights ... for women, migrants, blacks, homosexuals or every other subgroup. ... [T]he majority don't associate with any of these groups and there is a point at which the vast majority say, 'I have had enough, society is reasonably fair'⁴

2 Sir Gerard Brennan, ‘The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response’ in Phillip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 454, 458.

3 Ibid, 457.

4 L Taylor, ‘Minorities Rights Irk Most: Mabo Minister’, *The Australian*, 16 June 1994, in David Malcolm, ‘Does Australia Need a Bill of Rights?’ (1998) 5(3) *Murdoch University Electronic Journal of Law*, <<http://www.murdoch.edu.au/elaw/issues/v5n3/malcolm53.html>>, at 17 October 2005, [16].

Sir Harry Gibbs took a similar stance, asserting that minority groups these days sometime form pressure groups which exert excessive influence.⁵

II Judicial Independence

I turn to the judicial arm of government. Would a bill of rights shake confidence in an a-political judiciary?

Parliament makes the law. When there is a dispute about how parliamentary law is to be interpreted, independent judges are called upon to determine the dispute according to law. A partisan parliament may wish it to be interpreted in a particular way. A judge's job is primarily concerned with applying existing laws free from political pressure. Particularly where one of the parties to a dispute is the State, the public relax in the confidence there is a clear separation between those who make the law and those who interpret it. There will be an objective, dispassionate interpretation: 'the government' will not be there, pushing a barrow. At the adjudicative stage under our system, the decision-maker is utterly impartial, and especially, not constrained by governmental or party-political pressure. To ensure perceptions of this, judges are accorded security of tenure, not removable except in specified circumstances.⁶ By these means, judicial independence is upheld as the bulwark of justice according to law and the courts stand independently between citizen and state.

The position in the United States is somewhat different. It is apparent some judicial appointments are overtly politically motivated, and the courts do not balk at dealing with what we would regard as essentially political issues.

To Australians, the notion of anything but a completely a-political judiciary is an anathema. Sir Harry Gibbs argued that if Australian courts were given the power to make determinations on social and economic policy, there would be temptation to appoint judges for their political or ideological attitudes, rather than capacity for independence and legal ability.⁷

Following a High Court appointment in 2005, it was reported that two former Chief Justices of the High Court, Sir Anthony Mason and Sir Gerard Brennan, expressed concern about lack of transparency in the process of appointment. Sir Anthony Mason in particular urged the government to reveal whether private discussions had been held between the Attorney-General and the prospective new justice, and, if so, the content of those discussions: otherwise the 'process could not be described as transparent and open'.⁸

5 Sir Harry Gibbs, 'Does Australia Need a Bill of Rights' (1995), 6 *Upholding the Australian Constitution; The Proceedings of the Samuel Griffith Society*, <www.samuelgriffith.org.au/papers/html/volume6/v6chap7.htm>, at 15 October 2005.

6 *Australian Constitution*, s 72; *Constitution of Queensland 2001* (Qld), ss 60 and 61.

7 Sir Harry Gibbs, above n 5.

8 Chris Merritt and Elizabeth Colman, 'Court choices too secretive: judges', *The Australian*, 22 September 2005, See also 'Right choice for High Court but wrong process', *Sydney Morning Herald*, 22 September 2005.

A bill of rights could exacerbate that concern. One only has to recall what followed the retirement of United States Supreme Court Justice Sandra Day O'Connor; the appointment of Chief Justice John Roberts followed nearly 20 hours of questioning by the Senate Judiciary Committee. An editorial in *The Australian* newspaper following the appointment of Justice Crennan to the High Court commented:

With no disrespect, Crennan's appointment has already passed from newsprint to fish wrapping. And that is a very good thing. Why? Because in Australia, to the chagrin of many legal activists, most of our judges do not prance around as politicians in legal drag as they do in the US.⁹

III Political Character

A bill of rights would likely bring questions of high social and economic policy before the courts. The courts, as Sir Gerard Brennan points out, 'in supervising the exercise of political power, would be constrained to base their decisions on political considerations,'¹⁰ a departure from well-established current conceptions of the judicial function. As observed in the High Court in *Clunies-Ross v Commonwealth*:

It would be an abdication of the duty of this Court under the Constitution if we were to determine [this] important and general question of law ... according to whether we personally agreed or disagreed with the political and social objectives which the Minister sought to achieve ... As a matter of constitutional duty, [the] question must be considered objectively and answered in this Court as a question of law and not as a matter to be determined by reference to the political or social merits of the particular case.¹¹

Judges are not well-equipped to resolve issues of high economic and social policy: they lack the resources of the executive; they are not generally trained in economics or the social sciences. Judges may endeavour to give effect to 'the will of the people', but the basal difficulty is there is no reliable way for them to gauge that will. Courts cannot adjourn to await the result of a national referendum. One may argue ultimately, that to take this role from the executive and give it to the courts would involve an affront to parliamentary sovereignty: judges are not representative – they are not elected and in that sense not accountable to the people. Eventually in our Westminster democratic system, it is parliamentary sovereignty which counts.

9 Editorial, 'Let's not turn our judges into politicians', *The Australian*, 28 September 2005.

10 Sir Gerard Brennan, above n 2, 455.

11 (1984) 155 CLR 193, 204.

The situation here is quite different from that obtaining in the United States. There, judges sometimes appear comfortable applying personal perceptions of values in making their decisions. Public expectations are different here. Also, because a bill of rights throws up wide issues of social policy, decisions can differ according to the multitude of life defining experiences of the judge. On this basis it is argued that uncertainty and injustice would be introduced into the law.¹²

IV Evolving Nature of Rights

Another argument against a bill of rights concerns its content, and its susceptibility for evolution.

It is difficult, at any one time, to categorise all those rights to be considered 'basic and fundamental'. Rights which seem important today may be overtaken by future development. In some cases, the exercise of those rights could be detrimental to society.

An example is the right to keep and bear arms, enshrined in the United States Bill of Rights via the Second Amendment in 1791. The American Revolution had officially ended seven years earlier. The drafters of that amendment considered the right 'necessary to the security of a free state'. It is hardly suitable today. Its exercise has probably contributed to a culture of violence in that country. Moreover, two centuries of technological development in weaponry has meant many more lives may be vulnerable where the right is abused. A former Commonwealth Attorney-General, Mr Darryl Williams, pointed out that 'the Government ... establishing the National Firearms Buyback Scheme was not hampered by a constitutional entrenched right to bear arms. This would have been the case in the US.'¹³

Conversely, a static bill of rights could fail to embrace new, but equally basic and fundamental, rights. Some years ago Justice Kirby rightly predicted particular problems for the future will emerge from computer technology, biotechnology and the human genome project.¹⁴ The traditional rights model would not necessarily be broad enough to accommodate those challenges. If Australia adopted a bill of rights constitutionally entrenched, it would be difficult to secure amendments to ensure it remained a 'living document'. Parliament could of course legislate to protect new rights through specific legislation, but

12 David Malcolm, 'Does Australia Need a Bill of Rights?' (1998) 5(3) *Murdoch University Electronic Journal of Law*, <<http://www.murdoch.edu.au/elaw/issues/v5n3/malcolm53.html>>, at 17 October 2005, [26]-[27].

13 Daryl Williams, 'Against constitutional cringe: the protection of human rights in Australia' (2003) 9(1) *Australian Journal of Human Rights* 1 at 5.

14 Michael Kirby, 'A bill of rights for Australia – But do we need it?', Speech delivered to the Queensland Chapter – Young Presidents Association, Brisbane, 14 December 1997, <http://www.lawfoundation.net.au/resources/kirby/papers/19971214_austlaw.html>, at 15 October 2008.

this could produce a hierarchy, in which the constitutionally protected rights were seen to take precedence over others 'merely' statutorily enshrined.

V 'Paper Rights'

Does a bill of rights really guarantee protection of those rights it specifies? International human rights treaties abound. There is near universal ratification of the *International Covenant on Civil and Political Rights*, in particular. It would be difficult to argue that the rights contained in that treaty are anything but basic and fundamental. But some states who are parties to that Covenant regularly disregard them. Some of these countries have even incorporated a national bill of rights which goes further than the *International Covenant*.

On the other hand, Australians arguably enjoy more secure rights protection than citizens of many countries which have bills of rights. Sir Harry Gibbs describes the residual risks:

I am not at all sure ... that a bill of rights would enable the courts to check the worst abuses of political and bureaucratic power. It is unlikely to prevent a political party which had secured the requisite majority in the houses of parliament from stacking the courts and the public service, or from engaging in ruinous commercial ventures, or from subverting the conventions of the Parliament itself. ... Constitutional guarantees may provide some protection to human liberties, but in the end freedom depends on the willingness of a community to defend it.¹⁵

Practically speaking, there are two steps in ensuring observance of basic and fundamental human rights. The first is a government and a society which respect them, including the rights of minorities. That presupposes educating the people about their own rights, and how their exercise impacts on others' rights, and governments adhering to the international standards to which the state is bound.

The second is maintaining appropriate mechanisms to enforce respect for and protection of the rights. This is the primary reason why international human rights instruments provide no guarantee. The early operation of the United Nations Commission on Human Rights, the instrumental body in the drafting of the *Universal Declaration on Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, involved simply cataloguing complaints received. No action was taken upon them, the result being 'the world's most elaborate waste paper basket.'¹⁶ While the situation has improved somewhat (for example, the Sub-Commission on the Promotion and Protection of Human Rights can exert pressure on governments abusing their citizens'

15 Sir Harry Gibbs, above n 6.

16 Phillip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (1992), 141.

human rights through a public procedure under Resolution 1235 and a private procedure under Resolution 1503), there is no international body which can effectively 'police' compliance with international human rights norms.

It is often said the actual protection of human rights must occur at the national level. But typically the worst abusers of human rights are governments themselves, as attested by the countless allegations of torture and forced disappearances by some South American governments. In these situations, it has derisively been said a bill of rights is about as valuable as the paper on which it is written. Much more valuable are strong democratic institutions which can take practical steps to curb governmental abuses, and an educated populace tolerant of minority groups.

VI Adequacy of Current pProtections under Statute, the Common Law and the Constitution

A substantial argument against a bill of rights fastens on the adequacy of current protections under the common law, statutes and the Constitution.

As Chief Justice Doyle pointed out when Solicitor-General of South Australia, 'no-one should underestimate the capacity of the common law to adapt to change in society'.¹⁷ For example, it is accepted that where a statute is cast in ambiguous terms, or there is a gap in the common law, courts may in their response legitimately be guided by international human rights treaties and jurisprudence.¹⁸ In *Mabo v Queensland [No 2]* it was held the common law doctrine of *terra nullius* warranted reconsideration.¹⁹

Accordingly, while 'judicial development of the common law must not be seen as a backdoor means of importing an unincorporated convention into Australian law', Sir Anthony Mason and Justice Deane accepted in *Minister of State for Immigration and Ethnic Affairs v Teoh*, that:

ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights ... Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention.²⁰

17 John Doyle and Belinda Wells, 'How Far Can the Common Law Go Towards Protecting Human Rights?' in Phillip Alston (ed), *Towards an Australian bill of Rights* (1994) 107.

18 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J; Mason CJ and McHugh J agreeing).

19 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J; Mason CJ and McHugh J agreeing).

20 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288, 291 (Mason CJ and Deane J).

The courts have shown some willingness to use the common law to protect basic human rights, notwithstanding the controversy about judge-made law. Justice McHugh expressed the view that '[l]aw-making by judges is likely to remain controversial, but its existence seems essential. The need for and the right of the judge to make law in appropriate cases is now well-established.'²¹ In *Dietrich v R*²², notably, the High Court held that while an indigent person accused of committing a serious offence did not have a constitutional right to be represented by counsel at public expense, the court could stay a criminal trial which was unfair. While the court would look at each case on its facts, in most cases in which an accused were charged with a serious crime, it would be unfair for the trial to proceed without his or her being afforded legal representation.

Courts are guided by a large battery of presumptions when faced with the task of interpreting statutes which impinge on human rights. In a passage quoted with approval by Chief Justice Gleeson²³ and Justice Kirby,²⁴ Lord Hoffman termed this the 'principle of legality':

The principle of legality means that Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.²⁵

Chief Justice Spigelman has helpfully listed presumptions which manifest this principle.²⁶ These include that Parliament does not intend to:

-
- 21 Michael McHugh, 'The Law-Making function of the Judicial Process: Part II' (1988) 62 *Australian Law Journal* 116, 127.
 - 22 (1992) 177 CLR 292
 - 23 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ)
 - 24 *Daniels Corp v ACCC* (2002) 213 CLR 543, 582 (Kirby J).
 - 25 *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115, 131.
 - 26 James Spigelman, 'Statutory Interpretation and Human Rights', Address to the Pacific Judicial Conference, Vanuatu, 26 July 2005, <http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_260705>, at 17 October 2005. See also Dennis Pearce, Robert Geddes, *Statutory Interpretation in Australia*, (5th ed), 2001), 515-529.

- invade fundamental rights, freedoms and immunities;²⁷
- restrict access to the courts;²⁸
- exclude the right to claims of self-incrimination;²⁹
- permit a court to extend the scope of a penal statute;³⁰
- deny procedural fairness to persons affected by the exercise of public power;³¹
- interfere with vested property rights;³²
- alienate property without compensation;³³ or
- interfere with equality of religion.³⁴

Those presumptions do not allow judges to construe legislation inconsistently with its clear and unambiguous language. Rather, the 'principle of legality' impinges by requiring Parliament to indicate clearly where it intends to interfere with basic rights, liberties and expectations.³⁵ Chief Justice Gleeson viewed it as an aspect of the rule of law:³⁶ courts will look for a 'clear indication that the Parliament has directed its attention to the rights and freedoms in question and has consciously decided upon abrogation or curtailment.'³⁷ One would of course hope that in a robust democracy, with strong institutional checks on the exercise of executive power, there would be few instances where Parliament deliberately curtailed basic and fundamental rights.

Finally, there are a number of basic rights protected by the Constitution, both explicitly and implicitly. Specifically covered are: the right to vote (s 41); the guarantee that the Commonwealth may only acquire property on just terms (s 51(xxxi)); the right to trial by jury for an indictable offence (s 80); free trade between states (s 92); freedom of religion (s 116); and freedom from discrimination on the basis of state of residence (s 117).

The High Court has also been able to imply certain rights and freedoms. The best known is the freedom of political communication.³⁸ Also guaranteed is procedural fairness in the exercise of judicial power. Chapter III of the

27 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 493; *Bropho v Western Australia* (1990) 171 CLR 1; *R v Bolton*; *Ex parte Beane* (1987) 162 CLR 514, 523, 532.

28 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492; *Magrath v Goldsborough Mort & Co Ltd* (1932) 47 CLR 121, 134.

29 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

30 *Krakouer v The Queen* (1998) 194 CLR 202, 223.

31 *Commissioner of Police v Tanos* (1958) 98 CLR 363, 395-396.

32 *Clunies Ross v Commonwealth* (1984) 155 CLR 193, 199-200.

33 *Commonwealth v Haseldell Ltd* (1918) 25 CLR 552, 563.

34 *Canterbury Municipal Council v Muslim Alawy Society Ltd* (1985) 1 NSWLR 525, 544.

35 James Spiegelman, above n 27.

36 *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40, [21].

37 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 492.

38 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television P/L v Commonwealth* (1992) 177 CLR 106.

Australian Constitution is premised on the separation of powers; through the vesting of judicial power of the Commonwealth exclusively in Chapter III courts, Chapter III requires observance of ‘judicial process’. This means Parliament cannot pass a law requiring a Chapter III court to exercise judicial power inconsistently with the essential character of a court or with the nature of judicial power – for example, Parliament could not require a court to act contrary to natural justice.³⁹ In a way fortuitously, this also protects State courts, because they may exercise Commonwealth jurisdiction. Applying similar reasoning, Justice Deane and Justice Gaudron suggested through *obiter dicta* that the requirement that a trial be fair is impliedly entrenched in the Constitution.⁴⁰

Many commentators argue the combination of these protections provides a sufficient, and indeed the best, check on violations of basic and fundamental rights. The Hon Daryl Williams argued that:

[w]hile not perfect, Australia has an excellent human rights record. ... [L]et there be no doubt about the effectiveness of the arrangements that are already in place. ... They are both strong enough to provide firm protection for the rights that are fundamental to a modern democratic society, and flexible enough to respond to the needs of changing times.⁴¹

VII General Language of a Bill of Rights

A persistent challenge is the generality of bills of rights. It is incontrovertible that they employ very broad language. For example, art. 14 of the *European Convention on Human Rights*, given effect in the United Kingdom by the *Human Rights Act 1998* (UK), provides that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

That is the only provision in that Convention dealing with discrimination.

By contrast, there is a host of legislation in Australia outlawing discrimination; as examples, the *Age Discrimination Act 2004* (Cth), the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), and the *Disability Discrimination Act 1992* (Cth). It is the practical machinery set

39 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 26-27 (Brennan, Deane and Dawson JJ); *Leeth v The Commonwealth* (1991) 172 CLR 455, 486-487 (Deane and Toohey JJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

40 *Dietrich v R* (1992) 177 CLR 292, 326 (Deane J), 362 (Gaudron J).

41 Daryl Williams, above n 14, 1.

in place by those Acts which helps avoid discrimination and remedy its occurrence. This is not to say the United Kingdom does not have detailed legislation dealing with discrimination as well. Those who argue against a bill of rights assert it is better that rights be protected in this more detailed manner, with legislation establishing specific mechanisms for their protection.

That aside, generality in the form of prescription of the rights themselves may lead to inconsistent and unpredictable applications. Examples may be drawn from the United States Bill of Rights. The Fifth Amendment, which forbids any State to 'deprive any person of life, liberty or property without due process of law', has been interpreted to govern laws prohibiting abortion.⁴² The First Amendment, which prevents Congress from making laws 'abridging the freedom of speech or of the press', was held to justify the Supreme Court's determination of the question whether a student could be lawfully prevented from wearing braided long hair.⁴³ It is unlikely the drafters envisaged recourse to the amendments to resolve disputes like those.

VIII Content of a Bill of Rights

And what of the 'grading' of rights?

A bill of rights inferentially lends greater status to those specified, ahead of those left out. Western nations typically focus on civil and political rights, with the *International Covenant on Civil and Political Rights* playing a focal role in determining what rights should be protected. It is sometimes said, on the other hand, that rights are indivisible: civil and political rights cannot be fully enjoyed without the security of economic and social rights as well. Any move to establish a bill of rights guaranteeing civil and political rights may imply that economic and social rights, such as those set out in the *International Covenant on Economic and Social Rights*, do not enjoy comparable status.

But then inclusion of economic and social rights may well produce serious difficulties in adjudication. How does a judge determine a dispute based on rights to rest, leisure and reasonable limitation of working hours (art 7), social security (art 9), an adequate standard of living (art 11), cultural life (art 15), all set out in the *International Covenant on Economic, Social and Cultural Rights*?

42 *Roe v Wade* (1973) 410 US 113; *Webster v Reproductive Health Services* (1989) 492 US 490.

43 *New Rider v Board of Education* (1974) 414 US 1097.

IX Practical Issues: Cost and Extent of Litigation

Then there are some particularly practical considerations. In Canada, it has been noted the vast array of new legal conundrums presented by the *Charter of Fundamental Rights and Freedoms* has increased the time and cost of legal preparation and presentation, and also the amount of litigation, delaying judgments.⁴⁴ According to Sir Gerard Brennan, while the aim of a bill of rights is to protect individual rights, it is likely most people would be unable to afford the litigation.⁴⁵ Further, he argued that the ordinary manner of adducing evidence would be inappropriate:

The issues under an entrenched bill of rights are constitutional issues and the decision affects the powers of Government and the interests of all who live under the Constitution: such issues cannot be made to depend upon the choice or the capacity of the parties to adduce the evidence necessary for the making of an informed decision.⁴⁶

X Conclusion

These considerations obviously carry disparate weight. Of principal concern in my assessment, is the prospect of investing non-elected judges with a broad, socially-based jurisdiction which they would be ill-equipped, whether by training or experience, to discharge, and the discharge of which would inevitably erode public confidence in the judiciary's fulfilment of its mission, the delivery of justice according to law. The abiding assumption in the citizenry is that the 'law' which judges apply is clearly articulated and predictable in application. Bills of right do not fit that pattern.

44 Gerry Ferguson, 'The Impact of an Entrenched Bill of Rights – The Canadian Experience' (1990) 16 *Monash University Law Review* 211, 219.

45 Sir Gerard Brennan, above n 3, 459.

46 *Ibid.*, 458-459.

Chapter Two

The Debate We Didn't Have to Have: The Proposal for an Australian Bill of Rights*

SENATOR THE HON GEORGE BRANDIS, SC

The world has known few more stable democracies than Australia. In the 107 years since Federation, our democratic institutions have successfully managed and absorbed the challenges presented by two world wars, a depression, social change unimaginable to those who wrote our Constitution, and the transition – still underway – to a globalised economy. And yet, from the time our nation was founded, not a single drop of blood has been spilled by Australian fighting Australian in civil conflict. Our disputes have always been fought by the exchange of words – often, as becomes the robust spirit of our people, aggressive words – but never blows. Even the event which placed our Constitution under its greatest pressure, the dismissal of the Whitlam Government on 11 November 1975, was resolved in an utterly characteristic Australian manner. Large, angry crowds gathered outside Parliament House. They listened to indignant speeches. But the indignation never turned to violence and, at the end of the day, they adjourned to their homes – or adjourned to the pub, to maintain their rage over a beer. One social commentator of the time was foolish enough to say that, if Australia had been a truer democracy, there would have been blood on the streets. It is for the very reason that Australia is such a successful democracy that there was not, and the political crisis was resolved, as it should have been, at a spirited but peaceful election.

I wanted to begin this speech with an optimistic – but not, I hope, a Panglossian – tribute to the success of Australian democracy because it is something we all too often take for granted. Those who migrated to our shores from homelands riven by war and civil strife – most notably, the hundreds of thousands who settled in Australia from Europe after the Second World War – have often remarked on that great Australian vice: complacency. We take for granted rights and freedoms, liberal and democratic institutions, for which they and their forebears had to fight and for which, all too often, their parents and grandparents died. There are few things of which Australians should be more proud than that our democracy was itself created at the ballot box – at the great constitutional referenda of 1899 and 1900. But our experience is rare among democracies.

* An address to the James Cook University Law School, Townsville, 14 August 2008.

Perhaps it is because we take our democracy too much for granted, and appreciate its success too little, that some of us are so susceptible to the latest proposal to reinvent it. As a relatively young nation – although a comparatively old democracy – it is a feature of our national character to be receptive to new ideas, to take the side of the future over the past, to favour the optimistic attitude which tells us things can always be made better. Fortunately, that attractive habit of mind has been balanced by a worldly scepticism which is at least as important an element of the national character, and which dismisses with taciturn disdain Utopian schemes, particularly those sought to be imposed, from on high, by politicians, bureaucrats, academics and lawyers.

We are, in Australia, currently engaged in such a debate: the debate about whether Australia needs a bill of rights. Tonight, I want to use the opportunity of addressing the James Cook University Law School – a law school which, from what I know of its graduates, prizes practical wisdom above self-indulgent Utopian fancy – to set out the Federal Opposition's position in this debate. Specifically, I want to explain why, in the view of the Opposition, Australia does not need a bill or charter of rights, and why we consider that any attempt to impose one upon us would be, at best, wholly unnecessary, and may result in unintended and potentially very dangerous consequences.

Shortly after last year's change of government, on 5 December 2007, the new Attorney-General Robert McClelland expressed his government's support for the enactment of the a statutory bill of rights. In doing so, he was giving voice to established Labor Party policy, in particular as articulated by the then Shadow Attorney-General, Nicola Roxon, in 2006. In fact, Mr McClelland had, in his earlier period of service as Shadow Attorney-General, advocated a bill of rights as long ago as 2000. In this year's Federal Budget, the government allocated \$2.8 million over two years to 'facilitate national public consultations about the recognition and protection of human rights through a bill or charter of rights'. While the Budget announcement stipulated that the money is to be used for 'national public consultations', I fear that it will only be used to assist to make the case for a bill of rights, and the case against a bill of rights will fail to receive the public attention that it deserves.

If we are to have this debate – and, from the Opposition's point of view, it is a debate that we didn't have to have – we need to hear equally from both sides. It should not be just a party political debate. Indeed, there are many influential figures on the Labor side of politics who have already expressed their strong opposition to the enactment of a bill of rights in Australia – among them, the former Labor Premier of New South Wales Bob Carr¹ and that State's current Attorney-General John Hatzistergos²

1 Bob Carr, 'The Rights Trap: How A Bill of Rights Could Undermine Freedom', *Policy*, Winter 2001, 19.

2 John Hatzistergos, 'A Charter of Rights or A Charter of Wrongs?' (Speech to the Sydney Institute, Sydney, 10 April 2008).

Even the Young Labor Association has recently announced its opposition to the proposal.³

It is notable that the government has elected not to pursue a constitutionally entrenched bill of rights such as that in the United States. I suspect the government's reluctance to go down that path has more to do with the political reality of achieving constitutional change in Australia, rather than any sound, considered constitutional policy on the part of government. The last Australian government to have attempted to amend the Constitution by the entrenchment of substantive rights, the Hawke Government in 1988, failed to persuade the public that such constitutional change was either necessary or desirable; the previous such attempt of another Labor Government, at the urging of Dr Evatt in 1944, also failed.

Let me make it clear at the outset what this debate should *not* be about. It should *not* be a debate about whether Australian citizens should enjoy the full range of civil, political and other rights which are the defining characteristic of modern liberal democracies. The reason why we need not have such a debate is that the issue is uncontroversial: no public figure I can think of doubts that proposition. Rather, the debate about a bill of rights is about means, not ends. It is, in particular, about two things: first, whether the protection of the rights which our citizens undoubtedly have would be better served by the enactment of a bill of rights than they are under the existing law; and secondly, whether the debate on the question of what substantive rights Australians should enjoy takes place in the open forum of elected and accountable Parliaments, or is determined by unelected and largely anonymous judges in the cloistered environs of the courts.

The rights which we Australians enjoy are to be found in many sources of our law. The Constitution expressly provides a number of rights. For instance, s 80 guarantees the right to trial by jury for indictable offences against Commonwealth law. Section 51(ii) guarantees non-discriminatory taxation. Section 51(xxxi) – one of the few constitutional provisions to have found its way into our popular culture courtesy of the film *The Castle* – provides that the acquisition of property must be 'on just terms'. Section 116 guarantees religious freedom. With the benefit of more than a century of judicial interpretation, we now know that the Constitution also impliedly provides a number of other rights, for example the right to freedom of political communication.⁴

But the Constitution's recognition of certain rights – either expressly or by implication – is, admittedly, piecemeal. One looks to the common law for the recognition of most of our fundamental rights and freedoms, such as

3 Ashleigh Wilson, 'Young Labor votes to reject charter of rights', *Weekend Australian*, 7 June 2008, <<http://www.theaustralian.news.com.au/story/0,,23824134-2702,00.html>> at 1 April 2009.

4 *Theophanous v Herald & Weekly Times* (1993-94) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

those protecting freedom of expression and belief, the right to liberty and security of the person, the right to freedom of movement and the right to a fair trial. The common law also enshrines important presumptions which protect substantive rights through the canons of statutory interpretation: for example, the presumption that penal provisions are to be construed in the favour of the accused and the presumption that Parliament did not, unless expressly stated, intend to limit personal liberty or freedom of speech.

Additionally, the Commonwealth Parliament has enacted specific legislation which guarantees certain rights. One good example is the recognition and protection of the right to equal treatment, embodied in the suite of anti-discrimination laws contained in the *Human Rights & Equal Opportunity Commission Act 1986*; the *Racial Discrimination Act 1975*; the *Sex Discrimination Act 1984*; and the *Disability Discrimination Act 1995*. Much of this legislation in one way or another enacts many of Australia's international obligations under instruments like the *International Convention on the Elimination of All Forms of Racism*; the *International Convention of the Elimination of All Forms of Discrimination*, and the *International Covenant on Civil and Political Rights*. Australia was, of course, one of the earliest signatories to the *Universal Declaration of Human Rights*.

What the Attorney-General must demonstrate, and what proponents of a bill or charter of rights in Australia have, to date, failed to establish, is why Australia needs a bill of rights. Given that our legal system, one way or another, already provides for the full range of civil and political rights, what is it about our current arrangements that require us to restate those rights (or some of them, or different ones) in another enactment, and in abstract form? What balance do they seek to adjust? What rights do they believe are not adequately protected, and what new rights do they believe to be necessary?

Two Australian jurisdictions have chosen to enact statutory bills of rights: Victoria and the Australian Capital Territory. Section 5 of the *Charter of Human Rights and Responsibilities 2006* (VIC) exposes the logical difficulty faced by proponents of bills of rights. This section provides:

A right or freedom not included in this Charter that arises or is recognized under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

Section 7 of the *Human Rights Act 2004* (ACT) provides, more tersely:

This Act is not exhaustive of the rights an individual may have under domestic or international law.

So in both cases where Australian Parliaments have enacted bills of rights, they have expressly acknowledged that pre-existing rights remain unaffected. So what, logically, is the point of the bill of rights? If it is merely declaratory of existing rights, it is superfluous. That would not be the case if those instruments created new rights hitherto unknown to the law. But in neither the Victorian nor the ACT bill of rights does that appear to be the case. Nor has the Attorney-General foreshadowed that it is his intention to use a Commonwealth Bill of Rights to create or acknowledge hitherto-unrecognized rights. As a matter of mere logic, the exercise foreshadowed by Mr McClelland fails the test of utility.

One of the reasons why many in the community advocate the adoption of a bill of rights is that they mistakenly assume that such an instrument will be a *source* of rights. There are some countries – the United States of America is a good example – in which that is true, at least in part: the first fourteen amendments to the US Constitution, born of the revolutionary war and the Civil War, may properly be regarded as the source of the rights they describe, in the sense that, at the time, those rights were not secured – or sufficiently secured – elsewhere in American law. The same may be said of Magna Carta, which secured certain rights extracted from the King by the nobles, or the English Bill of Rights of 1689, which guaranteed the constitutional settlement of the Glorious Revolution. But, as the provisions of the Victorian and ACT bills of rights to which I have referred demonstrate, those instruments are not – and do not purport to be – *sources* of rights. They create no new rights at all. In fact, if they have any effect on rights already acknowledged and protected by the legal system, it is only likely to be the effect of attenuating those existing rights, by limiting them.

It is therefore the view of the Opposition there is no case for the enactment of a bill or charter of rights, in the absence of any demonstrated need for one. That view is not, as I have said, a partisan one. Our scepticism is shared across the political, legal and cultural spectrum, by voices as various as Mr Carr and Mr Hatzistergos, the Chief Justice of New South Wales Jim Spigelman⁵ (whose current view reflects a revision of his Honour's earlier support for the proposal⁶), Justice Keane of the Queensland Court of Appeal,⁷ Michael Sexton SC, the Solicitor-General of New South Wales,⁸ and Professor Jim Allen, the

5 James Spigelman, 'The Common Law Bill of Rights', (2008 McPherson Lecture, University of Queensland, 10 March 2008).

6 James Spigelman, 'Rule of Law – Human Rights Protection' (1999) *Australian Bar Review* 29; 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141.

7 Patrick, Keane, 'In Celebration of the Constitution', Address to the Australian National Archives Commission, Supreme Court of Queensland, 12 June 2008.

8 Michael Sexton, 'A bill of rights would leave us all worse off', *Australian Financial Review* 22 August 2003.

Garrick Professor of Law at the University of Queensland,⁹ alongside more conservative voices such as Cardinal George Pell¹⁰ and the columnist Janet Albrechtsen.¹¹ Three State Labor Governments – those of New South Wales, Queensland, and most recently Western Australia – have within the last decade held Parliamentary inquiries into the desirability of enacting bills of rights for their states, which either rejected the idea (in the cases of Queensland and New South Wales) or (in the case of Western Australia) left the matter in abeyance. Both common experience and practical wisdom dictates that, when an idea attracts significant opposition not merely from the conservative side of politics, but from significant and intellectually respectable elements of the Labor movement as well, there is little likelihood that it will generate the community consensus which would make it politically feasible.

On the other hand, the proponents of the idea are largely confined to a relatively small but voluble group of academic lawyers, loosely assembled under the banner of Professor George Williams. Certainly, the campaign for a bill of rights does not reflect either a deep-seated community need, or a priority identified as significant by political leaders on either side of the party divide. As John Hatzistergos pointed out in his address to the Sydney Institute on 10 April 2008, ‘the constituency for such change has come not from ordinary citizens but rather professional lobbyists and law school elites.’¹²

So the bill of rights argument fails two tests at the threshold: the utility test – the absence of a demonstrated need for one – and the test of public opinion – the absence of a demonstrated demand for one. Beyond those considerations, however, there are other powerful arguments why such a proposal is not merely unnecessary, but in its operation potentially dangerous to those very democratic rights and liberties it would seek to secure.

As I said a moment ago, the effect of bills of rights which are not *sources* of rights, but merely restatements of them may, paradoxically, be to limit them. That may occur in several ways. First, as has often been pointed out, one may limit rights by defining them. Of course, every judicial decision depends at one level upon the delimitation of categories. By the very exercise of deciding whether or not a particular cause of action, or a particular

9 Notably in James Allen, ‘Portio, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century’, Inaugural Lecture as Garrick Professor of Law, the University of Queensland, July 2005; James Allen, ‘Human Rights – Can We Afford to Leave Them to Judges?’, and; James Allen, ‘Don’t entrust liberty to madcap judges’, *The Australian* 17 July 2008 < <http://www.theaustralian.news.com.au/story/0,25197,24031469-7583,00.html> > at 1 April 2009.

10 ‘Four Fictions: An Argument Against a Charter of Rights’, As published in this volume.

11 Janet Albrechtsen, ‘Beware the galloping imperialist judiciary’, *The Australian* 23 April 2008 < <http://www.theaustralian.news.com.au/story/0,25197,23583373-7583,00.html> > at 1 April 2009.

12 Hatzistergos, above n 2.

defence, applies to a given set of facts, one is defining the boundaries of a right. But one is only defining it in the limited sense of determining its application in a particular case. The inductive process of reasoning by which the common law develops, memorably described by Tennyson as

That codeless myriad of precedent
That wilderness of single instances
Where freedom slowly broadens down
From precedent to precedent

is a very different thing from the establishment of generic categories of abstract rights, which are to be applied *a priori*. In fact, to determine the application of rights by that means is to turn the inductive processes of the common law on their head.

This was essentially the same point made by Sir Robert Menzies when, after his retirement in 1966, he delivered an influential series of lectures on the Australian Constitution at the University of Virginia Law School. He said:

I am glad that the draftsmen of the Australian Constitution, though they gave close and learned study to the American Constitution and its amendments made little or no attempt to define individual liberties. They knew that, with legal definition, words can become more important than ideas. They knew that to define human rights is either to limit them – for in the long run words must be given some meaning – or to express them so broadly that the discipline which is inherent in all government and ordered society becomes impossible.¹³

There is a second way in which the cataloguing of rights may limit them. It may not only limit them by definition; it may just as easily limit them by omission. The point of a bill of rights is that, although necessarily general, it is also intended to be comprehensive. That is the case notwithstanding saving provisions like s 5 of the Victorian *Charter* and s 7 of the ACT *Human Rights Act* to which I have referred. In interpreting such statutes, it is hardly likely that a Court would fail to take cognizance of the fact that some particular rights have been identified, but not others. By the very fact of identifying certain rights (however defined), it declares that those identified rights have a certain status or privilege, which other putative rights, which are not recognised by the bill of rights, do not enjoy.

Take, for example, the right to private property. I suspect that most Australians would be very surprised to learn that the right to own and enjoy property was not a fundamental right. Yet the ACT Charter, while making extensive provision for civil and political rights which citizens of that Territory

¹³ Robert Menzies, *Central Power in the Australian Commonwealth* (1967), 52.

already enjoy, contains *no* provision recognising the right to own or enjoy the use of property, nor any other form of protection of economic relationships – for instance, the right to participate in commerce – whatsoever. The Victorian *Charter of Human Rights and Responsibilities* is scarcely better. The full extent of its protection of property rights is that afforded by s 20, which provides:

A person must not be deprived of his or her property other than in accordance with law.

How, in heaven's name, is that a protection? And what on earth does it add to the existing law? And yet the ACT Act does not even contain so lame a provision – no recognition of property rights at all.

A further and related problem with bills of rights, particularly in a federal system, is the consequences of inconsistency of legislative language. This problem is already evident in the comparison between the Victorian *Charter* and the ACT's *Human Rights Act*. For example, the Victorian *Charter* states: 'Every person has a right to life and has the right not to be arbitrarily deprived of life'.¹⁴ Whereas, the ACT *Act* states: 'Everyone has the right to life. In particular, no-one may be deprived of life'.¹⁵ The ACT *Act* goes on to qualify that statement by saying that: 'This section applies to a person from the time of birth'.¹⁶

What are judges to make from this inconsistent language? Does an unborn baby fall within the definition of 'every person' under the Victorian *Charter*? Does the ACT's *Act*, by expressly making the right contingent upon being born, deprive that soon-to-be-born child a right to life?

Similarly, the Victorian *Charter* provides an abstract right to 'freedom of expression ... by way of art',¹⁷ but the *Charter* qualifies that right by saying that there are 'special duties' which are attached and which are 'reasonably necessary' for such other competing interests like national security, public order or public morality.¹⁸

This right to 'freedom of expression by way of art' under the Victorian *Charter* should be contrasted with the equivalent provision in the ACT's *Human Rights Act 2004*. The ACT *Act* states¹⁹ that: 'Everyone has a right to freedom of expression', including 'by way of art'. But importantly, the ACT *Act* does not expressly qualify that right to freedom of expression by way of art by other competing public interests, like morality. In fact, in s 28 of the ACT *Act* – the general limitation clause – there is no reference to national security, public order or public morality.

14 section 9.

15 section 9(1).

16 section 9(2).

17 section 15(2).

18 section 15(3).

19 section 16.

The problem is that inconsistent expressions in the statutory words in each jurisdiction presents considerable difficulties to courts, who are charged with deciding (particularly in borderline cases), whether there is difference between these sections in substance, and how the jurisprudence of each of these abstract rights, variously described, is developed. Should a judge, seeing that there is no express qualification regarding public morality, define the ACT freedom of expression right in a broader and more liberating sense than the equivalent provision in the Victorian *Charter*?

The problem will become more, not less, acute with a Commonwealth bill of rights, since courts will undoubtedly seek to achieve comity with the existing State and Territory instruments, and to draw upon the jurisprudence which develops around them. What happens when even the most careful judicial reasoning fails to reconcile an inconsistency? Is something to be a fundamental right for Victorians under the Victorian Charter, but not a fundamental right for Victorians, as Australians, under the Commonwealth bill of rights?

Which brings us to the issue which is, in the minds of many commentators, notably Professor Jim Allen, the most powerful objection to the proposed bill of rights. The enactment of a bill of rights which makes those rights justiciable effects a massive transfer of the power of the Parliament to define and give meaning to rights, to un-elected judges, who are not best suited to exercising that discretion.

The strength of our legal system is the age old maxim: judges determine what the law *is*, as opposed to, what the law *should* be. When we ask judges to give meaning to abstract rights, with little or vague guidance, we are asking judges to become legislators. By training and experience, the role of deciding what should be, as opposed to are, is best left with those who enjoy – from time to time – the democratic mandate of the electorate.

In the words of John Hatzistergos:

A Charter is wrong because it moves the debate about rights out of the political arena and places it in the judicial sphere. It is wrong because it removes from democratic Parliamentary processes and distances ordinary citizens from an important part of political life.²⁰

Bob Carr makes a similar point about the antidemocratic consequences of a Bill of Rights. In his submission to the New South Wales Parliament's inquiry into a bill of rights for that State, he said:

Parliaments are elected to make laws. In doing so, they make judgements about how the rights and interests of the public should be balanced. Views will differ in any given case about whether the judgment is

²⁰ Hatzistergos, n 2, 13.

correct. However, if the decision is unacceptable, the community can make its views known at regular elections. This is our political tradition. A bill of rights would pose a fundamental shift in that tradition, with the Parliament abdicating its important policy making functions to the judiciary... A bill of rights is an admission of the failure of parliaments, governments and the people to behave in a reasonable, responsible and respectful manner. I do not believe that we have failed.²¹

As rights are not absolute, then rights, abstractly expressed in a legislative enactment must be justiciable. Judges would be called on to decide when a right begins or finishes. If we are to require judges to decide when a right should, or should not, apply in any given factual circumstance, then we are requiring judges to decide what the law should or should not be.

This problem is best illustrated by looking at the qualification contained in the Canadian *Charter of Fundamental Rights and Freedoms* which are said to be 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.²² In Canada, the Charter requires judges to determine the reasonable limits of the many enumerated rights. What is so striking about this provision, and its equivalent in the Victorian *Charter of Human Rights and Responsibilities 2006*²³ and the ACT's *Human Rights Act 2004*²⁴ is their utter generality – and, I might add, banality.

Under the regimes in Victoria and the ACT, a judge will not be able to strike out legislation that is inconsistent with the Charter. Instead, judges will be encouraged to adopt whatever reading of the legislation that makes it consistent with the rights (and which of these if the rights compete with each other, I might ask) contained in the Charter. This, of course, is a mere invitation to judicial legislating. Considering a similar provision in the United Kingdom's *Human Rights Act*, the House of Lords held, 'the interpretative obligation [in the Act] is a very strong and far reaching one, and may require the courts to depart from the legislative intention of Parliament'.²⁵

21 Bob Carr, 'Submission to the Standing Committee on Law and Justice Inquiry into a NSW Bill of Rights' 9 January 2001,

22 *Charter of Fundamental Rights and Freedoms*, Article 1.

23 *Charter of Human Rights and Responsibilities Act 2006*, s 7(2): 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including ...'.

24 *Human Rights Act 2004* (ACT), s 28(1): 'Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society'.

25 *Sheldrake v Director of Public Prosecutions, Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264.

Speaking extra-judicially, New South Wales Chief Justice Spigelman describes the ‘rights compliant’ provision in the UK Human Rights Act as ‘a substantial change in the relationship between Parliament and the judiciary’. He identifies a conundrum, whereby ‘the intention of Parliament expressed in section 3 of the Human Rights Act is applied to override the intention of Parliament at the time that the other legislation, including subsequent legislation, is enacted ... In substance, it constitutionalises the Human Rights Act’.²⁶

Parliaments are the proper institutions under our system to decide what rights should be further developed or qualified by competing interests. Parliaments are the proper institutions to decide when free speech becomes pornography, the circumstances when security agencies should be able to limit an individual’s liberty, or the circumstances when public assemblies jeopardise public order. Yet, under a bill of rights, these would be questions not for Parliaments, but for the judiciary.

The transfer of power from Parliaments to the judiciary may be, if the Canadian and New Zealand experience are any guide, more extensive than the effect it might have on individual cases. In Canada, the Charter of Rights has been used to subject the decisions of governments and parliaments about resource allocation, to judicial review. Bob Carr cites the Canadian example, where the provincial legislature of British Columbia sought to redress the issue of the shortage of rural doctors – an issue with which those in this audience would be well familiar – by a scheme of incentives to attract new graduates to the Province. This measure was challenged successfully in the Supreme Court of the province, on the grounds that it violated the provisions of s 6 of the Canadian Charter (‘mobility rights’) and s 7 (the ‘right to life, liberty and security’). As Carr notes, ‘Canada’s rural population is still under-served by doctors, thanks to judges who want to write society’s rules’.²⁷ In New Zealand, an increase in public housing rental was challenged on the ground that it was a violation to a tenant’s ‘right to life’.²⁸

It may well be that, in each of those cases, there were good reasons to question the decisions of government on *policy* grounds. But are these really decisions which judges should be making? There are two related vices in subjecting such decisions to judicial review. First, it changes the discourse from an argument about how best to allocate resources to serve the interests of society as a whole, to an argument about the (asserted) rights of a particular individual. It changes an argument about social benefit to an argument about

26 James Spigelman ‘The Application of Quasi-Constitutional Laws’, (Lecture delivered at University of Queensland, 11 March 2008).

27 Cited in Bob Carr, ‘Lawyers are already drunk with power’, *The Australian* 24 April 2008 <<http://www.theaustralian.news.com.au/story/0,25197,23588943-7583,00.html>> at 1 April 2009.

28 *Lawson v Housing NZ* [1997] 2 NZLR 474.

individual claims. And so, it decontextualises what should be a decision about public policy, in which the claims of all stakeholders are weighed against each other and placed in the context of overall social benefit, and replaces it with a litigious process in which all such considerations must yield to a claim of right, once established, and in which there are no – or very limited – opportunities for the voices of other interests to be heard.

The second vice follows from the first: it means that decisions which determine social policy outcomes are transferred from the elected government, answerable to a representative Parliament, to a judiciary which is neither elected nor representative – nor, I might add, equipped by its training and experience to make such decisions. This leads to yet another problem: by charging judges to apply the law's traditional decision-making techniques to what are, often, properly matters of public policy, it risks exposing judges to the complaint that they are acting politically, not judicially, and thus potentially undermines the Courts' reputation for neutrality. In Carr's words: '... a bill of rights will unduly politicise the judiciary. Judges will be seen more and more as policymakers, undermining the role and independence of the judiciary.'²⁹

Let me next deal with the claim, made by proponents of the case for a bill of rights, that Australia is almost alone among developed democracies in not having one. Indeed, in his press conference of 5 December, this was actually the only substantive argument advanced by Mr McClelland as to why Australia needed a bill of rights. The simplest rejoinder is that Australia does not have a bill of rights because it has never felt the need of one – that fact alone demonstrates the strength of our protection of rights and liberties, not its weakness. I said at the start of this speech that one of Australia's proudest claims was that our democracy was itself created at the ballot box. That fact itself – the peacefulness with which our institutions came into being – has had an important bearing upon our political and legal culture, which distinguishes us from those democracies whose freedom was won by wars of independence, and purchased with the blood and treasure of their citizens. For instance, the United States Bill of Rights reflected the birth pangs of the republic: where nationhood was achieved by revolutionary war, and built upon the Enlightenment belief 'that all men are created equal, that they are endowed by their creator with certain inalienable rights', it was both appropriate and necessary for the founders to enshrine those beliefs in its foundational document.

But we in Australia have had no such searing experience, and if that makes our constitutional history a little more prosaic, we are none the worse for it. Indeed, just as the revolutionary wars defined America's political culture and have fundamentally shaped its course ever since; so the peaceable,

²⁹ Carr, above n 1.

intrinsically – indeed, presumptively – democratic circumstances of Australia’s birth have defined ours. And they have defined and shaped them in a particularly understated, low-key and pragmatic way, in which the rhetoric of demagogues, and passionate assertions about the rights of man, have seldom struck a chord. We are, if I may borrow a phrase from the former Prime Minister, ‘relaxed and comfortable’ about ourselves as a nation, so confident in our liberal democracy have we been. And if, as I said earlier, this sometimes gives rise to the national vice of complacency, that is the defect of our quality: the strength and success of our institutions.

A bill of rights can be appropriate and effective where it reflects the public culture of a nation, as it does in the United States. But where the public culture is inhospitable to the rights of the individual, no amount of grandiose language will change it, and bills of rights become meaningless constitutional baubles – as the Nazi bill of rights (which guaranteed ‘the dignified existence of all people’), the Soviet Constitution, and the bill of rights of modern Zimbabwe, chillingly attest. Conversely, in a nation such as Australia, the very strength of our liberal democratic culture is the strongest reason why such an instrument is redundant. In the words of the distinguished American jurist, Learned Hand:

This much I think I do know – that a society so riven that the spirit of moderation is gone, no Court can save; that a society where that spirit flourishes, no Court need save; that in a society which evades its responsibility by thrusting upon the Courts the nurture of that spirit, that spirit in the end will perish.³⁰

Lastly, the case against a bill of rights which does not spring spontaneously from the circumstances of a nation’s very creation, but merely embodies the values of one particular generation of politicians and academics, is that it is a conceit. It is a claim to take the received opinions of one random point in time – 2008 – and say that we alone, not the founding fathers, not those who built the nation over successive generations, not all the generations yet to come, have the right to say what is fundamental to being an Australian. In the words of Justice Keane:

Our Framers were not indifferent to the rights of individuals; they were, however, content to entrust those rights to a legislature composed of citizens with an equal stake in individual rights as a check upon executive governments which depended for their existence upon the continuing confidence of the legislature ... In embracing this ideal our Framers were taking a gamble on the political wisdom of future generations. They were, at this same time, exhibiting a modest appreciation of their

30 Learned Hand, *The Spirit of Liberty* (1954) 164.

own wisdom. That is to say, they were not so arrogant as to attempt to entrench their own views and priorities whatever the wishes of future generations. Had they done so, we might still be wrestling with the White Australia Policy.³¹

And so, the Founding Fathers created a democratic structure which left it to each succeeding generation to determine what was best for the Australia of its time, decided not by the unelected arm of government, but by elected governments and Parliaments. It would be difficult, given the century of the Australian experience, to say that they were not wise to do so. At constitutional referenda in 1944 and 1988, successive generations have followed the Founding Fathers' wisdom and have resisted the temptation, urged by the politicians of their day, to entrench their own views, priorities and prejudices for all time. As we yet again embark on the bill of rights debate, the question is: are we modest enough to trust our children to make their own decisions in another generation's time?

31 Keane, above, n 6.

Chapter Three

Responding to Some Arguments in Favour of the Bill of Rights

JULIAN LEESER*

There are two key arguments often advanced in favour of a bill of rights. The first argument is that bills of rights are a good way to address human rights problems. The second is that Australia is the only major democracy without a bill of rights and that we will face isolation if we do not adopt one.

Neither of these arguments are supported by past experience. In relation to the first argument, the evidence presented by the four bill of rights inquiries, conducted in Australia in recent years, simply does not illustrate a problem of widespread human rights shortcomings requiring a bill of rights. Most of the examples of ‘rights abuses’ amount to failures in bureaucratic and political leadership which can be corrected in other ways. Moreover, even in jurisdictions which have adopted bills of rights, those bills have failed to address the concerns previously identified.

The second oft-cited argument, that of Australian exceptionalism, fails to acknowledge the different legal, political and historical circumstances which exist in Australia as compared with other English-speaking western democracies.

There are, of course, many other arguments advanced by bills of rights advocates but these two arguments are the most ubiquitous and deserve detailed refutation.

I A Bill of Rights is not the Solution to Rights Deficiencies

Since 2003, bill of rights inquiries have been commissioned by Labor governments in the ACT,¹ Victoria,² Western Australia³ and Tasmania.⁴ Each of these inquiries identified what their authors consider to be human rights abuses.

* I would like to thank Ben Davies and James Allan for their helpful suggestions and Joanna Davidson for sustaining me while I worked on this book. The views in this chapter are the author’s own.

1 Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, (2003) (hereafter ‘ACT’).

2 Human Rights Consultation Committee (Vic) *Rights Responsibilities and Respect* (2005) (hereafter ‘Vic’).

3 Consultation Committee for a proposed WA Human Rights Act, *Report* (2007) (hereafter ‘WA’).

4 Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (2007) (hereafter ‘Tas’).

In 2008, the Rudd government established the Brennan Committee to inquire into a possible federal bill of rights.⁵ The four completed inquiries have highlighted perceived deficiencies in the law, especially in its application and administration by bureaucrats.

There is no evidence to suggest that bills of rights solve the problems identified. A bill of rights will do (and as the Appendix to this chapter shows, has done) little to address the direct concerns of those who have had a negative experience with government. It is only through specific legislative changes, directed to particular circumstances, or through political and bureaucratic leadership, coupled with the education of public servants that people's experience with government will be improved.

The tables in the appendix to this chapter illustrate that the Victorian and ACT bills of rights, once enacted, have failed to address the issues raised as justification for having a bill of rights by the inquiries that recommended their enactment. In some instances those governments still have not addressed the concerns years after the inquiries reported. The fact that these concerns have still not been addressed seriously undermines the argument that a bill of rights changes the culture of government in dealing with human rights issues. In Victorian inquiry chair George Williams' own words '[r]ights are meaningless unless they exist within a supportive legal, political and cultural environment.'⁶

One of the most important issues in government is the quality of service delivery. The way government impacts regularly and directly on most citizens is through its provision of public hospitals, schools, motor registry offices, refuse collection services and so on.

Many of the significant problems identified by the bill of rights inquiries arise not from what would be commonly regarded as human rights abuses but from poor service delivery. The WA Inquiry observed:

One of the strongest themes to emerge from both the public forums and the written submissions was the relevance of effective service delivery (including culturally appropriate and timely service delivery) to the enjoyment of human rights, particularly in regional areas.⁷

The Western Australian inquiry also heard examples of bureaucratic arrogance. The inquiry found evidence that 'family members had been ignored by hospital staff', nursing home staff mistreated patients, 'ignoring their requests for

5 Robert McLelland, 'Rudd Government Announces National Human Rights Consultation' (Press Release 10 December 2008) (hereafter 'the Brennan Committee') < http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_FourthQuarter_10December2008-RuddGovernmentAnnouncesNationalHumanRightsConsultation > at 20 April 2009.

6 George Williams, *A Charter of Rights for Australia?* (2007) 87.

7 WA, above n 3, 25.

medical assistance and by shunting them around between homes.’ An adoptive parent ‘believed she had been treated without respect by the authorities’. Grandparents ‘had been ignored’ in custody proceedings; landowners waiting for decisions about their properties ‘felt they had been treated disrespectfully as well as unfairly by the authorities’; local councils were ‘abusing their power and demonstrating a lack of respect for ... rights to free speech and enjoyment of ... property without undue interference’,⁸ police were failing ‘to respect the rights of those in detention’, carers of people with disabilities were ‘ignored by the authorities’ and there was the creation of a ‘bureaucratic culture where all people are regarded with suspicion and treated accordingly’.⁹ General observations made to the WA inquiry included:

- ‘Government often acts in an arrogant way – they simply swoop in and do what they like.’
- ‘The Government officials do not understand where people come from – physically and culturally.’
- ‘There is a problem with a lack of understanding of people’s needs.’¹⁰

Shortly after the Western Australian inquiry report was handed down an election was held and the Government which had been deficient in service delivery was voted out of office, suffering large swings, especially in rural areas. This is the traditional and appropriate method of expressing a community’s concerns about a government’s performance in delivering services, whether or not service delivery is a human right.

The Tasmanian inquiry revealed that treatment of people with intellectual disabilities showed a degree of bureaucratic arrogance, including a ‘lack of dignity and respect’ from ‘service providers and those charged with safeguarding their interests’. This took the form of ‘disregard for their wishes and their exclusion from decision-making about matters affecting them’.¹¹ The Wagga Wagga meeting of the Brennan Committee also acknowledged the importance of ‘developing a culture of respect’ amongst those responsible for government service delivery.¹²

All of these matters are cultural and require Ministers and heads of departments, especially those in charge of service provision, to instil in their staff that the public is to be treated with respect. The quality, disposition and attentiveness of staff in these front line areas is variable. Undoubtedly

8 Ibid 28.

9 Ibid 29.

10 Ibid 32.

11 Tas, above n 4, 23.

12 Brennan Committee, ‘Wagga Wagga Roundtable a Whopper’ <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/ConsultationNews_WaggaWagga_roundtableawhopper> at 20 April 2009.

government departments could provide better quality service. This requires an attitudinal change which is best achieved through bureaucratic leadership and prioritisation of customer service.

Bill of rights proponents think that a bill of rights will improve the culture of public services, presumably by its mere presence. It is eminently possible to improve public service culture without a bill of rights, whilst the presence of bills of rights in the other English-speaking countries has not resulted in a demonstrably superior bureaucratic culture, as graphically illustrated by the treatment of people in New Orleans after Hurricane Katrina,¹³ school closures without consultation in the ACT,¹⁴ scandals at Wellington Hospital in New Zealand,¹⁵ and the treatment of bush fire victims in Victoria.¹⁶

The second common theme in the reports of the four inquiries was perceived shortcomings with specific Acts of Parliament, all of which can be remedied on a case-by-case basis without a bill of rights.

Indeed, one of the most disappointing things about the four state bill of rights inquiries is that each reported evidence of shortcomings in the relevant equal opportunity and disability discrimination laws,¹⁷ yet none of them made specific recommendations to amend or otherwise improve those laws. The Brennan Committee has also received evidence of inadequacies in the area of discrimination law.¹⁸ Hopefully, it might consider specific amendments to anti-discrimination legislation as an alternative to a bill of rights. It makes more sense to remedy inadequate legislation by directly amending it, rather than by hoping a bill of rights will cure the problem in a more indirect way.

The four reports also cited other examples of perceived problems that could be dealt with by ordinary legislation. These included criminal laws dealing with people with intellectual disability, police search and seizure,¹⁹ humane treatment of prisoners and detainees, prohibitions against retrospective criminal laws,²⁰ prohibitions on torture,²¹ onus of proof

13 'After Hurricane Katrina' *Online News Hour*, 9 September 2005 <http://www.pbs.org/newshour/bb/weather/july-dec05/katrina/fema_background.html> at 20 April 2009.

14 'Budget's School Closures Shock Parents' *ABC News Online*, 6 June 2006 <<http://www.abc.net.au/news/newsitems/200606/s1656763.htm>> at 20 April 2009.

15 See for example 'Call for Calm over CCDHB' <<http://www.stuff.co.nz/national/167296>> at 20 April 2009 and Keith Lynch, 'Satisfaction Survey Sent to Dead Girl' <<http://www.stuff.co.nz/national/health/1389575>> at 20 April 2009.

16 'Groups Demand Victims Have say at Royal Commission' *ABC News Online*, 20 April 2009 <<http://www.abc.net.au/news/stories/2009/04/20/2547199.htm>> at 20 April 2009.

17 See WA, above n 3, 24, 28-29, 30-31; Vic, above n 2, 6-7; ACT, above n 1, 19-20; Tas, above n 4, 22-24.

18 National Human Rights Consultative Committee, 'Queanbeyan Consultation Starts with a Bang' <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Consultation_News_Queanbeyanconsultationstartswithabang> at 14 April 2009.

19 WA, above n 3, 36.

20 Vic, above n 2, 5.

21 Ibid and Tas, above n 4, 22.

reversals,²² use of video surveillance,²³ the number of juror challenges an accused is allowed,²⁴ laws dealing with taunting and vilification of Muslims,²⁵ Indigenous people,²⁶ and sexual minorities,²⁷ discrimination against the mentally ill,²⁸ and children suffering from violent behaviour.²⁹ All these concerns can be easily addressed directly through specific legislation. Surprisingly though, no recommendations were made by any of the four inquiries to address these concerns.

A third genre of complaints concerned breaches of existing laws. Citizens do not always realise that they have existing rights which they can enforce, even without a bill of rights. For instance, the four inquiries were alerted to breaches of women's rights including female employees being paid less than their male predecessors performing precisely the same work, pregnant women being sacked,³⁰ women being sexually harassed,³¹ and inappropriate procedures relating to strip searching in prisons and mental health facilities.³² These are all illegal under the current law and those making submissions should have been encouraged to use the mechanisms currently available to seek redress and enforce their rights.

A recurring theme in the inquiry reports and submissions was dissatisfaction with four Howard Government policies: industrial relations, migration detention, counter-terrorism laws and the Northern Territory Intervention. Some of the complaints were expressed in rights language whilst other submissions were simply venting their author's disagreement with the policy on a political basis. It is worth examining these four policies in the context of proposals for a bill of rights.

Disagreement with industrial relations reforms was raised as a supposedly relevant issue by proponents of bills of rights.³³ However, the example of industrial relations, better than most others, proves the case against a bill of rights. The argument for the current rights protection system is that if voters

22 Tas, above n 4, 26.

23 Ibid 22.

24 Ibid 23.

25 WA, above n 3 25, Vic, above n 2, 7 and ACT, above n 1 20.

26 Vic, above n 2, 7, WA, above n 3, 24 and ACT, above n 1, 19-20.

27 Vic, above n 2 7, Tas, above n 4, 24 and WA, above n 3, 25.

28 Tas, above n 4, 25, ACT, above n 1, 19, WA above n 3, 24, Vic, above n 2, 7 and Brennan Committee, 'Plenty of Ideas in Penrith' <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/ConsultationNews_PlentyofideasinPenrith> at 20 April 2009.

29 Tas, above n 4, 28 and ACT, above n 1, 18

30 ACT, above n 1, 20.

31 Tas, above n 4, 25.

32 See for example WA, above n 3, 30; Vic, above n 2, 7, ACT, above n 1, 19 and Tas, above n 4, 37.

33 Tas, above n 4, 21, 27 and Brennan Committee, 'Broken Hill Tells US How to Fix It. *Non Lawyers Welcome!*' <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/ConsultationNews_BrokenHilltellsushowtofixit> at 20 April 2009.

think that a government has the wrong balance on a particular issue then they can throw the government out. In 2005 the Howard Government enacted the WorkChoices laws. These laws were a major subject of debate in the lead-up to the 2007 election which saw a change of government. Responding to that debate in 2009 the Rudd Government enacted new industrial relations laws.

The second area raised was that of migration detention.³⁴ Australia has had a migration detention policy for most of its history. Since 1992, when the policy was first introduced by the Keating government, people who were in Australia without a valid visa have been mandatorily detained.³⁵ Migration detention has been used as a means of deterrence both for people smugglers and for those people in Australia who might seek to unlawfully remain beyond the term of their visa. Australia has always had an orderly migration program, welcoming migrants at a time and pace that maintains public confidence in the program. It is possible that Australia has been spared some of the tensions and acts of violence against minority groups seen in Europe in part because of our orderly migration program.

At various times the migration policy was thought to be either too harsh or too soft. Parliament has been the institution best placed to test the public mood to see whether the laws need liberalising or tightening. For instance, during the life of the Howard Government, a number of Government backbenchers were able to achieve a series of changes to the migration detention policy.³⁶ The Rudd government has continued to liberalise migration detention laws.³⁷ As a series of boats carrying asylum seekers have begun to arrive questions

34 Submissions from Russell Blackford <[http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(712B446AA84F124A6F0833A09BD304C8\)-Russell_Blackford_AGWW-7NNBRL.doc/\\$file/Russell_Blackford_AGWW-7NNBRL.doc](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(712B446AA84F124A6F0833A09BD304C8)-Russell_Blackford_AGWW-7NNBRL.doc/$file/Russell_Blackford_AGWW-7NNBRL.doc)> at 20 April 2009, Laura Ealing, <[http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)-Laura_Ealing_AGWW-7P55KZ.pdf/\\$file/Laura_Ealing_AGWW-7P55KZ.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)-Laura_Ealing_AGWW-7P55KZ.pdf/$file/Laura_Ealing_AGWW-7P55KZ.pdf)> at 20 April 2009 and Noel Cranswick <[http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(712B446AA84F124A6F0833A09BD304C8\)-Noel_Cranswick_AGWW-7MSTU6.pdf/\\$file/Noel_Cranswick_AGWW-7MSTU6.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(712B446AA84F124A6F0833A09BD304C8)-Noel_Cranswick_AGWW-7MSTU6.pdf/$file/Noel_Cranswick_AGWW-7MSTU6.pdf)> at 20 April 2009 and TAS, above n 4, 21, 28.

35 *Migration Reform Act 1992* (Cth) s 13.

36 These changes gave the minister discretion to remove families with children from detention centres, grant a visa to anyone in detention, to set time limits on departmental decision making and have the ombudsman review cases of anyone detained for more than two years. See John Howard 'Immigration Detention' (Press Release 17 June 2005) <http://pandora.nla.gov.au/pan/10052/20060921-0000/www.pm.gov.au/news/media_releases/media_Release1427.html> at 20 April 2009. Pressure from a similar group of backbenchers also prevented the Government passing a bill which would have seen all unlawful boat arrivals processed offshore. See John Howard, (Press Conference 14 August 2006) <<http://pandora.nla.gov.au/pan/10052/20060921-0000/www.pm.gov.au/news/interviews/Interview2073.html>> at 20 April 2009.

37 See Chris Evans, 'New Directions in Detention: Restoring Integrity into Australia's Immigration System' (Speech delivered at the Australian National University, Canberra, 29 July 2008) <<http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>> at 20 April 2009. The essence of the Rudd Government's changes have been ending temporary protection visas, closing offshore processing centres, removing all children from detention and releasing detainees into the community once health, identity and security checks are undertaken.

have been raised about whether this policy has undermined the deterrent effect of the migration detention policy. Under the current system achieving the balance in migration policy is a matter for Parliament, and Parliament has made a number of changes. In Britain, because of the interpretation given to the migration laws as a result of their *Human Rights Act*, the government's ability to maintain control over its migration program has been significantly undermined.³⁸

In the context of migration detention, bills of rights supporters argue that if Australia had a bill of rights the government would not be able to detain people indefinitely.³⁹ This argument is founded in some comments of McHugh J in the case of *Al-Kateb v Godwin*.⁴⁰ A view has emerged that Australia should have a bill of rights because one High Court Judge, now retired, felt uncomfortable about a decision his legal reasoning led him to make. But even in the absence of a bill of rights three High Court judges felt their legal reasoning compelled them to the opposite result.

In *Al-Kateb*, by a majority of 4:3, the High Court upheld the continuing detention of Mr Al-Kateb, a stateless Palestinian who was unable to be repatriated to his homeland or a range of other countries. He was released from the detention centre in 2002 while he was waiting to be repatriated.⁴¹ His case came to the High Court on the question of the interpretation of two provisions of the *Migration Act 1958* (Cth).⁴²

The judgment of the Court is most notable for the debate between McHugh and Kirby JJ about methods of constitutional interpretation, especially Kirby J's method of interpreting the constitution 'consistent with the principles of the international law of human rights and fundamental freedoms.' In the context of preferring a bill of rights to Kirby J's method of interpretation, McHugh called for a constitutionally entrenched bill of rights. He held that 'If Australia is to have a Bill of Rights, it must be done in the constitutional way – hard though its achievement may be – by persuading the people to amend the Constitution by inserting such a Bill.'⁴³

Due to changes in government policy, lobbying the Minister by Members of Parliament and prominent citizens including Gerard Henderson (a bill of rights sceptic) Mr Al-Kateb was given a visa. Indefinite detention was not the intention of the law. It was the unfortunate consequence of people being

38 On this point see the paper by Felicity McMahon elsewhere in this volume.

39 See for example Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back their Rights*, (2009) 104-105.

40 [2004] HCA 37.

41 David Marr, 'Escape from a Life in Limbo', *Sydney Morning Herald*, 26 October 2007 <<http://www.smh.com.au/news/national/escape-from-a-life-in-limbo/2007/10/26/1192941339538.html>> at 20 April 2009.

42 *Migration Act 1958* (Cth) ss 196, 198.

43 [2004] HCA 37 [73] (McHugh J).

unable to be repatriated to their country of origin or to a third country at a particular time. The political processes granted Mr Al-Kateb his freedom. Under a bill of rights it may be that Mr Al-Kateb would not have been detained at all because of an interpretation of law that a court is forced to arrive at by reading legislation consistent with a human rights instrument. This might not be problematic in the case of Mr Al-Kateb but in another case there may be reasons for not releasing such a person into the community, for instance, where a person 'is shown to be a danger to the community, or to be likely to abscond... [or that] the detainee is regarded by his country of nationality, and other countries, as a dangerous person.'⁴⁴ In this case the ordinary parliamentary and legal processes eventually produced a good result while allowing maximum flexibility for policy makers. A bill of rights conversely may introduce major inflexibilities and uncertainties into the system.

Also in the context of migration detention the cases of Vivian Solon and Cornelia Rau have been mentioned.⁴⁵ No one would want to defend what happened to Ms Solon and Ms Rau and, indeed, they each received apologies from the Government.⁴⁶ Their cases represented serious administrative failures. Our current system has methods of addressing failures of this kind. Independent inquiries were established under Mick Palmer and Neil Comrie respectively. Recommendations were made and accepted by government to improve processes and coordination. Ms Rau received \$2.6 million in compensation in addition to her legal costs.⁴⁷ Ms Solon initiated a compensation claim, obtained the services of Marcus Einfeld,⁴⁸ and had her claim mediated by no less a figure than the former Chief Justice of Australia, Sir Anthony Mason. Media reports suggest that she received a settlement of \$4.5 million.⁴⁹ While these women had terrible experiences, it reflects well on the value Australians place on rights that they were compensated. However, it is a mistake to think that a bill of rights will stop wrongful detention happening again. As a further aside, both the current Victorian and ACT bills of rights specifically prevent the awarding of any compensation for a breach of human rights. Ultimately, only better bureaucrats and better

44 [2004] HCA 37 [29] (Gleeson CJ.).

45 TAS, above n 4, 28

46 ABC Television, 'PM Apologises to Rau and Solon' *Lateline* 14 July 2005, <<http://www.abc.net.au/lateline/content/2005/s1414689.htm>> at 20 April 2009

47 AAR, 'Rau Wins \$2.6 Million in compo' *Sydney Morning Herald* 7 March 2008 <<http://www.smh.com.au/news/national/rau-wins-26m-compo/2008/03/07/1204780046361.html>> at 1 April 2009 and Chris Evans, 'Cornelia Rau's Settlement Offer Finalised' (Press Release 7 March 2008) <<http://www.minister.immi.gov.au/media/media-releases/2008/ce08021.htm>> at 1 April 2009.

48 See for instance ABC Radio, 'Solon Compensation case begins', *The World Today* 27 March 2006 <<http://www.abc.net.au/worldtoday/content/2006/s1601753.htm>> 20 April 2009.

49 ABC Television 'Vivian Solon Awarded Compensation' *Lateline* 30 November 2006 <<http://www.abc.net.au/lateline/content/2006/s1801600.htm>> at 1 April 2009.

quality systems together with strong political leadership will reduce the chance of these sorts of situations occurring.

Another area of policy concern was counter-terrorism laws.⁵⁰ Australia enacted these laws after September 11 to meet the changing security environment.⁵¹ These laws were enacted by both Coalition and Labor governments at federal and state level, with bipartisan support. Counter-terrorism cases are not always in the news and it can be easy to forget that Australia is and has been a terrorist target. The most recent annual report of the Office of the Commonwealth DPP records that as at 30 June 2008, '26 people were charged with Commonwealth terrorism offences ... 21 were currently in custody, and five had been granted bail pending their trial.' The report also notes two large trials involving nine and 12 people are under way, another two were expected to commence shortly and another person's conviction which was quashed is due for retrial.⁵² In the same year the AFP finalized 35 counter terrorism investigations and had 76 on-going investigations.⁵³

The existing anti-terrorism laws play a real part in preventing a terrorist attack. In November 2005 the Parliament was recalled to change one word in an Act which provided a legal basis for the arrest of seven people only a few days later on terrorism charges.

Many of the submissions critical of anti-terrorism laws appeared to be premised on the argument that such supposed limits on rights were inherently wrong and that the political process (and the Australian people themselves) got it wrong by placing a premium on community security. Typical of this view was the comments of the Victorian Equal Opportunity Commission, which in 2006 hosted a 'human rights oration' on anti-terrorism laws and other subjects by barrister Julian Burnside. The Commission promoted the event in the following terms:

Mr Burnside blames a weak Opposition, a compliant media and Government fear mongering about the threat of terrorism for the erosion of human rights in Australia.⁵⁴

50 WA, above n 3, 36, Vic, above n 2, 12, Tas, above n 4, 27, Ealing, above n 34 and Brennan Committee 'Queanbeyan Consultation Starts with a Bang' <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/ConsultationNews_Queanbeyanconsultationstartswithabang> at 20 April 2009.

51 Daryl Williams, 'Condolence Motion' 17 September 2001 <<http://pandora.nla.gov.au/pan/10285/20020811-0000/www.ag.gov.au/ministers/attorney-general/articles/condolence.html>> at 20 April 2009.

52 Commonwealth DPP, *Annual Report 2007–008* (2008) 46.

53 Australian Federal Police, *Annual Report 2007–2008*, (2008) 48.

54 Victorian Equal Opportunity Commission 'Protecting Rights in a Climate of Fear,' (Press Release 12 December 2006) <<http://www.humanrightscommission.vic.gov.au/News%20and%20Events/media%20releases/20061212.asp>> at 20 April 2009.

Nonetheless, human rights concerns were at the forefront of the design of the laws through a range of oversight mechanisms such as limits on detention for questioning, which requires the permission of a prescribed authority (usually a sitting Judge).⁵⁵ When the Howard Government made changes to the sedition laws it received concerned feedback from its backbench and the matter was referred to the Australian Law Reform Commission for independent review.⁵⁶

Anti-terrorism laws brought into sharp focus the competing principles which so often arise in consideration of human rights, and the inherent tension between rights and other legitimate concerns. The former Attorney-General Philip Ruddock observed:

Unfortunately the debate on counter-terrorism issues has been dominated by traditional analysis of protecting either national security, or civil liberties, as if the protection of one undermines the protection of the other... This discourse is unhelpful as it implies that counter-terrorism legislation is inevitably at odds with the protection of fundamental human rights ... failing to recognise that national security can in fact promote civil liberties (by preserving a society in which rights and freedoms can be exercised), will inevitably lead to the incorrect conclusion that civil liberties have been overlooked in an effort to promote national security.⁵⁷

Of course, even in the area of counter-terrorism mistakes can happen, as in the case of Dr Hanneef.⁵⁸ Like the mistakes that occurred in the context of migration detention an independent inquiry was undertaken by John Clarke QC, who interviewed, among others the former Prime Minister, Attorney-General and Immigration Minister and made a series of recommendations, which have been adopted by the Government. The Haneef case is another case of bureaucratic failure which is best addressed not by the introduction of a bill of rights with all its vagaries but by implementing the recommendations of the Clarke review, which are designed to lead to specific improvements in the areas of counter-terrorism detection and prosecution.

55 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth).

56 It should be noted that a number of bill of rights advocates want to challenge the sedition laws. See Cynthia Banhan, 'Sedition Laws Under Threat' *Sydney Morning Herald*, 11 December 2008, 2.

57 Philip Ruddock, 'A New Framework: Counter Terrorism and the Rule of Law' (Speech to the Sydney Institute, Tuesday 20 April 2004, Sydney) < http://pandora.nla.gov.au/pan/21248/20071114-1542/www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_20_April_2004_-_Speech_-_A_New_Framework__Counter_Terrorism_and_the_Rule_of_Law.html > at 16 April 2009.

58 WA, above n 3, 37, Cranswick, above n 34.

The final area of complaint was the Northern Territory Intervention.⁵⁹ The Intervention happened in response to the *Little Children Are Sacred* report which detailed numerous instances of abuse of Indigenous children in remote communities. The federal government intervened to restore the rule of law to these communities and to restore some hope for Indigenous children who were displaying signs of serious neglect and sexual abuse. The Intervention has removed certain rights of people in the communities while restoring others. Among other things the Intervention has placed bans on alcohol and pornography, introduced more police, expanded night patrols and created safe houses for women and children experiencing violence. Parents have been placed on income management for welfare payments and the Intervention has also provided for health checks and follow-up treatment for children and support for children who have been abused.⁶⁰

There have been complaints by human rights lawyers that Indigenous elders were not consulted and that this, and other elements of the intervention breach the *Racial Discrimination Act 1975* (Cth). These complaints seem to value abstract adherence to rights legislation more highly than practical solutions to deal with truly horrific rights abuses of the most extreme kind. As former Minister Mal Brough noted:

We can talk about land rights, we can talk about permit systems or we can actually deal with the difficult core issues of children being raped, babies with gonorrhoea, children having their absolute hearts ripped out by people who are supposed to be people of authority, and we can say, no more. If we do that, then we, as a nation, can look ourselves in the eye again.⁶¹

The Government took the view that the rule of law had broken down to such an extent that it had no choice but to intervene as and when it did.⁶² In that vein the Government chose to amend the *Racial Discrimination Act* to clarify its operation. As Mal Brough observed in his Second Reading speech:

The provisions of the bills for the Northern Territory national emergency response are drafted as “special measures” taken for the sole purpose of securing the advancement of Indigenous Australians. The impact of sexual abuse on Indigenous children, families and communities requires

59 WA, above n 3, 37.

60 About the Northern Territory Emergency Response <http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/Pages/about_nter.aspx> at 27 April 2009.

61 Mal Brough, ‘Commonwealths Intervention into Aboriginal Communities in the Northern Territory’ (Speech to the National Press Club, Canberra, 15 August 2007) <http://pandora.nla.gov.au/pan/48207/20071017-0012/www.ofw.facs.gov.au/internet/minister3.nsf/content/transcript_nter_15aug07.html> at 1 April 2009.

62 ABC Television ‘Brough defends intervention laws’ *Lateline*, 7 August 2007 <<http://www.abc.net.au/lateline/content/2007/s1999216.htm>> 10 April 2009.

decisive and prompt action. The Northern Territory national emergency response will protect children and implement Australia's obligations under human rights treaties.⁶³

This has not stopped lawyers from trying to take pot shots at the new laws.⁶⁴ The Northern Territory Intervention should be celebrated as a practice consistent with human rights principles – the protection of children from physical, sexual and psychological abuse. Yet a number of bill of rights advocates are looking to the bill of rights to challenge the Intervention.⁶⁵

This is one of the more disturbing elements of the bill of rights debate – that when faced with grave abuses of rights requiring immediate and decisive action, some bill of rights advocates are more interested in abstract notions of rights of certain adults rather than the tangible rights of innocent children. This view was illustrated by public comments by the CEO of the Victorian Equal Opportunity and Human Rights Commission, who has argued that a federal bill of rights could have successfully stifled elements of the Intervention by, amongst other things, entrenching the right to 'participation'.⁶⁶

A close analysis of all the practical (as opposed to theoretical) shortcomings in rights protection cited in the four bill of rights inquiries reveals that the root of the problems is poor service delivery and bureaucratic failure. These problems are best addressed by effective leadership and specific legislation directed at particular problems. The advantage of directly addressing problems in this way is that it avoids the inherent downsides of a bill of rights, such as greater uncertainty in interpretation, the politicisation of the judiciary and the creation of a rights (as opposed to responsibilities) focused culture. In relation to the Howard Government policies two further points can be made. First, some are essentially political choices about which people can and do disagree – they are not issues of 'human rights' which can or should be remedied through human rights instruments. Secondly, some of the Howard government policies with which bill of rights advocates disagree (such as mandatory detention and anti-terror laws) had bipartisan support, which in turn reflected very broad community support. The clear implication of the bill of rights proponents is that Parliament (and the people it represents) can't be trusted to get it right and the only way to rectify Parliament's shortcomings is through a shift of power to the judiciary via a

63 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 22 (Mal Brough).

64 ABC Television, 'Govt Intervention in NT could face legal challenge' *Lateline*, 10 August 2007 <<http://www.abc.net.au/lateline/content/2007/s2002492.htm>> at 20 April 2009.

65 ABC OnLine, 'NT Intervention Breaches International Law: Amnesty' 16 March 2009 <<http://www.abc.net.au/news/stories/2009/03/16/2517145.htm>> at 20 April 2009.

66 Dr Helen Szoke, 'Letter to the Editor – Northern Territory Intervention', 28 October 2008; <<http://www.humanrightscommission.vic.gov.au/News%20and%20Events/media%20releases/20081028a.asp>> at 20 April 2009.

bill of rights. At its core, this is an elitist and anti-democratic sentiment that insults the good sense of the Australian people and the judgement of their elected representatives.

II Australian Exceptionalism

One of the major arguments bill of rights advocates press is that Australia is the only major democracy in the world which does not have a bill of rights. We should have a bill of rights, they say, so we are in step with the rest of the world and our judges are not isolated from foreign jurisprudence.

Sir Anthony Mason once argued that ‘If we don’t adopt a Bill of Rights I am inclined to think that we will stand outside the mainstream development in the western world’.⁶⁷ It is a simplistic and incorrect view to think that we should blindly adopt a bill of rights because other nations have done so and we need to keep up with them.

The obvious response to such an argument is to point out that many of the countries where the greatest human rights abuse occurs have bills of rights: Zimbabwe,⁶⁸ North Korea,⁶⁹ Iran,⁷⁰ Afghanistan under the Taliban,⁷¹ the Soviet Union,⁷² Nazi Germany⁷³ and even Fiji⁷⁴ all have or had bills of rights. Indeed the embrace of bills of rights by despots and dictators has a long and lamentable history.

One of the early bills of rights, the French Declaration of the Rights of Man and Citizen, was drafted by, among others, Maximilien Robespierre who later became one of its great human rights abusers as a member of the Committee for Public Safety and leader of the Great Terror in which tens of thousands of Frenchmen were tortured and executed for being enemies of the State. Indeed the brutality of the French Revolution, its embrace of the ‘rights of man’ and the critique of that revolution by Edmund Burke⁷⁵ has much to do with the reluctance of countries with inherited British legal systems to embrace bills of rights until very recently.

