

DOES AUSTRALIA NEED A BILL OF RIGHTS?¹

Frequently, throughout the last 60 years, Australia has been an active participant in world forums that supported recognition of human rights. It is a high compliment to this country's standing as a champion of human rights that it was one of the eight nations given responsibility in 1948 for drafting the Universal Declaration of Human Rights². Since then, Australia has played a leading role in the development and adoption of international human rights treaties approved by the United Nations. By any reckoning, Australia has done much to advance the cause of human rights and freedoms in the long period since World War II. As recently as 2000, the Secretary-General of the United Nations identified Australia as a "model member" of the United Nations.³

Why then has one commentator described this nation as "a wolf in sheep's clothing"?⁴ Regrettably, it is because in recent times legislative and executive practices have diminished Australia's reputation as a champion of human rights. The failure of the Australian government to protest against the imprisonment without trial for five years of Mr David Hicks is a striking example. Whatever his sins, no human being should be treated in the way

1. I am indebted to Lorraine Van der Ende for assistance given to me in the preparation of this Lecture as the result of research done by her in 2005 while employed as a Research Assistant in the High Court of Australia Library.

2. Along with the United States of America, United Kingdom, USSR, China, France, Lebanon and Chile.

3. "Transcript of the Prime Minister, The Hon. John Howard MP", *Television Interview with Kerry O'Brien*, 7:30 Report, 30 August 2000. Accessed at: <http://www.pm.gov.au/news/interviews/2000/interview428.htm>

4. R. Mongoven, "Better a white knight than a Trojan horse", *The Australian*, 27 January 2003.

that the United States government treated him during his long period of incarceration. Recent decisions by the High Court concerning immigration, race relations and indefinite detention for habitual criminal offenders and legislative provisions concerned with the mentally ill provide many examples of current deficiencies in the protection of human rights within Australia.

The fact that we appear to be the only Western country in the world without a Bill of Rights raises questions about our true commitment to the human rights standards that we have accepted over the years by subscribing to numerous international treaties and conventions. The evident short-comings of Australia's present system of rights protection - many of which have become more apparent in recent years - means that the question of enacting a Bill of Rights for Australia can not be brushed aside as unworthy of serious debate.

Previous attempts to introduce a national Bill of Rights

Over the years there have been numerous attempts to introduce a Bill of Rights into Australia. Each attempt has proved unsuccessful. None of the Bills introduced by the federal government has been approved by both Houses of Parliament. This lack of progress at a national level has occurred despite the adoption of a Bill of Rights being included in the official policy platforms of political parties represented in the Australian Parliament, such as the Australian Labor Party, the Australian Democrats and the Greens.⁵

⁵ Australian Labor Party, *ALP National Platform and Constitution 2004*, Chapter 7, nos. 11-12;

Attempts to obtain the support of the Australian people for inserting rights guarantees into the Constitution have been similarly unsuccessful. For example, the proposals put to referendum in September 1988, which included certain human rights measures, were comprehensively defeated in every State. This led Professor George Williams to observe that:

“Attempts to provide better legal protection for human rights in Australia - from national referendums to new federal legislation - amount to a series of failures. In each case, proponents of change have been unable to inspire Australians with the simple idea that improving the protection of their rights is a change for the better.”⁶

Do we need a national Bill of Rights?

Critics of enacting a Bill of Rights argue that these failures reflect a widely held view among the Australian people that rights are already adequately protected in this country. As I indicated in a speech that I gave at Sydney University nearly two years ago, survey results do not support this conclusion. For example, a survey conducted in 1997 showed that 54% of respondents did not feel that rights were well protected in this country and that 72% supported the introduction of some type of Australian Bill of Rights.⁷ A majority of Australians do seem, therefore, to believe in the need to improve the protection of human rights and freedoms within Australia and are sympathetic to the notion of a Bill of Rights.

Australian Democrats, *Australian Democrats Issue Sheets: Prime Minister and Cabinet, Bill of Rights (Election 2004)* Australian Greens, *Constitutional Reform and Democracy*, 2.16.

⁶ G. Williams, *The case for an Australian Bill of Rights: Freedom in the War on Terror* (2004), at p.64.

⁷ *Ibid*, at p. 64.