The traditional Westminster system of parliamentary supremacy has given rise to a range of rights acquired through political processes. As

67 Quoted in Frank, Brennan *Legislating Liberty: A Bill of Rights for Australia?* (1998) 30.

68 *Constitution of Zimbabwe 1990*, Chapter 3.

69 *Constitution of North Korea 1972*, Chapter 5.

70 *Constitution of the Islamic Republic of Iran 1979* Chapter III.

71 *Constitution Of Afghanistan 1990*, Chapter 3. See also the Taliban’s ideas for rights protection in a post-Taliban Afghanistan Isambard Wilkinson, ‘Taliban Unveils Hardline Afghan Constitution’ *Daily Telegraph* (UK) 1 October 2007 <<http://www.telegraph.co.uk/news/worldnews/1564573/Taliban-unveils-hardline-Afghan-constitution.html>> at 20 April 2009.

72 *Constitution of the Union of Soviet Socialist Republics 1936* Chapter X and *Constitution of the Union of Soviet Socialist Republics 1977* Chapter 7.

73 *Die Verfassung des Deutschen Reichs (Constitution of the German Reich)*, Part 2.

74 *Constitution (Amendment) Act 1997* (Fiji), Chapter 4.

75 Edmund Burke, *Reflections on the Revolution in France* (first published 1790, 1986 ed).

particular rights have come through political processes they provide the opportunity to ventilate a range of views before their enactment and are thus more likely to gain broad acceptance than rights imposed by judicial fiat. Britain (until 1998) and Australia have a long and proud tradition of protecting freedoms and granting rights to citizens through the legislature. The emancipation of Catholics and Jews, universal suffrage, abolition of slavery, the enactment of anti-discrimination legislation and the prohibition of religious tests for public office are just some of the examples of rights protections that came through the Parliament. The success of the parliamentary system and the failure of many bills of rights systems to be as successful in protecting rights goes some way to explaining the reluctance of countries whose legal traditions are rooted in the British system to embrace a bill of rights.

There are a number of countries which have inherited a modified form of British legal tradition which have adopted bills of rights: the United States, South Africa, Canada, New Zealand, the United Kingdom. These are often cited as examples for Australia to follow, but a closer look at their history and their reasons for adopting bills of rights reveals that their own experiences are extremely different to Australia. In addition, bills of rights in these countries have not always provided the strongest protection. The US Bill of Rights, for instance did not prevent slavery, nor did it prevent that country establishing detention facilities and military commissions for enemy combatants at Guantanamo Bay. A close analysis of the history of the bills of rights in each of these countries demonstrates that Australia has no valid reason to blindly follow their example.

A *United States of America*

The United States was the earliest Anglophone country to adopt a bill of rights, in 1791. The United State's Bill of Rights was born of political compromise to provide a means of securing ratification of the US Constitution. At the Constitutional Convention of 1787, delegates were split between those who were opposed to the Constitution (Antifederalists) because of their fear of a strong central government, and those who supported the Constitution as drafted (Federalists). The Antifederalists proposed a bill of rights which they hoped would undermine the power of the central government and preserve a greater degree of state autonomy. But their support for a bill of rights was really a political tactic designed to retard the ratification of the Constitution.

Despite their reservations, the Federalists called the Antifederalists' bluff and agreed to insert a bill of rights into the Constitution following its ratification. As Leonard Levy observes, the US Bill of rights was not initially included in the Constitution because of 'passion on the part of anyone to enshrine personal liberties in the fundamental law of the land'. Instead, it

arose from ‘the reluctant necessity of certain Federalists to capitalize on a cause that had been originated, in vain, by the Antifederalists for ulterior purposes.’⁷⁶

There is another important point about the US Bill of Rights. Many of the framers of the American Constitution had significant experience dealing with bills of rights at the State level and the US Bill of Rights drew heavily on these. The earlier bills of rights included the Massachusetts Body of Liberties (1641), Provisions of the Charter of Rhode Island (1663), the Charter of Fundamental Laws of West New Jersey (1677) and the Frame of Government for Pennsylvania (1682) which became the Pennsylvania Charter of Privileges (1701). During the revolution eight states enacted bills of rights and by the time of Ratification only New Jersey, Georgia, New York and South Carolina did not have their own bills of rights.⁷⁷ In his drafting James Madison, the Bill of Rights’ principal author, drew heavily on the Virginia Declaration of Rights (1776).⁷⁸ When it came to the question of a federal bill of rights, the American framers had some familiarity with their likely operation and effect especially as bills of rights had operated in the United states for up to 150 years. Australia’s experience with bills of rights, by contrast, amounts to less than five years.

B South Africa

Among the nations cited as examples for Australia to follow, South Africa’s history is the most different. Before the first multiracial elections in 1994, Apartheid, which underpinned South Africa’s system of government, had undermined South Africa’s democracy. As one commentator observed:

South African socio-political life had been scarred by forty years of rule by one party, including four years of executive lawlessness under a state of emergency. The policy of systematic racism pursued by that Government had caused untold suffering and death and uprooted more than three million South Africans from their homes. The legal system and the courts had become largely inaccessible and discredited. The rule of law had long since been eroded, except in its most formal sense and the “constitution” consisted of a transparent arrangement (expressed in an ordinary Act of Parliament) to reserve legislative and executive power for a race group which made up less than one-seventh of the population...⁷⁹

76 Leonard Levy, ‘The Bill of Rights’ in Leonard Levy (ed) *Essays on the Making of the Constitution* (2nd ed) (1987) 289.

77 Ibid 295-299.

78 Paul Johnson, *A History of the American People* (1997) 195.

79 Hugh Corder, ‘Towards a South African Constitution’ (1994) 57 Mod L Rev 491,521.

In the late 1980s, as white South Africans prepared themselves for the possibility of a transition from power, they began to contemplate how to protect their own interests in a multi-racial South Africa. The South African Law Commission began to examine whether group rights could be protected in order to maintain the privileges of white South Africans. However the Commission concluded in 1989 'that there was "no rational or appropriate manner" in which groups rights could be constitutionally protected.'⁸⁰ While the ANC had been in favour of a bill of rights in South Africa since 1955, by 1990, the National Party:

had concluded that the protection of fundamental rights would form an indispensable part of any package of constitutional change... The negotiating parties were thus of one mind that any constitutional settlement should have a Bill of Rights as one of its foundation stones.⁸¹

Discussions about the Bill of Rights thus arose in the broader context of writing a new Constitution for South Africa. The distinguished South African jurist Richard Goldstone has written:

A Bill of Rights was one of the essential tools without which the relatively peaceful transition from this history of racial oppression and apartheid to a nonracial democracy would not have been possible. Without some guarantee of protection for the rights of minorities, the previous ruling white minority government would not have relinquished power to an inevitably black-controlled majority government.⁸²

Frank Brennan has also referred to the South African Bill of Rights as a 'bill of whites', a 'judicially enforceable bill of rights as a fetter on the newly enfranchised majority blacks.'⁸³

The South African Bill of Rights is understandable in the context of that country's lamentable history. It would have been impossible, given that experience, to argue that, in creating a reconstituted multiracial South Africa, parliament and the courts alone could be left to protect human rights. It was therefore a little ironic that the bill of rights, a tool often invoked to assist the oppressed, was needed in the New South Africa to protect the rights of the former oppressor and to help encourage them to relinquish power and transfer to a new constitutional order. In this sense the South African situation provides no real analogy for Australia.

80 Richard Goldstone, 'The South African Bill of Rights' (1997) *Tex. Int'l L J* 451-569, 455.

81 Corder, above n 79, 512.

82 Goldstone, above n 80, 452.

83 Frank Brennan above n 67, 177.

C New Zealand

Despite its geographical proximity to Australia, New Zealand's history and constitutional development has been quite different. The *New Zealand Bill of Rights Act* 1990 was enacted during a period of broader consideration of the constitutional structure of New Zealand.

New Zealand has fewer constitutional protections for its citizens than Australia. Like Britain, New Zealand has never had a written constitution. In 1950 New Zealand abolished its Upper House. A single member first-past-the-post election system was in place in New Zealand until 1996. This meant that minor parties, representing minority opinion, were rarely elected to the New Zealand Parliament and their views were not important to the considerations of the major parties either at election time or during the parliamentary term. Major parties had a massive advantage. As one of the committees examining the New Zealand Bill of Rights observed New Zealand was 'without some of the checks and balances of other similar jurisdictions'.⁸⁴

While Australia abolished appeals to the Privy Council in 1986, New Zealand maintained appeals to the Privy Council until 2004. One of the arguments for adopting the Bill of Rights in New Zealand in 1990 was that the Privy Council, unlike New Zealand Courts – or Australian courts for that matter, had significant experience dealing with bills of rights in other jurisdictions, and that this experience would be beneficial if brought to bear in New Zealand.

Since the 1960s New Zealand had had an enduring debate on whether it needs a written constitution and the enactment of a bill of rights was an ongoing part of that debate.

New Zealand had four major attempts at introducing a bill of rights. The Constitution Society for the Promotion of Economic Freedom and Justice in New Zealand first petitioned for a written New Zealand Constitution containing a bill of rights in 1960. The proposal was considered by a parliamentary committee but the committee made no recommendations on the petition.

In 1963 Sir Keith Holyoake's National Government introduced a bill of rights modelled on the Canada's *Bill of Rights 1960*. A second petition from the Constitution Society was considered at the same time but this time a parliamentary committee recommended that the Bill not proceed.

In 1985 Geoffrey Palmer, Minister for Justice in the Lange Labour Government produced a white paper with a draft constitutionally entrenched bill of rights. Again a parliamentary committee rejected its adoption in that form but, by majority, gave some support for a statutory bill of rights.

84 In Paul Rishworth, Grant Huscroft, Scott Opican and Richard Mahoney, *The New Zealand Bill of Rights* (2003) 7.

In 1989 Sir Geoffrey Palmer, who by then was Prime Minister, brought forward a statutory bill of rights which came into force on 25 September 1990. Right throughout the process the Bill of Rights met substantial opposition and scepticism.⁸⁵

Interestingly, from the late 1960s, attitudes to a New Zealand bill of rights shifted with some trenchant opponents like Palmer and Professor (later Sir) Kenneth Keith revising their position. The change of mood in New Zealand has been attributed, in no small part, to growing government interference with the economy and business during the late 1970s and early 1980s, which prompted many to see a bill of rights as a potential protector of individuals against big government:

The Oil Shocks of the early 1970s had heralded considerable intervention by government in the economy, both as a regulator and as an instigator of national energy projects. With greater regulation, the scope for conflict with individual rights and liberties increased dramatically.⁸⁶

Butler and Butler also suggest that use of legislation to 'impose wage, price and rent controls and freezes, to support the introduction of "car-less" days (to cut down on the use of petrol)⁸⁷ created a favourable climate for a bill of rights.

The executive's dominance of the legislature under the Muldoon Government which allowed it to rush through controversial infrastructure projects and to 'punish striking workers'⁸⁸ provided another impetus.

Finally New Zealanders also tended to 'look to Canada for guidance and inspiration in constitutional matters.'⁸⁹ In Australia there seems to be little debate at the present time about government heavy-handedness which would provide an analogous situation to that of New Zealand in the 1980s. Indeed, the Prime Minister believes that there has been too little regulation and government intervention in the Australian economy in recent years.⁹⁰

D Canada

Expatriate Australian lawyer Geoffrey Robertson has previously expressed his concern that in Australia '[w]e have given our children nothing they can recite with pride, except the doggerel in the national anthem'.⁹¹ He is likely to be disappointed if Australia bases a bill of rights on the Canadian Charter of Rights and Freedoms. This Charter has been described as:

85 This history is outlined in Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary*, (2005) 11-33.

86 Rishworth et al above n 84, 6.

87 Butler and Butler, above n 85, 24.

88 Ibid.

89 Ibid 25.

90 Kevin Rudd, 'The Global Financial Crisis' *The Monthly*, February 2009, 20-29.

91 Geoffrey Robertson, above n 39, 4.

disappointing and lacking in romance and poetry...a heavy, Germanic text that had none of the clarity and succinctness of either the American Bill of Rights or the Declaration of the Rights of Man. It was a complex lawyer's text that needed professional advice for its understanding.⁹²

Canada's Charter of Rights is closely tied to federal government attempts to strengthen their federation and weaken the divisions resulting from Canada's significant French-speaking minority which threatened to secede. The Canadian Charter is also the product of attempts to create a greater sense of Canadian nationalism through constitutional reform designed to 'patriate' Canada's constitution by cutting legal links with Britain.

The Canadian Charter is not Canada's first bill of rights. The Canadian provinces of Quebec, and Alberta enacted their own bills of rights between 1972 and 1979.⁹³ Saskatchewan had a bill of rights since 1947. Federally, Canada has had a Bill of Rights since 1960. With the exception of one major case⁹⁴ the first Canadian Bill of Rights was largely read down by the Canadian Supreme Court, which chose to defer to principles of parliamentary supremacy.

Pierre Trudeau was the father of the current Canadian Charter of Rights. Like Geoffrey Palmer in New Zealand he was a law professor who entered politics, became Justice Minister and ultimately Prime Minister. The Charter of Rights was a major part of Trudeau's nation building strategy which had three other elements: (a) create a stronger national identity to discourage separatist forces; (b) patriate the Constitution to leave its amendment in the hands of Canadians not in the hands of the UK Parliament; and (c) create new mobility rights so Canadians of all backgrounds would 'feel at home in any part of Canada'.⁹⁵ The Charter of Rights was intended to:

...become an instrument of national unity. An entrenched bill of rights that applied across the country would lead, it was expected, to a national discourse about human rights. New national coalitions and identities would be created that would transcend and weaken the forces of regionalism and provincialism.⁹⁶

Whilst the Canadian Charter has certainly succeeded in creating a 'national discourse' about human rights, it has so far failed to weaken the forces of regionalism and provincialism it was designed to address.

A majority of the Canadian provinces ultimately signed up to the new Constitution and the Charter of Rights, French-speaking Quebec still has

92 Edward McWhinney, *Canada and the Constitution 1979-1982* (1982) 60.

93 Walter Tarnopolsky, 'The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms' (1981) 44 *Law and Contemporary Problems* 169, 187.

94 *R v Drybones* [1970] S.C.R. 282.

95 Ian Greene, *The Charter of Rights* (1989) 38.

96 *Ibid.*

not. On two occasions since it took effect in 1982, the Canadian Government tried to get Quebec to sign up to the Constitution and Charter of Rights. On both occasions it has failed. Canada's bill of rights was implemented, in part, to address serious concerns of national unity which do not bear any comparison to Australia. That it has failed in this objective hardly commends it as an example to follow.

E United Kingdom

Bills of rights had been discussed in the United Kingdom over the last thirty years usually in conjunction with discussions about further constitutional reform. While Labour and some Conservatives (like Sir Keith Joseph and Lord Hailsham) have been in favour of the concept of a bill of rights, at various times both parties have also been opposed to a bill of rights. Throughout this time, consideration of a bill of rights in the UK has been intrinsically linked to debate about the UK's membership of the European Union.

The *Human Rights Act 1998* (UK) was enacted in response to a particular set of international circumstances which had a direct impact on domestic law in the United Kingdom. While Britain was moving closer to Europe, Britain's reluctance to incorporate the European Convention on Human Rights (the Convention) was causing inconsistencies in its legal system. The Convention was ratified by the UK in 1951 and since 1966 the UK had allowed its citizens to petition the European Court of Human Rights in Strasbourg. This led to situations in which the European Court could reach decisions which were inconsistent with those reached by British courts.

In a book produced before the 1997 UK elections, *Bringing Rights Home*,⁹⁷ the Labour Party proposed to incorporate the European Convention on Human Rights into British law, in order to make domestic British human rights law consistent with that of Europe. This became part of the Blair Government's wider agenda for constitutional reform including devolved Scottish, Welsh and Northern Irish Assemblies, Freedom of Information legislation and a reconstituted House of Lords. Britain at the time lacked many of the checks and balances of Australia. It had a unitary government, no 'New Administrative Law' system, an unwritten Constitution and an unelected Upper House.

At the time the *Human Rights Act* was enacted the European Court of Human Rights had found a breach of the European Convention by the UK on 56 occasions since ratification. The United Kingdom was the country with the second-largest number of cases where a breach had been found, with only Italy having more at 101 cases.⁹⁸

97 Jack Straw and Paul Boateng, *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights Into U.K. Law* (1997).

98 Robert Blackburn *Towards a Constitutional Bill of Rights for the United Kingdom* (1998) 20-21.

There were two major practical arguments for incorporation of the Convention. The first was that incorporation would enable Britain to ‘redress the growing number of glaring inconsistencies that have emerged in the administration of justice with respect to European law generally.’⁹⁹ Secondly, incorporating the Convention would mean that the number of UK cases needing to be taken to Strasbourg would be reduced, ‘since it is widely recognized that most legal questions that have arisen concerning the principles of ECHR could have been dealt with and resolved satisfactorily by ... domestic courts’.¹⁰⁰

There is a significant advantage for parties to litigate matters domestically as before incorporation an aggrieved individual ‘would have to be committed enough and have sufficient resources in order to make an application to Strasbourg.’¹⁰¹

The *Human Rights Act 1998* was enacted due to the unique circumstances brought about due to the affect on domestic law of Britain’s accession to the European Convention on Human Rights. Australia does not face the same external institutional pressure to enact such a law.

As a post script it is interesting to note that Lord Chancellor Jack Straw has become ‘frustrated’ with British Judges’ interpretation of the *Human Right Act* and with the Act’s reputation as a ‘villain’s charter’ and has called for a review of the Act.¹⁰² Whilst one objective of the 1998 Act has been achieved, that of consistency with Europe, it is highly debatable whether Britain’s bill of rights has done more harm than good in terms of creating a workable system in which the public and the government can have confidence.

F *Victoria and the ACT*

The Victorian and ACT Bills of Rights have been subjected to sustained criticism by the Opposition in those jurisdictions. They are not the result of manifest human rights problems or major constitutional reforms in their jurisdictions. They are not designed to accommodate secessionist movements or special interest groups (other than human rights lawyers). Nor are they the result of widespread concern about the inadequate protection of rights.

In terms of explaining their origins and motivations, these bills of rights are essentially the result of the ideological fixations of their main proponents – ACT Chief Minister Jon Stanhope and Victorian Attorney-General Rob Hulls. They were enacted following a consultation process which was conducted in each case by a significant advocate for change. There were no

99 Ibid xxix.

100 Ibid xxix.

101 Edwin Shorts and Claire de Than, *Human Rights in the UK*, (2001) 40.

102 Benedict Brogan, ‘Jack Straw Reveals: why I want to Change the Law’, *Daily Mail* 8 December 2008.

compelling reasons for their enactment. In the ACT the Inquiry struggled to find human rights abuses that justified a charter of rights. The report noted that they had been: 'assured that the protection of human rights in the ACT is of the highest standard.'¹⁰³ The report quoted from a submission that said 'the lack of reported cases of slavery in [the Canberra suburb of] Gungahlin and torture in [the Canberra suburb of] Wanniasa show that there is no serious contravention of basic rights under the current regime'.¹⁰⁴

In Victoria, Rob Hulls' bill of rights has a series of Orwellian features. It is called the Charter of Rights and Responsibilities although it contains not a single specified responsibility. And the 'independent' committee he appointed to investigate whether Victoria needed such an instrument was headed by George Williams – its most prominent advocate.¹⁰⁵

There are no particular conclusions that should be drawn from the fact that two Australian jurisdictions now have bills of rights except that they are ahistorical and reflect the ideological predilections of their proponents.

G *Why Australia is Different*

While the political, legal and historical circumstances leading to the adoption of bills of rights in other jurisdictions are themselves divergent some common themes are present. What is clear is that Australia has few of the conditions which led to the adoption of bills of rights elsewhere but conversely has additional protections for minority rights that those other jurisdictions do not.

1 *Conditions Absent in Australia*

A number of important factors which led to the adoption of national bills of rights in other countries do not apply to Australia. Unlike the other jurisdictions, Australia has comparatively little experience of bills of rights. Canada had a legislative bill of rights for over twenty years before it enacted its current Charter and a number of Canada's provinces also had enacted Charters.

The American states had experience with rights instruments going back 150 years in some jurisdictions, and the UK had the experience of more than 20 years of decisions from the European Court of Human Rights.

The ACT and Victorian bills of rights have not been operating sufficiently long enough, especially given the time it takes to bring cases to court, for any significant experience to have developed from their application.

103 ACT, above n 1, 18-19.

104 ACT, above n 1, 18.

105 For more background to the Victorian Charter see Ben Davies, 'Who Gets the Bill? The Lawyers Bill of Rights' (2006) 18 *Upholding the Australian Constitution: the Proceedings of the Samuel Griffith Society*, 44-57.

For instance neither Bill has been given detailed consideration by the High Court.¹⁰⁶

The second quality Australia lacks is a comparable political context in which to introduce a bill of rights. Neither the federal Government or the Brennan Committee are examining the bill of rights in the context of any broader constitutional reforms as had occurred in each of the other jurisdictions. The bill of rights is also not being used to win the support of broader constituencies for those reforms (as with French Canadians and white South Africans).

Thirdly, in all other jurisdictions the idea of a bill of rights has been supported at some point in time by leading figures in parties of the centre-right. In Canada, Prime Minister John Diefenbaker, who first proposed the patriation of the constitution in the 1960s; in the UK Lord Hailsham and Sir Keith Joseph; in New Zealand Sir Keith Holyoake and Ralph Hanan; in the United States both Federalists and Antifederalists eventually supported the bill of rights; and in South Africa all parties eventually supported the bill of rights.

In Australia the Liberal Party, which embodies a proud Australian tradition of scepticism, has never embraced a bill of rights and strongly opposed it on each occasion (1944, 1973, 1986, 1988 and 2009) that it has been proposed at a federal level and on every occasion that it has been proposed at a state level.¹⁰⁷ The only Liberals to embrace a bill of rights have been minor figures or former parliamentarians who, when they enjoyed a popular mandate, had strongly opposed a bill of rights.¹⁰⁸

Bills of rights in Australia have been, and remain, the agenda of one segment of one side of politics only. The opposition to a bill of rights from senior Labor figures like Bob Carr and John Hatzistergos reflects the reality that support for a bill of rights within the community is more limited than some of its proponents make it out to be.

2 *Judicial Isolation*

An additional argument put forward by advocates of a bill of rights is that without it, Australia will face judicial isolation. The argument is that Australia's failure to adopt a bill of rights will mean that our judges are isolated from developments in other parts of the world. This argument is

106 Passing reference was made to the ACT legislation in *Priestly v Godwin* [2008] HCA 59, *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] HCA 50 and *Coleman v Power* [2004] HCA 39. Hayne J found it unnecessary to consider the Victorian legislation in *Tilley v The Queen* [2008] HCA 58.

107 See for instance ABC Radio, 'The ACT Bill of Rights' *The Law Report*, 9 December 2003 <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1005349.htm>> at 20 April 2009 and Victoria, *Parliamentary Debates*, Legislative Assembly, 13 June 2006, 2000-2002 (Robert Clark).

108 Despite their recent support for bills of rights Fred Chaney and Malcolm Fraser both opposed bills of rights when in Parliament.

difficult to sustain. The notion of one single common law is an anachronistic notion harking back to British Empire days when it was considered important for Australian courts to follow the British common law and the development of Australia's law was supervised by the Privy Council. Such thinking is now obsolete.

Australian judges will still be free to examine precedents from other countries but will need to apply the level of caution and scepticism they deem appropriate in so doing. But it will be no more caution than that which judges already exercise when examining decisions from other jurisdictions. Even before the enactment of the UK *Human Rights Act* Australia was not following the precedents set by England and other countries in the development of the Australian common law.¹⁰⁹ It is surely no bad thing for Australian judges to continue to be a self-reliant as they currently are.

3 *Australia's Democratic System is Different*

The Australian political system is substantially different from other jurisdictions. Unlike the UK and New Zealand Australia has a written constitution which, unlike Canada, its citizens have been able to amend since 1901. Australia's electoral system ensures all voices, especially minority voices, are heard. Voting is compulsory, suffrage is universal and there is no significant controversy in this country over minorities being excluded from the electoral process. House of Representative elections are conducted on a compulsory preferential basis meaning that major parties need to take into account the concerns of minor party voters in order to secure their preferences. In order to win seats some major party policies have to be directed to winning the second preferences of minor party supporters. At various times since the Second World War minor parties have helped to make and unmake governments.¹¹⁰

Unlike Britain, New Zealand, Canada, the United States until 1913 and Apartheid-era South Africa, Australia has had a popularly elected Upper House since Federation. Appointed Upper Houses are unaccountable and can, after long periods of Government, be completely skewed in the political direction of the Government which has just lost office. This was the case in Britain in 1997 and in Canada in 2006. In addition the House of Lords does not provide an ultimate check on governments because it cannot reject legislation its only power is to delay legislation. Since the adoption of

109 See for example the Australian attitude to *Rylands v Fletcher* (1868) LR 3 HL 330, which Australians courts rejected in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; the Polly Peck defence in defamation *Polly Peck PLC v Trelford* [1986] QB 1000 which Australian courts did not adopt in *Chakravarti v Advertiser Newspapers Limited*, (1998) 193 CLR 519, and *R v Majewski* (1977) AC 443 which was not followed in *R v O'Connor* (1980) 146 CLR 64 a case concerning the defence of intoxication.

110 For instance the Gorton Government won the 1969 election on the back of DLP Preferences and the Hawke Government won the 1990 election because of Green preferences.

proportional representation 60 years ago the Senate has only been controlled by the governing party for 16 years. The fact that Governments have usually needed the support of minor party senators or independents to pass legislation means that in making laws minority interests are likely to be taken into account. Even when the government controls the Senate this does not mean that government senators can always be relied upon. Indeed one recent study demonstrates that floor crossings double in both Houses when a government controls the Senate.¹¹¹

4 *Australia's New Administrative Law*

A much underrated area of Australian legal protection that has operated since the late 1970s and early 1980s is what was once called the 'New Administrative Law'. The New Administrative Law refers to the system of legal review that developed from the late 1960s and produced among other things the Administrative Appeals Tribunal, The Administrative Decisions (Judicial Review) Act, the Ombudsman, the Administrative Review Council, Freedom of Information Laws and the necessity for Commonwealth officials to provide reasons for their decisions. The New Administrative Law gives people a greater chance to challenge and review government decisions not only for their legality but also to conduct a merits review of the decision.¹¹²

This may not have the sex appeal of a bill of rights, but it has proven to be an effective means of preventing the abuse of government power. It has helped promote due process rights and protects citizens from the arbitrary exercise of government power. The Commonwealth Ombudsman John McMillan has observed that bill of rights proponents

frequently overlook the established and effective human rights role currently played by Ombudsman offices and other elements of the administrative law system ... complaint investigation by the Ombudsman is directly concerned with human rights issues...the Ombudsman's office captures what is arguably the most fundamental of all human rights, namely the right to complain against and to challenge the government in an independent forum.¹¹³

In the last year applications were lodged with the AAT to review 6,312 decisions.¹¹⁴ The ombudsman received '39,932 approaches and complaints,

111 Deirdre McKeown, Rob Lundie and Greg Baker, 'Crossing the Floor in Federal Parliament 1950-August 2004', Research Note No 11 2005-06, 10 October 2005 <<http://www.aph.gov.au/library/Pubs/RN/2005-06/06rn11.pdf>> at 1 April 2009.

112 Roger Douglas, *Douglas and Jones's Administrative Law*, (4th ed 2002) 56-59.

113 John McMillan, 'The Ombudsman and the Rule of Law' (Speech to the Public Law Weekend 6 November 2004, 15 <[http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/speeches_2004_03/\\$FILE/omb_rule_law-publaw-nov2004.pdf](http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/speeches_2004_03/$FILE/omb_rule_law-publaw-nov2004.pdf)> at 14 April 2009.

114 Administrative Appeals Tribunal, *Annual Report 2007-2008* (2008) 20.

including requests for information and complaints about organisations and matters that are out of jurisdiction.¹¹⁵ There were 33 applications for administrative law review filed in the Federal Magistrates Court¹¹⁶ and 136 current administrative law matters waiting determination at the Federal Court.¹¹⁷ This demonstrates that Australians make good use of New Administrative Law mechanisms in protecting their rights.

Australia also already has extensive rights protection in other legislation such as the *Racial Discrimination Act 1975* (Cth) the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth). Criminal procedure and evidence legislation and the common law also protect the rights of accused persons. Other bodies which assist in protecting the rights of our citizens include the Privacy Commission and a host of tribunals like the Veterans Review Board, the Social Security Appeals Tribunal and the Migration and Refugee Review Tribunals. These bodies, and the Acts of Parliament that govern them, provide specific safeguards that might be expressed in only vague terms in a bill of rights but are expressed in a very detailed and precise manner so that citizens know exactly where they stand under the law.

III Conclusion

By comparison with most other nations Australia has a very good human rights record. Our democratic traditions which sustain rights are older than most other nations. While Australians are right to examine the rights protections we have in this country it would be wrong to abandon the system we have out of a desire to keep up with developments in other countries which have different institutions, different rights protections, different national imperatives and different histories to Australia.

Instead of adopting a bill of rights which would sit at odds with Australia's history, traditions and institutions and would cause a shift in the locus of power on some issues from the Parliament to the Judiciary, the Brennan Committee should give serious consideration to the other more specific measures it could use to address the concerns people have with governments. Australian institutions have proven open and adaptable. They are likely to remain the best means of dealing with human rights concerns without the additional shortcomings that are inherent in any bill of rights.

115 Commonwealth Ombudsman, *Annual Report 2007–2008* (2008) < http://www.ombudsman.gov.au/publications_information/annual_reports/ar2007-08/chapter_1/chapter_1a.html > at 1 April 2009.

116 Federal Magistrates Court, *Annual Report 2007–2008* (2008), 35 < <http://www.fmc.gov.au/pubs/docs/0708pt3.pdf> > at 14 April 2009.

117 Federal Court of Australia, *Annual Report 2007–2008* (2008) 22 < http://www.fedcourt.gov.au/pdfs/rfbs_a/annual_report_2007/annualreport2007.pdf > at 14 April 2009.

APPENDIX

Specific human rights concerns documented by bill of rights inquiries in Victoria and the Australian Capital Territory and what those Governments have done since the enactment of their bills of rights to address those concerns.

VICTORIA

Concern Identified by Inquiry	Government Action
Submissions focused on deficiencies in the <i>Equal Opportunity Act</i> pointed to exceptions to the Act and to its failure to prohibit discrimination against people because they are homeless or poor. ¹¹⁸	The <i>Equal Opportunity Act 1995</i> (Vic) still does not prohibit discrimination on these grounds.
Privacy law relates mainly to 'information privacy in the public sector and with health information and does not protect people from other types of privacy invasion.' ¹¹⁹	The <i>Information Privacy Act 2000</i> (Vic) has not been amended to take into account other types of privacy invasion.
No provision which prevents legislation being enacted to create criminal offences retrospectively. ¹²⁰	In the Charter
No legislative prohibition on the use of torture or cruel, inhuman or degrading treatment. ¹²¹	In the Charter
No legislation protecting freedom of speech. ¹²²	In the Charter
The right to due process of law. ¹²³	This right is not protected in the Charter
The right to marry and form a family. ¹²⁴	This right is not protected in the Charter

118 Vic, above n 2, 6.

119 Ibid.

120 Ibid 5.

121 Ibid 9.

122 Ibid 6.

123 Ibid 5.

124 Ibid.

Concern Identified by Inquiry	Government Action
<p>The right to humane treatment in detention or prison.¹²⁵</p>	<p>This right is protected in the charter but the Victorian Ombudsman's 2007–2008 Annual Report revealed that prisoner rights are still being abused despite the Charter by overheating transport vehicles, use of excessive force and limits on prisoner visitation rights¹²⁶</p> <p>In 2007, a year after the enactment of the Charter, the Victorian Equal Opportunity and Human Rights Commission claimed there was an ongoing 'culture of abuse' in the Melbourne Custody Centre.¹²⁷</p>
<p>People with physical disabilities reported difficulties with access and participation, including barriers to exercising their right to vote....the impediments to voting for people with disabilities include physical access to polling booths, difficulties becoming registered to vote and staying registered, the inaccessibility of the voting ballot and privacy issues.¹²⁸</p>	<p>Section 94 of the <i>Victorian Electoral Act 2002</i> dealing with voters requiring assistance has not been amended since the consultative committee report. Although in 2005 before the Human rights consultative committee had reported the Victorian Electoral Commission developed a Disability action plan and improved consultation with the disability sector¹²⁹</p>
<p>Young people also talked a lot about their desire to be heard and to participate in decisions affecting them.¹³⁰</p>	<p>The Victorian Equal Opportunity and Human Rights Commission's recent report released in March 2009 found that 'at the state government level, limited effort has been directed towards developing sustained strategies and frameworks for consultation and engagement with young people.'¹³¹</p>

125 Ibid.

126 Victorian Ombudsman, *Annual Report 2007-2008* (2008) 31-33 <http://www.ombudsman.vic.gov.au/resources/documents/Annual_Report_07-08_human_rights.pdf> at 1 April 2009.

127 Victorian Equal Opportunity and Human Rights Commission, 'Culture of Abuse is a breach of Victorian Human Rights Charter' (Media Release 23 November 2007) <<http://www.humanrightscormission.vic.gov.au/news%20and%20events/media%20releases/20071123.asp>> at 1 April 2009.

128 Vic, above n 2, 7.

129 Victorian Electoral Commission, *Report to Parliament on the 2006 Victorian State Election* (2007) 31.

130 Vic, above n 2, 7.

131 Victorian Equal Opportunity and Human Rights Commission, *The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities: Emerging Change* (2009) 7.

Concern Identified by Inquiry	Government Action
<p>Women prisoners complained of having little confidentiality in the provision of medical services and about ‘very personal comments’ being made ‘in front of a group of male officers’, or of being escorted to gynaecological appointments by male officers.¹³²</p>	<p>There are still no regulations or procedures governing the presence of male officers at the sensitive medical appointments of female prisoners.</p>
<p>One woman visited an Orthopaedic Surgeon at hospital. She reported being handcuffed to a waist belt and wearing ankle shackles. The male prison officer remained in the room while she removed the top half of her clothing for examination. To examine her lower back, the surgeon himself had to remove her shoes, socks and trousers and dress her again in front of the officer when he was finished.¹³³</p>	<p>Part 32.2 of <i>Standards for the Management Of Women Prisoners In Victoria</i> (2008) now states ‘An Instrument of restraint... (e) will be removed during medical tests and procedures provided this meets security and management requirements.’</p>
<p>The use of strip searches for women when they first enter the prison, when receiving visitors or at random when looking for contraband, was described as dehumanising, humiliating and degrading. One woman said: ‘Our dignity as women is taken completely’.¹³⁴</p>	<p>Regulation 62(3)(a) made under the <i>Corrections Regulation 1998</i> (Vic) states that a prison officer conducting a strip search must ‘ensure that the prisoner is not searched by a person of the opposite sex, except where such a search is urgently required and a person of the same sex as the person to be searched is unavailable to conduct the search’. This regulation was in place before the Victorian consultative committee reported. The Department of Justice, <i>Women’s Prisons in Victoria: Correctional Policy and Management Standards</i> 1995 also stated ‘The Prison manager must (a) ensure strip searches... are conducted by staff members of the same sex, wherever possible, and in as least intrusive manner as possible, and are carried out within facilities that ensure the dignity and privacy of the prisoner being searched (b) ensure strip searches of prisoners and visitors do not include body cavity searches or the removal of tampons.’</p>

132 Vic, above n 2, 7.

133 Ibid.

134 Ibid.

Concern Identified by Inquiry	Government Action
<p>Muslim communities reported racial discrimination and vilification.... People were frustrated that current anti-discrimination law deals with individual complaints and has not effectively tackled ingrained and institutional racism.¹³⁵</p>	<p>The Islamic Council of Victoria does not keep records on whether incidents of discrimination or vilification had risen or fallen since the introduction of the Charter.¹³⁶</p>
<p>The right to vote was considered to be inadequately protected by almost 50 per cent of participants. This is consistent with recent research demonstrating that at least 75 per cent of eligible homeless people did not vote at the 2002 Victorian State Election.¹³⁷</p>	<p>The <i>Electoral Act 2002</i> (Vic) was amended in 2004 before the consultation committee began its work to take into account the rights of homeless electors. The Victorian Electoral Commission took steps to improve communications with people providing services for the homeless and established a polling place in a homeless persons shelter in Fitzroy.¹³⁸</p>

135 Ibid 8.

136 Conversations with the author.

137 Vic, above n 2, 9.

138 Victorian Electoral Commission, *Report to Parliament on the 2006 Victorian State Election* (2007) 35.

AUSTRALIAN CAPITAL TERRITORY

Concern Identified by the Inquiry	Current State of the Law
<p>Police recruits practise their craft by targeting vulnerable groups as seen in the recent wave of arrests of young Indigenous people. Other examples of overzealous policing were when Aboriginal and Torres Strait Islander people are assembling, school activities, sporting events and even funerals have seen police attending in numbers. Just one phone call from a member of the public advising that a number of Aborigines are assembling is enough for police attendance.¹³⁹ There was also harassment by police of Indigenous people and young people.¹⁴⁰</p>	<p>The 2003–2004 ACT Policing Annual report notes that ‘[s]ince 1998 the AFP has employed Aboriginal Community Liaison Officers recognizing the importance of this role in coordinating and monitoring Aboriginal and Torres Strait Islander Activities within the ACT’¹⁴¹ The position continues today but the role does not appear to have changed.¹⁴² No particular initiatives are mentioned to address these concerns in either the Police or ACT Equal Opportunity and Human Rights Commission reports.</p> <p>But see the words of the Human Rights Commissioner</p> <p>‘So, if I were a woman from Venus researching the question “how well is a human rights culture developing in the ACT for its indigenous community,” I’d put a tick in the box about laws and legal framework – particularly when you add our Human Rights Act to the picture. The language is certainly there. The concepts are there. But it wouldn’t take a great deal of extra research by the woman from Venus to see that human rights language, by itself, has not and will not create a human rights culture. The language has not ensured that the things the standards aspire to have been achieved. The researcher would need to look no further than our appalling record in relation to the health of indigenous people and the on-going over-representation of aboriginals in adult and juvenile detention.’¹⁴³</p>

139 ACT above n 1, 19.

140 Ibid 20.

141 ACT Policing, Annual Report 2003-2004 (2004) 134 <http://www.afp.gov.au/__data/assets/pdf_file/3721/actpannualreport0304.pdf> at 14 April 2009.

142 Act Policing, *Annual Report 2007–2008* (2008) 104-105 <http://www.afp.gov.au/__data/assets/pdf_file/87998/ACTPolicingAR08.pdf> at 14 April 2009.

143 Mary Durkin, ‘Looking Forward, Looking Back How well is a human rights culture developing in the ACT for its Indigenous Community?’ Text of a speech delivered at a forum held at the ACT Aboriginal and Torres Strait Islander Cultural Centre on Friday, 11 May 2007 <<http://www.hrc.act.gov.au/assets/docs/CYPspeech11052007.doc>> at 14 April 2009.

Concern Identified by the Inquiry	Current State of the Law
Children enjoyed less protection against physical violence than adults. ¹⁴⁴	Domestic Violence Protection Orders are now in place for children under the <i>Domestic Violence and Protection Orders Act 2008</i> (ACT). These came into place as a result of the <i>Children and Young People Act 2008</i> (ACT).
The existing law did not provide sufficient opportunities for children to express their views freely on matters that affected them. ¹⁴⁵	The <i>Children and Young People Act 2008</i> (ACT) has provisions for a Children and Youth Services Advisory Council with at least '1 member who represents the interests of young people; and 1 member who represents the interests of children.' But it is not stipulated that these positions need to be held by children or young people. The ACT also has a Youth Advisory Council and a Youth Policy Group
Children are subject to unreasonable strip-search provisions. ¹⁴⁶	The <i>Children and Young People Act 200</i> (ACT) contains a range of provisions dealing with searches of children in custody or detention.
Discrimination by landlords against single mothers and Indigenous people. ¹⁴⁷	Provisions of the <i>Discrimination Act 1991</i> (ACT) relating to non discrimination against women and Indigenous people predated the Committee's work.
Female employees being paid less than male predecessors performing precisely the same work. ¹⁴⁸	The ACT Women's plan 2004 ¹⁴⁹ notes that the gap between men and women's pay is decreasing but it does not outline any strategies or legislative changes to close the gap.
Pregnant women being sacked. ¹⁵⁰	Provisions of the <i>Discrimination Act 1991</i> (ACT) relating to non discrimination against women on the basis of pregnancy predated the consultative committee's work.

144 ACT above n 1, 19.

145 Ibid.

146 Ibid.

147 Ibid 20.

148 Ibid.

149 ACT Government, *ACT Women's Plan* (2004) 12 <http://www.dhcs.act.gov.au/__data/assets/pdf_file/0020/39053/actwomensplan.pdf> at 14 April 2009.

150 ACT above n 1, 20.

Concern Identified by the Inquiry	Current State of the Law
<p>Occasional incidents of harassment and discrimination against Muslims.¹⁵¹</p>	<p>Despite the fact that in 2006 the ACT Human Rights Commissioner recommended amendments to the <i>Discrimination Act 1991</i> to deal with religious vilification¹⁵² these amendments have not been made.</p>

151 Ibid.

152 ACT Human Rights Office, Issues Paper: Racial and Religious Vilification in the ACT *Investigating the effectiveness of Part 6 of the ACT Discrimination Act 1991* (2006) 17-18 <<http://www.hrc.act.gov.au/assets/docs/Review%20of%20racial%20vilification%20final.pdf>> at 14 April 2009.

A grayscale photograph of a hand holding a wooden gavel over a wooden block on a desk. The gavel is positioned as if about to strike the block. The background is a blurred white curtain.

Part II:
Separation of Powers

Chapter Four

Don't Risk What We Have

THE HON JOHN HOWARD, AC

Listening to a radio interview with a Baptist pastor in the United States, who was commenting on the recent presidential election campaign, I was reminded of the stark difference between Australia and the United States on the respective roles of elected politicians and judges.

The pastor said that the then soon to be elected president would be the forty-fourth president of the United States, yet Mr Justice John Roberts, currently Chief Justice of the Supreme Court, was only the seventeenth Chief Justice. Make no mistake, this comparison was a complaint. He did not like the idea that judges remained in office for so long, particularly when compared to the people for whom he was allowed to vote.

The pastor had a reason for this. Many decisions which have far reaching social and political consequences are made by judges in the United States; in Australia those same decisions are made by parliaments, elected by the people.

The debate about abortion in the United States centres largely on how the outcome of a presidential campaign can alter the composition of the United States Supreme Court and then, in time, potentially overturn or confirm the Court's 1973 decision in *Roe v Wade*¹, which was seen as having liberalised the application of abortion laws.

By contrast, in Australia, the debate is about whether or not parliaments might alter laws which affect abortions.

All of this highlights one of the fundamental differences between Australia and the United States. Both countries are great democracies. The United States, however, is a 'bill of rights' type democracy, whereas Australia is not. The result is that many contentious issues in the United States are beyond the reach of citizens' influence, except in the most indirect of ways such as a gradual change in the philosophical composition of the Supreme Court.

To my mind this is thoroughly undesirable. Australia should avoid it, like the proverbial plague. Not only does it take power from people, but it also contaminates judicial appointments. Judges should be appointed according to legal merit, not social or political bias.

The recently retired Chief Justice of the High Court, Murray Gleeson, provided a clear description of the Australian tradition when he gave his farewell address to the National Press Club on 20 August 2008. He was

1 *Roe et al v Wade, District Attorney of Dallas* 410 U.S. 113 (1973)

asked whether he had difficulty applying the former government's mandatory detention or workplace relations laws. His response was telling:

If I had found a case in which I couldn't conscientiously apply the law, I would have resigned. There may be many (laws) with which I disagree but with which I comply as a citizen and which I am happy to enforce as a judge, just because they're the law and because they have behind them the legitimacy of parliament. That's the way the democratic process works.²

This was a classic statement of a well understood principle in Australia. The people elect parliaments, who make the laws, and judges enforce them.

I suspect that a retiring Chief Justice in the United States would give a somewhat different response to that of the former Mr Justice Gleeson. He would not be so deferential to Congress and state legislatures. He would emphasise his role in protecting the rights of citizens as guaranteed by the constitution. This, I might add, would not only be because, unlike the High Court of Australia, the United States Supreme Court deals only with constitutional issues. The point, of course, is that, due to the bill of rights character of the American Constitution, so many more issues in America have a constitutional dimension.

I have never supported a bill of rights for Australia. It would not enhance freedom or expand liberty. It would run the risk of curtailing the very things its proponents might hope it would advance.

The strength and vitality of Australia's democracy rests on three great institutional pillars: our Parliament with its tradition of robust debate; the rule of law upheld by an independent and admirably incorruptible judiciary; and a free and sceptical press. These are the best guarantees any society can have of fundamental rights and we have them in Australia.

I have called this trilogy in the past the real title deeds of our democracy and a political inheritance which has given us a level of stability and cohesion that is the envy of the world.

If Australia were to embrace or entrench a bill of rights it would represent an historic transfer of responsibility from an elected legislature to an essentially unaccountable judiciary. Over time it would frustrate citizens as the realisation dawned upon them that there was little point putting their views on controversial issues to their elected members of Parliament, as the response would inevitably be that it was really something out of the hands of Parliament and, of course, politicians had no right to tell the courts what to do.

Courts in Australia enjoy a high level of respect, are very independent and generally speaking free of unfair criticism. This owes much to the integrity of our judges. It is also because Australians have long been used to

2 Murray Gleeson, Address to the National Press Club, Canberra, August 20, 2008.

the traditional view of courts. They exist independently to enforce the law of the land as determined by parliament. They do not meddle in politics.

The lively debate about judicial activism, which took place in Australia several years ago, revealed a welcome sensitivity about any significant shift in the balance of responsibilities between parliament and the courts in this country.

Much of this would change if we had a bill of rights. It would politicise our courts. The Canadian experience is instructive. Recently a survey in that country found that two-thirds of respondents now supported the concept of elected judges.³ This is barely surprising given that the Canadian Charter of Rights and Freedoms has led to the appropriation by the courts of significant areas of responsibility, which in Australia rest with Parliament.

Comparing the Australian and Canadian approaches on gay marriage is illuminating. In Australia, the former government which I led, decided in 2004 that the *Marriage Act 1961 (Cth)* should be amended to define marriage as a voluntary union for life between a man and a woman to the exclusion of all others, thus precluding the possibility of recognising same sex marriages.

In Canada it was not so simple. In a series of decisions the courts had declared that prohibitions on gay marriage, enacted by some provincial legislatures, were contrary to the Canadian Charter of Rights and Freedoms. Only by the Canadian Parliament passing a law expressly overturning that decision could the provincial prohibitions on gay marriage have been revived. This was a theoretical power only. In practice it was not a realistic option.

In other words, in Canada it was not Parliament which expressed the will of the Canadian people on this sensitive social issue, it was a court. Surely that was wrong. Irrespective of the views one might hold on the issue, don't the people, through their elected representatives, and at all stages, have the right to decide these issues without reference to the courts?

The case for a bill of rights has a simplistic appeal. As Professor James Allan of the University of Queensland (an avowed opponent of a bill of rights) has rhetorically asked; who could be against free speech? Who could be against freedom of expression, or against freedom of religion?⁴

But the issue, of course, is where the lines are drawn and by whom. While it can be argued that those rights listed above are fundamental, we must also acknowledge that they may also clash. Who decides where free speech ends and defamation begins? Surely that must depend on the circumstances of each individual case. As such it is inconceivable that a bill of rights can provide a generic formula to resolve such clashes more effectively than they are at present.

3 The Strategic Counsel, A Report to The Globe and Mail and CTV, Canadian Charter of Rights and Freedoms, 21 March, 2007.

4 James Allan, 'Let's draw a line through a bill of rights', *Sydney Morning Herald*, September 26, 2005.

Rights conflict, and to argue that one could establish a list of absolute rights is, as Jeremy Bentham once famously remarked, 'rhetorical nonsense – nonsense upon stilts'.⁵ Providing a legal dimension to any moral issue inevitably raises the question of why a judge has more moral insight than another individual or their elected representatives.

The core argument of those who want a bill of rights is that it is needed both to state succinctly and therefore to protect our fundamental liberties. This argument overlooks a reality which is quite basic to the whole debate about a bill of rights.

In the end it is the customs, attitudes and culture of a people, as expressed through their institutions which determine the strength of their commitment to democratic values. History is full of constitutions with high sounding definitions of liberty and equality which have proved worthless in the face of political tyranny.

The constitutions of the former Soviet Union and the pre-Hitler Weimer Republic in Germany had many fine phrases. Even Nazi Germany had a bill of rights guaranteeing the 'dignified existence of all people'. More recently, the Zimbabwean constitution contains a bill of rights that promises extensive human rights protection for citizens of that country.

Fervent advocates of a bill of rights for Australia often justify their case by reference to Australia's international obligations. I have always found this argument quite humiliating. It suggests that, left to our own devices, the natural instinct for freedom that exists in Australia would not assert itself and that somehow we need the discipline of adherence to international treaties and conventions to stay on the democratic straight and narrow.

Those who hold this view must have forgotten that Australia is one of fewer than 10 nations to have remained continuously democratic for the last 100 years. The fact that the full adult franchise, with equality for men and women, existed in Australia in advance of most other countries, is but one example of the maturity and trailblazing character of Australian democracy.

They have also forgotten that on all too many occasions in the past international committees, dealing with human rights issues, have included representatives of nations with appalling domestic records on human rights.

In other words, we do not need to reach overseas to learn about democracy. It is a well developed and fully embraced habit in this country.

In fact, I see dangers in the ad hoc incorporation of international law into Australia's domestic law. For example, I regard section 32 of the Victorian *Charter of Rights and Responsibilities 2006* as having potential dangers. The *Charter* states:

5 Jeremy Bentham, quoted in S. A. de Smith, *The New Commonwealth and its Constitutions*, (1964) 164.

International law and the judgements of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

We are in no particular need of foreign jurisprudence. We have a well developed domestic sense of human rights. The danger here is that an inferior, or less well developed, view of human rights could be picked up in Australia.

My final word on the issue goes to the heart of our parliamentary democracy. On a regular basis, and in my view quite unfairly, the quality of members of Parliament in Australia is denigrated. Therefore, it does not serve the reputation of our elected representatives for them, quite frequently, to seek to shift decision making from Parliament to so-called 'independent' non political bodies. Every time Parliament passes authority to decide something to another body the importance of the Parliament itself is diminished.

This is why, for the whole time that I was Prime Minister, I resisted the creation of statutory authorities, independent of ministerial control, unless there was a clear public benefit in doing so, such as giving the Reserve Bank of Australia the independent power to set official interest rates.

To me the model which best reflected the responsible parliamentary character of our democracy was one where ultimate authority, and therefore responsibility, rested with a minister acting in the name of the government. If the public was displeased with the decision then they knew who to blame. That is how it should always be.

In many cases, the real reason why some parliamentarians want to hand over decision making to independent statutory authorities is to escape the opprobrium of unpopular decisions. Nothing could be more self defeating. The more that ministers and Parliaments are seen to avoid responsibility (except of course when something popular has been done), the greater will be the level of indifference, or even hostility, to our parliamentary institutions.

My experience has been that Australians bring earthy common sense to their appreciation of political decisions. They will support unpopular decisions if the government of the day clearly establishes that there is a public benefit to be gained from the decision, and that the impact of the decision is fairly spread through the community.

Likewise, however, they quickly detect attempts by any government to shift responsibility for an unpopular decision to a third party in the form of some tribunal or commission which has been established for the express purpose of avoiding political responsibility for the decisions which, in the first place, they have been elected to take. That is why, for example, the public greets with derision attempts by state government ministers to shift

responsibility for fare or service charge increases with claims that they have been decisions of 'independent' pricing bodies.

A bill of rights for Australia would involve a huge transfer of responsibility from the elected representatives of the people, far in excess of anything we have seen before. It would diminish the importance of our parliaments, enhance the power of unelected judges and weaken the particular system of democracy which has served this country so well. I hope that it never comes to pass.

Chapter Five

In Whom We Should Trust

THE HON IAN CALLINAN, AC, QC

I do not distrust courts. How could it be otherwise when I have persisted in spending almost all my working hours waiting in the corridors of courts, in the courts themselves, and preparing to be in them? That I do not distrust them and those who constitute them, does not mean that I have unbounded faith in their capacity to resolve, or indeed the appropriateness of their deciding, matters deeply touching the conscientiously held views and ways of life of all sections of the community. The point is that it requires a leap of faith to give courts the power to decide virtually all such matters as is the case when a constitution contains or a legislature enacts – it is of little consequence which – a bill of rights. Once even merely enacted, it would require a government much more courageous than Jim Hacker's or any others I have known, to repeal it.

It will already be apparent that although I may be, as in fact I am, strongly in favour of human rights and their maintenance, I am opposed to a bill of rights. The arguments against a bill of rights have been well marshalled by others both in this book and elsewhere. It is not easy therefore to say something about them without being repetitive.

But I can say this. I have read on many occasions, and I hope, with attention and respect, the arguments of those who favour codification of human rights, but I remain opposed. It seems to me that in a democracy such as ours it is better that parliament decide the social questions with which bills of right seek to deal than the courts.

In English history there have been two monumental constitutional documents, Magna Carta in 1215 and the Bill of Rights 1689. I refer to these as constitutional documents because of the great and enduring influence that they have had upon public affairs, even though neither is entrenched in the way in which rights and obligations are embedded in written constitutions susceptible of change only by significant majority vote or other elaborate processes. Apart however from instruments and enactments such as these, Westminster democracy and its progeny throughout the world, until recent times at least, has tended to proceed, on the basis of Dicey's theory of negative liberty and parliamentary supremacy: that is, not on the basis that inviolable and immovable rights of a defined kind should be legislated, but that anyone may do as he or she wishes, so long as it is not illegal under the written or the common law.

It is not surprising that this was the approach of the British peoples. Almost without exception they had resolved, ahead of other peoples and other places, to put their trust in popularly elected politicians: it has been for them, the politicians, at their peril to decree what should be proscribed; and only to a lesser extent, to the judges, to determine what was permissible under the common law. I say to a lesser extent, because it was always within the power of the legislature to override judicial decisions not made under entrenched constitutional provisions.

I have written and spoken in other places of a tendency for modern governments to outsource a deal of the business of government. Standing commissions and boards, superficially independent of, but ultimately, inevitably, the creatures of governments can operate as an extension, or instrument of government power, as well as an excuse. Bills of rights enforceable by judicial decree tend in the same way to allow executive and political power to be outsourced to the Courts. That is not good for government and can be worse the courts.

Abortion on demand raises very difficult questions and arouses high passions. So too does privacy. But the media to whom governments are often beholden, or whom they fear, are not keen on privacy. Exposure sells newspapers and attracts watchers, including voyeurs. I do not intend to enter the debate about abortion. I am prepared however to advocate a right to privacy, but a carefully defined right, defined by Parliament after consideration and debate, and not a vague slogan in a bill of rights to be enlarged or narrowed by a succession of judges as they see fit.

I refer to these two matters because most if not all other rights suggested for inclusion in a bill of rights seem to me, largely to exist now at common law or under statute. I will revert to these a littler later but I return to my main theme.

The burning question is whether it is safe to continue to put your trust in politicians: or whether the only sure way of guarding human rights is to incorporate them in a written instrument which can be only changed with much difficulty. Those who would advocate a guarantee of rights are those who sometimes express contempt and derision for politicians. Everyone from time to time becomes frustrated by the political process. Politicians themselves become frustrated by it. But politics is the art of the possible. That is another way of saying that politics always involves compromises. As Chief Justice Gleeson said in his Boyer Lectures, to despise politics is to despise democracy. Very often compromise is by no means a bad thing. An excessive exercise of a personal right can involve an intrusion upon the rights of others. In a democratic society a compromise will usually be reached which requires that the individual right be exercised in a moderate way, so to avoid as little imposition upon the rights of others as is reasonably possible.

One emotive phrase often used is ‘crass majoritarianism’. It is used as if it is an invincible argument in favour of entrenched human and civil rights. Whatever validity it may have in relation to other places, it is an expression which I think should be approached with scepticism in this country. There is no doubt that minorities do need protection, and that such protection may, on occasions, need to be extended to some positive discrimination in their favour. But the reality in Australia is that few of its governments are elected on huge majorities, and our system of checks and balances, not invariably, but ordinarily, means that most interests are not overlooked: in short the compromises which democracy involves, and to which I have already referred have been, or will be made. Nor should it be overlooked that executive power is itself subject in this country to many checks, which include, commissions with coercive powers to expose corruption in official life, ombudsmen, judicial review of administrative action, freedom of information, a rejuvenated system of parliamentary committees, an independent judiciary, and, unlike in the United States, the opportunity of members of parliament to question ministers of state in minute detail.

I am reminded of an anecdote of Sir Harry Gibbs of an event following the famous ‘winds of change’ speech made by Harold McMillan in the second decade after the Second World War foreshadowing the grant of independence by Britain to most of its remaining colonies. On the inception of a new nation there was conventionally a ceremony attended by many dignitaries at which the Imperial flag was lowered, to be replaced by the flag of the new nation. Among the dignitaries were usually a member of the Royal Family, a senior English politician and representatives of other nations. At one such ceremony in Africa, the United States Secretary of State turned to a man of African appearance, saying to him that he must be proud to have his freedom now. The man replied ‘I ain’t got no freedom, I’m from Alabama’.

I The International Experience

The reality is that no matter what may be written in a constitutional document, and no matter how deeply imbedded in it a human right may be, it will be worth little or nothing, unless there is the political will to give effect to it. It was only when the late President of the United States Lyndon B. Johnson was majority leader in the Senate that human rights legislation was steered through the Congress, that is, almost 100 years after the abolition of slavery in that country and almost 90 years after the 14th Amendment to the Constitution in 1875¹ which was intended to make all citizens of the nation equal in all respects. Throughout those years, the United States Constitution, with its various amendments theoretically standing for the protection of all

1 The relevant legislation in the period consisted of the *Civil Rights Act* 1957 (US), the *Civil Rights Act* 1960 (US) and the *Civil Rights Act* 1964 (US).

of the people of the United States, was held up as a model for other Constitutions, yet it was only because of the determination of a politician, (often derided for his ruthlessness and hypocrisy) and his influence on other politicians, that the energy and the will were found to implement its rights provisions.

Justice Holmes and Justice Brandeis of the United States Supreme Court were in dissent on the ambit of the much vaunted First Amendment to the United States Constitution in the third decade of the last century² that is about 140 years after its constitutional incorporation. It was only when the media, and the politicians campaigned and insisted, that free speech started to become a reality, eventually to evolve into what it has become in that country, something that some might say goes further than it ought. Nor, it may be observed, did the United States Constitution secure any relief for the victims of the McCarthy inquisitions at about the same time as the High Court of Australia was striking down the Communist Party Act³, even though no provision of our Constitution has ever said anything about freedom of political expression.

The Bill of Rights in the United States has not always lived up to expectations. Contrasts between them and what we have experienced in this country are worth attention.

The first part of the First Amendment to the United States Constitution is almost an analogue of s 116 of ours, but then it goes on to provide that Congress shall make no law abridging the freedom of speech, or of the press, or of the people peaceably to assemble, and to petition the government for a redress of grievances. Let me focus again for a moment upon freedom of speech and of the press. The closest that we have come to this is a right of political communication, found, it is said in an implication of the Constitution. I was not myself, before the decision in *Lange*,⁴ conscious of any lack of vigour in discussion of political affairs in this country, and indeed, I would suggest that until the decision of the United States Supreme Court in *New York Times v Sullivan*⁵ political discourse in that country might have been more inhibited than it has always been in this one.

The Second Amendment, sometimes described as the terrifying amendment,⁶ and which includes the right of the people to keep and bear arms might have seemed very desirable in December 1791 when it was introduced. It would be totally unpalatable as a constitutional right in this country and perhaps there also now. The Second Amendment provides a good

2 See generally Samuel Konefsky, *The Legacy of Holmes and Brandeis*, (1965) 181-256.

3 *Communist Party of Australia v Commonwealth* (1951) 83 CLR 1.

4 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

5 376 US 254 (1964).

6 See Williams, 'Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment' (1991) 101 *Yale Law Journal* 551.

example of the descent, of a well-meaning and once attractive solution to a short term problem, to an embarrassing and harmful anachronism. Its operation also shows the extremes to which a 'right' may be put. The purpose of the Second Amendment was to ensure, that instead of large standing armies, of which the colonists of North America were deeply suspicious, citizens in a frontier nation, supplying their own weapons, in the use of which they were adept, might readily constitute a militia to repel invaders or put down royalist revisionists. It was certainly not intended to facilitate access by Chicago bootleggers to machine guns to mow down their business competitors.

The Sixth Amendment provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, and to have, among other things, the assistance of counsel. The Seventh Amendment preserves the right of trial by jury in civil matters in which the value in controversy exceeds twenty dollars. Which country provides the better system? I make two points. Both the Sixth and the Seventh Amendments stand in the way of necessary or desirable procedural and substantive reforms from time to time. The requirement of juries in so many cases has the capacity to overload the legal system beyond what any system could bear. It can also lead to the substitution of plea-bargaining, as a matter of routine, for a trial, and the consequential awareness of an accused person that the system cannot provide him with what the Constitution would give him, with the result that he will know that the prosecution will be anxious to accept a lesser plea. If everyone is to have a jury trial then it may be difficult for everyone deserving of it to have a speedy trial. The second point is this. Without constitutional guarantees, the courts in this country have held that there is a relevant right at common law. Courts here do have a jurisdiction to stay long delayed trials as abuses of process, and in serious cases for accused to have a right to counsel.⁷

The Canadian Charter of Rights and Freedoms was enacted in 1982 and entrenched in the Canadian Constitution. It now forms Part 1 of that document.

The entrenchment of the Charter was promoted as part of a 'people's package' by which power would be 'transferred from the political elites to the people, to enhance Canadian democracy'.⁸ Fifteen years afterwards Justice McLachlin was to say, at an anniversary conference, that the Charter had thrust the Court into an 'uncertain sea of value judgments.' It has also been suggested, and with some force, that the political intent was to centralise political power.⁹

7 *Dietrich v The Queen* (1992) 177 CLR 292.

8 Fudge, 'The Canadian Charter of Rights; Recognition, Redistribution, and the Imperialism of the Courts' in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights* (2001) 336.

9 *Ibid* 336.

One commentator, Judy Fudge has observed that by the early 1990s the popular view of the Charter began to change as more cases came before the courts requiring its interpretation.¹⁰ Rights supporters were disappointed by what they saw as overly narrow interpretations of the rights and freedoms.¹¹ On occasions however, when victories were won, such as the recognition of the rights of homosexuals and lesbians, there was a backlash against judicially enforceable rights.¹² The Charter had shifted power to determine the values of Canadian society to unaccountable judges.¹³

In a series of cases, the Supreme Court of Canada condemned discrimination against homosexuals and lesbians as violations of their rights to equality under the Charter.¹⁴ In *Canada (AG) v Mossop*¹⁵ the Court invited a litigant who complained that his employer's refusal of his request to attend the funeral for his partner's father infringed the Charter, to frame his claim as a challenge to the constitutionality of the Canadian *Human Rights Act*, implying thereby that it should consider whether the fact that sexual orientation was not included as an unlawful basis for discrimination in the Act was unconstitutional. This followed the decision of the Supreme Court of Canada in *Schachter v Canada*,¹⁶ in which the Court held that, in a limited category of special circumstances, the courts may ADD to the text of legislative provisions so that they conform to the requirements of the Constitution. In *Mossop* the litigant chose not to pursue the argument.

In *Vriend v Alberta*¹⁷ the Court again confirmed *Schachter*, and added sexual orientation to the list of prohibited grounds of discrimination to Alberta's human rights legislation. The Court, in effect, 'read in' an additional item on to the list. In *M v Hurley* the definition of spouse in Ontario family law legislation, which did not include same sex couples, was found to be of no force or effect. Rather than reading a new concept into the legislation as it did in *Vriend*, the Court in *M v Hurley* suspended its declaration for six months to allow the Ontario legislature to amend the Act. The practical result, however, was the same.

The *New Zealand Bill of Rights Act* was passed by the New Zealand Parliament in 1990. In 1985 it had been suggested by the New Zealand Government that the Bill of Rights might be enacted as a fully justiciable

10 Ibid 337.

11 Ibid 337.

12 Ibid 337.

13 Ibid 338.

14 Ibid 341.

15 [1993] 1 SCR 554.

16 [1992] 2 SCR 679.

17 [1998] 1 SCR 493.

‘constitutionalized’ instrument¹⁸. A select committee of the New Zealand Parliament rejected that idea and clearly recommended the enactment only of a statutory bill of rights.¹⁹

During its passage through Parliament two major amendments were made to the Bill.²⁰ First, section 4 was inserted. It explicitly stated that a court must not hold any provision of any enactment to have been impliedly repealed by the Bill of Rights. Similarly, a court could not decline to apply any provision of an enactment by reason of inconsistency with a provision in the Bill of Rights. The second change that was made, was the removal of a clause (rather like section 24 of the Canadian Charter) allowing a court to grant wide and novel remedies in the event of a contravention of a person’s rights.²¹ The Bill of Rights was plainly therefore not intended to create new remedies.

Section 5 provided that, subject to s 4, the rights and freedoms contained in the Bill may be subject only to such limits prescribed by law as could be demonstrably justified in a free and democratic society. The fact that s 5 is expressed to be subject to the limitation in s 4 raised questions as to the effect and operation of s 5. Sir Robin Cooke in *R v Butcher*, said this:

What can and should be said unequivocally is that a parliamentary declaration of human rights and individual freedoms, intended partly to affirm New Zealand’s commitment to internationally proclaimed standards, is not to be construed narrowly or technically.²²

Certainly the Act is not entrenched. Still it is an affirmation of the basic rights of the people in New Zealand. The correct judicial response can only be normally to give it primacy, subject to the clear provisions of other legislation.²³

Later he condemned the High Court of Australia for timidity in an article in *The Commonwealth Lawyer*.²⁴ As Lord Cooke of Thorden, as he had by then become, he wrote, ‘the best the High Court has been able to do in that direction [that is of finding rights] is to discover in the Constitution, after nearly a hundred years, a hitherto unsuspected implied right – a right to defame politicians, subject to limited qualifications’.²⁵

18 James Allan ‘The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson from New Zealand’ in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights* (2001) 377.

19 Ibid 377.

20 Ibid 378.

21 Ibid 378.

22 [1992] 2 NZLR 257 at 264

23 [1992] 2 NZLR 257 at 267

24 Cooke, ‘Final Appeal Courts; Some Comparisons’ (2003) 12 *The Commonwealth Lawyer*, 43.

25 Ibid 45.

Sir Robin Cooke was not the only judicial enthusiast in New Zealand. In *Simpson v Attorney-General (Baigent's Case)*²⁶ the Bill of Rights was given effect in the civil law. By a majority of 4:1, the Court of Appeal created a public law remedy sounding in the Bill of Rights Act, notwithstanding the earlier explicit parliamentary rejection of novel remedies. The new remedy was distinguished from the ordinary remedy for breach of statutory duty.

It seemed for a time that *Baigent's Case* might perhaps be the high water mark of judicial development of the Bill of Rights²⁷ for in 1998; the Court of Appeal was reluctant to go as far as the Supreme Court of Canada in relation to same sex couples. In *Quilter v Attorney-General*²⁸ it held that the New Zealand *Marriage Act 1955* was intended to confine marriages to a union between a man and a woman. The Act was considered to be inconsistent with the Bill of Rights' 'freedom from discrimination' provision, and therefore to prevail.

In the year 2000 however, the Court was on the march again, indicating that it saw a significant role for itself in making its own value judgments. In *Moonen v Film and Literature Board of Review* it held that:

In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s 5, it is desirable first to identify the objective which the legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed... Of necessity value judgments will be involved. ... Ultimately, whether the limitation in issue can or cannot be justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.²⁹

The great bastion of the common law, the United Kingdom has also succumbed.

The *European Convention of Human Rights and Fundamental Freedoms* was signed on 4 November 1950, ratified by the United Kingdom on 8 March 1951 and became effective in Europe on 3 September 1953 (after 10 States had ratified it). It is not possible or necessary to explain the complications of its status in the United Kingdom as a result of ratification.

Following the election of the current government in 1997, a White Paper was released in which it was argued that it was no longer enough to

26 [1994] 3 NZLR 667.

27 Allan, above n 17, 382.

28 [1998] 1 NZLR 523.

29 [2000] 2 NZLR 9, 16-17.

rely on the common law for the protection of rights. The authors of the paper advocated the incorporation of the Convention into the domestic law of the United Kingdom. The *Human Rights Act 1998* was passed by the Parliament at Westminster on 9 November 1998. It applied to laws passed by the Parliament on and from 2 October 2000.

The rights protected under the Act are, with certain reservations, those set out in the Convention.

The United Kingdom Parliament gave the courts some of the powers that the New Zealand courts took for themselves. Under s 8 of the *Human Rights Act 1998* the Court may, in relation to any act which the Court finds is, or would be unlawful, grant any relief or remedy within its powers as it considers appropriate and just. Damages may only be awarded if, taking account all of the circumstances of the case, including any other remedy granted, the Court is satisfied that the award is necessary, to afford just satisfaction to the person whose rights had been contravened.

Section 3 of the Act imposes an interpretive obligation on courts to read legislation and give effect to it in a way that is compatible with the Convention. The section also makes it clear that this does not affect the validity, continuing operation, or enforcement of any incompatible primary legislation.

Section 4 confers a discretionary curial power to declare that a provision is incompatible with a Convention right. Such a declaration is not binding on the parties to a dispute about Convention rights and does not affect the validity, or operation of the primary legislation declared to be incompatible.

The only remedy available in the case of a declaration of incompatibility is the possibility of a 'remedial order' under s 10. Section 10 empowers a *Minister*, if satisfied that there are compelling reasons to do so, to amend legislation, by order, so as to remove the incompatibility.

II Conclusion

I have said enough I hope to demonstrate the risks of bills of rights. Whether the risks are outweighed by advantages is a matter upon which the two camps are unlikely to agree. I am myself opposed for further reasons which are not always easy to articulate. Judges are not immune to the narcotic of power. Most, but certainly not all, avoid addiction. That some can not, and then even those who do have no choice, under a bill of rights, but to decide a vague rights question, as such questions usually are, as best they can, are factors which influence me.

A further factor is the effect bills of rights can have on the internal operation of the courts. The Australian courts, including the High Court, have a genuine commitment to an apolitical decision making process. In my view constant exposure to the political and social questions thrown up for decision under the United States' Bill of Rights may have infected the

decision making processes of the courts in that country. If even a third of what is written in *The Brethren* and *Closed Chambers* is true it can be seen that the Judges of the United States Supreme Court sometimes conduct themselves internally as if they were in a smoke filled back room, wheeling and dealing with one another and trading off a compromise on one issue for a reciprocal promise from a colleague or another: if you go along with me on the right to bear arms I'll support you on free speech. Australian courts including the High Court do not engage in activities of that kind and I hope would never do so.

I conclude with an anecdote. In writing this chapter I have borrowed from a paper which I presented at a 'rights' conference some years ago which was attended by judges from two of the jurisdictions in which bills of rights had relatively recently been introduced. In the course of my presentation I raised some doubts about my training, qualifications, experience and way of life as a judge to decide the social questions tied up in bills of rights. That two judges from those other jurisdictions brushed aside my concerns, and expressed the greatest possible confidence in their own capacity to decide these matters that clinched the argument for me.

Chapter Six

What's Wrong About a Statutory Bill of Rights*

PROFESSOR JAMES ALLAN

I have resisted the temptation to entitle this chapter 'Whaling is for Scientific Purposes; Homeopathy Actually Works; and a Bill of Rights Will Enhance the Role of Parliament – These are a Few of My Favourite Myths'. All in all it was a bit unwieldy. But it will become plain, as I proceed, why I was tempted, not least by the dripping sarcasm.

Many, if not most, of those pushing for some form or other of a bill of rights instrument like to point to the fact that Australia is one of the very few democracies – depending on how you look at the Basic Laws in Israel and the judiciary's unwillingness to make much of what they have in Japan and a few other non-common law countries, perhaps the only one – without a national bill of rights. On its own, of course, such a 'we differ from everyone else' type of argument tells us nothing. After all, Australia is one of only two democracies with preferential voting; only a handful more have compulsory voting; few have a form of bicameralism with an elected, genuine house of review Upper House; and many lack federalism. Ought we to change any of these on the sole ground that we stand out from the pack? Of course not.

The real question is not whether we should emulate others but whether a bill of rights is a good idea in its own right. Would having one deliver better outcomes than we achieve without one?

My answer is an emphatic and resounding 'no'. Here is why.¹ To start, notice that any sort of bill of rights enumerates a list of vague, amorphous – but emotively appealing – moral entitlements in the language of rights. It operates at a sufficiently high level of abstraction or indeterminacy that it

* Based on an edited version of the author's Senate Occasional Address in 2008.

1 What follows is a selective overview of my reasons for opposing bills of rights. For more detail, arguably mind-numbing detail, see eg. James Allan, 'Bills of Rights and Judicial Power – A Liberal's Quandary?' (1996) 16 *Oxford Journal of Legal Studies* 337; James Allan, *Sympathy and Antipathy: Essays Legal and Philosophical* (2002); James Allan, 'Rights, Paternalism, Constitutions and Judges' in Grant Huscroft and Paul Rishworth (eds.), *Litigating Rights: Perspectives from Domestic and International Law* (2002) 29; James Allan, 'Oh That I Were Made Judge in the Land' (2002) 30 *Federal Law Review* 561; James Allan, 'Paying for the Comfort of Dogma' (2003) 25 *Sydney Law Review* 63; James Allan 'A Modest Proposal' (2003) 23 *Oxford Journal of Legal Studies* 197; James Allan 'An Unshamed Majoritarian' (2004) 27 *Dalhousie Law Journal* 537; James Allan, 'Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century' (2006) 17 *King's College Law Journal* 1; James Allan, 'Thin Beats Fat Yet Again – Conceptions of Democracy' (2006) 25 *Law & Philosophy* 533; James Allan, 'The Victorian *Charter of Human Rights*: Exegesis and Criticisms' (2006) 30 *Melbourne University Law Review* 906.

is able to finesse most disagreement. Ask who is in favour of 'freedom of expression' or 'freedom of religion' or a 'right to life' and virtually everyone puts up his or her hand. And of course this is where bills of rights are sold, up in the Olympian heights of disagreement-disguising moral abstractions and generalities; this is where they are being sold right now in Australia.

Nevertheless, that is not where these instruments have real effect. People do not spend hundreds of thousands of dollars going to court to oppose 'freedom of speech' in the abstract. They do not take a case all the way to the Supreme Court of Canada or the United States or to the House of Lords in the United Kingdom, with all the costs and time and worries that entails, to argue that they are opposed to 'freedom of movement' or to a 'right to life' or 'to liberty and security of the person' (or to any other of the enumerated rights in Victoria's *Charter of Human Rights*).

Bills of rights have real, actual effect down in the quagmire of social-policy decision-making where there is no consensus or agreement across society at all about what these indeterminate entitlements mean. Rather, there are smart, reasonable, well-informed, even nice people who simply disagree about where to draw the line when it comes to campaign finance rules or hate speech provisions or defamation regimes or whether Muslim girls can or cannot wear veils to school or whether to sanction gay marriage and so much more. One could sit around in groups, holding hands, singing 'Kumbaya', and chanting 'right to free speech' or 'right to freedom of religion' for as long as one wanted and it would help not at all in drawing these contentious, debatable lines.

What a bill of rights does is to take contentious political issues – issues over which there is reasonable disagreement between reasonable people – and it turns them into pseudo-legal issues which have to be treated as though there were eternal, timeless right answers. Even where the top judges break 5–4 or 4–3 on these issues, the judges' majority view is treated as *the view* that is in accord with fundamental human rights.

The effect, as can easily be observed from glancing at the United States, Canada and now New Zealand and the United Kingdom, is to diminish politics and (over time) to politicize the judiciary. Meanwhile, the irony of the fact that judges resolve *their* disagreements in these cases by voting is generally missed. The decision-making rule in all top courts is simply that 5 votes beat 4, regardless of the moral depth or reasoning of the dissenting judgments, or that they made more frequent reference to JS Mill or Milton or the International Covenant on Civil and Political Rights. Only the size of the franchise differs.

None of this deters bill of rights proponents from talking repeatedly about how such an instrument 'protects fundamental human rights', as though these things were mysteriously or magically self-defining and self-enforcing. They are not. They simply transfer the power to define what

counts as, say, a reasonable limit on free speech over to committees of ex-lawyers (who have no greater access to a pipeline to God on these moral and political issues than anyone else, but who are immune from being removed by the voters for the decisions they reach).

Of course in the Australian context proponents who formerly championed some sort of American or Canadian-style constitutionalised bill of rights that would allow judges to strike down legislation now tell us (after repeated failures to get Australian electors to agree) that they favour only statutory bills of rights. And they make much of how these statutory versions leave the last word with elected politicians.

By no means is this the sort of Damascene conversion some proponents pretend. Quite simply, these statutory versions are virtually as potent as their constitutionalised cousins. They too shift much power to the unelected judiciary, however much some proponents may indicate otherwise.

The proof of the pudding, of course, is in the eating. And the evidence from New Zealand and the United Kingdom (both jurisdictions having statutory bills of rights, indeed ones that were the models copied by the state of Victoria's *Charter of Rights*) is clear and unambiguous. The top judges there have become more powerful since the arrival of the respective bills of rights.

How? One of the main (and little publicized) devices is a provision in these statutory versions that is known as a 'reading down provision'. These end up being a license to rewrite (as opposed to strike down) legislation. What they do is direct the judges, *so far as it is possible to do so* (Victoria and the UK) or if they *can* (NZ), to read all other statutes as consistent with the enumerated rights. Of course what is and is not consistent with such rights is wholly up to the judges, as is the question of what is and is not possible. Even the secondary question of what limits on rights are reasonable is one that bills of rights leave wholly with the unelected judges. They decide what aspects of other statutes are or are not consistent with the vague, amorphous rights provisions; they decide what is and is not possible insofar as giving other statutes a different meaning; and they decide what is and is not reasonable.

Remember that when you hear proponents of statutory bills of rights continually talk in gaseous platitudes about protecting fundamental rights. Remember that people disagree down in the quagmire of detail about where to draw the line to do that protecting; remember that the judges have no greater moral (not legal, but moral) perspicacity in knowing what will and will not be the course of action that does that upholding of fundamental rights than you or I or plumbers or secretaries or, dare one say it, politicians; and remember that when the unelected judges disagree amongst themselves on these tough rights questions, as they inevitably do, they themselves resort to voting and letting the numbers count, the exact same decision-making procedure so many bill of rights proponents like to belittle, at least in quiet moments of honesty over a drink or two.

Turning back to these various sorts of reading down provisions – these directions to give the words of other statutes a meaning that you, the judge, happen to think is more moral and more in keeping with your own sense of the demands of fundamental human rights – the danger is that just about any statutory language (however clear in wording and intent) might possibly be given some other meaning or reading.

Put differently, reading down provisions such as these throw open the possibility of ‘Alice in Wonderland’ judicial interpretations; they confer an ‘interpretation on steroids’ power on the unelected judges. So although there is no power to invalidate or strike down legislation, the judges can potentially accomplish just as much by re-writing it, by saying that seen through the prism (that is, their own prism) of human rights, ‘near black’ means ‘near white’. They can make bill of rights sceptics like me half long for the honesty of judges (under constitutionalised bills of rights) who strike down legislation rather than gut it of the meaning everyone knows it was intended to have (rule of law values notwithstanding – and by that I mean the value we citizens, if not judges, all otherwise put on knowing in advance what the laws are that we are required to abide by so that we can plan accordingly and have our legitimate expectations satisfied).

Now that allegation of ‘Alice in Wonderland’ interpretations can sound alarmist. So the question arises, has anything remotely like that occurred under the UK and New Zealand reading down provisions? As it happens, the answer is a definite ‘yes’.

Here I will simply quote from the leading House of Lords decision from four years ago. Read what Lord Nicholls (supported, more or less, by all the other Lordships) was prepared openly and explicitly to say:

It is now generally accepted that the application of s 3 [the reading down provision] does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, s 3 may none the less require the legislation to be given a different meaning... Section 3 may require the court to ... depart from the intention of the Parliament which enacted the legislation... It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant [meaning bill of rights compliant].²

The other Lords (even Lord Millett in dissent) were broadly in agreement with these revolutionary views. Lord Steyn was clear that the interpretation adopted need not even be a reasonable one. And just to give you the full potency of these reading down provisions, it is crucial to realise that in

2 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571-572.

reaching this result their Lordships overruled one of their own House of Lords authorities – a case on the meaning of exactly the same statutory provision, an authority only five years old, and one that had held the meaning to be clear.³

Lest anyone be inclined to think this was some rogue case, note what was said two years later: ‘The Human Rights Act 1998 [incorporating the European Convention on Human Rights – their bill of rights] created a new legal order’.⁴ It is a new order, of course, in which a good deal more of the moral and political line-drawing in society is being done by committees of ex-lawyers. I do not think it is in any way an unfair characterisation to say that what is happening in the United Kingdom is the diminishing of democracy (where democracy is understood in its usual sense of ‘majority rules’ or ‘letting the numbers count’). And the various people who are presently pushing for one of these statutory bills of rights here – and I am not clear whether that includes the Attorney-General or not – should at least have the good graces to come clean and tell everyone that there is the potential for this statutory bill of rights of theirs ‘to create a new legal order’, one that will enhance significantly the role of unelected judges while diminishing that of the elected representatives of the voters.

Certainly after looking at the experience of the United Kingdom one could summarize what has thus far happened there by saying that under a statutory bill of rights the most senior judges of what was once considered to be the most interpretively conservative court in the common law world now tell us they can give other statutes – statutes they concede would otherwise be clear and unambiguous – the exact opposite meaning as that intended by the elected Parliament. They can read words in, read words out, and opt for clearly unwanted outcomes. Wow! As I said, that is Alice in Wonderland stuff. It certainly looks to me to amount to a power to redraft or rewrite disfavoured statutes. And it is precisely that which bill of rights advocates have shifted to promoting in Australia. It is largely that version of a statutory bill of rights, with a bit of New Zealand’s thrown in, that Victoria has enacted.

The experience in New Zealand with their reading down provision reinforces this assertion. Despite on the face of things having the most enervated bill of rights imaginable – not least because the remedies provision had to be wholly removed and a unique ‘this bill of rights loses to all other statutes’ provision (s.4) inserted to get the Bill through Parliament – the judges across the Tasman have done the following: a) in the first case⁵ ever to reach the highest domestic court Cooke P suggested that this new bill of rights, with its reading down provision, may require a court to depart from

3 *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

4 *Jackson v Attorney General* [2006] 1 AC 262, [102] per Lord Steyn.

5 *Flickenger v Crown Colony of Hong Kong* [1991] 1 NZLR 439, 441.

long established interpretations as regards the meaning to give to other statutes; b) the remedies clause was read back in, while creating a new public law remedy sounding in the bill of rights;⁶ c) s.4 was and has been more or less completely ignored; d) exclusion of evidence rules were re-written (and re-written again), to the advantage of accused; e) the judges simply gave themselves a power to issue declarations of incompatibility (see below), with no statutory warrant whatsoever.⁷

And here's what they came within a whisker of doing. They came within one judicial vote of saying that they, the judges, could use the bill of rights (with its reading down provision) to say that old statutes – when perceived to be inconsistent with one of the amorphous rights entitlements – could prevail over inconsistent statutes of more recent enactment. In other words, three of seven top Kiwi judges thought that if the judges happened to conclude that an old statute was more in keeping with rights than a new one, and the two were inconsistent, the judges could say the old one prevailed.⁸ (The seventh judge decided the case on other grounds.)

Think about that. The doctrine of implied repeal, based on the notion that each generation should decide matters for itself, would go out the window. This would have been a power to choose whether newly enacted statutes can be ignored in favour of older, existing statutes the judges happen to prefer, or to think more in keeping with their notion of what is a rights-respecting outcome. And this on the basis of an enfeebled, enervated bill of rights much weaker than those of the United Kingdom or Victoria. All that Australian proponents of such instruments tend to say in response is a) that at least this worst sort of wild, unintended outcome did not, in the end, come to pass in New Zealand; and b) even the New Zealand top judges have on one occasion disapproved of the UK approach.⁹ So even if all the other matters I enumerated above are true, and they are, at least the New Zealand top judges haven't gone as far down the 'giving statutes a meaning you think they should have, rather than the one they clearly do have' path as the UK judges have. Does that comfort any of you in the audience?

I think I have said enough to back up my earlier claim that the experiences of the United Kingdom and New Zealand throw open the possibility of Alice in Wonderland interpretations, should we opt for a statutory bill of rights. And were this to come to pass it would look to me very much like what the judges do in Canada and the US under constitutionalised bills of rights. There they strike down statutes. In the UK and New Zealand they simply re-write them (under the guise of pretending to interpret them) to say

6 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667.

7 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

8 *R v Porz* [2001] 2 NZLR 37.

9 *R v. Hansen* [2007] NZSC 7.

what they, the judges, think would be preferable. And in New Zealand they came one vote away from simply handing themselves the power to ignore new statutes in favour of other, older, inconsistent statutes.

No one could ever say, with a straight face, that reading down provisions do not hold out the prospect of transferring much power to the unelected judiciary.

So what do the singers of the ‘bill of rights for Australia’ siren song say in response? And here I hope you’ll forgive me for descending into a technicality or two, but if you bear with me you might just think it worthwhile. In effect they point to four words that are part of the *Victorian Charter of Human Rights* but that are not part of the UK or New Zealand bills of rights. I am referring to the respective reading down provisions. The UK’s (s.3(1)) states: ‘So far as it is possible to do so [other legislation] must be read ... in a way which is compatible [with this bill of rights]’. By contrast, Victoria’s Charter (s.32) states: ‘So far as it is possible to do so *consistently with their purpose*, all statutory provisions must be interpreted in a way that is compatible with human rights.’

It is those extra four words (‘consistently with their purpose’) that we now are being told will make all the difference. Those four words will be our bulwark against the tide of interpretation on steroids type House of Lords’ results, results that are not interpretation so much as redrafting. Those four words will ensure that Parliament in Australia remains supreme (within the confines of the Constitution). To paraphrase Churchill, ‘never has so much been owed by so many to four words’, at least if we are to take this latest incarnation of the pro-bill of rights camp’s assurances seriously.

Before tracing out their argument, and why it is a feeble one, notice that this bill of rights debate in Australia has taken on something of a smoke and mirrors quality to it. You can never quite pin down proponents on what they actually think or believe. To start, most proponents were all in favour of a vigorous US-style or Canadian-style entrenched, constitutionalised bill of rights. After something of an apparent Damascene conversion for some of them, not least when Australian voters continually rejected their hopes for one of these, we then learned it was only a harmless little statutory bill of rights they wanted. What harm could a mere statutory version cause? But as the evidence came in from the UK and New Zealand, that position was abandoned too in favour of this new gloss: That these four words will make all the difference in reining in the unelected judges.

Here’s the gist of their argument. With these four words in place judges are directed to read down all other statutes, just as they are in the UK and New Zealand, BUT here they are being directed to do so only when that reading down outcome will be ‘consistent with the purpose’ of the statute being interpreted. So here’s the crucial question. How constraining on the point-of-application interpreter of a statute is that extra four word injunction?

You can read words in, read words out, have no need to wait for any ambiguity before doing so, indeed (given that subsection (2) of Victoria's s 32 reading down provision explicitly tells the judges to consider overseas case law, and that includes quite clearly what the House of Lords and top New Zealand courts are doing) you can even copy all these international trends, provided only that the meaning you end up attributing to the statute after this reading down exercise is one that is 'consistent with its purpose'. To repeat the key question, how constraining on a judge is that?

Not very much at all is the short answer. I would say that any half decent lawyer, told that his preferred human rights rewriting of a statute would only be allowed if he could also say that it was in keeping with the purpose of the statute, would rarely have much difficulty driving a truck through that sort of purported constraint. The fact is that most decent sized statutes have a multitude of purposes.

Here's how the famous American legal scholar Lon Fuller of Harvard made the point about the porousness of purposive limitations or constraints when it comes to interpretation (and Fuller was an advocate of such a purposive approach, he just was honest about its malleability) in his famous mock hypothetical *The Case of the Speluncean Explorers*:

We are all familiar with the process by which the judicial reform of disfavored legislative enactments is accomplished. Anyone who has followed the written opinions of Mr. Justice Foster [who is the fictional judge Fuller created to put forward the purposive case] will have had an opportunity to see it at work ... I am personally so familiar with the process that in the event of my brother's incapacity I am sure I could write a satisfactory opinion for him without any prompting whatever, beyond being informed whether he liked the effect of the terms of the statute [or not].

The process of judicial reform requires three steps. The first of these is to divine some single 'purpose' which the statute serves. This is done although not one statute in a hundred has any such single purpose, and although the objectives of nearly every statute are differently interpreted by the classes of its sponsors. The second step is to discover that a mythical being called 'the legislator', in the pursuit of this imagined 'purpose', overlooked something or left some gap or imperfection in his work. Then comes the final and most refreshing part of the task, which is, of course, to fill in the blank thus created. *Quod erat faciendum*.¹⁰

Here is the truth of the matter. Any judge inclined to fancy himself or herself a latter day philosopher king – an arbiter for the rest of us of what is

10 (1949) 62 *Harvard Law Review* 616, 634.

and is not in keeping with the amorphous notion of fundamental human rights – will not in the least be prevented from doing so by these four extra words. Those who balk at what the House of Lords has done would balk without these four extra words. And those who would not balk, who think they have some sort of pipeline to God when it comes to all these incredibly contentious and debatable line-drawing exercises connected to rights-based disputes that always and everywhere lead to disagreement and dissensus amongst smart, reasonable, well-informed and even nice people, well those sort of judges are simply not going to be deterred by these four words. Does anyone really think, hand to heart, that these four words would have made the crucial difference to a Steyn or Hoffmann or Cooke? (Discretion being the better part of valour I refrain from mentioning any Australian judges here, but I'm quite sure many people would not find it an overly taxing job to list a few for themselves.)

If the assurances against runaway judicial conceit and over-powerful judges and juristocracy and kritarchy now rest on the four words 'consistently with their purpose', then I am afraid they don't rest on much at all.

So reading down provisions can turn, and in the UK and New Zealand to a significant extent they have turned, a statutory bill of rights into something that gives the unelected judges almost as much power as they are afforded under an entrenched, constitutionalised bill of rights. You might like that, or – like me – you might not. But pretending it is not a possibility is at odds with what is happening in jurisdictions that have already gone down the statutory bill of rights path. It is simple prevarication or naivety, you pick. And in those other jurisdictions, as with here, we were heartily assured before the enactment of the bill of rights that 'the judges here are so interpretively conservative you have nothing to worry about'. Elsewhere those assurances have proven to be hollow to the core.

Let me now say a few brief words about the other main provision in a statutory bill of rights that transfers power to the unelected judges – yes, there is more than one. Then I want to move back to some more general concluding remarks.

Section 36(2) of the *Victorian Charter of Rights and Responsibilities* has a provision that gives that state's Supreme Court the power to declare that in its opinion a statutory provision cannot be interpreted consistently with one of the enumerated rights. I do not have time to go through all the problems with this provision. But notice that s 36 furthers the tendency – one indulged in almost always by bill of rights proponents – to conflate 'what the judges think about rights' and 'what is actually the case about rights'. It is as though a committee of ex-lawyers had some authoritative, definitive (and to me, mysterious) ability to know and to declare precisely where to draw all the highly contestable and disputed lines that comes from turning political disputes into pseudo-legal ones.

Yet put that to one side, along with the potential chapter III and s 73 issues related to advisory opinions.

Instead, let's take this declaration of inconsistent interpretation provision on its own terms. In the absence of any power to strike down legislation (as per constitutionalised bills of rights as in the US and Canada), and assuming (wildly optimistically in my view) that the judges will not go too far down the Alice in Wonderland path of how to use the reading down provision, it is precisely these judicial declarations that are supposed to give rise to all the benefits proponents of statutory bills of rights predict. The claim is that there will be some sort of dialogue¹¹ and that the legislature – on learning that one of its statutes has attracted one of these judicial declarations – will ponder it and reflect on how best to accomplish its aims while at the same time attempting to uphold the various enunciated human rights, or at least limit them only to an extent that is reasonable and justifiable.

That is the claim. However, that claim is only remotely plausible where the elected legislature is left in a position in which it feels it can, on occasion at least, disagree with and overrule the unelected judges. Remember, judges are not gods and so there is no reason at all to think their view on some moral or political issue is by definition the correct one. So if the Victorian *Charter of Rights* is really to result in a dialogue, a scenario in which the judges' views do not routinely prevail, then it must be the case that sometimes – in fact – the elected legislators stand up to the unelected judges and say, in effect, 'we've heard your view and we've considered it but after more reflection we disagree'. If the judges always prevail that in no way resembles a dialogue.

The signs on this front are bleak indeed. In Canada, with its constitutionalised *Charter of Rights* that nevertheless contains an override that in theory allows the elected parliament to trump the judges, the elected federal parliament has not used that override – not one single time – in the 26 years of the Canadian *Charter's* existence.

Perhaps, though, that can be ignored as what flows from a constitutionalised model (or so, at least, we regularly are reassured). What then of the UK? It has a statutory bill of rights. It has a provision allowing the judges to make declarations of incompatibility. What, in fact, happens over there after the judges issue them? Does the elected legislature ever dispute what almost always amounts to a highly debateable line-drawing call, one over which sincere, reasonable, well-informed, even nice people can and do disagree?

The answer is 'no'. According to Klug and Starmer, writing in 2005, '[i]n every case where remedial action had not been taken before the [judicial]

11 Personally, I think such claims highly implausible. For an attack on the very plausibility, coherence and likelihood of any judicial-legislative dialogue, see Jeremy Waldron, 'Some Models of Dialogue Between Judges and Legislators' in Grant Huscroft and Ian Brodie, (eds) *Constitutionalism in the Charter Era* (2004).

declaration was made, the government responded by repealing, amending or committing to repeal or amend, the relevant provision'.¹² In other words, after every single judicial declaration of incompatibility in the UK, *every single one of them*, the elected legislature deferred to the unelected judges.

Dialogue should be made of sterner stuff. And so, too, should be claims that this declaration power will not make it impossible for the elected parliament to disagree with the judges, will not have the de facto effect of making the judges' views the ones that end up prevailing.

Let me turn, to make a few concluding remarks. As a native born Canadian I had thought about recounting what the judges have done in Canada with their bill of rights. Yes, I know theirs is a constitutionalised one, but the way things are going with statutory versions there won't be much, if any, difference between what the UK and Canadian judges can do. Of course when I point to Canada I'm often told I'm scaremongering. In this instance, however, a little scaremongering might go a long way.

So let us recall some of the decisions of the Supreme Court of Canada. The judges there have decided that free speech concerns trump health and safety concerns in the context of tobacco and commercial advertising;¹³ they have decided what campaign finance rules are acceptable,¹⁴ that each and every refugee claimant to Canada must be given an oral hearing (at a cost of billions of dollars, and massive ongoing delays),¹⁵ and that the legislature's ban on private health insurance was unconstitutional,¹⁶ as was its confining of marriage to opposite sex couples.¹⁷ They have twice over-ruled the federal Parliament on whether convicted and incarcerated prisoners must in all cases be allowed to vote,¹⁸ indeed in the latter of those cases the Chief Justice of Canada has referred obliquely to countries that disagree with her court's 5–4

12 Francesca Klug and Keir Starmer, [2005] *Public Law* 716, 721 (emphasis mine – and note that the authors see this as a *good* thing).

13 See *RJR MacDonald Inc v Canada* (1995) 127 DLR (4th) 1.

14 See *Harper v Canada (Attorney General)* [2004] 1 SCR 827 or *Libman and Equality Party v Attorney General of Quebec* [1997] 3 SCR 569.

15 See *Singh v Canada (Minister of Employment and Immigration)* [1985] 1 SCR 177.

16 See *Chaoulli v Quebec (Attorney General)* 2005 SCC 35. Strictly speaking this was a 7 member court splitting 3-3 on whether s. 7 of the *Charter* was violated. The casting vote held that the Quebec Charter was violated, so there were 4 votes for striking down the legislation.

17 See *Halpern v Canada (AG)* [2003] OJ No. 2268. After this Ontario Court of Appeal decision the court was awarded the title of 'nation builder of the year' by the *Globe and Mail* newspaper and the judges posed for a portrait.

18 See *Sauve v Canada (Attorney General)* [1993] 2 SCR 438 and *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519. And as for any vapid and vacuous notions of a dialogue between elected and unelected branches of government, the Chief Justice's core view is made clear in the latter case. 'Finally, the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a 'dialogue'. Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between legislature and the courts should not be debased to a rule of 'if at first you don't succeed, try, try, again'.' ([17], per the Chief Justice)

ruling, including Australia, the UK, the US and New Zealand, as 'self-proclaimed democracies'.¹⁹ (Perhaps I should pause for a moment and allow fully to sink in the staggering self-assuredness – no, the out and out moral sanctimoniousness and self-righteousness – of a top Canadian judge calling New Zealand, Australia, the US and the UK 'self-proclaimed democracies'? What would have been the reaction had George Bush said that?)

I could go on and mention other Canadian cases, say the one striking down the compromise abortion legislation²⁰ or others. However, let it suffice simply to recall the case of *Reference Re Remuneration of Provincial Court Judges*,²¹ a scandalous decision in which the Canadian Supreme Court struck down legislation reducing the salaries of provincial judges as part of a general province wide reduction of public servants' pay. As Jeff Goldsworthy describes it:

[F]irst year law students [are] taught to clear their heads of 'mush' and think like lawyers. In [this] case, the Supreme Court seems to have undergone something like the same process in reverse. But there is a difference: the Supreme Court's mush is calculated – it is mush in the service of an agenda [it is] a disingenuous rationalization of a result strongly desired by the judges on policy grounds.²²

So I finish with this thought. Democracy is the best form of government for people who aren't sure they're right. Bills of rights, by contrast, are for people who think their moral antennae are better than everyone else's, who *are* sure they're right. Actually, that's not quite correct, is it? Because bills of rights – in turning debatable and contentious political and moral line-drawing exercises into pseudo-legal exercises where one side or the other has to be proclaimed to be the one on the side of fundamental human rights – actually empower a small group of unelected judges. The bet that proponents are making isn't that *they* have a pipeline to God, but that the judiciary does. They're betting that judges have greater moral and political perspicacity than do the elected representatives of the people. It's an unattractive bet, in my view, when it's presented openly and honestly, rather than when it's disguised in moral abstractions and grand proclamations about 'protecting rights' (as though Australia were some North Korea whose citizens lacked rights; as though at present, without a bill of rights, we didn't outscore Canada in terms of the scope citizens are afforded to express themselves without

19 Ibid., [41]. The reference is to countries discussed in Justice Gonthier's dissent. See [125], [130] and [131].

20 See *R v Morgentaler* [1988] 1 SCR 30.

21 [1997] 3 SCR 3. For a similar view see Jeffrey Goldsworthy, 'The Preamble, Judicial Independence and Judicial Integrity' (2000) 11(2) *Constitutional Forum* 60.

22 *Ibid.*, 64.

constraints and didn't outscore the UK in terms of having the less harsh anti-terrorism provisions).

At core, if we're at all honest, any sort of bill of rights is about imposing an aristocratic or anti-democratic element into government. It's about handing an awful lot of line-drawing powers as regards an awful lot of highly contentious moral and political issues to committees of ex-lawyers, who will resolve their disagreements on these issues by themselves voting, the only difference being the size of the franchise. Those of us who think democratic decision-making – for all its many and obvious faults – is nevertheless the least bad form of government going (and certainly better than what you'd get if you added an element of judicial oversight) had better start voicing their opposition to a Commonwealth bill of rights now, before it's too late.

This won't be easy. Emotively-laden appeals up in the Olympian heights of amorphous moral abstractions have a certain attraction in some quarters. It's time to start explaining why that attraction is superficial, vacuous and, down in the quagmire of day-to-day detail, at odds with giving each Australian a more-or-less equal say in how we are all governed.

Chapter Seven

Solomon's Heirs? Dissecting the Campaign for Judicial Rule in Australia

ALAN ANDERSON

At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Abraham Lincoln¹

Novelty is a common conceit of political idealists, even as they unconsciously recycle the intellectual refuse of past generations. Contemporary advocates of an Australian charter of rights trust that our generation has uniquely discovered the philosophical foundations of a just society, such that we may now embark upon the ambitious project of documenting them comprehensively.

They share this conceit not just with their fellow travellers in other nations, past and present, and with the many past advocates of incorporating a bill of rights into Australian law, but also with intellectual forebears stretching back at least to Plato and his utopian Republic.

So long as bad ideas, chameleon-like, emerge in new guises, so must the arguments against them adapt. As Hayek explained, '[i]f old truths are to retain their hold on men's minds, they must be restated in the language and concepts of successive generations'.² The objective of this essay is thus to adapt the case against explicit enumeration of protected 'rights' to the present context.

There are three broad objections to the introduction of a charter of rights.

- A charter of rights would undermine national and democratic sovereignty.
- A charter of rights leads to inefficient and perverse outcomes of law and policy.
- A charter of rights is not an effective mechanism to protect rights.

After dealing with necessary matters of terminology and context, I shall explore each of these three objections.

1 Abraham Lincoln, First Inaugural Address, 4 March 1861.

2 FA Hayek, *The Constitution of Liberty* (1960) 1.

I will refer to the 'human rights lobby' on numerous occasions. This term is not intended to include all advocates of the expansion of particular rights and liberties. Rather, I am referring to those who identify themselves not just with a set of rights, but a method of implementation: instruments which enumerate rights and their enforcement by courts at a domestic and international level.

I will also refer to a 'charter of rights', rather than a 'bill of rights'. The adoption of the term 'charter' by its proponents was doubtless calculated to avoid connotations of the United States Bill of Rights and to distance the new project from failed attempts in Australia over the past century. I am conscious that my Orwellian opponents would seize on the term 'bill' as evidence that my arguments do not apply to their more modest 'charter', so I will not contest the arid battleground of terminology.

Finally, I shall refer to national and democratic sovereignty. By the former term, I mean the principle that the Australian nation is not answerable to foreign powers, governmental or otherwise, for the conduct of its internal affairs. By the latter term, I mean the principle that the Australian people exercise meaningful and ultimate control over their own governance. I employ the lesser used 'democratic sovereignty', rather than 'popular sovereignty', to indicate that the control must be meaningful rather than merely a philosophical construct. I eschew the term 'parliamentary sovereignty' to avoid the presumption that the status quo is the desired end state. I thus accept the burden of disproving the proposition that judicial rule presents an alternative mechanism for reflecting the will of the people.

I The Australian Context

On 10 December 2008, Attorney-General Robert McClelland launched the National Human Rights Consultation, widely perceived as a Trojan Horse for an Australian charter of rights. The move followed years of activism by elements of the legal community and members of the growing human rights lobby, which won significant victories in securing the implementation of charters of rights in Victoria and the ACT.

The terms of reference explicitly proscribe any recommendation to introduce a *constitutional* bill of rights. They also request that the options identified by the committee 'should preserve the sovereignty of the Parliament'.

Debate is thus focussed on a *statutory* charter of rights, such as those adopted in Victoria and the ACT. Those instruments provide a possible model for ostensibly accommodating the request to preserve parliamentary sovereignty, by empowering courts only to make declarations of incompatibility or inconsistency between laws and rights.

An alternative model is presented by the *New Zealand Bill of Rights Act 1990* which prohibits them from making declarations of incompatibility or inconsistency. All three jurisdictions require courts to interpret laws consistently with the enumerated rights so far as is possible.

II Undermining Sovereignty

The most compelling argument against a charter of rights is that it would undermine the principle that ultimate sovereignty in Australia lies with the Australian people.

A charter of rights would undermine Australian democratic sovereignty in two respects. First, it would compromise the democratic nature of our system of government by moving legislative power from the people's elected representatives into the hands of unelected judges. Second, it would compromise national sovereignty by making Australian law substantially more dependent on foreign and international jurisprudence.

A *The Judge as Lawmaker*

To establish the case that a charter of rights would undermine the democratic nature of our system of government, it suffices to verify three propositions.

First, the ambiguity of particular rights leaves the judicial decision-maker with so little guidance as to make his or her opinion the most significant determinant of the outcome in many cases.

Second, the opinions of judicial decision-makers are a substantially less representative guide to the views of the Australian people than the basis upon which elected representatives determine laws.

Third, a court which alters its interpretation of laws to make them 'consistent' with a charter of rights, or which merely exercises the power to declare a law incompatible with a charter of rights, is nonetheless exercising effective legislative power.

1 *One Man's Right is Another Man's Wrong*

In a representative democracy, the people do not vote directly on legislation. The principle of democratic sovereignty must necessarily be implemented by delegation.

As society has become more complex, the volume of law has grown exponentially. Attempts to codify law in a casuistical manner, anticipating all possible permutations of events, can never be comprehensive. The law can provide a framework, but its application to actual cases is non-trivial.

Regulatory decisions are frequently taken by bureaucrats in statutory agencies, so that the distinction between the functions of the legislature, in setting the law, and the executive, in administering it, has become blurred.

Similarly, the distinction between the legislature and the judiciary is somewhat blurred. The common law traditionally characterised the judicial process as 'discovering' predetermined law, as if the body of law were like the Indian maiden in Salman Rushdie's *Midnight's Children*, whose doctor was only allowed to inspect through a hole in a sheet the part of her anatomy giving rise to current concern.

In practice, resolving ambiguities in the law as it relates to a particular case necessarily requires that judges 'make' law. Yet judges should do as little violence as possible to the myth of discovered law. As Lord Devlin notes,

It is facile to think that it is always better to throw off disguises. The need for disguise hampers activity and so restricts the power. Paddling across the Rubicon by individuals in disguise who will be sent back if they proclaim themselves is very different from the bridging of the river by an army in uniform and with bands playing.³

Judges have followed this injunction to varying degrees, but the lack of a charter of rights in Australia has left activist judges with a limited armoury to defend their incursions.

Australian statutes, like all statutes, contain a measure of ambiguity that regulators and judges must resolve in individual cases. Nevertheless, statutes represent a bona fide attempt to provide the maximum guidance possible, so that regulators and judges operate within clearly defined areas of discretion.

Rather than attempting to constrain the scope of judicial discretion, a charter of rights is a deliberate attempt to widen it. The ambiguity of typical charter 'rights' is such that the personal opinions of the judge constitute the only plausible determinant of the outcome.

Consider the Fourteenth Amendment to the US Constitution, which includes the text, 'nor shall any State deprive any person of life, liberty, or property, without due process of law'. In *Roe v Wade*,⁴ the Supreme Court discovered in that provision an implied 'right to privacy', which it construed to exclude laws that prohibit abortion.

An alternative interpretation of the due process clause would be to determine that an unborn foetus cannot be deprived of life, as it is clearly not possible to subject it to 'due process of law'.

The Fourteenth Amendment can thus be taken to prevent the prohibition of abortion, albeit by drawing a very long bow, or to be itself a prohibition of abortion. A third view is that it has nothing at all to contribute on the subject. A particular judge's interpretation will turn upon the judge's opinion regarding the commencement of life.

3 Lord Devlin, 'Judges and Lawmakers', (1976) 39 *Modern Law Review* 1, 11.

4 410 US 113 (1973).

Similarly, the Victorian *Charter of Rights and Responsibilities* (which tellingly contains a list of rights but no responsibilities) declares, ‘Everyone has the right to liberty and security’.⁵

A conservative might take an expansive view of police powers, to safeguard our security. A civil libertarian would focus on the liberty and adopt a more restrictive position. Interpreting the powers of police ‘consistently’ with the Charter is entirely a matter of ideology.

The Charter declares: ‘Families, as the fundamental group unit of society, are entitled to be protected by society and the state.’⁶ Should this constrain child safety workers from arbitrarily removing from its parents a child who has been smacked? Or is an interventionist approach to child safety part of protecting families?

‘Rights’ of this sort do not just invite activist judges to release their creative urges. They compel even conservative judges to do so. There is no way to determine whether a law is consistent with citizens’ rights to liberty and security, other than by reference to personal policy preference, as the way to defend those rights is a topic upon which reasonable people can and do disagree entirely.

In this respect, a charter of rights is precisely the opposite of traditional statute, which seeks to provide maximum guidance for the resolution of cases by delimiting the boundaries of judicial discretion. A charter of rights deliberately obscures those boundaries, maximising the discretion of the decision-maker in the individual case.

2 *Even Less Representative Swill*

Law-making by judges might not be inconsistent with democratic sovereignty if judges were consistently representative of the popular will. Judges are chosen by the government, which is determined by the composition of the parliament, which is elected by the people. Perhaps, one might argue, this provides the necessary democratic link. As the then Governor-General Michael Jeffrey noted,

While the Constitution guarantees federal judicial officers’ independence, the political accountability of the Executive for judicial appointments forms the nexus between the judiciary and the fundamental principle of government by popular consent.⁷

The context of this statement is revealing. His Excellency was addressing a judicial conference convened to promote the cause of a judicial appointments commission, a project which has since been informally realised under the

5 Section 21(1).

6 Section 17(1).

7 Michael Jeffrey, Address to the Judicial Conference of Australia (2006).

Rudd Government. The Governor-General was providing a subtle caution against such an abdication of responsibility by the Executive.

I have elsewhere developed the analytical tool of 'degrees of democratic separation'.⁸ In a system with zero degrees of democratic separation, such as Athenian democracy, the people decide policy by direct vote. In a system with one degree of democratic separation, they elect representatives to make the decisions.

Our elected representatives select judges, who exercise judicial power at the second degree of democratic separation. (Arguably the representatives select the government that selects the judges, but the distinction seems disingenuous in the Australian context.) Under the new system, elected representatives select the unelected appointments panel that selects the judges, at three degrees of democratic separation.

Each degree of democratic separation is a trade-off. It allows the delegation of decision-making to persons who can devote adequate time and develop specialisation in the relevant area, but it weakens the democratic nexus between the will of the people and the decision-maker.

This weakening is manifested, for instance, in the gulf between public views on criminal sentencing and the more liberal views of most judges, which leads to a sense of public disenfranchisement and disillusionment with the law. Some states in the United States have reached an alternative trade-off by electing judges directly.

There is a good case for two degrees of democratic separation in the exercise of judicial power. Some cases arouse strong public emotion. If the application of the law to individual cases is to be performed in a consistent manner, the decision-maker must be shielded from electoral reprisal. This is why the Constitution also grants judges security of tenure and remuneration. This adds a temporal element to democratic separation: judges can outlast by decades the government which appointed them.

I demonstrated in the previous section the vastly magnified impact of a judge's personal policy preferences on substantive policy outcomes under a charter of rights. The more that judges exercise legislative power, the greater the need for a stronger democratic nexus.

The unspoken attraction of a charter of rights to the human rights lobby is that a majority of judges share the political preferences of the lobby on issues such as asylum seekers, indigenous land rights and the alleged 'stolen generation', criminal sentencing and rehabilitation.⁹ As Robert Kaplan has remarked, in the new world order, globalised elites in the law, academia and media have far more in common with each other than they do with the bulk of the citizenry in their own nations.¹⁰

8 Alan Anderson, 'The Rule of Lawyers', *Policy Magazine* (Spring 2005).

9 Jason Pierce, *Inside the Mason Court Revolution: the High Court of Australia Transformed* (2006).

10 Robert Kaplan, *The Coming Anarchy* (2001).

The rule of a judicial elite with no electoral accountability is not a path to socially progressive Utopia, but a dark vision of the future. The history of the 20th century is replete with examples where well-intentioned reformist idealism, once decoupled from robust electoral mechanisms, has led to perverse and ultimately catastrophic consequences, from Soviet collectivism to the Great Leap Forward. It is the height of arrogance for today's human rights lobby to presume that it is immune from these tendencies.

Of course, the logical conservative response to a left-wing judiciary exercising expanded legislative power under a charter of rights is to call for the direct election of judges. This is an unintended consequence which would likely lead to outcomes directly contrary to what the human rights lobby is seeking to achieve, as the *Herald Sun* and the *Daily Telegraph* replaced the *Sydney Morning Herald* and *The Age* as barometers of judicial opinion.

With appropriate emphasis on egregious cases of under-sentencing, outrageous compensation awards and acceptance of spurious asylum claims, a conservative leader could command strong public support to effect such a change. Even if not constitutionally enshrined, it would be politically irreversible.

3 *The Ruse of Interpretative and Declaratory Provisions*

It remains to address the argument that the derogation of democratic sovereignty implicit in a charter of rights can be remedied by more modest instruments, requiring the courts only to interpret laws consistently with the charter and to make declarations of incompatibility which do not invalidate the law in question.

Prima facie, this argument lacks credibility, as it is difficult to imagine that the human rights lobby has spent years agitating for a measure it believes will have no practical effect on the substance of the law.

Clauses calling for the interpretation of statutes consistent with a charter of rights essentially confer on judges a power of statutory amendment which is limited only by their own consciences. In the United Kingdom, the Lord Chancellor lamely asserted that such a power,

... while significantly changing the nature of the interpretative process, does not confer on the courts a licence to construe legislation in a way which is so radical and strained that it arrogates to the judges a power completely to rewrite existing law.¹¹

11 Lord Irvine, public address, 1999, per Julie Debeljak, *The Human Rights Act 1998 (UK)*, (2003) AJHR 10.

In fact, an interpretation of statute may contradict the plain meaning of the text: so long as it is a 'possible' interpretation, the court is obliged to prefer it to a plain meaning which is inconsistent with the rights instrument.¹² The parallel language of the Australian instruments leads to the same conclusion.

The question of whether an interpretation is radical or strained lies with the courts themselves, leaving us to ponder, *quis custodiet ipsos custodes?* We should be suspicious of the assumption that judges will exercise due restraint when gifted with such power.

Indeed, the President of the Victorian Court of Appeal, a prominent member of the human rights lobby, openly called for lawyers to bring forward claims under the Victorian Charter. To see a judge enthusiastically touting for opportunities to flex newly conferred judicial muscle is to understand that Lord Acton's dictum is equally germane to the judiciary.

There are few better examples than Israel, where the Supreme Court has intruded itself deep into the affairs of government, resulting in a 2004 Knesset resolution deploring the interference. The Court has effective control over appointments to its own Bench, has declared decisions of the Attorney-General, an unelected and subordinate government official, binding on the Government, and has determined that the Government may not replace the Civil Service Commissioner or, by implication, the Attorney-General.¹³

The Court's expansion of power under long-serving former Chief Justice Aharon Barak, a hero of the human rights lobby, was driven by an interpretative philosophy which holds that the plain meaning of the text and the intent of the legislators are not determinant of the content of law. Rather, the law encompasses a set of options, depending on a choice of norms, from which judges must choose the most 'justified'.¹⁴ This philosophy, which is the logical product of a jurisprudence based on amorphous and ambiguous rights, is pithily captured by Sylvester Stallone's Judge Dredd: 'I am the law'.

Turning to the second mechanism, a declaration by a court that a particular law is inconsistent with fundamental rights would present a serious political impediment to the maintenance of that law.

Australians are accustomed to treating court judgments as 'law', so that a government which ignores a judgment is undermining the 'rule of law'. Over time, the intrusion of courts into political debate would undermine this view.

However, at least in the medium term, the human rights lobby will succeed in perverting the rhetoric of the 'rule of law' to imply that a legislature ignoring a declaration of incompatibility is in some way undermining it.

12 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

13 Robert Bork, *Coercing Virtue*, (2003).

14 Eli Salzberger, *Judicial Activism in Israel*, University of Haifa, 2007, Available at SSRN: <http://ssrn.com/abstract=957849>.

This is, of course, the aim of the human rights lobby: to enlist the credibility of the courts on their side in debates which are inherently political.

Finally, we should not ignore the possibility that courts themselves will invent new remedies for breaches of a charter of rights, despite the absence of statutory support. This is precisely what has happened in New Zealand, where a deliberate decision to exclude remedies from the Bill of Rights was ignored by a Court of Appeal that created from whole cloth a right to “public law compensation”.¹⁵

Given an inch, judges will be only happy to take a mile, as demonstrated by Justice Toohey, formerly of the High Court, who speculated in 1992 that the Court might simply invent the constitutional bill of rights that the people had refused to endorse:

Just as Parliament must make unambiguous the expression of its legislative will to permit executive infringement of fundamental liberties before the courts will hold that it has done so, it might be considered that the people must make unambiguous the expression of their constitutional will to permit Parliament to enact such laws before the courts will hold those laws to be valid.

If such an approach to constitutional adjudication were adopted, the courts would overtime articulate the contents of the limits on power arising from fundamental common law liberties. It would be then a matter for the Australian people whether they wished to amend their constitution to modify those limits. In that sense an implied “bill of rights” might be constructed.¹⁶

B Undermining National Sovereignty

A charter of rights undermines not only democratic sovereignty, but national sovereignty.

Our best known judicial activist, the recently retired High Court Judge Michael Kirby, was wont to refer in judgements to instruments of international law such as the Universal Declaration of Human Rights. In part, this reflects the absence of any such document in Australian law.

It is little surprise that some Australian judges, jealous of the powers of their foreign brethren, are enthusiastic about the importation of international human rights jurisprudence.

In Australia this trend reached its pinnacle in the case of *Minister for Immigration and Ethnic Affairs v Teoh*, in which the Court found that Australian law should be interpreted on the basis that there is a ‘legitimate

15 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA).

16 J. Toohey, ‘A Government of Laws, and Not of Men?’ (1993) 4(3) *Public Law Review* 158-74, 170.

expectation' it would be consistent with treaties Australia has ratified.¹⁷ A subsequent court substantially retreated from this position.¹⁸

The creation of a charter of rights would expose Australia to a resurgence of the use of international law jurisprudence to 'interpret' Australian statute. The popularity of this trend in the United States, leveraging the extensive US Bill of Rights as an excuse for brazen judicial ventures into law which has no domestic status, is evidence of this temptation.¹⁹

The United Kingdom has explicitly ceded sovereignty to European bodies in this field, with the European Court of Human Rights now the tribunal of ultimate appeal for terrorists facing deportation,²⁰ or any plaintiff whose grievance can be manipulated into appropriate form. By incorporating the European Convention of Human Rights into domestic law, the UK has created the supranational enforcement mechanism that the human rights lobby favours to remove decision-making entirely from the field of national sovereignty and consequent democratic accountability.

There is no reason to believe that Australian judges would be immune from what Professor Robert Bork has termed, 'the insidious appeal of internationalism.'²¹ As I noted earlier, the Australian judiciary is drawn from a legal elite that feels far greater intellectual kinship with its foreign brethren than its fellow citizens, and would be appropriately deferential to their jurisprudence.

The precise content of an Australian charter may be of limited relevance; the application of the charter would likely be driven more by the whims of foreign jurists than by the preferences of the legislature which sets into writing so ambiguous a set of concepts.

III Perverse and Inefficient Outcomes

Principles of sovereignty aside, a charter of rights would lead to perverse and inefficient outcomes in law and policy. This is true in both a substantive and a procedural sense.

A Poor Policy

As explained above, the ambiguity of charter rights requires judges to use their personal policy preferences to resolve the outcome of disputes. The task of balancing conflicting rights and interests to resolve questions of policy,

17 (1995) 183 CLR 273.

18 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502.

19 Donald Kochan, 'Sovereignty and the American Courts at the Cocktail Party of International Law', (2006) 29 *Fordham International Law Journal*.

20 'Bin Laden lieutenant' Abu Qatada can be deported after Lords Ruling, *The Times*, 18 February 2009.

21 Bork, above n 13, 22.

such as the proper extent of police anti-terrorism powers, is one for which judges are ill-equipped, for three reasons.

First, judges lack the machinery of policy development which the government and legislature possess. Developing legislation involves the advice of countless public servants, who attempt exhaustive consideration of the consequences of government actions.

In contentious and complex areas, this is combined with various stakeholder input mechanisms, such as consultations, reviews and parliamentary hearings. Frequently, draft policy or legislation is released for public comment, then substantially revised in the light of feedback. Studies may be conducted; statistics analysed.

By contrast, a judge lacks this comprehensive machinery. At best, courts might subpoena government policy documents for consideration (a dangerous precedent), or weigh the evidence of expert witnesses.

A second and related weakness of judges in policy development is their lack of a 'helicopter view'. Judges make decisions on individual cases. They are confronted with particular litigants, whose interests will naturally be front of mind when they formulate decisions. They have no visibility of the other members of society who may be affected by their decisions.

For instance, in the *AIDS Case*,²² South African judges were confronted with litigants who desired access to expensive treatment that they claimed the state was obliged to provide, given their constitutionally enshrined right to healthcare. The court complied, believing itself qualified to reprioritise public health expenditure based upon the application of a specific set of litigants before it.

Similarly, in *Grootboom*,²³ the court reallocated public housing resources in favour of the litigants before it. Needless to say, it did not identify the areas of public expenditure that would be sacrificed to fund its largesse to litigants.

The third weakness of the judiciary as policy-makers is inconsistency. Many judgments on the most politically contentious issues involve closely split decisions on appeal. At lower levels, jurisprudence is often confused, with conflicting authorities creating uncertainty as to the state of the law.

Indeed, it is not unknown for litigants, or more often their counsel, to express delight or despair at the identity of the judicial officer selected to hear their case, particularly in politically sensitive fields such as immigration, industrial relations and anti-terrorism matters.

While such inconsistencies between judges are unavoidable, the effect is clearly magnified when judges are asked to interpret broadly worded rights instruments. The predictability of the law will inevitably decline, and uncertainty gives rise to cost.

22 *Minister of Health v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC).

23 *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

B Increased Litigiousness

A second source of cost under a charter of rights would be the increased litigiousness of society. The additional ambiguity of law created by a charter would mean that cases which are today unarguable would tomorrow become contentious. Take the example of the recent eviction of student squatters from a property owned by the University of Melbourne. The student squatters initially indicated they would challenge under the Victorian charter. The range of potentially contentious fact situations is expanded by the very ambiguity of the charter.

It is no coincidence that bodies like the Australian Lawyers' Alliance, formerly the Australian Plaintiff Lawyers' Association, are strong advocates of a charter which will provide their members with a comfortable livelihood.

Ironically, those whose rights are in most danger of being trampled by administrative processes are generally those least able to afford quality legal representation. Pro bono assistance is likely to be available for *causes celebres*, such as the Islamic Council of Victoria's spurious religious vilification claim against a Christian pastor, but less likely for truly deserving litigants combating, for instance, an officious local council. As P.J. O'Rourke says, 'Everyone wants to save the world. No one wants to help Mum do the dishes'.

IV Protecting Rights

In assessing the merits of a charter of rights, it is important to address the alleged benefits as well as the costs and dangers.

A charter of rights would do little to protect actual rights. This is because of selectivity in the rights that are included and the extent of their protection. In fact, it is Australia's culture and institutions that are the best protection against undue infringements of rights.

A Culture and Rights

Human rights in the United Kingdom, Canada and New Zealand did not undergo a quantum shift upon the introduction of rights instruments in those countries. The United States is not a useful basis for comparison, as its establishment was almost contemporaneous with the introduction of the initial Bill of Rights.

Human rights instruments no doubt reflected the values of these nations, but the values preceded the instruments. If the instruments do not give rise to the aspiration and values, do they aid in the enforcement?

One of the more extensive bills of rights is that included in the 1977 Soviet Constitution, providing citizens with the right to a job, housing, health, education, involvement in the management of state and public affairs, free political association, privacy and leisure. As I have previously written, this must have been a comforting thought on cold Siberian nights in the Gulag.

Similarly, the introduction of an extensive bill of rights in the South African constitution, guaranteeing healthcare, housing and other social and economic rights, has not prevented that country from experiencing increasing deprivation, endemic violence and inter-tribal rioting.²⁴

Another African country with an exemplary bill of rights is Zimbabwe, whose vile dictator was once an object of adoration for Afro-Marxist fetishists in the human rights lobby. The right to ‘protection from deprivation of property’ of the white farmers who once fed the country was of little interest to the human rights lobby, though it is taking belated interest in the rights to life, liberty and protection from inhumane treatment of Zanu-PF supporters.

The conceit that embodying a set of vague aspirations in a document and declaring it enforceable can alter underlying physical and cultural realities is shared only by the cappuccino class. Does the quality of rights protection in Canada and New Zealand bear more resemblance to that in Australia, which lacks a charter of rights, or Zimbabwe?

If we wish to identify a common characteristic of countries with strong protection of individual rights against arbitrary government action, that characteristic would surely be membership of what Churchill dubbed the English-speaking peoples, whose rich legacy of classical liberalism forms a cultural foundation for the continued protection of individual rights.

It is insufficient for charter advocates to convince us that we should share the aspirations embodied in their anodyne list of rights. They bear the burden of proving that their instrument would help to achieve those aspirations. It is a challenge they have conspicuously failed to meet.

B Selective Protection

I have already commented on the ambiguity of typical charter rights in discussing issues of sovereignty. This ambiguity also undermines the usefulness of a charter of rights as a protector of rights.

Because rights inherently conflict – my right to freedom of expression, your right to peaceful enjoyment of your house without Wagnerian fanfares blaring over the fence – adjudication of rights involves striking a balance. Further, instruments like the Victorian charter explicitly recognise that rights may need to be curtailed to meet important social goals, and call upon the courts to determine when this is appropriate.

For instance, the very government which created the Victorian charter, with its guaranteed freedom of expression, also introduced racial and religious vilification legislation that restricts that freedom to an unprecedented extent.²⁵

24 ‘Post Apartheid South Africa enters anxious era’, *New York Times*, 5 October 2008.

25 *Racial and Religious Tolerance Act 2001* (Vic).

Thus the enumeration of rights in a charter is no guarantee that they will be respected. As always, they will frequently be traded-off against conflicting interests. A charter of rights does not alter this reality; it merely alters the identity of the decision-maker, substituting a judge for the legislature. This does nothing to enhance the protection of rights.

V Conclusion

The campaign for a charter of rights represents an attempt by the human rights lobby to implement a leftward shift in Australian law and policy without the troublesome inconvenience of persuading the Australian electorate. While the intentions of the campaigners are generally benevolent, their proposal would do great violence to our constitutional arrangements and damage to our nation.

A charter of rights would undermine both democratic and national sovereignty. It would lead to perverse and inefficient outcomes of law and policy. Yet it would do little to enhance the protection of rights.

The presumption that our judicial officers are better qualified than the general public to decide issues in the political realm is unsubstantiated, and derives from the same intellectual self-absorption that gave rise to the worst tyrannies of the last century. If communism may be interpreted as an overreach by the profession of economics, seeking to control the entire scope of human existence through the centralised allocation of resources, the human rights lobby manifests a similar conceit on the part of the legal profession.

Ultimately, attempts to impose unpopular policy prescriptions through legal sleight of hand will result in corrective measures, such as the appointment or even election of conservative judges. Regardless of whether the campaign to introduce a charter of rights succeeds, its proponents will inevitably fail in their long-term objectives. The strength and vibrancy of Australian democracy will see to that. The only question is how much damage will be done to our constitutional system of government in the process.

Chapter Eight

**Human Rights: The Question is –
Who is the Master?**

THE HON JUSTICE KENNETH HANDLEY, AO

There is no such thing as a free human right. Every one comes at a cost which must be borne either by the community or by other individuals or corporations.

The reach of laws against terrorism, and the legalisation of the abortion pill, or of scientific experiments with human embryos, or of euthanasia raise political and moral questions which cannot and should not be settled by judicial decision. Most people have opinions on these matters and a judge's opinion is no better than that of anyone else.

Judges do not have democratic legitimacy. They are not elected by the people and, except in extreme cases, they are not accountable to them. They have no business deciding political questions. The statutory text enacted by Parliament has democratic legitimacy, and under the rule of law its meaning and application are proper questions for a Court. In fulfilling this role the Court seeks to be faithful to the text of ordinary legislation and Parliament is the master.

The position is different with Human Rights Acts because of the wide general language in which they are expressed. They are a blank canvas on to which judges can and do project their moral and political views. The process was described by Humpty Dumpty in *Alice in Wonderland*, 'When I use a word it means just what I choose it to mean, neither more or less. The question is who is the master'.¹

Under a Human Rights Act, although it may take a while, the Court eventually becomes the master. The results are there for all to see. In *Roe v Wade*² the US Supreme Court decided by a majority of seven to two that the States could not criminalise all abortions. The majority laid down different legal regimes for each trimester which made it harder to obtain a lawful abortion at later stages of the pregnancy. Whatever one thinks about abortion one can only marvel at the processes of statutory construction which derived the decision and these regimes from the language of the Due Process Clause of the Fourteenth Amendment. This prohibits the States of the United States depriving 'any person of life, liberty or property without due process of law or denying to any person the equal protection of the laws.'

1 Quoted by Lord Atkin in *Liversidge v Sir John Anderson* [1942] AC 206, 245.

2 410 US 113 (1973).

The majority held that the Due Process Clause protected the right to privacy against state action and this right included a woman's qualified right to terminate her pregnancy. Though the state could not override that right, it had legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, and each of these grows and reaches a 'compelling' point at different stages of the woman's approach to term.

The legal regime laid down was as follows:

- (a) Up to approximately the end of the first trimester the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- (b) From the end of the first trimester the state, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- (c) After the foetus becomes viable at the end of the second trimester the state, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

As Associate Justice William Rehnquist (later Chief Justice) of the United States Supreme Court, said in dissent:

The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one ... partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.³

He examined the historical background of the Fourteenth Amendment passed in 1868 and said:

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment.⁴

The decision of course has not quelled the controversy which continues to this day. In *Osman v the United Kingdom*⁵ the European Court of Human Rights (the European Court) held that Article 6(1) of the European Convention on Human Rights (the Convention) created a substantive right to sue the police for negligent policing. Article 6(1) provides:

3 Ibid 174.

4 Ibid 174.

5 (1998) 29 EHRR 245.

In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing by an independent and impartial tribunal ...

The Article on its face says nothing about the content of those rights and obligations.

In 1988 in *Hill v Chief Constable of West Yorkshire*⁶ a unanimous House of Lords and a unanimous Court of Appeal held that the police did not owe a legal duty of care to the public to identify and apprehend an unknown criminal, nor a duty to individual members of the public who might suffer injury through the criminal's activities. The House of Lords also held that as a matter of public policy the police were immune from actions for negligence in the investigation and suppression of crime.

In *Osman's* case the European Court held by a majority of 12 to 5 that, notwithstanding *Hill's* case, the applicants must be taken to have had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, that the harm caused by the criminal was foreseeable, and that in the circumstances it was fair, just and reasonable not to apply the rule in *Hill's* case. The applicants' assertion of that right was enough to attract Article 6(1).

Thus the Court held that Article 6(1) had created a substantive right to sue police authorities for damages caused by negligent policing. The Osmans had not been denied the right to bring their claim to a fair and public hearing before an independent and impartial tribunal. They commenced proceedings in the High Court of England and Wales in September 1989. In 1991 an application by the Metropolitan Police Commissioner for the Statement of Claim to be struck out for not disclosing a reasonable cause of action was dismissed. In 1992 the Court of Appeal unanimously allowed the Commissioner's appeal⁷ and the action was struck out. The Court of Appeal and the House of Lords both refused leave to appeal. Thus the Osmans' case had been heard by three courts, but failed because they did not have a cause of action.

My last example is the decision at first instance in *J.A. Pye (Ltd) v The United Kingdom*.⁸ Article 1 of Protocol 1 to the Convention (Article 1) provided:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law ...

6 [1989] AC 53.

7 *Osman v Ferguson* [1993] 4 All ER 344.

8 (2005) 43 EHRR 3.

One might have thought that the Article was intended to prevent unjust acquisitions by the state or a public authority, but the European Court at first instance by a majority of four to three held that it had been infringed by a general limitation statute which extinguished the title of a documentary owner of real property after 12 years' adverse possession.

The company, a property developer, was the registered owner of 23 hectares of agricultural land in Berkshire. The owners of an adjacent property, Mr and Mrs Graham, occupied the land under a grazing agreement until December 1983 when they were asked to vacate. In January 1984 the owner refused to grant them a further grazing agreement but the Grahams remained in occupation with the owner's consent until September that year. Thereafter until January 1999 they remained in undisturbed possession of the land without the owner's permission.

The company then brought proceedings for possession which the Grahams defended arguing that its title had been extinguished by their adverse possession for more than 12 years. The Grahams succeeded at first instance, then the Court of Appeal by majority found for the company, but their decision was unanimously reversed by the House of Lords⁹ so that the company lost the land, and the Grahams acquired it.

The English courts could not consider the effect of Article 1 as the relevant events occurred before the commencement of the *Human Rights Act 1998* and the Act was not retrospective.

The former owner commenced proceedings in the European Court against the UK Government. It alleged that the extinguishment of its title on the expiration of the limitation period involved a breach of Article 1 and it claimed compensation for the loss of its property.

The UK Government argued that the company's loss was the result of a pre-existing legal regime under which its interest in the land was ultimately defeated because of its inherent defeasibility and Article 1 did not apply. The company's peaceful enjoyment of its land was disturbed by the Grahams, and not by the state so there was no breach of the state's primary negative obligations under the Article.¹⁰ There had been no form of state expropriation.

A Chamber of seven Judges held, by a majority of 4:3, that Article 1 applied to the compulsory transfer of property from one individual to another¹¹ and it had been infringed. The UK Government appealed and the appeal was heard by the Grand Chamber.

9 *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

10 (2006) 43 EHRR 43, 54, 58.

11 The Court followed *James v United Kingdom* (1986) 8 EHRR 123 where it held that the *Leasehold Reform Act 1967* did not contravene Art 1. The Act allowed tenants of long leaseholds of residential property to acquire the freehold on favourable terms. The Court considered that the taking of property in pursuance of legitimate social, economic, or other policies may be in the public interest. Surely these issues should be left to our Parliaments and not handed over to unelected judges to second guess elected politicians.

General limitation provisions are common in the countries which are signatories to the Convention and they have a long history. It is extraordinary that a Convention intended to protect individuals from the legislative and executive powers of the state should be interpreted so as to trump general legislation fixing limitation periods in legal proceedings between one citizen and another where the state has no interest in the outcome of the particular proceedings. If the decision at first instance had stood the Grahams would have kept the land and the British taxpayer would have compensated a property developer which lost its land because it slept on its rights for more than 12 years. The Grand Chamber of the European Court reversed the decision at first instance by a 10:7 majority.¹²

Human rights are the flavour of the month for some, but the public should realise that they are a sugar-coated pill. An accurate title for such an Act would be the Parliament (Transfer of Powers to the Courts) and Lawyers (Augmentation of Incomes) Act. Politicians and others who advocate a Human Rights Act do so either because they do not understand what would happen or because they understand only too well. The latter hope to increase their power and influence and achieve legal and social change through the Courts they cannot achieve through Parliament. This is government by litigation and when change occurs in this way no one is accountable, not the judges and not the politicians.

12 *JA Pye (Oxford) Ltd v The United Kingdom* (2008) 46 EHRR 45.



Part III:
Specific Challenges

Chapter Nine

Principles and Exceptions: Problems for Bills of Rights

DR DAVID BENNETT, AC, QC

The primary objection to a bill of rights is a philosophical one which may be summarised by saying that there is no reason why the principle should always prevail over the exception – indeed the nature of exceptions rather makes the contrary a more logical position.

If you are opposed to moral relativism, you should read no further. The proposition I am putting springs from a profound belief in moral relativism.

One needs to start by asking what a principle is. Most principles develop from generalisations. Something is seen to be ‘right’ or ‘desirable’ in most cases and therefore it becomes enshrined as a principle. This is a useful process so long as respect is paid to the word ‘usually’. It is not useful if one applies it in the few cases where the major premise is not true. The problem with bills of rights, as I will show, is that they necessarily prefer the principle to the exception.

I Principles and Exceptions

We can all agree that killing people is wrong yet this should not lead us to conclude that killing in self-defence or in the defence of others is not justifiable. To take a more specific example, discrimination in employment on the basis of religion is wrong. There is a clear exception where a religious body is proposing to employ a religious leader and requires that person to belong to its own religion. This creates a need to answer the following syllogism:

All discrimination in employment on the basis of religion is wrong.
(the major premise)

For the Catholic Church to insist that priests be Catholics is discrimination in employment on the basis of religion. *(the minor premise)*

Therefore for the Catholic Church to insist that priests be Catholics is wrong. *(the conclusion)*

The conclusion is clearly erroneous. The problem is to work out where the fallacy lies.

One does not find the fallacy by seeking to refute the minor premise by twisting the meaning of the word 'discrimination'. It is not correct to say that this is not discrimination. It is. The point is that it is justifiable discrimination. The better answer is that the major premise is not universally true. It should be expressed: 'Subject to certain narrow exceptions, all discrimination in employment on the basis of religion is wrong,' or, in formal logical terms: 'Some discrimination in employment on the basis of religion is wrong.' This effectively invalidates the syllogism. It now contains an undistributed middle.

If one were dealing with this problem under a bill of rights, the court would need to ask whether there is any way in which the word 'discrimination' could be construed so as to exclude this type of discrimination. Probably this could not be done.

Reasoning which assumes the universality of moral or ethical principles is frequently used in political debate. When so used, it is often little more than a device to avoid sensible inquiry into the merits and demerits of the particular proposal under consideration. This tendency is well illustrated by Senator Brett Mason in his recent book: *Privacy without Principle*, in which he demonstrates how an uncritical approach to the idea that privacy is a universal good can lead to a failure to examine the relevant issues in political debate. Many would see a similar problem in the stem cell debate. A better example is the question of the admissibility of illegally obtained evidence in a prosecution. In the United States, the prohibition is absolute. If the police, having discovered that a mass murderer lives in a particular street, search the garbage bins in it on garbage day without a warrant and find the gun with the perpetrator's fingerprints, that gun cannot be used in evidence against the perpetrator. In Australia, under the rule in *Bunning v Cross*,¹ the court weighs the seriousness of the breach of law by the police (a trivial breach in my example) and the gravity of the crime being prosecuted (serial murder in my example). This would almost certainly produce the result that the gun was admissible evidence. On the other hand, if the police break down the door of a home without a warrant and find a single marijuana cigarette, a court in Australia is free to apply the balancing test and to refuse to allow the evidence to be tendered.

The problem is, of course, that bills of rights do not normally express principles in a qualified way. They start with a generalisation and assume that it must prevail whenever there is a conflict between it and a suggested exception. If bills of rights could be written like the *Income Tax Assessment Act* which contains a few general statements about income and deductions but hundreds of detailed exceptions and exceptions to exceptions, they would be less objectionable, although even then there would be a problem

1 (1978) 141 CLR 54

with exceptions not recognised at the time. For some reason, however, proponents of bills of rights rarely, if ever, favour this type of drafting. The drafter of a bill of rights who decides to insert a principle that there shall be no discrimination in employment on the ground of religion may not think of the exception in relation to ministers of religion. The drafter who decides to insert a principle that there shall be no discrimination in employment on the ground of sex may not think of the exception for the producer of a play or film who wishes to hire an actor to play the role of a man or a woman.

The role of religion in this type of question is interesting. Religions tend to develop general principles and then petrify them as absolutes. If there had been roads and traffic at the time when the major Western religions were developing, it may well be that keeping to a particular side of the road would have become a religious duty. Religious leaders might well have described those who sought to develop one-way streets as proponents of moral relativism because they necessarily permit departure from the hypothetical religious duty to keep to a particular side of the road. I will refrain from expatiating on the religious wars that might have developed between societies that drove on the right and societies that drove on the left.

In fairness it should be noted that the mediaeval church recognised to some extent the need to depart from rigid principle. It developed the doctrine of economy under which certain rules could be waived where necessity required it. In *Attorney-General for NSW, ex rel. Elisha v Holy Apostolic and Catholic Church of the East (Assyrian) Australia NSW Parish Association*, Justice Young of the Supreme Court of New South Wales quoted St Cyril as saying:

Economies sometimes demand that a little be lost in order that more may be gained. Just as sailors in a storm, when their ship is in danger, throw overboard some of their cargo in order to save the rest, so we in matters where it is not possible to keep everything surrender some in order that we may not lose all.²

His Honour gave the example of the rule against translating bishops from one see to another which could be put aside where it was in the interest of the whole Church to do so.

The law has evolved to recognise that principles sometimes need to be tempered. One example is the standard rule in rules of court which permits the court to dispense with particular procedural rules or to extend or abridge time in particular cases. The history of the development of Equity is a history of the realisation that fixed rules (of the common law) might have undesirable consequences in particular circumstances. Indeed, the standard provision in Australian criminal legislation permitting the court to find the offence proved

2 (1989) 98 ALR 327, 331; 95 FLR 392.

but, without proceeding to conviction, to impose no penalty is a recognition of the approach for which I contend.

The issue remains even in relation to such generally accepted principles as the right to life. Could such a principle prohibit an executive declaration of war against an invading army (this being the societal equivalent of self-defence which is almost universally recognised as an exception to a law prohibiting the taking of human life)?

Perhaps the clearest example of the need for exceptions arises in the area of affirmative action to reduce the effects of past discrimination. It would be absurd to argue that, because affirmative action is itself discrimination, it ought to be barred by a general prohibition on discrimination.³ There may be arguments for or against it in particular circumstances, but those arguments ought not to be resolved by applying the principle to the detriment of the exception in every case.

The debate over preventative detention of potential terrorists is in the same category. One needs to weigh on the one hand the principle that people should not be detained except where they have been convicted of offences and on the other hand the benefit to society of preventing terrorist acts which may kill many innocent people. The weighing process should be carried out free from any idea that the principle must necessarily overcome the exception. This particular principle has, of course, many other exceptions which also require a weighing process. These include mandatory quarantine, detention where bail is refused pending trial, jury sequestration and perhaps consensual detention as in press lock-ups at budget time and the detention of an unwilling child in a boarding school (where the consent is given by the parents). The general principle that only properly convicted people should be detained may be a praiseworthy generalisation but it should be treated as part of a weighing process rather than as an absolute.

The mention of 'the right to life' leads to another objection to the petrification of principles in a bill of rights. This is the risk that, because of the breadth with which they are expressed, they will be interpreted beyond their originally anticipated scope. Two examples in relation to the right to life illustrate this tendency.

The first is the use made by anti-abortionists of the phrase. Indeed, they have hi-jacked the phrase 'right to life' so that it is used more frequently in relation to abortion than it is in relation to general human life. (There may be an analogy here with the way the women's movement has hi-jacked the formerly useful word 'chauvinist' so that it now cannot be used with its original meaning of a person who is obsessively loyal to every cause in which he or she believes and to every group to which he or she belongs. There is a

3 Cf. *Gerhardy v Brown* (1984–85) 159 CLR 70 and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

further obvious analogy with the word 'gay'.) The phrase 'right to life' cannot be used in a bill of rights because of the modern denotation of the phrase.

Abortion involves difficult questions about balancing a woman's right to choose whether to be a mother and the rights of the potential child. This difficult debate (which involves many particular nuances in particular situations) should not be foreclosed in one direction by an entrenched 'right to life' any more than it should be foreclosed in the other direction by an entrenched 'right to choose'. It requires weighing, not slogans.

The second arises because many governmental decisions may statistically have the necessary effect of resulting in a number of deaths. A decision to make the speed limit on a stretch of highway 100 km/h rather than 80 km/h may increase societal convenience but result in one more death (say) every five years. Decisions of this sort are made every day by traffic authorities but they would not be assisted by the application of some absolute rule which provided that they could not make a decision which would probably result in an increased death toll. The ultimate consequence of such an application of a 'right to life' to governmental decision-making in the traffic context would be a speed limit of 10 km/h and every car being preceded by a person carrying a red flag on foot. For this reason any entrenched right to life should be qualified by the statement that it does not apply to require statistical application to laws which may result in an increased number of deaths. I have never seen this type of qualification articulated in a bill of rights.

II Constitutions and Rights

The Australian Constitution does not contain a bill of rights. This is fortunate for a number of reasons, not the least of which is that the dominant principles in which the 'founding fathers' believed were White Australia and adult white male franchise. Unfortunately there were no 'founding mothers'. They were, however, wise enough not to impose those principles on future generations.

A good example of this problem is the so-called Bill of Rights of 1688 (Imp). Although this document is generally described as a bill of rights, it was in fact a statutory manifestation of sectarian bigotry. Section 9 of the rights section provided:

IX Papists debarred the crown

And whereas it has been found by experience that it is inconsistent with the safety and welfare of this protestant kingdom to be governed by a popish prince or by any King or Queen marrying a papist the said lords spiritual and temporal and commons do further pray that it may be enacted that all and every person and persons that is, are or shall be reconciled to or shall hold communion with the see or church of Rome and shall profess the popish religion or shall marry a papist shall be

excluded and be for ever incapable to inherit, possess or enjoy the crown and government of this realm and Ireland and the dominions thereunto belonging or any part of the same or to have, use or exercise any regal power, authority or jurisdiction within the same.

For good measure, s 7 of the Act provided:

VII *Subjects' arms*

That the subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.

Even *Magna Carta* provided:

- 10 If anyone who has borrowed a sum of money from Jews dies before the debt has been repaid, his heir shall pay no interest on the debt for so long as he remains underage ...
- 11 If a man dies owing money to Jews, his wife may have her dower and pay nothing of the debt from it...
- 34 No-one is to be taken or imprisoned on the appeal of a woman for the death of anyone save for the death of that woman's husband.

Whatever may have been the relevant factors at the time, these are clearly not principles that should be entrenched. Entrenched bills of rights make future generations slaves to the morality of the time.

It is interesting to note that the few 'rights' which were entrenched in the Australian Constitution have caused difficulties because of the absence of exceptions. The principle enshrined in s 117 of the Constitution that a State may not discriminate against a resident of another State is clearly meritorious. One day, however, the High Court will have to decide whether it prevents a State which chooses to spend a high proportion of its budget on free hospital care from confining that benefit to its residents or whether a beachfront council may give free parking at the beach to local ratepayers. Most would agree with the result in *Street v Queensland Bar Association*⁴ where the High Court found that the Queensland laws which prevented interstate lawyers being admitted to practise in Queensland breached s 117 of the Constitution. The contrary view (held by many Queensland lawyers at the time) that the discriminatory law was necessary for the development of a strong legal profession in Queensland would have been irrelevant to the argument and was not considered. The right result was reached but it would have been better if the Constitution had permitted the application of a balancing process rather than an absolute rule. Under such an approach, the Constitution would have permitted a court to weigh the benefit to the State in maintaining

4 (1989) 168 CLR 461.

a purely local legal profession against the desire of residents of other states to practice throughout Australia.

I do not need to expatiate on the problems caused for generations of Australians by the difficulty of interpreting s 92 which provides that trade, commerce and intercourse among the states shall be 'absolutely free'. Different tests were propounded from time to time in contexts which included State and Federal marketing schemes, transportation of goods across State boundaries prior to returning to the original State and prohibitions on the taking of particular maritime species. Difficulties were also encountered in interpreting s 51(xxxi) concerning the acquisition of property on just terms. In general, property should not be acquired otherwise than on just terms but there are exceptions. The High Court has held that s 51(xxxi) does not apply to fines or forfeitures or to the vesting of the property of bankrupts in trustees. The need to create such exceptions illustrates the problem with the entrenchment of such general principles. More controversially, however, it has been held to apply to the legislative abridgment of a time limit for the commencement of an action where that abridgment took effect before expiry of the time limit but still left sufficient time for the action to be commenced.⁵

Thus far, I have been considering the problems created by an entrenched bill of rights which invalidates inconsistent legislation. The more modern approach recognises many of these problems and tends to seek a bill of rights which merely permits 'declarations of incompatibility' whose sole effect is to put pressure on the Legislature to change the offending law. The retired High Court justice, the Hon Michael McHugh in a paper entitled 'A Human Rights Act, the Courts and the Constitution'⁶ has recently expressed the view that such a bill of rights might offend Chapter III of the Constitution for a number of reasons, one of which is that it effectively permits declaratory judgments not having substantive legal effect. It is possible that this objection could be solved by making the effect of a determination of incompatibility the imposition of an obligation on the Attorney-General to publish a public statement as to whether the Government proposes to amend or repeal the offending provision and, if not, why not. This would make the Attorney-General (who is the logical contradictor) a party having a legal interest in resisting the claim. Although, I hasten to add that this only addresses one aspect of the possible constitutional difficulties associated with replicating the declarations of incompatibility method into Commonwealth law.

Another suggested variation is that the 'statute of rights' provide for the interpretation of legislation in accordance with its principles. This creates considerable difficulties in determining how far courts can go in stretching

5 *Smith v ANL Ltd* (2000) 204 CLR 493

6 Michael McHugh, 'A Human Rights Act, the courts and the Constitution', 5 March 2009, http://www.humanrights.gov.au/letstalkaboutrights/events/McHugh_2009.html, at 16 April 2009.

the interpretation of words to achieve a result. To some extent it is already done by the courts as in *Minister for Immigration & Citizenship v Haneef*⁷ and by three of the seven justices in *Al-Kateb v Godwin*.⁸ What the minority did in the latter case was to stretch the meaning of the word 'until' so that it necessitated a period with a finite termination (unlike the use of 'until' in the phrase 'until Hell freezes over' or in songs such as 'until the Twelfth of Never'.) The majority in that case found no ambiguity; the minority reached its result by finding one. As we all know, the problem was ultimately solved (as it should have been) by the government changing the statutory instruments so as to permit the granting of visas to persons in Mr Al-Kateb's position.

III Conclusion

Like the debates over capital punishment, abortion and state aid to religious schools, the debate over a bill of rights has the advantage that it gives rise to a large number of rational arguments on both sides. Another common feature with those debates is that there are intermediate positions that need to be considered. I have not purported in this paper to provide an exhaustive list of or commentary upon all those arguments or positions. What I have sought to do is to add one significant argument against bills of rights that is often lost in the debate – the argument that there is no universal truth that the principle should always override the exception; indeed the reverse is usually the case. I have also discussed briefly one specific objection to entrenched bills of rights and a method of avoiding the constitutional problem with a non-compulsory 'statute of rights'.

7 [2007] FCAFC 209.

8 (2004) 219 CLR 562.

Chapter Ten

Pluralism, Parliamentary Democracy and Bills of Rights

THE HON CHRISTIAN PORTER, MLA

The claim made by charter advocates that human rights can be best protected in Australia by some form of bill or charter of rights is on its face a very attractive one. This is because it appeals to a simple intuition. If some value which we label a ‘right’ is thought to be universally accepted as desirable and important; then should that value not be maintained and advanced by the measure of setting the value out in legislation, which has the primary effect (depending on the nature of the legislation) of ensuring a degree of permanency to the existence of the value in our society?

Notwithstanding the intuitive attractiveness of such a notion there are two fundamental and related propositions, which, if accepted as correct, combine to provide a powerful demonstration that the benefits asserted to attach to enshrining ‘rights’ in legislation are ultimately illusory and, indeed, that bills of rights are documents which potentially operate to diminish citizens’ authority. One of these propositions is normative and the other descriptive.

The normative proposition is a view in political philosophy that public policy determined by democratically and periodically elected parliaments will be superior to policy settings the result of judicial decisions.

The judicial process is too principle-bound – it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formulation of policy.¹

While agreeing firmly with the proposition above the purpose of this brief paper is not to restate this view, which has been elegantly and sometimes humorously advanced elsewhere.²

Rather, this paper seeks to undertake two more modest tasks.

1 Alexander Bickel, *The Supreme Court and the Idea of Progress* (1978) 175.

2 Greg Craven, *Conversations with the Constitution* (2004), particularly chapter 7 ‘Rights, Wrongs and the Constitution’.

The first is to outline the practical or descriptive proposition which, while it is fundamental in the sense that it appears to precede and underpin the philosophical proposition outlined above; is often overlooked or perhaps assumed. The fundamental descriptive proposition, which underpins opposition to bills of rights, is that of value pluralism. Simply put, this is a contention that values exhibit one central feature – that they cannot be simultaneously obtained. Rather, values are in constant conflict with each other and that choices between different and thereby competing values is agonistic in the sense that choosing more of one value invariably means accepting less of another.

The descriptive idea of value pluralism is absolutely fundamental to the philosophical view that elected representatives are best placed to make determinations of public policy. This is because value pluralism, if it is true, is the reason why what courts do in determining questions arising under rights documents is fundamentally to engage in setting public policy outcomes.

The second purpose is simply to examine the actual operation of rights documents in the light of the theory of value pluralism by providing some examination of recent decisions made under rights documents, these decisions appear to illustrate that the inevitable manifestation of value pluralism in rights documents is such that judicial decisions consequent upon such documents are not determinations about rights themselves but are determinations about public policy outcomes where one or more rights are in conflict. In this part of the analysis some focus will be placed on decisions relating to a variety of criminal justice issues both because these decisions are highly illustrative but also, as is always the case with the criminal law, they are also the most interesting.

I Value Pluralism

The idea of value pluralism is a simple but powerful one.

It is a descriptive analysis of the state of the non-physical world which has been best and most thoroughly put by the late Professor Isaiah Berlin. In essence, value pluralism is a view of the world which holds that values (a term which this analysis will elaborate upon further in part two) are in constant and unavoidable conflict – to obtain a greater amount of one value will invariably result in the need to give up some amount of another value. Professor John Gray depicts value pluralism as the idea

... that ultimate values are objective and knowable, but they are many, they often come into conflict with one another and are uncombinable in a single human being or human society, and that in many of such conflicts there is no overarching standard whereby the competing claims of such ultimate values are rationally arbitrable.³

3 John Gray, *Post Liberalism: Studies in Political Thought* (1996) 67.

The term value pluralism is often used interchangeably with the related term ‘incommensurability’. However it is more correct to consider incommensurability as one of three identifiable components of the doctrine of value pluralism. Notably that:⁴

1. There exists an inability to rank values;
2. There exists an incompatibility amongst many values so that there is a constant series of conflicting choices faced by individuals and societies between different values and even different elements of a single value (incommensurability);
3. There is only a fairly limited extent to which universally accepted principles of rationality can be applied to compare and measure one bundle representing one mix of values to another bundle representing a different mix of values (anti-rationalism).

These three elements combine to form the suggestion that the idea of human perfection is incoherent.

To illustrate the point in a simple way it is useful to refer to an intriguing book written by Benjamin Franklin. Franklin’s book *The Means and Manner of Obtaining Virtue* was part autobiography and part moral exhortation to American youth. It suggested a best practice process to each individual that would lead them to execute a life which was as morally superior as it could be. Franklin engaged in the process of keeping a journal where he recorded scores of his ethical and moral performance against what he had determined to be the desirable human values that were unarguably worthy of obtaining. Anyone who reads this marvellous book will be impressed by Franklin’s herculean efforts to lead the best life, but they will also note that it gives rise to some intriguing frustrations. Franklin originally pursued twelve virtues but later added as a further virtue, humility. However, he struggled with an unfortunate incongruence, notably, that the better he became at obtaining his other virtues the more proud he became of his achievements (and the less humble). Franklin noted this incommensurability in the following way:

In reality, there is, perhaps, no one of our natural passions so hard to subdue as pride. Disguise it, struggle with it, beat it down, stifle it, mortify it as much as one pleases, it is still alive, and will every now and then peep out and show itself; you will see it, perhaps, often in this history; for, even if I could conceive that I had completely overcome it, I should probably be proud of my humility.⁵

4 It is worth noting here that (while outside the scope of this analysis) there remains substantial disagreement regarding precisely what incommensurability is, how true a depiction of the real world it may be, or how deep it may reach – see Ruth Chang (ed) *Incommensurability, Incomparability and Practical Reason* (1997).

5 Benjamin Franklin, *The Means and Manner of Obtaining Virtue* (1995), chapter VI.

Franklin's frustrations are an illustration of Berlin's theory regarding the actual incommensurate operation of values in societies or in a single life. In addition, Franklin's seeming surprise at the difficulty he encountered demonstrates that while Berlin's theory is a simple one it is not necessarily intuitive and in consideration of the powerful 20th century political views which have been alternative to value pluralism it might be seen as an idea which has been something of a minority view in modern political philosophy.

It is useful to deal first with the last of the three elements implicit in Berlin's idea of value pluralism that being a substantive anti-rationalism.

Value pluralism is a conception of morality as lacking a substantive rational structure. In this sense it is a reaction against 20th century attempts to engage in a rationalist diagnoses of societal ills and the disastrous impositions of correspondingly 'rational' solutions that were witnessed at various points in the last century. Berlin describes that the central view that value pluralism speaks against was that, '[R]ational methods – hypothesis, observation, generalisation, deduction, experimental verification where it is possible – can solve social and individual problems, as they have triumphantly solved those of physics and astronomy...'⁶ Berlin argues that the 20th century slaughter of individuals on the 'altar of historical ideas' has been caused by a belief, that:

... in divine revelation of the mind of an individual thinker, in the pronouncements of history or science, or in the simple heart of an uncorrupted good man, there is a final solution. This ancient faith rests on the conviction that all the positive values in which men have believed must, in the end, be compatible, and perhaps even entail one another.⁷

At its heart value pluralism was an attack on the rationalist notion that there is one discernible good life for human beings. Berlin saw his opposing view as reaching back to the work of Machiavelli, who denied that there was any final solution to the question of how men should live. In the example given above Benjamin Franklin had merely made a personal discovery of a fact which Berlin credits Machiavelli as having made the overarching philosophical discovery of, notably the fact of; 'conflicts amongst values as a permanent feature of life, which no system or theory is likely to remove.'⁸

6 Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (1990) 70. Berlin here was speaking in favour of the philosophical views of Vico and Herder. On this point Gray sees the universalist claim of classical political philosophy as being the application of an 'enlightenment project' of giving human institutions a claim on reason that has universal authority. This universalist claim predicts a marginalisation of cultural difference, which phenomenon Gray argues has been empirically falsified: 'the propensity for cultural difference is a primordial attribute of the human species; human identities are plural and diverse in their very natures...' – See Gray, above n 3, 109-115.

7 Isaiah Berlin, *Four Essays on Liberty* (1969) 167.

8 Sidney Morgenbesser and Jonathon Lieberman, 'Isaiah Berlin.' in Edna Margalit and Avishai Margalit (eds) *Isaiah Berlin: A Celebration* (1991) 7.

Inherent in this anti-rationalism is a view that there exists an incomparability as between different bundles of values and, therefore, between good lives. The implication is that there is no warrant for judging the ends of one person (or society) as rationally preferable to those of another. That while we can exclude some ends as invalid, as between valid ends, we do not possess a rational criterion for judging one better than another. Therefore, the elevation of one life to that of highest position constitutes a dangerous view of human moral experience. Morality becomes a, 'realm of life where a plurality of valid, true and equally ultimate values compete with one another.'⁹

The first two elements of value pluralism are also critical to understanding the operation of bills of rights.

The first element asserts that a cardinal or ordinal ranking as between values is impossible.

Berlin says that, 'to assume that all values can be graded on one scale, so that it is a mere matter of inspection to determine the highest, seems to falsify our knowledge that men are free agents, to represent moral decision as an operation which a slide rule could, in principle, perform.'¹⁰ The central idea is that human beings cannot rationally calculate which prioritised ordered list of values is better than any other prioritised ordered list. Rather, there is a plurality of equally valid and inherently conflicting values. Humans may, conceivably, be able to rationally exclude some goals from the list of valid human ends (the penetration of rationality to this extent stems from Berlin's conception of human nature, which point will be considered shortly). However, when confronted with a conflict between two or more valid values there is no universally accepted rational order which can be ascribed to them.

The second element asserts a fundamental incompatibility between values. It says that some (perhaps all) values are mutually exclusive with respect to their simultaneous attainment. As stated by Berlin, the idea that, 'we cannot have everything is a necessary, not a contingent truth.'¹¹ In this sense Berlin rejects the Enlightenment belief that all good things in life are compatible, which belief he describes as having previously provided a, 'deep source of satisfaction

9 Robert Kocis, *Critical Appraisal of Sir Isaiah Berlin's Political Philosophy* (1989) 121. The anti-rationalist underpinning to Berlin's pluralism has a relativistic quality but as will be expanded upon it is not a doctrine of methodological relativism where a radical ethical scepticism denies the existence of any rational method whatsoever applicable to ethics. Rather Berlin's pluralism has more in common with non-methodological relativism which holds that, while there may be a unique rational method applicable to ethics in some circumstances (such as the ability to discern between good and bad ends), in many instances it is simply impossible to discern between competing ethical judgements – that is they are equally valid (On this point see Richard Brandt, *Ethical Theory: The Problems of Normative and Critical Ethics* (1959) .