Australia has much to be proud of in terms of our human rights record, both domestically and at the international level. There are, however, numerous recent examples that raise doubts about our practical commitment to protecting human rights. Devika Hovell, the Director of the International Law Project at the Gilbert and Tobin Centre of Public Law, made this point in suggesting that:

“On paper, Australia is a champion of the international human rights framework. Australia is a party to all the major UN human rights treaties, and has recognized the competence of five of the UN treaty bodies charged with monitoring state compliance with these treaties. Yet, while Australia has agreed to the rules and acknowledged the umpire, it consistently refuses to comply with the umpire’s decision. While, on paper, Australia contributes significant support to the international human rights framework, in practice, Australia contributes more to the great human rights paradox, referred to by Falk, that many prominent countries adopting human rights treaties basically believe that human rights are only relevant for other countries.”⁸

Human rights protection within Australia

Probably the argument most frequently raised against the adoption of an Australian Bill of Rights is that “if it ain’t broke, don’t fix it.” However, an examination of the current system of rights protection within Australia raises serious questions about the validity of this argument. Professor Hillary Charlesworth has pointed out that:

“A marked gap in the celebrated features of Australian democracy, however, is a coherent system of protection of human

⁸ D. Hovell, “The Sovereignty Stratagem: Australia’s response to UN human rights treaty bodies” (2003) 28 *Alternative Law Journal* 297, at p. 297.

rights.”⁹

This gap becomes even more evident when we consider recent decisions by all arms of government in areas such as immigration, race relations, indefinite detention and counter-terrorism. Recent developments in these areas have highlighted the ease with which human rights concerns can be side-lined within Australia. They have emphasized the pressing need to address this problem through the adoption of a national Bill of Rights.

(a) The protection of human rights under the Australian Constitution

The Australian Constitution contains few express human rights guarantees. Basically, it is a document designed to govern the distribution of legislative power between the States and the Commonwealth. The inclusion of a Bill of Rights was debated in the years leading up to Federation, including at the 1897-1898 Constitutional Conventions but was specifically rejected. To a large extent, the Convention delegates believed that the constitutional entrenchment of the doctrines of responsible parliamentary government and separation of powers would itself provide the best protection for human rights. There was also, however, a fear that express provisions to protect human rights, such as an equal protection clause, would prevent the operation of existing racially discriminatory laws aimed at Aboriginal people and the Chinese immigrants who came to Australia to work in the goldfields.

The Constitution does contain a small number of individual rights. They

⁹ H. Charlesworth, “Human Rights in Australian Law” (2002) 13 *Public Law Review* 155, at p. 155.

include the right to vote,¹⁰ the right to trial by jury,¹¹ freedom of religion,¹² and the prohibition on discriminating against an individual on the basis of that person's place of residence.¹³ The Constitution also protects some "economic rights": the Commonwealth can only acquire property on just terms¹⁴ and interstate trade, commerce and intercourse must be absolutely free.¹⁵ With the exception of the property guarantee and the 40 years period when section 92 was effectively regarded as a guarantee of free enterprise, the High Court of Australia has interpreted these provisions conservatively with the result that they offer little practical protection for individuals. But in any event, most of them do not extend to protecting individuals against the actions of State Governments of Australia.

For example, the High Court held in *R v Pearson; ex parte Sipka*¹⁶ that the right to vote conferred by section 41 only protected the rights of people who were entitled to vote at the State level before the enactment of the *Commonwealth Franchise Act 1902*. This decision means that s.41 has no practical effect today.

Similarly, the right to trial by jury granted by section 80 provides for the right only when the trial concerns an offence charged on indictment. The drafting history and the language of this section has caused the High Court

¹⁰ Section 41 of the *Constitution*.

¹¹ Section 80 of the *Constitution*.

¹² Section 116 of the *Constitution*.

¹³ Section 117 of the *Constitution*.

¹⁴ Section 51(xxxi) of the *Constitution*.

¹⁵ Section 92 of the *Constitution*.