10 Berlin, above n 6, 171.

11 Ibid, 170.

both to the intellect and to the emotions.¹² Berlin's alternative conception is that conflicts of values are an irremovable part of life and, consequently, that total human fulfilment is a formal contradiction.

The question then arises what has Berlin's theory of an eternal and eliminable conflict between human values got to do with rights generally or bills of rights specifically? The answer, simply put, is that when Berlin talks of values he is in at least one sense talking about rights, or at the very least, the view of the ethical world that Berlin subscribes to applies equally to what Berlin means by values as it does to what we now in modern western democracies seem to mean when we refer to rights.

To expand on this idea it needs to be restated that Berlin's anti-rationalism constitutes a denial of a view that underneath the apparent diversities of men lies a shared and unchanging nature of such a substantive type that it can support a claim that all men possess a substantive pool of identical needs, motives and values. For Berlin there is some very limited commonality to the nature of all humans but not enough to support a single conception of an objective verifiable, universally ideal human life and the search for it is conceptually incoherent. By extension, and as set out above, Berlin's position is opposed to the enlightenment idea that 'whatever cultural variety the future of mankind would encompass, it was reasonable to expect convergence on a universal civilisation under-girded by a shared, rational morality.'¹³

While for Berlin, human life is substantially underdetermined by our common humanity, at the same time he identifies a commonality to human experience and values, such that; 'their variety cannot be unlimited, for the nature of men, however various and subject to change, must possess some generic character if it is to be called human at all.'¹⁴

The most important shared characteristic of all men is that we are choosers: 'a being who is prevented by others from doing anything at all on his own is not a moral agent at all, and could be neither legally or morally regarded as a human being, even if a physiologist or a biologist, or even a psychologist, felt inclined to classify him as a man.'¹⁵ What is fundamentally universal about man is purposive choice – all men everywhere are seekers of ends.¹⁶ In an approving description of Mill's account, Berlin describes that man differs from animals because he is, 'capable of choice, one who is most himself in choosing and not being chosen for; the rider and not the horse; the seeker of ends; and not merely of means.'¹⁷

12 Ibid.

13 Gray, above n 3, 68.

14 Berlin, above n 5, 80.

15 Berlin, above n 6, 161.

16 Isaiah Berlin, *The Hedgehog and the Fox' in Russian Thinkers* (1978) 27 and see Kocis, above n 8, 89 for the similarity here to natural law doctrines.

17 Isaiah Berlin, 'John Stuart Mill and the Ends of Life' in Isaiah Berlin, *Four Essays on Liberty* (1990) and Berlin, above n 6, 178.

Berlin's view of human nature is not merely that humans everywhere do choose – they must do so to be human – to be human is necessarily to act for purpose on the basis of volition. This has been depicted as a quasi-Kantian notion of all men as seekers of ends,¹⁸ but whereas for Kant men were rational agents seeking rational ends, Berlin's humans, in their search for ends, can only be described as purposive, not rational.

Human beings are united in search and choice, not in outcome or opinion.

For Berlin a man who never chooses would be inhuman. And a man who chose with no semblance of purposiveness; 'a man to whom it literally made no difference whether he kicks a pebble or kills his family, since either would be antidote to ennui or inactivity', is to be considered insane or inhuman.¹⁹

Gray notes that Berlin consistently maintained that, 'though their embodiment in specific forms of life may vary across cultures, ultimate values are objective and universal – as are conflicts among them.'²⁰

Berlin's perception that humans are able to discern good and bad ultimate ends appears to flow from a further feature of human nature as Berlin perceived it to exist.

Berlin sees man as sharing a common perception of the external world. Humans share an 'intuition', a type of common human dialect, regarding both fundamental logical notions such as time and space and ethical notions such as good and bad. Some of this commonality is internalised in the form of 'human values': 'Such notions as society, freedom, sense of time and change, suffering happiness, productivity, good and bad, right and wrong, choice effort illusion ... Are not matters of induction and hypothesis ... to think of someone as human is ipso facto to bring these notions into play.'²¹ Human values are not merely shared perceptions. Rather, they are constitutive of man and in constituting our common humanity they allow for moral intercommunication.²²

While ends are incompatible, 'their variety cannot be unlimited for the nature of men, however various and subject to change, must possess some generic character if it is to be called human at all ... [W]ithin the limits of humanity the variety of ends, finite though it is, can be extensive.'²³ Therefore, despite life being underdetermined by our common humanity and despite the possibility of great divergence in ends there exists an objective list of universally good human ends. It is this proposal that distinguishes Berlin's position substantively from methodological relativism. However, to the

18 Kocis, above n 8.

19 Isaiah Berlin, *Does Political Theory Still Exist? in Concepts and Categories* (1978) 166.

20 Gray, above n 3, 66.

21 Berlin above n 15, 166.

22 Berlin, above n 5, 11, where Berlin says: 'Intercommunication between cultures is only possible because what makes men human is common to them, and acts as a bridge between them.'

23 Ibid. 79.

extent that Berlin's position, as put by Kocis, is that 'we can certainly know that there are goods, but we lack the rational grounds for assurance that any one of the goods is superior to the others,'²⁴ it is a position which still resembles non-methodological relativism.

Importantly, these human values are not infinite; 'the number of human values, of which I can pursue while maintaining my human semblance, my human character, is finite – let us say 74, or perhaps 122, or 26,...'²⁵ It appears that the existence of these human values enables humans to identify objectively ultimate good and bad ends. The link between human nature and objectively good ends or values seems to follow in stages. Some combination of shared moral and logical intuitions are internalised as human values such as happiness, freedom and choice. These then constitute a common universal element to humanity. This commonality then, in turn, extends in part to form the objective nature of our ultimate ends. As stated by Berlin:

the ability to recognise universal – or almost universal – values, enters into our analysis of such fundamental concepts as "man", "rational", "sane", "natural", etc. – which are usually thought of as descriptive and not evaluative – that lies at the basis of modern translations into empirical terms of the kernel of truth in the old a priori Natural Law doctrines.²⁶

An examination of rights documents shows that what they fundamentally deal with is the conflict between values that Berlin describes.

Berlin's reference to 'the old a priori Natural Law doctrines' is, in essence, a reference to the doctrine that has had various formulations but which fundamentally holds human beings have rights by simple virtue of their humanity. Depending on its formulation this doctrine holds that either given to humans by god, or endowed to us by 'nature' or because of our own unique human nature are in the permanent interests of man; are a finite pool of natural or later termed 'human rights'; most notably those to life, liberty, property and the rule of law. Further, that these rights because of their origins (however imperfectly explained) are inalienable and fundamental.²⁷

The purpose of this analysis is not to propose that Berlin's pluralism may represent one of the better contemporary attempts to recast the natural law doctrines of self-evidently existing human rights. Although Berlin mounts a strong case for founding human rights upon a commitment to recognisable,

24 Kocis, above n 8, 119.

25 Isaiah Berlin, *The First and the Last* (1999) 51.

26 Berlin, above n 15, 166.

27 Berlin describes these 'natural rights' as essentially negative rights which set limits between or minimum frontiers between individual and state. Berlin points out that it is the scope of this minimum that has proved the decisive feature in debates between liberalism and that: 'Different names or natures may be given to the rules of these frontiers: they may be called natural rights, or the word of God, or Natural Law, or the demands of utility or the 'permanent interests of man.'" (Berlin, above n 6, 164 – 165.)

universal and fundamental human values such as freedom and autonomy which may be necessary essentials of maintaining a human's status as human (quite apart from improving well being). Rather, the point sought to be made is that while Berlin speaks in terms of conflict between 'values' he may as well be and (in consideration of his conception of how humans can determine a pool of ultimate values), perhaps often is, speaking in terms of a pluralist conflict between rights.

Even considering the most basic natural rights conception above, the potential for a pluralist conflict is evident. Should one person exercise their right to freedom in such a manner that they express a genuinely held but highly contestable view in a speech or publication, for instance, that 'the Jewish State of Israel is an illegal occupation of the sovereign lands of the Palestinian people such that those lands should be reclaimed by force'; that may well causally incite violence which decreases the relevant Jewish residents rights to life manifest at least in a right not be assaulted. To illustrate this idea, Berlin notes at several points that the very concept of freedom itself contains incommensurable components.

That conflict can be so readily conceived between rights to life and liberty (and even inside the idea of liberty itself) lends weight to the view that rights exhibit the same qualities as the values with which Berlin primarily deals and that rights as we commonly conceive them are in constant and unavoidable conflict with one another.

To speak of rights to life, liberty, property and the rule of law is to do no more than to label in the most general way, the most commonly agreed values that we now describe as rights. This historic formulation of rights simply entails a level of conceptual agreement about areas where it is desirable for frontiers to oppression to exist, inside of which individuals are free to choose their actions unobstructed by the coercion of others. Each of these rights is essentially negative in the sense that this conceives of some appropriate and agreeable limit upon the degree of interference to which an individual can be subject either at the hands of other individuals or the State or some other institution.

That conflict is inherent between even the most basic conception of negative rights is to say nothing of the nature of conflict that may exist in the interactions between basic negative rights and other positive claims to certain desired outcomes, positions or institutions that have also been labelled by their proponents as rights. If it is accepted, that certain socio-economic or welfare claims can also be properly characterised as rights (such as those set out, for instance, in the United Nations International Covenant on Economic Social and Cultural Rights) then the conflict between rights becomes deeper and more intense. Indeed, if some form of equality or positive welfare is considered to be a basic right just as is the right to freedom or property, then the modern consideration of rights is not much, or at all, different from Berlin's consideration of the world couched in terms of values.

II The Operation of Rights Documents

What is actually contained within rights documents is not much more than various lists and reformulations of those things that Berlin considered might be identifiable as agreed human values. If this is the case and we accept that what Berlin says about values is correct, then rights documents simply contain values in inevitable conflict and invariably what occurs in decisions arising from rights documents is determinations about what mix of values is to be preferred over another mix. This has the consequence that judicial decisions consequent on rights documents are simply public policy outcomes to which there may exist several equally justifiable positions or commensurate outcomes. It is the fact of the existence of commensurate outcomes to public policy decisions regarding values that lends power to the philosophical suggestion that judicial decision making amongst commensurate outcomes is politically illegitimate. Notably because it subverts democratic values by privileging the views as to public policy outcomes of a small number of unelected and electorally unaccountable judges over that of elected representatives; and that in so doing it disenfranchises ordinary citizens. The reason why criminal justice issues are a useful vehicle to illustrate this point is because they so often involve clearly discernable and competing values.

A primary example is the case of *S & Marper v The United Kingdom*²⁸, In that case an application was brought in the European Court of Human Rights by two British Nationals, alleging breaches of Art. 8²⁹ and Art 14³⁰ of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (“the European Convention”).

Specifically, the applicants were seeking the destruction of fingerprints and DNA samples taken by the British Police in the course of an investigation which did not result in a successful prosecution. Such retention was permitted in domestic British law.³¹

The Applicants submitted that retention of their fingerprints and DNA profiles constituted an interference in their private life in breach of Article 8

28 *S and Marper v The United Kingdom*, 30562/04 [2008] ECHR 1581.

29 *Convention for the Protection of Human Rights and Fundamental Freedoms (EU)*, Art 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

30 *Ibid*, Art 14.

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

31 *Criminal Justice and Police Act 2001* (UK), s 82

of the European Convention. After weighing up (i) whether the holding of samples constituted an interference in the applicants' private lives, and (ii) whether such interference was justifiable on grounds of the benefits to law enforcement, the European Court of Human Rights ultimately upheld the applicants appeal, stating:

...the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, *fails to strike a fair balance between the competing public and private interests* and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a domestic society... Accordingly, there has been a violation of Article 8 of the Convention in the present case.³² (emphasis added)

What is noteworthy about this matter is not the quality of the decision ultimately arrived at, but the degree to which the Court's decision involves public policy making in the guise of protection of an apparently absolute right.

This case involves two equally valid ultimate values in clear and unavoidable conflict. In accordance with Berlin's reasoning we may be able to identify two ultimate and valid ends in this example. The first end might be described as a public interest, that of securing and enhancing citizens safety by establishing a robust long term system of detecting and punishing criminal activity (this might be seen as some species of the genus right to life). The second may be described as the private interest of ensuring a level of non interference with the lives of citizens which might be prompted or directly caused by the storage of personal genetic data (this might be seen as some species of the genus right to liberty). Each of these ends or goals may be knowable and objectively and near universally agreed in a given society to be discernible and distinguishable value which is desirable. However, they are ultimate ends which are in clear contextual conflict with one another and are uncombinable in a human society in the sense that they cannot both be perfectly obtained. Further, there is no rational or universally agreed overarching standard whereby the competing claims of such ultimate values can rationally be arbitrated. Modern western democracies place value on both these ends and sometimes the majority of electors might wish for there to be tighter controls on the storage of data by police than presently exist. Or, in another context, the majority may have given their government a mandate to retain a wider range of samples for the purposes of stronger law enforcement (as was apparent by the terms of the relevant UK Act). Majority

32 [2008] ECHR 1581 [125-126]

views in this regard may vary from country to country or over time in the same place as conditions change. However, a decision as between the appropriate mix of these competing values is not a decision about a right in the sense of protecting some single value which rational analysis shows us is neutral, universal and eternal. As the European Court itself acknowledged, it was not performing the task of assessing whether there exists in all circumstances a right not to have samples of this nature held. Instead, they arrived at a decision by performing an assessment whether the decision made by a democratically elected parliament of a member state 'fail[ed] to strike a fair balance between the competing public and private interests.' The idea that Courts should not only possess the capacity to overrule parliament, but also be left to make an entirely subjective decision on what is essentially a matter of public policy, is not merely discomforting, it is something which entirely subverts the purpose and functions of parliamentary democracy, and substitutes an executive judiciary for an executive cabinet.

Of course, whether a bill of rights is expressed in generalities or much more specific terms, it cannot avoid this inherent dilemma. In the above example, there are two competing values described as a public and private interests – that of the individual's legitimate expectation that there be a limitation on how the State may obtain and use their personal data, and the community's legitimate expectation that law enforcement authorities should be able to obtain and use data likely to lead to the apprehension of offenders. Under a bill of rights, the inevitable task with which the judiciary is faced is not to ascertain which of these interests is absolute, but to rank them – this is the essence of the public policy – taking a role which has traditionally and appropriately been the province of Parliament. What Berlin's analysis tells us is that for values such as those under consideration in this case there is no universally agreed rational system of measuring values that can rank such values as these, either in an ordinal or cardinal ranking. That question of ranking is a matter of preferences not absolute rationality. And so the central issue that arises in considering whether to adopt bills of rights is whose preferences do we prefer those of representatives elected by the citizens or those of appointed members of the judiciary.

Before providing further Australian examples in the area of criminal justice it is necessary to consider briefly the distinction between purportedly non-binding rights documents and more traditional binding documents.

The earliest rights documents stem from the established tradition of a bill of rights enshrined in a constitution, which document enables judges to declare unconstitutional legislation which courts consider contravene the rights expressed in the bill, the most prominent example being the US Bill of Rights. At the opposite end of the spectrum are statutory rights documents. Examples of this type of rights document are to be found in Victoria³³ and

33 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

the Australian Capital Territory³⁴, as well as, the European Charter of Human Rights.³⁵ These documents are often purported to be more palatable to those attached to notions of parliamentary sovereignty.³⁶ This is because such Bills do not empower courts to declare legislation unconstitutional, and hence invalid. Rather, they provide judges with the ability to issue a declaration that legislation is incompatible with the bill of rights. The effect of this is that the legislation remains operative. However, before proceeding to consider several recent decisions under such documents it is necessary to note how they actually operate in a practical and political context.

Notwithstanding that declarations of incompatibility do not render legislation invalid, such declarations create a situation in which parliaments may well find it very difficult to resist the imperative to give effect to that declaration by amending or repealing the law. More immediately, these documents also require the courts to construe legislation in such a way so as to achieve compatibility between the legislation considered and the bill of rights. In actuality, the effect is that under the cloak of statutory interpretation, Judges have the capacity to remake legislation and therefore to reshape the intent and policies of parliament. This goes a good way beyond the traditional scope and ambience of statutory interpretation. A third consequence, although often overlooked, must also be taken into account. This is the existence of a further impact on the parliamentary process. To avoid either of the first two consequences, it is not difficult to imagine that members of parliament would find themselves having to disregard the policy preferences which they and their constituents want enshrined in legislation when laws are being drafted and introduced.³⁷

It appears that the model now being advocated as the one which should be adopted in Australia is a Commonwealth based charter which is a statutory document based on the declaration of incompatibility model. This would likely apply to Commonwealth agencies and authorities and to those (whether private individuals or corporations) acting under or within the purview of Commonwealth laws. It would also likely apply to State laws, State agencies and authorities and individuals acting in areas not otherwise

34 *Human Rights Act 2004* (ACT).

35 *Charter of Fundamental Rights of the European Union* (EU)

36 Despite the common perception that the doctrine of Parliamentary Sovereignty (perhaps because of its UK origins) applies in Australia, it must be remembered that because of the existence of the Australian Constitution, no parliament whether State, Commonwealth or Territory has unlimited or plenary legislative power. That is, legislative power and hence parliamentary sovereignty is limited by the Constitution and, therefore, that limitation of itself protects people's rights. This is the essence (often overlooked) of having a constitutional democracy.

37 There is further position which is represented by the Canadian Charter of Rights, which contains a legislative override enabling the parliament to indicate that provisions of that Charter do not apply to legislation. Again from a practical and political perspective it is very difficult if not impossible for Parliament to pass legislation which expressly indicates that provisions in the Charter are being disregarded.

regulated by Commonwealth laws.³⁸ This would be in addition to the standard situation of Commonwealth Laws prevailing over inconsistent State laws under s 109 (an example may be defendant to a state prosecution invoking a right under the Commonwealth charter).

The fact is that the concerns regarding the subversion of the democratic process do not only arise out of rights documents which authorise Judicial nullification of legislative provisions, but also those which at least on the face of it, appear only to give courts a mandate to issue non-binding declarations or utilise rights documents as an aid to statutory interpretation. That this is so is apparent in those Australian jurisdictions which presently possess rights documents.

Much of the Victorian *Charter of Human Rights and Responsibilities* ('the Victorian Charter') came into operation on 1 January 2007. However some sections, including s 32 (which empowers Courts to read down provisions) and s 36 (dealing with declarations of inconsistency) did not come into operation until 1 January 2008. Hence, examples are only now beginning to emerge of how these sections operate in judicial practice.

One such decision is *RJE v Secretary to the Department of Justice & Ors*³⁹. Handed down on 18 December 2008, this case dealt with an appeal against an order made pursuant to s 11(1) of the *Serious Sex Offenders Monitoring Act 2005* (VIC) ('The Monitoring Act'), that required the appellant to be subject to an extended supervision order for a period of 10 years. Under the Monitoring Act, the Court was only empowered to make an extended supervision order where it was 'satisfied to a high degree of probability, that the offender is likely to commit a relevant offence.'⁴⁰

A live and central issue during the appeal was the meaning of 'likely to commit' in the context of the Monitoring Act. Specifically, whether 'likely to commit' meant 'more likely than not' (i.e. a greater than 50% chance of an offence being committed), or merely indicating the real possibility that an offence may be committed (i.e. potentially less than a 50% chance). Prior to this decision, the latter interpretation had been preferred by the Victorian Supreme Court.⁴¹

The Court unanimously allowed the appeal and overturned the previous decision. Of particular interest to discussions of the impact of the Charter is the judgment of Justice Nettle, who held that:

38 This is a consequence of the inter-relationship of the expanding scope of Commonwealth legislative powers under s 51 of the Commonwealth Constitution (for example, the interpretation of s 51(xx) in *New South Wales v Commonwealth (WorkChoices Case)* (2006) 231 ALR 1) and the ability of Commonwealth legislation to bind the States, their agencies, and statutory authorities (as indicated by *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (the Engineers Case) (1920) 28 CLR 129).

39 *RJE v The Secretary to the Department of Justice*, [2008] VSCA 265.

40 *Serious Sex Offenders Monitoring Act 2005* (VIC), s 11(1).

41 See *TSL v Secretary to the Department of Justice* (2006) 14 VR 109.

In this state, it is now necessary to consider to [sic] the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter')... Now, perforce of s 32 of the Charter, it is necessary to construe s 11 of the Act (so far as it possible to do so consistently with the purpose of the section) in a way that is "compatible with human rights".⁴²

His Honour Justice Nettle went on to state that s 11 of the *Monitoring Act* should be construed:

in a way that subjects the appellants' rights to freedom of movement, privacy and liberty only to such reasonable limits as can demonstrably be justified in a free and democratic society etc. In my view, that requires a departure from the *TSL* interpretation of likely.⁴³

His Honour then commented that although Parliament's intention had presumably been in line with the previous interpretation of likely:

To adopt now the construction which I prefer is to accept that the intention has changed. But that appears to be the way in which the Charter was intended to operate.⁴⁴

The breadth and depth of such a change in principles of statutory interpretation is breathtaking.⁴⁵ Where courts previously interpreted legislation by attempting to ascertain the intention of Parliament (or at least the existence of clear precedent), now, *all* legislation enacted previous and subsequent to the Charter are subject to reinterpretation in light of the Charter. Apart from creating uncertainty in relation to all laws, such a change requires judicial lawmaking on a grand scale.

Hence, provisions such as s 32 do not merely allow judicial excursions into the realms of policy making – they positively require them. It should be appreciated that this is not a question of the relative merits of judicial activism as opposed to judicial deference, such a section effectively bypasses that debate by requiring all judges of all stripes to take on an activist role.

And again that the decision involves a ranking of conflicting values incapable of perfect simultaneous attainment is clear. Two ultimate and valid ends are at issue in this example. The first end might be described as that of securing and enhancing citizens safety by establishing a robust system of detaining those considered (notwithstanding completion of a custodial sentence) a risk to the safety of society (similar to Governor's pleasure

42 [2008] VSCA 265 [105] per Nettle JA.

43 Ibid, [106].

44 Ibid, [114].

45 Or in the words of Lord Woolf CJ discussing the parallel section of the *Human Rights Act 1998 (UK)* 'it is difficult to overestimate the importance of (the relevant section)'; *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48

detention of the insane a fact of criminal justice of some long standing). The second end may be described as the end of ensuring a level of non interference with the lives of citizens which occurs by virtue of a detention not based upon (or only partly based upon) criminal conviction. Again, each of these ends or values may be knowable and objectively and near universally agreed in a given society but they are nevertheless ultimate ends which are perfectly uncombinable in a single human society.

This example also highlights an unfortunate side effect of rights documents; that they create a system which almost inevitably invites a continuous (and perhaps acrimonious) debate or dialogue between the Courts and Parliament. The primary function of legislation is to implement the will of the electorate through its representative Parliament. It is difficult to conceive a more cumbersome arrangement than one which would require Parliament to draft legislation knowing Courts might consider themselves bound to interpret this legislation in as contrary a fashion as possible to the original intent of its elected drafters.

A further example emanates from the Australian Capital Territory in an unreported decision of a Magistrate of the ACT Children's Court in the matter of *Perovic v CW*.⁴⁶ This example serves to illustrate the powerful interpretive impact of even merely declaratory rights documents. *Perovic* involved the prosecution of a juvenile for a sexual offence, in circumstances where there had been delay between the time of the complaint and the laying of the relevant charge. The delay gave rise to an application to permanently stay the proceedings, relying in part on a submission that the delay prejudiced the child's ability to defend the charges, and represented a breach of s 20(3) of the *Human Rights Act* which states that 'A child must be brought to trial as quickly as possible.'⁴⁷

The Magistrate considered international authorities which proposed that an absence of proper resources is not a valid reason for delay and found that the accused juvenile was not brought to trial as quickly as possible, which fact amounted to a breach of the *Human Rights Act*. Further, even though the *Human Rights Act* does not provide specific remedies for breach the Magistrate was quite clear that the provision provided the determinative factor in the exercise of discretion, noting as follows:

46 *Perovic v CW*, No.CH 05/1046 (1 June 2006)

47 The special rights of children in criminal proceedings are set out in s 20 of the *Human Rights Act 2004* which states that:

- (1) An accused child must be segregated from accused adults
- (2) An accused child must be treated in a way that is appropriate for a person of the child's age who has not been convicted
- (3) A child must be brought to trial as quickly as possible
- (4) A convicted child must be treated in a way that is appropriate for a person of the child's age who has been convicted.

It is, in my view, consistent with the principles of the HR Act, to consider that a breach of that Act, when the breach occurs in relation to criminal charges, may give rise to a situation in which an injustice would occur if the breach was, in effect, accepted and notwithstanding that breach, charges were heard and determined by the Court. One of the specific considerations in *DPP v Shirvanian* [(1998) 102A Crim R 180] which dealt with the power to stay proceedings] was, as I have already quoted “*that every court has either inherent or implied power to prevent its own processes being used to bring about injustice.*”

The two values in conflict in *Perovic* were that of the private and public interests that have been well documented in a range of case law dealing with applications for permanent stays of criminal proceedings based on grounds of delay. Notably, first, the public interest in seeing accused persons facing prosecution; and where the case is proven, conviction. Second, the value placed on prosecutions not being brought in circumstances that are oppressive to individual accused citizens. In this case the *Human Rights Act 2004* (ACT) was absolutely determinative in the Magistrate’s exercise of a discretion which has traditionally balanced these two competing values in a manner that has been weighted far less dramatically against prosecutions than was the result in this particular case.

III Conclusion

Views may rationally differ as to whether the balance between competing values has been well struck in the decisions summarised above. But that is exactly the point. Rights documents are so controversial because they have the invariable tendency to elevate the view of the judiciary, or small parts of it, above the view of present and future democratically elected parliaments.

The value pluralist conception that was the subject of the first part of this paper proposes that while the commonality of human nature can provide support for the idea of a stable pool of objectively good ends or values – reason cannot function as a perfect arbiter in conflicts among good ends or universally accepted values. In describing Berlin’s position in this regard Gray states that pluralism, ‘has the role in Berlin’s thought of privileging choice-making as the embodiment of human self-creation’⁴⁸ – that:

... self creation by choice making is forced upon us by the uncertainty in our very natures in virtue of which no one form of life is best for us, and by the diversity of rivalrous and incommensurable values we inescapably encounter in our experience.⁴⁹

48 John Gray, *Berlin* (1995) 142.

49 Ibid, 143.

In this sense modern liberal democracy can be described as agonistic – a system which is inherently one of agonizing conflict and unavoidable loss amongst rivalrous goods.⁵⁰ If Berlin's conception about the nature of values and therefore modern liberal democracy is correct then it follows that amongst all values freedom of choice has a special pre-eminence; because the 'value in freedom is the opportunity it gives us of navigating among incommensurable options and forms of living.'⁵¹ In consideration of this possibility and as is illustrated by the examples summarised in this analysis, the unfortunate effect of rights documents is that they hand over the opportunity to navigate among incommensurable values and options from parliaments to the judiciary, making those choices more remote and removed from the people that the choices ultimately effect.

In a federation there is a further remoteness to be contended with. In the Victorian example above a duly elected Parliament has authorised a dramatic departure from accepted practices of statutory interpretation to occur through a bill of rights. In such a situation one parliament has made public policy decision making more remote from future parliaments of the same type. However, in the context of a Commonwealth charter of rights, a situation would arise where the Commonwealth Parliament would compel a style of statutory interpretation which, when Courts came to apply it to state legislation, would dramatically distort State Parliaments' purposes and policies well into the future, with no regard for the existing delineations of State-Commonwealth power.

50 Ibid. See also Joseph Raz, *The Morality of Freedom* (1986). Agonistic liberalism is asserted to implicitly repudiate many of the assumptions of post war liberalism, liberal utilitarianism, theories of fundamental human rights and contractarian theorising to the extent that these are based on rational choice.

51 Gray, above n 3, 67 and see op. cit., Kocis, above n 8 245.

Chapter Eleven

The Judicature, Bills of Rights, and Chapter III

RYAN HADDRICK*

In an interview soon after the announcement of his appointment, the Commonwealth Solicitor-General, Stephen Gageler SC, said that Chapter III of the Constitution ‘is where the action is’.¹ He went on to say: ‘In the last two decades there has been less and less emphasis on the federal-state divide and increasing emphasis on the limitations of power, whether they be Commonwealth power or state power’. The *political* battleground over the desirability or otherwise of a federal statutory bill of rights, will, by and large, be over the proper role for courts and judges; do we want unelected judges usurping the role of elected officials?² After the Government’s consultation process and subsequent legislative activity,² the *legal* battleground will be fought on the field of Chapter III of the Constitution.³

The exercise by courts of the judicial power of the Commonwealth (described in this chapter as ‘federal courts’) must be in conformity with Chapter III of the Constitution. The Commonwealth Constitution is more than a paramount text; it is an instrument of prescription as well as proscription. The issue of whether a federal statutory bill of rights can be constitutionally supported by one or more heads of legislative power in s 51

* The author wishes to record his appreciation to The Hon Ian Callinan, AC, QC; Dr David Bennett, AC, QC; Mr Trent Glover; and Ms Katherine Store for reviewing a draft of this chapter. The opinions expressed in this chapter are the author’s.

- 1 Michael Pelly, ‘Black-belt Solicitor-General says he lacks the killer instinct’ *The Australian*, 18 July 2008, 33.
- 2 For the purposes of this examination of the constitutional issues involved in a federal statutory bill of rights, I have assumed that the Commonwealth Government will (after all the consulting is done) propose that the Commonwealth Parliament replicate the structure of the two existing bills of rights: the *Charter of Human Rights and Responsibilities 2006* (Vic) (the *Victorian Charter*) and the *Human Rights Act 2004* (ACT) (the *ACT Act*).
- 3 Professor George Williams has recently remarked that there might be a constitutional problem: ‘This problem only applies at the [C]ommonwealth level and that is because of the rigid separation of powers. Will the Victorian model be viable at the federal level? We just don’t know the answer to that question.’ He continued: ‘It depends entirely upon what happens when such an issue comes before the High Court. There is an uncertainty whether the ‘declaration of incompatibility’ mechanism can be successfully included in a federal charter of rights’, *The Weekend Australian*, 13 December 2008, 1. Another prominent bill of rights advocate, and former Chief Justice of the High Court, Sir Gerard Brennan has highlighted constitutional problems with a statutory charter of rights: Michael Pelly, ‘Brennan foresees constitutional glitch with rights charter’, *The Australian*, 14 March 2008, 33. It appears that the Government’s Human Rights Consultation Committee has become alive to these issues recently: James Eyres, ‘Dialogue model gives pause’, *The Australian Financial Review*, 20 March 2009, 43.

– or elsewhere – is not canvassed here;⁴ rather, this chapter examines the constitutional requirements and limitations – the prescriptions and proscriptions – on the Commonwealth Parliament's ability to enact a statutory bill of rights utilising the 'declarations of incompatibility'⁵ technique. This is similar to the mechanism enacted by the legislatures of Victoria and Australian Capital Territory in their statutory bills of rights, which permits the Supreme Court of those jurisdictions to grant a declaration of incompatibility.

There are two inter-woven, but quite distinct, constitutional issues that need to be considered by the Federal Government in detail before deciding whether to use the declarations of incompatibility method to protect human rights. They are: Chapter III of the Constitution's implied prohibition on vesting in federal courts non-judicial power, except where that power is incidental or ancillary to the judicial function (the separation of powers issue); and the Constitution's express requirement that the federal courts may only consider what ss 75 and 76 of the Constitution describes as 'matters' or 'matter' (the advisory opinions issue). Each of these issues will be considered separately to ascertain whether the declaration of incompatibility method is constitutionally permissible under Commonwealth law.

As noted above, these issues are inter-woven. They both involve an examination of the same indicia of judicial power, and they are both associated with the exercise of the judicial power of the Commonwealth. Yet they are quite distinct issues. One arises from implied prohibitions resulting from a textual understanding of the Constitution generally, and Chapter III more specifically; the other arises because of the express requirements of ss 75 and 76, and the meaning of two words – 'matters' and 'matter'.

I Declarations of Incompatibility

The *Victorian Charter* and the *ACT Act* both have as their centrepiece of judicial machinery the 'declarations of incompatibility' mechanism. Essentially, a party to proceedings is able to apply under the relevant statute for a declaration of incompatibility from the relevant Supreme Court that a particular statutory provision cannot be interpreted consistently with a human right. In order to appreciate the operation of a declaration of incompatibility it is necessary to take a few steps back. First, both the *Victorian Charter* and the *ACT Act* list a collection of abstract statements of principles (called 'human rights') which are lacking in precise legislative

4 For the purposes of this chapter, it is assumed that the external affairs power and the reference power may be enlisted to found the necessary legislative competence for the Commonwealth Parliament to enact legislation similar to the *Victorian Charter* and the *ACT Act*.

5 The *Victorian Charter* refers to 'declarations of inconsistent interpretation', whereas the *ACT Act* describes the technique as 'a declaration of incompatibility'. For the purposes of this chapter, both are referred to as 'declarations of incompatibility'.

definition and are general in nature. Secondly, they each contain a qualification provision, in which each human right is made subject only to ‘such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom ...’.⁶ It is unclear how the requirement that legislation be interpreted consistently with a human right sits with the declarations of incompatibility mechanism.

Thirdly, a key feature of the declarations of incompatibility mechanism is the inclusion of a section in the statute that qualifies the operation of a declaration. For instance, under s 35(5) of the *Victorian Charter* and s 32(3) of the *ACT Act*, a declaration of incompatibility does not ‘affect in any way the validity, operation or enforcement’ of the law that a party to the proceedings has asked the court to declare as inconsistent with a human right.

And finally, the *Victorian Charter* and *ACT Act* include an interpretational rule that opens the door to international jurisprudence. For example, the *Victorian Charter* provides that ‘[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision’.⁷ The *ACT Act* contains a similar provision.⁸ This allows the Supreme Court to consider the jurisprudence of other nations and legal systems in interpreting the scope and application of the statutory human rights.

II Introduction to the Constitutional Issues

Before addressing the two Commonwealth constitutional issues identified above, it is useful to set the comparative constitutional context. Advocates of a federal statutory bill of rights often point to Australia’s position as standing alone amongst the United Kingdom, New Zealand, South Africa, Canada and the United States without having either a constitutional or statutory bill of rights. In particular, they place emphasis on the enactment by the Parliament of the United Kingdom of the *Human Rights Act 1998* (UK), as evidence to suggest that Australia is out of step with the common law world, and should enact similar legislation. The underlying premise is that if the birthplace of the common law and English legal tradition can bring itself to enact a statutory bill of rights, why won’t the Australian Parliament? But to equate the situation in the United Kingdom and New Zealand with that of the Australian Federation is to misunderstand a basic constitutional difference between those two nations and Australia.

What constitutionally sets the Australian Federation apart from the United Kingdom and New Zealand (both nations with statutory bills of rights) is the supremacy of our written constitution. The Parliament of the

6 *Victorian Charter*, s 7 and *ACT Act*, s 28.

7 *Victorian Charter*, s 32(2).

8 *ACT Act*, s 31(1)

United Kingdom may do as it wishes, save perhaps its United Kingdom's European Union commitments.⁹ The classic words of this constitutional doctrine are of those of AV Dicey:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament ... has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.¹⁰

The Commonwealth Parliament does not enjoy the parliamentary sovereignty in the same way that the Westminster and Wellington Parliaments do. The Commonwealth Parliament is not free to ignore the strictures of our nation's paramount text. As in all other areas of legislative activity, the Commonwealth Parliament can only enact what it is legislatively competent to enact under the provisions of the Constitution. The text and structure of the Australian Constitution, like the Constitution of the United States, 'confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts as well as other departments, are bound by that instrument'.¹¹ It is the express and implied requirements of the Commonwealth Constitution that provide reason to doubt the ability of the Commonwealth Parliament to enact a statutory bill of rights that utilises the declarations of incompatibility mechanism.

The idea of a federal bill of rights is rolled out every now and then by those who wish (to adapt an expression) 'to get as much ethics into the law as they can'.¹² It is perhaps a little surprising that there hasn't been greater public consideration of whether the Commonwealth Parliament can, constitutionally, enact a statutory bill of rights, and in what form. There has, however, been some academic consideration of these issues recently.¹³ And following this academic consideration of the constitutional issues, the Hon Michael McHugh, a former justice of the High Court of Australia, made an important

9 See Adam Tomkins, *Public Law*, (2003) 108-120.

10 AV Dicey, *An Introduction to the Study of the Law of the Constitution* (first published in 1885), (Ninth Edition, 1939) 39-40.

11 *Marbury v Madison* (1803) 1 Cranch 137, (Marshall CJ).

12 Oliver W Holmes, *The Path of the Law*, [1897] 10 *Harvard Law Review* 457, 462.

13 Jim South, 'The campaign for a national Bill of Rights: would 'declarations of incompatibility' be compatible with the Constitution?' (2007) 10 (1) *Constitutional Law and Policy Review* 2; James Stellios, 'Federal Dimensions to the ACT Human Rights Act' (2008) 47 *ALAL Forum* 33; and Geoffrey Lindell, 'The statutory protection of rights and parliamentary sovereignty: Guidance from the United Kingdom?', (2006) 17 *Public Law Review* 188; Dominique Dalla-Pozzaq and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights', (2007) 12 *Deakin Law Review* 1; Pamela Tate, 'Protecting Human Rights in a Federation', (2007) 33 *Monash University Law Review* 220.

speech¹⁴ in which he expressed his doubts about the mechanism's constitutionality. The speech received some media attention.¹⁵

When the Commonwealth Government announces its plans for greater rights protection in Australia, and the detail of its legislative proposals after a period of public consultation, it is, as a matter of constitutional policy, incumbent on the government to not only explain *why* the proposed legislation should be enacted, but also justify that it *can* be enacted constitutionally.

As mentioned above, there are two possible constitutional problems associated with the declarations of incompatibility mechanism of achieving greater protection of rights that need to be drawn to the attention of the public. The first is the separation of powers issue (sometimes known as the *Boilermakers'* principle). The second is the prohibition on a court exercising the judicial power of the Commonwealth from providing 'advisory opinions'.

These two issues are different in nature. The first issue is an implied prohibition on federal courts exercising non-judicial functions that are not incidental to the exercise of the judicial power of the Commonwealth. It arises because of the textual structure of the Constitution. The second issue is an express prescription that federal courts limit their exercise of judicial power to proceedings which are described in ss 75 and 76 of the Constitution as 'matters' or 'matter'. The first issue is about the absence of judicial power; the later is about the wrongful use of judicial power.

III The Separation of Powers Issue

Since 1956,¹⁶ the High Court has consistently held that the Commonwealth Parliament cannot confer on a federal court power that is not part of the judicial power of the Commonwealth, or incidental to it. In the *Boilermakers' case* the question was whether the Court of Conciliation and Arbitration could make orders which were an exercise of the judicial power of the Commonwealth and whether the Constitution authorised the Parliament to create a tribunal which performed both the function of industrial arbitration and also exercises part of the judicial power of the Commonwealth.¹⁷ Put simply, could a federal court exercise non-judicial power? Based primarily

14 Michael McHugh, 'A Human Rights Act, the courts and the Constitution', 5 March 2009, <http://www.humanrights.gov.au/letstalkaboutrights/events/McHugh_2009.html>, at 8 April 2009.

15 Michael Pelly, 'Rights bill too hard: McHugh' *The Australian*, 13 March 2009, 28; Andrew Lynch, 'Judge right on rights' *The Australian*, 20 March 2009, 28; Jack Waterford, 'Judicial hurdles in race for rights' *Canberra Times*, 14 March 2009, 8; Richard Ackland, 'Human rights dialogue develops a stutter' *The Sydney Morning Herald*, 13 March 2009, 15.

16 *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), hereinafter, the '*Boilermakers' case*'.

17 (1956) 94 CLR 254, 266-267.

on the textural structure of the Constitution,¹⁸ the majority of justices answered in the negative. The justices concluded that Chapter III of the Constitution 'does not allow a combination with judicial power of functions which are not ancillary or incidental to its exercise but are foreign to it'.¹⁹ The *Boilermakers'* principle is well-established in Australian constitutional law.²⁰

The separation of powers issue may be further subdivided into two questions. The first question: is a declaration of incompatibility an exercise of judicial power, or incidental to the exercise of judicial power? The second question: is a declaration of incompatibility an exercise of judicial power in a manner consistent with the requirements of Chapter III of the Constitution? If the answer to either of these two questions is 'no', then the declaration of incompatibility mechanism is a breach of the separation of powers doctrine, and is a function that cannot be constitutionally vested in a court exercising the judicial power of the Commonwealth.

A *Is a Declaration of Incompatibility an Exercise of Judicial Power or Incidental to the Exercise of Judicial Power?*

As set out above, if a declaration of incompatibility is neither an exercise of judicial power nor incidental to the exercise of such power, then the conferral of that function on a federal court is unconstitutional. To determine that, more must be said about judicial power as a species of governmental power.

1 *The Nature of Judicial Power*

To appreciate what powers and functions can and cannot be reposed in a federal court the constitutional meaning of 'judicial power' requires consideration. The Constitution itself does not define 'the judicial power of the Commonwealth'. The traditional starting point for consideration of this phrase is the definition by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* (*Huddart*):

[T]he words 'judicial power' as used in s 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.²¹

18 (1956) 94 CLR 254, 275.

19 (1956) 94 CLR 254, 296 and hereinafter, the '*Boilermakers'* principle'.

20 *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 73 (Gummow, Hayne and Crennan JJ).

21 (1909) 8 CLR 330, 357 (Griffith CJ).

This definition of judicial power is not exhaustive, nor is it without flexibility.²² In *Brandy v Human Rights and Equal Opportunity Commission*,²³ four members of the High Court opined:

Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not. ... One is tempted to say that, in the end, judicial power is the power exercised by courts and can only be defined by reference to what courts do and the way in which they do it, rather than by recourse to any other classification of functions. But that would be to place reliance upon the elements of history and policy which, whilst they are legitimate considerations, cannot be conclusive.

... Another important element which distinguishes a judicial decision is that it determines existing rights and duties and does so according to law. That is to say, it does so by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion.²⁴

The High Court has been busy in the last decade and a half considering the definition of judicial power. It has not yet settled on a definition of judicial power that accommodates and reconciles all of its decisions during that time, but it has, for the purposes of juristic analysis, developed a range of indicia that point towards a function being judicial in nature. The first three indicia are drawn from Griffith CJ's definition in *Huddart*. That is, that judicial power requires: (a) a controversy, which is (b) about rights and duties; and (c) is a binding and authoritative determination. In fact, so determinative are these three characteristics that Professor Leslie Zines has said that '[i]f these three elements are present, that is, the function involves a conclusive determination of a controversy about existing rights, the

22 Having considered the weight and number of the court's recent decisions regarding the characterisation of 'judicial power', Professor Leslie Zines observed that (Leslie Zines, *The High Court and the Constitution*, (5th Ed, 2008), 256): 'It is simply not the case that the creation of new rights and duties is necessarily outside the concept of judicial power ... The issue is rather when ... it is permissible to confer on courts functions of that nature.' He went on to say: 'In the long run, however, in the case of both broad standards and the creation of rights and duties, the issue is the desirability or appropriateness of judges performing the particular function.' The level of public policy involved in deciding is important – the 'wider and the more policy laden the discretion, the less likely the decision is to be judicial': Bede Harris, *Essential Constitutional Law* (2007) 56.

23 The Commission was renamed the Australian Human Rights Commission in 2008.

24 (1995) 183 CLR 245, 267–8 (Deane, Dawson, Gaudron and McHugh JJ).

function belongs exclusively to the judiciary'.²⁵ The centrality of these three elements of judicial power has found some support from the justices of the High Court²⁶ as well as some commentators.²⁷

In addition to these three indicia, an examination of judicial power also considers: (d) the width of the discretion conferred on the decision-making body – the wider the discretion and the greater the court's consideration of public policy when deciding the case, the more likely the function is non-judicial;²⁸ and (e) the history of the function, or the way it has been traditionally exercised.²⁹

Furthermore, in *Precision Data Holdings Ltd v Wills*, in a unanimous Full Court judgment, the High Court stated that:

if the object of the adjudication is not to resolve a dispute about the existing rights and obligations of the parties by determining what those rights and obligations are but to determine what legal rights and obligations should be created, then the function stands outside the realm of judicial power.³⁰

Although this statement of the court should not be considered conclusive in all cases, it is perhaps our best indication of the High Court's approach to the classification of a function as being either judicial or non-judicial in the present context.

2 *The Indicia of Judicial Power and Declarations of Incompatibility*

At the heart of the separation of powers issue is the likely absence of two key indicia of judicial power in the declarations of incompatibility mechanism. They are, first, that the function must concern existing rights and

25 Zines, above n. 22, 220.

26 *Albarran v Companies Auditors and Liquidators Disciplinary Board and Another* (2007) 231 CLR 350, 358 and 360-362 (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ); *Thomas v Mowbray* (2007) 233 CLR 307, 414 (Kirby J); and 464-465 (Hayne J, who also affirms Kitto J's statement in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374: 'a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in the future to be decided as between those persons or classes of persons'. [Hayne J's emphasis]. His Honour went on to affirm that 'a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified'). See also *White v Director of Military Prosecutions* (2007) 231 CLR 570, 614-615 (Kirby J).

27 See Zines, above n 22, 219; Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (2007) 125.

28 *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 at 149 (Lord Simonds LC); *Precision Data Holdings Pty Ltd v Wills* (1991) 173 CLR 167, 189.

29 *R v Davison* (1954) 90 CLR 353, 368; (1956) 94 CLR 254, 278, (Dixon CJ, McTiernan, Fullagar and Kitto JJ); and (2007) 233 CLR 307, 326-327 (Gleeson CJ); and 428 (Kirby J).

30 (1991) 173 CLR 167 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

duties, and secondly, that the function be about binding and authoritative determinations.

As to being about rights and duties; is the court's role in making a declaration of incompatibility one of deciding what rights the parties *have*, or one of deciding what rights the parties *should have*? An exercise of judicial power 'involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation ...'³¹ This characteristic of judicial power should be contrasted with legislative power, 'which is primarily concerned with the laying down of rules of some degree of generality directing behaviour of persons for the future'.³² This characteristic requires a court to have a sufficiently precise legal standard or criterion to apply to the proceedings before it. In considering the constitutionality of the function, the High Court would need to decide if the making of a declaration of incompatibility is an adjudication of the existing rights and obligations of the parties, or determination of what those rights and obligations should be? When taken together, the breadth of the discretion (in the sense of its utter subjectivity) and the prospective nature of the determination, it is reasonable to conclude that an application for a declaration of incompatibility will not involve an adjudication of existing rights and duties.³³

Furthermore, the process of declaring whether various enactments, or parts of enactments, are in breach of the enunciated human rights is very different to the existing statutory judicial review arrangements.

Sections 5 and 6 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth),³⁴ permit a federal court to grant a remedy (including a declaration³⁵) where there has been (or is currently occurring), a decision made under an enactment, which breaches one or more of the enumerated grounds of judicial review. Despite the similarity in process for seeking a declaration of incompatibility, and an order declaring the rights of the parties under the *AD(JR) Act*, there is a very real difference between the nature of statutory judicial review and an application for a declaration of incompatibility.

31 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374. Similarly, more recently in *Attorney-General of the Commonwealth of Australia v Alinta Ltd* (2008) 242 ALR 1, the High Court said that although 'no single combination of necessary or sufficient factors identifies what is judicial power' (Hayne J [93]), the judicial function is 'undertaken in order to resolve a dispute about the existing rights and obligations of the parties by determining what they are, not in order to determine what rights and obligations should be created.' [152].

32 Zines, above n 22, 220.

33 The author acknowledges that this criticism is slightly weakened by the High Court's decision in *Thomas v Mowbray* where the Court in that case accepted that the legal criterion was sufficiently precise for judicial application, despite the great degree of subjectivity involved in the application of the statutory language.

34 Hereinafter, the '*AD(JR) Act*'.

35 *AD(JR) Act*, s 15.

Applications for statutory judicial review are made pursuant to very precisely defined legal criteria. The rules of natural justice, an improper exercise of power, and the other grounds for judicial review are well known in our jurisprudence and are very precisely stated³⁶ in the *AD(JR) Act*. Not so the human rights under the *Victorian Charter* or the *ACT Act*. The application of human rights takes 'the judiciary too far into determining controversial political issues on the basis of their own moral views guided by their selection from an open-ended range of international precedents'.³⁷ Judicial review is an entirely different exercise to human rights review.

As to the binding and authoritative determination characteristic; judicial power only exists where the decision of the court has a determinative status between the parties to the proceedings. Again, in determining the constitutionality of an application for a declaration of incompatibility the High Court would need to decide if the function being reposed in a federal court, in making a declaration, results in a legally operative remedy being granted in the proceedings, and settles the justiciable issue/s between the parties once and for all, subject to any appeal rights they might have. Plainly, declarations of incompatibility do not conclusively settle the matter in the proceedings between the parties. As s 35(5) of the *Victorian Charter* and s 32(3) of the *ACT Act* state, a declaration of incompatibility does not 'affect in any way the validity, operation or enforcement' of the law that a party to the proceedings has asked the court to declare as inconsistent with a human right. If a federal statutory bill of rights included a similar provision, then it would establish a judicial mechanism that would be inconsistent with the judicial power of the Commonwealth.

3 *Exceptions to the Separation of Powers Requirement – Functions Incidental to the Exercise of Judicial Power*

As with all things, there are exceptions. The constitutional prohibition of federal courts exercising non-judicial power is subject to the exception that non-judicial functions can be vested in federal courts if those functions are incidental or ancillary to the exercise of the judicial power of the Commonwealth. The *Boilermakers'* principle does not apply to functions attached to federal courts which are 'auxiliary or incidental'³⁸ or 'consequential, accessory or incidental authorities'.³⁹ Since the *Boilermakers' case*,⁴⁰ and

36 *AD(JR) Act*, subs 5(1) and 5(2)

37 Tom Campbell, 'An opportunity we must grab: A 'democratic bill of rights' would enable Australia to take a lead in the global promotion of human rights', *The Canberra Times*, 16 December 2008, 15.

38 (1954) 94 CLR 254, 271-272.

39 (1954) 94 CLR 254, 288.

40 (1954) 94 CLR 254, 278.

reaffirmed more recently in *Re Wakim*,⁴¹ the High Court has determined that to be classified as incidental or ancillary to the exercise of the judicial power, the function must be necessary or proper to render the exercise of judicial power effective. For example, a decision as to whether to grant bail in criminal proceedings, or grant applications for apprehended violence orders, might not, of themselves, be a judicial function, as the court is making a prospective decision as to whether a person is a risk to others, and whether the community can accept that risk.⁴² But the granting of bail or apprehended violence orders are a necessary function for the exercise of judicial power and therefore are incidental to the exercise of judicial power.

Bill of rights advocates might suggest that in establishing a statutory bill of rights, the Commonwealth Parliament would merely be seeking to qualify or burden judicial techniques – much the same as the *Acts Interpretation Act 1901* (Cth), and other statutes and the common law gives courts guidance on how to interpret statutory provisions. In effect, what they might say is that all the Parliament is doing is giving courts guidance on statutory interpretation. And therefore, the argument becomes: in establishing a statutory bill of rights, the courts are being burdened with a function incidental to the exercise of judicial power.

This argument should be rejected. The better view is that by incidental, the function bestowed on the court is a necessary aspect of the court's functions, but is not the court's primary function.

The settling of justiciable controversies through the application of settled rules is the primary function of courts. Judicial activities that go directly to the performance of this function are an exercise of the judicial power of the Commonwealth. Judicial activities that do not go to the performance of this function, but so closely aid and assist in the overall performance of this function, are incidental to the exercise of judicial power of the Commonwealth. For instance, the promulgation by judges of rules of court is not strictly a judicial function – it does not require a justiciable controversy, or the application of rules to a settled controversy. But the creation of rules of court so closely aid and assist in the overall performance of the judicial function of the courts that they ought to be considered as incidental to the judicial function.

Whereas the exercise of the judicial power of the Commonwealth must be characterised by the indicia of judicial functions; the exercise of powers incidental to the judicial power of the Commonwealth need not be so strictly characterised by the indicia of judicial functions.

The body of legal theory, including the rules of statutory interpretation, should not be considered to be incidental to the exercise of judicial power.

41 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 562-3.

42 And therefore, is not an adjudication of existing rights.

Statutory interpretation is a judicial activity that goes to the core of identifying the settled rules that need to be applied to quell the justiciable controversy. Activities and processes that go directly to the quelling of justiciable controversies through the application of settled rules are judicial in nature – they are not incidental to it.

Therefore, the ‘auxiliary or incidental’⁴³ or ‘consequential, accessory or incidental authorities’⁴⁴ exception to the *Boilermakers*’ principle should not be said to apply to statutory guidance (in the guise of a bill of rights) given to the courts for the purposes of statutory interpretation.

The enactment of a statutory bill of rights is an attempt to change the way a court carries out its primary function – the quelling of justiciable controversies. Such an enactment would not qualify as an incidental function, and as such, it cannot escape the requirement that the functions and activities given to the federal court be characterised by the necessary indicia of judicial power, so as to classify the functions or activities given to the federal court as an exercise of the judicial power of the Commonwealth. This, in short, means that even if the High Court were to view a federal statutory bill of rights as an elaborate form of statutory interpretation, the declarations of incompatibility mechanism cannot escape the requirement that it have the requisite judicial nature.

B *Is a Declaration of Incompatibility an Exercise of Judicial Power in a Manner Consistent with the Requirements of Chapter III of the Constitution?*

In their joint judgment in *Thomas v Mowbray*⁴⁵ (a recent High Court case considering the nature and proper use of judicial power), Gummow and Crennan JJ said:

[L]egislation which requires a court exercising federal jurisdiction to depart to a significant degree from the methods and standards which have characterised judicial activities in the past may be repugnant to Ch III [of the Constitution].⁴⁶

In the same case, Kirby J recognised that in addition to the judicial power requirement, there is also a requirement that the judicial power be exercised in a manner consistent with Chapter III of the Constitution. His Honour cited earlier dicta of Deane and Toohey JJ who said that the provisions of Chapter III of the Constitution ‘not only identify the possible repositories of Commonwealth judicial power. They also dictate and control

43 (1954) 94 CLR 254, 271-272.

44 (1954) 94 CLR 254 288.

45 (2007) 233 CLR 307.

46 (2007) 233 CLR 307, 355. See Heydon J concurring (2007) 233 CLR 307, 526.

the manner of its exercise'.⁴⁷ In *Thomas v Mowbray*, Callinan J too seemed to accept that Chapter III can limit the imposition upon a court of a function which does not require or imply 'the usual indicia of the exercise of judicial power'.⁴⁸ Gleeson CJ also appeared to accept the premise of this requirement.⁴⁹ Therefore, to paraphrase Gummow and Crennan JJ, the question for the High Court becomes: Having regard to the indicia of the judicial function, does a declaration of incompatibility oblige courts to act in a manner consistent with the essential character of a court or with the nature of judicial power?

C The Application of these Principles to Declarations of Incompatibility

If '[r]ights are just the boundary between an individual's liberty and the liberty of everyone else, our liberty and the liberty of everyone else depends on the shape of our rights',⁵⁰ then a statutory bill of rights allows a court to move the boundary considerably. There are at least four reasons why the declarations of incompatibility technique departs to a significant degree from the methods and standards which have characterised judicial activities in the past and which are required by Chapter III of the Constitution.

First, it is clear that in applying a list of abstract principles, the legislation asks the court to exercise a very substantial degree of judicial discretion, in the sense that the court's decision is so utterly subjective. The judicial discretion encompasses such a broad range of public policy considerations which could be described as within 'reasonable limits' and 'demonstrably justified'. Therefore, it is reasonable for the High Court to conclude that what the Commonwealth Parliament would actually be asking the federal judiciary to do is *create* rights, as opposed to declaring existing rights. On top of this discretion involved in giving meaning and scope to each of the 'human rights', the court would have a further wide discretion when applying the limitation clauses. In adding a further statutory discretion in expressions like 'reasonable limits' and 'demonstrably justified', the judicial discretion is expanded. Does this mean that a federal court is required to exercise judicial discretion on top of discretionary rights – in short, a discretion on a discretion? This is hardly the required legal standard or criterion for a court to exercise judicial power in a manner consistent with Chapter III of the Constitution.

It fact, so utterly subjective would the court's discretion be in applying the list of abstract principles, that the court would inevitably depart from the methods and standards which have characterised judicial activities in the

47 (2007) 233 CLR 307, 508 and 509.

48 (2007) 233 CLR 307, 335.

49 Ibid.

50 Charles Fried, *Modern Liberty and the Limits of Government*, 2007, 79. Professor Fried was the Solicitor-General of the United States (1985-89).

past in Australia. The method and standards of judicial determination of issues would progressively become more similar to the method and standards of judicial decision-making usually associated with the Supreme Court of the United States.⁵¹

Secondly, the absence of a judicial determination. The second indicium of the definition of judicial power that is absent in the declaration of incompatibility technique is that judicial power involves a binding and authoritative determination between the parties. Section 35(5) of the *Victorian Charter* states:

A declaration of inconsistent interpretation does not: (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or (b) create in any person any legal right or give rise to any civil cause of action.

Similarly, section 32(3) of the *ACT Act* states:

The declaration of incompatibility does not affect (a) the validity, operation or enforcement of the law; or (b) the rights or obligations of anyone.

In seeking to achieve a minimalist model for a statutory bill of rights, the Victorian Parliament and Australian Capital Territory Legislative Assembly have sought to ensure that the Supreme Court's remedy – the declaration – is nominal in nature, and is not binding or authoritative between the parties to the litigation in the sense that it settles the rights between the parties. The absence of these two characteristics leans against the declaration of incompatibility mechanism being consistent with the methods and standards which have characterised the exercise of judicial power in the past.

Thirdly, until the *Victorian Charter* and the *ACT Act* (and indeed the United Kingdom's *Human Rights Act 1998*), the idea that a court could grant a remedy because, on the face of it, a perfectly legitimate act of Parliament is inconsistent with some fundamental right *which does not emanate from a basic law*⁵² has no precedent in the common law tradition.⁵³ It is entirely contrary to the methods and standards of the Australian legal tradition to enable the judiciary to pass judgment (even if only in a non-binding way) on acts of Parliament, based on an almost unfettered discretion, in terms of subjectivity.

51 The author wishes to thank the Hon Ian Callinan for alerting him to this point, and which he canvasses in his chapter.

52 In Australia's case, the *Commonwealth of Australia Constitution Act 1900* (Imp).

53 The author acknowledges a possible weakness in this argument – just because a process has not occurred in the past does not, on its own, constitute that the power, step or function is not, of itself, non-judicial. If this were not so, advances in court room procedures, and developments in the adversarial system might be said to be 'non-judicial'.

Finally, that judges make law is not contested. But as Dicey observed, judge-made law ‘aims rather at securing the certainty than at amending the deficiencies of the law’.⁵⁴ Judicial method is characterised by finding a rule which is certain and fixed, even though it might not be the best rule conceivable.⁵⁵ Dicey cites one of the most eminent English judges to make this point:

Our Common Law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and *for the sake of attaining uniformity, consistency and certainty*, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, *because we think that the rules are not as convenient and reasonable as we ourselves could have devised*. It appears to me to be of great importance to keep this principle of decisions steadily in view, not merely for the determination of the particular case, but for the interests of law as a science. [Emphasis added]⁵⁶

An application for a declaration of incompatibility asks the court to do this. They are an invitation to the court to substitute the rules of law and abandon analogy, to find new rules of law that are *more convenient and more reasonable* than the precedents already allow. Whereas courts are not usually at liberty to abandon all analogy and certainty, the declarations of incompatibility mechanism asks courts to put aside their quest for certainty, and continually seek new rules based on convenience and reasonableness. If we want proof of this, we need only look at the *Victorian Charter* and the *ACT Act*. Both statutes direct the court to seek to advance human rights,⁵⁷ both direct the court to consider the decisions of any foreign court or tribunal; and both qualify the court’s discretion with touchstones like ‘demonstrably justified’ and ‘in a free and democratic society’.

54 AV Dicey, *Lectures on the Relation between Law and Public Opinion in England During the Ninetieth Century* (1962) 366.

55 Ibid.

56 *Mirehouse v Rennell* (1833) 1 Cl & F 527, 546, (Sir James Parke, later 1st Baron Wensleydale of Walton).

57 According to the *Victorian Charter*, s 1(2): ‘The main purpose of this Charter is to protect *and promote* human rights by- (a) setting out the human rights that Parliament specifically seeks to protect *and promote*; and (b) ensuring that all statutory provisions, whenever enacted *are interpreted so far as is possible in a way that is compatible with human rights ...*’. [Emphasis added]; The long title to the *ACT Act* is ‘An Act to respect, protect *and promote* human rights’, and the preamble of the *ACT Act* states that: ‘(2) Respecting, protecting *and promoting* the rights of individuals improves the welfare of the whole community’. Additionally s 30 of the *ACT Act* requires that: ‘*So far as it is possible* to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.’ [Emphasis added].

Similarly, the difference between judge-made law and parliament-made law is emphasised in the extra-curial words of Chief Justice Gleeson. In his Boyer Lectures in 2000, the Chief Justice described judge-made law as 'inductive and pragmatic, rather than ideological and legislative'.⁵⁸ He said: 'There is a symbiotic relationship between the law made by parliaments, and the law made by judges. But there is, or ought to be, a difference between what is involved in the making'.⁵⁹ He continued:

The method by which judge-made law is developed and modified is fundamentally different from the method by which parliaments make law. This subject is sometimes complicated by an indiscriminate use of terms such as 'policy' and 'values'. It is necessary to be clear about what is meant by policy and by values. It is true that the common law is informed by certain values and policies, but they are generally not of the same character as the policies which are in issue at an election. The method of the common law is based upon experience, reflected in precedents. From precedent, principle is derived and the application of principle creates further precedent. The development of principle sometimes involves departure from earlier precedent, but the technique always requires an understanding of the policy of the law. It does not turn upon the personal choices or preferences of individual judges. Legal reasoning that commands respect does so upon the basis of adherence to legal principle. Respect for precedent is itself one legal value, although there are times when it is outweighed by other legal values.⁶⁰

A statute that requires a court to constantly ignore time-honoured judicial method, and seek better rules of law – rather than established rules – is a statute that departs from the method and standards that have characterised the exercise of judicial power in the past.

For these reasons, declarations of incompatibility may be seen as inconsistent with the manner which 'characterised judicial activities in the past' and therefore repugnant to Chapter III of the Constitution.

D Some Likely Criticisms of this Analysis

Advocates of a federal statutory bill of rights may see matters differently. There are several criticisms of, or aspects to, these two conclusions that should be mentioned and responded to.

First, bill of rights advocates might challenge the conclusion that 'reasonable limits' and 'demonstrably justified' are so imprecise as to import too wide a meaning, and constitute an absence of legal criterion. Indeed, Professor George Williams has stated that the *Victorian Charter* and *ACT Act*

58 Murray Gleeson, *The Rule of Law and the Constitution: Boyer Lectures 2000* (2001) 99.

59 Ibid 97.

60 Ibid 97-98.

constitute ‘a determination of the consistency of an existing law as against one or more [enumerated] specific legal criteria’.⁶¹ Advocates might point to any number of times the High Court has concluded that terms like ‘reasonably necessary’ and ‘reasonably appropriate and adapted’,⁶² and similar terms⁶³ have been held to be sufficiently precise and an adequate legal standard for judicial usage. They might also point to the enumerated factors that could be contained in a limitation clause⁶⁴ which could require the court to give meaning to ‘reasonable limits’ by looking at such matters as the nature of the right, the importance of the limitation, and the extent of the relationship between the purpose and the limitation. In effect: limitations on the limitation clauses.

In the end it is a case of degree and of tradition. The High Court has regularly categorised functions traditionally exercised by courts within the British legal tradition as judicial. Those functions, which might strictly be described as the creation of new rights, will be upheld as judicial if they are analogous to functions that courts have traditionally exercised.⁶⁵ Whilst any number of recent and historical examples can be identified where a court is – in reality – creating rights and duties, as a matter of degree, declarations of incompatibility stretch the definition of judicial power in extremis. The absolute breadth of the discretion involved, as well as the volume of public policy considerations which are properly legislative in nature, taken together, leans towards this conclusion. The use of ‘reasonable limits’ and ‘demonstrably justified’, or other similar terms, to colour each human right reaches beyond the outer limits of a permissible exercise of judicial power.

Professor Leslie Zines says that ‘in the case of both broad standards and the creation of rights and duties, the issue is the desirability or appropriateness of judges performing the particular function’.⁶⁶ The protection of the judicial function is important to the High Court. It is for this reason that the appropriateness of judges performing declarations of incompatibility duties may trouble the Court. There is a distinct possibility that it would declare the operative (and offending) sections of a federal

61 Dalla-Pozzaq and Williams, above n 13, 12. It is acknowledged that since *Thomas v Mowbray*, this argument does have some weight to it.

62 (2007) 233 CLR 307, 333 (Gleeson CJ).

63 ‘tyrannical and oppressive’; *R v Spicer: Ex Parte Australian Builders’ Labourers’ Federation* (1957) 100 CLR 277; ‘just and equitable’, and ‘necessary to make to do justice’: *Cominos v Cominos* (1972) 127 CLR 588; see (2007) 233 CLR 307, 346-347 (Gummow and Crennan JJ).

64 For example, see the *Victorian Charter*, s 7(2).

65 Zines, above n. 22, 256.

66 Zines, above n. 22, 267; furthermore, former justice of the High Court, the Hon Michael McHugh has said: ‘whether or not the vesting of a power in attributable is judicial or non-judicial depends upon a value judgment made after weighing the factors that point to the vesting of judicial power against the factors in the point against the vesting of judicial power in the tribunal’: McHugh, above n. 14, 39, 40.

statutory bill of rights as an unconstitutional attempt to repose a non-judicial function in a federal court.

Secondly, advocates might challenge the assumption that the High Court has any consistency in characterising whether a function is judicial or non-judicial. Advocates may point to the many examples in legislation where a federal court is required to create rights between parties. Examples of this might include:⁶⁷ s 78 of the *Family Law Act 1975* (Cth), which allows the Family Court to 'declare the title or rights, if any, that a party has in respect of the property', or in s 60CA which, in an abstract way which is not dissimilar to a statutory bill of rights, enacts the paramountcy principle in deciding whether to order a particular parenting order; or perhaps where a court is called upon to amend the distribution of an estate under the 'family provision' powers in each jurisdiction's succession laws. There are many similar examples from Commonwealth statutes.

The dichotomy of precise legal standards and public policy is not a neat and clean one. What distinguishes a court's creation of rights and duties in family law and succession proceedings, and the other examples of a court actually creating rights and duties between the parties is breadth. The breadth of public policy considerations, in terms of the social, economic and political considerations that a federal court needs to consider in granting the declaration requested; as well as the breadth of the social, economic and political application of the precedent being sought.

A decision as to which spouse should get what in a marriage break-up, and how a particular child's best interests are served by spending every second weekend with their father has very little general application. Of course, rules of law can emanate from these cases, just like any other case. But as to what is 'fair and equitable', or whatever particular legislative formulae is used in deciding what rights there *should be* between the parties, the factual circumstances of the case allow each decision to easily be distinguished in subsequent cases. And they do not create rules of law with a wide factual application. Nor do these cases usually require the court to have regard to the broader jurisprudential impact of their decision within the wider community.

It is the broadness of the discretion, and the universality of the court's decision (in that it impacts upon the relationship of the entire community to an impugned statute, as opposed to just the parties to a particular case) that sets the creation of rights and duties in a statutory bill of rights apart from the creation of rights and duties which are already tolerated as legitimate uses of judicial power.

67 That is, examples of where a federal court is permitted, in the exercise of the judicial power of the Commonwealth, to 'declare' the rights, duties and obligations between the parties, but, on closer juristic examination, the function being exercised is, in essence, deciding what rights, duties and obligations between the parties there *should be*.

Thirdly, Professor George Williams has suggested that the ‘binding and authoritative’ indicium is present. Professor Williams points to the requirements under the *Victorian Charter* and the *ACT Act* for a third party – the State or Territory’s Attorney-General – to table the declaration before the legislature and take certain administrative steps. He says that for the purposes of ‘the requisite indicia of judicial power’, it should be accepted that the *Victorian Charter* and the *ACT Act* stipulate ‘that binding obligations are triggered by a declaration’.⁶⁸ The fact that a declaration of incompatibility requires someone, somewhere, to do something, seems unconvincing. As Professor Williams himself recognises: ‘That the declarations are not binding on the parties is a relevant (albeit negative) factor in determining whether the power is judicial’.⁶⁹ Former justice of the High Court, the Hon Michael McHugh has also indicated recently that he does not find Professor Williams’ argument persuasive.⁷⁰

The former Commonwealth Solicitor-General, Dr David Bennett has alerted this author to a related, but different aspect of the ‘binding and authoritative’ indicium issue. The legislative requirement that the Attorney-General is under an obligation to table a statement in the Parliament (as the Attorney-General is currently required to under the *Victorian Charter* and the *ACT Act*) may be considered to be an unconstitutional interference by the courts with the Commonwealth Parliament.⁷¹

In sum, it is arguable that the High Court could reasonably conclude that the Commonwealth Parliament has attempted to vest a non-judicial function in a federal court in breach of the separation of powers requirement of the Constitution. If this is the case, then the Parliament’s ability to conscript the federal judiciary to the application of a statutory bill of rights might be seriously undermined.

The Commonwealth Government, if it chose to, may need to consider the viability of using other Commonwealth machinery in achieving greater human rights recognition and protection. The potential for expanding the Administrative Appeals Tribunal may need to be explored. Presumably, as a consequence of the greater use of tribunals, one of the key objectives of the Government’s legislation – to use judicial machinery (rather than executive machinery) as a break on future Parliamentary activity and to ‘promote’ human rights – will have been defeated.

68 Dalla-Pozzaq and Williams, above n 13, 15.

69 Ibid 17.

70 McHugh above n 14, 44.

71 In this respect, Dr Bennett has suggested to this author how this aspect may be overcome. If the Commonwealth legislation were drafted in a fashion as to allow a declaration to be made requiring the Commonwealth Attorney-General to publish in a defined manner a statement advising whether or not the Attorney-General (on behalf of the executive government) intends to amend the impugned provision, and the Attorney-General’s reasons, then this possible unconstitutional interference with the Commonwealth Parliament may be overcome.

IV The Advisory Opinions Issue

Now, even if declarations of incompatibility are indeed judicial in nature, and do not offend the separation of powers doctrine, there is a further issue – a requirement – that the mechanism needs to conform to in order to enable it to be vested in federal courts. The High Court and other federal courts are limited to exercising the ‘judicial power of the Commonwealth’. Therefore it is not enough to just ascertain whether a power is judicial in nature, it must also be ‘of the Commonwealth’ – that is, it complies with the other Chapter III requirements of the Constitution.

Since *In Re the Judiciary Act and In Re the Navigation Act*⁷² in 1921, the High Court has held that the use of the expression ‘matters’ or ‘matter’ in ss 75 and 76 of the Constitution limits the judicial power of the Commonwealth to proceedings that are encompassed by this expression. The court said that it did ‘not think that the word ‘matter’ in sec 76 means a legal proceeding’, but rather the subject matter for determination in a legal proceeding’.⁷³ In the court’s opinion: ‘[T]here can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court.’ The court went on to say that it could:

find nothing in Chapter III of the Constitution to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.⁷⁴

This means that the judicial power of the Commonwealth is limited to the resolution of disputes between two parties and ‘is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject, and which therefore governs their relations, and constitutes the measure of their respective rights and duties’.⁷⁵ Advisory opinions, that is, opinions as to the state of the law by a court, are, by their nature, an exercise in judicial power. But under the express terms of the Constitution, Chapter III courts are prohibited from exercising that power. Therefore, the exercise of the judicial power of the Commonwealth is not only limited to functions which are judicial (except where ancillary or incidental), but is also limited to proceedings where there is a substantial disagreement between the parties and the outcome of the proceedings will govern the parties’ respective rights and duties.

72 *In Re the Judiciary Act and In re the Navigation Act* (1912) 29 CLR 257 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); affirmed in *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261; see generally, Helen Irving, ‘Advisory Opinions, The Rule of Law, and The Separation of Powers’, (2004) 4 *Macquarie Law Journal* 105.

73 (1921) 29 CLR 257, 265.

74 (1921) 29 CLR 257, 267.

75 (1921) 29 CLR 257, 266.

Having standing to bring an application for a declaration of incompatibility does not mean there is the requisite ‘matter’ required by the Constitution. A statute may give a person standing to bring an application before a court, but if the statute allows a court to determine abstract questions of law without the right or duty of any body or person being affected by the resolution of those questions, then the proceedings are not a ‘matter’, and the request is for an advisory opinion.

In 1999, the High Court had reason to revisit the constitutional meaning of ‘matters’ in *Abede v Commonwealth*.⁷⁶ According to Gleeson CJ and McHugh J:

A “matter” cannot exist in the abstract. If there is no legal remedy for a “wrong”, there can be no “matter”. A legally enforceable remedy is as essential to the existence of a “matter” as the right, duty or liability which gives rise to the remedy. Without the right to bring a curial proceeding, there can be no “matter”.⁷⁷

Gleeson CJ and McHugh J went on to say:

If a person breaches a legal duty which is unenforceable in a court of justice, there can be no “matter”. Such duties are not unknown to the law. For example, in *Australian Broadcasting Corporation v Redmore Pty Ltd* [78], this Court had to consider the effect on a contract of a statutory provision which prohibited the making of the contract without the approval of a Minister. The prohibition arose in a context where s 8(1) of the relevant Act imposed a duty on the Board of the appellant to ensure that it did not contravene any provision of the Act but s 8(3) provided that “[n]othing in this section shall be taken to impose on the Board a duty that is enforceable by proceedings in a court.” Although the point did not arise for decision, it is plain that breach of the prohibition was incapable of giving rise to a “matter”.⁷⁹

Their Honours continued:

The existence of a “matter”, therefore, cannot be separated from the existence of a remedy to enforce the substantive right, duty or liability. That does not mean that there can be no “matter” unless the existence of a right, duty or liability is established. It is sufficient that the moving party claims that he or she has a legal remedy in the court where the proceedings have been commenced to enforce the right, duty or liability in question. It does mean, however, that there *must be a remedy enforceable*

76 *Abede v Commonwealth* (1999) 197 CLR 510

77 (1999) 197 CLR 510, 517 and 527.

78 (1989) 166 CLR 454

79 (1999) 197 CLR 510, 527-528.

in a court of justice, that it must be enforceable in the court in which the proceedings are commenced and that the person claiming the remedy must have sufficient interest in enforcing the right, duty or liability to make the controversy justiciable. Questions of standing cannot be divorced from the notion of a “matter”. [emphasis added]⁸⁰

A *The Application of this Principle to a Declaration of Incompatibility*

A central feature of the declarations of incompatibility mechanism in the *Victorian Charter* and the *ACT Act* is that a declaration of inconsistent interpretation does not affect the rights of the parties to those proceedings in which a declaration has been made. Under the *Victorian Charter*, a declaration of incompatibility does not affect the validity, operation or enforcement of the impugned statutory provision, or ‘create in any person any legal right or give rise to any civil cause of action’.⁸¹ Under the *ACT Act*, a declaration of incompatibility does not affect ‘the validity, operation or enforcement of the law; or the rights or obligations of anyone’.⁸²

A declaration of incompatibility is a remedy resulting from a determination of abstract questions of law without the right or duty of any body or person being involved. They are modern day advisory opinions. And they are not, at least when sought on their own, ‘matters’ which a court exercising the judicial power of the Commonwealth should be able to determine.

As mentioned above, bill of rights advocates have pointed to the *Victorian Charter* and *ACT Act’s* requirements for the relevant Attorney-General to table a copy of the declaration in the legislature as evidence that there is a binding determination,⁸³ and, as a consequence, a remedy, even though it is not *inter partes*. The statement of Gleeson CJ and McHugh J (‘that there must be a remedy enforceable in a court of justice, [and] that it must be enforceable in the court in which the proceedings are commenced’) leans very much in favour of the view that not only must there be a remedy, but that the determination giving rise to the remedy must be binding *inter partes*. In so much as declarations of incompatibility provide a remedy, that remedy lies against the Attorney-General, being a member of the executive government, and not against one of the principal parties to the proceedings. This probably does not satisfy the constitutional requirement.

80 (1999) 197 CLR 510, 528.

81 *Victorian Charter*, s 36(5).

82 *ACT Act* s 32(3).

83 Dalla-Pozzaq and Williams, above n 13, 15.

V An Aspect Worth Noting

Indeed, the separation of powers and advisory opinions issues both present a very substantial possible problem for the existing Australian statutory bills of rights. If the High Court cannot constitutionally identify and apply the rights provided in these statutes, either because of a breach of the separation of powers doctrine, or because there is no ‘matter’ within the meaning of ss 75 and 76 of the Constitution, then there is a problem with Australia’s judicial hierarchy. The High Court’s duty to exercise its appellate functions, as the apex of the judicial hierarchy, is significantly compromised by its inability to consider appeals from the Supreme Courts of each state. This is an issue that has received some attention in academic circles.⁸⁴

If the Supreme Courts of each state and territory, being unencumbered by the separation of powers doctrine or ‘matters’ requirements of Chapter III courts, are able to progressively give meaning to those jurisdiction’s bill of rights statutes – each applying abstract rights in different and diverging ways – there is a very real prospect that the jurisprudence on each right could fragment from jurisdiction to jurisdiction. This could diminish the High Court’s role of developing a uniform common law throughout Australia. If we accept that what the court is doing in applying these statutory rights is finding within the common law the jurisprudence to give meaning to the rights, then the High Court would have its hands tied in its duty of superintendence over the common law of Australia. It would run the risk of taking the ‘common’ out of ‘the common law’ in this area of law.

VI In Summary

The separation of powers doctrine has been centuries in the development. And whilst the Australian Constitution’s doctrinal heritage is influenced by the thinking of James Bryce, James Madison and *The Federalist* papers generally, it did not begin with revolutionary North America. Interestingly, Professors Blackshield and Williams suggest that the doctrine can be traced back to the Old Testament.⁸⁵

At its heart, the separation of powers requires that courts and judges act like courts and judges. The reality is that judges exercise discretion; and this discretion pervades the law. It was put succinctly by the great American jurist, Oliver Wendell Holmes:

84 Stellios, above n 13, 34.

85 Tony Blackshield, George Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, (2002). Professor Blackshield and Professor Williams, begin their chapter on the separation of powers: ‘The idea of an analytical differentiation between the three different functions of government, legislative, judicial and executive, is as old as Isaiah 33:22’ (‘The Lord is our judge, the Lord is our lawgiver, the Lord is our king’).

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.⁸⁶

This realism, so evident to Holmes and others, is ever present. It cannot be denied. That said, it is the fiction that this does not occur that helps to sustain the English legal tradition, and gives substance to the idea of separating judicial and legislative power. Presently, and consistent with the separation of powers, the judiciary gives effect to the 'felt necessities of the time' in a very subtle and gentle way – always maintaining the fiction that the law is the law – and not competing moral and political theories awaiting to be unleashed. For the High Court to conclude that the application writ large of an abstract list of human rights (assisted by the moral and political theories of the other nations and legal systems) is an exercise of the judicial function would be a blatant repudiation of the judicial method, and a significant attack on the separation of powers doctrine.

Rights need protecting. Too often Western legislatures have turned a blind eye to important human rights. But the damage done to the judicial function of government, and the reputation of judges, by asking the courts to give meaning to the prevalent moral and political theories does nothing to protect human rights in the long run. The rule of law necessitates the protection of the separation of powers, and in particular, the judicial function.

If the Commonwealth Government announces plans to introduce legislation to achieve greater protection or promotion of human rights, and if it involves the use of federal courts, the Government will quite rightfully need to obtain legal advice on its constitutionality. If it does, the opinion of the Commonwealth Solicitor-General should be made public to allow the Parliament (and the public at large) to know that what the Government is proposing is indeed constitutional. Chapter III of the Constitution certainly is 'where the action is'.

86 Oliver W Holmes, *The Common Law*, (first published 1881), (1981), 1. This statement of judicial method perhaps slightly overstates the case, at least in the Australian constitutional context. Former justice of the High Court, the Hon Ian Callinan has suggested to the author that the better description of the judicial tools associated with the judicial method in an Australian constitutional context is that of Sir Robert Menzies' description of 'a unique mixture of history, statutory interpretation, and some political philosophy': *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 514.

Chapter Twelve

A Legal Perspective on Bill of Rights

PROFESSOR HELEN IRVING

Over the century-plus since the Commonwealth Constitution was framed, the idea that Australia should have a bill of rights¹ has been raised on many occasions. The proposed form for such a bill has varied, alternating between constitutional amendment, legislative enactment, and ‘discovery’ through constitutional interpretation. One after the other, however, these initiatives have all come to nothing.

When the Constitution was drafted in the 1890s, the framers rejected a proposal to include more than a limited number of ‘rights’. Their preference lay in the common law as a protector of rights.² Subsequently, in 1944 and 1988, the insertion of a range of ‘rights’ provisions in the Constitution was attempted via referendums. Each was unsuccessful.³ Statutory bills of rights were introduced, without success, into the Commonwealth Parliament by Labor Attorney-General Lionel Murphy in 1973, and Labor Attorney-General Lionel Bowen in 1985. Forecasts of the imminent discovery of a range of implied rights in Chapter III of the Constitution came hard on the heels of two landmark cases in 1992, in which the High Court held that the Constitution contained an implied freedom of political communication.⁴ These were quickly disappointed. The prospect of the discovery of an implied constitutional ‘bill of rights’ thus joined the list of failures.

Given this unpromising record, why is an Australian bill of rights back on the agenda? What, if anything is new? In the last decades of the twentieth century, other comparable countries adopted their own bills or charters (since 1982, this has included the United Kingdom, Canada, New Zealand

1 I use the term ‘bill of rights’ generically.

2 What they rejected, to be accurate, was not a bill of rights, as is often claimed, but a clone of section 1 of the U.S. Fourteenth Amendment. See John M. Williams, *The Australian Constitution: A Documentary History* (2005), 208-210.

3 The 1944 referendum on Post-War Reconstruction and Democratic Rights, included a single question with 14 points, including an express guarantee of freedom of speech, and religion, and safeguards against the abuse of delegated legislative power. The 1988 referendum (Question 4) proposed extending to the States some of the ‘rights’ or ‘freedoms’ in the Constitution that bind only the Commonwealth. It sought approval on the proposal ‘To alter the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government.’

4 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. See George Winterton, ‘The Separation of Judicial Power as an Implied Bill of rights’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994).

and South Africa,). The Commonwealth of Australia, as proponents of a bill of rights frequently remind us, is now the only common law country (or democratic country) without a bill.

Global concerns about civil liberties and natural justice have been significantly heightened in the last decade, stimulating an increased interest in the legal protection of rights. New laws have been adopted in Australia, as elsewhere, to protect national borders or national security. New laws for deterring unlawful immigrants, and combating terrorism or to avert terrorist acts, have been passed. These have, indeed, generated the bulk of the examples upon which recent Australian rights advocacy rests.⁵

Within Australia, the *Human Rights Act 2004* (ACT) and the *Charter of Rights and Responsibilities 2006* (Vic), have changed the landscape, giving hope and renewed energy to proponents of a national bill, and in addition, serving as trial-runs for governments or individuals who might be inclined to support a national bill in principle but are nervous about the practice.

The election of a new Commonwealth Government in 2007 generated renewed hope. Advocates were reminded that previous Labor governments initiated bills of rights. The Prime Minister's 2020 Summit in April 2008 resoundingly endorsed a resolution calling for a national bill of rights, and in late 2008, Commonwealth Attorney-General, Robert McClelland, flagged his interest in pursuing this, with the appointment of a committee, chaired by Father Frank Brennan, tasked with reporting on the desirability of a bill.

At some point the pressure may become irresistible. There is all the more reason, therefore, to consider the proposal not only critically, but with reference to reality, including the record in other countries, and our own history. Before we go down the national bill of rights track, we should think very carefully about what is at stake, and also what it is we want to achieve.

I The 'Countermajoritarian Difficulty'

No reasonable person can object to the protection of rights. Those who question the bill of rights agenda are rarely contemptuous of rights, or of the law, or the integrity of the judiciary or the judicial system. Most are concerned, rather, about the *best means* of protecting rights. The central issue is whether the best means revolves around judicial review.

For many critics, the main objection to a bill of rights is the so-called *countermajoritarian difficulty*,⁶ that is, the spectre of unelected and unaccountable judges exercising power to strike down legislation, passed by

5 See, for example, the New Matilda campaign for a Commonwealth Human Rights Act. In its rebuttal of the claim that the Australian human rights record is exemplary, it lists seven examples of recent violations of rights, three of which directly, and two indirectly, refer to border protection or anti-terrorism laws or procedures. See <http://www.humanrightsact.com.au/2008/about-a-hr-act>

6 Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

the elected representatives of the people. Such an objection, on its own, should not settle the bill of rights question. It rests upon an empirical and conceptual simplification. The complex political-legal system that characterises any modern democracy will necessarily involve many institutions where officials, elected and unelected, make critical decisions that do not have, or would not have, popular support. Constitutionalism means limitations on legislative power. Elections and electoral accountability are central to a democracy, and opponents of a bill of rights are justified in emphasising this aspect of our system. But elections are neither sufficient nor exhaustive of the processes a democracy requires.

A system such as Australia's involves three arms of government. Each plays its part in balancing diverse and conflicting interests, in maintaining and protecting our fundamental institutional structures, in developing our standards and values, and in preventing the other arms of government from accumulating or monopolising power. The problem does not lie in the grasping (or even willing) over-reach of judges. It lies in misconstruing the separation of powers. It lies in what bills of rights ask judges to do.

Judges do not wantonly strike down laws in the course of judicial review. Legislation is rarely ruled unconstitutional. People outside the legal profession are likely to be surprised, even disappointed, to learn this. Indeed, one of the first problems with proposals for bills of rights is their tendency to create false expectations on the part of those who are not familiar with judicial history. This was evident in the deliberative poll forums prior to the adoption of the ACT's *Human Rights Act*, and in many other public forums on this question. There is a common, and popular perception that individual grievances can be simply redressed through access to the courts, and that claims that rights have been breached will invariably be vindicated. The record is that challenges to the validity of laws fail just as often as, if not more often than they succeed.

II The Rights Record

The objection is not to laws protecting rights, but to a bill (or other type of legal instrument) permitting the validity of the laws, *as such*, to be challenged. Australia is far from deficient in rights. This is a wide range of rights-bearing Commonwealth legislation; for example, the *Racial Discrimination Act* 1975; *Ombudsman Act* 1976; *Freedom of Information Act* 1982; *Sex Discrimination Act* 1984; *HREOC Act* 1986; *Age Discrimination Act* 1992; *Human Rights (Sexual Conduct) Act* 1994; *Disability Discrimination Act* 1992; *Age Discrimination Act* 2004; among others. These have counterparts in State laws. Australia has a robust common law, and a network of administrative review tribunals.

Australia's record in protecting rights goes beyond the legal sphere. This is commonly overlooked in debates about the merits of a bill of rights. A strong democracy and an active civil society are critical in the protection of rights and freedoms. Australia has a democratic political culture, along with practices and institutions that support it. It has a complex democratic infrastructure. To give one example, the Australian Electoral Commission performs numerous democratic functions, including public education. Australia's long-standing system of compulsory voting serves not only to ensure that a genuine majority records its voice at election time. It also requires governments to make active provision for exercising the vote, creating maximum opportunities for every eligible person (including the homeless, those in remote communities, in hospitals, and even prisons) to cast a vote. Our parliaments have a complex committee system. The Senate Scrutiny of Bills Committee, for example, assesses and regularly reports on proposed legislation with respect to, among other things, whether bills 'trespass unduly on personal rights and liberties'; 'make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers'; or 'make rights, liberties or obligations unduly dependent upon non-reviewable decisions'.⁷ Other standing and select parliamentary committees conduct inquiries into the status of rights protection more broadly. The Joint Standing Committee on Foreign Affairs, Defence and Trade, for example, announced an inquiry into Human Rights Mechanisms and the Asia-Pacific in 2008.⁸

In many of these legal and political initiatives, Australia has been a pioneer. Australians did not feel uncomfortable standing alone, or with few companions in the common law or democratic world, when these initiatives were first adopted. Our record is not perfect, but it is far from the stark picture that is conveyed in the claim that Australia, alone among democratic countries, lacks a bill of rights.

The generic term 'human rights' is frequently employed, but what exactly does it mean? Which rights do we want? There are many contenders. Political, civil, social, economic, cultural, linguistic? Individual or group? Rights for corporate persons or only natural persons? Rights for citizens only, or also for aliens? Where do we think our 'rights' come from? What is the *mischief* for which proponents consider a bill of rights to be the remedy?

III Constitutional Versus Statutory Bills

In recent years, those campaigning for a national bill of rights have abandoned

7 Parliament of Australia, Senate, Standing Order 24.

8 Parliament of Australia, Joint Standing Committee on Foreign Affairs Defence and Trade, Terms of Reference <http://www.aph.gov.au/house/committee/jfadt/asia_pacific_hr/tor.htm> at 1 April 2009.

constitutional avenues, and have concentrated instead on the alternative of statutory enactment. This shift, it can be supposed, is the result both of pragmatic reflection on the poor record of proposals for constitutional alteration in Australia, and the positive influence of models of statutory bills in other jurisdictions.

Much is made by proponents of the difference between a constitutional and a statutory bill. The former, being entrenched, is more difficult to amend and more likely therefore to remain quarantined from progressive shifts in values and conceptions of rights. The latter, in contrast, is said to be amenable to alteration by ordinary parliamentary processes and more flexible and adaptable.

The difference, however, may be more apparent than real. A statute is technically, at least, more easily amended or repealed than a constitution, but a constitution is not *unalterable*. It is merely more difficult to alter. In turn, a statute may be less amendable than is often thought. Sometimes the distinction between constitution and statute is itself not clear. Take the United Kingdom's constitution. It is said not to be written, and not to be entrenched. Neither is accurate. The United Kingdom's constitution has written parts. These consist in a number of key instruments or Acts, which were passed over several centuries, among which are counted the Magna Carta of 1215, the *Bill of Rights* of 1689, the *Act of Settlement* of 1701, the *Act of Union* of 1707, and the several *Reform Acts*. These Acts are ordinary statutes in form, and not *entrenched* in a technical sense, but they might as well be. They are indeed entrenched in a cultural, or conventional sense. While technically capable of simple parliamentary alteration, such Acts are in practice no easier to change than an entrenched constitution.

Key statutes *become* entrenched over time. Furthermore, proponents of statutory bills of rights want them to be. They want them to be removed from the body of statutes that are easily amended; they want them changed at a government's peril. The *New Zealand Bill of Rights Act* of 1990 has become effectively entrenched. The *Human Rights Act 1998* (UK) is on its way.

IV Claims for Rights

From where do our 'rights' come? Different rights derive from, and belong to, different fields. Some, arising from the natural law tradition, are so fundamental that no derogation should ever be permitted. Each arm of government should be committed to their protection. Others are creatures purely of legislation, or only make sense against the context of pre-existing social and political institutions. Some rights are available to the individual alone, others to groups or classes of person; some rest on a distinction between citizens and non-citizens; others are enjoyed by natural persons only, and still others extend also to corporate persons; some are enforceable

only against governments, others against private actors as well. Some rights are 'negative', taking the form of prohibitions on legislation. Others are 'positive', expressed as guarantees, which can be asserted against governments. The field of rights, in other words, is not consistent, uniform, or settled.

Many of what are described as 'rights' are actually interests or values cast in the language of law. By self-definition or self-classification, this language creates a claim to legal recognition and protection. It turns a value claim into a legal claim, and by doing so removes it from the political realm of contestation and controversy. Many new rights, in particular, have this character. For example, what are known as sexuality rights, reproductive rights, the right to die with dignity, and environmental rights, among others, rest upon values that are still controversial, still open to public debate. In casting these values as 'rights', their supporters seek to make them unassailable, to foreclose debate, and shift their protection from the political to the judicial arm of government.

Some rights involve claims with major resource implications. As claims – for example, to health, education, housing, employment – these are entirely worthy. Every good society *should* provide the best levels of health and education and housing, the best opportunities for decent and well-paid employment. But according to which criteria are we to decide whether these claims have been met? How are we to know whether the resources available have been optimally or equitably allocated?

These are not questions that courts should be expected to answer, nor are they matters for which judicial remedies should apply. Such matters should be the subject of political campaigns. Those who consider the government to fall short in their delivery should be encouraged to campaign for a change in policy or in government, not for a resolution in the courts.

Even the sort of bill of rights that does not permit the invalidation of legislation, but empowers the courts instead to make a determination or declaration of 'incompatibility' between laws and rights, does not avoid these questions. The Victorian *Charter of Human Rights and Responsibilities* is such a bill. Section 19(1), for example, requires courts, when the issue arises, to assess whether a person who has what it describes as 'a particular cultural, religious, racial or linguistic background' has been denied 'the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.' To determine whether a person has a 'particular' background, and whether such a denial has occurred, require detailed knowledge of cultural particularities, practices and expectations, in a context where these operate alongside other practices, both 'particular' and mainstream. These are sociological and historical matters, not properly judicial matters of inquiry.

Section 11(1) of the *Human Rights Act* (ACT) states that '[t]he family is the natural and basic group unit of society and is entitled to be protected by

society.’ This provision requires the courts to resolve questions about the identity of the family and the indicia of its integrity, notwithstanding the fact that the family is an open-ended and socially-evolving institution, one that has fascinated and taxed ethnographers and social historians for more than a century. Again, these are not judicial inquiries.

To take another example, many who advocate a national bill of rights hold up indigenous disadvantage as one of the most pressing areas for legal reform, and among the strongest arguments for a bill. The Commonwealth Constitution’s ‘races power’, they argue, permits laws that are adverse both to aboriginal people and to indigenous rights. In the New South Wales government’s inquiry into a bill of rights (which reported in 2001), for example, prominent legal academics made submissions that the *Native Title Amendment Act 1998* (Cth)(which, among other things, permitted pastoral leases to override native title) would not have been possible if Australia had had in place a bill of rights protecting indigenous rights. More recently, the New Matilda campaign for a Human Rights Act for Australia listed ‘[a]n acute lack of safety, health and adequate living conditions of Indigenous Australians’ among its reasons for promoting a bill, and suggested that both mandatory sentencing laws in the Northern Territory, and the recent Northern Territory ‘Intervention’ would not be permitted under a national bill of rights.

Here, with respect, is a confusion of policy and law. Whether laws or official action or programs are adverse is rarely a simple matter, rarely one that may be dealt with in the ‘either-or’ manner of a legal decision. Is the Commonwealth’s Intervention adverse or beneficial? Indigenous people are themselves divided on this question. It may have adverse effects for some and beneficial effects for others. It may be adverse in the immediate term and beneficial in the long term (or vice versa). A court is not well-placed to decide which.

A court cannot determine whether a highly-complex set of actions, based on detailed legislative and administrative schemes, with reference to conduct that is ongoing and future-oriented, is or is not ‘adverse’. This is a matter for political debate, for public discussion and input, for fine-tuning, for long-term planning, for compromise, for balancing interests, for hard decisions about means and ends and resources. In short, the sorts of things that are done in the political realm.

It is said that the type of remedy found in the *Human Rights Act* (UK), and copied in the Australian Capital Territory and Victoria, whereby the courts are empowered to make declarations of incompatibility, rather than invalidity, takes account of such objections and creates a ‘dialogic’ process, an opportunity for judicial criticism to be followed by governmental response or legislative override, in a dialogue or ‘conversation’ between the arms of government.

In his evidence to the parliamentary inquiry into a New South Wales Bill of rights, Bret Walker SC, representing the Bar Association of New South Wales, responded to such a view with scepticism:

The notion that you remove difficulties by giving to the courts a power to say to the legislature 'Do it again, and do it better' is, to my mind, politically a very frightening one.... It is not democratic if some judge ... can say, 'Your program, whatever that is, requires X. Your enactment does not quite get to X, it is only seven-eighths of X. I am going to hold things and send it back, because I think you should move in this direction more solidly...'⁹

The problem, whether or not the courts are empowered to strike down laws or merely to advise on their 'fit' with a bill of rights, is the demand that judges should answer political questions and provide legal remedies for controversial and contestable policy decision. It is the erosion of the separation of powers.

But not all rights are political. *Legal process* rights – the rights that surround the arrest, charge, trial and detention of persons suspected of having committed an offense – belong, properly, to the judicial arm of government. They concern the judicial process. They concern justice. They are necessary components of the rule of law, essential protections against arbitrary rule. They should extend to all persons without distinction, and are thus appropriately quarantined from legislative or executive impairment. Questions concerning the legitimacy of legislative limitations on these rights are appropriately answered in the courts. If the claim made by proponents of a bill of rights were confined to such rights, then a level of consensus might be secured among those who are otherwise sceptical.

It is very unlikely, however, that most proponents would be satisfied with confining it to legal process rights. Most advocates seek much more extensive entrenchment, and many are motivated precisely by the goal of greater equality in social and economic conditions that they believe a bill of rights will deliver. The New Matilda campaign, chaired by Susan Ryan, AO (a former Commonwealth Minister for Education) is a major example. Supported by prominent Australians, including jurists and church leaders, it considers the current regime of rights protection in Australia, including in the Australian Capital Territory and Victoria, to be too limited. Its draft Human Rights Bill of 2006 includes provisions extending well beyond civil and political rights, including the right to primary and higher level education, to 'the highest standard of physical and mental health', to adequate food, clothing and housing, the right to work and the free choice of work, among others.

9 Standing Committee on Law and Justice, New Parliament, *A NSW Bill of Rights*, (2001) 85.

The New Matilda campaign recognises that such rights are costly and have major resource implications. Its draft Bill therefore includes a provision governing the interpretation of economic and social rights, and requiring courts to take into account, among others, the estimated cost and the financial capacity of governments or public authorities in enforcing a socio-economic right.¹⁰

This interpretive provision (which closely resembles provisions of the South African Bill of Rights¹¹) may appear to act as a reasonable brake on what might otherwise be an uncontrollable demand for judicial review of living standards and quality of life. The appearance of reasonableness, however, is deceptive. The result of such provision, if adopted, would be to empower the courts to require governments to submit financial statements, budget papers, and justifications for fiscal policy. The courts would become, effectively, tribunals where judges challenged budget decisions or the costing of public programs. The erosion of the separation of powers, not to mention the time and cost involved in such a process, would be deep and almost complete.

V The Problem of Inflexibility

Human rights advocates are divided on whether they want rights protected permanently and inflexibly, or open to amendment and evolution. The reality is that, regardless of the legal form (statutory or constitutional) in which the bill appears, inflexibility is likely to be the outcome. After a time, statutory bills become effectively constitutionalised, as do the rights they include. Once rights are named and listed, and remedies are identified for their breaches, those rights in time become *reified*. They are regarded as definitive, as an exhaustive statement of rights, occupying the space available for claims for justice.

The framers of the United States Constitution were initially reluctant to include a bill of rights, in part because they recognized this tendency. When (four years after the Constitution was completed) they finally yielded, they included the Ninth Amendment, stating that ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’ Such a provision has become commonplace in later constitutions or Acts. Section 7 of the *Human Rights Act* (ACT) states, for example: ‘This Act is not exhaustive of the rights an individual may have under domestic or international law.’

10 New Matilda, Human Rights Act Campaign < <http://www.humanrightsact.com.au/2008/> > at 1 April 2009.

11 For example, section 26 (1) ‘Everyone has the right to have access to adequate housing’ (2) ‘The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.’

This may appear to settle concerns. In practice, however, the meaning of the Ninth Amendment has always been mysterious. United States Courts do not rely on it to identify or uncover missing or silent rights. Commentators continue to debate what it means.¹² There is virtually no Ninth Amendment jurisprudence. Enumerated rights have always had the upper hand, and rights that are the subject of later claims have struggled to gain recognition. That entrenched rights may become a fetter is exemplified by the notorious Second Amendment of the United States Constitution,¹³ a right that lives on long past its historical use-by date, constraining laws (and other rights) in the present through the values and interests of the distant past. A recent case has confirmed that it is alive and active.¹⁴

No legal provision can be framed in such a way as to cover all circumstances, and in particular circumstances that arise and change over time. Even textual definitions, and the inclusion of express limitations cannot account for, or anticipate the concrete claims that arise in the future and will be made in reliance on particular provisions. In contrast, individual pieces of legislation (rather than an over-arching bill) are open to amendment and adaptation.

VI The Cost of Rights

Bills of rights are enforced through legal action. Litigation is a poor substitute for political campaigns. It is individualised; it is confined to a concrete controversy, and it is expensive. Even where rights-based claims may be raised only in existing proceedings (as in the ACT and Victoria), the demand for additional legal expertise, and the likely increase in the length and complexity of proceedings will add to existing costs. The costs of litigation are commonly borne, furthermore, by the very individuals who are already disadvantaged, and whose expectation of success, is (statistically at least) unlikely to be matched by reality. Political campaigns, in contrast, are not necessarily costly. They may be collective, cheap, and conducted in multiple forms and media. Unlike a legal action, they may be repeated, again and again, if they fail.

The cost of litigation may of course be borne by free or subsidised legal aid, offered by public interest advocacy groups or pro-bono lawyers. Bills of rights indeed generate a demand for such aid. Groups like the Canadian Legal Education Action Fund (LEAF) were set up as civil society initiatives to support challenges to breaches of constitutional rights, following the

12 See, for example, Randy Barnett, 'Who's Afraid of Unenumerated Rights?' (2006) 9 *University of Pennsylvania Journal of Constitutional Law* 1.

13 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.'

14 *District of Columbia v Heller* 554 U.S. (2008).

adoption of the Canadian Charter of Rights and Freedoms.¹⁵ Such programs are worthy. However, they depend upon private good will, private philanthropy, and a community of supporters who remain favorable to the party alleging a breach of rights, in a context of deep asymmetry between the typical individual plaintiff and the typical official defendant. The asymmetry is more than financial. It lies in knowledge, access to information and advice, cultural familiarity, confidence, time and energy. These are typically in short supply among the socially and economically disadvantaged.

The protection of rights should not have to rely upon the good will of individuals. This reliance is inherently unstable and potentially risky. Political campaigns minimise the costs to individuals, as well as avoiding a simple win-or-lose scenario. Where governments respond with positive legislation and programs, both the cost and the fruits of social progress are spread across the community.

Governments themselves may, of course, promote the progressive interpretation of their country's constitution and enforcement of rights. We find examples of proactive official initiatives. In Canada, for example, the 'Court Challenges' program, a government initiative, was expanded in 1985, following the adoption of the Canadian Charter.¹⁶ Its purpose was to support individuals alleging legislative breaches of the Charter. It offered funding to alleviate the cost of litigation, normally borne by private parties. However, this program has had a checkered history. It has been successively withdrawn and reinstated, and withdrawn again, as Canadian governments have changed hands.

Even if assistance in supporting the cost of litigation could be regularized and made reliable, there is a further problem. Proponents of a bill of rights assume that the path of justiciable rights is automatically and always progressive. This assumption needs to be questioned. Judicial review may result in the defeat or invalidation of progressive laws or programs. While a statutory bill, conferring on the courts only the power to make declarations of incompatibility, would not lead to invalidation, such a declaration may have a chilling effect on laws of this nature.

VII Constitutional Problems

For many proponents of a bill of rights, the problems that lie in constitutional entrenchment and legislative invalidation have been satisfactorily addressed in the *Human Rights Act* (ACT) and the Victorian *Charter*. Rather than empowering the courts to invalidate legislation, they permit them only to make declarations of incompatibility or inconsistency between rights and

15 See Beverley Baines, 'Using the Canadian Charter of Rights and Freedoms,' in Beverley Baines and Ruth Rubio-Marin, (eds), *The Gender of Constitutional Jurisprudence* (2005).

16 Court Challenges Program of Canada: www.ccppcj.ca/el/ccp.shtml

laws. These Acts serve as potential models for the Commonwealth, both in their statutory form and in the limited power they confer on the courts with respect to judicial review. An issue arises, however, for a proposed Commonwealth bill that does not arise in the states and territories. The Commonwealth may not be able to confer jurisdiction on the High Court (or other federal courts) to make declarations of incompatibility.

The Australian Constitution confers original jurisdiction on the High Court in a range of what it calls 'matters', and permits the Parliament to vest jurisdiction in the Court in a further range of matters.¹⁷ The High Court ruled in 1921 that a 'matter' meant a concrete controversy between parties, and could not extend to giving advice or opinions in the absence of 'some immediate right, duty or liability to be established by the determination of the Court.'¹⁸ As the tests for standing have loosened over the years, the identification of a controversy has moved toward the identification of remedy.¹⁹ In 2000, in *Truth About Motorways*,²⁰ the High Court held that so long as there was a remedy 'appropriate to the asserted wrong,'²¹ there was a matter within the meaning of Chapter III of the Constitution. A concrete legal controversy, in other words, requires a remedy that affects the rights or liabilities of the parties. Advisory opinions and hypothetical controversies do not have this character and are not constitutionally permitted for the High Court.

In a speech delivered to the Human Rights Law Resource Centre in 2008, former Chief Justice of the High Court, Sir Gerard Brennan, commented that 'if a judicial declaration of incompatibility had no effect on a litigant's rights or liabilities, there would be a question whether such a declaration can be made in the exercise of federal jurisdiction.'²² Doubts about the constitutional validity of the power to make such declarations were also expressed by former Justice of the High Court, Michael McHugh, in early 2009.²³ It may be that a declaration of incompatibility sufficiently resembles a declaration of right (declaratory relief), as a form of remedy.²⁴ It may also be that the fact of its being made in the course of a pre-existing proceeding concerning another controversy, satisfies the test for a 'matter'.

17 Sections 75 and 76.

18 *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

19 See Helen Irving, 'Advisory Opinions, the Rule of Law, and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 105.

20 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 2000 CLR 591.

21 *Ibid*, at 612 (Gaudron J).

22 Gerard Brennan, 'The Constitution, Good Government and Human Rights', (Speech to the Human Rights Law Resource Centre), 12 March 2008.

23 Michael McHugh, 'A Human Rights Act, the courts and the Constitution', Address to the Australian Human Rights Commission, 9 March, 2009.

24 See, for example, *Croome v Tasmania* (1997) 191 CLR 170, where the plaintiffs, having suffered no direct or personal injury, successfully sought a declaration of the invalidity of the relevant law (provisions of the Tasmanian Criminal Code criminalising homosexual conduct).

We can be confident, however, that a Commonwealth bill that empowered the government to seek an opinion of the High Court on compatibility in the absence of a controversy would be unconstitutional. Note section 37 of the Victorian *Charter* which requires the Attorney-General, within six months of the Supreme Court's making a declaration of inconsistency between a statutory provision and a human right, to prepare and publish a written response to this declaration. This process detaches the declaration of inconsistency from the controversy to which it gave rise, rendering it an abstract question and giving the declaration the character of an advisory opinion. If adopted at the Commonwealth level, it may prove constitutionally problematic.

The virtue of the 'dialogue' model – where the courts are empowered only to make declarations, inviting government response – is said to lie in the very fact that it is virtually 'remedy-less.' The Commonwealth Constitution, on the other hand, requires a 'matter', and a 'matter' requires a remedy. If there is to be a Commonwealth bill, the suitability of the ACT and Victorian models in this respect is seriously in doubt. It will, thus, need close scrutiny. This is not merely a technical matter, but goes to the merits. If a bill or charter of rights, as proposed, is inconsistent with the Australian Constitution's provisions for the separation of powers, its adoption would involve a distortion of our current system.

VIII Conclusion

To maintain and, where necessary, enhance the protection of rights in Australia, is a worthy goal. But much of what is included in the *Human Rights Act* (ACT) and the Victorian *Charter* already exists at the Commonwealth level, in legislation and in parliamentary bodies and practices. There is more to protecting rights, however, than official action, whether by government or the courts. Continuous, robust *debate* about rights, both in the political and civil society remains critical. Those who advocate a bill of rights often appear to want to close debate, to set rights in concrete so that they are fixed and final. They seek 'dialogue' between the arms of government, but not about the nature of the right as such, but only about the legality of limitations.

People are fearful – quite reasonably at times – of the potential for erosion *unless* rights are protected from alteration. This very goal, however, may have perverse effects, taking the struggle for rights out of the political realm, making it uni-dimensional and uni-directional, encouraging the disadvantaged to think primarily in terms of legal avenues for redress. These avenues are costly and uncertain. The vesting of policy, especially with resource implications, in the judiciary is certain to politicize the judicial arm of government. The 'dialogue' process has the potential for creating antagonism between the judiciary and the government, as much as – perhaps

even more than – constructive exchange. If so, it cannot fail to have a corrosive effect upon the independence of the judiciary.

That Australia is unique in not having a bill of rights is held up by proponents as a defect, even a matter for shame. But unless and until Australia's record in protecting rights is manifestly and consistently weaker than in other comparable countries, there is no cause for shame. Currently we have a robust, complex system of rights protection, and an effective separation of powers. We should work on improving them, not supplanting them.

Chapter Thirteen

A Charter of Rights Will Harm Aboriginal Prospects

THE HON DR GARY JOHNS

The roll call of the great battles by Aboriginal people for land rights sends shivers through the spine of the Aboriginal rights movement. The 1964 destruction of the Cape York Mapoon community by the Queensland Government for a Comalco mine, the 1966 walk off at Vestey's Wave Hill cattle station in the north west of the Northern Territory, the 1968 Yirrkala Arnhem Land fight against Nabalco, and the 1980 battle at Noonkanbah in the Kimberleys to halt AMAX drilling for oil were key events in the political struggle for the recognition of land rights. In all cases, Aborigines gained rights to their land through political struggle and by legislation, including native title following the *Mabo* judgment. A charter of rights was not to be seen.

Still, although these were signature events in the land rights movement they did not secure Aborigines a living or a better quality of life. Not one of the places is economically viable, although one is close enough to 'whiteman's' economy to commute. Perhaps a charter of rights might be that extra tonic to free Aborigines from a life of welfare? I very much doubt it.

Indeed, a charter of rights may prolong Aboriginal dependence by encouraging people to think that only rights secure liberty and economic freedom. Of course, each of these struggles is testament of the opposite, that political struggle secures rights. But rights do not create a better quality of life for Aborigines – no greater life expectancies, educational outcomes or economic prospects. The rights movement and the ready access of Aborigines to legal instruments simply puts off the day when they enter the marketplace. Aborigines can no longer afford to live as museum pieces, it is killing them. A new rights instrument may delay the necessary adjustment, causing further harm and waste of public monies. The charter is likely to expand the grounds on which Aborigines and their advocates can make claims on the common wealth and delay their entry to a world where they contribute to the common wealth.

For example, the Australian Government has an explicit policy to ensure that Aborigines get a job.¹ A job, however, is not a right it is a consequence of the demand for labour. Securing a job depends on the health of the

1 Australian Government, *Increasing Indigenous Employment Opportunity: Proposed Reforms to the CDEP and Indigenous Employment Programs* (2008) 1.

economy and the supply of labour, which means people must be job ready and in the right place. Can the charter help? Almost certainly not, but that will not stop the chartists and others trying. The chartists are likely to seek to widen the purview of the charter by reference to the *International Covenant on Economic, Social and Cultural Rights* and the *Declaration on the Rights of Indigenous Peoples* which was recently endorsed by the Rudd Government. These instruments talk of economic matters as if they are rights. If economic matters creep into Australian jurisprudence through international instruments experience demonstrates that Aborigines will be more likely to wait for the legal path to compensation rather than work.

I Widening the Powers of Legal Redress

There is no shortage of human rights lawyers willing to enter the fray. For example, former ALP candidate and human rights lawyer George Newhouse recently addressed a meeting of indigenous representatives in Alice Springs from the Prescribed Areas People's Alliance who are against the Northern Territory Emergency Response. Mr Newhouse has enlisted the help of former Victorian Federal Court Judge, Ron Merkel QC (who before he was a judge told Aborigines that they had a good chance if they mounted compensation cases for being members of the stolen generations)² to advise the group, which wants to complain to the UN Committee on the Elimination of Racial Discrimination about the impact of the intervention on Aborigines. Mr Newhouse argues that the intervention laws are discriminatory and that treaty obligations require them to be reassessed urgently.³ The chances of a George Newhouse or a Ron Merkel succeeding in delaying rational policies increase as the instruments available to him increase.

Indeed, Newhouse and Merkel will not be alone they have hired hands to assist the cause. Dr Helen Szoke, Chief Conciliator of the Victorian Equal Opportunity and Human Rights Commission, criticised the Labor Government's review process in the next phase of the NT Emergency Response, chiding it for 'rejecting key recommendations'⁴ of the review. The review, chaired by the radical separatist Peter Yu of the Kimberleys was effectively disowned by the Minister Jenny Macklin who showed very poor judgement in her selection of chair. Dr Szoke was joined by Dr Helen Watchirs, Human Rights and Discrimination Commissioner of the ACT,

2 Ron Merkel 'Government Culpability for the Forced Removal of Aboriginal Children from their Families.' (1990) *Aboriginal Law Bulletin* 50.

3 Patricia Karvelas, 'PM told to soften welfare regime as NT plan faces overhaul' *The Australian* September 30, 2008 <<http://www.theaustralian.news.com.au/story/0,25197,24423117-5013172,00.html>> at 1 April 2009.

4 Helen Szoke, 'Letter to the Editor – Northern Territory Intervention.' 28 October 2008 <<http://www.equalopportunitycommission.vic.gov.au/news%20and%20events/media%20releases/20081028a.asp>> at 1 April 2009.

who in response to a request from the Chief Minister expounded at considerable length⁵ the dangers of the NT Emergency Response in a wholly political intervention beyond her powers within the ACT and delving into explicitly political realms, including providing personal opinions based on media reports as to the motivations and actions of players in the Northern Territory.

A charter of rights will be used as a tool to make hard choices to improve the welfare and aspirations of Aboriginal Australians, even harder. If critical aspects of the Northern Emergency Response were prohibited by 'rights' in a bill of rights, for instance, then it will be harder for future Australian governments to do the necessary balancing act between 'rights' and responsibilities. Many activist organisations and human rights groups are salivating at the prospect of using a charter to undermine the NT Emergency Response, against the wishes of both major political parties representing over 90 per cent of the electorate's wishes.

The ways of using the courts for political means are many. For example, the Victorian Charter of Rights (a likely model for a national charter) is clearly very much taken with Aboriginal rights. These are given precedence and special mention. Section 19 (2) states,

Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community –

- (a) to enjoy their identity and culture; and
- (b) to maintain and use their language; and
- (c) to maintain their kinship ties; and
- (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Moreover the Preamble to the Victorian Charter of Rights includes the statement,

human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

By way of a preliminary analysis of problems with a charter, and before returning to land rights in particular, there are three issues that should concern Australian Aborigines considering an Australian charter of rights

5 Helen Watchirs, 'Request for advice on discrimination & human rights implications of Commonwealth emergency measures in NT Indigenous communities announced on 21 June 2007', 26 June 2007 <<http://www.hrc.act.gov.au/assets/docs/Final%20HRDC%20ATSI%20NT%20advice%2020071.doc>> at 5 April 2009.

along the lines of the Victorian model. First, the claim is not proven that Aborigines have a 'distinctive essential relationship with the land, water and other resources'. Native title claims, for example, rely on establishing proof of an unbroken relationship with the land and the nature of that relationship in each instance. A broad prejudgement about relationships undermines the integrity of native title. The introduction of the term 'essential' is no doubt meant to buttress the importance of the claim but it cannot assist in the proof of claims and indeed may on some readings limit the claims only to those that are essential as opposed to any that are not essential.

Second, the claim that 'human rights have a special importance for the Aboriginal people of Victoria' is a gross misuse of the Charter, which is meant to protect human rights of all Victorians. As distinctive as any set of rights are, each must in the first instance be given equal weight and their limits judged on a case by case basis. The fundamental critique of any charter is that it provides no guide to the weighting of competing rights. In addition, the Victorian Charter compounds the error by providing special status to Aboriginal human rights, by implication lessening the rights of all others.

Third, the UN Declaration on the Rights of Indigenous Peoples has considerable problems. When Australian legislators and judges look abroad for precedent, including to international courts and tribunals as they are encouraged to do under s 32(2) of the Victorian Charter, they should be wary about using UN sources and be alive to the political, ideological and in many cases undemocratic baggage of UN instruments. They are not like domestic laws. The tests of reputation and impact in regard to the Indigenous Declaration are that the four common law countries with extant indigenous populations and fine traditions in attempting to accommodate the demands of indigenous citizens refused to sign the Declaration. That is, until the Rudd Government decided to sign up to it.

Moreover, under the Charter, the Supreme Court of Victoria has been given a power to examine legislation so that, through a 'declaration' process, it might refer to parliament legislation that cannot be interpreted consistently with human rights. Such a declaration does not make the legislation invalid, but it triggers a parliamentary process by which the Minister administering the legislation must respond. By this process, a 'dialogue' is facilitated about the content and operation of the legislation. Further, the Victorian *Charter* must be reviewed in 2011⁶ to consider the inclusion of additional rights such as those found in the International Covenants mentioned above. The minister confronted with an apparent breach of say the *International Covenant on Economic, Social and Cultural Rights* or the *Declaration on the Rights of*

6 Kevin Bell, 'Enhancing Australian democracy with a federal charter of rights and responsibilities' (Speech delivered to Australian Institute of Administrative Law (Victorian Chapter) 20 November 2008) 7.

Indigenous Peoples (albeit not a covenant and therefore less binding) by Aboriginal litigants will likely either retreat for fear of losing votes, or if not retreat be accused of seeking votes from racists or more likely will increase the value of some 'compensation' package. Claim and compensation is the essence of the legal game. Aborigines do not need compensation they need employment in the real economy to take control of their own lives; but the greater the promise of compensation the greater the incentive to wait and not work.

As interpreters of the law, judges provide a brake on the parliamentary executive. While the executive is sensitive to the parliament, to the voters and the press the judges are not, they have jobs for life. The judiciary's great contribution to society is to make law incrementally and interpret statute according to law. Judges play a vital role when they are constrained by specific precedent and narrow statute, in that vein laws should never be framed in broad or aspirational terms. A wide brief invites judges to interpret, not according to legal precedent and principles, but to according to values. This is dangerous. Mr Justice Toohey's remarks for example, at the granting of lands to the Walbiri under the NT *Land Rights Act 1976* that 'there will be benefits to the people of a spiritual and psychological nature, mainly I think in the impetus it will give to the movement away from centres of high population and the opportunities to return to a more traditional way of life'⁷ are in retrospect, and for many of us at the time, a tad embarrassing. He was badly mistaken.

A Enter the Declaration on the Rights of Indigenous Peoples

Armed with access to wider powers of interpretation litigants will return to the land rights field and judges may accommodate them. Unfortunately, land rights have not provided a solution to the Aboriginal economy or the quality of life of aboriginal people. A common use of land rights for example has been to extract rent from miners to sustain immediate consumption without a thought for investing in the future.⁸ A proposed charter, which leverages the Declaration on the Rights of Indigenous Peoples may enhance rent seeking behaviour, thus delaying the adjustment of Aborigines from taking a productive role in the economy. It is among the reasons the Howard Government, along with three Anglosphere nations, rejected the Declaration and is highly relevant to the present consideration of the Declaration and the use to which it may be put.

7 Quoted in Kenneth Maddock, *The Australian Aborigines: A Portrait of Their Society* (2nd ed, 1982) 160.

8 Gregory Andrews, 'Economic passivity and dependency in Mutitjulu: some suggestions for change.' (Discussion Paper, Mutitjulu *Tjungu Waakaripayi* Project 'Working Together' 2005) 11 <<http://www.bennelong.com.au/articles/pdf/gandrews2006.pdf>> at 4 April 2009.

At the time of the UN debate on the Declaration the Australian Ambassador and Permanent Representative of Australia to the United Nations, Robert Hill and the U.S. Advisor, Robert Hagen condemned the Declaration in the same terms, 'it was the clear intention of all States that [the Declaration on the Rights of Indigenous Peoples is] an aspirational declaration with political and moral, rather than legal, force.'⁹ Both rejected any possibility that the document could become customary international law. As New Zealand, under the instructions from Helen Clark's Labour Government, stated, 'this text is ... clearly unable to be implemented by many States, including most of those voting in favour of its adoption.'¹⁰ The declaration is another UN try-on by those states whose interest in indigenous affairs is either nil – Europe – or great but without any intention of compliance – most African, Middle Eastern and Asian states.

The Howard Government expressed its dissatisfaction¹¹ with the references to self-determination in the Declaration.¹² It argued, quite properly, that self-determination applies to situations of de-colonisation and the break-up of states into smaller states with clearly defined population groups. It also applies where a particular group with a defined territory is disenfranchised and is denied political or civil rights. It is not a right which attaches to an undefined subgroup of a population seeking to obtain political independence. It is unconscionable for any future Australian government to support a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a state with a system of democratic representative government and yet this is precisely the view of Mick Dodson, whom the Human Rights Commissioner Tom Calma has appointed to advise him on political representation. Now that the Australian Government has acceded to the Declaration, the courts may be entitled to seek guidance from the UN Declaration. The Declaration's provisions on lands and resources¹³ could be read to require recognition of Indigenous rights to lands without regard to other legal rights existing in land, both indigenous and non-indigenous. Any right to traditional lands must be subject to national laws, otherwise the provisions would be both arbitrary and impossible to implement, with no recognition being given to the fact that ownership of land may lawfully vest in others, for example,

9 Explanation of vote by Robert Hill, Ambassador and Permanent Representative of Australia to the United Nations Declaration on the Rights of Indigenous Peoples, General Assembly, 13 September 2007. Explanation of vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, September 13, 2007.

10 Explanation of Vote by Rosemary Banks, New Zealand Permanent Representative to the United Nations, on the Declaration on the Rights of Indigenous Peoples, 13 September 2007.

11 Hill, above n 9.

12 United Nations Declaration on the Rights of Indigenous Peoples, (UNDRIP) UN A/RES/61/295, Annex and Article 3.

13 Ibid, Article 26.

through grants of freehold or leasehold interests in land. Many national legal systems, including Australia's, also provide for lawful compulsory acquisition of interests in land. The New Zealand view was pungent. Despite a treaty concluded at Waitangi between the Crown and New Zealand's indigenous people in 1840, nearly 40 per cent of the New Zealand fishing quota is owned by Maori and claims to over half of New Zealand's land area have been settled, New Zealand could not consent to the entire country being subject to claim. As Rosemary Banks, New Zealand Permanent Representative to the United Nations stated,

The Article appears to require recognition of rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous, and does not take into account the customs, traditions, and land tenure systems of the indigenous peoples concerned. Furthermore, this Article implies that indigenous peoples have rights that others do not have.¹⁴

Australia and Canada¹⁵ previously expressed concerns that the Declaration expanded too far any right to free, prior and informed consent. For example, the Declaration provides that states shall obtain the free, prior and informed consent of Indigenous peoples before adopting or implementing certain measures that may affect them.¹⁶ The scope of this proposed right could mean that states are obliged to consult with Indigenous peoples about every aspect of law that might affect them. This would not only be unworkable, but would also apply a standard for Indigenous peoples that does not apply to others in the population. No Australian government should accept a right that allows a particular sub-group of the population to be able to veto legitimate decisions of a democratic and representative government. More acutely, New Zealand and Canada interpreted the Declaration as implying that indigenous peoples have a right of veto over a democratic legislature and national resource management.¹⁷

Australia did not raise the issue of collective rights mentioned in the Declaration,¹⁸ but the U.S. made it clear that if a collective could hold and exercise human rights, 'individuals within those groups would be extremely vulnerable to potential violations of their human rights by the collective.'¹⁹ In addition, if groups and individuals could each hold human rights, it would be difficult to reconcile disputes over which human rights should

14 Banks, above n 10.

15 Statement by Ambassador John McNee, Permanent Representative of Canada to the United Nations to the 61st Session of the General Assembly on the Declaration on the Rights of Indigenous Peoples, September 13, 2007.

16 Ibid, above n 12, Article 19.

17 Ibid, Articles 19 and 32.

18 Ibid, Articles 3 and 10.

19 Hagen, above n 9.

prevail. Australia's failure to raise collective rights may be explained by the fact that the U.S. was prepared to do so and Australia ducked the issue. The reason may be that so much of Australian efforts in Indigenous affairs in the last decades have been aimed at consultation with collectives. For example, the beginnings of the mutual obligation revolution now sweeping indigenous communities commenced with Shared Responsibility Agreements and Regional Agreements. These proved to be ineffectual instruments in the face of intransigent problems of poor individual behaviour.²⁰ Mutual obligation has now become personal; parents will have payments withheld if they do not have their children attend school. Presumably the Rudd Government will be able to explain its accession to an instrument of collective rights in the face of the failure of collective rights in Australia and its wholehearted embrace of individual rights in pursuit of changing Indigenous (and other welfare recipient) behaviour.

The Declaration, in seeking to give Indigenous people exclusive rights over property, both intellectual, real and cultural, does not acknowledge the rights of third parties, in particular the rights of third parties to access Indigenous land, heritage and cultural objects where appropriate under national law. The Declaration fails to consider the different types of ownership and use that can be accorded to Indigenous people and fails to consider the rights of third parties to property. Australia, Canada and New Zealand did not support the inclusion in the text of intellectual property rights for Indigenous peoples²¹ because Australia extends protection to Indigenous cultural heritage, traditional knowledge and traditional cultural expressions to the extent that it is consistent with Australian and international intellectual property law. However, Australia will not provide *sui generis* intellectual property rights for Indigenous communities as envisaged in this Declaration. New Zealand expressed the view that the provisions on redress and compensation²² were unworkable as the entire country would appear to fall within the scope of the Article and the text generally takes no account of the fact that land may now be occupied or owned legitimately by others or subject to numerous different, or overlapping, indigenous claims,

It is impossible for the State in New Zealand to uphold a right to redress and provide compensation for value for the entire country – and indeed financial compensation has generally not been the principal objective of most indigenous groups seeking settlements in New Zealand.²³

Australia was also concerned that the Declaration placed Indigenous

20 The most powerful instruments are aimed at individual income. See Andrews, above n 8.

21 UNDRIP, above n 12, Article 31.

22 *Ibid*, Article 8.

23 Banks, above n 10

customary law in a superior position to national law. Customary law is not 'law' in the sense that modern democracies use the term; it is based on culture and tradition. It should not override national laws and should not be used selectively to permit the exercise of practices by certain Indigenous communities which would be unacceptable in the rest of the community. Australia declared that it would read the whole of the Declaration in accordance with domestic laws as well as international human rights standards.²⁴

The charter, aided by the international instruments which will be brought into Australian law through the back door, will undo the policy gains made in recent years in the Aboriginal policy area because the charter focuses the debate on processes not outcomes and on rights not on responsibilities. The real gains made in changing the lives of Aboriginal people have been in undoing the 'human rights' work of an earlier period. The human rights rubric has framed the debate in such a way as to lead Aborigines to expect the society to pay them for being Aborigines. The mindset has ruined their lives. It has left them without motivation to work, and nothing could be more destructive of their human right to succeed.

III Land Rights have not Secured a Future for most Aborigines

Wider powers applied to old battles of land rights will cause harm to Aborigines. If Justice Toohey and indeed other judges as sympathetic to Aboriginal demands were to revisit earlier decisions and accompanying declaratory remarks they may be shocked that their handiwork has produced little or nothing and possibly the opposite of what they had hoped. In particular the decisions did not create a better standard of living for Aborigines based on economic activity derived from their newly won asset. Charters of rights mandate legal solutions to real world issues but history suggests that legal 'solutions' have not improved the lot of Aborigines. Aborigines secured legal rights to land a generation ago, but in so doing they did not understand that land has to be made productive. Aborigines have been used by the law to place them as landlords and extract rent from the whiteman, but not to work the land in a way that would give them a permanent stake in the economy, that is, by teaching them marketable skills. A brief revisit of the landmark land rights cases provides a tale of the inconsequence of the law as a remedy in matters of political-economy.

A Mapoon

Comalco was granted a lease to mine bauxite in Cape York, which included the land occupied by both Weipa and Mapoon Missions. In 1964 Presbyterian missionaries planned to relocate residents to make way for a mine, but Mapoon residents were assured that they would not be forced off the mission.

24 Hill, above n 9

Many agreed to move, but about 40 wanted to stay and be given a chance to establish local industries. These 40 were forced from their homes and the town was razed.

From the late 1970s, people began returning to Mapoon. These people returned though with little expectation that an economy would follow. In 2000, Mapoon was formally recognised as a Deed of Grant in Trust Community with status similar to a shire council.²⁵

Mapoon is situated in the primary labour market catchment of Weipa and is within an hour's drive of Weipa. Rio Tinto Alcan is the primary employer, indeed Weipa's very existence is due to the development of bauxite mining. Unfortunately, the children of the Mapoon returnees have different, more material expectations and whether because of welfare dependence or lack of employment in Mapoon (but not in Weipa), have succumbed to drugs. Drug and alcohol dependence were the primary factors that prevented Aborigines from being employed by Rio Tinto Alcan or its contractors in a recent Rio recruitment intake most of whom were Mapoon residents.²⁶

B Wave Hill/Wattie Creek

In August 1966, Gurindji pastoral workers walked off the job on the Vestey's cattle station at Wave Hill in the Northern Territory. The next year the group moved to Wattie Creek, a place of significance to the Gurindji people.²⁷ The Whitlam government legislated to allow for the original Wave Hill lease to be surrendered and two new leases issued: one to the Vestey's and one to the Murrumulla Gurindji Company. The Gurindji lease of approximately 3300 square kilometres included important sacred sites.

In 1975, Prime Minister Gough Whitlam came to Daguragu and in an historic act of conspicuous compassion poured a handful of soil into claimant Vincent Lingiari's hand. Whitlam said:

Vincent Lingiari, I solemnly hand to you these deeds as proof in Australian law that these lands belong to the Gurindji people, and I put into your hands part of the earth as a sign that this land will be the possession of you and your children forever.²⁸

Wattie Creek Station is now held by the Daguragu Land Trust. The property is over 3,000 sq kilometres. Of this only 700 sq kms are leased (McDonald Yard) and 5,000 head of cattle are run, there is very little

25 National Museum of Australia <<http://indigenousrights.net.au/document.asp?iID=677>> at 15 January 2009.

26 Interview by author and colleagues. The figures are very similar to those reported by Woodside in the Pilbara.

27 Frank Hardy, *The Unlucky Australians*, (3rd edn 1981).

28 National Museum of Australia, <<http://indigenousrights.net.au/subsection.asp?ssID=85>> at 14 January 2009.

employment associated with the lease. The traditional owners do not live on the property, but simply receive the rent from the pastoral lease.²⁹

C Yirrkala

In 1963, the Commonwealth government approved Gove Bauxite Corporation's plans to mine in the vicinity of the Yirrkala Methodist Mission.³⁰ In 1968 the Yirrkala tribes (among them Yolgnu) launched a legal challenge against the Gove bauxite alumina project. In 1971 Mr Justice Blackburn ruled against the Yirrkala claimants in *Milirrpum and Others v Nabalco Pty Ltd and the Commonwealth of Australia*.³¹ The Yirrkala people eventually received title to their land in 1978 under the *Aboriginal Land Rights (Northern Territory) Act 1976*. However, the mining leases to which they had objected were excluded from the provisions of the Act. In the intervening years 4000 white Australian mining employees and their families settled in the area.³²

Meanwhile, Laynhapuy Homelands Association (LHA) a major player in the region wants to keep Yolngu people on country and connected to their cultural and social foundations. They are not in favour of economic development through mining, instead they want to manage their 'estate' and be engaged in border & environmental protection, bio-diversity conservation and the production of arts crafts, music, dance, and the general maintenance of culture.³³ To this end there are government funded designated Ranger positions for Yirrkala Rangers.³⁴

In the long term, if the small business sector of the remote economy can grow, it will generate a genuine income stream for homelands communities, and their dependence on government monies for their survival will correspondingly decrease. At best, remote Australia will be home to networks of thriving, functioning small communities, where thousands of people continue to balance, in a creative way, their sense of being uniquely themselves with the demands of being part of the wider polity and economy.³⁵

29 Advice from the Indigenous Land Corporation.

30 Edgar Wells, *Reward and Punishment in Arnhem Land* (1982).

31 (1971) 17 FLR 141.

32 National Museum of Australia, 'The Campaign for Mapoon' <<http://indigenousrights.net.au/subsection.asp?ssID=63>> at 14 January 2009.

33 Laynhapuy Homelands Association Incorporated, Submission To Northern Territory Government on the CDEP Discussion Paper, March 2008 4.

34 Ibid 9.

35 Frances Morphy 'The Future of the Homelands in North-East Arnhem Land' 11 January 2005 quoted in *ibid*, 8.

LHA dreams of a 'milk bar' economy, the dream of modern anthropologists and other economic illiterates. It does not support the elevation of mainstream jobs to the 'top of the hierarchy' and argues that CDEP jobs can be equally valuable.

D Noonkanbah

The Yunggora people were employed by the station owners at Noonkanbah until 1971 until they walked off over a pay and conditions dispute.³⁶ In 1976 the station was purchased by the Aboriginal Land Fund to be developed by the traditional owners. It has since then been run by the people of the Yunggora Community. The station was the scene for an intense political dispute when the government of the day allowed exploration company AMAX to drill for oil in sacred sites – in 1980 a convoy of 45 drilling rigs entered the site. Violent confrontations between police and Noonkanbah protesters ensued, culminating in the drilling rigs forcing their way through community picket lines.

In April 2007, the Yunggora people had their native title recognised over the Noonkanbah land.³⁷

Yunggora's Community Development Employment Project (CDEP) is one of the largest stand alone CDEPs left in the region. It has 165 people on CDEP which includes participants who work on the three out stations under their control. In 2008 it achieved no non-CDEP jobs and no viable businesses.

E Recent attempts to leverage the white mans' wealth

Land rights played their part in the maturation of the relationship between Aboriginal and non-Aboriginal Australia, but they did not produce much change for Aborigines. Armed with government money and ample avenues for legal redress, land councils have attempted to sting developers for rent. No doubt they will do so again and will use any and all means to do so, including any court that will enhance their prospects through human rights dialogue. A recent example of a land council overplaying its hand may serve as an example however that a legal forum and indeed political activism does not always provide a remedy where the underlying cause is flawed.

In 2008 the Japanese gas company Inpex decided to abandon its \$25 billion project to bring LNG onshore in the Kimberleys. Inpex had planned to pipe the gas 200km from the Browse Basin gas field to a proposed LNG

36 E Kolig, 'Government Policies and Religious Strategies: Fighting With Myth at Noonkanbah.' In R Tonkinson and M. Howard (eds.), *Going It Alone: Prospects for Aboriginal Autonomy* (1990) 235-250.

37 Tony Smith, 'Indigenous Accumulation and the Question of Land in the Kimberly Region of Western Australia: Pre 1968-1975.' (2002) <<http://eh.net/XIIICongress/cd/papers/58Smith195.pdf>> at 15 January 2009.

plant on the Maret Islands but a facilitation agreement was instead signed with the NT government. The gas will be piped 909km to a new LNG plant at Middle Arm in Darwin Harbour. It appears the reason was that the Kimberley Land Council became too greedy.

The Kimberley Land Council accused Inpex of trying to avoid environmental and native title regulation with its decision to build the project in the Northern Territory and not Western Australia. In a letter to the Premier Colin Barnett, Kimberley Land Council executive director Wayne Bergmann said he

believes that Inpex's approach to its development options clearly reflects a desire to avoid environmental and native title regulation, and is reminiscent of an outdated, unacceptable approach to development. This approach is not acceptable to traditional owners or to the general community.³⁸

The new Premier accused former State Development Minister Eric Ripper's decision to give Aboriginal groups the right of 'veto' over the project of being the last straw for Inpex, which had been left in an untenable position in its bid to find a site. Mr Barnett said that to some extent the people negotiating on behalf of Aboriginals had 'overplayed their hand'. Mr Bergmann statement, that 'at no time did traditional owners or the KLC reject an offer from Inpex of \$1 billion over four years' suggests a very large asking price.³⁹

The following statement by Bergmann provides a very strong clue to his demands.

We don't want beads and blankets but we think we could strike a balance where what's reasonable in other words what the company can afford in fair sharing of their economic wealth. Because they can't develop a major gas (field) and have the long term certainty unless they come on board and do a proper agreement with Indigenous people in Australia. The deal has to be far bigger than what you would call a standard Native Title Agreement where one Native Title Group has a compensation package and throws in a few jobs and training and business opportunities. This has to be far more sophisticated and complicated.⁴⁰

38 Matthew Carney, Interview with Wayne Bergmann, *Four Corners* 22 September 2008 <<http://www.abc.net.au/4corners/content/2008/s2370888.htm>> at 2 October 2008.

39 Jessica Strutt, 'Inpex set out to avoid regulation: land council' *The West Australian* 2 October 2008 <<http://www.thewest.com.au/default.aspx?MenuId=77&ContentID=100702>> at 2 October 2008.

40 Bergman, above n 38.

The more sophisticated and complicated deal is equity in the company.

We would be looking at a range of income models to negotiate with the companies and the State based on the processing of gas on the site and a base rental. We're also looking at having equity ownership. There are certain important things about equity and from past experience we need Aboriginal people to sit on the board of management so we can build our capacity and be directly involved in the decision making and be part of crucial decisions about the management of the site and indigenous participation. If indigenous people aren't sitting on the decision making boards we find that our issues are generally left to the side. So equity that brings that type of participation is really important I think to create world's best practice.⁴¹

A separate negotiation is taking place with Woodside who like Inpex may reject the Kimberley's landfall and bring their gas onshore elsewhere, in their case hundreds of kilometres away at Karratha. 'The discussions are so preliminary, equity hasn't even been raised. There's one thing I'm confident that they will want world's best practice. I'm not certain that will include equity.'⁴²

Using Aborigines and their fundamental struggle for land as a case study it is clear that a charter of rights having played no part in the securing of land may be used to confound the attempts to have Aborigines work their land, or leave it for work elsewhere.

IV Conclusion

There is a class of person, mainly with legal training that believes they have a superior set of instruments in the shape of a charter of rights to overcome Aboriginal disadvantage. In fact, they have instruments that will compound the disadvantage. Those who intervened against the NT Emergency Response were the handmaidens of those who protect the criminal and immoral elements that hold Aboriginal women and children hostage in appalling conditions on Aboriginal land. It is time for the 'chartists' to come out from behind their cloaks and face the fact that the solution to Aboriginal despair rests with tough choices, mostly with teaching Aborigines the same lessons that most Australians teach their children, those of responsibility and reward for effort. A charter of rights begins with fine aspirations for the minorities and ends by using the law as a tool to promote bad policy. For the benefit of Aborigines and the broader community the law should be left in its proper technical role and not abused for political purposes.

41 Ibid

42 Matthew Carney, Interview with Betsy Donaghey, *Four Corners* 22 September 2008 <<http://www.abc.net.au/4corners/content/2008/s2370831.htm>> at 2 October 2008.

Chapter Fourteen

Trust Me – It Will Not Be As Bad As You Think

MAJOR GENERAL AJ MOLAN, AO, DSC (RET'D)

I Introduction

In this article, I give the view of an Australian military practitioner on the issue of a statutory bill of rights for Australia and its impact on the Australian Defence Force (ADF). My study of the law is restricted to those laws that apply to me as a military practitioner, especially the laws of armed conflict, and I have applied those laws during conflict in which the consequences of my actions were extreme.

In the second year of the war in Iraq, as chief of operations to the US commanding general of the Multi National Force – Iraq, I controlled all the operations of all the coalition forces across all of Iraq. I held a US position in what was fundamentally a US headquarters using US forces. I wrote of this experience, including the legal aspects, in a book entitled *Running the War in Iraq*.

Despite the fact that Australian support for the invasion of Iraq was less than universal and therefore perhaps many Australians unthinkingly disagreed with the counter insurgency that followed (in my view, the counter insurgency following the invasion was a just war), the nature of operations in Iraq are the kind of operations that most militaries will face for the foreseeable future. The fighting is in cities, our adversaries pay no heed to any rights, they are violent in the extreme, they are fought among a civilian population, the legality of our position is predominate, and the stakes are huge for all concerned. Our aim in such stabilization operations is to assist the host nation through a normally imperfect government to create the rule of law. This has involved violence and when violence is applied in cities that are still occupied by their civilian populations, non-combatants will suffer.

I have been asked often if I was limited by the laws of armed conflict in the militarily effective way that I could run the war in Iraq. My answer was that it was not so much the laws of armed conflict, or the fear of the International Criminal Court that guided my actions. It was much more my own morality and my ethics as an Australian officer. The laws of armed conflict and their requirements are general in the extreme and part of my responsibility was to interpret such laws for soldiers engaged in close combat. What is important as I conducted operations in which there was not unlimited time for legal musing, was that it was my view of those essential

precepts that guided my actions. I was advised by a lawyer as part of the team that made decisions about who or what was targeted, but we both knew that his role was to advise, and my role was to make decisions.

Bureaucratic reform is something that the ADF has learned to live with but its effect on the efficacy of the ADF has not really been tested over the last 40 years. I claim that we have not seen the full effect on the ability of the ADF to do its job because the level of military operations that the ADF has conducted since Vietnam has not been high, despite a tendency for the military to describe it as so.

The ADF has not been involved with a substantial number of troops in a conflict where it was involved in a high level of combat based on offensive operations resulting in a significant number of deaths since the early 1970s. A concentration on bureaucratic reform may work for a military at peace in its barracks, in peace keeping duties (Somalia or Cambodia), in operations where combat was severely limited (such as East Timor), or in operations where only very small numbers of very experienced and well trained troops conduct intense combat operations (such as Afghanistan). The question must always be: What is the effect of such proposals on the combat effectiveness of the ADF?

As a serving officer with 40 years of experience, most of it in command positions in both peace and on operations, and with experience in other Western militaries as well experience of some Asian and Middle East forces, I have seen the effect of bureaucratic reform in a dozen areas. Most of these have been forced on the ADF, some have been good reforms, but many have been neutral in their end affect, and some, I suspect when we understand their full effect, will have been harmful.

The most obvious harmful effect at the moment is that commanders are prevented from attending to their full range of duties by imposed administrative tasks. In a resourced and logical system, higher level commanders would be provided with teams of assistants to handle such bureaucratic administration. In some areas, such as safety, there has been some increase in resources to enable commanders to keep their heads above the administrative waters. This relieves both them and their subordinate commanders and permits time and intellectual effort to be focussed on core business.

But a consistent complaint from both junior and senior commanders at every command and leadership conference that I can remember has been the detrimental impact of bureaucratic demands over the last few decades, unrelieved by additional resources. The ADF recognizes that it is part of Australian society and that it is not only the ADF that is subject to such burdens. But it is cognizant of the fact that few outside its own ranks (including government) understand what the ADF must be able to do. It also understands that some in our society (and in politics), for naïve ideological reasons, seem prepared to barely tolerate the ADF in its peace

time non-combat roles, and do not see the reduction in the ability of the ADF to conduct effective combat operations as being a disadvantage.

My basic concern of a bill of rights is that this will take its place next to those other bureaucratic reforms that are not just neutral but detrimental to the core operational functions of the ADF. This is because they are ideologically driven or naïve in their application, and the effect on the ADF is either not understood or not considered important.

It is difficult for us to talk of the effect of a bill of rights on the military because we are talking in the abstract at this early stage. We have only the Victorian and the ACT examples to go by in Australia. Both those bills make exemptions, and they do not apply to the military in its capacity as a federal institution conducting military operations mostly overseas. I found it disconcerting recently when it was reported that the ACT could not enact legislation similar to the anti-bikie legislation judged to be essential in NSW, because the ACT has a bill of rights. This may not have been foreseen by the drafters of the ACT bill of rights, or not seen as important because they are not personally affected by bikie violence or organised crime, and so place the rights of bikie groups to associate on an equal level with the rights of others.

I fear that the unforeseen will occur, as it normally does, and the consoling words of drafters of such human rights legislation will be only words, and their handiwork will impact unfavourably on the ADF. The ADF will then be left to pick up the pieces.

I took some comfort that the two most competent militaries in the world, the US and the UK, both operate under exemptions that are either specified or implied. If these two militaries can manage to be effective in a human rights environment, then possibly the worst effects of an Australian version might be mitigated. Perhaps there would be a recognition of the role of the ADF and it be offered certain exemptions.

Neither can we be specific in looking at the challenges faced by the ADF in operationalizing an Act of Parliament that sets out what 'human rights' are enjoyed by all, and how the courts (as they can under the existing ACT and Victorian Acts) will look to international, and foreign law, court and tribunal decisions, to give meaning to what those human rights are.

My point is that if Australia is to have a bill of rights, then those that draft such legislation must be cognizant of the effect of such legislation on the ADF's ability to conduct its next serious war, and not base it on our experience of limited conflict since the end of Vietnam. Even ADF leadership might tend to say that the latest impost is something that the ADF will just have to live with, and that based on operations since the end of the Vietnam war, the ADF might indeed be able to live with. But the ADF does not buy military equipment just for today's smaller and less critical operations. The ADF prepares itself for once-in-a-generation substantial conflicts, and so too should mooted legislation such as a bill of rights.

There are two problems that I foresee. The first is the impact on the ADF's command culture, and the second is 'extra-territoriality'.

II Command Culture

It is not the expectation in most sophisticated militaries that every order of every commander is accepted unquestioningly at every stage of the decision making process, or even during execution. This is a ground for disaster in modern fast moving operations. There may be less questioning at the lowest tactical level – when someone says 'Duck!' it is best to act without discussion. But even at this level, there are very few occasions when an order must be obeyed immediately and to the letter. When that must occur, it is normally of overwhelming importance. Any confusion in the system detracts from effectiveness, especially if that confusion comes from our own side and not just from our adversary.

The best militaries in the world have decision making processes that allow subordinates to question superiors' judgements and so assist the commander to make better decisions. Once a decision is made, on some occasions it must be carried out to the letter. During the execution of an order, there is give and take, there is discussion, there is adjustment and there is a reliance on junior commanders to assess a situation that only they can see. They are required to act logically and not according to a now illogical order given by a remote commander that may be out of date. In the best militaries, commanders are paid to know when to ignore an order previously given which no longer applies. Such flexibility and reliance on the initiative of lower commanders is only successful if it is built on a body of common understanding, on a command culture that permeates the entire organisation. It then results in obedience to orders that are legal, logical, achievable, fully understood and agreed with, and applied to the situation as it exists in reality at the time.

What makes the military different is that the consequence of these orders is that they can result in death, and that they are obeyed even to the risk of death to oneself, and that the legal system under which the ADF operates punishes transgressions in a way unique in our society. This difference must be recognized.

In some ways, technology has facilitated this process, because subordinate commanders can more easily contact superiors to discuss an order. That same technology can work in reverse. That is, it can carry political and military leaders' directions to subordinates very quickly down to a very low level in a more effective way than it can carry a full understanding of a fast changing situation on the ground back up to a remote leader. Prime Ministers can talk to ships' captains. The 'Children Overboard' incident was but one example of the ability of technology to carry information from one command level even to the political level that is far from perfect.

Society must control its military to achieve the political effect it wants from its involvement in a conflict. The best military outcomes seem to be achieved by political leaders that tightly control their military. This, however, implies a need for political leaders to have the capacity to understand the military situation and the advice that their military commanders are providing them. This is not always the case, and the longer that Australian society is without a sufficiently deep understanding of the nature of military operations, the more they will view military operations through the prism of their own limited understanding and their biases. If that understanding distorts military operations by an unbalanced focus on individual rights, even in addition to the laws of armed conflict, at the expense of achieving the political and military aim of the involvement, conflict (and the suffering of the innocents) can be unnecessarily extended.

In the end on critical issues the ADF will always act at the direction of governments, and subordinate commanders will obey superior commanders. But this obedience imposes a severe obligation on political leaders and legislators. ADF obedience should not mean that more attention can be paid to those that make the most noise, and that the ADF can be taken for granted because it will obey quietly.

Governments need to know, once the discussion is finished, that what they tell their commanders to do, they will actually do in the field. Commanders in turn, cannot be expected to keep looking over their shoulders and trying to second guess whether a government or more senior commander has told them to do, is, or is not, rights compliant. Especially if that compliance can never be determined at the same speed as military operations, but can only be established in retrospect.

While the ADF is guided by any number of rules and laws, the essential difference between the treaties Australia is a party to, and a statutory bill of rights is that the treaties do not, on the face of them, make commanders' decisions subject to a possible court order challenging a decision of a commander. Are commanders of the future going to be burdened by having to worry about courts reviewing their military decisions, based on whether a federal judge thinks that a different military or operational decision should have been taken?

Up until recently I would have said that this is ridiculous – it could never happen. I understand that there are a number of models for a statutory bill of rights, and that hopefully, a court would conclude based on the drafting of a statutory bill, that military decisions are not subject to legal review, but the drafting of the United Kingdom's Human Rights Act does not instil me with confidence.

I also note that one possibility is that a bill of rights might be modelled on the Victorian Charter of Human Rights and the ACT's Human Rights Act, allowing the court to make declarations of incompatibility. (The Acts

also require courts to read legislation consistent with human rights principles and this can result in strange interpretations producing a result vastly different from what the Parliament originally intended). This, whilst better than a bill which would allow a court to substitute its decision for the decision of the elected government and its military commanders, still contains significant vagueness to be a cause for concern.

If a proposed bill of rights was specific in its directions and the extent of its authority, and exemptions were laid down unambiguously, then conflict with society's expectations of its military, and what might be permitted under a bill of rights, might be avoided. But this is not the nature of such legislation. The norm is likely to be that neither the government nor the military will be able to tell in advance what the application of an abstractly expressed bill of rights might be. Practice tells us that the expectation of government as to the application of such bills might be different from the view of judges.

The major concern for me is that the unintended consequence of the application of a bill of rights to the ADF will be to replace an operational command culture that is now based on trust between subordinates and superiors, and a reliance on initiative and the acceptance of risk, with a 'safety first' culture that is based on boards of legal review.

III Extra-Territorial Application

There is a part of the proposal to introduce a federal statutory bill of rights that I want to specifically comment upon, and that is the extra-territorial application of a bill of rights to the Australian Defence Force, that is, beyond the limits of the Commonwealth and its Territories. The Commonwealth Parliament has the capacity to legislate with respect to extra-territorial matters – that is, for matters which are outside Australia but have some connection to Australia – 'sex tourism' is an example. The courts here recognise the Commonwealth's power to regulate the conduct of Australian persons outside Australia.

It is my concern that the territorial application of a Commonwealth statutory bill of rights will not be considered within the public debate, and the Commonwealth Government will not give proper or detailed consideration to the operational requirements and challenges of the Australian Defence Force's deployments in various theatres of operation around the globe.

Given the United Kingdom has had a statutory bill of rights and the United Kingdom's statute is being held up by Australian bills of rights advocates as a model, and the UK armed forces are among the best in the world, I think we would be able to look to the UK for guidance. I would have thought that given the United Kingdom's statute was enacted in 1998 and commenced in 2000, and the United Kingdom is, broadly speaking,

engaged in the same theatres of operation as Australia is, this might mean that we could get some guidance from the British experience.

All sorts of assurances were given in the UK as they considered how their Defence Forces might achieve their military objectives whilst also observing their obligations under the *Human Rights Act 1998* (UK) over the last eleven years.

The extra-territorial application of the *Human Rights Act*, I would have thought, would have been something the British Ministry of Defence would have been totally informed about, and advised the government of their position prior to 1998, or at least before that Act commenced in 2000. We can only assume that with the UK's understanding of modern war, they might have demanded from their government a clear answer on behalf of their commanders – are they bound by the Act when engaged in military operations extra-territorially, and if so, what is the nature of the Defence Force's obligations in that situation?

The question was not answered (if it was asked) until nine years after the *Human Rights Act 1998* (UK) was enacted, when the House of Lords in 2007 considered an appeal of a decision from the English High Court in 2004 in the case of *Secretary of State for Defence v Al Skeini* [2007] UKHL 26. The findings make for essential reading for an ADF being asked to trust a government or its drafters. Having been given assurances, the judicial committee of the House of Lords ruled that based on essentially statutory construction grounds, the *Human Rights Act* applies to British Forces extra-territorially.

This is not what the British government thought would apply. It is not what was in the submission to the judicial committee of the House of Lords which stated that the *Human Rights Act* 'does not apply to overseas territories of the United Kingdom' which was seen as a 'a general and well established principle of statutory interpretation'. So it might not only be the ADF that will be surprised by what such an Act might mean in the future, but if the UK experience is any guide, the government will be surprised as well. What price then, all the assurances that will be given?

The British Government, the same government that enacted the *Human Rights Act*, was arguing nine years after its enactment that the Act did not apply to British Forces in Iraq. The challenges presented by the application of the British statute to British forces on operations are only just starting to take shape. And, not wanting to be seen to roll back its Human Rights agenda, the British Government is now stuck with a statute which it argued in the courts did not apply to its soldiers whilst serving extra-territorially. This is a mistake that we are more than capable of making.

My aim was to express my concern about the application of a bill of rights to the ADF, and its impact on the ADF on operations. I expect to be assured by advocates of a bill of rights that the impact will be minimal and exemptions will be given.

If I am to be asked to trust the drafters of such legislation to not place the ADF in a detrimental position through their legislative actions, why is it that I am not assessed as being sufficiently trustworthy, to wage war on behalf of my government and in accordance with my personal morality (a reflection of our society and our military), and the directions of my government and the laws that it makes?

I suspect that my success rate could be more relevant than some legislators.



Part IV:
**Historical and
Cultural Perspectives**

Chapter Fifteen

A Chaos of Rights

PROFESSOR GEOFFREY BLAINEY, AC

So a bill of rights is on the federal agenda again. It sounds so benign and decent, so basic and simple. Who could possibly oppose it? And yet the recurring proposals for a bill or a charter of rights form one of the puzzling outbursts in Australian political life.

The proposal is often made in the name of the people, in the implied name of democracy. We easily forget, however, that this nation is one of the four or so oldest continuing democracies in the world and the pioneer of many successful experiments in democracy. Of the modern nations of the world, it was the first to be created by a vote of the people. It was also the first to be founded on a written Constitution, created by a series of highly democratic conferences and confirmed directly by the vote of the people and unalterable without a referendum.

Democracy here is alive and vigorous. And yet, almost concealed within Australian democracy, is an antidemocratic current or stream of thought. This current has its main haven in the Australian Labor Party, the very party which argues – sometimes validly – that it has been the most democratic of all the political parties in spirit and in action.

The antidemocratic current is often learned and fluent. It is favoured by many senior members of the legal profession. It tends to be tertiary educated. It is careful to wear a democratic suit of clothes even when putting forward proposals which are quite alien to trusted democratic practices. It is not confined to the Labor Party – it is also present in the Greens and in the Liberal Party though definitely outnumbered there.

Even in the parliamentary wings of the Labor Party this antidemocratic current is sometimes outnumbered but it has very powerful supporters. It has many sympathisers in the Canberra press gallery.

Remarkably this strong current is rarely singled out as undemocratic. It avoids scrutiny partly because it formally gives so much weight to the people's rights. And yet while claiming to give rights to the people, it actually takes them away. It tends to demote public opinion and especially to demote Parliament: in short it reduces the power of that institution which underwrites democracy. The 'rights' crusaders hope to assign to judges, either in the courts or other tribunals, powers which in a democracy belong to the people or the Parliament.

This antidemocratic current is also suspicious of the power entrusted to the Australian people by the federal Constitution. In Canberra many Labor

politicians, for some generations, have wished that the people's power to amend the Constitution did not exist. An extraordinary attempt was made by the Scullin government to eradicate the people's referendum. In 1930 his government successfully introduced into the House of Representatives the Constitution Alteration (Power of Amendment) Bill. It would allow a party holding an absolute majority in each federal house to amend the Constitution. No referendum would be required. This proposal, if carried, would have weakened the power of the states and also removed from the Australian people a vital power entrusted to them.

In preparation for the day when the federal Parliament possessed this increase of power, the federal Labor ministry took a preliminary step. Realizing that the High Court would have to declare whether this profound change, and the spirit underlying it, infringed section 128 of the Constitution, it appointed Dr HV Evatt and EA McTiernan to the High Court: both had been Labor politicians in NSW, one in the state and the other in the federal Parliament. Scullin himself did not approve of these appointments: he then was travelling overseas on urgent governmental business and was unable to stop them.

This revolutionary step to disempower the people did not succeed. Labor lacked control of the Senate: indeed it could rely on the support of only eight of the 36 senators. In May 1931 the Senate finally rejected the Bill. Scullin did not persist, adding that there were constitutional doubts. Presumably, even if the Power of Amendment Bill had been passed by both houses, it would have been challenged as unconstitutional, especially by State governments which saw it as an indirect attack on their rights.¹

It is easy to understand the viewpoint of the Labor Party. Generally it was more in favour of unification than federalism. Therefore it decided that the easiest way to promote unification was to remove from the Australian people the power to amend the Constitution. In essence the Labor government of that day was prepared to put democracy lower in its hierarchy of goals than unification and centralisation. Scullin's proposal of 1930 was, in Australian terms, highly undemocratic. It would abolish the nation-wide referendum, that foundation stone which had helped to make Australia since 1901, an exceptionally vigorous democracy.

This same antidemocratic current or tradition expresses itself vigorously in a desire for a bill of rights. The proclaimed aim of such a bill is to enthrone the people's rights. But in making that attempt, it has to weaken the greatest of all rights, the right of the people and their Parliament to decide, in concrete instances, which religious, civic, social and cultural values are important and which values can sometimes be sacrificed.

In 2008 the Rudd government revived plans for a bill of rights. Its first

1 Geoffrey Sawer, *Australian Federal Politics and Law 1929–1949*, (Vol 2, 1963) 23–33.

step, now in motion, is to test the people's views by means of a small, roaming, committee of inquiry. At present the Brennan Committee is hearing views and going to some length to show that it wants to listen. In all the discussions of this inquiry, however, I have seen no reference by Mr Rudd or other federal Labor leaders to the fact that public opinion on this question has already been tested. One crucial test was in 1985–86. A bill of rights, introduced by the Hawke Labor government and debated extensively inside and outside the federal Parliament, aroused such criticism, especially in the Senate that it was quietly dropped.

It is important to review Hawke's proposal to confer on Australia a charter of rights. It embodied unusual principles, most of which will reappear in any future proposal for a bill or charter of rights. In 1986, I found myself becoming one of the leading opponents of Mr Hawke's bill. While I belonged to no political party, and to the best of my knowledge I discussed the proposal with no federal politician, I increasingly felt uneasy. I was then writing regular columns for major newspapers and expressed my unease there. Accepting invitations to speak at public meetings and private seminars on the bill of the rights, I learned much through the process of debate, and altered my views and emphasis here and there.

One memorable public meeting, held in Perth on 6 June 1986, was a foretaste of the public's increasingly critical mood. It was said to be the largest breakfast held in WA up to that time (498 people each paid their \$25); and the audience's sense of surprise showed me how easy it had been for the federal government, so far, to sell the advantages of the bill of rights while remaining silent about the dangers.

My arguments against Mr Hawke's bill of rights² were eventually set out in some detail. A very short summary of my main criticisms is given below, almost word for word.³ They remain relevant to any serious attempt to create for Australia another federal charter or bill of rights

The bill of rights was the most revolutionary change attempted in Australian politics since the introduction of democratic government. It challenged our traditional system of fair play and even the concept of a fair trial. It had the capacity to overturn many of the principles of Australian life and the potential to weaken many of the important institutions.

2 The text of the Bill discussed by the Federal Parliament is available at the Australian Government Publishing Service under the title Australian Bill of Rights Bill 1985, House of Representatives, Cat No. 35 5022 7. Australian Bill of Rights: Explanatory Memorandum, The Senate 1985–86, Cat No. 85 5048 7,

3 Geoffrey Blainey, *Bill of Rights. Bill of Wrongs?..* (Printed pamphlet, Seminar on the Sociology of Culture, La Trobe University, Victoria, 1986). See also the debate with the federal Attorney-General, Lionel Bowen, conducted through long articles in *The Weekend Australian* in 1986: 14–15 June 1986 (Blainey), 21–22 June 1986 (Bowen), 5–6 July 1986 (Blainey).

The Bedlam of Conflicting Rights

The federal government proclaimed that hitherto Australians have lacked civil liberties and rights. Soon, they would receive 32 inalienable rights.

But these rights embodied major contradictions or conflicts. Thus, nothing could be more emphatic than the Bill's insistence in Article 7 that everyone has the right to freedom of expression 'without interference'. But in Article 3 the government claimed the right to interfere with freedom of expression. Again and again one particular right conflicts with another, when translated from grand theory into practice.