¹⁶ *R v Pearson; ex parte Sipka* (1983) 152 CLR 254.

to take a narrow view of this guarantee in cases such as *R v Archdall and Roskruge; Ex parte Carrigan and Brown*¹⁷, *Kingswell v The Queen*¹⁸ and *R v Cheng*¹⁹. The High Court has held that it is for the federal Parliament to determine whether an offence will be classified as indictable. As I noted in *R v Cheng*:

“Such a conclusion is unlikely to be acceptable to many civil libertarians or those who believe that serious criminal offences should be tried by juries. But it is what our Constitution mandates. A contrary result can only be reached, in my respectful opinion, by disregarding the plain meaning of s 80, its drafting history and its purpose.”²⁰

Express protection for human rights under the Constitution is limited. Professor George Williams has concluded that:

“The protection the constitution gives to human rights is deficient. Constitutional freedoms are few, and many basic rights receive no protection. A quick comparison between the Australian constitution and other like instruments, such as the Canadian Charter of Rights and Freedoms, makes this clear. As well as failing to protect many basic rights, the constitution fails to guarantee that all Australians are entitled to the rights it does offer. Several important “gaps” exist.”²¹

The High Court has given constitutional protection to fundamental rights in

¹⁷ *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128.

¹⁸ *Kingswell v The Queen* (1985) 159 CLR 264.

¹⁹ *R v Cheng* (2000) 203 CLR 248. See also *R v The Federal Court of Bankruptcy; Ex parte Lowenstein* (1939) 59 CLR 556; *Sachter v Attorney-General for the Commonwealth* (1954) 94 CLR 86; *Zarb v Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v Rankin* (1978) 141 CLR 182.

²⁰ *R v Cheng* (2000) 203 CLR 248, per McHugh J at 295.

²¹ G. Williams, *The case for an Australian Bill of Rights: Freedom in the War on Terror* (2004), at p. 45.

certain limited areas by drawing implications from the constitutional text and structure. The most controversial of these has been the implied right to freedom of political communication that was initially outlined in *Nationwide News Pty Ltd v Wills*²² and *Australian Capital Television Pty Ltd v Commonwealth*²³. This implied freedom is drawn from sections 7, 24, 64 and 128 of the Constitution. In *Lange v Australian Broadcasting Corporation*, the High Court held that:

“Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be ‘directly chosen by the people’ of the Commonwealth and the States respectively.”²⁴

The freedom of political communication found within the Australian Constitution is not however the equivalent of the *First Amendment* to the United States Constitution. Subsequent cases have illustrated the limited nature of this freedom, most recently in *APLA Limited v Legal Services Commissioner (NSW)*.²⁵

Over the years, attempts have been made to widen the ambit of implied constitutional rights. The most prolific supporter of implied constitutional rights was undoubtedly Justice Murphy. During his time on the High Court, Justice Murphy asserted the Constitution contained a number of implied

²² *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

²³ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

²⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, at p. 559.

²⁵ *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44.

rights such as freedom of movement, freedom from discrimination on the basis of gender, freedom from cruel and unusual punishment and freedom from slavery. This last freedom was found, he said:

“... in the nature of our Constitution. It is a Constitution for a free society.”²⁶

No other member of the High Court has adopted Justice Murphy's implied Bill of Rights.

While the drawing of implications from the Constitution may be one way of bolstering rights protection in Australia, it provides, at best, a constrained form of protection and is in no way a substitute for a comprehensive and express Bill of Rights. Moreover, given the language of the Constitution, its drafting history and the content of the Convention debates, the Justices of the High Court could only imply a modern Bill of Rights into the Constitution by themselves effectively amending the Constitution without the legitimacy of endorsement by the Australian people through the amendment procedure mandated by the Constitution itself. A Bill of Rights attached to the Constitution by referendum under section 128 would not attract this criticism. Even a statutory Bill of Rights would have the advantage of having been debated and accepted by the people's representatives in Parliament. A further difficulty in relying on implied rights is that it does not provide a foundation for the protection of those rights that is as secure, explicit or certain as would be provided by a constitutional Bill of Rights.

²⁶ *R v Director-General of Social Welfare (Vic); ex parte Henry* (1975) 133 CLR 369, per Murphy J at 388.

(b) Legislative protection of human rights

Existing legislation within Australia does provide a measure of protection for certain rights and freedoms. Examples include the various anti-discrimination laws, such as the *Racial Discrimination Act 1975 (Cth)*, *Sex Discrimination Act 1984 (Cth)*, *Disability Discrimination Act 1992 (Cth)* and the *Age Discrimination Act 2004 (Cth)*. Legislation of this nature and the creation of statutory bodies such as the Human Rights and Equal Opportunity Commission do have a positive role to play in ensuring the protection of human rights in this country.