The Case of the Missing Rights

The United Nations Covenant, from which derive nearly all western bills of rights, was designed for the Congo rather than for Canberra. Thus Hawke's bill insisted that 'no person should be held in slavery' but proclaimed no right to own private property.

State Rights

This Bill went further than any previous federal law in challenging State laws. Thus, the Hawke government promised that the Human Rights Commission, once the Bill became law, would investigate a host of State laws.

Mass Exterminations

The Bill was alien to the parliamentary system. Thus Clause 11 stated that any Commonwealth Act which is in conflict with these new rights shall, to the extent that it is in conflict, be deemed to be repealed by the bill of rights.

The Bill, while appealing to the principle of certainty, promised to usher in a period of civil and legal chaos.

In essence this was why so many Australians became nervous of the proposed bill of rights. These reasons are likely to apply to any new bill or charter.

Meanwhile, Hawke's bill was in the hands of the federal Parliament. It had been passed by the House of Representatives late in 1985 and then it stagnated. In the new year it was debated for 36 hours in the Senate. No previous legislation of any kind had been debated in the Senate for so many hours. In the end the Democrats joined the Coalition and opposed the bill. Mr Hawke did not persevere, and during or before October 1986 his ministry resolved to drop the bill. He had, however, another string to his bow.

The idea of an Australian bill of rights was far from dead. A hand-picked federal commission of inquiry, much more experienced than the present

Brennan committee, pressed for a bill of rights. Called the Constitutional Commission, it was chaired by Sir Maurice Byers, and Mr Gough Whitlam was one of the six original members. Aided by advisory committees, it made a wide range of strong recommendations on many constitutional matters in June 1988. Even those who did not agree with many of the arguments in the two large volumes would have to concede that they were logically and lucidly presented. As an aside, I debated some of these matters publicly with Mr Whitlam in Sydney in 1988, and he presented an eloquent and learned case, even though most of his audience were not persuaded. It is what the ‘rights crusaders’ omit from their case that arouses the public’s doubts and fears.

The Constitutional Commission, amongst many other findings, called for a lengthy list of rights to be added to the Constitution itself, primarily in section 124.⁴ Mr Hawke was more cautious. He selected only three of the most attractive rights, including freedom of religion and trial by jury, wrapped them up attractively for the federal Parliament to accept, and finally placed them before the people in a referendum in September 1988.

The ‘rights’ were not simply defeated by the vote of the people: they were trounced. In Tasmania and South Australia only one quarter of the voters said ‘yes’. In Australia as a whole only 31 per cent said ‘yes’. Of all the separate questions voted on by the Australian people in all national referenda held since the forming of the Commonwealth, this was the most abject defeat.

And here we are again, about to follow the same route, with scarcely any public recall of these earlier plans and defeats. Indeed much of the ground the Rudd government will peg out again, in its quest for a charter or a bill of rights, is ground previously pegged by the Labor Party, but rejected by the Senate in 1986 and rejected by the people’s vote at a referendum in 1988.

The latest noteworthy attempt to set up a bill or charter of rights was made in Victoria by the Bracks’ Labor government. Called *The Charter of Rights and Responsibilities Act*, it was enacted in 2006. Said to be the likely model for a proposed Commonwealth law, it is full of echoes of Mr Hawke’s bill of rights, thwarted 20 years previously. It even carries verbatim many of the same exotic pledges and rights: ‘no person shall be held in slavery’ or ‘be subject to torture’. It contains many of the same omissions and the ingenious explanations of why those important rights – including the clear right to own private property – are absent or understated. If copied by the Commonwealth, it has possibly the same potential to challenge state rights. It has the same undemocratic tendency to transfer to judges and tribunals decisions about social priorities and values, decisions which should be made by elected parliaments.

4 *Final Report of the Constitutional Commission*, (1988). For the bill of rights, see vol 1, ch. 9.0.

It displays the same chaos of conflicting rights. When first read a charter of rights seems like utopia. But in practice, rights are limited and sometimes nullified. People cannot have every right promised to them because the right which one person specially values might conflict with a right valued by somebody else. If a student gains a right, a teacher might lose another. If an employee gains his right, an employer might lose his right. The rights of parents and young children are often in conflict: neither can be promised an inalienable right.

In the Victorian Charter there is the right, under s16, to join a trade union, but not the right to refuse to join a trade union. There are rights for children but not real rights for parents. You will search the Charter in vain for a definite right to own property: instead there is a crafty excuse for that specific omission. Most of the rights set out can be in conflict with each other, and therefore even rights mentioned will, at times, have to give way to other conflicting rights deemed superior by a court or tribunal. If rights listed in the Charter can at times be trampled upon, how much more readily can rights excluded from the Charter be trampled upon? Admittedly the Victorian Charter is only a state, not a federal law, and is still in its early stages of implementation. It is not necessarily a guide to a federal charter.

It would be unfair and unwise to predict what exactly the Brennan committee will recommend and, more important, what the Rudd government is likely to accept or alter. Irrespective of the specific document drawn up, the punitive and arbitrary effects of any charter or bill of rights will be there. Parliament will have less power, the people indirectly will have less power, and the tribunals and courts will have more power. The bureaucracy, especially the Human Rights Commission, will have considerable power to intrude into people's lives. In essence the people will have less say on a range of matters important to their personal lives – the family, religion, property, culture, privacy, work, liberty, justice, and many topics. Instead, the judges will be imposing their preferences on vital human values and attitudes. They will be judging matters that could well be called political and social rather than legal.

The law is a noble profession and it has played a crucial role in the English-speaking world. It also attracts wide talent – more, probably, than ever before. But there is nothing in a legal training, background and experience, which enables senior members of the profession to be the main determinants of what should be the important values of a democratic society. Even if judges normally determined these everyday and personal matters with a little more wisdom than the rest of us can provide, why should they be allowed to determine them? After all, many of the matters they will decide upon are primarily political rather than legal. The essence of a democracy is one person-one vote. There is no valid reason why these unelected judges, worthy and lucid as they usually are, should be each given the equivalent of a million votes.

I am not against the legal profession. I would raise the same objections against an Australian court or tribunal dealing with social values and consisting solely of leading academics; or a tribunal composed solely of leading bureaucrats, or leading historians or scientists, or leading churchmen and philosophers, or leading philanthropists, or even a round table of those deemed to be the most learned in the land. Experts are vital, but in a democracy they should be harnessed to those tasks they do best. We would not ask five Einsteins to determine the social values and priorities of the world.

The essence of a democracy is that the people should decide matters of concern, usually at the ballot box and then through the debates and decisions of their elected representatives. In contrast the delegating of matters of deep personal concern to a superior court is alien to a democracy and especially to the traditions of Australian democracy. It is alien, too, to the strong traditions of the Australian Labor Party.

Once again we will hear the familiar lament. We will be told that Australia is one of the few countries without a bill of rights, or without its rights jeweled into its Constitution, and that in consequence we must all smarten ourselves up. A few words should be offered in reply. In fact many of the countries that have enshrined the rights of their citizens grant them, in practice, few worthwhile rights. Dictatorships especially love to display to the outside world a bill of rights. Dictatorships and tyrannies have even played a prominent part in shaping the international covenants on these matters – covenants which in turn strongly shaped the rights chosen and the rights shunned by Mr Hawke and Mr Bracks and other Australian political leaders eager for change.

It really is a strange argument – that the laws and rights of the people of all nations should be alike. There could be no experiments in the world, even the heartening experiment with democracy in the modern era, if it were agreed that all nations must hold the same basic laws and illusory safeguards.

Chapter Sixteen

From British Rights to Human Rights*

DR JOHN HIRST

What has been the attitude of Australians towards the state? Many scholars have attempted to answer this question, most following in some degree the classic formulations given by Keith Hancock 70 years ago.¹ The question has been of particular interest to those who want to understand the history of human rights in Australia.

But in this matter as on others we will reach only a partial answer if our aim becomes the discovery of what was distinctively or peculiarly Australian, for this society was for most of its history a dependent society, as much British as Australian.

If, following Hancock, we say that Australians had a pragmatic, utilitarian, remarkably unsuspecting attitude to the state, this is only in part true. Australians were certainly creative in finding new purposes for the state, but it was still a British state in a British society and Australians fully shared in the stock understandings of what that meant. They knew the history and peculiar virtues of the British state, a grand narrative that encompassed tyranny, liberty and rights. It was because they were so certain that their British rights were protected that the Australians expanded the activities of the state so unconcernedly.

To gain an idea of the strength of this British tradition in Australia listen first to Robert Menzies as Commonwealth Attorney General speaking in Westminster Hall, London, to a gathering of the Empire Parliamentary Association in 1935:

I am confident that our parliamentary system is going to see it through. And why? Because its roots are deeply set in the history and character of the British people. In those countries where it has fallen, a parliament was adopted as the embodiment of an attractive theory. As a fully-grown tree it was carefully transplanted and watered and cared for. And at the first real blast of the storm it fell.

Will our parliaments survive? I believe that they will. The growth of parliament is in truth the growth of the British people; self-government here is no academic theory, but the dynamic power moving through 800 years of national history.

* *This paper was delivered at a seminar on human rights organised by the Monash University Law School in December 2003. This paper is republished with permission of the author.*

1 W.K. Hancock, *Australia*, (1930).

We are told today that the parliamentary system is antiquated, that it is slow, inefficient, illogical, emotional. In the presence of each charge, it may admit to some degree of guilt. But with all its faults, it retains a great virtue, alas! in these days, a rare virtue. Its virtue is that it is the one system yet devised which ensures the liberty of the subject by promoting the rule of law which subjects themselves make, and to which everyone, Prime Minister or tramp, must render allegiance.

We British people still believe that men are born free, and that the function of government is to limit that freedom only by the consent of the governed.²

It might be objected that Menzies was a notable Anglophile. So listen now to Doctor H.V. Evatt the chief opponent of Prime Minister Menzies' attempt to ban the communist party in 1950–51. As chair of the General Assembly of the United Nations in 1948 Evatt had proclaimed the Declaration of Human Rights, but it was not to that document that he referred in denouncing Menzies proposal:

This represents a direct frontal attack on all the established principles of British justice...this is one of the most dangerous measures that has ever been submitted to the legislature of an English speaking people. I do not think that a bill of this character would receive a moment's consideration from the mother of parliaments, the British parliament, for in that parliament traditions of political liberty and established justice are always recognised and, are, indeed all powerful.³

The points for speakers that the Labor Party produced for campaigners for a No vote in the referendum to ban the Communist Party in 1951 began in this way:

The powers being sought by the government constitute a frontal attack on all the established principles of British justice.

And concluded:

The amendment is contrary to the whole spirit of the Constitution (by which was meant the British constitution, not the Commonwealth of Australia Constitution Act 1900)

The amendment involves the sacrifice of Magna Carta and the rule of law.⁴

2 *The Times*, 5 July 1935.

3 *Commonwealth Parliamentary Debates*, Vol. 213, (1951), 1213.

4 *Speakers' Notes*, Issued by the Australian Labor Party, NSW Branch, (1951).

Speakers could confidently refer to Magna Carta and the constitution for the understanding of these matters was not confined to the elite. The history children studied at school was British history and its chief themes were parliaments gaining control over kings and the people gaining the right to elect the parliament and having the right to a fair trial before an independent judge. The children were being taught what their elders already knew: Magna Carta, John Hampden and Ship Money, Star Chamber, Charles I losing his head, Judge Jeffreys, the Glorious Revolution, the first Reform Bill. And those who didn't know these particularities knew at least the slogans of British constitutional liberty: Britons never will be slaves; the Englishman's home is his castle; it's a free country; fair play, I'll have the law on you – which were heard as often in Australia as in Britain and which are a far cry from a utilitarian calculus.

Part of the pride in being British was that British rights did not have to be enshrined in one document. They were immanent in the practices and conventions of government and law and were culturally or, even more securely, racially embedded in the British people, who everywhere understood and valued them. Until the 1960s there was no serious debate in Australia over whether a bill of rights was required. In 1959 representatives of the Labor and Liberal parties on a parliamentary committee on the constitution agreed that there was no need for a bill of rights (which had no strong advocates). They were confident that an executive responsible to parliament would not be able to infringe rights. As Brian Galligan reports this was the last time there was bipartisanship on this issue.⁵

Advocates of a bill of rights in recent times have argued that parliament is a poor defender of human rights particularly in Australia where party discipline is so strong. Party discipline has been strong, but party has only in recent decades colonised question-time which was the chief mechanism for government being held to account. Government backbenchers in previous generations were not so craven as to ask a minister in question-time to explain the success of government policy in some area and to comment on any other proposals of which he is aware – that is, to bag the opposition.

I opened the 1959 Hansard at random and examined question time in the House of Representatives on 10 March. The Liberal backbencher Malcolm Fraser asked a Liberal minister whether it was true that wool was to be replaced by synthetics in the manufacture of army uniforms and blankets. The Liberal backbencher James Killen asked a minister whether he had the power to prevent the export of koala bears. And there were two questions concerning rights. William Riordan, a Labor member, asked the Minister of Territories whether it was true that a widow in the Northern Territory was being prevented from mining on her own freehold land. Clyde Cameron,

5 Brian Galligan, 'Australia's Rejection of a Bill of Rights', *Journal of Comparative and Commonwealth Politics* (1990) 344, 351.

later a Labor minister, asked Menzies quite unaggressively whether he had followed up his (Cameron's) suggestion that Aborigines residing on mission stations should receive the benefit of social service legislation in the same way as other people.

Quite rapidly in the 1960s and 1970s Australia ceased to be British. In the composition of its population it was becoming less British but the key factor was simply that Britain abandoned its leadership of world-wide British society. Australians for the first time became simply Australians and their British heritage dropped away. They retained the English parliamentary system and English common law but lost touch with their sustaining myths. What they knew of their system of government was eventually reduced to current politics: scandal, broken promises, ego-tripping. The party faithful had their reasons for a continuing attachment to political life, but then parties lost their social or class identity and the number of the party faithful plummeted.

At the same time part of the political elite became enthusiastic for creating new rights and entrenching old ones. The Labor Party added civil liberties and law reform sections to its platform in the late 1960s. Senator Lionel Murphy, who was their chief advocate, was careful to say that Labor's plans for economic change were still necessary, but as the party became less ambitious on this front the creation of rights and new protection of rights became an important part of its agenda.⁶ On the other side of politics, there was some support for this agenda but the Liberal and National parties refused to support what Labor regarded as the necessary capstone of the new order, a Bill of Rights.

These advocates of rights regarded the unsystematic, unentrenched British system of rights as totally inadequate. Its lack of formality was now depicted as a weakness, not a strength. Instead of rights being secure within the very fabric of society, they were perilously superficial. The model for the new advocates was the United States Bill of Rights and the UN Declaration of Human Rights and its successors. The British heritage of the polity was not simply being quietly forgotten; it was being hurried off the stage. This is the great disruption in the history of our civic life.

The new rights were to secure citizens liberties as against big government and large corporations but they were also to be directed against the social restraints placed upon marginalised and minority groups. No discrimination was the formula with the grounds of illegitimate discrimination being steadily widened. Murphy's list in 1969 was colour, race, sex, creed or politics.⁷ To this has been added age, sexual preference, physical handicap.

These policies have been so overwhelmingly successful that no argument of principle can be raised against them. But to call them policies is misleading;

6 Ibid 352-55.

7 Australian Labor Party, *Platform, Constitution and Rules*, Trades Hall, Adelaide, (1969), 31.

they were the instincts of a social revolution much more powerful than any political party could conjure up and whose sources still remain a mystery. Suffice it to say that the libertarian revolution of the 60s and 70s, with its attacks on social hierarchies and restraints of all sorts, was as strong here as anywhere else in the world. Rights was the watchword of the greatest social transformation in our history.

The institutional legacies of the new movement for rights are the Ombudsman, Administrative Appeals tribunals, Equal Opportunity commissions, the Human Rights Commission – but not a Bill of Rights.

Two things surprise me in the alarmist and despairing writings of those who will not rest until there is an Australian Bill of Rights. First a reluctance to examine soberly what the new institutional arrangements in Australia have achieved. Complaints about police can be heard in Canada as breaches of the Charter of Rights; in Australia they can be taken to an ombudsman or some specialist tribunal. It is not clear to me that one mode is clearly superior to another.

I am even more surprised when the advocates of a Bill of Rights offer explanations of the Australian failure to produce one. They say that Australia has ‘a culture wary of the discourse of rights’ and that ‘a ‘culture of rights protection’ still has to be fostered.’⁸ Brian Galligan has baldly declared ‘Australia does not have a rights culture’.⁹ It often seems to me that we have had in these last decades a rights culture and nothing else. I myself tried fruitlessly to combat it. Some 10 years ago I wrote that the left were not serving their own cause well by their new enthusiasm for rights. I dealt with the cases of public housing and public education under the Victorian Labor government of the 1980s.¹⁰ The government, wanting to empower the tenants on public housing estates, provided tenant workers as their advocates. The tenant workers proclaimed that there was a right to housing and that tenants could not be evicted for non-payment of rent. Rent collections fell catastrophically and the Housing Commission was unable to sustain, let only expand, its operations. In schools students were proclaimed to have a right to education and it became much more difficult to suspend or expel disruptive students who threatened the quality of education being offered to the rest. In these cases rights spectacularly trumped utility.

I appeal for support on this point to James Allan who spoke at a previous Monash seminar on human rights. He said:

8 Hilary Charlesworth, ‘The Australian Reluctance about Rights’, in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994), 21; George Williams, ‘A Community-Based Bill of Rights’, in Tom Campbell, et al (eds), *Protecting Human Rights: Instruments and Institutions*, (2003), 254-5.

9 Galligan, above n 5, 365.

10 John Hirst, ‘The Left and New Rights’, *Overland*, (1991), 23-8.

I take to be uncontroversial the claim that most moral and political debate is these days conducted in the language of rights. Nearly two decades ago H. L. A. Hart was already of the view that 'the doctrine of human rights has at least temporarily replaced the doctrine of maximising utilitarianism as the prime philosophical inspiration of political and social reform'. The language of rights, with its connotations of entitlements and at times stark absolutism, is to most people immensely emotionally attractive and seems often to carry with it a capacity to overwhelm all disagreement not itself framed in terms of rights.¹¹

So I think the absence of a bill of rights in Australia has been over explained. If Labor had controlled the Senate during its periods of office in the 1970s or the 1980s there would have been a Bill of Rights. Its continuing absence does not indicate a lack of interest in rights among the political elite, but that the rights agenda has been pursued through other institutional structures. It happens that a bill of rights has become a partisan issue; equal opportunity commissions have been much less so.

When parliamentarians, state and federal, were asked in the early 90s whether they thought human rights were adequately protected 78 per cent answered that they were well protected. This strikes me as informed judgement from those who knew the institutional arrangements. The people at large on the other hand gave a directly contrary verdict; 54 per cent did not think that human rights were well protected and 72 per cent wanted a Bill of Rights.¹² If they strongly wanted a Bill of Rights, it would make its absence more difficult to explain. However, I read this result chiefly as an expression of the resentment against politics and politicians, a similar phenomenon to the support for a directly elected president under a republic.

Hilary Charlesworth concluded her 1994 essay in support of a Bill of Rights with these words: 'what is most crucial is for Australians to develop a new, non-utilitarian notion of democracy; a sense that something is wrong if minorities and disadvantaged groups within our society have less possibility of having their human rights observed than socially dominant groups'.¹³

There is a widespread belief in Australian society that our history over the last few decades has been the reverse of what Hilary Charlesworth posits; that is that the disadvantaged and minorities have been given far too much attention. It is this feeling that lay behind the success of One Nation and to which John Howard has appealed. His slogan at his first election victory in 1996 was 'For all of us' and he appeals to what he calls the mainstream and to the battlers whose life is not easy but who have been neglected while career women, gays, ethnics and Aborigines have been claiming successfully to have their rights respected.

11 James Allan, 'A Defence of the Status Quo', in Campbell, above n 8, 184.

12 Philip Alston, 'An Australian Bill of Rights: By Design or Default' in Alston, above n 8, 6.

13 'The Australian Reluctance about Rights', in Alston, above n 8, 53.

John Howard's success and particularly his ability at two elections to win the support of a majority of blue-collar workers has made Labor more wary of pursuing a rights agenda and championing minority causes. But more disheartening for those who still want to see a Bill of Rights is the philosophical rejection of a rights agenda by prominent Labor figures.

Lindsay Tanner writes:

Simple concepts of liberation no longer provide answers to contemporary social problems. Our most pressing problems are a reflection of insufficient social order and security, not an absence of personal rights and freedoms. The liberationist left has little to say on the very serious issues of social disintegration facing Western societies.¹⁴

Mark Latham made a similar diagnosis. He insisted that Labor should rebuild communities; re-connect people in creative ways so that they can co-operate for their mutual benefit. The rights agenda has been a mistake – in his words – ‘subdividing society into a collection of single identities based on race, gender and sexuality. Far from creating social connectedness, this process has generated social resentment, especially among those groups excluded from positive discrimination programs’.¹⁵

Another straw in the wind has been the complete transformation in the debate over Aboriginal policy. Previously when Aborigines were discovered to be disproportionately unemployed, poorly educated and unhealthy the progressive response was to declare that their rights were being infringed or that they needed new rights. Now Noel Pearson and others in Cape York are saying that Aborigines need to get off welfare and establish a viable economic base for their communities – and that rights need to be restricted. Alcohol and drugs must be prohibited and perhaps restrictions placed on how Aborigines spend their welfare money to ensure that they do not neglect their children. The priority is to re-establish community cohesion and discipline. These Aboriginal leaders openly criticise the formulas of their progressive sympathisers. Here, where it had been all powerful, the rights paradigm has been broken.

The advocates of human rights have been regularly criticised for their lack of concern about community, to those social circumstances in which rights can be successfully claimed and enjoyed. For a long time this criticism had little impact against the libertarian tide. I sense now that the balance in the culture is beginning to tip against the advocates of rights.

The community for human rights is humankind. This has been their great strength. People anywhere on the globe can claim them – those who have never enjoyed them; those who are being deprived of them – and they

14 *The Age*, 1 September 2003, 15.

15 Mark Latham, *From the Suburbs: Building A Nation From Our Neighbourhoods* (2003) 38-9.

can appeal to a global public opinion for support and to some, as yet, fairly weak institutional enforcers. 'Human rights abuses' is a cry that is heard.

However, the people of the globe live within nation states and it is within these communities that rights will be enjoyed or not. The advocates of human rights envisage that rights will be extended and protected by shaming or threatening the nations into compliance. Australian advocates of human rights regularly declare that our international obligations are being breached by our failure fully to comply with UN covenants and that our reputation will suffer in the court of world opinion. I must say that these appeals always rankle with me. Australia is depicted as some hopeless laggard – all the world but us refuses to allow the Catholic Church to escape equal opportunity principles! And the world for these purposes does not include regimes which lock up torture and kill their opponents. Why do these appeals rankle? Because I have a sense that the human rights record of this society – except in regard to Aborigines – is outstandingly good and that its foundations are much older than UN declarations.

But there are social groups to whom these appeals can successfully be made. Katharine Betts at Swinburne University identifies them as the cosmopolitans, people who are well educated, well travelled happy with the new global economy; the opposing group are the parochials worried about outside forces and content with old Australian values. She sees this divide as highly significant for our politics and for attitudes to immigration.¹⁶ The cosmopolitans were certainly the dissenters over the Howard government's treatment of the Tampa and border protection. They identify their predominant response to these policies as feelings of shame, not simply because the policies departed from supposedly kinder policies of the past but because, allegedly, they reduced us in the opinion of the world.

Perhaps the cosmopolitans will eventually grow to be a majority, but that is a long way off. We can check where we stand at present by looking at the government's efforts to protect Muslims in Australia after the September 11 attacks. John Howard, following George Bush's example, visited a mosque. There Muslim spokesmen identified themselves strongly as Australian and the Prime Minister extended to them the 'hand of Australian mateship' and told them they were 'a treasured part of the Australian community'. He urged Australians not to attack Australian Muslims because of the destruction of the twin towers.¹⁷ That is, if Muslims were to be protected, they had to be identified as part of the Australian community, not just as human. From which I conclude that human rights are not enough, that if rights are to be protected there must be a community in which people care about each other's rights – as there was in Australia when the people and their rights were British.

16 *The Great Divide: Immigration Politics in Australia* (1999).

17 *The Age*, 18 October 2001, 2.

Chapter Seventeen

There is More to It Than Meets the Eye!

THE HON BRONWYN BISHOP, MP

Twenty-one years ago the Hawke Government put a series of four referendum questions to the Australian people to entice them to amend the Constitution. The final question was an attempt to place a mini bill of rights into our Constitution with a promise of more to come. Travelling the country talking to people about their attitudes to inserting a bill of rights into the Constitution it soon became apparent that, despite initial support for the concept, the longer the debate went on the more Australians became concerned about the effect a bill of rights would have on Australia. When Australians came to vote on inserting a bill of rights into the Constitution they overwhelmingly voted against the proposal. In the final result only 30.79% of Australians voted to insert a mini-bill of rights into the Constitution. In other words virtually 70% of Australians voted 'No' to a bill of rights. This remains the worst defeat for any referendum question since Federation. Australians were rightly sceptical of having a bill of rights in 1988 and I do not detect that that basic scepticism has changed. And despite the Rudd Government's declaration that it is not interested in constitutional amendment to entrench rights, the lessons learnt from the last Labor Government's attempt to entrench rights are prescient.

The most important part of the process of the 1988 proposed bill of rights was without doubt the fact that the people were allowed to exercise their most precious right – the right to vote – to decide the question for themselves. But Australians won't get a say under the current proposal. In 2009 we have a surreptitious body touring the country, at our expense, talking to small groups of people and this is meant to overcome the need to let the people have a say and exercise their right to vote.

By proposing a so called charter of rights, which would be only an Act of Parliament (as distinct from a constitutionally entrenched bill of rights which would require a referendum) the people are denied their right to express their view on what is a highly significant issue.

Despite the technical differences a charter of rights has many of the same unintended consequences as a constitutionally entrenched bill of rights. These are starting to emerge in Victoria which has followed such a path. The agreement between the states, other than Victoria, to take joint action against outlaw bikie gangs is a potent example. Victoria is unable to take action because its government believes targeting a lawless bikie gang probably contravenes the freedom of association provisions in its Charter of Rights

The idea that the Victorian people would have voted to have a law which prevented police taking action against a lawless bikie gang is ludicrous. But the reality is that their 'betters', the politicians who comprise the Government of Victoria, did not ask them to vote on the Charter – they merely imposed it. If the Government gets its way the same thing could happen at the federal level.

I Lessons from 1988

In the 1988 referendum the Government took the KISS approach – keep it simple stupid – in an attempt to lull the Australian people into a false sense of security. Indeed the tactic appeared, initially, to be working. Polling showed the propositions were supported by up to 80% of respondents. So arrogant was the Government that it reduced the timetable to allow only three months (down from 6 months) to publicly debate the issue prior to voting in a referendum. It further decreed that four ticks (i.e. 1 for each question) would be a valid “Yes” vote but only four crosses indicating a “No” vote would be invalid because, they argued, a cross could mean Yes!

But the people weren't fooled.

We, the Opposition, ran a strong and informative “No” case with a Task Force on which I was the NSW representative having put up a strong argument in the Party Room for a No vote for each of the four referendums. Peter Reith chaired the Task Force and each state and territory had a representative on it. Overall our theme was Australia has a strong Constitution – why weaken it? Vote “No”.¹ However another theme I used again in my Bishop Report, and I believe is relevant again is ‘There's more to it than meets the eye!’²

One thing became apparent early on. There is a significant difficulty in trying to reduce rights to paper. Things that might initially sound innocuous have real and unintended consequences. Each of the papers that we presented highlighted that point. The same point can be made in relation to the proposed Charter of Rights. While no one would be against, for example, freedom of speech in principle, people have strong views on defamation law, tobacco advertising and hate speech. Similarly while I would always defend the ability of law abiding Australians to freely practice their religion, as I point out below, placing freedom of religion in a Bill of Rights might affect the ability of the state to provide aid to non-government schools. Bills of rights create greater uncertainty because their language needs to be interpreted by Courts who may take a broad or narrow view of what the sparse and

1 This was our Taskforce letterhead throughout the campaign

2 Bronwyn Bishop, ‘Freedom of Religion: The real issues’ in Peter Reith, (ed) *The Reith Papers, : A Series of Papers and Related Material on the 'No' Case Opposing the 1988 Constitutional Referendums* (June 1988).

vague words mean. This concern formed the background of our opposition to the 1988 referendum proposals.

The Task Force ensured that the ‘No’ campaign was supported by well researched arguments. Accordingly members of the Task Force wrote papers on each of the questions.³

The paper on Question One – to allow simultaneous elections for the House of Representatives and Senate with the term of members of the House increased to up to 4 years and Senators terms to be reduced from 6 years to 4 years was, however, a paper delivered by a retired public servant Ewart Smith OBE LLB to a seminar at the ANU in July 1988.

Peter Reith, as Chairman of the Task Force and Shadow Attorney-General, wrote the paper on Question Two ‘Fair & Democratic Elections’ designed in reality to allow the Commonwealth to set electoral boundaries for the states.

The third question proposed the inclusion of local government in the Constitution and the relevant paper was appropriately written by Ray Braithwaite the Shadow Minister for Local Government. The Hawke Government argued that the amendment would protect local government to ensure its continuance. However when you look at the words proposed to be inserted into the Constitution it was for a ‘system of local government’ which could include non-elected bodies and would no doubt be subject to legal challenges as to the meaning of ‘system of local government’.

Question Four which provided for the mini Bill of Rights essentially contained three parts. The wording of which asked voters to approve a law ‘To alter the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government’ with three different topics addressed in one question. This meant that it was not possible to agree with one or two proposals if an elector disagreed with any of the proposals he or she had to vote ‘No’. Each of the three issues was addressed by a separate paper.

The proposal to ‘extend the right to trial by jury’ was dealt with by Senator Richard Alston as a Member of the Task Force. Alston pointed out that the Government’s language was deceptive. The fact is that rather than extend the right to trial by jury it would have potentially lessened it by taking away the right to trial by jury from anyone facing a sentence of two years or more.

Further, in my view, if a State were to reinstate the death penalty, the Constitution would not guarantee the right to trial by jury. This is what happens when there is an attempt to define rights by description. The result is that rights are lessened because those defined become the exclusive list and those left out lose standing as rights.

3 These papers were later collected as Peter Reith, above n 2.

Senator Alston also prepared the paper on the question of fair terms for persons whose property is acquired by any Government. He again pointed out and I quote 'that this was yet another example of political grandstanding designed to enable the Commonwealth to get into the business of re-writing a State's powers and duties when the Founding Father's clearly intended that the Commonwealth should do no such thing.'⁴

The paper on the freedom of religion question was prepared by me and I paid particular attention to the effect this proposal would have on questions determined in the DOGS – Defence of Government Schools Case of 1981.⁵

The issue of state aid to private schools had been a very divisive sectarian debate beginning in the 1960's. State and Federal Governments made the decision that there was sense in providing financial assistance to non-government schools and enacted legislation accordingly. The principled policy argument in favour of state aid is that the state has a responsibility to ensure that children are educated. The parents who send their children to non-government schools pay taxes which help the state discharge this duty and at the same time they relieve the state of the financial burden of educating all children. Therefore in recognition of its duty to educate children the state provides money to children who attend non-government schools as well as government schools.

Section 116 of the Australian Constitution provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The meaning of s116 was tested in the High Court in the DOGS Case. This case established that state aid to religious schools does not infringe the Constitution. The argument was put to the High Court by the counsel for Defence of Government Schools that, because buildings or money allocated to or appropriated for church-based schools for education could have had an ancillary usage for the promotion of religion, this constituted a law for the establishment of a religion or for the imposing of a religious observance and as such was in breach of the Constitution. That argument was rejected by all but Murphy J. Sir Garfield Barwick, the Chief Justice, said in his judgment:

4 Richard Alston 'Acquisition of Property on Just Terms: the Real Issues' in Peter Reith, above n 2

5 *Attorney-General (Vic); Ex Rel Black v Commonwealth* ('DOGS case') (1981) 146 CLR 559.

A law which in operation may indirectly enable a church to further the practice of religion is a long way away from a law to establish religion as that language properly understood would require it to be if the law were to be in breach of s 116.⁶

He said further:

The law must be a law for it, i.e. intended and designed to set up the religion as an institution of the Commonwealth.

Stephen J held:

the conjunction of ‘establishing’ with ‘law’ with ‘religion’ gives it a particular meaning . . . to speak of a religion being established by the laws of a country may well be to include much more than the act of according material recognition and status to a set of beliefs, a system of moral philosophy or particular doctrines of faith; it would certainly include the recognition of a particular religion or sect, with its priestly hierarchy and tenets, as that of the nation.⁷

Mason J really made the bottom line statement when he said:

. . . as I have already indicated, the principal obstacle to an acceptance of the plaintiffs’ argument lies in the words ‘any law for establishing any religion’.⁸

He went on to say:

the form of religious inequality which has been forbidden by s. 116 is that form of religious inequality which is expressed by the critical words ‘any law for establishing any religion’.

Our concern with the referendum proposal was that the words used by the Government ‘to extend freedom of religion’ might, in an appropriate case, cause the High Court to reconsider its previous ruling. The question of freedom of religion became a touchstone and was seen to affect each individual voter in a much more personal way than perhaps the more esoteric questions dealt with earlier did.

The proposed change to the Constitution was to remove the words ‘make any law for’ which was so fundamental to the decision in the DOGS Case. This made a mockery of the Government’s desperate attempt to convince the people that nothing would change with regard to state aid if this referendum was passed. This was patently, arrant nonsense. Clearly the

6 (1981) 146 CLR 559, 583.

7 (1981) 146 CLR 559, 606.

8 (1981) 146 CLR 559, 617.

way would be opened for the High Court to distinguish the DOGS case and come to a contrary view. As I said in my paper of June 1988 'This proposed amendment could again see all the bitterness that abounded in the previous (State aid) debate rage again'⁹.

There was another practical concern that related to the concept of extending religious freedom and the necessary fetters which must apply to all freedoms within a democratic society. The overriding concern with the concept of extending religious freedom is the legitimate desire of a society to have religious practices not offending against established interests and freedoms. That was acknowledged by the Constitutional Commission when it said, at page 624 of volume II of its report:

Like all freedoms, however, freedom of religion cannot be absolute. It must be qualified at times by other social interests and freedoms.

The use of religion to justify unacceptable practises like female circumcision designed to desensitise young girls and sexual and psychological abuse in marriage are unacceptable in Australia and should not be allowed to become acceptable because of loopholes created by a bill of rights.

II Other Factors in the Success of the No Case

There were three other factors that contributed to the success of the No case. The first is that a range of credible experts cast serious doubts on the Government's claims about the effect of the amendments. The former Chief Justice of the High Court, Sir Harry Gibbs warned on the local government question:

One cannot safely assume that any general provision will have no more than a symbolic effect. One can understand how some may feel that a constitutional provision recognising the existence of local government may, in time, prove to be the nether millstone on which the power of the States will be ground exceedingly small; the upperstone, the Commonwealth power, being held firmly in place.¹⁰

An opinion was given by David Bennett QC (who later became Commonwealth Solicitor-General), in August 1988, supporting the argument put forward for the No case on the freedom of religion question.¹¹

The Catholic Bishops endorsed the position of the No case particularly on the question of freedom of religion. Initially there had been a belief that

9 Bronwyn Bishop, above n 2.

10 Federal Coalition Taskforce, 'Former Chief Justice Delivers Warning on Referendums' (undated).

11 David Bennett, 'Opinion: Effect of the Proposed Amendment to Section 116 of the Constitution' 10 August 1988 in Peter Reith, above n 2.

the Government and particularly the Catholic members of the Government would not do anything to jeopardise state-aid for their schools. I had the opportunity to meet with a variety of senior Clergy and explain how no-one, no matter how well disposed, could give an assurance as to how the High Court would construe new wording in the Constitution. I explained that a deliberate decision to change the wording of s 116 of the Constitution would necessitate a new interpretation. The safer course was therefore to vote No.

The second factor in the success of the No Case was the televised debate on Thursday night before the Referendum.

The participants in the debate were, for the Yes case, Hon Lionel Bowen MP, Attorney-General, Hon Gough Whitlam, former Prime Minister and Sir Maurice Byers, former Solicitor General – and for the No case Hon Peter Reith MP, Shadow Attorney-General, Senator Bronwyn Bishop, Task Force member and Professor Lauchlan Chipman from Wollongong University.

The debate focused attention on the complexity of the four referendums which, as stated earlier, the Hawke Government had portrayed as simple and straightforward. In fact, if passed, thirty three changes to the Constitution would have been required.

A significant part of the debate concentrated on the freedom of religion question and the threat it posed to state aid for religious schools. It afforded an additional opportunity to publicise the support of the Catholic Bishops for the No case and the fact that no-one could say that the DOGS case decision would not be changed if the proposed wording was inserted into the Constitution.

The third factor was Peter Reith's success in the High Court¹² in having a declaration made that certain parts of the two proposed Government TV advertisements were in breach of s11(4) of the *Referendum (Machinery Provisions) Act 1984* which prohibits the expenditure of Government money on the argument in favour of, or the argument against, a proposed law with certain formal exceptions. The Government had spent money on two advertisements which contained the following commentary:

Advertisement 1.

Over two years ago, the Constitutional Commission representing a cross-section of Australians began a review.

They held public meetings in each state and accepted over 4000 submissions.

Their recommendations form the basis for 3 of the 4 proposed amendments on which you'll be asked to say yes or no in the September 3 Referendum.

12 *Peter Keaston Reith v The Hon Mr Justice Morling and Others* (Unreported, High Court of Australia, Dawson J, 12 August 1988).

Advertisement 2.

Just as our Federal Parliament has outgrown its old home and moved to this magnificent new Parliament House, you have the opportunity on September 3 to review our Constitution.

The TV Advertisements relied on the assertion that a body i.e. the Constitutional Commission representing a cross section of Australians (which it did not, its members were all lawyers: former Prime Minister EG Whitlam, former Solicitor General Sir Maurice Byers and two legal academics professors Leslie Zines and Enid Campbell) had conducted a two year review, held public meetings in each state and accepted (probably meaning received) over 4000 submissions was sufficient reason to change the Constitution in accordance with their recommendations. The effect of the declaration made by Dawson J was that the two advertisements did not go to air as they breached the *Referendum (Machinery Provisions) Act 1984*.¹³

III Conclusion

No doubt when the National Consultation Committee on Human Rights reports on 31 August 2009 they too will say they have consulted for almost a year, held public meetings and received/accepted submissions and will say these consultations provide sufficient reason to implement their recommendations. This committee's task is to look at which human rights and responsibilities should be protected and promoted, are these human rights currently sufficiently protected and promoted and how could Australia better protect and promote human rights.

The big difference between the recommendations of the Constitutional Commission in 1988 and the recommendations of the National Consultative Committee – a committee no more representative of Australians than the 1988 Constitutional Commission – in 2009 is that in 1988 the people were entitled to exercise their most precious right – the right to vote. But in 2009 their betters i.e. the Government, will impose upon the Australian people, by way of legislation and without a referendum a charter of rights – just like Victoria. No Australian will have the opportunity to have a direct say on an issue that will fundamentally alter the balance of our polity.

Why you might ask is the Government taking this route? The answer is obvious, they believe they cannot win a referendum to insert a bill or charter of rights in the Constitution so they will just enact ordinary legislation.

An appraisal of the results of the 1988 referendums shows that not one electorate in the entire country voted yes to any of the questions. Indeed for question one the national average voting NO was 67.09%. For question two it was 62.41%, for question three 66.39% and for question four, 69.21%.

13 Australian Electoral Commission, *Annual Report 1988–1989*.

The impact of an imposed charter of rights will not only prevent proper analysis and debate by all the people, prior to its enactment to see if, just as in 1988, there's more to it than meets the eye; but it will hand over the power of the legislature to make laws for the peace, welfare and good government of the people of Australia, as required by the Constitution, to the Judges as they interpret the charter of rights to determine if new legislation infringes the charter.

Just as we have fought hard and successfully before to protect the rights and interests of the Australian people we will have to do it again should yet another Labor Government try to lessen our rights while pretending to enhance and protect them. As in 1988, Australians will again realise that there is more to this than meets the eye.

Chapter Eighteen

Four Fictions: An Argument Against a Charter of Rights

HIS EMINENCE CARDINAL GEORGE PELL, AC*

I Lawyers and Human Rights

The call for a charter of rights was one of the headline outcomes from the 2020 Summit held in Canberra in 2008. However, summit delegates were by no means unanimous in support of the idea, and the supporters themselves were further divided between those who want a bill of rights entrenched as an amendment to the Commonwealth Constitution, and those who think a charter of rights as an ordinary act of Parliament more achievable in the short term.

In the midst of all this, there was a small and illuminating aside which attracted some attention. One delegate, a prominent human rights lawyer whose work in many respects I greatly admire, made the strange suggestion that politicians be prosecuted when they allegedly fail to tell the truth. It was very quickly pointed out in reply that if there were to be any such law it should also apply to lawyers. There is a charming unselfconsciousness about this lawyer's suggestion which does go to one of the central problems of a charter of rights; and that is the easy assumption, that lawyers are more trustworthy when it comes to protecting rights than politicians.

I am not sure that this assumption is readily shared in the general community. Politicians have one very great advantage over lawyers, and especially those lawyers who are appointed to be judges. They regularly have to account for their decisions and actions to the electorate, to ourselves, the voters who have to live within the provisions of their legislation. This remains as one of the great safeguards of freedom and justice in a democratic society. It is strange indeed that some are now claiming that this safeguard is not enough and our rights will only be secure when they are entrusted to unelected judges who are accountable only to the constitution and the law which they themselves interpret and administer.

It is instructive on this point to note that Zimbabwe has a constitutional bill of rights, which among other things protects rights to personal liberty,

* This paper is based on a lecture delivered at the Brisbane Institute in May 2008, and subsequently published in *Quadrant* (July–August 2008). An earlier version of the paper was delivered to the St Thomas More Society in Sydney in June 2007.

freedom of conscience and expression, and freedom of assembly, association and movement. The Zimbabwe bill of rights also provides protections against inhuman treatment, deprivation of property, arbitrary search or entry, and discrimination. Just to list these rights against the present situation in Zimbabwe shows how fragile they are. A courageous judge or court could undoubtedly make a difference by faithfully administering the law, but Mugabe's government has largely taken care of that danger. The only thing which might put an end to the abuse of human rights and the destruction in Zimbabwe – and we can only say “might”, because there are no guarantees – is a complete change of government. This is something quite beyond the reach of any court order.

The suspicion of majority – that is, parliamentary – rule; the preference for judicial, as opposed to political, determination of fundamental questions; the unacceptable transfer of responsibility from the parliament to the courts, and the unspoken assumptions which inform not only these tendencies but the particular social and political agenda which a charter of rights is intended to implement, are some of the critical problems with proposals for a bill or charter of rights. These problems are compounded by confusion over the foundations of human rights, freedom and truth.

II Four Fictions in a Charter of Rights

One major intrinsic problem with a charter of rights is that it relies on a number of significant fictions. There are four fictions that I want to highlight.

A. Fiction One

One of the most important is the claim that courts are forums of principle where rights are given their due, while parliament is a forum of political power, where public opinion and government or party policies make compromise the order of the day. Former Chief Justice of Australia Sir Anthony Mason has expressed his support for a charter of rights exactly in these terms, arguing in 2006 that a charter of rights would better protect basic rights from political interference by replacing ‘political compromise’ with ‘principled judicial decision-making’¹.

Unfortunately things are not so clear cut. While parliamentary decision making is affected by party politics, lobbying, ambitions for re-election, public pressure and ideology, principle is not regularly vanquished by these considerations. Principle is particularly important in parliamentary decision-making on fundamental issues, as the debates over the rights of refugees and asylum seekers, RU-486 and cloning, and euthanasia, make very clear.

1 Sir Anthony Mason, ‘Rights Bill a Matter for Judgement’, *The Age*, 29 March 2006.

Similarly, while courts obviously place great emphasis on principle, it is naïve, if not absurd after forty years of judicial activism, to suggest that considerations of power and ideology, policy and compromise, as well as ambition, political pressure, media and academic flattery, never come into play in the law. Judges themselves have frequently drawn attention to the unacknowledged operation of these various factors in judicial decision making.

The high standard of probity and commitment among judges and politicians in Australia is a blessing we should not take for granted. But as a forum for decisive public answers, parliament has a great advantage over the courts because it is much easier to bell the cat. Genuine public debate exposes the influence of extraneous factors which may or may not work against principled decision making. It allows all those concerned about an issue to have their say about the proper basis in principle for making a determination. This is an important safeguard.

B. *Fiction Two*

Another fiction invoked in the argument for a charter of rights is that decision making by majority vote, either in parliament or in elections, regularly means injustice for the minority or the unequal treatment of some groups in law. To the extent that there is truth in this it is in the form of a truism: the danger posed to a minority by majority rule is real when it is taken as the absolute basis for political decision making. But there is another, more present danger and that is the disproportionate influence that organised minorities can have over the political process.

Lenin and the Bolsheviks made the minority coup d'état a matter of political principle. Thankfully this is not our problem today. But modern democracy is inextricably entangled with the influence of powerful minorities in politics. The role not only of the Christian churches but of party factions, sectional interests and lobbyists in the political process is regularly identified as problematic. Other minorities, such as political interest groups, some intellectuals, and journalists (and especially the power of the media generally) are also influential, although typically they are not regarded as a problem.

Since the late 1960s talk of 'the tyranny of the majority' has become rather fanciful in Australia. Social and legal reform during this time has been driven overwhelmingly by minority agendas. Even the election of seriously conservative governments with large majority mandates has done little more than slow this trend down here and there.

A great deal of this has been undoubtedly for the good. The rights of Aborigines and indigenous or racial minorities, women (not strictly speaking a minority!), homosexuals, migrants and the poor, the disabled and the elderly needed recognition and protection in different ways.

In Australia most of these developments came about through parliamentary initiative, with majority public support either present from the beginning or accruing as the discussion proceeded. Majority resistance to these measures was completely absent. This is the way democracy works at its best in Australia. When proposals of the political class address genuinely fundamental issues of fairness or justice, the fair-mindedness and decency of ordinary Australians can be counted on for support most of the time.

The bedrock idea of a fair go is not fail-proof, as I shall discuss in a moment. But it is simply untrue to claim that majority rule is the absolute basis of Australian democracy to the exclusion of minority rights or representation. The reality is a much more complex interplay of leadership and agitation, populism and scepticism, principle and compromise. Despite the range of forces working to shape and manipulate consensus and opinion, this complex of factors keeps politics in Australia broadly centrist and strongly favouring the pragmatic and moderate over ideological nostrums and extremism. Compulsory voting and the preferential ballot system also help us to move regularly around the centre.

It helps to understand the game that is afoot in the push for a charter of rights to consider the way 'the tyranny of the majority' is used to browbeat majority scepticism about minority agendas. Until very recently same-sex marriage was considered an oxymoron by most people, and I suspect it still is. In the United States 30 states have amended their constitutions to prohibit same-sex marriage, and 38 states (including many of those with constitutional bans) have passed statutory prohibitions.² This has led the academic jurist Ronald Dworkin to criticise the majority of his countrymen for using the law to impose their understanding of marriage (as being between a man and a woman only) on the homosexual minority³. This is, of course, a deliberate distortion of the real situation, in which a minority of the homosexual minority are actively seeking to impose their redefinition of marriage on the rest of the population through spurious rights-claims and judicial fiat.

The tyranny of the majority is also invoked in discussions about the treatment of asylum seekers and laws against terrorism. In both these areas the concern about governments disregarding the rights of individuals or minorities to placate the majority has a more substantive basis. The re-election of the Howard government in 2001 after the Tampa affair and the

2 Christine Vestal, 'Same Sex Marriage Legal in 4 States' *Stateline.org* 4 April 2009 <<http://www.stateline.org/live/details/story?contentId=347390>> at 19 April 2009.

3 Ronald Dworkin, 'Three Questions for America', *New York Review of Books*, 53:14 (21 September 2006), 30. Dworkin claims that Americans who oppose same-sex marriage 'believe that a majority of citizens has the right, acting through the normal political process, to shape the religious and spiritual character of our shared culture by law. Those who favor permitting gay marriage believe, on the contrary, that a religious and spiritual culture must be shaped organically, by the individual, free decisions of everyone'. An astonishing reversal of what is really going on.

support for processing asylum seekers outside Australia's migration zone (the 'Pacific solution') have been raised in this context.

Certainly the asylum seeker issue highlights where the limits of the ethic of the fair-go among the majority can be encountered. I wonder about the consequences for Australian democracy if we were to suffer a major terrorist attack on our own soil, although the level-headed and clear-sighted public response to the Bali bombings in 2002 should remind us that Australians generally tend to be politically sophisticated rather than politically reactive.

The critical point, however, is that if fear and insecurity are drivers in a political situation, democratic politics offers the only real chance we have for dealing with them. Treating majority fears and opinions condescendingly is no part of the solution. Here we depend on the leadership, wisdom and prudence of democratically elected leaders, in both government and opposition, factors we cannot take for granted and which for that very reason we must always work to encourage. Clear principles about human rights and strong institutions are also required, but hoping that court decisions will make fear and insecurity disappear among the general populace or using court decisions to impose a solution on a worried population may not be good for politics, the courts or respect for law.

C. *Fiction Three*

A third fiction that proponents of a charter of rights rely on is that rights are ultimately about moral beliefs or consensus rather than moral truth. This is a problem to which John Finnis drew attention almost three decades ago⁴. The shift in the law from moral truth to moral belief became apparent in the late 1950s with Lord Devlin's influential treatment of the enforcement of morals. Devlin accepted that the state may enforce laws against obscenity, for example, but argued that this can no longer be based on the promotion of virtue or a judgement about the right way for people to live. Instead it must be based on the state's interest in preserving the morale and cohesion of society. Shared ideas and values are critical to social cohesion, and for this reason the law should support deeply held and widespread beliefs reprobating obscenity and ensure that they are not flouted.

Devlin grasped at this device to shore up the foundations of law in the wake of the law's repudiation of the law of reason (or natural law) beyond the positive law. How well it has served to shore up laws against obscenity is plain to see in a society awash with pornography and its malign influence in marketing and advertising. But because the law rejected the law of reason and the truth about human flourishing to which it directs us, law is left with

4 John Finnis, 'A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence'. Maccabean Lecture in Jurisprudence, delivered at the British Academy, 30 October 1985. *Proceedings of the British Academy* 1986, 312-14.

nothing else as a basis for human rights than the slender reed of 'deeply held and widespread moral belief'.

For some this is congenial. If moral consensus is the basis for human rights, then the manipulation and coercion of moral belief can produce new rights such as those to abortion, euthanasia, and the cloning and destruction of human life for research purposes. Political and legal elites are only at ease with this approach, however, because they assume that they will always be in control of it. This is one of the reasons for the despair and panic that was discernible in some places when very different, deeply held and widespread moral beliefs about limiting the rights of asylum seekers came to the fore in 2001 and seemed poised to take the 'consensus' on rights in a different direction.

Basing human rights on moral consensus has its advantages in producing new rights, but it also creates problems when it comes to claiming that these rights really are true and inviolable and not just creations of lawyerly ingenuity. As Finnis has observed, 'a bill of rights purports to identify certain interests as truly fundamental aspects of human flourishing' which it is unjust to neglect or violate. It is difficult to sustain this claim, which is fundamental to the success of any defence of human rights, without a concept of truth beyond the law and beyond the moral beliefs of the moment. The incoherence of this position 'denatures the modern bill of rights'⁵, and reduces it to an instrument enabling the courts to make final determinations about the commitments and principles which comprise the common good. In the absence of any greater authority, human rights become dependent on judicial compulsion for their force and meaning.

D. *Fiction Four*

This brings us to the fourth fiction underlying the push for a charter of rights; namely the 'greatly expanded element of make-believe' that is required to keep up the appearance that courts are 'doing justice according to law' when they are in fact legislating without opposition on fundamental questions of value and commitment⁶. This is tolerated from time to time because of the deep respect democratic societies have for the rule of law. But if the rule of law becomes the rule of judges we will have a serious problem on our hands.

III Interpreting a Charter of Rights

Basing rights on a consensus of moral belief rather than moral truth places them on an uncertain foundation. This foundation is made even more unstable by the use of the courts to reshape moral beliefs, or to bypass majority beliefs in the general community. For people who are serious about

5 Ibid 313.

6 Ibid 330-31.

human rights, this is akin to playing with fire. Rights cannot be inviolable if they are only plastic. They cannot be inherent to the dignity of the person if they are also a stalking horse for a particular social and political agenda. Rights are either a human artifice, or grounded in reality, in truths to be recognised and respected. No one has the authority to abolish human rights in the second hypothesis.

Typically, we want to have our cake and eat it; to make up new rights and then proceed as though we haven't. This undermines the credibility of human rights and the credibility of political and legal institutions. Perhaps there are some who imagine that there is no real harm in this because logical contradictions in law and government are often overlooked by ordinary members of the public and seem to have little consequence. This would be a mistake. Everyone in our society understands the advantages of dressing up a demand or a desire for something they want with the word 'rights'. Astute social engineers are able to use this for their own purposes.

The whole concept of human rights has become so massively dependent on imaginative interpretations of the law, for example from the right to privacy to the right to abortion, that there is little knowing where it might finish up. The experience of human rights instruments overseas makes it very clear that some rights will be interpreted narrowly and some expansively. Exceptions and limitations will be treated in the same way, depending on the particular right to which they are attached⁷.

Naturally I am especially concerned about the fate of the right to religious liberty under a charter of rights. Experience overseas is not entirely encouraging on this score.

In the United Kingdom in 2005, Mrs Veronica Connolly, a pro-life campaigner, sent photos of aborted babies to three pharmacies in an attempt to dissuade them from stocking the morning after pill. The pharmacies complained to the police and Mrs Connolly was charged under the *Malicious Communications Act 1988* (UK) for posting material to people which was 'in whole or in part, of an indecent or grossly offensive nature'. She was duly convicted and fined, and she appealed to the High Court of Justice. In her appeal Mrs Connolly claimed that the Human Rights Act required the English law against malicious postal communications to be applied in a way consistent with her rights to freedom of expression and freedom of thought, conscience and religion under the European Convention on Human Rights.

In January 2007 the court dismissed this argument, ruling that freedom of thought, conscience and religion is a right which of its nature is likely to cause offence to others and so must be narrowly construed. The limitations for protecting the rights of others placed on this right, and in this case also on the right to freedom of expression, were given an expansive reading, so

7 Ibid 315.

that the 'distress and anxiety' caused to those who saw the photos sent by Mrs Connolly was found to be a violation of their rights. For this reason, the court concluded, 'the conviction of Mrs Connolly on the facts of this case was necessary in a democratic society'⁸. The House of Lords declined to grant her leave to appeal against this decision.

This case shows what can happen when a charter of rights is interpreted from the premises of a secularist mindset, especially when it is sharpened, as in Europe, by fear of home-grown Islam. Britain's population has had a Christian majority for over a thousand years, probably for fifteen-hundred years. It is ironic that the Christian right to free speech on a life issue like abortion can be limited so fiercely. In the UK at least, one should fear further restrictions on Christian comments in public life as anti-religious elements use the fear of Islamic violence to place limits on all religious groups bold or foolish enough to speak out publicly on issues declared 'taboo' by the new political correctness. Presently such issues touch on sexuality, marriage, family and life. In the near future, given the likely developments in biotechnology, we shall be battling against involuntary euthanasia and even compulsory eugenics, as well as human cloning.

Proponents of a charter of rights regularly point to the UK Human Rights Act as a model that should be adopted here. *Connolly v DPP* shows how little protection religious people can expect from anything like the UK Human Rights Act if it were to be implemented in Australia, even for minor and maladroit forms of religious expression and political activity such as Mrs Connolly's.

IV Conclusion

The push for a charter of rights springs from a suspicion of majority rule, a preference for judicial decision-making on fundamental questions, the imperatives of the particular social and political agenda that a charter of rights serves, and the elitism of privileged reformers – not all of whom are lawyers. And the problems with such a charter are increased by the inability of contemporary law and philosophy to agree on a secure foundation for human rights, freedom and truth.

The different charters of rights currently in force (in Victoria and the Australian Capital Territory) or being offered in Australia seek to provide important protections of some values upon which we all agree. For example, no one wishes to detract from rights to due process and a fair trial. These are not in dispute or under challenge, and already enjoy substantial common law and statutory protection, as a number of leading jurists have pointed out. But even these rights can be made questionable by a charter of rights.

8 *Veronica Connolly v Director of Public Prosecutions* [2007] EWHC 237 (Admin).

In Canada, the Supreme Court has given these rights a substantive rather than procedural meaning, so that any infringements against them, even when they are procedurally fair, are ruled to be major rights violations. As a consequence the threshold for excluding evidence from criminal trials has been progressively lowered, seriously hampering the administration of criminal justice, and making these rights a matter of controversy⁹. In Australia there is no evidence of serious vindictiveness towards terrorism suspects among the majority of the population at the moment. But this could change very quickly if cases against them begin to fall over; if, for example, an Australian court declares that being compelled to take part in a police line up is incompatible with the right to due process.

So it is not only in areas of life, family, freedom of religion, discrimination and equality that a charter of rights causes trouble. The irony is that the uses to which courts put a charter of rights often generate exactly the hostile majority reaction to rights that this sort of legislation is meant to avert. We don't have a culture war here in Australia in the way the United States does, but a charter of rights could help provoke one.

When it comes to the protection of human rights, it is important to ensure that we are not labouring under illusions. There are major problems with the whole concept of a charter of rights which place worrying question marks over human rights, the rule of law, and the democratic process. The preamble to Canada's 1960 statutory Bill of Rights, superseded by the 1982 constitutional Charter of Rights but still part of Canadian law, expressly recognises that 'fundamental freedoms and human rights' are derived from 'the supremacy of God, [and] the dignity and worth of the human person'. We could learn from this.

In contrast, the Canadian Charter of Rights offers a preamble which is little more than an introductory sentence, and reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law". The Australian charters either avoid any reference to a foundation for rights or omit a preamble altogether. Ironically, given the fear of the majority discussed here, the federal human rights act being proposed by New Matilda seems to suggest that democracy is the source of human rights.

Rights are best protected by the common law and by Parliament when the people are equally aware of their responsibilities. Democratic law-making is imperfect, but preferable to rule by the courts.

9 Ted Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Broadview Press, Ontario: 2000), 39-40 & 44-46.

Chapter Nineteen

Slaves Cannot Be Free – The Biblical Roots of Our Rights

RABBI DR JOHN LEVI, AM

I Biblical Roots of Rights and Freedoms

‘And God said to Cain:’ Where is your brother Abel?’ And he said: ‘I do not know. Am I my brother’s keeper?’ (Gen.4:10) To which the obvious, unspoken answer is: ‘Of course you are!’ The first recorded death in the Hebrew Bible is a matter of murder and from that we instantly learn that there are values implicit in life itself. Cain’s attack on his brother, in which a religious act degenerates into an act of bloodshed followed by an obvious lie, introduces us to a narrative filled with ethical issues, value and meaning.

Even the most fervent atheist must concede that the Judeo-Christian tradition includes some basic legal concepts, which are difficult to ignore, and which are embedded within western political theory. I am not a religious fundamentalist and I can’t believe in the concept of literal revelation however the biblical tradition has shaped the way in which we look at the world. The Hebrew Bible, which is an ancient library of books, begins with the foundation myth that human beings are made in the image of the Divine and that life is precious. There are many contradictory sub-texts in the bible but its enduring and underlying message is that the world is not indifferent to spiritual values which include concepts such as justice, truthfulness, individual conscience, the sacred status of human life and concern for one’s neighbour. A numinous sense of awe in the face of life’s beauty and complexity are woven into the biblical stories and law codes that, once upon a time, everybody knew. As these texts and sacred documents fade from our collective memory we are all the poorer. Nevertheless, they have shaped western civilisation. The exodus from Egypt is the Hebrew biblical paradigm story. It doesn’t have to be historically true. We may never be able to identify the year of the exodus or the Pharaoh ‘who knew not Joseph’ but we can recognise the saga of a people in search of freedom. Those people are justifiably apprehensive. The looming desert holds the risks of starvation and thirst. It is only after they have left Egypt that they can stand at Sinai and receive the Ten Commandments. It is self understood that those fundamental laws of human behaviour can only be given to free men, women and children. Slaves, by definition, cannot observe a weekly day of rest. Slaves do not have the ability to honour their parents because their lives belong to their masters.

Memories of the revelation at Sinai generated a Hebrew prophetic tradition that persistently assumes that human beings have innate human rights. In the eighth century BCE the prophet Amos declared 'Hate evil and love the good and establish justice in the gate...let justice well up as waters and righteousness as a mighty stream.'¹ At the gates of every city stood the open air public courts at which justice was administered by judges who were commanded to neither 'respect the person of the poor; nor favour the person of the mighty'² These words from the biblical text known as the Holiness Code describe a society that was deeply concerned with human rights. The farmer was commanded not to strip his fields or trees bare.

You shall leave them for the poor and the stranger... You shall not oppress your neighbour nor rob him; the wages of a hired servant shall not stay with you all night until the morning...You shall not stand idly by the blood of your neighbour. . You shall not take vengeance nor bear any grudge against the children of your people but you shall love your neighbour as yourself.³

The biblical prophet was not a soothsayer. The prophet told the truth. He felt that need so deeply that he was convinced that he spoke in the name of God. Nowhere is this better illustrated than in the famous confrontation of the prophet Nathan with King David.⁴ Nathan tells the king a chilling story of betrayal and theft in which a rich man steals 'a little ewe lamb which (a poor man) had bought and reared and it grew up with him and with his children'. The king is outraged by this story of inequality and abuse of power and declares he should restore the lamb four fold 'because he had no pity'. The prophet Nathan turns the table on the king who has stolen another man's wife and thunders 'You are that man'.

There is a sub-plot implicit in the biblical version of history. Human destiny is seen as being a partner of God in the perfection of the world. Both Judaism and Christianity speak of a Kingdom of God that will come about at the end of time. We will never live to see that day but it is our responsibility to repair the world and to guard it for future generations. In Hebrew this process is called *Tikkun Olam* . In Jewish tradition planting trees for a future generation to enjoy and to use must take precedence over rumours of the arrival of the Messiah.

1 Amos 8:14, 24.

2 Leviticus 19:15.

3 Leviticus 19: 10, 13, 16, 18

4 II Samuel 12

II The Context of Debates about Rights

Quite simply, we were not born in a world devoid of values. Our world can look back at intellectual and spiritual triumphs and terrible mistakes. When Hitler proclaimed that his Third Reich would last a thousand years he defied the ethical structure of civilisation and his kingdom crumbled within a decade and a half because the seeds of its own destruction were embedded within his state. Equally doomed was China's ill-fated Cultural Revolution in which the accumulated wisdom of the past was brutally consigned to the dustbin. We should be acutely aware of past failures as well as historic successes. It took thousands of years for the western world to understand that slavery was immoral. The time of the hunter-gatherers has long past and yet women are still struggling to be free. Ancient sexist and racist prejudices still bubble beneath the surface of many cultures. The certainties of religious fundamentalism combined with the nuclear might of nation states may be far more dangerous than any previous manifestation of totalitarianism.

A news clip screened on television haunts me. Following the second terrorist attack on the London transport system in 2007 Scotland Yard swooped on members of the gang that was alleged to have been responsible. Television reporters mingled with the police as a suspect was ordered to strip to his underpants and emerge on the balcony of his terrace house with his hands held high. There he stood shouting to the world 'I have rights! I have rights!'

What was he thinking when he made his claim? Do terrorists have rights? Do we have rights? More specifically, do we have the inalienable right to hijack planes or execute hostages? The last blood stained century deprived hundreds of millions human beings of their right to live. That murderous genocidal plague was so vast and the number of perpetrators so numerous that tens of thousands would never face a court of justice. There is no need to think abstractly about the distant killing fields of Cambodia or the cruel destruction of human beings in Darfur or Rwanda to understand the international complicity in the crime of justice denied, delayed or deferred. We now know that at the height of the Cold War the United Kingdom asked Canada, Australia and South Africa to accept German, Ukrainian and Baltic collaborators who had fled from Eastern Europe as the Red Army swept across Nazi occupied territory. In Australia, after years of lobbying, a Federal War Crimes Unit was established but, by then, very few victims were left who could give coherent testimony in court. The perpetrators of genocide had turned into frail elderly gentlemen who appeared to be incapable of doing anything remotely unpleasant. The War Crimes Unit was disbanded and those alleged criminals, who still survive, can now sleep happily at night. Did their victims have the right to live or is there does a statute of limitations apply to mass murderers?

III Australia and America Compared

On 4 July 1776 the representatives of the British colonies in North America declared their independence by proclaiming that men may rightfully form or disband governments at will, for the higher purpose of protecting God-given individual rights. That formative era ended with the subsequent ratification of the American Constitution which created a federal government which would collect taxes, fund an army and a navy, grant copyrights and coin money. The 'God given rights' would soon be confronted by political necessities and a process of producing amendments was begun which began to explore the consequences of a nation that was governed 'by the people, for the people'. Observers of the American experience may doubt that God wants us to have the right to bear arms and will conclude from this that absolute certainty about the divine will may, in itself, be dangerous.

The Australian experience has been dramatically different. Vast distances meant that the Australian colonies took some time to realise that they together controlled the destiny of an entire continent. Inter-colonial rivalries produced customs barriers, differing railway gauges and differing legislative procedures. The nineteenth century concluded with a leisurely debate about a federal system without the slightest hint of revolutionary fervour. The Australian Constitution explicitly or implicitly accepts that there will be judges and ministers, elected houses of parliament, state government, an army and an educated electorate. Echoing the Americans who proclaimed, 'Congress shall make no law respecting an establishment of religion' Australia made provision for the separation of church and state. Despite the printed preamble on the first page of every Australian passport, our constitution clearly states that we are subjects of the Crown. We are not citizens. My very large 'Shorter Oxford English Dictionary' that a citizen may be an 'enfranchised inhabitant of a country as opposed to an alien'. But even aliens have rights. Mercifully, however, we have a classless Constitution and, apart from the monarch, power is neither conceded nor granted by reason of birth or property. Australians, therefore, do have 'inalienable rights' but they exist more by implication than by fiat.

Do we have the right to free speech and free assembly? A Conference held in Sydney on Australia Day 2007 advocated the introduction of a world wide Islamic Caliphate governed by Sharia law. Its organisers later claimed that their ambition did not include Australia but, because we are the next door neighbour of the most populous Islamic state in the world, the Khalifah Conference which was attended by hundreds of Australian citizens pushed freedom of speech and assembly to its political limits. In Melbourne a minister of the Christian 'Catch the Fire' of the Protestant Evangelical Assemblies of God was prosecuted for having denounced Islam and breached provisions in the Anti-Vilification Law of the State of Victoria. A conviction

was quashed in the Supreme Court but had the pastor been found guilty on appeal there is no doubt that he would have gone to gaol as a testimony to his faith. Are religious leaders still permitted to describe Jews as 'pigs' and Christians as 'idolaters'?

Free access to information is now understood to be a basic right by all liberal democracies and the Internet has made censorship virtually impossible. 'Big Brother' and the state cannot win a war against cyber space. Bamboo, silk and iron curtains are no longer effective. From Teheran to Beijing political and intellectual insights can be exchanged in the secure anonymity of a computer screen. The internet's freedom has altered the future shape of public and private morality. Older Australians can well remember the thrill of fear of being 'found out' when they smuggled copies of *Lady Chatterley's Lover* past the vigilant eyes of the Custom's Officer. Today, sadly, we know our precociously immature pre-adolescent children are informed about all kinds of sexual behaviour long before parents dare to broach the basic facts of life with their offspring. Children certainly have rights but how do we weigh up their well being against the nightmare of a totalitarian and oppressive infrastructure of moral censorship?

Following the 1996 Port Arthur Massacre, Prime Minister John Howard successfully read the mood of the electorate and banned the hitherto unchallenged, but unwritten, Australian 'right to bear arms'. No doubt a constant television diet of American High School massacres had helped to bring about an understanding that Australian suburbanites no longer needed a gun in their desk drawer and a rifle in the garage. We also lacked an Australian myth of a frontier society where cowboys endlessly battled whooping Red Indians and our earliest years were not replete with stories of revolutionary colonists who courageously defeated a mercenary band of British redcoats.

IV An Australian Bill of Rights?

In general, Australians are proud of our ironic distrust of authority and our stoic cynicism in the face of misfortune. We have historically derided and rejected orthodoxies. Indeed, it is difficult to imagine a general statement about individual civic rights (and responsibilities) that could possibly gain general acceptance. Notwithstanding this very serious qualification discussions about how autonomous citizens think their society should be governed and what rights are due to each individual are a good thing. These discussions help us highlight deficiencies and strive for better government.

Before a society changes its political system and embraces a bill of rights, no matter how attractive and splendid it sounds, that society must thoughtfully engage with and understand of our spiritual, ethical, political and legal heritage. It simply cannot be a blind acceptance of past wisdom nor

a rush to change for the sake of fashion. It demands an active engagement. One of the difficulties of a bill of rights is that it is clearly impossible to compose a bill of rights which is static and untouchable. The past teaches us that even the most inspired and inspiring declaration will become outmoded and can actually become destructive.

Sadly, it is ridiculous to expect the United Nations to provide guidance for an Australian bill of rights. It may be diplomatically expedient from time to time to gather the world's kings and presidents in one hall in one city but nothing can be better calculated to inspire fear and loathing than an organisation which indiscriminately includes governments that murder its own citizens, oppress its women, grant sanctuary to murderers and rob the poor and defenceless. As Sir Harry Gibbs has said to the Samuel Griffith Society 'Constitutional guarantees may provide some protection to human liberties, but in the end freedom depends on the willingness of a community to defend it.'⁵ Grand declarations of human rights which are issued by international gatherings sponsored by the United Nations are counter productive.

It is a tribute to the system of common law that, until now, Australia has not yet seriously addressed the question of a bill of rights. Obviously Australians are reluctant to experiment with changes to our system of government, and while I believe our Constitution urgently needs rewriting to become more relevant and inspiring, I understand that the emotions of many Australians reflect the maxim 'If it ain't broke why fix it?'

'Rights' implies that, in turn, citizens have responsibilities. Do citizens have a right to health care? Does the modern democratic state have a responsibility to educate and train its young people to the highest possible level free of charge? Is it a right to foster a national culture?

It would be a challenging exercise to create an effective *Charter of Australian Rights and Responsibilities*. The current proposal at the Commonwealth level is to mirror the Victorian State Charter of Human Rights and Responsibilities which is, in turn, a mirror of the UN Convention on Human Rights. The Commonwealth proposal is to translate into Australian domestic law that which is already international law. In addition, the Victorian Charter is non-justiciable. It is not possible to bring an action on the basis that a right defined by the Charter has been breached. Courts are given power to make declarations as to whether an Act breaches the Charter but no power to remedy that breach. Parliament may pass legislation and a parliamentary committee would then filter the legislation but unlike the United States, in which the personal rights of every citizen is entrenched, Australians would have great difficulty challenging offensive legislation. As the late Justice Haim H. Cohn of the Supreme Court of Israel observed:

5 Harry Gibbs 'Does Australia Need a Bill of Rights' in J Stone (ed) 6 *Upholding the Constitution: Proceedings of the Samuel Griffith Society* (1996) 74-81, 75.

The rights listed in the Declaration [of Human Rights] are generally ('universally') recognized as existing and well-established rights of every individual-but none of them is actually and legally enforceable: none of these individuals can by national or international action claim or obtain any remedy by virtue thereof. They are *leges nuda*, or paper rights, making very lofty and sublime reading, but affording very small consolation and comfort to the oppressed and persecuted. The Declaration itself regards these rights as but "a common standard of achievement for all peoples and all nations", that is, a criterion or standard to be used by legislature if and when enacting enforceable law; but there is nothing in the Declaration either to bind individuals or respect those rights or to obligate states to enact them.⁶

On 11 January 1944 President Franklin Delano Roosevelt's State of the Union Message to Congress brilliantly tackled the need for a second economic Bill of Rights through legislative means. He believed that because the political rights guaranteed by the Constitution had 'proved inadequate to assure us equality in the pursuit of happiness' and attempted to define a series of 'new' rights.

In our day, these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all, regardless of station, race or creed. Among these are the right to a useful and remunerative job in the industries or shops or farm or minds of the nation. The right to earn enough to provide adequate food and clothing and recreation. The right of every family to a decent home. The right to adequate medical care and the opportunity to achieve and enjoy good health. The right to adequate protection from the economic fears of old age, sickness, accident and unemployment.

It was courageous to speak to the American people about rights at a time of struggle yet Roosevelt chose this theme to give his people hope and to focus their efforts on a wider horizon at a time of total war. Our own twenty-first century list would, of sad necessity, have to expand the list of inalienable political rights which include free speech, free press, free worship, trial by jury and freedom from unauthorised searches and seizures. Our list would now have to include the right to be safe from terrorist attack, the right to choose and change one's own religion, the right to choose no religion, the right to clean air, food and water.

6 Haim Cohn, *Human Right in Jewish Law*, (1984) 19.

We are the children of a very gentle evolution in an egalitarian society in which each person is as good as his neighbour. Australian society was created during the age of the enlightenment. There is no medieval or feudal past in Australia. There are no cathedrals in which Australians were once crowned as kings. There was no revolution in which the aristocracy was overthrown and an established church was disallowed. We inherited a system of common law which can be traced back to the Magna Carta and, before that, to the Hebrew Bible.

The best way to ensure that our democratic values are preserved and evolve is to entrust that role to the most flexible arm of government . The challenge of what our twenty-first century rights are, how they can be applied and maintained, and when they can be safely set aside is one best placed in the hands of those who are required to account to the people through regular elections. A constitutional bill of rights or a statutory bill of rights – it doesn't matter which – would compromise the flexibility in our system which balances rights and responsibilities, taking into account and respectfully shaped by ancient concepts of human dignity and human rights, while responding to the great vicissitudes of life.

Chapter Twenty

Why should Christians be Concerned about a Bill of Rights?

BRIGADIER JIM WALLACE, AM (RET'D)

One might naturally assume that Christians would be staunch supporters of codifying human rights into national law through a bill of rights.

The Christian faith embodies many commands to respect what might now be termed ‘human rights.’ The Bible teaches that people are made in the image of God and are therefore precious. As we are all equally precious to God, we are to love our neighbour as we love ourself. In the Ten Commandments we find examples of the right to life (you shall not murder) and the right to private property (you shall not steal). Significantly, we are also made aware that God will hold us accountable for our treatment of others, particularly those who are weaker than us.¹

The Christian Church itself began as a persecuted minority movement, many of whose leaders were unjustly imprisoned, tortured and executed. Many parts of the world still lack any recognition of religious freedom: in such countries Christians have endured and continue to endure appalling persecution for preaching and confessing their faith.

However, the Bible does not specifically advocate the kind of ‘rights-based’ culture that is becoming the norm in Western societies. Although Christians should respect others’ rights, there are many instances where we are told to forego our own; this is our Christian duty. Jesus said, ‘If someone strikes you on the right cheek, turn to him the other also. And if someone wants to sue you and take your tunic, let him have your cloak as well.’² Similarly, we find members of the early church giving up their rights to private property, selling their possessions and holding everything in common, so that they were better able to give to those in need.³

Because there is a Christian foundation for the notions underlying certain human rights, we can see throughout history many Christians taking action to preserve them, whether by ending the slave trade, supporting persecuted believers in other countries, championing civil liberties for negroes in the US, defending the right to life of the unborn, affirming the worth of people with disabilities, or exercising leadership in the early trade

1 Matthew 25: 40 – ‘whatever you did for the least of these brothers of mine, you did for me.’

2 Matthew 5:38-40.

3 Acts 2:44-46.

union movement. Human rights are also important to the very mission of the Church. Without freedom of speech, the Church's ability to preach the gospel is compromised. And freedom of religion is necessary if those who hear the gospel are to be free to make a personal decision to accept or to reject it without fear of state penalties.

Given this rich Christian heritage, the Australian Christian Lobby certainly appreciates the significant value of human rights as a tool for protecting life and liberty. However, this does not mean that a bill of rights should be enacted. The Australian Christian Lobby has consistently opposed a bill of rights for Australia, and will continue to do so for five reasons:

- (i) A bill of rights is unnecessary as rights can be protected clearly and precisely in specific legislation relevant to the particular right in question;
- (ii) A bill of rights does not itself protect against abuse of state power;
- (iii) A bill of rights opens the door to the excessive use of judicial power by transferring final decision-making from the elected parliament to the courts, thus introducing uncertainty into the meaning and application of the law;
- (iv) A bill of rights can be used as a Trojan horse for minority agendas, which might be justified on a spurious 'rights' basis, when they could not have been achieved through the political process; and
- (v) A rights based culture is too often a self-centred and litigious culture.

Before discussing these five objections to a bill of rights, I would like to examine some of the philosophical issues involved in human rights discourse and to consider the mechanisms by which Australia currently protects human rights.

I What is meant by Human Rights and Rights?

I think we need to distinguish between 'human rights' and 'rights.' We have human rights simply because we are precious people made in God's image. Human rights seem to ensure that the minimum conditions for a secure life are available to us. As Jack Donnelly argues:

The Universal Declaration of Human Rights, for example, tells us little about what life is like in most countries, but rather tries to set out the minimum conditions for a dignified life worthy of a fully human being, requirements so basic that they must be recognised as rights/titles/claims, with all that entails.⁴

4 Jack Donnelly, *The Concept of Human Rights* (1985) 33.

Without giving an exhaustive list, such conditions might include the right to life, to food, to shelter, to be free from persecution, to participate in government. We would probably all agree that the atrocities we have seen on the world stage such as genocide, mass rape, people trafficking, political repression, and religious persecution constitute violations of human rights.

Yet not all rights are human rights. My right as a consumer to a full refund if I am sold faulty goods is not an inalienable human right, though I certainly do appreciate it! Wherever I live in Australia I have the right to vote (derived from my inalienable right to participate in government), but some of my other rights depend on where I live. If I lived in suburbia my local council would remove my rubbish each week because I have the right to such a service in return for payment of taxes: as I live in a rural area, I have to dispose of my own rubbish. These are important rights, but they are not inalienable human rights.

Few of the 'rights' claims that hit the newspapers are complaints about the denial of inalienable human rights (or even the denial of other rights); more commonly they represent an elevation of an individual's 'right' to do whatever he or she pleases. In 2006, to the disgust of many parents, healthcare professionals and teachers, a UK textbook for school citizenship classes raised the question of whether forcing children to run a cross-country race was a breach of their human rights. Yet both children and adults often have to do things we would prefer not to do; this is a vital part of our education system and of a well-functioning civil society.

Clearly we must be very conscious of attempts to treat all rights as if they were inalienable human rights.

II Human Rights in an Age of Moral Relativism

There is a deep contradiction in rights talk. On the one hand, tolerance and relativism seem to be our society's highest values as it seeks to accord equal status to what are often contradictory moral perspectives. Yet on the other, human rights talk still attempts to proclaim absolute moral truths about what constitutes the right way to treat people.

Human rights talk began in a Christian age, where it was recognised that rights were bestowed by God and corresponding responsibilities were generally acknowledged and respected. Such sentiments were reflected in the US Declaration of Independence, which states:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.⁵

5 The Declaration of Independence, 4th July 1776.

Today, very few political theorists still acknowledge that God is the source of our human rights. Rather we find simple assertions that human rights exist, but deliberate avoidance of where they come from.

The 1948 UN *Universal Declaration of Human Rights* is a good example of this phenomenon. It was born out of a desire to prevent a recurrence of the atrocities committed during the Second World War and, as a former UN peacekeeper in various war-torn countries, I can heartily agree with the sentiments of the authors. But I cannot understand how human rights can exist simply because someone says they do, or how universal human rights can exist in a moral vacuum or climate of moral relativism. As Samuel Gregg argues:

Without truth claims there is *nothing* – no objective standards – to which we can morally and politically appeal in order to defend freedom. For if there is only opinion but no truth, then there is no inherent reason why slavery should not be seen as the same as liberty, or coercion the same as equality.⁶

Furthermore, rights are often unclear in practice and therefore sometimes conflict with one another. This is particularly true of second and third generation rights, which deal with social, economic and cultural rights. In reality, it is extremely difficult to prioritise conflicting rights: a value judgement is always required. Moral relativism is not a secure foundation for absolute rights.

III Australia's Approach to Human Rights

Compared to many countries, Australia already has an enviable human rights record. Of course, we can always do better but I believe we already have the essential tools. We have a model of government based on the separation of powers. We have a strong civil society, with many active special interest groups and a free and vocal press. Where human rights abuses occur, we can seek redress either at the UN Human Rights Committee, or by lobbying for amendments to whichever law is at fault.

There is a large body of international law codifying human rights. According to the United Nations,⁷ the International Bill of Human Rights consists of the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), and the International Covenant on Civil and Political Rights (1966) and its two Optional Protocols. The Declaration outlines a moral obligation to

6 Samuel Gregg, 'Crisis of Human Rights', *Policy* Autumn 2001.

7 Office of the High Commissioner for Human Rights, United Nations, Fact Sheet 2 (revision 1), the International Bill of Human Rights. < <http://www.unhchr.ch/html/menu6/2/fs2.htm> > at 1 April 2009.

protect rights, whilst the conventions add a legally enforceable obligation. Optional Protocol 1, to which Australia has acceded, provides a mechanism for aggrieved individuals to complain directly to the UN's Human Rights Committee for Covenant breaches by the state. As Justice Brennan noted in *Mabo v Queensland (No. 2)*, this brings to 'bear on the common law the powerful influence of the Covenant and the international standards it impacts.'⁸ Other international documents addressing human rights include:

- The Declaration and International Convention on the Elimination of All Forms of Racial Discrimination
- The Declaration and International Convention on the Elimination of All Forms of Discrimination Against Women
- The Declaration and Convention on the Rights of the Child; and
- Conventions on slavery, trafficking, exploitation, prostitution, forced labour, torture, inhuman or degrading punishment, treatment of prisoners, the rights of disabled people, freedom of association, prevention and punishment of genocide, treatment of refugees and the Geneva Conventions.

These documents recognise many excellent human rights and I see little there that is objectionable from a Christian perspective. Indeed, I am encouraged by provisions such as the right of men and women of marriageable age to marry and found a family⁹ and the widest possible protection and assistance for the family, especially for mothers, children and young people.¹⁰ Clear protections are put in place for vulnerable groups such as refugees, children, people with disabilities and prisoners of war.

Australia has ratified many of these international human rights documents and there is scope for an aggrieved individual to bring a case to the UN. The courts may also use their provisions as a legitimate guide when interpreting our laws and therefore developing common law.

It is true that Australia has not enacted these international conventions directly into national law. However, I would argue that their intent is very clearly reflected throughout our statute books. Countless Australian laws protect civil and political rights as well as economic and social rights. Australians enjoy the right to vote, the right to belong to a trade union, religious freedom, cultural expression, equality before the law, state subsidised healthcare and education, a social security net, privacy protections and anti-discrimination laws, to mention just some of the many examples.

8 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

9 International Covenant on Civil and Political Rights, article 23.

10 International Covenant on Economic, Social and Cultural Rights, article 10.

Of course, Australian parliaments could choose to ignore the intent of the international human rights mechanisms, but this risks international censure and a possible electoral backlash. Notwithstanding this, the prerogative for our own elected governments to make such decisions is important and may become even more so in the future, if international discussions on rights are increasingly determined on the basis of cultures or values not necessarily adhered to by Australians.

International agreements may be the best way to address serious violations of human rights. As Andrew Cameron argues, 'Rights may be the only way we have to address Belsen, Srebrenica or Rwanda.'¹¹ But there are often more problems than solutions when it comes to legislating rights on a national level. A cultural obsession with 'my rights' is selfishly based and not helpful in encouraging a caring community.

IV Five Objections to a Bill of Rights

In our modern 'Age of Terror,' growing concern over the perceived erosion of civil liberties has led to renewed calls for a bill of rights in Australia to limit the power of the state. I see several problems with this approach.

First, it would be a serious mistake to think that human rights are not protected in Australia simply because there is no bill of rights in most states or federally. Rex Ahdar notes that much rights talk in the international sphere is based on a false premise that universal norms must be implemented in the same way in every nation.¹² According to Mary Ann Glendon, the framers of the Universal Declaration of Human Rights 'never envisaged that its 'common standard of achievement' would or should produce completely uniform practices.'¹³ Some nations may choose to respect human rights by passing a specific Bill of Rights. Australia has chosen to respect human rights by passing specific laws relevant to the rights in question, which to me is a stronger approach. As noted above, the International Bill of Rights is already reflected in many Australian laws. Human rights are well protected here already. Australians have built a happy, free and prosperous society without a bill of rights.

Secondly, a bill of rights is not an effective way to limit the power of the state. Some of the most appalling human rights abuses in modern times have taken place in countries with explicit bills of rights. This is true not only of countries with dysfunctional governments, but also of democratic nations. America's Bill of Rights did not prevent the practice of slavery, segregation in

11 A Cameron, 'What do we do with Rights?' Unpublished paper presented to the Australian Public Theology Network (2006).

12 Rex Ahdar, *Adrift in a Sea of Rights*, New Zealand Education Development Foundation (2001), 53.

13 Mary Ann Glendon, 'Foundations of Human Rights: The Unfinished Business', 44 (1999) *American Journal of Jurisprudence* 1, 7.

the south as late as the 1960s, poor treatment of Native Americans, or the inquisitional practices of the McCarthy era. The French Declaration of the Rights of Man in 1789 and the re-iterated guarantee of rights in the constitution of June 1793 did not prevent Robespierre's Committee of Public Safety from unleashing the Reign of Terror in September of that year. The Soviet Union enshrined the fundamental rights and duties of citizens in its 1936 constitution, supposedly protecting an expansive list of rights whilst Stalin simultaneously conducted his Great Purge of political repression and persecution. However laudable its aspirations, a bill of rights has, of itself, little impact on the use or abuse of power and therefore it does not necessarily provide the protections its advocates hope for.

Thirdly, having failed to constrain the executive, a Bill of Rights opens the door to excessive judicial discretion. It transfers to unelected judges the power to interpret and develop by precedent a body of law that should only be established by an elected parliament. It is true that a parliament would initially have to pass the legislation to enshrine a bill of rights into law. But once this was done, it would have to be interpreted by the judiciary on a case-by-case basis. The provisions of a bill of rights would probably be quite general, leaving the courts considerable leeway to decide what the law should mean. The courts may take a radically different approach to that envisaged by legislators and may effectively create law against the will and intention of the originating parliament. This makes the law uncertain.

It is also likely that many court judgements would erode family values in Australia. One of the most infamous US Supreme Court rulings was, of course, *Roe v Wade*, where the justices inferred a right to privacy and therefore a right to abortion from the Ninth and Fourteenth Amendments (which do not mention either abortion or privacy)¹⁴. Also in America, it has been successfully argued that naked dancing in bars is protected by the outer limits of the First Amendment because it is a form of sexual expression.¹⁵

It is highly doubtful that the authors of the US Bill of Rights ever intended that it be used to allow the abortion of unborn children or the protection of naked dancing in bars. Yet it seems that no matter how bizarre the interpretations of the courts, the Congress is effectively powerless to re-establish the original intent, because the US Bill of Rights is entrenched in the Constitution and therefore virtually impossible to amend or revoke.

There are few calls for a constitutionally entrenched bill of rights in Australia, because this too would involve amending the constitution (though the Northern Territory is considering a constitutional bill of rights as part of its discussions on statehood). However, parliaments are considering, and

14 *Roe v Wade*, 410 US 113 (1973).

15 *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

some have already enacted, a bill of rights as an Act of Parliament. These have much the same effect in practice. Interpretation of Acts of Parliament is a responsibility of courts. If the bill includes a 'read down' clause, then all other legislation has to be reinterpreted in the light of the bill's provisions, probably subverting the intent of the original elected legislators.

Perhaps a number of controversial court rulings would show that the provisions of the bill were flawed if they were open to such perverse interpretations. Where this occurs with ordinary legislation, parliaments can take steps to amend a specific law: for example the case in Queensland where the Supreme Court ruled that a child sex offender's human rights had been breached because the prison only provided tinned, not fresh, halal meat, leaving him with a largely vegetarian diet.¹⁶ In this case, the Police & Corrective Services Minister of the Queensland Government was able to propose amending the Act to ensure that it could not be interpreted in this way again, thus reasserting the Parliament's original intent in its legislation.¹⁷ However, it would be a very courageous politician who proposed amending a bill of rights. As former New South Wales Premier Bob Carr has argued:

Even when a Bill of Rights is not constitutionally entrenched and can therefore be changed by legislation, the political reality is that a Bill of Rights is given 'quasi-constitutional status' and is almost impossible to amend.¹⁸

I would argue that this transfer of power to the courts risks undermining our civil and political rights. Concern about the potential subversion of democracy would remain even if the content of an Australian bill of rights was consistent with Christian principles and even if the judiciary was in some way constrained in its interpretation of the laws. The ordinary citizen has a degree of power over the legislature and executive through the democratic process. The judicial system is rightly not accountable to the electorate for its decisions, but its independence is compromised once it becomes the final arbiter on matters of social policy. As a former Chief Justice of the High Court of Australia has argued:

When a court is empowered to give a final decision on important matters of social policy, there is a great temptation to appoint judges whose views on those questions of policy are views of which the executive government approves. The circumstances surrounding some judicial appointments in the United States show that it has often been impossible

16 *State of Queensland v Mahommed* [2007] QSC 018.

17 The World Today, 'Qld prisoner discrimination case sparks human rights debate,' 12 February 2007 < <http://www.abc.net.au/worldtoday/content/2007/s1845985.htm> > at 1 April 2009.

18 Bob Carr, 'Submission to the Standing Committee on Law and Justice Inquiry into a NSW Bill of Rights'; Mr Carr was then Premier of New South Wales.

to resist this temptation. Thus one of the essentials of a free society – an independent judiciary – tends to be weakened when the judges are given what virtually amounts to political power.¹⁹

Certainly the appointment of Associate Justice Samuel Alito to the United States Supreme Court became highly political, particularly given Alito's conservative views on abortion. The US Senate eventually confirmed his appointment in a vote that ran closely along party lines.

At present, lobby groups such as the Australian Christian Lobby have only a passing interest in judicial appointments. However, I could easily see the ACL and other special interest groups taking a much more active interest in these if the judiciary's role became pivotal because of the passing of a bill of rights. At the same time, if a bill of rights existed that fully protected the right to life, for example, I wonder what impact this would have on state abortion laws and on the human rights legislation of Victoria and the ACT?

The fourth objection to a bill of rights is that it is a modern Trojan horse for ideological campaigners. The transfer of power from a representative parliament to an unelected judiciary is one of the key reasons why those championing minority agendas are so keen to have an Australian bill of rights. Having failed to transform society into their image through the democratic process, they seek to do it indirectly through favourable court rulings that re-interpret the original intent of those laws they deem objectionable. Professor Rex Ahdar argues that:

Social engineering is a demanding exercise for governments but especially so for special interest groups... A cure is at hand however. The broad generalities of modern rights laws can be invoked and interpreted to further one's cause. A bald assertion of one's interests is both crude and unnecessary. One's approach can, instead, be felicitously couched in the language of rights.²⁰

At the 1995 UN Conference on Women held in China, feminist delegates from America impeded the drafting of conference documents by refusing to accept any cross-references to the International Bill of Rights that might impede their pro-abortion agenda. These included references to the right to religious freedom (they viewed religion as patriarchal) or to special protections for mothers and children (believed to entrench women in the oppression of marriage). They were anxious to use rights language to achieve certain parts of their agenda, but keen to suppress those rights that curtailed their aims.²¹

19 Harry Gibbs, 'Does Australia need a Bill of Rights?' (1996) 6 *Upholding the Australian Constitution: Proceedings of the conference of the Samuel Griffith Society*.

20 Rex Ahdar, above n 13, 43

21 Mary Ann Glendon, 'Rights Babel: Thoughts on Approaching the 50th Anniversary of the Universal Declaration of Human Rights', (Thomas J Furphy Lecture 1996).

Within Australia, it has been interesting to see how 'universal human rights' are being tailored to reflect contemporary ideological beliefs. A good example is the right to life. The UN documents, written in an age when abortion was usually illegal, recognise the rights of all human beings to life, and the Declaration on the Rights of the Child notes the child's right to special protection before as well as after birth. The Victorian *Charter of Rights and Responsibilities* and the ACT's *Human Rights Act* have both explicitly limited this right so that it applies only from birth.

The activist elements within the homosexual lobby have also chosen to present their campaign for social approval as a civil rights issue. Homosexual strategists in the USA have argued that:

In any campaign to win over the public, gays must be cast as victims in need of protection so the straights will be inclined by reflex to assume the role of protector...In the early stages of the campaign, the public should not be shocked and repelled by premature exposure to homosexual behaviour itself. Instead, the imagery of sex per se should be downplayed, and the issue of gay rights reduced as far as possible, to an abstract social question.²²

This campaign has enjoyed significant success. Homosexual marriage and adoption have been presented as issues of civil rights. In Australia, some state governments have passed laws that, although intended to uphold 'rights' sacrifice the right of a child to a father and a mother.

However, there is still significant opposition within the Australian Federal Parliament, and it is no wonder that some homosexual rights groups therefore seek to make use of human rights legislation to achieve their aims through the courts. This was certainly the case with marriage where homosexual couples who had 'married' in Canada made clear their intention to bring a legal challenge to Australia's *Marriage Act*. Whilst Australia had always recognised marriage as being between a man and a woman, this had never been explicitly stated in law. Because of the likely attempt to introduce gay marriage through a court ruling, the Federal Parliament passed an amendment to the *Marriage Act*, which explicitly defined marriage as the lifelong, voluntary union of a man and a woman to the exclusion of all others. Samuel Gregg notes that:

The paradox that confronts us is that contemporary rights language seems increasingly predicated towards facilitating the use of political and legal power to sanctify certain ideological tendencies (most notably various feminist assertions) to undermine core institutions such as the nuclear family in the name of diversity or, as we have seen in more

22 Marshall Kirk and Erastes Pill, 'The Overhauling of America' *The Guide*, November 1987.

recent times, to attempt to restrict as fundamental a freedom as religious liberty to what occurs during church services.²³

Finally, I believe Christians are rightly concerned about the development of a rights based culture where someone must always be to blame. A rights obsessed culture engenders a culture of litigation, where individual responsibility is often avoided as tenuous lines of responsibility are established to find someone who can make a compensation payment. This trend is demonstrated by a number of almost farcical cases such as that of a drunken Queensland man who staggered in front of a moving vehicle and then sued both the driver and the hotel where he bought his drinks.²⁴ In the US, a woman successfully sued McDonald's because she burnt herself with coffee that she placed between her legs to stir in the sugar whilst in the passenger seat at a drive through.²⁵ Admittedly, McDonald's coffee was found to be much hotter than that of other outlets, but surely the woman was aware that coffee is a hot drink and should be handled carefully, even if she was not aware of the precise temperature of McDonald's coffee!

Of course, we value living in a culture with a good human rights record. But rights-language is now applied to many different situations, which really do not constitute a breach of human rights. Not everything that troubles or inconveniences us is a breach of human rights. Indeed it is offensive to hear trivial matters described as human rights abuses when one reads about genuine cases of appalling brutal treatment in other countries. As Andrew Cameron notes:

When Christians oppose new bills of rights, they want to give our society a richer view of what it can be. Although useful for lawyers and judges, bills of rights create ever more contractual relationships with each other and with the state, and the relationships of grace and mutual service that constitute much of society sink farther from view. Rights language cannot nurture the bonds of affection that sustain a political community.²⁶

V Conclusion

Real human rights abuses have been and can continue to be prevented using the existing mechanisms of our legal and political system. We do not need a bill of rights, with all its attendant adverse consequences. Indeed, it is much more effective to define rights clearly and precisely in specific legislation

23 Samuel Gregg, above n 6.

24 *Johns v Cosgrove & Chevron Queensland Ltd & Ors*.

25 *Liebeck v McDonald's Restaurants, PTS, Inc.*, No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. Aug. 18, 1994).

26 Cameron above n 11.

relevant to the particular right in question, than it is to enact a bill of rights which aims to guarantee general rights expressed in vague terms.

As the late Sir Harry Gibbs has said, and history has proven: 'If society is tolerant and rational, it does not need a bill of rights. If it is not, no bill of rights will preserve it.'²⁷

27 Harry Gibbs, quoted in *Sydney Morning Herald* 12 December 1984. See a reference to this quotation here < <http://www4.gu.edu.au:8080/adt-root/uploads/approved/adt-QGU20050920.163200/public/06Main.pdf> > at 20 April 2009.

Chapter Twenty One

Ethics and the Limits of a Bill of Rights

AMANDA FAIRWEATHER

I am a medical student. I am also a Christian. One day, I hope to graduate, register, and practice medicine. When I do so, I hope I will have the freedom to practice, with the aim of increasing health outcomes, and not acting against my conscience. I hope I will be able to act in accordance with the ethical principles that have guided medical practice for centuries, which can be summarised as: beneficence, non-maleficence ('first do no harm'), autonomy and justice. And I hope that in allowing a patient to exercise his or her own autonomy, I won't be impeding on my own.

It is on the last point that I am particularly concerned. Many have argued that a woman's choice of abortion is an exercise of her autonomy. While the justification of my position is beyond the scope of this discussion, it will suffice to summarise my position as 'pro-life'. I am of the conviction that personhood starts when biological humanity starts, which is at conception. I believe a living homo sapien who happens to be developing inside a uterus should have just as much of a right to continue existing as a living homo sapien who happens to be developing outside of a uterus. This is partly because I am a Christian, but partly because I think any other definition is purely arbitrary.

The history of the abortion debate and the variety of positions both legal and popular taken by peoples and their governments around the world make it clear that abortion is not an ethically incontrovertible issue. It is then also unsurprising that issues of conscientious objection should arise amongst the community of medical practitioners, who represent a diverse group of people from a vast range of cultural and religious backgrounds, but who despite this diversity are increasingly expected to be monolithic in the range of services they provide.

There are those who believe an unborn human is a person who deserves special protection if and only if this person's parents desire for him or her to exist. If not, he or she may be discarded at his or her parents' will. Most proponents of this attitude hold it on the basis that we cannot impose on the mother's freedom. I find this palpably ironic, because many of these same proponents have pushed to have my freedom removed to not be involved in this process.

Some people would have a problem with me choosing to use my future position of influence as a doctor to tell women that it is morally wrong to end the life of their unborn offspring. In the same way, I have a problem with

the State choosing to use its position of power over me, forcing me to be involved in the process that will result in an unborn human unnecessarily losing his or her life.

This is exactly what has happened in Victoria's recent *Abortion Law Reform Act 2008* (the Act). One of the biggest concerns for medical professionals – even those who have no moral problem with abortion – was the imposition on the freedom of conscience of Victorian health care workers.

Section 8 of the Act forces doctors with a conscientious objection to abortion to disclose their beliefs before *referring women to a doctor who is not opposed to termination*. In effect, this means the doctors are involved in a woman procuring an abortion. They are required by law to act in a manner which is well known to be contrary to the consciences of many doctors.

If a woman came to my practice with a non life-threatening pregnancy seeking an abortion, I'm not sure I could, in good conscience, facilitate that process. Under the legislation a woman can seek an abortion for any reason up until 24 weeks (and quite easily thereafter). Babies born at less than 24 weeks have been known to survive, which could present a very understandable question of conscience for practitioners, religious or otherwise

The Victorian Parliament was aware of the difficulties this part of the legislation caused. But this did not deter them. The Bill was passed without amendment. In fact, some bioethicists have championed this sort of imposition on freedom of conscience. Professor Julian Savulescu, of the Oxford Uehiro Centre for Practical Ethics, has said '[i]f people are not prepared to offer legally permitted, efficient, and beneficial care to a patient because it conflicts with their values, they should not be doctors.'¹

Putting aside for a moment the question of whether abortion is beneficial for a woman (a point which is hardly clear, even before considering the welfare of the foetus), what are the values that Professor Savulescu is so indifferent towards? The values that extend all the way back to the Hippocratic Oath, which states 'I will give no deadly medicine to any one if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion.' A woman may have the right to request an abortion, but a doctor should maintain the right to not be involved in her receiving that abortion.

Many people would champion the cause of unfettered patient autonomy with no room for any ethical considerations of the doctor. They would say we are basically service-providers, and if that's what the patient wants, that's what the patient must get. However, I think the implications on a doctor not being able to exercise his or her own freedom of conscience in medicine are enormous.

1 Julian Savulescu, 'Conscientious objection in medicine' (2006) *BMJ* 332, 294-297.

Let me provide an analogy. Think for a moment of a practice that all reasonable Australians would consider grotesque: Female Genital Mutilation (FGM). It is defined by the World Health Organisation as a procedure that ‘intentionally alters or injures female genital organs for non-medical reasons’ (often social or cultural). It is associated with significant morbidities and even mortalities, not just because of the procedure itself, but because of the unsafe and unhygienic practices often associated with it.

The procedure is considered so abhorrent that Australian law forbids any Australian doctor from performing it or referring a patient onto another doctor for it, whether in Australia or overseas. *Médecins Sans Frontières* – who justify their provision of abortion services on the argument that women will do them anyway so they might as well be ‘safe’ – will NOT under any circumstances perform an FGM – even to reduce the morbidities associated with unhygienic ‘backyard’ provisions of the procedure. In effect, the State and a significant non-governmental organisation have drawn a line in the sand and said they will not facilitate this process on moral grounds.

However, FGM is a widely-accepted practice in much of the world. For example, it has a prevalence rate of 90% in Somalia. It is legal in some countries, and considered an important part of the culture. In some areas, it is difficult for a girl to get married if she has not had FGM performed on her.

If I was an expatriate doctor working in Somalia, and a girl came to me asking to perform an FGM on her what should I say? Should I tell her this procedure is wrong, that it is immoral, that it is not necessary for her medical care, and that she should not proceed? But that would be paternalistic medical practice; it would diminish her autonomy.

Should I say, ‘Look I won’t provide it, but here’s a list of doctors who will – in fact, let me refer you to one’? But that would be a part of facilitating the process. My actions would help her get an FGM.

Should I just give in and perform the procedure – after all, she’s more likely to suffer health risks if she takes the matter into her own hands, and considering how prevalent and widely-accepted the procedure is, she’s going to get it done anyway – it might as well be under my watch so that it is as ‘safe’ as possible? If I truly must put my own ethical considerations aside, performing the FGM would make for good clinical practice.

It is easy to see how a scenario like this is possible when we allow legislation to override the conscientious objections of practitioners. This scenario also illustrates the importance of preserving the right to conscience separately from particular ethical determinations.

The fact of the matter is that the medical profession’s ethical considerations regularly place restrictions on clinical practice, and on patient autonomy. The only question is *which* ethical considerations.

On a highly contentious ethical issue the Victorian legislation takes one particular position (namely, a fairly liberal approach to provision of abortions),

and then prescribes a course of action to doctors without respect to (or seemingly, regard of) their conscience. It does not consider the conscience of, say, doctors within the Catholic health system, which provides 1/3 of Victoria's obstetric care, many of whom would have a major issue with being part of this process. It does not consider my conscience, which would be hesitant to engage in any aspect of a woman procuring a non-life-saving abortion.

So we have reached a point where doctors' rights to conscience are being breached in a most unabashed manner. Surely this is where a bill of rights comes into its own, where professionals of conscience are saved from the vagaries of legislation by the iron-clad strength of explicit rights protections. Yet, this has not been the case.

Victoria has a Charter of Rights and Responsibilities. In S 14 it states:

Freedom of thought, Conscience, Religion and Belief

- (1) Everyone has the right to freedom of thought, conscience and religion. This right includes:
 - (a) the freedom to have or to adopt a religion or belief of his or her choice; and
 - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.
- (2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Yet this Charter did nothing to stop clause 8 of the Act to passing, even though it clearly acts against many doctors' freedom of thought, conscience, religion and belief.

This is the problem with the state attempting to legislate rights and values. Inevitably, different values will conflict. The value that promotes abortion as an ethical good is ultimately in conflict with the broadly held (if still in the minority) value that considers life as having significant, intrinsic value from its conception.

When the state supports one 'right' it faces the complication of (sometimes many) competing 'rights'. Indeed, this is a well-known weakness in the 'rights' approach to ethics in general. Rights proliferate, adding imperative to imperative, all the while giving no guidance to the resolution of competing values and interests. When the state codifies rights, we are left with the law as our tool for resolving these often extremely complex and difficult intersections. The law is too blunt an instrument. The codification of rights removes ethical discourse from professional communities and the public in general. In the case of medical ethics, this takes the determination

of the right course in a given situation away from both patient and doctor, away from family and community, away from the hospital or clinic, and quarantines the difficult ethics in parliaments and courts. This is clearly not where these discussions are best held and the Act demonstrates this well.

But if I were relying on a charter or bill of rights to protect my freedoms, I wouldn't be so confident. Either it would be impotent to protect the rights it is supposed to (such as the Victorian Charter, which despite its section on freedom of conscience did nothing to stop clause 8 of the Act from being passed), or it would have power, but would only protect the rights the bill itself sees as correct.

If there is significant disagreement within the community over the application of one of the rights, at the expense of another, the debate will not go to democratically elected parliamentarians who can be voted out next election, but to undemocratically appointed judges. There is the potential here for judges to push their own agenda.

Ultimately, despite the fact that I am saddened by the Victorian Parliament's decision in passing the Act, I would still rather trust in a sovereign parliament, where I can be actively involved in the democratic process in trying to remove the clause, than in a charter of rights. I hope the Victorian Parliament will amend the Act. I hope the thousands of people who protested, the many submissions Parliament received, and the common sense of many Victorian parliamentarians will lead to this clause being amended because of the way that it ultimately decreases freedoms and rights.

I do not have any faith that the Victorian Charter of Rights and Responsibilities will protect conscientious objection now that the Act is in effect any more than it prevented its creation in the first place. Nor do I believe that similar rights legislation on a national level would protect my freedom to abstain from uses of medicine that I find morally indefensible. Despite its best intentions, a bill of rights is mere symbolism at best, and a danger to the freedom it so boldly promises at worst.

A grayscale photograph of a hand holding a wooden gavel over a wooden block on a table. The gavel is positioned as if about to strike the block. The background is a plain, light-colored wall.

Part V:
Bill of Rights in Operation

Chapter Twenty Two

The Human Rights Act 1998 (UK): An Impossible Compromise*

FELICITY MCMAHON

Like many western countries, up until 2002, the United Kingdom had certain laws which severely restricted cross examination of a rape victim's sexual history. These laws are often referred to as the 'rape shield laws'. Whatever one's opinion might be of the virtues, or lack thereof, of rape shield laws, a duly elected government, partly due to sustained and successful lobbying by women's rights group, determined that it would be inappropriate to allow rape victims to be cross-examined on their sexual history in the context of a rape trial. This duly elected government enacted s 41 of the *Youth Justice and Criminal Evidence Act 1999* which prevented cross-examination of a rape victim's sexual history which might nonetheless be relevant to the accused's defence. In 2002, however, the House of Lords in *R v A (No.2)*¹ held that this provision should be read down, in accordance with a court's obligation under the *Human Rights Act 1998*² to read legislation *so far as it is possible to do so*, to give effect in a way which is compatible with Convention rights. Despite the lack of ambiguity regarding the intention of Parliament, the House of Lords held that s 41 must read to mean that evidence of past sexual history of the victim could only be admitted if it was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial in breach of Article 6 of the European Convention on Human Rights. The decision in *R v A (No. 2)* reinstated the discretion of courts to admit a victim's past sexual history which the *Youth Justice and Criminal Evidence Act* sought to remove.

The supporters of the government which enacted this legislation, and the women's rights groups which campaigned for it, therefore found themselves in a strange position. Not being an Act of Parliament, but a decision of the House of Lords, there was no one they could lobby to re-enact the laws which they had fought so hard to introduce. The House of Lords, being an unelected judicial body, is beyond the realms of the democratic process and cannot be 'lobbied' to seek a change in decision-making. Technically, under the HRA, the Parliament of the United Kingdom could enact a law in breach of the Convention rights, but given the 'rights culture' which has subsumed the English national conscience, such an act would be political suicide.

1 *R v A (No 2)* [2001] UKHL 25; [2001] 2 WLR 1546.

2 Hereinafter the 'HRA'.

As a 'legislative act' of the British Parliament, many supporters of the HRA attempt to argue that it balances the need to protect human rights against the desire to protect parliamentary sovereignty. On the contrary, the Act serves to achieve two things only: the abdication of parliamentary power to judges and the abdication of national power to European courts through the incorporation into national law of European human rights decisions. The Act is an uneasy compromise between the maintenance of parliamentary sovereignty and the implementation of human rights³ contained in the European Convention on Human Rights⁴.

In attempting to achieve these two competing aims, the sovereignty of Parliament is the obvious and necessary victim as power is passed to judges to frame the content of rights and determine the legislative limits of parliamentary power. In this respect, despite attempts by politicians and proponents of the Act to portray it as distinct from a constitutionally entrenched instrument, as though a mere instrument of Parliament can protect parliament's own sovereignty, the HRA falls short, side-stepping the Parliamentary process which produces better policy and provides greater legal certainty. Its application perverts the policy aims of government and results in unintended consequences to the detriment of the general public. It is an apt demonstration of the perils of legislating for the protection of human rights in either constitutional or legislative form.

Although the HRA supposedly preserves the right of Parliament to enact legislation incompatible with the HRA, the rights culture which has developed in the United Kingdom makes such action politically impossible. Moreover, the interpretative obligations contained in the HRA have unleashed judicial activism on a scale that Parliament did not intend. The HRA illustrates that when it comes to attempting to 'balance' parliamentary sovereignty and human rights, there is no safe compromise. There is also the strong sense that a statutory bill of rights is a step in the direction towards a constitutionally entrenched model of protecting human rights, increased demands for incorporating additional rights such as social and economic rights and a slippery step towards a total distortion of parliamentary power and, ultimately, of the popular will.

I An Outline of the Operation of the Act

A Political and Historical Context

To understand why the HRA was introduced, it is necessary to understand its political and historical context. Prior to the introduction of the Act, the effect of the ECHR in the UK was confusing. Whereas the European

3 Described as the 'Convention rights'.

4 The Convention for the Protection of Human Rights and Fundamental Freedoms (but sometimes described as the "European Convention on Human Rights" or the "ECHR").

Community exercised legislative powers within the scope of EC law, the ECHR constituted general principles of EC law. Between 1964 and July 1999 the ECHR was referred to in over 650 English cases.⁵ However, any alleged breaches of Convention rights required plaintiffs to appeal directly to Strasbourg. In 1996–1997 alone, 451 applications against the United Kingdom were registered in Strasbourg.⁶

The campaign to introduce a United Kingdom Human Rights Act began in 1968, culminating in the ‘Charter 88’ campaign in 1988 which proposed a wide range of constitutional reforms including the incorporation of the ECHR. Momentum gathered thereafter resulting in the first two Bills introduced into the British Parliament in 1994 by the Liberal Democrat peer, Lord Lester of Herne Hill QC. The second bill, modeled on the New Zealand *Bill of Rights Act 1990*, which did not give courts the power to strike down inconsistent legislation, was given a Second Reading on 5 February 1997. Lord Lester said that the HRA was a ‘strengthened version of the New Zealand model’. With the election of the Labour government in May 1997 and the toppling of John Major’s Conservative Government, the Human Rights Bill was virtually a *fait accompli*. The Labour Party was committed to the incorporation the Convention into British law and set about carrying that out in October 1997 with the publication of its White Paper, *Rights Brought Home: The Human Rights Bill* and the new Bill for which the then Secretary of State for the Home Department, Jack Straw, was the responsible minister. The *Human Rights Act 1998* was enacted on 9 November 1998 and was substantially brought into force on 2 October 2000. The Conservatives opposed the introduction of the Bill, as indeed did a significant section of the British media.

The then Prime Minister, Tony Blair, said that the purpose of the Act was to give people in the UK an opportunity to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the European Human Rights Court in Strasbourg. There was an expectation that the HRA would increase litigation in English courts on the basis of human rights claims. If an applicant has sought redress in English courts and is unhappy with the outcome, it can still apply to Strasbourg for a review of the English decision as a final avenue of appeal.⁷

Since its enactment, criticism of the HRA has increased. As the breadth of its application is tested and extended, it has become increasingly apparent to large sections of the British population that the HRA and its interpretation

5 Stephen Grosz, Jack Beaton and Peter Duffy, *Human Rights: The 1998 Act and the European Convention*, (2000) 3, citing Murray Hunt, *Using Human Rights Law in English Courts* (1996) Appendix 1.

6 Jason Coppel, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (1999) 107.

7 The cost of such action was estimated by Blair’s Government in its White Paper, *Bringing Rights Home*, published before introducing the HRA, to average £30,000.

is not working as intended. This is something that even the man responsible for introducing the HRA into Parliament, the current Secretary of State for Justice, Jack Straw, has acknowledged.⁸ The policy of the current Conservative Party, led by Opposition Leader David Cameron MP, is to abolish the HRA in favour of implementing 'A British Bill of Rights'. The Conservative Party, owing largely to an entrenched human rights agenda in the UK, has compromised its original stance in opposition to the HRA in its entirety and, instead of challenging the validity of the whole legislative human rights act or charter framework, is aiming its criticism at the supremacy of decisions of the European Court of Human Rights. This is an altogether justified criticism, but reflects a compromise in favour of pragmatism. Australian political parties would be wise to learn from the limited scope of the Conservative Party's criticisms. It is difficult to step back from accepting in principle some form of legislative or constitutional protection of human rights once that 'protection' has been enacted. The Conservative Party is fortunate that it still can take aim at European institutions. Australia has no such comparable scapegoat.

B Purpose

The HRA aims to 'give further effect to rights and freedoms guaranteed under the European Convention on Human Rights' in three main ways.

First, s 3 requires courts, *so far as it is possible to do so*, to read legislation in a way which is compatible with Convention rights.⁹ Section 6 of the HRA also requires public authorities to act in a way which is compatible with Convention rights and s 7 allows individuals to bring proceedings against an authority.

Secondly, s 4 of the HRA empowers higher courts (i.e. anything higher than a Magistrate's Court, County Courts and Crown Courts) to declare that legislation is incompatible with a Convention right by issuing a 'declaration of incompatibility'.

Thirdly, s 2 gives effect to European decisions on human rights by requiring any British court or tribunal determining a question which has arisen in connection with a Convention right to take into account any opinions, decisions, judgments, declarations or advisory opinions of the ECHR and the European Commission.

The HRA gives courts very broad powers with respect to ordering judicial remedies. Under s 8, judges are empowered to grant against a public authority acting unlawfully any relief or remedy or make any such order

8 The emergence of a 'rights culture' is something which has been acknowledged by the current Justice Secretary, Jack Straw, who admitted that the British viewed the HRA as a villain's charter and expressed concerns about the way in which the HRA had been implemented, see Times Online, 'Jack Straw backs overhaul of Human Rights Act', 8 December 2008 <<http://business.timesonline.co.uk/tol/business/law/article5305999.ecc>> at 1 April 2009.

9 Described as the 'interpretation obligation'.

within its powers as it considers just and appropriate. An award of damages must be necessary to afford just satisfaction and in deciding to award damages the court must take into account principles applied by the ECHR and Article 41 of the European Convention.

Since the Act is a legislative act of Parliament, it is *theoretically* possible for Parliament to alter its contents through a subsequent act of parliament. This is only a *theoretical* possibility because, politically and realistically, any party seen to revise down or narrow the scope of human rights would be taking a politically fatal step. Moreover, since the Act gives effect to rights already contained in the ECHR, a convention of the European Union, it is all but impossible to alter the content and scope of rights. It is therefore very difficult for the UK Parliament to change any substantive aspect of the content and scope of rights since the rights actually protected are contained in a European legal instrument, which, like any other international agreement, can only be altered by the parties to the agreement.

C Convention Rights

The HRA gives effect to sixteen Convention rights,¹⁰ namely:

1. The right to life (Article 2)
2. Prohibition of torture (Article 3)
3. Prohibition of slavery and forced labour (Article 4)
4. Right to liberty and security (Article 5)
5. Right to a fair trial (Article 6)
6. No punishment without law (Article 7)
7. Right to respect for private and family life (Article 8)
8. Freedom of thought, conscience and religion (Article 9)
9. Freedom of expression (Article 10)
10. Freedom of assembly and association (Article 11)
11. Right to marry (Article 12)
12. Prohibition of discrimination (Article 14)
13. Protection of property (Article 1, First Protocol)
14. Right to education (Article 2, First Protocol)
15. Right to free elections (Article 3, First Protocol)
16. Abolition of the death penalty (Article 1, Thirteenth Protocol)

At first glance, the list seems like an uncontroversial array of rights. Unlike any human rights instrument, however, the need for these rights to be interpreted, and for their limits, content and application to be defined, necessarily requires judges to exercise more than just judicial power and to

¹⁰ Section 1 of the Act defines 'Convention rights' to mean rights and fundamental freedoms set out in Articles 2 to 12 of the Convention, Articles 1 to 3 of the First Protocol and Article 1 of the Thirteenth Protocol.

encroach upon the responsibilities with which parliamentarians are ordinarily entrusted. The legislative nature of the HRA does not escape this. There is nothing special about the manner in which the Convention rights are drafted which guarantees certainty of interpretation. Just like most human rights instruments, the Convention rights are broadly phrased, sometimes with qualifications which are similarly broadly expressed. Just like any human rights instrument, the Convention rights require interpretation – the application of an individual understanding of right and wrong, and, largely, the exercise of political ideology. When it comes to something which requires the exercise of political ideology, judges are the wrong actors. Moreover, the Convention rights contrast to ‘black letter’ legislation which is familiar to common law judges and a feature of common law legal systems. Detailed legislation sets out the precise operation of laws and judges join the dots when cases throw up novel concepts. In such legislation, the dividing line between interpreting and legislating is clear. In the context of human rights and under the HRA, this dividing line is far less clear.

Furthermore, a close inspection of these rights also shows that they afford far less protection than one might think. Freedom of Expression, for example, is not so broad as to protect supposed ‘racist speech’ or ‘hate speech’ or even ‘holocaust revision’. The right to life may even impose an obligation on the state to protect the general public from apparently life-threatening hazards present in the environment. It is beyond the scope of this paper to address the content and definition of these rights, except to note that since s 2 of the HRA requires courts to take into account European Court of Human Rights¹¹ case law when interpreting Convention rights, those rights will be interpreted in a similar way by United Kingdom courts as they are by ECtHR. As discussed below, the effect of this is to limit the legislative freedom of the UK parliament to choose between policy alternatives and to balance competing interests within its own society on its own grounds.

D Interpretation

Section 3 of the HRA requires courts to read and give effect to legislation in a way which is compatible with Convention rights, so far as it is possible so to do. Ordinarily, courts must interpret legislation so as to give the words their natural and ordinary meaning, and in line with the intention of legislation by parliament. Section 3 is therefore at odds with the general rules of statutory interpretation which have ensured that courts interpret the laws in a manner that could be reasonably expected by ordinary members of the public. As pointed out by Lord Cooke of Thondon in the House of Lords during parliamentary debates before enactment of the HRA, the clause

11 Hereinafter the ‘ECtHR’

requires a very different approach to interpretation from that to which English courts are accustomed. His Lordship went on to say,

traditionally, the search has been for the true meaning; now it will be for a possible meaning that would prevent the making of a declaration of incompatibility.¹²

As his Lordship noted, if s 3 is scrupulously complied with,

the common law approach to statutory interpretation will never be the same again; moreover, this will prove a powerful Bill indeed.¹³

His Lordship's perceptive comments have been confirmed in practice by judges who have said that when applying the interpretation obligation in s 3, sometimes it will be 'necessary to adopt an interpretation which linguistically may appear strained'.¹⁴ It may involve employing techniques to 'read down' express language in a statute and 'read in' certain provisions.¹⁵ While courts cannot 'contort' words to produce 'implausible or incredible meanings', they may be required to give a meaning to a statutory provision which it would not ordinarily bear,¹⁶ to imply words into a provision¹⁷ or establish implied exceptions.¹⁸ Such an absurd approach to legislative interpretation is apparently justified on the basis that a declaration of incompatibility can only be issued as a last resort.

In *Offen*¹⁹ the House of Lords was faced with imposing mandatory life sentences on persons convicted of two serious offences as provided in s 2 of the *Crimes (Sentences) Act 1997* (which has since been repealed). The Court of Appeal, concerned that automatic life sentences constituted a breach of the Article 3 protection from inhuman or degrading punishment, gleaned that Parliament must have intended mandatory life sentences only to apply to persons who committed two serious offences and were also judged to be a danger or risk to the public. It therefore interpreted *into* the *Crimes (Sentences) Act 1997* an exception for offenders who are judged not to pose a danger or risk to the public – in situations, for example, where the relevant offences are

12 United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, vol. 582, col. 1272 (Lord Cooke of Thorndon).

13 Ibid 1273.

14 *R v A (No 2)* [2001] UKHL 25; [2001] 2 WLR 1546.

15 Ibid.

16 *R v DPP ex parte Kebilene* [1993] 3 WLR 972.

17 *Lister v Forth Dry Dock & Engineering Co. Ltd* [1990] 1 AC 546 (House of Lords); *Pickstone v Freemans plc* [1989] 1 AC 66, 112D (House of Lords).

18 *R v Offen*, *R v Gilliard*, *R v McKeown*, *R v Okwuegbunam*, *R v Saunders (Stephen)* [2001] 1 WLR 514 (House of Lords); *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115; *R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539, 573G-575D, 587C-590A.

19 [2001] 1 WLR 514 (House of Lords).

of a different kind, or a long period elapses between the offences. It clearly was Parliament's intention to *automatically* impose life sentences for two serious offences, without any exceptions. The effect of the interpretative obligation, however, was to destroy Parliament's intent and thwart its policy: judges became the legislators.

The effect of English courts' approach to interpreting legislation so as to be compatible with Convention rights has been twofold. First, the interpretation obligation often requires courts to depart from the legislative intention of Parliament. Secondly, the courts' primary motivation is to construe legislation to be compatible with Convention rights so that a declaration of incompatibility is a 'measure of last resort'.²⁰ It is at the interpretive stage where the most damage, however, is done.

E Incompatibility Order

The power of the court to make a 'declaration of incompatibility' under s 4 of the HRA, as opposed to striking down a piece of legislation and declaring it 'unconstitutional,' as would be the case with a constitutionally-entrenched model, is supposedly one of the key features of the Act which preserves parliamentary sovereignty. In this respect the HRA is similar to the New Zealand and Canadian models. Under the HRA, only 'higher' courts are empowered to make such declarations, including the House of Lords, the Privy Council, Courts-Martial Appeal Court, the High Court and the Court of Appeal.²¹ All courts, however, are required to interpret legislation in a way which is compatible with Convention rights.

The process of introducing proposed legislation now begins with the minister responsible making statement that a bill is compatible with Convention rights. If this statement cannot be made, the responsible Minister must state that Parliament must proceed to pass the bill regardless of the inability to make a statement of compatibility under s 19(1)(b). The reasons outlined by the minister why the legislation is compatible can be consulted and scrutinised by judges when deciding whether to make a declaration. This requirement is supposed to initiate a dialogue between courts and parliament, and between parliament and the people, as though this is something that wouldn't take place without the HRA.

It is difficult to describe what sort of power a court exercises when carrying out this process or what the effect of a declaration of incompatibility actually is. In the parliamentary debates in the House of Lords, Lord Irvine of Lairg (the then Lord Chancellor), said that a

20 Ben Emmerson, Andrew Ashworth, Alison Macdonald (eds), *Human Rights and Criminal Justice*, (2007), 170.

21 Thereby excluding County, Magistrates and Crown Courts.

declaration of incompatibility will not itself change the law. The statute will continue to apply despite its incompatibility. But the declaration is very likely to prompt the Government and Parliament to respond.²²

The continued validity and operation of the law despite the declaration is enshrined in s 4 of the HRA. What, however, is the consequence if the Parliament fails to respond to the declaration of incompatibility?²³ Is the Act only as strong as the extent to which Parliament is accountable to the people? If so, what need is there for the Act?

During committee debates, the then Lord Chancellor reiterated that a declaration 'has no operative or coercive effect and in particular does not prevent either party relying on, or the courts enforcing, the law in question unless and until changed by Parliament.'²⁴ Rather, 'by enabling the courts to make a declaration of incompatibility, the situation can be brought to the notice of Parliament and the deficiency subsequently rectified by Parliament, whether by primary legislation or by approving a remedial order.'²⁵ In other words, the HRA empowers judges to instruct parliament to change laws.

F Examples of Declarations of Incompatibility Issued to Date

There have been a limited number of declarations of incompatibility issued to date. This is largely a reflection of the extent to which judges have used the interpretation obligation to develop an interpretation of statutes which avoids issuing a declaration of incompatibility.

A declaration of incompatibility has also been issued in the following contexts:

- In relation to the penalties under the *Immigration and Asylum Act 1999* imposed on persons convicted of dishonestly and/or carelessly transporting illegal immigrants into the UK on the basis that the penalty (£GBP2000 per illegal immigrant transported) was severe and inflexible (article 6 right to fair trial) and violated property rights because the vehicle used to transport illegal immigrants was seized as a security for payment of fines and the seizure was not reviewable.²⁶

22 United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, vol. 582, col. 1231 (Lord Irvine of Lairg).

23 The legal answer is of course none. Section 6 of the HRA provides that a failure to introduce legislation or to make a remedial order following a declaration of incompatibility cannot be challenged in the courts. While s 10 of the Act empowers a minister to amend incompatible primary legislation by issuing a 'remedial order', nothing in the HRA compels any minister to do so.

24 United Kingdom, *Parliamentary Debates*, House of Lords, 18 November 1997, vol. 583, col. 544, per (Lord Irvine of Lairg).

25 United Kingdom, *Parliamentary Debates*, House of Commons, , 3 June 1998, vol. 313, col. 459, (Geoffrey Hoon MP).

26 *International Transport Roth GmbH v Secretary for State for the Home Department* [2002] 3 WLR 344.

- A provision of the *Consumer Credit Act 1974* (UK) which provided that a consumer credit agreement regulated by that Act could not be enforced unless there was a document signed by the debtor which contained all the terms of the agreement (rather than, for example, a reference to another document containing the terms and conditions of the agreement) was incompatible with the right to fair trial (article 6).²⁷ The decision to issue a declaration of incompatibility was overturned by the House of Lords.²⁸
- In relation to s 23 of the *Anti-terrorism, Crime and Security Act 2001* which allowed foreign nationals to be detained and deported on the basis that there was evidence of them being a threat to national security.²⁹ The Secretary of State had certified certain individuals as suspected terrorists and they were detained without charge or trial in accordance with the UK's derogation from Article 5(1) provided by the *Human Rights Act 1998 (Designated Derogation) Order 2001*. This was held to be disproportionate and incompatible with the ECHR rule against discrimination between nationals and foreign nationals (articles 5, 6 and 14, ECHR).³⁰ The government did not seek to renew the offending provisions but has sought to replace them with a new scheme which does not discriminate between foreigners and citizens, but may be subject to review by British courts under the HRA and in relation to which a declaration of incompatibility could be issued.
- In *McR's Application for Judicial Review*³¹ against s 62 of the *Offences against the Person Act 1861* (attempted buggery) which continued to apply in Northern Ireland. Section 62, which created the offence of attempted buggery was held to be in breach of Article 8. Section 62 was repealed in Northern Ireland by the *Sexual Offences Act 2003*.
- In *R (on the application of Anderson) v Secretary of State for the Home Department*³² in relation to s 29 of the *Crime (Sentences) Act 1997* which was held to be incompatible with the right under Article 6 to have a sentence imposed by an independent and impartial tribunal. Section 29 set the minimum period which must be served by a mandatory life sentence prisoner before being considered for parole.

27 *Wilson v First County Trust Ltd* [2001] EWCA Civ 633; [2001] 3 WLR 42.

28 [2003] UKHL 40 (House of Lords).

29 *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2004] UKHL 56 (House of Lords).

30 The *Anti-terrorism, Crime and Security Act 2001* was subsequently replaced with the *Prevention of Terrorism Act 2005* which removes the discrimination between nationals and foreign nationals.

31 [2003] NI 1.

32 [2002] UKHL 46 (House of Lords).

Setting the minimum period before a prisoner is eligible for parole should fall within the scope of the powers of parliament. This decision has limited parliament's policy scope with respect to those convicted of the most heinous crimes. It is this case, and cases like this, which have earned the HRA status as a 'villain's charter'.

- In *R v Secretary of State for the Home Department, ex parte D*³³ in respect of s 74 of the *Mental Health Act 1983* which was held to be incompatible with Article 5. Section 74 provided that the continued detention of discretionary life prisoners who had served the penal part of their sentence depended on the exercise of a discretionary power by the executive government to grant access to court. One would have expected such a matter should remain within the scope of the executive. Section 74 was subsequently amended by the *Criminal Justice Act 2003*.
- In *Blood and Tarbuck v Secretary of State for Health*³⁴ in relation to s 28(6)(b) of the *Human Fertilisation and Embryology Act 1990* which was held to be incompatible with Article 8 on the basis that it did not allow a deceased father's name to be given on the birth certificate of his child. The law was subsequently amended by the *Human Fertilisation and Embryology (Deceased Fathers) Act 2003*. This appears to be one of the more reasonable declarations of incompatibility issued by UK courts.
- In *Bellinger v Bellinger*³⁵ in relation to s 11(c) of the *Matrimonial Causes Act 1973* which was held to be incompatible with Article 8 and 12 in so far as it makes no provisions for the recognition of gender reassignment. In this case, a post-operative male to female transsexual appealed against a decision that she was not validly married to her husband, by virtue of the fact that at law she was a man.

The list above shows that, among some of the more absurd decisions, there have been some sensible decisions by courts to issue declarations of incompatibility. *Bellinger v Bellinger* and *Blood and Tarbuck v Secretary of State for Health* are good examples. The problem is, however, that these decisions are mixed with some extraordinary decisions and the more reasonable decisions still come at the cost of limiting Parliament's power. Moreover, it is entirely probable that the absurd laws in *Bellinger* and *Blood and Tarbuck* could have been remedied via the parliamentary process without using the HRA.

33 [2002] EWHC 2805.

34 Unreported, Sullivan J, 28 February 2003.

35 [2003] UKHL 21 (House of Lords).

The greater problem, however, is the extent to which courts are not simply issuing a declaration of incompatibility to prompt Parliament to address the supposed incompatibility, but are instead adopting absurd interpretations of laws under s 3 of the HRA to make the laws compatible with Convention rights. In *Ghaidan v Godin-Mendoza*³⁶ Lord Steyn analysed the 25 cases in which courts had considered issuing a declaration of incompatibility up until the date of that case. Lord Steyn cited that in 10 cases the courts used the interpretation obligation under s 3, and in 15 cases courts issued a declaration of incompatibility. Of the 15 declaration cases, in five cases, successful appeals resulted in the declarations being reversed.³⁷ Lord Steyn concluded that under the HRA the interpretative obligation was the principal remedial measure raising questions about the proper implementation of the HRA. His Lordship concluded that 'a study of the case law reinforces the need to pose the question whether the law has taken a wrong turning'.³⁸

G Examples

The best way to illustrate the impact of the HRA is on some of the important cases of British courts. The two key areas which have sparked a significant amount of public interest have been in relation to terrorism laws and crime.

H Terrorism

One of the areas of judicial intrusion into legislative policy making due to the HRA sparking considerable controversy has been terrorism. Policy choice in the area of terrorism is difficult at the best of times. Under the HRA, terrorism legislation has been subject to close scrutiny by the House of Lords, for example, in *A and others v Secretary of State for the Home Department*³⁹ (as discussed above) in which the choice of immigration legislation and policy approach taken by parliament as a response to terrorism was closely dissected.

The provisions of the *Prevention of Terrorism Act 2005*, which allows the Home Secretary to impose control order on individuals suspected of terrorist-related activity, have been given mixed treatment by courts of the United Kingdom. In one case, the court held that control orders, which imposed on individuals suspected of terrorist-related activity, *inter alia*, a curfew, required the suspects to wear tags, phone a monitoring company, imposed limitations on visitors and possession of communication equipment, violated Article 5

36 [2004] 2 AC 557.

37 *R (Alconbury) v Secretary of State Environment* [2003] 2 AC 295; *Wilson v First County Trust (No. 2)* [2004] 1 AC 816; *Matthews v MoD* [2003] 1 AC 1163; *R (Utley) v Secretary of State for the Home Department* [2004] 1 WLR 2278; *R (MH) Secretary of State for Health* [2005] UKHL 60; *R (Morris) v Westminster CC* [2005] 1 WLR 865.

38 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, 39.

39 [2005] 2 AC 68.

(right to liberty) and were therefore unlawful.⁴⁰ In another case,⁴¹ an order against a suspected Libyan Islamic extremist which included a 14-hour curfew, restrictions on contacts, reporting obligations and travel restrictions, was held not to be in violation of Article 5. The fact, however, that neither suspects had been informed of the accusations leveled against them and so had not had the benefit of a fair hearing was problematic. One would argue that tipping off the suspects as to the authorities knowledge of their activities might be a legitimate policy motivation behind not disclosing to the suspects the accusations leveled against them. These two cases in which courts reviewed parliament's response to terrorism severely impact the freedom of parliament to respond to terrorist threats in a way it perceives – rightly or wrongly – as appropriate and responsible.

In the *Afghan Hijackers Case* the Immigration Tribunal, on the basis of the HRA, ruled that nine Afghan men who hijacked a plane with 180 passengers on board to flee from the Taliban, could remain in the United Kingdom and had the right to seek work. Their convictions for hijacking and false imprisonment were quashed and they were given temporary leave to remain in the United Kingdom, regardless of the fact that they committed serious crimes suggesting that they were not eligible for refugee status.

The HRA has been relied upon by Asylum seekers to increase the benefit they received from the State⁴² on the basis that the benefit given combined with a provision forbidding asylum seekers from working constituted a breach of article 3 prohibition on torture and of inhuman or degrading treatment or punishment. This followed a flood of claims by asylum seekers claiming breaches of article 3⁴³ despite the fact that asylum seekers had shelter, sanitary facilities and money for food.

I Crime, Law & Order

The second area in which the United Kingdom has witnessed the perverse effects of the HRA is in crime.

Six prisoners in British jails have applied to give sperm to their wives and partners after the Strasbourg Human Rights Tribunal, the Grand Chamber, said that blocking the couple's request was a denial of their right to become parents in breach of Article 8 guaranteeing a right to private and family life. A British prisoner, Kirk Dickson, serving 15 years for kicking a man to death, requested access to artificial insemination services under the HRA which was blocked by the government. The government's block was reviewed by the

40 *Secretary of State for the Home Department v JJ* [2007] UKHL 45.

41 *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46.

42 *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2002] EWHC 426.

43 *R (Q, D, KH, OK, JK, H, T and S) v Secretary of State for the Home Department* [2003] EWHC 2507 (Admin).

Grand Chamber which held that to refuse permission unless there were exceptional circumstances, set the bar too high to allow consideration of the proportionality of such decisions. Each application must now be considered on a case-by-case basis.⁴⁴ Parliament's ability to form and implement *policy* in relation to crime is therefore being severely restricted.

Elsewhere in the context of crime, the United Kingdom's Asylum and Immigration Tribunal has ruled that Italian-born Learco Chindamo, the killer of head teacher Philip Lawrence, should not be sent back to Italy once released from prison because it would breach his right to family life under the HRA.⁴⁵ That the court refuses to send a prisoner back to *Italy*, a safe European country, geographically close to the UK, on the basis of his right to a family life, clearly spells out how privileged the HRA makes prisoners and how little regard is had for the interests of the community and the possible danger a foreign national might pose to it.

Similarly, the Asylum and Immigration Tribunal overturned a decision of the Home Office to deport Mohammed Kendeh on the basis that he posed a serious risk of re-offending, particularly of serious sexual assaults. He had admitted assaulting 11 women over five years and had other convictions for robbery, burglary and drug offences. A panel of immigration judges, however, ruled that deportation to his home country of Sierra Leone would be contrary to his rights to a family life.⁴⁶ This is a direct application of ECtHR jurisprudence where it has been held that measures taken in the field of immigration may affect the right to respect for family life under Article 8 if a person is excluded from a country where members of his family are living.⁴⁷

Elsewhere, the HRA has been relied upon the Gypsies and Travelers to challenge local council's decisions to remove them from unlawfully occupying land in breach of planning controls.⁴⁸

J Conclusion: the Legislative Model does not Preserve Parliamentary Sovereignty

The operation of the HRA has shown that it is a severe blow to the sovereignty of Parliament. The interpretation obligation, rather than the power to issue a declaration of incompatibility, results in parliamentary intention and purpose being undermined and the object of legislation perverted. This seriously contorts the power of Parliament to implement policy. An analysis

44 Jamie Doward, 'Prisoners demand right to be fathers', *The Observer*, 8 February 2009.

45 Ibid.

46 Richard Ford, 'Serial Sex Offender "Can stay because deportation would breach his rights"', *The Times*, 31 October 2007.

47 *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471.

48 For a discussion see Sarah Spencer, 'Gypsies and travelers: Britain's forgotten minority', [2005] EHRLR 4, 335-343.

of the case law surrounding the HRA shows that despite attempts to preserve parliamentary sovereignty by implementing a legislative model of human rights protection, when power is transferred to judges to review the acts of Parliament, to read down or away from the intention of Parliament, the harm to parliamentary sovereignty is unavoidable.

But statutory models are not supported from a desire to protect parliamentary sovereignty. The philosophical starting point of such models is a distrust of democracy, its ability to determine the limits of rights and to balance rights against other concerns of society. Proponents of statutory models highlight how ‘majoritarianism’ associated with democracy which is supposedly geared towards protecting ‘majority rights’, as opposed to minority rights or individual rights. This argument suggests that the self-interest of the majority which manifests itself in a desire only to protect the interests of the majority. It therefore follows, it is argued, that civil and political rights guarantee that unpopular and minority voices are heard and are necessary in the brutal democracy in which only the rights of the majority would otherwise be protected. Of course, this is wrong for three reasons. First, the majority is not so large such that ‘minority’ rights or interests are disregarded. Secondly, the majority *is* interested in the ‘plight’ of the minority, if those concerns are valid, balanced against other considerations. Thirdly, the premise underpinning such arguments is that the minority is always right, which is often untrue. On the contrary, democracy is the best counterweight against irrational minority voices. The assertion that minority opinions and rights must trump majority interests and rights, rightfully or wrongfully, underpins the Charter of Rights movement and highlights the inherent distrust for democracy that it seeks to ‘remedy’. It is for these reasons, and the associated transfer of power away from parliament, which demonstrate how a Charter of Rights, in whatever form, runs contrary to the interests of democracy.

Whatever might be the supposed deficiencies in the protection of rights in Australia, the British experience has shown that a legislative bill of rights is no safe compromise and provides no assurances as to the protection of parliamentary sovereignty. Complex policy decisions involving weighing multiple concerns from various sectors of the community are best left to the parliamentarians who, regardless of their inadequacies, remain responsible to the electorate and face the consequences of their decision-making in regular elections.

Chapter Twenty Three

The Devil in the Detail: Lessons from the ACT Human Rights Act

TRENT GLOVER*

The *Human Rights Act 2004* (ACT) commenced operation on 1 July 2004.¹ Although styled as simply an ‘Act’, the Human Rights Act is actually Australia’s first statutory bill of rights.² Advocates of statutory bills of rights argue that the Human Rights Act has now been in operation for over four years with little or no impact on the day-to-day lives of Canberrans. They point to the Human Rights Act as a shining beacon for those Australian jurisdictions without statutory bills of rights – most notably the Commonwealth – to follow.³ The most that can generally be said about the first four years of operation of the Human Rights Act, however, is that it

* The views in this chapter are the author’s own. The law is as at November 2008. Thanks to Katherine Store for her helpful comments and suggestions on an earlier draft of this chapter.

- 1 Up until that date, Australia had remained, stubbornly, ‘one of the last outposts of resistance’: James Spigelman, ‘Blackstone, Burke, Bentham and The Human Rights Act 2004’ (2005) *Aust Bar Rev* 1. Advocates of statutory bills or charters of rights like to mention that almost every other country which derives its legal system from the English common law has a statutory, or constitutional, bill of rights. The countries most frequently cited are the United Kingdom (*Human Rights Act 1998*), Canada (*Charter of Rights and Freedoms*, which comprises Part I of the *Constitution Act 1982*, being Schedule 2 to the *Canada Act 1982* (UK)) and New Zealand (*Bill of Rights Act 1990*). Of course, implicit in this proposition is the assumption that ‘the reasons other common law countries have adopted a bill of rights are relevant to Australia’: Charles Parkinson, ‘Bills of Rights: Some Reflections on Commonwealth Experience’ (2007) 19 *Upholding the Australian Constitution: Proceedings of the Samuel Griffith Society* 67, 69. It has also been noted, comparing the absence of a bill of rights in Australia to the bill of rights amendments to the United States’ Constitution that ‘our Constitutional differences are profound, and ... our resemblances can be over-emphasized’: Robert Menzies, *Central Power in the Australian Commonwealth* (1967) 49. See also Philip Ruddock, ‘Bills of Rights do not protect freedoms’, *Sydney Morning Herald*, 31 August 2007.
- 2 The Human Rights Act’s younger sibling, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is referred to as ‘the Charter’ rather than the Act by virtue of a ‘citation provision’ contained in s 1 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). It has been suggested that Act or Charter is a ‘more benign’ way of referring to bills of rights: Janet Albrechtsen, ‘An Australian Bill of Rights by Stealth?’ (2006) 18 *Upholding the Australian Constitution: Proceedings of the Samuel Griffith Society* 80. Another interesting aspect of the title of the Charter is the reference to ‘responsibilities’ when the Charter itself imposes none on individuals.
- 3 See eg, Terence Higgins, ‘Australia’s First Bill of Rights – Testing Judicial Independence and the Human Rights Imperative’, address to the National Press Club, 3 March 2005 and Hilary Charlesworth & Gabrielle McKinnon, *Australia’s First Bill of Rights: The Australian Capital Territory’s Human Rights Act*, (Centre for International and Public Law, Law and Policy Paper 28,2006) 23–24. At the same time, some advocates have argued that the Human Rights Act does not go far enough: see eg, Simon Bronitt, ‘The Human Rights Act 2004 (ACT): a ‘Clayton’s Bill of Rights’ or New Magna Carta’ (2004) 28 *Crim LJ* 325.

has been most frequently invoked to enable accused persons to obtain bail and, other than that, as a footnote in ACT Supreme Court judgments.⁴

Despite the Human Rights Act's apparently innocuous existence, it should not be forgotten that statutory bills of rights are extremely powerful laws. They have the potential to assume quasi-constitutional status. By reaching into every aspect of government, law-making and interpreting, statutory bills of rights have tremendous potential to wreak havoc on the day-to-day operations of government more generally.⁵ This chapter will highlight this impact, by specific reference to the Human Rights Act. In the case of statutory bills of rights, the devil is truly in the detail.

First, it is a fundamental mistake to seek to legislate in respect of generic rights capable of uncertain and unintended application. Secondly, the Human Rights Act fundamentally alters the relationship between the legislature and the judiciary, and does so in a manner inconsistent with the doctrine of Parliamentary supremacy. These criticisms are what can be described as the 'usual' criticisms of statutory bills of rights.⁶

Instead of a generic one-size-fits-all statutory bill of rights, a preferable approach is for the legislature to articulate clearly the circumstances in which a specific right or obligation is enlivened. Indeed, this has been the approach adopted by legislatures for centuries. If a particular right – be it procedural, substantive, civil, political, economic, social or cultural – requires legislative protection, amplification or merely articulation, Parliaments can, and should, enact substantive laws to achieve these outcomes.⁷ Viewed in this light – and having regard to their uncertain and almost always unintended operation – it will be seen that attempts to enumerate broad, generic rights in statutory bills of rights are not only unnecessary, but downright dangerous.

4 See eg, the recent decisions of *In the matter of an application for bail by Nuno Rodrigues* [2008] ACTSC 50, *R v Kristiansen* [2008] ACTSC 83 and *R v Coath* [2008] ACTSC 89.

5 And, in the context of the Human Rights Act, perhaps even further a field. Recently, in *Priestley v Godwin (No 2)* [2008] FCA 1453 [11], Bennett J described why s 79 of the *Judiciary Act 1903* (Cth) 'may operate to "pick up" at least parts of the Human Rights Act in relation to matters before the Federal Court sitting in the ACT.' In order for the Human Rights Act to so apply, it would be necessary for the Federal Court to be considering the interpretation of a law of the ACT. No question of the interpretation of a law of the ACT actually arose in the case. The Human Rights Act cannot, of course, apply to the interpretation of Commonwealth legislation (*R v Tjanara Goreng-Goreng* [2008] ACTSC 74 [44]) or 'bind' Commonwealth bodies, except to the extent they exercise powers under ACT laws (*R v PJ* [2006] ACTSC 37 [12]).

6 These criticisms are not new. For perhaps the best academic criticism of an Australia statutory bill of rights see James Allan, 'The Victorian *Charter of Human Rights and Responsibilities*; Exegesis and Criticism' (2006) 30 *Melbourne University Law Review* 906.

7 A current example of a legislative undertaking in this regard is the Commonwealth's Parliament amendment of Commonwealth legislation to remove discrimination against same sex couples. This example will be returned to later. Examples from the States can also be given, such as de facto property rights legislation.

The Human Rights Act itself is relatively short, particularly by today's legislative standards.⁸ As at November 2008, it comprises a mere forty-four sections, one schedule and a dictionary of defined terms. That said, the Act itself has already grown in its short period of existence.⁹ In January 2009, the provisions of a new Part 5A come into effect. Among other things, and perhaps most alarming of all the criticisms that can be made of the Human Rights Act, Part 5A creates a *statutory cause of action* against a public authority for a violation of a human right contained in the Act. The ACT Supreme Court is given jurisdiction to award any relief it considers appropriate except damages. This chapter concludes by considering the implications of this new statutory cause of action and, with an eye to the future, the likely implications of the ability of private sector entities to voluntarily subject themselves to the Human Rights Act.

I The Human Rights Act as a Statutory Statement of Rights

A Beware Simplicity – this is no Garden Variety Statute

As a preliminary point it should be noted that the rights contained in statutory bills of rights – though described by terms including 'fundamental', 'absolute' and 'non-derogable'¹⁰ – are an entirely subjective matter for the relevant legislature concerned.¹¹ The Human Rights Act reproduces the *substance* of most of the rights contained in the International Covenant on Civil and Political Rights (ICCPR). However, the Act does not use language consistent with that contained in the ICCPR. It does not include economic, social and cultural rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Australia is a party to both covenants, so it would be expected that the Human Rights Act would mirror the provisions of both covenants.¹² In a further example of subjectivity, the current Commonwealth Attorney-General, the Hon Robert McClelland MP, has gone further still, arguing that not only should any federal bill of

8 A brief discussion of the growth of statute law, under the heading 'Magnitude of the task', appears in D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) [1.1].

9 The Act is already been amended in some significant respects by the *Human Rights Commission Legislation Amendment Act 2005*, the *Human Rights Commission Legislation Amendment Act 2006* and, most significantly, the *Human Rights Amendment Act 2008*.

10 See eg, *Explanatory Statement to the Human Rights Bill 2003*, 2 (fundamental) and 4 (absolute).

11 By way of example from the Human Rights Act itself, the 'right to life' in s 9(1) of the Human Rights Act commences only from birth (s 9(2)). This fairly neatly disposed of any controversy about the application of the Human Rights Act to the ACT's liberal abortion laws. See also, Charlesworth & McKinnon, above n 3, 4.

12 ICCPR [1980] ATS 23, entered into force for Australia on 13 November 1980 (except for art 41 which came into force generally on 28 March 1979) and ICESCR [1976] ATS 5, entered into force for Australia on 10 March 1976.

rights include ICCPR rights, ICESCR rights but also a 'statement of aspirations'.¹³

This subjectivity produces absurd results when legislatures attempt, as they do of necessity in all statutory bills of rights, to enumerate generic rights 'in broad, amorphous, indeterminate terms'.¹⁴ Take the following examples from the Human Rights Act: '[e]veryone has the right to life',¹⁵ '[e]veryone has the right of peaceful assembly'¹⁶ and '[e]veryone has the right to freedom of association'.¹⁷ No further articulation of these rights is provided. On one view, drafting legislation in such a way has, 'ostensibly, a charming simplicity'.¹⁸ Indeed, one of the most vocal advocates of statutory bills of rights has argued that the Human Rights Act is 'an ordinary, common, garden [variety] piece of legislation'.¹⁹

What proponents of statutory bills of rights would like forgotten is that these rights are expressly intended to operate in an unconstrained and undefined way and apply to any given factual situation.²⁰ This is quite extraordinary. Most legislation, of course, covers a single subject-area of law.²¹ Close, and careful, consideration of the operation of the legislation to particular circumstances is attended to by the legislature as part of the legislative process. For statutory bills of rights such as the Human Rights Act however, it falls to the Courts to pronounce where the 'many highly

-
- 13 Robert McClelland, 'How is a Bill of Rights relevant today?' [2003] *Australian Journal of Human Rights* 2, 3. Interestingly, more recently, the Attorney-General has not referred to a statutory bill of rights when speaking about the government's human rights agenda. The intention is to, apparently, 'encourage broad community debate on a range of human rights issues – not only whether a Charter or Bill of Rights is necessary': Robert McClelland, Launch of the 18th Annual Human Rights and People's Diplomacy Training Program, 24 November 2008.
 - 14 James Allan, 'Bills of Rights as Centralising Instruments' (2006) 18 *Upholding the Australian Constitution: Proceedings of the Samuel Griffith Society* 40 and Allan above n 6, 913. It has been suggested that it is because of the prevalence of disagreement that bills of rights are expressed in general terms: Adrienne Stone, 'Australia's Constitutional Rights and the Interpretative Disagreement' (2005) 27 *Sydney Law Review* 29, 47.
 - 15 Human Rights Act, 9(1).
 - 16 Human Rights Act, s 15(1).
 - 17 Human Rights Act, s 15(2).
 - 18 In a recent paper, the Victorian Solicitor-General has warned not to be deceived by the simplicity of these statements of rights: Pamela Tate, 'Some Reflections on Victoria's charter of Human Rights and Responsibilities' (2008) 52 *AIAL Forum* 18, 19. The Solicitor-General was there using this description to warn of the dangers of viewing statutory bills of rights as simplistic legislation. She goes on to state 'do not be deceived'.
 - 19 Hilary Charlesworth, radio interview on *The Law Report*, Radio National, 9 December 2003, cited in Albrechtsen, above n 2, 83. See also Helen Watchirs, 'ACT Bill of Rights' [2005] *Hot Topics* 4, 2.
 - 20 Expressed another way, to define human rights so broadly makes 'the discipline which is inherent in all government and ordered society ... impossible': Menzies, above n 1, 52.
 - 21 By way of recent substantive ACT examples (ie, not amending Acts), see the *Work Safety Act 2008* (ACT) (dealing with occupational health and safety laws), the *Domestic Violence and Protection Orders Act 2008* (ACT) (dealing with domestic violence) and the *ACT Civil and Administrative Appeals Tribunal Act 2008* (establishing a general merits review tribunal consolidating the jurisdictions of existing administrative tribunals into the one tribunal).

debateable and disputed lines have to be drawn'.²² Indeed, '[s]ocial issues will become legal issues.'²³

B An Example of Uncertainties Thrown up by a Legislative Attempt to Define Human Rights Generically – the Right to a Fair Trial

One example of the potential dangers of legislating in respect of generic, one-size-fits-all, rights, is provided by the right to a fair trial in the Human Rights Act. Section 21(1) provides as follows: Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing. On the face of it this appears not unreasonable. But closer examination of the three components of s 21(1) reveals the devil in the detail in the scope of application of this particular provision.²⁴

In the context of criminal charges, it can be said that s 21(1) 'does not introduce concepts that were unknown to the common law'.²⁵ The same can probably be said for civil proceedings. However, s 21(1) is not limited to criminal and civil proceedings only. The phrase 'rights and obligations

22 Allan, above n 14, 40.

23 Ben Davies, 'Who gets the Bill? The Lawyer's Bill of Rights in Victoria' (2006) 18 *Upholding the Australian Constitution: Proceedings of the Samuel Griffith Society*, 53. See also, Allan, above n 6, 913 and Philip Ruddock, 'Keep politics off the bench', *Australian Financial Review*, 12 October 2007.

24 Of the several ACT Supreme Court and Court of Appeal decisions which have considered the operation of s 21, few are instructive or informative as to the Court's approach to this right. In *Stevens v McCallum* [2006] ACTCA 13, [138] the ACT Court of Appeal (comprising Higgins CJ, Crispin P and North J), held that the rights contained in s 21(1) were 'enforceable' (citing *R v YL* [2004] ACTSC 115, *Skaramuca v Crafi* [2005] ACTSC 61, and *SI bbnf CC v KS bbnf IS* [2005] ACTSC 125). In the circumstances of the case the action required to remedy a breach of s 21(1) was to declare the impugned trial to have miscarried, set aside the verdict and sentence and remit the matter for a hearing according to law. Apart from this general comment, the Court did not discuss how the rights in s 21(1) were enforceable or whether their enforceability differed from the inherent powers of a superior court to prevent a miscarriage of justice. See also, eg, *R v Griffin* [2007] ACTCA 6 [4] (application for permanent stay of proceedings), *R v DA* [2008] ACTSC 26 [10] (application for vacation of trial date), *R v Bersinic* [2007] ACTSC 46 [11] (non-disclosure orders made as a result of a public interest immunity claim enlivened right such that a stay may be necessary), *West & Anor v NSW & Anor* [2007] ACTSC 43 [19]-[22] (right did not alter court's approach to a strike out application), *Stevens v McCallum* [2006] ACTCA [13], [137]-[141] (incompetence of counsel invokes right), *R v JA* [2007] ACTSC 51 [33] (s 26 of the *Criminal Code 2002* (ACT), dealing with criminal capacity of minors, was consistent with the right), *Commonwealth v Davis Samuel Pty Ltd & Ors* [2008] ACTSC 59 [13] (application for disqualification of judge for bias informed by right, but ultimately determined in accordance with common law principles), *Capital Property Projects ACT Pty Ltd v ACT Planning and Land Authority* [2008] ACTCA 9 [38] (right applies in civil proceedings), and *Stock v Hyde* [2006] ACTSC 11 [18] (the right to procedural fairness is given statutory recognition in s 21).

25 Richard Refshauge, 'The Human Rights Act 2004 and the Criminal Law', (Speech delivered at the Conference *Assessing the First Year of the ACT Human Rights Act*, Canberra, 12 July 2005) 4. See also *McKinney v The Queen* (1991) 171 CLR 468, 478 (Mason CJ, Deane, Gaudron and McHugh JJ) (the central thesis of the administration of criminal justice is the entitlement of an accused person to a fair trial according to law) and *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J) (the right to a fair trial is a 'central pillar of our criminal justice system).

recognised by law' also embraces the entire spectrum of administrative law rights in an unlimited number of governmental decision making contexts. And it is in this sphere of operation that s 21(1) proves particularly difficult to apply in practice. Any decision in relation to rights and obligations recognised by law which does not meet all three requirements contravenes s 21(1).

The requirement to have a right or obligation decided by a 'competent, independent and impartial court or tribunal' presents considerable difficulties for administrative decision makers, particularly in respect of 'lower-end' administrative decisions. For example, does a single public servant decision maker located in a government department which administers a licensing scheme possess the necessary independence and impartiality to comply with s 21(1)?²⁶ Does the reference to 'competent' mean 'seized of jurisdiction to make the decision' or 'qualified'? How does the single public servant decision maker comply with the requirement to hold a 'public hearing'? Looking more generally, is it intended that the content of the right is to vary according to the particular process under consideration?²⁷ What is the relationship between the right to a fair trial in s 21(1) and the rights in criminal proceedings contained in s 22?

Another example of the uncertainty in the operation of s 21(1) is that it appears that interim or preliminary administrative decisions fall within the ambit of s 21(1).²⁸ The ICCPR provision upon which s 21(1) is based – article 14 – uses the word 'determination', suggesting that only final decisions are intended to be the subject of the right. Subsection 21(1), however, omits that word. The legislature chose to provide no explanation for this omission in the Act's Explanatory Memorandum.²⁹ Presumably then, all

26 See eg, *Commissioner for Housing for the ACT v Y* [2007] ACTSC 84 [51], where s 21(1) indicated to Higgins CJ that 'if an applicant for assistance needs to have a discretionary decision applied to them to recognise the comparative justice of their claim to secure appropriate shelter so as to avoid otherwise severe and unavoidable hardship then a process that attracts a review would be preferable to that of an unexaminable discretion by a single public official.' The question is also analogous to the situations considered by the House of Lords in *Runa Begum v London Borough of Tower Hamlets* [2003] 2 AC 430 (an employee of the decision making local government was not 'an independent and impartial tribunal' as required by art 6(1) of the European Covenant on Human Rights, which is Schedule 1 to the *Human Rights Act 1998* (UK)), and *R (Anderson) v Home Secretary* [2003] 1 AC 837 (Home Secretary was not an independent and impartial tribunal for the purposes of determine the length of the punitive term of imprisonment to be served by a convicted murderer).

27 For eg, as the administrative law principle of procedural fairness does: *Kioa v West* (1985) 159 CLR 550, 585 (Mason J)

28 Interim or preliminary administrative decisions are not ordinarily amenable to judicial review: *Administrative Decisions (Judicial Review) Act 1989* (ACT), s 3A(1).

29 Peter Bayne, 'The Human Rights Act 2004 (ACT) and Administrative Law: A Preliminary View' (2007) 52 *AIAL Forum* 9. Indeed, the most the Explanatory Statement says of these important changes is that some rights have been changed to 'improve the drafting or to clarify' the application of the rights in the ACT (p 4): Julie Debeljak, 'The Human Rights Act 2004 (ACT): A Significant, Yet Incomplete, Step Towards the Domestic Protection and Promotion of Human Rights' (2004) 15 *PLR* 169.

interim or preliminary administrative decisions are required to address the questions above.

In the United Kingdom, some creative law-making by the House of Lords has gone some way to addressing such questions.³⁰ The fact that there exists overseas jurisprudence does not forgive the laziness in the drafting of the Human Rights Act that gives rise to such uncertainties. These questions could easily be addressed by the legislature in relation to each particular administrative decision making process. However, the one-size-fits-all approach of a statutory bill of rights leaves these important questions unanswered and unexplained until there is an appropriate vehicle for a court to answer them.³¹ It also places a considerable additional onus on the court. This has arisen squarely because the legislature – the elected arm in the Westminster system of government – has abdicated its responsibilities to the courts. The importance of such questions is further highlighted when the new statutory cause of action for contravention of a human right by a public authority is considered. The new cause of action is discussed below.

C Rights in the Human Rights Act are not Exhaustive of Other Rights

In another illustration of the devil in the detail of the Human Rights Act, the Act itself is expressed as not being exhaustive of other rights protected by law.³² An individual may, for example, have rights under other ACT laws, such as the *Discrimination Act 1991* (ACT), or international conventions, including rights under the ICCPR not listed in the Human Rights Act. This further exposes the intellectual fallacy on which statutory bills of rights, such as the Human Rights Act, are founded. On the one hand, the legislature thought it sufficiently serious to enact certain, generic, human rights. But, at least until 1 January 2009, an individual has no remedy under the Human Rights Act for a violation of those rights.³³

At the same time, the creation of a statutory cause of action for a violation of a human right does not resolve the fallacy. The Human Rights Act recognises that an individual may have other rights not enumerated in the Act. Those rights are obviously considered by the ACT Legislative

30 See eg, *R (Daly) v Home Secretary* [2001] 2 AC 532 (validity of prison security requirements under common law and Convention the same), *R (Keboe) v Secretary of State for Work and Pensions* [2006] 1 AC 42 (a decision by Child Support Agency not to pursue debt did not enliven Convention right to hearing), *South Bucks District Council v Porter* [2003] 2 AC 558 (jurisdiction to restrain breaches of planning control interpreted consistently with Convention rights, so that court would have regard to all the circumstances of the case).

31 Indeed, no assistance is provided by reference to the *Explanatory Statement* which discusses the 'civil and political rights' contained in ss 8-27 of the Act collectively.

32 Human Rights Act, s 7.

33 At most, if an ACT law is inconsistent with a right contained in the Human Rights Act, the ACT Supreme Court could make a declaration of incompatibility: Human Rights Act, s 32. Bizarrely, a declaration of incompatibility does not affect the 'validity, operation or enforcement' of the law: Human Rights Act, s 32(3).

Assembly to be 'lesser rights', even though the legislature has considered, specifically, (i) when those rights are to apply, and (ii) the consequences for a violation of those rights. The best example in this respect is probably the *Discrimination Act 1991* (ACT). That Act, which substantially follows the form of equivalent Commonwealth and State anti-discrimination legislation,³⁴ makes it unlawful to discriminate against a person on the basis of certain attributes articulated in the Act. The Discrimination Act creates exemptions for conduct that would otherwise be unlawful discrimination in specified circumstances, provides for the bringing of complaints about discrimination to the Discrimination Tribunal (soon to be the ACT Civil and Administrative Tribunal), and specifies the remedies available to a person who has been unlawfully discriminated against.

Surely, it must be preferable, if a legislature feels sufficiently concerned about the violation or breach of some right, that it should legislate to specifically recognise and protect that right. This should be done by defining the content of the right (including the circumstances in which the right will and will not apply) and setting out the consequences of violating the right. Moreover, this is a legitimate and appropriate function for the legislature. It is not for the legislature to 'legislate out' of this function by giving the task to the courts.

D Human Rights May be Limited

The case most frequently cited as being potentially decided differently had there been a federal statutory bill of rights is *Al-Kateb v Godwin* (2004) 219 CLR 562.³⁵ In that case, the High Court, by a 4-3 majority, held that the *Migration Act 1958* (Cth) authorised and required the detention of an unlawful non-citizen even if his removal from Australia was not reasonably practicable in the foreseeable future. The reason this case is usually raised in the context of statutory bills of rights is that because one prominent member of the majority, McHugh J, indicated that his decision would have been different had there been a federal bill of rights.³⁶ However, this argument fails to recognise the importance of the ability of the legislature to limit – essentially meaning override – the rights contained in a bill of rights. But just how and when the limitation applies, further exposes the dangers lurking in the detail of statutory bills of rights, as the limitation provisions of the Human Rights Act shows.

34 See eg, *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth) *Anti-Discrimination Act 1977* (NSW), *Anti-Discrimination Act 1992* (NT), *Anti-Discrimination Act 1991* (Qld), *Equal Opportunity Act 1984* (SA), *Anti-Discrimination Act 1998* (Tas), *Equal Opportunity Act 1995* (Vic) and *Equal Opportunity Act 1984* (WA).

35 See eg, Charlesworth & McKinnon, above n 5, 24 and Hilary Charlesworth, 'Who Wins Under a Bill of Rights?' (2006) 25 *University of Queensland Law Journal* 39, 45.

36 (2004) 219 CLR 562, 594-595.

Section 28(1) states that human rights may be subject ‘only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society’.³⁷ But by what means are legislators, and the ultimate arbiter of the limitation – the ACT Supreme Court – able to ascertain whether a limit on a human right, contained in an ACT law, is reasonable and demonstrably justified in a free and democratic society? An attempt is made to explain this absurdity in the *Explanatory Statement to the Human Rights Bill 2003*:

Whether a limit is reasonable depends upon whether it is proportionate to achieve a legitimate aim. Proportionality requires that the limitation be:

- necessary and rationally connected to the objective;
- the least restrictive in order to accomplish the object; and
- not have a disproportionately severe effect on the person to whom it applies.³⁸

Who determines whether a limit is proportionate to achieve a legitimate aim or not? Surely, the mere fact that the legislature has considered it necessary to legislate in respect of a matter that must, *prima facie*, evidence a legitimate aim. But that is not necessarily the case. It is not the legislature which determines whether a limitation on a human right is justified. As noted above, this task falls to the ACT Supreme Court; directly undermining the notion of parliamentary supremacy.³⁹

From 1 January 2009, a new s 28(2) will provide that:

In deciding whether a limit is reasonable, *all relevant factors must be considered, including* the following:

- (a) the nature of the right affected;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose;

37 Human Rights Act, s 28. See also, Charter of Rights and Responsibilities, s 31, which enables the Victorian Parliament to override the Charter in ‘exceptional circumstances’. For discussion of the uncertainties contained in s 31, see Albrechtsen, above n 2, 83 and Carolyn Evans and Simon Evans, *Australian Bills of Rights* (2008) [2.60]-[2.62], Allan, above n 6, 916 et seq. Interestingly, the Explanatory Statement notes at 4 that s 28 is not intended to operate uniformly in relation to the rights contained in the Act and is subject to the principle that certain rights are absolute or non-derogable. The rights described as absolute include the right to be free from genocide, slavery and servitude, systemic racial discrimination and torture. See also Debeljak, above n 29, 170.

38 These three principles are drawn from *R v Oakes* [1986] 1 SCR 103 at 138-9. See the discussion in Debeljak, above n 29, 171.

39 The relationship between the legislature and judiciary under the Human Rights Act is considered further below.

- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve. [emphasis added]⁴⁰

The italicised words demonstrate this new subsection really says nothing at all. All relevant factors must be considered. Surely, a court would seek to do that already when considering such an important issue – the limitation on a human right? What does not change with the inclusion of this new subsection is the fact that the decision about whether a limitation on a right is justified is left to the court. The five factors contained in paragraphs (a) – (e) all involve matters at the core of public policy. The court is not directed to give any particular weight to the fact that the legislature has chosen to limit a right as *prima facie* evidence that the limitation is justified. Does this not demonstrate a ‘want of confidence in the will of the people’ expressed through the actions of their chosen representatives sitting in the ACT Legislative Assembly?⁴¹

Advocates of statutory bills argue that overseas jurisprudence provides assistance with the resolution of these public policy questions.⁴² In particular, the Supreme Court of Canada has held that, in order to be reasonable, the object of the law must be ‘of sufficient importance to warrant overriding a ... protected right or freedom’.⁴³ In other words, it is necessary for the law to ‘relate to concerns which are pressing and substantial in a free and democratic society’.⁴⁴ This is quite extraordinary; surely the fact that the Parliament has chosen to legislate in such a way as to derogate from a human right must evidence these concerns? Of course, this is a question that is not for the ACT Legislative Assembly to determine. The ACT Supreme Court is given the decision making role in relation to whether a limitation on a right contained in the Human Rights Act is justified under s 28. But more of this later.

The Human Rights Act is not entrenched legislation.⁴⁵ The legislature could, at any time presumably, repeal or amend the Human Rights Act to

40 This new subsection (s 28(2)) is modelled on s 7 of the Victorian Charter and s 36 of the Bill of Rights in the *Constitution of the Republic of South Africa 1996*. The *Explanatory Statement to the Human Rights Amendment Bill 2007* explains that the intention of the new subsection is to provide guidance in the application of the general limitation provision and to reduce its uncertainty.

41 Menzies, above n 1, 53.

42 *Explanatory Statement to the Human Rights Amendment Bill 2007*, 4. See also Debeljak, above n 29, 170.

43 *R v Oakes* [1986] 1 SCR 103.

44 Debeljak, above n 29, 171.

45 Charlesworth & McKinnon note that it would have been possible to entrench human rights under the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (the Self-Government Act): Charlesworth & McKinnon, above n 3, 5. Although not expressed as such, presumably by this statement the authors mean that the Self-Government Act, which establishes the ACT as a body politic and is quasi-constitutional in that respect, could have been amended to incorporate the human rights contained in the Human Rights Act, thereby removing the ability of the ACT Legislative Assembly to alter those human rights. This statement, of course, neglects the fact that an amendment to the Self-Government Act, as a piece of Commonwealth legislation, would need to be introduced, and pass through, the Commonwealth Parliament.

correct this imbalance in the relationship between the legislature and judiciary. However, would not the very act of altering the Human Rights Act infringe on an individual's human rights such that any purported alteration could be viewed as an action inconsistent with, or otherwise limiting, a human right? Who would then determine whether such alteration was consistent with the Human Rights Act? The answer, of course, is the ACT Supreme Court.

II Alteration of the Relationship between the Legislature and the Judiciary

The effect of the Human Rights Act on the ACT Legislative Assembly is often described in terms of increased scrutiny of legislation prior to passage.⁴⁶

It has been argued that:

... critics of bills of rights have continued to object to [the Human Rights Act's] interference with the democratic process. These critics rarely make clear how human rights-consistent statutory interpretation differs from judicial interpretation in other contexts and the 'democratic' objection appears more an automatic response to the idea of a bill of rights than one based on the actual terms of the ACT law.⁴⁷

But an analysis of the *actual terms* of the Human Rights Act to establish why statutory bills of rights alter the relationship between the legislature and the judiciary in a way that contravenes the Westminster principle of Parliamentary supremacy.⁴⁸ Presumably, this is the 'democratic objection' referred to in the

46 Section 37 of the Human Rights Act states that the Attorney-General is required make a compatibility statement about every bill presented to the Legislative Assembly by a Minister. The Attorney-General must state whether, in his or her opinion, the bill is consistent with human rights and, if it is not, how it is inconsistent with human rights. For further discussion of the operation of s 37, see Evans and Evans, above n 37 [2.5]-[2.7]. Section 38 requires the Legislative Assembly's Standing Committee on Legal Affairs, which is essentially a scrutiny of legislation committee, to report to the Assembly about human rights issues raised by proposed legislation. For further discussion of the operation of s 38, see Charlesworth and McKinnon, above n 3, 15. For an overview of the operation of comparable provisions in the Victorian Charter, see Davies, above n 23, 44 and Tate, above n 18, 24-25.

47 Charlesworth & McKinnon, above n 3, 22. See also Charlesworth, above n 35, 42. At page 44, Professor Charlesworth appears to modify her criticism of the democratic objection, stating that her 'argument is not that parliaments are "less suit[ed] than courts to making human rights decisions", but rather that, at least in Australia, they are currently less likely to do so' (footnote omitted). Surely the fact that the current membership of the Legislature is, purportedly, less likely to legislate to protect rights should not mean that the responsibility for policy relating to rights should pass from the legislature to the unelected judiciary? The very fact that there are regular parliamentary elections, and consequential changes of government, renders this modified critique redundant.

48 In *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, 74, Dawson J stated that 'parliamentary supremacy is a basic principle of the legal system which has been inherited in this country from the United Kingdom'. See generally then, the following classical exponents of the doctrine, A V Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed, 1959), E Coke, *Institutes of the Laws of England* (1797), vol 4, 36 and W Blackstone, *Commentaries on the Laws of England*, (9th ed, 1783), Book 1, 160. These last two sources are referred to in *Kartinyeri v Commonwealth* (1996) 195 CLR 337, 355 (Brennan CJ and McHugh J).

quote above. Two particular aspects of the Human Rights Act illustrate these propositions; the effect on statutory interpretation, and the ability of the ACT Supreme Court to issue declarations of incompatibility.

This discussion should not be seen as an attack on the judiciary or the judicial system. After all, the judiciary is simply the decision making repository in under statutory bills of rights.⁴⁹ The complexity and significance of the task given to the courts is highlighted by often competing, and finely-balanced, public policy goals necessarily involved in any consideration of human rights.⁵⁰ In *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9 at 16, the New Zealand Court of Appeal explained the nature of the court's decision making role as follows:

Of necessity value judgments will be involved ... [these will be] a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.

Is this really the proper function for a court? Surely, the appropriate arm of government to make these judgments is that arm elected by the people; the legislature? It is apt here to quote from Australia's longest-serving Prime Minister, leading constitutional lawyer and statesman, Sir Robert Menzies, who explained why the protection of rights is a matter for the legislature:

... the Executive is not only responsible to the Legislature but, in its political embodiment is part of and directly responsible to the Legislature. ... a Minister is not just a nominee of the head of the Government. He is and must be a member of Parliament, elected as such, and answerable to Members of Parliament at every sitting. He is appointed by a Prime Minister similarly elected and open to regular question. Should a Minister do something which is thought to violate fundamental human freedom he can be promptly brought to account in Parliament. If his Government supports him, the Government may be attacked, and if necessary defeated. And if that, as it normally would, leads to a new General Election, the people will express their judgment at the polling booths.⁵¹

Menzies' view, quite rightly, was that 'responsible government in a democracy' is the ultimate guarantee of justice and individual rights, such that human rights in Australia are as adequately protected as they are in any other country on the world.⁵²

49 Parkinson, above n 1, 69.

50 Ibid.

51 Menzies, above n 1, 54.

52 Ibid.

A Effect on Statutory Interpretation

It is fair to say that the Human Rights Act – to the extent it has not already done so – will become the fundamental basis for statutory interpretation in the ACT.⁵³ This is due, largely, to s 30 of the Human Rights Act, which states:

In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.⁵⁴

The Explanatory Statement states that the effect of s 30 is that ‘the *courts, tribunals, decision makers and others authorised to act* by a Territory statute or statutory instrument must take account of human rights when interpreting the law.’⁵⁵ In other words, a statutory power or discretion must be exercised consistently with human rights unless the statute intends to authorise administrative action regardless of the human right. The House of Lords has described the equivalent provision in the *Human Rights Act 1998* (UK) as ‘unusual and far-reaching in character’.⁵⁶

From 1 January 2009, s 30 will be amended to provide:

So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.⁵⁷

The reason for this change is described as clarifying:

... the interaction between the interpretive rule and the purposive rule such that as far as it is possible a human rights consistent interpretation is to be taken to all provisions in Territory laws. This means that unless the law is intended to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail.⁵⁸

53 It has been claimed that this has already occurred in Victoria: Davies, above n 23, 53. For similar views expressed in relation to the *Human Rights Act 1998* (UK), see H W R Wade, ‘Sovereignty – Revolution or Evolution?’ (1996) 112 *Law Quarterly Review* 568. It should here be noted that some commentators argue that the interpretative provisions in statutory bills of rights are consistent with parliamentary supremacy: see eg, Andrew Butler ‘The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1998 is a Bad Model for Britain’ (1997) 17 *Oxford Journal of Legal Studies* 323, 340.

54 It should also be noted that s 30 is not the only provision of the Human Rights Act which deals with statutory interpretation. Section 31 specifically allows ‘international law and the judgments of foreign and international courts and tribunals, relevant to a human right’ to be used in interpretation. ACT courts, however, ‘have been slow to refer to this type of jurisprudence in cases where the [Human Rights Act] has been invoked’: Charlesworth and McKinnon, above n 3, 14. One of the few exceptions to this proposition is *R v Upton* [2005] ACTSC 52 [19]-[24]. See also, Allan, above n 6, 908 et seq and Tate, above n 18, 27.

55 *Explanatory Statement to the Human Rights Bill 2004*, 5 (emphasis added).

56 *Ghadian v Godin-Mendoza* [2004] 2 AC 557, 571 [30] (Lord Nicholls of Birkenhead).

57 *Human Rights Amendment Act 2007* (ACT), s 5. For an assessment of the likely impact of s 30, see Simeon Beckett, ‘Interpreting Legislation Consistently with Human Rights’ (2008) 58 *AIAL Forum* 43, 58.

58 *Explanatory Memorandum to the Human Rights Amendment Act 2007*.

In the case of either formulation of s 30, it can be said that the provision gives rise to a new, 'less text-based or less plain meaning approach to interpretation'.⁵⁹ The scope of courts to impose 'their own contestable view of what is a Bill of Rights-friendly approach'⁶⁰ is obvious. Courts will be able to bend and manipulate a law in all kinds of ways in the name of ensuring the law is human rights-consistent.⁶¹ Lord Woolf CJ has acknowledged that the 'most difficult task which courts face is distinguishing between legislation and interpretation. ... if it is necessary in order to obtain compliance [with the UK Human Rights Act] to radically alter the effect of the legislation this will be an indication that more than interpretation is required.'⁶²

The House of Lords decision in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (*Ghaidan*) illustrates the lengths courts will go to in imposing their own human rights-consistent interpretation. In that case, the word 'spouse' in the *Rent Act 1977* (UK) was interpreted consistently with the Human Rights Act 1998 (UK) to include a homosexual partner, notwithstanding that the term 'spouse' in the Act itself was defined to mean a person 'living with the original tenant as his or her wife or husband'. A 'more regrettable'⁶³ example is provided by *R v A (No 2)* [2002] 1 AC 45 in which the House of Lords interpreted legislation designed to protect complainants in sexual offence cases from the giving of evidence and cross-examination about previous sexual history⁶⁴ in such way, consistent with the accused's human rights 'so as to considerably reduce the protection afforded to the [complainant] and to allow otherwise inadmissible evidence to be used to the accused's advantage in the criminal trial.'⁶⁵

The 'Alice in Wonderland'⁶⁶ approach to statutory interpretation illustrated by *Ghaidan* and *R v A (No 2)* can be compared with an example of a considered legislative response to the perceived infringement of a right; that is, the approach commenced by the Howard government, and now continued by the Rudd government in expressly amending legislation which

59 Allan, above n 14, 37.

60 Allan, above n 14, 37.

61 Davies, above n 23,, 53. See also Allan, above n 6, 913.

62 *Poplar Housing and Regeneration Community Association Ltd v Donogoe* [2002] 1 QB 48 73 [76].

63 Tate, above n 18, 28.

64 Such legislation is known generally as 'rape shield' legislation. In Australia, the Commonwealth, all States, the ACT and the Northern Territory have enacted such legislation: eg, *Crimes Act 1914* (Cth) ss 15YB–15YC, *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 48–53, *Criminal Procedure Act 1986* (NSW), s 293, *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4, *Criminal Law (Sexual Offences) Act 1978* (Qld), s 4, *Evidence Act 1929* (SA), s 34I, *Evidence Act 2001* (Tas), s 194M, *Evidence Act 1958* (Vic) s 37A, *Evidence Act 1906* (WA) ss 36A–36BC.

65 Tate, above n 18, 28.

66 Allan, above n 14, 37.

discriminates against same sex couples.⁶⁷ Rather than just legislating loosely and generically, the Parliament carefully considered the public policy issues and how best to address them. Arguably, if there had been a federal statutory (or constitutional) bill of rights containing generally equivalent terms to the Human Rights Act, there would have been no impetus for the legislature to act at all. It would have been up to a private litigant to seek to have the discriminatory laws interpreted in a way that was consistent with the bill of rights. The other alternative would be to seek a declaration of incompatibility. As will be shown below however, a declaration that a law is inconsistent or incompatible with a right will not necessarily result in action from the legislature.

Additionally, it might be thought that, over time, the instances of weighty public policy issues coming before the courts will diminish as the application of the rights contained in statutory bills of rights are clarified. However, recent judgments delivered by the House of Lords have raised issues such as whether police have a positive human rights obligation to protect the life of a person arising out of the investigation of threats against the person⁶⁸ and whether the right to marry was violated by a legislative scheme designed to prevent sham marriages from enabling illegal immigrants to avoid deportation.⁶⁹

Finally while s 30 does not expressly apply to the common law, it can easily be seen how the consequences of applying human rights-consistent interpretations to statute laws can effect the common law.⁷⁰ Perhaps most alarmingly in this regard is an example from Canada, in which the Supreme Court of Canada held that the *Charter of Rights and Freedoms* applied to the exercise of non-statutory powers, such as ‘a Cabinet decision taken under the prerogative to allow the United States to test its cruise missile in Canada’.⁷¹

67 See Robert McClelland, Rudd Government Welcomes Senate Passage of De Facto Reforms (Press Release, 16 October 2008). See also Robert McClelland, (Address to the Marrickville Central Branch Forum, Herb Greedy Hall, Marrickville, 27 October 2008). The work was commenced by the previous government, see Philip Ruddock, Howard Government Welcomes Release of HREOC’s Report on Same Sex Discrimination (Press Release, 21 June 2007).

68 *Chief Constable of The Hertfordshire Police v Van Colle & Anor* [2008] UKHL 50.

69 *R (On The Application of Baiai and Others) v Secretary of State For The Home Department* [2008] UKHL 53.

70 See eg *Kingsley’s Chicken Pty Limited v Queensland Investment Corporation and Canberra Centre Investments Pty Limited* [2006] ACTCA 9, where the ACT Court of Appeal had to consider the meaning of the words ‘offer’ and ‘accepts’ in the *Leases (Commercial and Retail) Act 2001* (ACT). Even though the Human Rights Act had no direct application to the case, the Court referred to s 30 as it then stood and its requirement to prefer an interpretation that is consistent with a policy objective. Even though the case involved interpretation of words appearing in an ACT law, the Court was prepared to accept that the interpretative techniques contained in s 30 were capable of applying more generally.

71 Bayne, above n 29, 7 citing P W Hogg, *Constitutional Law of Canada* (2004 Student edition) 767-768.

B *Declarations of Incompatibility*

The Human Rights Act does not permit the court to overrule an ACT law. Instead, by s 32, the ACT Supreme Court is given the power to declare that an ACT law is incompatible with the Human Rights Act.⁷² A declaration does not affect the validity, operation or enforcement of the law or the rights or obligations of anyone.⁷³ Interestingly, there is no free-standing right to apply to the Court for a declaration of incompatibility. A declaration is only able to be made in proceedings that have independently attracted the jurisdiction of the Court.⁷⁴

The intention behind this mechanism is that it 'may create a political imperative leading to a change of the offending legislation, which the Human Rights Act envisaged could occur with retrospective effect.'⁷⁵ There is certainly no legislative imperative that this occurs, as s 33 of the Human Rights Act requires only that the Attorney-General present a copy of the declaration of incompatibility to the Legislative Assembly and prepare a written response to it.

What if the legislature disagrees with a declaration of incompatibility issued by the courts? Will the legislature stand up to the courts in such circumstances?⁷⁶ Experience in the United Kingdom up to 2005 suggests not.⁷⁷ Why is this so? Professor Allan explains that judicial declarations of incompatibility:

... can convey the impression that the unelected judges had some authoritative, definitive (and to me, mysterious) ability to know and to declare precisely where to draw all the highly contestable and disputed lines (including knowing what amounts to a reasonable limit and what does not). ... [This is] grossly misleading in terms of a characterisation of what is in fact happening, which is that the judges (or rather, a majority

72 The Standing Committee on Legal Affairs raised concerns about whether the declaration of incompatibility mechanism would breach the separation of powers: *Scrutiny Report 42* (2004) 5-12. The Government's response, delivered by the Chief Minister (in his capacity as Attorney-General), appears in ACT, *Parliamentary Debates*, Legislative Assembly, 2 March 2004, 532 (Jon Stanhope). See further Debeljak, above n 21, 172. Interestingly, it is the supposed 'preservation of parliamentary supremacy' of the declaration of inconsistency mechanism that has led the United Nations Human Rights Committee to criticise the declaration of incompatibility device as being insufficient to protect human rights: UN Doc A/50/40 [176] (NZ) and [408] – [435] (UK), referred to in Charlesworth & McKinnon, above n 3, 22. In Victoria, the Charter gives the Supreme Court the power to make a declaration of inconsistent interpretation: s 36(2). Both the ACT and Victorian provisions are modelled on s 4(2) of the *Human Rights Act 1998* (UK).

73 Human Rights Act, s 32(3).

74 Evans and Evans, above n 37, [4.85].

75 Spigelman, above n 1, 9.

76 Allan, above n 6, 913.

77 Francesca Klug & Keir Starmer, 'Standing Back from the *Human Rights Act*: How Effective Is It Five Years On?' [2005] *Public Law* 716, 721, quoted in Allan, above n 6, 914.

of judges) and the legislators (or rather, a majority of legislators) have disagreed over a highly contestable decision about where to draw some line on the basis of an indeterminate, abstract rights entitlement.⁷⁸

What has been the experience in the ACT? The first case in which a declaration of incompatibility was sought was *SI bhmf CC v KS bhmf IS* [2005] ACTSC 125. The case has been much commented on, and concerned the interpretation of the *Domestic Violence and Protection Orders Act 2001* (ACT) (DVPO Act) with respect to the human rights to a fair trial, freedom of movement, and the rights of children.⁷⁹ Higgins CJ refused to make a declaration of incompatibility but ‘did indeed exercise some creativity in interpreting the legislation’.⁸⁰ Interestingly, neither s 32, nor the declaration sought, are referred to specifically in the judgment.⁸¹ It is also unfortunate, though perhaps not unexpected,⁸² that the court did not provide any guidance on the interaction of the declaration of incompatibility mechanism with the requirement to interpret laws consistently with rights in the Human Rights Act. Also of note is the emphasis Higgins CJ gave to the fact that the DVPO Act had been certified by the Attorney-General to be consistent with human rights, in accordance with s 37 of the Human Rights Act.⁸³ In the result, his Honour held that a ‘final’ protection order under the DVPO Act had to be made by a Magistrate and not, as had occurred in the case of the protection order appealed from, by a deputy registrar of the ACT Magistrates Court. Higgins CJ stated that this result arose, absent the Human Rights Act, by reference to the principles adopted by the High Court in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.⁸⁴

So where then does this leave the law? In a state of continued uncertainty at best. On the one hand, s 32 of the Human Rights Act empowers the Supreme Court to declare the laws are incompatible with human rights. On the other, the Court is required (along with others who are required to interpret legislation), by s 30, to give ACT laws a human rights-consistent interpretation. This is a clear example of the devil being in the detail of statutory bills of rights.

78 Allan, above n 6, 914-915.

79 See [2005] ACTSC 125 [24], where Higgins CJ also considered that the DVPO Act could also potentially impact on the human rights contained in s 15 (peaceful assembly and freedom of association) and s 16 (freedom of expression) of the Human Rights Act.

80 Charlesworth and McKinnon, above n 3, 13.

81 Ibid 12.

82 Not unexpected in the sense that the courts cannot be expected to rule on such matters when the legislature has no given guidance.

83 [2005] ACTSC 125 [80] and [113]. See also Charlesworth and McKinnon, above n 3, 13.

84 [2005] ACTSC 125 [100].

The ACT Legislature, of course, has provided no guidance on how ss 30 and 32 of the Human Rights Act are meant to interact, if indeed they are meant to. The legislature – elected by the people and charged with responsibility for such matters – has completely abdicated its responsibility to the courts in this regard. Why would any legislature do this? This is a complex question; and one that is made more complex by the unique system of government in the ACT. The ACT government is not quite State government; not quite local government. Whilst it is not the purpose of this chapter to attempt to answer this complex question, the point to note is that such an alteration of the relationship between the legislature and judiciary by statutory bills of rights leads inevitably to uncertainty and confusion in an area of government in which there should be none.

III New Part 5A – Statutory Cause of Action and Private Entity opt-in

Advocates of statutory bills of rights consider that the Human Rights Act has had ‘considerable influence on the workings of government’.⁸⁵ Whatever may be said about this comment, it is true to say that, from 1 January 2009, the influence of the Human Rights Act on the working of the ACT government will increase ten-fold. This is because of new Part 5A of the Human Rights Act.

Part 5A is titled ‘Obligations of public authorities’. The term public authority is defined broadly.⁸⁶ New section 40B makes it unlawful for a public authority:

- (a) to act in a way that is incompatible with a human right; or
- (b) in making a decision, to fail to give proper consideration to a relevant human right.⁸⁷

These requirements are far-reaching. They apply not only to actions under statutory powers, but also to executive power and an exercise of the prerogative.

A The New Statutory Cause of Action

Prior to 1 January 2009, the Human Rights Act was silent on the issue of remedies available for a violation of human rights, except for compensation for unlawful arrest or detention or wrongful conviction.⁸⁸ That notwith-

85 Charlesworth and McKinnon, above n 3, 1.

86 Human Rights Act, s 40.

87 This section is modelled on s 38 of the Victorian *Charter of Rights and Responsibilities* and s 6 of the *Human Rights Act 1998* (UK): *Explanatory Statement to the Human Rights Amendment Bill 2007*, 5.

88 Human Rights Act, ss 18(7) and 23(2). Evans and Evans, above n 37, [4.6] mention only wrongful conviction. They note that the Victorian *Charter of Human Rights & Responsibilities* contains no equivalent provisions relating to compensation.

standing, the superior courts of the ACT seemed determined to grant relief for perceived violations of human rights.⁸⁹

This will change on 1 January 2009, with new s 40C creating a statutory cause of action, if a person:

- (a) claims that a public authority has acted in contravention of section 40B; and
- (b) alleges that the person is or would be a victim of the contravention.

The person, described in the Explanatory Statement as the ‘victim’,⁹⁰ may either commence proceedings in the ACT Supreme Court against the public authority or rely the Human Rights Act in other legal proceedings.⁹¹ Most importantly, the Supreme Court ‘may grant the relief it considers appropriate except damages.’⁹²

The difficulties and uncertainties arising out of the new statutory cause of action can be illustrated by focussing on the relief that may be awarded. The exclusion of damages as a remedy is interesting. Clearly, other forms of monetary relief are intended to be available under s 40C. This relief could include damages-like monetary remedies. The new cause of action does not affect the ability to seek other relief, including damages, apart from s 40C.⁹³ But how does relief under s 40C sit with those other claims, particularly claims in tort and contract? Should the relief ordered by the ACT Supreme Court for a violation of a human right equate to the relief that would be ordered in those actions? Jurisprudence from New Zealand arising out of the implied statutory cause of action sounding in damages suggests not.⁹⁴

What of the relief for violation of a human right in an administrative law context? Ordinarily, the remedy in an administrative law context would be to have the impugned decision set aside, a declaration that it was not

89 See eg, *Stevens v McCallum* [2006] ACTCA 13, 138, discussed above and Evans and Evans, above n 37, [4.8] – [4.10].

90 *Explanatory Statement to the Human Rights Amendment Bill 2007*, 6-7. A victim must be a natural person and cannot be a corporation or public authority.

91 Human Rights Act, s 40C(2).

92 Human Rights Act, s 40C(3)

93 Examples include compensation for unlawful arrest or detention under s 18(7), compensation for wrongful conviction under s 23, and relief under the *Administrative Decisions (Judicial Review) Act 1989* (ACT).

94 See eg, *Taunua v Attorney-General* [2007] NZSC 70 [233] (Blanchard J) and [304] (Tipping J), *Manga v Attorney-General* [2000] 2 NZLR 65, 194-195 (Hammond J), *Dunlea v Attorney-General* [2000] NZCA 84 [64]-[65] (Thomas J, dissenting) and *Martin v Tauranga District Court* [1995] 2 NZLR 419, 428 (Richardson J). It should be noted that New Zealand has no statutory remedy in its Bill of Rights Act. However, courts in that country have, extraordinarily, read in a statutory cause of action sounding in damages: *Simpson v Attorney-General* [1994] 3 NZLR 667. See also James Allan, ‘Turning Clark Kent into Superman: the New Zealand Bill of Rights Act 1990’ (2000) 9 *Otago Law Review* 613. By contrast, in Canada, damages are available as a remedy for a violation of human rights: see eg, *RJR-Macdonald Inc v Canada (Attorney-General)* (1994) 111 DLR (4th) 385, 406.

properly made and an order to make the decision afresh. However, in New Zealand it seems that monetary compensation is also available in administrative law cases.⁹⁵ This would be a considerable and dangerous development in Australian public law. Government decision making would be paralysed for fear of compensation being awarded to aggrieved parties.

In *Martin v Tauranga District Court* [1995] 2 NZLR 419 at 428, Richardson J stated that:

The choice of remedies should be directed to the values underlying the particular right. The remedy or remedies granted should be proportional to the particular breach and should have regard to other aspects of the public interest. ... What is basic is that the plaintiff be compensated for what he or she has lost, the protection of a fundamental right.

His Honour considered that 'effective and appropriate relief' for breach of a human right required: (i) public acknowledgement that a violation had occurred, (ii) the violation to have ended, (iii) compensate the victim for the violation and (iv) ensure that no further violations occur.⁹⁶

This provides another example of the creativity in which the judiciary has to engage when the legislature shirks its public policy responsibilities in the rights arena. Of course, it remains to be seen whether the ACT courts will adopt a similar approach. But the point is there is now the ability to bring proceedings for a breach of the Human Rights Act. The devil already existing in the detail of the Human Rights Act, will be given a particular outlet through this new cause of action.

B Private Entity opt-in to Compliance with the Human Rights Act – voluntary for now?

Although new Part 5A is titled 'Obligations of public authorities', s 40D(1) enables entities that are not public authorities to voluntarily opt-in to the requirements in Part 5A. An entity does this by asking the Minister to declare that the entity is subject to the obligations of a public authority to act consistently with human rights.⁹⁷

On receiving a request the Minister *must* make the declaration.⁹⁸ A declaration *may* be revoked if the entity asks the Minister to revoke it.⁹⁹ It is interesting that the Minister has no discretion to declare that an entity has opted-in but does have a discretion in relation to revoking a declaration. This could have the effect of essentially binding entities into complying with the

95 *Minister for Immigration v Udompun* [2005] NZCA 128, [168]-[170] (although the NZ Court of Appeal did express some caution 'in the area of damages for breaches of natural justice').

96 *Martin v Tauranga District Court* [1995] 2 NZLR 419, 428.

97 Human Rights Act, s 40D(1).

98 Human Rights Act, s 40D(2).

99 Human Rights Act, s 40D(3).

Human Rights Act when they no longer wish to do so. What if the Minister knows that the entity making a request has little or no ability to comply with the Human Rights Act? The entity will be exposed to Supreme Court proceedings whenever it acts in a manner inconsistent with a human right.

It might be thought, aside from the apparent limitation of opting-out mentioned above, that the ability of private entities to voluntarily opt-in to the Human Rights Act regime is quite harmless. However, in another good example of the devil being in the detail, the Explanatory Statement reveals a far more sinister intention on the part of the ACT government by enacting s 40D. The relevant passage states as follows:

The private sector is already required to act lawfully in regard to occupational health and safety, equal opportunity and similar obligations. Encouraging broader, voluntary compliance with human rights standards is a *natural progression in the process* of ensuring the best possible outcomes for Canberrans.

This provision will be unique to the ACT, however, it draws on the increasing intentional recognition that *the private sector should be encouraged* to respect and promote human rights [emphasis added]¹⁰⁰

It's fair to say that these statements clearly reveal an intention on the behalf of the ACT government to expand the operation of the Human Rights Act to the private sector. There is a voluntary opt-in for the time being, but the 'natural progression' alluded to must surely be that all entities – public and private – will be required by law to act in accordance with the Human Rights Act.

And just how will private sector entities be expected to comply with the generic amorphous rights? What of small business operators? What of companies with operations in other jurisdictions which, sensibly, do not have statutory bills of rights? These few questions demonstrate that the compliance costs to business of any application of the Human Rights Act to the private sector are enormous. Businesses will be discouraged from carrying on business in the ACT. Jobs will be lost.

IV Conclusion

Advocates of statutory bills of rights argue that they are necessary to protect 'fundamental' rights and freedoms and are essential for 'our' way of life.¹⁰¹ It has even been suggested that Australia is less of a democracy because we

100 *Explanatory Statement to the Human Rights Amendment Bill 2007*, 8.

101 See eg, Jon Stanhope, Lawyers Challenged to Help Build a Human Rights Culture in the ACT' (Press Release 2 June 2004), Victorian Department of Justice, *Human Rights In Victoria – Statement of Intent*, May 2005, 1 and Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 2006 (Rob Hulls) 1106.

do not have a federal statutory (or in the extreme case, a constitutional) bill of rights.

However these arguments are not borne out when regard is had to the Human Rights Act. In fact, all that can be said of the Human Rights Act is that it has introduced uncertainty – some may say further uncertainty – into the ACT legal system. The reasons for this are simply stated. The generic one-size-fits-all rights contained in the Human Rights Act are capable of uncertain and unintended application.

Additionally, by requiring human rights-consistent interpretations of laws and enabling the ACT Supreme Court to make declarations of incompatibility, the Human Rights Act upends the relationship between the judiciary and the legislature. All important public policy questions – which of necessity impact on the rights enumerated in the Human Rights Act – fall to the courts for determination. Far from being a leader in the field of human rights, the ACT Legislative Assembly has simply left the field. By contrast, it is in the area of public rights that legislatures should be most heavily involved.

Another good illustration of the devil being in the detail of statutory bills of rights is new Part 5A of the Human Rights Act. Other than an inability to award damages, no guidance or elaboration has been given by the legislature on the new statutory cause of action. Again, it is left to the courts to fill the void, by ruling whether there has been a violation of the one-size-fits-all rights, and then determining an appropriate remedy. Secondly, the ‘voluntary’ opt-in for private sector appears at best a temporary measure before the ACT government forces the Human Rights Act into every aspect of life – both public and private – in the Territory. If this prediction bears out, its consequences will be disastrous.

It can be seen then that the ACT Human Rights Act is no beacon lighting the way for a federal statutory bill of rights. At a federal level, Parliament simply should not abdicate its policy responsibilities through a statutory bill of rights. Where specific rights require or deserve protection, the Parliament should respond only by enacting specific laws that expressly articulate the protections Parliament – expressing the will of the electorate – is prepared to afford.

Chapter Twenty Four

A Reflection on the ACT Human Rights Act 2004

BILL STEFANIAK*

The question of having a bill of rights, human rights act or charter has cropped up from time to time in Australia and there have been several moves to enact a bill of rights at the state, territory and federal level of government.

In 2004, the ACT Labor Government became the first government in Australia to enact a Human Rights Act and from the outset I believed it was unnecessary and would be more detrimental to *real* rights than a positive influence on them – and nothing in the intervening time has affected this view.

On 1 January, 2007, Victoria followed suit by enacting the Victorian *Charter of Human Rights and Responsibilities*, claiming to strengthen that state's right to vote, freedom of expression and speech, and other civil and political rights.

However, the jury is out in terms of whether these additional layers of legislation do in fact deliver better human rights protections. I believe that human rights laws as they are framed in the ACT and Victoria – and also in New Zealand and Canada – tend to favour offenders' rights against those of the general community. These laws actually make it far more difficult for courts and police to punish offenders and protect society.

It is hard to imagine how or why any elected government could choose such a course.

There are rumblings that other governments may follow suit, but I hope that this does not come to pass.

So far, based on all I have observed, the ACT *Human Rights Act 2004* has done little if anything to assist ordinary, law-abiding people in Canberra. Instead, it has been an enormously costly social experiment. In the ACT, the legislation duplicates extensive amounts of pre-existing legislation, creating fresh loopholes in existing laws that could be described as 'get out of jail free cards' for criminals and their legal representatives to exploit.

The costs in terms of additional court processes, extended police investigations and the release of offenders back into the community is very difficult to measure in dollar terms.

* This chapter was written when the author was still a Member of the Australian Capital Territory's Legislative Assembly.

While the ACT *Human Rights Act* could not yet be described as a disaster for Canberra there is evidence that it undermines the justice system by unequally favouring the rights of accused criminals over victims and the broader society. In instances where it has been used to grant bail to accused criminals it has not advanced the best interests of a just and decent society. Instead, it has weakened the ability of the courts and police to administer the justice system as it applies to known criminals.

The ACT *Human Rights Act* as applied in the Territory has not served the public well and has led to significant increases in the bureaucracy and the creation of a number of costly senior public service positions. There is also the extra cost for taxpayers as government departments spend money to comply with the additional layer of *Human Rights Act* requirements.

Public servants have told me that progress in legislation in their own departments was delayed by several months because they had to 'tick off all the boxes' to be '*Human Rights Act* compatible'. This has been the case even for technical or mechanical amendments that have little to do with 'rights' at all.

Nor is there any groundswell in the ACT community calling for a bill of rights. The ACT human rights consultative committee held six meetings, and only 120 people attended them all up. I attended four of those meetings and the number of people at meetings ranged from four to 45. In reality, there is no community desire for a human rights act for very good reasons.

Our rights in Australia are protected, by convention, because Australia is a strong democratic nation, and by provisions in Acts of Parliament. Australia's traditions and conventions have their early origins in the Magna Carta 1215 and have been enhanced and enshrined over the centuries. Our basic 'human' and social rights are protected by Acts of Parliament ranging from the Australian Constitution to the *Crimes Act 1900* (ACT).

Fundamental rights and freedoms are protected by constitutional requirements of regular elections, just terms compensation for compulsorily acquired property, jury trial on indictment and freedom of religion. Implications drawn from the Constitution protect the right to freedom of political communication, movement and association.

The *Crimes Act 1900* (ACT), Parts 10 to 13, contain restrictions in relation to police powers of search, arrest, investigation, gathering of evidence and other issues, such as admissibility of evidence and fitness to plead.

Our statutes, common law and conventions protect fair trial rights, freedom of peaceful assembly, fair elections through a secret ballot process and the right to own and acquire property.

Through the actions of various governments over the last century and through legislation other rights have been guaranteed, such as the right to social welfare, the right to proper standards in the workplace, the right to rest and leisure, the right to an education, rights centring around the protection

of children, the right to a clean environment and the rights governing equality between all people in Australia.

An example of rights protected by statute is the *Discrimination Act 1991* (ACT). This Act sets out, in detail, a range of protections against discrimination. The breadth of protections covered by this Act can be seen in s 7, which precludes discrimination on grounds ranging from sex, race and age through to status as a parent or carer.

If anything, there are many people in our society who feel that our laws give too much emphasis to a person's rights while not enough emphasis is placed on a person's responsibilities. Many people say there is too much emphasis on the rights of a criminal and not enough regard for the rights of society or the victim.

Rights are further enhanced and updated through passing new legislation and the development of legal and political conventions over time. One of the most fundamental of our rights is the right to vote and our ability to throw out a government that has over stepped the mark. Constitutional provisions requiring regular elections ensure this fundamental right.

Human rights legislation has been enacted in a number of western democracies and now in the ACT. Has any country – or the ACT (which only recently acquired its *Human Rights Act*) been better off from the experience? I think not.

The then NSW Labor Premier, Bob Carr, in an article that appeared in *The Canberra Times* highlighted the culture of litigation that has developed in Canada and New Zealand as a result of their bills of rights. He lamented the fact that the primary use of a bill of rights in those two countries had been in relation to criminal appeals.

In New Zealand in the first seven years after the Bill of Rights was enacted it was invoked by the accused in thousands of criminal cases. The Bill of Rights continues to be routinely used as grounds for trying to overturn admissibility of evidence, including confessions, evidence obtained under search warrants and breath-testing of drink-drivers.

The main beneficiaries of the Bill of Rights are the lawyers who profit from the fees and the criminals who escape imprisonment on the grounds of a technicality. The main losers are the taxpayers.¹

I agree wholeheartedly with the former NSW Premier on this point.

Mr Carr's article makes a number of points which are: 'a bill of rights does not protect rights', a bill of rights 'will turn community values into legal

1 Bob Carr, How a Bill of Rights Lays a Trap, *Canberra Times*, 20 August 2001 <<http://www.canberratimes.com.au/news/local/news/columns/how-a-bill-of-rights-lays-a-trap/663234.aspx?storypage=0>> at 1 April. 2009.

battlefields', a bill of rights 'will further engender a litigation culture' and finally 'that a bill of rights is an admission of the failure of parliaments, governments and the people to behave reasonably, responsibly and respectfully'.

Mr Carr's view highlights the problems we have seen with the ACT *Human Rights Act* and the problems with human rights acts in other countries. It shows the moral bankruptcy of the argument that we need a human rights act at all when these acts do not protect those people one logically would expect they were designed to protect.

When citizens of a country have very significant rights, any tinkering with those rights has to be done very carefully. These days, giving a certain group of people extra rights invariably means that some other group has their rights diminished.

For example, rights that go too far in favour of criminals take away from the fundamental right of honest citizens to be protected by the laws of the land. This is a real fear in terms of any recent bill of rights and this is something that has started to bear fruit in the ACT.

I have great difficulty in seeing how we could end up with a bill of rights that does not lead to all the inherent problems that we have seen in other western countries, where those countries have bills of rights. It seems to me the only safe outcome in Australia is for this notion to be stopped before it gathers too much momentum.

I Bill of Responsibilities

The deficiencies in the *Human Rights Act* caused me to introduce a private member's Bill suggesting the ACT adopt a 'Bill of Responsibilities'.

I did this because I thought human rights have to be balanced with responsibilities that each of us owes to our fellow citizens. If we are going to go down the path of having a human rights act, I think we also need a charter of responsibilities to complement it.

The 'Bill of Responsibilities' was focused on the fact that everyone is capable of making free and responsible choices and that the inalienable rights and inherent dignity of all human beings also requires certain obligations to be followed and responsibilities to be accepted. The rule of law and human rights depend on the readiness of everyone in our society to act justly. These rights simply cannot endure without the commitment to the responsibilities that go with them. Everyone is responsible, to the best of their knowledge and ability, for a better community which cannot be created or enforced by laws, prescriptions and conventions alone.

The 'Bill of Responsibilities' would have had paramouncy over the bill of rights. It enshrined a few key principles. It was based on principles of mutual respect – everyone has a responsibility to respect other people.

The public should respect public officials such as police, nurses and teachers. Professionals and public officials have a responsibility not abuse the public's trust. They should show respect to others, have ethical standards and serve truth. Australians should respect our institutions like the rule of law. People have a responsibility to be honest and fair in dealing with everyone else. There is a responsibility not to lie. Employers have a responsibility to look after their employees and visa versa. Finally there are provision dealing with marriage the family, private property and the environment and our responsibility to uphold each of these.

A society which is concerned more about responsibilities than rights is a healthier society. It is a society in which we are all concerned for our neighbours. It was these factors that I hoped my Bill of Responsibilities would encourage. Sadly the Bill of Responsibilities was not supported by a majority of Members of the Legislative Assembly. However I maintain that any jurisdiction that decides to adopt a bill of rights should also adopt a bill of responsibilities to maintain a balance.

II The Human Rights Act has not Protected the Weak

Without a Bill of Responsibilities I maintain that the ACT *Human Rights Act* should be repealed because it does not do the job it purports to do and is already showing signs of exhibiting all the problems that I have referred to above.

When I wrote an article in relation to this issue in 2002 I noted that I thought we would be worse off as a community and the problems experienced in New Zealand and Canada would happen in the ACT.

The *Human Rights Act* has done very little for ordinary citizens in the ACT. Over the years I have referred a number of people to the Human Rights Commission. Many have been disappointed to find out that there is little that the office can do to assist them with their problems.

Let's look at the example of Errol's case. Errol was an assistant manager of a Canberra club. Until November 2004, ACT club staff that were off duty were able to play the poker machines and gamble at the TAB at the club at which they worked.

A regulation was introduced by the government in November 2004 which precluded anyone who worked in a club, who had dealings as a result of their employment with gambling or poker machines, from being able to gamble in that club even in their spare time.

Errol was also an ordinary member of the club at which he worked. Prior to this regulation he enjoyed having a flutter on the horses at the TAB. As a result of this regulation Errol couldn't 'have a flutter' on the horses any more.

Whilst he was a member of the club, his position as assistant manager precluded him from enjoying all the other rights other ordinary members had. He felt like a second-class citizen in his own club. Errol went to the Discrimination Commissioner. He was unable, although he came close, to have the matter dealt with under the *Discrimination Act*.

I suggested to him he should try the new *Human Rights Act* and he did. He was told the Human Rights Commission could not help him because his complaint involved a government regulation and they had no jurisdiction over government regulations and did not feel they could be involved.

This seemed ridiculous given that s 12 of the *Human Rights Act* states that all people are to be treated equally, or words to that effect. Clearly, the assistant manager was being treated as a second-class citizen in his own club.

I've referred a number of other cases to the Human Rights Commission. In one instance a fellow had incorrect data relating to traffic convictions on his record. The Human Rights Commission was unable to assist and suggested he seek legal advice.

I also referred the complaint to the Road Traffic Authority. The authority promptly realised an error had been made and expunged the incorrect convictions at no cost to the constituent. I should add that the Human Rights Commission also stated in their advice that it currently had no 'complaints handling' function.

I really wonder, then, about the effectiveness of the *Human Rights Act* in assisting ordinary people whose rights have clearly been affected and even where the circumstances have involved a breach of the *Human Rights Act*.

Even the Council of Civil Liberties in the ACT has problems with the *Human Rights Act*. One would expect that as the first jurisdiction in the whole of Australia to have a *Human Rights Act*, the ACT, would be a veritable utopia for human rights. But not that long after the Act had been operating for a couple of years, Civil Liberties Australia wrote to the ACT Government about their concerns about the increasing creation and pervasiveness of strict liability offences in Territory legislation.

The letter was signed by the ACT President, Dr Kristine Klugman, who pointed out that under strict liability offences the prosecution did not have to prove fault or intent. And while there are exceptional circumstances, such as traffic offences where the position of strict liability may be justified, she argued that many existing and proposed strict liability offences were too onerous.

Dr Klugman gave the example of the *Tree Protection Bill 2005* (ACT) where strict liability provisions had the 'capacity to punish people for genuine accidents or even worse when they may well have acted reasonably in the circumstances'. Civil Liberties went on to say that the onerousness of these provisions together with the dramatic decrease in the state's burden of proof

were ‘inconsistent with the small-l liberal traditions of our society and the protection of individual liberty and offends notions of justice and fairness’.

There was another Canberra example. Mr Daniel Steiner complained to the *The Canberra Times* that the well publicised intimidation and assaults on members of the Ulysses Club motorcycle group by a bikie gang was not being pursued by the ACT Government through its law enforcement agencies. Mr Steiner wrote, ‘The Ulysses Club members have clearly had their civil liberties and rights infringed in the only state that has a Bill of Rights.’

The Ulysses Motorcycle Club is a group of mature age ladies and gentlemen. A local bikie gang objected to the logo on their shirts being similar to a bikie gang’s logo and the police appeared powerless to do anything about it. The government seemed even less interested in using its law enforcement agencies to protect the rights of Ulysses Club members.

Ulysses Club members raise a lot of money for charity and are regarded as a bona fide social club – as opposed to some of the outlaw gangs we see in Australia. It was an outlaw gang that caused the problems here and yet the *Human Rights Act* provided them protections rather than the lawful activities of the Ulysses Club. So much for the culture change brought about by the *Human Rights Act* in Canberra.

III More Arguments for Litigants

The ACT *Human Rights Act* has been a significant issue in Supreme Court hearings on a number of occasions over the past few years. It has been used in several matters to grant bail when bail otherwise would not have been granted. This has caused considerable angst to victims and their families and it highlights the fact that bills of rights tend to privilege the rights of criminals over those of law abiding citizens and victims in our society.

The Director of Public Prosecutions, at a conference in 2005,² expressed his concern that ‘the *Human Rights Act* might be no more than a catchcry for the predilection of those asserting its protection instead of a real jurisprudence’. And the Director, Richard Refshauge, also addressed the issue of proportionality stating, ‘human rights inevitably conflict with one another in the infinitely various circumstances in which humans interact.’

Mr Refshauge said anecdotal evidence from his prosecutors indicated that in the context of arguments about the right to a fair trial, ‘suggestions by prosecutors that the rights of victims might be relevant and taken into account in determining the content of the right to a fair trial had generally been summarily dismissed by judicial officers.’

2 Richard Refshauge, ‘The *Human Rights Act 2004* and the Criminal Law’ (Paper presented at the Gilbert + Tobin Centre for Public Law Conference Addressing the First Year of the ACT Human Rights Act, Canberra, 12 July 2005) < http://acthra.anu.edu.au/articles/Richard_Refshauge.pdf > at 1 April 2009.

This makes a mockery of the *Human Rights Act* and reinforces the point made by Bob Carr and myself that bills of rights serve to protect the interests of criminals as opposed to those of law abiding citizens.

IV Attacking the Intervention

Perhaps one of the more blatant incidents the double standards of supporters of *Human Rights Act* is borne out by the response to the federal government's timely intervention in the Northern Territory to protect little children in indigenous settlements from being sexually and otherwise abused.

I commended publicly the actions of former Prime Minister John Howard and Mal Brough and of the present Federal Government in attempting to do something and I note with interest the welcome that intervention taskforce have received going into these remote settlements. Many women in these settlements have been crying out for a number of years that something needed to be done to protect their children and their communities from the ravages of drink and predatory behaviour.

In that context it is interesting to look at a media release in June of 2007 issued by ACT Chief Minister Jon Stanhope and his Human Rights Commissioner.³ The Chief Minister and the Commissioner stated that compulsory medical checks for children without informed consent could amount to a form of abuse.

The release went on to say that it was difficult to regard some of the measures proposed by the Commonwealth as positive discrimination to improve the status of a disadvantaged group when indigenous communities had not been consulted in their formulation as required under the international convention regarding all forms of racial discrimination.

The release said proposed laws underpinning the intervention 'do not appear to be effective in overcoming disadvantage and they in fact entrench or worsen existing discrimination'. The release criticised the proposals as 'discriminatory, coercive and paternalistic', and 'mimicked failed past policies' that had led to the stolen generations.

Whilst agreeing with effective responses to child abuse and other related problems in indigenous communities, as they were sufficiently important objectives and that some of the measures may in part have had a rational connection to these objectives, the release went on to say that the supposed short-term benefits they might offer were not proportionate to their deleterious effects.

3 Jon Stanhope 'Human Rights Commissioner Examines Commonwealth's Indigenous Package for NT' (Press Release 27 June 2007) <<http://www.chiefminister.act.gov.au/media.php?v=5734>> at 1 April 2009.

This view seems divorced from the practical realities of the situation and offers little in the way of commonsense solutions or empathy for the little children who are being abused, the little children whom Noel Pearson said were huddled in the corner while the adults were getting drunk and the little children who were worried about who was going to abuse them next.

Whose rights are more important here? It's a no-brainer.

During the public debate on NT intervention I pointed out how the children's rights which were supposedly protected by the *Human Rights Act 2004* (ACT) were being breached in the NT prior to the Intervention. The ACT *Human Rights Act* declares in its preamble that human rights 'are necessary for individuals to live lives of dignity and value and that respecting, protecting and promoting the rights of individuals improves the welfare of the whole community.'

Sections 10 and 11 of the *Human Rights Act* are most relevant to the rights of children and women in indigenous communities. Section 10 says that no-one may be punished in a cruel, inhuman or degrading way. What could be more cruel, inhuman or degrading than taking away the innocence of children?

What could be more cruel, inhuman or degrading than a culture of violence, rape and sexual abuse? Section 2 of the ACT *Human Rights Act* states 'every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.'

Arguably, the only racial discrimination would be to continue to ignore the plight of indigenous children who are being subjected to repeated and prolonged degradation and abuse.

We should not regard the situation in the NT prior to the intervention as acceptable. We would not regard this as acceptable anywhere else and certainly there should not be one law for non-indigenous Australians and another for indigenous Australians.

Again those who oppose the NT Intervention seem more concerned about the rights of criminals than the rights of victims. Unfortunately this is the sort of thinking that bills of rights sadly foster.

This is symptomatic of the cultural and practical problems with the ACT *Human Rights Act* and symptomatic of the problems with human rights acts in other countries. It shows the moral bankruptcy of the argument that we need a national human rights act when those supporting such instruments would use them to undermine protections for those people who one would logically expect such an instrument to protect.

I can't think of a starker example than the abuse going on in the Northern Territory and the criticism by many proponents of human rights acts of the sensible and necessary intervention by the federal government. It may not be perfect but it is humane, timely and necessary.

V Conclusion

We are very lucky in Australia. We live in one of the greatest countries in the world; we live in one of the freest countries in the world. We live in one of the most easy-going countries in the world.

This is due to the way we have evolved as a society with our easygoing open way of life, and the good fortune we have had inheriting those wonderful conventions of the common law, the democratic process, and the supremacy of a democratically elected Parliament. We have a system that has evolved since Magna Carta – and which continues to evolve.

We do not need human rights acts. They may be appropriate when they grow out of revolutions like the American Revolution. But we did not grow out of a revolution. We evolved from British colonies to a great self-governing nation that continues to evolve and continues to be the envy of most parts of the world.

Australia has managed without a human rights act through a combination of great legal and political conventions and the nature of our open society based on the principle of the fair go.

These enduring qualities don't need human rights acts to protect them. Indeed, they offer far more protection than human rights acts ever could. One final problem with the human rights acts of course is that they are fundamentally anti-democratic because they transfer a lot of the real decision-making power away from elected representatives and they place it in the hands of an unelected and, in practice, un-sackable judiciary.

It is virtually impossible to dismiss a judge. They are not elected. They are in office until they are 70, unlike politicians – if you don't like a politician's decision you can throw him or her out after three or four years.

We don't need any more human rights acts in Australia and I think we all need to stop and think and in my view get rid of the ones we have as they add absolutely nothing to real rights protection.

Chapter Twenty Five

Look But Don't Leap: Lessons from the Victorian Statutory Bill of Rights

BEN JELLIS*

In the early 1950s Melbourne demolished a number of its Victorian-era buildings. The idea was to replace them with 'modern' structures and to present a progressive face to visitors to the 1956 Olympic Games (many of whom, it might be observed, were rebuilding their own cities on an involuntary basis).

Suffice to say, the exercise was a disaster. In time tastes began to once again appreciate the beauty, and indeed the durability, of older buildings. In Melbourne today, those that remain, such as the UNESCO preserved Exhibition Buildings, are among the cities most prized (and protected) institutions.

In recent times, history has repeated itself as the cultural cringe turned its eye to the legal system in Victoria. The long-standing common law approach to the protection of rights was derided on the basis that the Victorian legal system was not subject to a formal bill of rights. Frequently, the argument was made that the rights of citizens in Victoria were unprotected, when compared to those of persons in other jurisdictions such as the United Kingdom, Canada and South Africa.

The result was the introduction of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (the 'Charter'). Introducing the *Charter*, the Attorney-General of Victoria alluded to Victoria's new comity with international trends. Foreshadowing a possible federal change, he noted that:

Australia is the last major common law-based country that does not have a comprehensive human rights instrument.²

Perhaps inevitably, however, just as Victoria decided to join the rest of the world, there began to arise a new international understanding that statutory bills of rights can, in fact, detract from the strength of more traditional protections of citizens rights. In particular, significant public dissatisfaction has arisen in relation to the United Kingdom's *Human Rights Act 1998* (upon which the *Charter* is based).¹

* The views expressed in this article are the author's own and do not represent those of his employer. The law is correct as stated at 25 January 2009

1 As an example see Philip Johnson, 'Human Rights Act is a Law for Ne'vr-Do-Wells', *Daily Telegraph*, 18 December 2008.

Indeed, late in the year that the key provisions of the *Charter* came into force, the chief architect of the *Human Rights Act* (UK) conceded that his own legislation was now viewed as a 'villain's charter'.² He expressed the wish to 'rebalance' the *Act*, in the midst of a public outcry about a number of intended consequences.³

The first year of the *Charter* in Victoria has, similarly, revealed a number of unintended consequences. Principally, it may be observed that the *Charter* can work to upset the proper balance between the Victorian Parliament and the courts. This is because the *Charter* requires that all courts interpret legislation in such a way as to make it 'compatible' with human rights. In practice, this means courts are often asked to, in effect, re-write legislation so that it is more expressive of individual rights. This has negative implications for the separation of powers, the rule of law and the sovereignty of parliament.

I The Charter Explained

A The Operative Provisions of the Charter

The *Charter* lists a set of rights which are largely drawn from a United Nations document, the International Covenant on Civil and Political Rights. The *Charter* contains a number of mechanisms by which these rights are protected.

First, the *Charter* requires that when interpreting legislation all courts must adopt an interpretation which is 'compatible with human rights'. It provides that:

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way which is compatible with human rights.⁴

To this end, the *Charter* further specifies that regard may be had to 'international law and the judgments of domestic, foreign and international courts and tribunals'.⁵

Second, the *Charter* requires that if the Victorian Supreme Court determines that a particular law cannot be interpreted in accordance with 'human rights' the Court may issue a 'declaration of inconsistent interpretation'.⁶ Upon the Supreme Court making such a declaration, the

2 Benedict Brogan, 'Jack Straw Reveals Why I Want to Change the Law', *Daily Mail*, 8 December 2008, <http://www.dailymail.co.uk/news/article-1092695/Jack-Straw-reveals-Why-I-want-change-law.html> at 20 January 2009.

3 Benedict Brogan, 'Cameron Will Scrap Human Rights Act in Campaign for UK Bill of Rights', *Daily Mail*, 8 December 2008, <http://www.dailymail.co.uk/news/article-1092716/Cameron-calls-UK-Bill-Rights-Straw-reveals-plans-overhaul-Human-Rights-Act.html> at 20 January 2009.

4 Section 32(1).

5 Section 32(2).

6 Section 36.

impugned law will remain valid, but the relevant Minister is required to table a response in Parliament.

Third, each public authority (defined in such a way as to include individuals such as employees of a government department, law enforcement officers and public servants), must ensure that its actions are compatible with the rights specified in the *Charter*.⁷

Finally, a range of other more minor mechanisms have been introduced into parliamentary and administrative processes. These include the requirement that all future legislation be accompanied by a statement that the draft legislation complies with human rights, and a provision which allows the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission to be joined as a party to proceedings in any case where a question of law arises relating to the *Charter*.⁸

II Criticisms of the Charter

A *Upsetting Democratic Compromise*

When the Victorian Parliament seeks to act, it can only do so by using those tools which are available to it. In law-making, that tool is legislative words. Traditionally, the responsibility of courts is to apply the legislation as enacted by the Parliament. This inevitably involves interpretation, which can be a difficult task as most words import a range of meanings and ambiguities, particularly when seen through a variety of contexts. Notwithstanding this difficulty, a judge must attempt to find the meaning of the words that have been chosen by the Parliament.

The *Charter* upsets this role, by requiring judges to interpret legislation so as to make it ‘compatible’ with enumerated rights. This obligation would not of itself be problematic, were it only to be applied where a particular reading of the legislation would bring about an obvious breach of human rights. Indeed, there already exists in Victorian and Commonwealth law a common law presumption that legislation is not intended to be read in a way which has the effect of diminishing rights.⁹

The problem is that in practice, courts are asked to perform an entirely different task; to re-write legislation so that it may better give effect to individual rights. The bail laws provide an example, as judges are now being asked to read the provisions of the *Bail Act 1977* (Vic) so that they give effect to a right to a timely trial.¹⁰

7 Section 38.

8 See for example ss 28 and 34.

9 *RJE v Secretary to the Department of Justice* [2008] VSCA 265 at [54] (Maxwell, P and Weinberg, JA).

10 This was recognized in *Gray v DPP* [2008] VSC 4 and *Application for Bail by Dickson, Re* [2008] VSC 516 but it is unclear the extent to which these considerations influenced the presiding judge.

A further demonstration of this is provided in the United Kingdom, where for some years a similar interpretative principle has been in place under the *Human Rights Act 1998* (UK). The most infamous example is *R v A (No 2)*.¹¹ There, the judicial committee of the House of Lords was required to consider the application of a law which prevented an accused's legal representative from engaging in the cross examination of a complainant as to the complainant's sexual history.¹² It was argued by the accused that this law was inconsistent with the right to a fair trial. The House of Lords agreed, and adopted an interpretation of the law which granted discretion to the trial judge to allow such evidence to be admitted.¹³ This interpretation, which read down the statutory prohibition on asking questions about prior sexual history expressly overrode the stated intention of the British Parliament which enacted the prohibition.

A similar effect can be observed in the recent Victorian case of *RJE v Secretary to the Department of Justice*.¹⁴ There, the appellant, a convicted sexual offender, appealed against an extended supervision order made by the Parole Board. The order, under section 11(1) of the *Serious Sex Offenders Monitoring Act 2005*, provided that the appellant was to be subject to a range of conditions on release, such as monitoring of his movements. The Parole Board based its decision on the statutory requirement under section 11(1) that it consider whether the offender was 'likely' to commit a relevant offence on release. The meaning of 'likely' had been determined in a recent decision of the Court of Appeal of Victoria, a decision which had also been followed by the Court of Appeal of New South Wales.

On appeal, it was argued that the term 'likely' should have been applied in a different way by the Parole Board. The appellant argued that the word should now be interpreted in a manner consistently with the *Charter*. Two judges of the Court found that the previous decision of the Court of Appeal was incorrect. They did so 'by application of ordinary principles of statutory interpretation' and without needing to consider the *Charter*.¹⁵

The third judge, however, expressly relied upon the *Charter* in reaching his decision. His Honour stated that while he would previously considered himself bound by precedent, the *Serious Sex Offenders Monitoring Act 2005* now needed to be read subject to the *Charter*. As his Honour said:

11 [2001] UKHL 25.

12 Section 41, *Youth Justice and Criminal Evidence Act 1999* (UK).

13 Another example concerns the burden of proof. In *R v Halberd* [2001] UKHL 37 the House of Lords, in obiter, took the view that section 28 of the *Misuse of Drugs Act 1971* (UK), which purported to impose a legal burden of proof on the defendant (on the basis of possession), could be read down to the extent that it would impose merely an evidential burden of proof. This was, on the basis that, it would allow the provision to be read in a manner "compatible" with the presumption of innocence.

14 [2008] VSCA 265.

15 [2008] VSCA 265 [54].

... one is now compelled to construe s 11 of the Act, so far as it is possible to do so consistently with the purpose of the section, in a way that subjects the appellant's rights to freedom of movement, privacy and liberty only to such reasonable limits as can demonstrably be justified in a free and democratic society.¹⁶

The requirement to depart from the Court of Appeal's earlier decision gave rise to some unusual consequences. As his Honour noted, the new interpretation required the Court to 'accept that the intention [of Parliament] has changed' since the enactment of the *Serious Sex Offenders Monitoring Act*. Noting this anomaly, his Honour concluded that 'appears to be the way in which the *Charter* was intended to operate'.¹⁷

This demonstrates one of the most obvious ways which the *Charter* requires a departure from the Court's traditional approach to interpretation. The Parliament which passed the *Serious Sex Offenders Monitoring Act* must have intended that legislation to have some effect. To find that the *Charter* has retrospectively changed this intention, is to open the possibility that all previous legislation might now be taken to mean something quite different to what was intended when it was passed.

This represents a challenge to the assumption that legislators should be taken to mean what they say. Legislators must always choose between competing rights and interests, and they embody that choice in the words that they choose. To subject those words to an additional layer of interpretation on the basis of 'compatibility', is inconsistent with the idea that the people, through their elected representatives in Parliament, have themselves chosen a balance between those considerations.

B Introducing Uncertainty into the Law

The second unintended consequence of the *Charter* is that it has introduced a considerable level of uncertainty into the law in Victoria. Consider for a moment the implications of the decision in *RJE*:

- (1) Existing precedent as to meaning of legislation may no longer apply because the meaning of that legislation has been altered by the *Charter*;
- (2) Victoria may be required to depart from comity with other intermediate appellate courts as its legislation is now subject to different principles of interpretation under the *Charter*; and
- (3) The intention of Parliament in enacting legislation prior to the introduction of the *Charter*, must be viewed as having changed as a result of the introduction of the *Charter*.

16 [2008] VSCA 265 [106]. (Nettle JA)

17 [2008] VSCA 265 [114].

These factors, and in particular the uncertainty surrounding existing precedent, have considerably increased the burden upon persons appearing before the court. It goes without saying that persons with limited means are those who will feel that burden most severely. Placing such a level of uncertainty over the meaning of legislation also detracts from a key principle of the rule of law, which is that the law should, as far as possible, be predictable and understandable to the public.

A further aspect of uncertainty is caused by the requirement in the *Charter* which requires judges have regard to '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right' in interpreting a Victorian statutory provision.¹⁸

This too, has the capacity to significantly increase the burden upon courts and litigants. This is illustrated by the recent decision in *Sabet v Medical Practitioners Board*.¹⁹ There, Dr Sabet, appealed against a decision of the Medical Practitioners Board of Victoria who suspended his registration due to allegations made against him by two female patients. He did so on the basis that the Board, in private disciplinary proceedings, was required to observe the 'rights in criminal proceedings' under the *Charter*. Ultimately the judge was not required to decide the question, coming to the view that Board did not act in such a way as to unreasonably limit those rights. In rejecting the argument the judge was, however, required to consider a number of sources of international law including:

- Section (1) of the New Zealand Bill of Rights Act,
- Section 11 (d) of the Canadian Charter of Rights and Freedoms,
- Article 11 of the Hong Kong Bill of Rights
- Article 14 of the International Covenant of Civil and Political Rights; and
- Article 6(d) of the European Convention.

It is difficult to see any benefit from this new judicial workload. As United States Court of Appeal Judge Richard Posner has pointed out, the more likely effect citing of foreign decisions is a judicial 'arms race' whereby:

if one judge starts citing such sources, opposing judges are placed under pressure to go digging in the same source for offsetting claims [and] the net contribution to sound judicial decision making may be nil.²⁰

Furthermore, consulting foreign decisions in the interpretation of Victorian statutes, introduces a high degree of uncertainty into the judicial process. How might a Victorian judge, for example, go about determining the

18 Section 32(2).

19 [2008] VSC 346.

20 Richard Posner, *How Judges Think* (1998) 351.

relevance of foreign law, when interpreting legislation made in the 1950s dealing with statutory limitation periods?

This difficulty is demonstrated by considering the application of foreign law to Victoria's adversarial legal system. In the criminal law, the adversarial system places an emphasis on the rights of an accused that is, in a global context, uncommon. What weight then should a Victorian judge give to judgments which arise out of legal systems with different priorities such as, for example, the inquisitorial legal systems of continental Europe? One suspects that the answer is, very little. Lawyers instinctively know that such authority would not be relied upon, because it would not be consistent with current laws that protect the rights of an accused. The applicability of international law is, in reality, determined solely by the acceptability of its consequences. It is most likely to be cited as a reason to do that which has been already decided. The requirement upon Victorian courts to consult international sources is therefore a disruptive and time consuming aspect of the *Charter*.

C Introducing a Bias into the Law

A third unintended consequence is that the interpretative provisions of the *Charter* place, within the law of Victoria, a considerable bias in favour of individual rights.

The labours of all legislators are inevitably captive to the interpretation of the words they have chosen. The effect of the *Charter* is to take the emphasis of interpretation away from determining what such words *do* mean and towards an analysis of what they *should* mean. The effect is akin to a black hole sitting at the side of the legal system, tugging all legislation in the direction of individual rights.²¹

This will be particularly felt in cases involving the criminal and quasi-criminal law (a term I use to describe related areas including evidence, criminal procedure, sentencing and evidence). That branch of public law comprises an attempt by society to balance a number of significant interests. These include: the rights of an accused or convicted person, the interests of any victim, as well as the interest of the broader community that those who are guilty of an offence are appropriately punished for their crimes.

The State (in one form or another) will almost always comprise one half of any matter involving the criminal or criminal law. It represents, in this capacity, the interests of the public at large. In the overwhelming majority of cases, the rights under the *Charter* can only be used to the benefit of the accused (or convicted) party. Surely it is a distorting influence to make these rights *the* paramount interpretative priority.

21 The consequence of this might be considered in light of the observation of Ted Hughes that "a word has its own little solar system of meaning".

Consider, for example, judges' directions to juries in criminal cases. No other area of law represents a more dedicated attempt²² to balance the rights of the accused with those of the alleged victim. Currently, in Victoria there exists a view that jury directions may have become unduly complex. To this end, the Victorian Law Reform Commission has been asked by the Attorney-General to consider a number of potential reforms to the system of jury directions.²³ This includes identifying directions which might be abolished or simplified.

If, in this context, a new set of criminal directions are prepared, drafted and enacted by the Parliament, what good is served by subjecting those directions to an additional step of interpretation, whereby judges tinker to make them 'compatible' with the *Charter*? Why is it not preferable that those judges simply give effect to the balance chosen by the Parliament?

As Associate Justice Antonin Scalia of the United States Supreme Court has observed:

all government represents a balance between individual freedom and social order, [and] it is not true that every alteration to that balance in the direction of greater individual freedom is necessarily good.²⁴

The interpretative provisions under the *Charter* will inevitably shift criminal and quasi-criminal law in the direction of individual rights. This is a negative consequence of the *Charter*. Should the Parliament intend to embark upon a wholesale expansion of those rights, it should do so in a deliberate rather than inadvertent manner.

III A Response to Arguments in Support of the Charter

A *Unlikely to Increase Protection*

The primary argument in support of the *Charter* is that, whatever its shortcomings, the *Charter* has introduced a useful protection of citizens fundamental rights.

To this, it is first worth observing that there was no instance of demonstrable injustice which led to the introduction of the *Charter*. On the contrary the Supreme Court of Victoria has an almost peerless reputation for independence and respect for individual rights.

22 Usually by the judiciary through the common law, though at times augmented by statute.

23 Victoria Law Reform Commission 'Jury Directions – Terms of Reference', <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Current+Projects/Jury+Directions/LAWREFORM+-+Jury+Directions+-+Terms+of+Reference>, at 20 January 2009.

24 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997) 42.

It is interesting to reflect upon that fact that less than two weeks before the commencement of the *Charter*,²⁵ the Court of Appeal quashed the conviction of high profile terrorism accused 'Jihad' Jack Thomas, not by reference to 'human rights law', but in accordance with well established common law protections relating to the admissibility of involuntary confessions.²⁶

Every rational person would nonetheless agree that anything which prevents a clear breach of human rights, such as torture or slavery, is a positive thing. In this spirit it might be hoped that the *Charter* at least provides formal protection which can stop the government from taking action which clearly breaches those fundamental rights? Unfortunately it does not even go close to doing so.

The *Charter* in fact contains a built in mechanism which allows Parliament to expressly authorize a breach of human rights. Section 31 of the *Charter* provides that:

Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights...²⁷

Such a provision is an inevitable aspect of a statutory bill of rights, as parliamentary sovereignty, means that any earlier law may be amended or repealed (including the *Charter* itself).²⁸ Each of the fundamental rights in the *Charter*, such as the prohibition on torture²⁹ or slavery³⁰ are, therefore, somewhat meaningless, because what government would pass a law authorising such activities, but feel constrained not to include a declaration overriding the *Charter*?

The result is a *Charter* which is only likely to apply in cases where the central concern is a contestable line between conflicting rights or interests. For those who believe that the drawing of such lines should be in the hands of the democratically elected Parliament, the *Charter* represents a challenge to the belief that the people should have the final say.

B Dialogue Model Rejected

It is often argued that as Parliament retains the power to amend the law, this mitigates the concerns expressed above. Indeed, it is suggested that the *Charter* promotes a 'dialogue', whereby Parliament is free to adopt or ignore

25 The various provisions of the *Charter* were subject to a staggered commencement, with the Charter except for Divisions 3 and 4 of Part 3 coming into force on 1 January 2007.

26 *R v Thomas* (2006) 14 VR 475.

27 Section 31(1).

28 Such a provision would, similarly, be a necessary inclusion in any statutory bill of rights at a federal level. It is not necessary for the purposes of this article to note exceptions to this principle such as restrictive procedures under State Constitutions.

29 Section 10.

30 Section 11.

statements from the courts about the appropriateness of particular laws. Jeremy Webber puts this argument well when he states:

If a bill of rights is adopted by ordinary legislation, and if the legislature remains free to amend it, repeal it, or legislate an interpretation that differs from that adopted by the courts, what is the problem if it declines to do so?³¹

As Webber goes on to ask 'isn't the refusal to legislate just as much an exercise of the democratic will?'³² The answer is no.

The reason is that where a court makes a ruling that a particular law, or interpretation of a law, is inconsistent with human rights – that ruling carries enormous political weight. To override that decision, requires public disagreement with the court. It also requires, in effect, a public statement that the Parliament intends to pass a law which restricts human rights.

The judges which constitute the courts do, however, have no greater insight into the appropriateness of a law, than does any other citizen. There is no reason why a particular judge's view as to, say, the appropriate line between free speech and racial vilification should carry any more weight than that of any other citizen.

The irony is that the legitimacy of a judge's decision is drawn from the apolitical and independent reputation of the courts. This points to a difficulty that advocates of the idea of a 'dialogue' with Parliament fail to address. Such a dialogue inevitably concerns the subject of the lawmaking power of the Parliament. By requiring the courts to exert a significant degree of influence over this power, the *Charter* is likely to lead to the increasing politicization of Victorian courts.

IV Conclusion

Australia is a fortunate country in that the rights of its citizens have been well protected by the strength and integrity of its institutions. The first year of the *Charter* in Victoria provides no example that the protection of those rights is strengthened by a statutory bill of rights. It furthermore demonstrates a number of unintended consequences, which in fact weaken those institutions most important in the protection of citizens' rights.

The lesson to federal policy-makers is that they should stand outside the dictates of international trends, and recognize the strengths of the traditional institutions which protect the rights of citizens in Australia. These should not be dismantled by a federal adoption of Victoria's experiment with a charter of rights.

31 Jeremy Webber, 'A modest (but robust) defence of statutory bills of rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone, *Protecting Rights Without a Bill of Rights* (2006) 274.

32 Ibid.

Afterword

DR SUE GORDON, AM

It would be impossible to summarise the arguments and ideas of the various authors in this book, whose arguments and contributions I respect. Fortunately, I have not been asked to do that, instead I draw on my own experience as an Aboriginal citizen of this country.

I was born in 1943, the child of a half-caste Aboriginal mother and a white father. Because of this, and nothing more, my rights at birth were almost non-existent and such rights as I had were later removed. This removal of rights occurred in a number of ways, but most fundamentally it occurred upon my removal from my mother at the age of 4. I was institutionalised in Perth and did not see her again for another 30 years.

It is well documented that Australia's history is littered with the denial of rights for Aboriginal and Torres Strait Islander (ATSI) people. That history includes massacres, removal from tribal lands, removal of children, horrific violence against women, classification as 'sub-human', and racist policies designed to include ATSI people as 'fauna and flora'.

Through my work there is evidence that Australia, even today, still denies ATSI children their rights and those children are subject to many abhorrent forms of abuse, on a daily basis. The reasons for this? Because the agencies set up to protect their interests and rights are under-resourced, not willing, or simply incapable of accepting that ATSI children have rights under international conventions and, most importantly, under Australian law. Across Australia, ATSI women also continue to be abused and discriminated against.

This is made all the more disturbing when you appreciate that we are now in the 60th year of the Universal Declaration of Human Rights (1948), the 25th year since Australia ratified the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1983), and it has been 19 years since Australia ratified the United Nations Convention on the Rights of the Child (1991).

On 3 April 2009, the Rudd Government formally endorsed the United Nations Declaration on the Rights of Indigenous Peoples. As we know, and the Government has also accepted, this is not a legally binding instrument as a matter of Australian law. The purpose of this Declaration superficially appears to meet the wishes of the 'rights' agenda. But is it just another document signed to appease a small vocal group? What will signing the document give ATSI people? I am concerned that the tangible benefits which

the Declaration will bring may disappoint even its supporters. I hope my concerns are proven to be misplaced.

Let me not forget the progress we have made in the area of land rights though. That journey, at least in the Courts, started with *Milirrpum v Nabalco* in 1971 and got us to *Mabo v Queensland (No 2)* in 1992. But the debate must now address the other basic human rights of all ATSI people, including law and order, housing and health, to name a few. How will a bill of rights address these matters? And how will these rights be enforced? Without timely and cost effective enforcement mechanisms, the bestowing of rights on people achieves little. And the debate must address how best to ensure rights do not come free of responsibility. These points have resonance for all Australians, not only ATSI people.

In my view, the bill of rights debate is an important debate for our democracy to have especially in the context of our history. It appears from the contributions of the various authors in this book that I am not alone in recognising the importance of this debate. And its importance underscores the need for the people of Australia to be able to make the decision about whether we will have a bill of rights directly through a plebiscite, and not through mere legislation or executive decree.

*Sue Gordon
Perth
May 2009*

Don't Leave us with the Bill provides a comprehensive case against an Australian Bill of Rights from the perspective of a range of different Australians.

"Of principal concern in my assessment, is the prospect of investing non-elected judges with a broad, socially-based jurisdiction which they would be ill-equipped, whether by training or experience, to discharge, and the discharge of which would inevitably erode public confidence in the judiciary's fulfilment of its mission, the delivery of justice according to law."

Queensland Chief Justice, Paul de Jersey

"Fervent advocates of a bill of rights for Australia often justify their case by reference to Australia's international obligations. I have always found this argument quite humiliating. It suggests that, left to our own devices, the natural instinct for freedom that exists in Australia would not assert itself and that somehow we need the discipline of adherence to international treaties and conventions to stay on the democratic straight and narrow."

Former Prime Minister, John Howard

"That Australia is unique in not having a Bill is held up by proponents as a defect, even a matter for shame. But unless and until Australia's record in protecting rights is manifestly and consistently weaker than in other comparable countries, there is no cause for shame. Currently we have a robust, complex system of rights protection, and an effective separation of powers. We should work on improving them, not supplanting them."

Professor of Law, Helen Irving

"The push for a bill of rights springs from a suspicion of majority rule, a preference for judicial decision-making on fundamental questions, the imperatives of the particular social and political agenda that a bill of rights serves, and the elitism of privileged reformers — not all of whom are lawyers."

*Catholic Archbishop of Sydney,
Cardinal George Pell*

"The primary objection to a bill of rights is a philosophical one which may be summarised by saying that there is no reason why the principle should always prevail over the exception — indeed the nature of exceptions rather makes the contrary a more logical position."

*Former Commonwealth Solicitor-General,
David Bennett*



Published and authorised by Julian Leeser
Menzies Research Centre,
Cnr Blackall and Macquarie Sts
Barton ACT 2600