Again, however, there is no doubt that the protection currently provided under ordinary legislation is no substitute for the protection that could be provided by a national Bill of Rights. The most important difference is that while a constitutional Bill of Rights entrenches the protection of those rights, ordinary legislation can be readily amended or repealed by a government for short-term political gain. An example is the proposal, put forward in 2001, to amend the *Sex Discrimination Act* to allow discrimination against women on the basis of their marital status with the aim of preventing single or lesbian women from accessing reproductive services such as in vitro fertilization. Similarly, the government expressly limited the operation of the *Racial Discrimination Act* under section 7 of the *Native Title Amendment Act 1998*, so as to allow for the introduction of its ten point plan in the area of native title. The Bill, presently before the Parliament, to give effect to the federal government's policy of intervening in the Northern Territory to protect Aboriginal children also limits the operation of the *Racial*

Discrimination Act. Unlike ordinary legislation, a Bill of Rights is expressly designed to place fundamental human rights beyond the reach of day-to-day politics.

Unlike ordinary legislation, a Bill of Rights is expressly designed to place fundamental human rights beyond the reach of day-to-day politics. In any event, there are major gaps in our current framework of domestic human rights legislation which would be addressed under a national Bill of Rights. Human rights in Australia have been granted statutory protection in a piecemeal and incomplete fashion. Moreover, they will always be vulnerable to changes in government policy and subject to amending legislation. Numerous submissions made to the NSW Parliamentary Standing Committee on Law and Justice as outlined in their 2001 report entitled “A NSW Bill of Rights” demonstrated the point.²⁷

(c) The protection of human rights under the common law

The common law also provides some measure of protection for individual rights. Indeed, Sir Robert Menzies once suggested that:

“... to live in a common law country is ... the very best guarantee of the rights of the individual.”²⁸

Common law rights within Australia include such things as the writ of *habeas corpus* to redress false imprisonment and the right against self

²⁷ NSW Parliamentary Standing Committee on Law and Justice, *A NSW Bill of Rights* (2001), at [5.16] – [5.22].

²⁸ *Sydney Morning Herald*, March 1974. Quoted by T.H. Jones, “Legal Protection for Fundamental Rights and Freedoms: European Lessons for Australia” (1994) 22 *Federal Law Review* 57, at p. 60.

incrimination. The courts have also played an important role in developing the common law to provide some recognition for various human rights. The most obvious example of this was the recognition of Aboriginal native title in the *Mabo* case.²⁹ A further example is the recognition in *Dietrich v The Queen* of the right of an accused person to legal representation when accused of a serious crime.³⁰

The common law within Australia does not however provide protection for a comprehensive range of human rights, nor does it provide protection in a systematic manner. To begin with, such protection can only ever be residual. The International Commission of Jurists has noted:

“... under the common law the liberty of the subject is what is left over when all the prohibitions have limited the area of lawful conduct.”³¹

The development of the common law by an independent judiciary by no means provides an adequate safeguard for human rights. It cannot provide the same level of protection as a national Bill of Rights can do. With few exceptions – Lionel Murphy being one - even radical judges are constrained by the principle of parliamentary sovereignty and the doctrine of precedent. Development of the common law must take as its starting point the existing doctrines. As Lord Diplock once pointed out, the courts could not have created the welfare state³². Judicial activism in the development of the common law so as to protect human rights inevitably invites political

²⁹ *Mabo & Ors v Queensland (No.2)* (1992) 175 CLR 1.

³⁰ *Dietrich v The Queen* (1992) 177 CLR 292.

³¹ V. Thampapillai, “A Bill of Rights for New South Wales and Australia”, *The Law Society of New South Wales Discussion Paper* (January 2005), at p. 46.

³² “The Courts As Legislators”, *The Lawyer and Justice* (Sweet & Maxwell) (1978).

criticism and legislative reaction, as the High Court's decision in *Mabo* showed. In the absence of a Bill of Rights, any human rights protected under the common law may be overridden by an ordinary act of Parliament.

(d) Judicial protection of human rights

In addition to developing the common law, the judiciary can play a role in protecting human rights through constitutional review and the interpretation of legislation. Decisions of the High Court in cases such as the *Communist Party Case*,³³ a decision described as “probably the most important ever rendered by the Court”,³⁴ illustrate the important role that an independent judiciary can play as guardians of fundamental human rights and freedoms by ensuring that legislation does comply with the Constitution. But, of necessity, this role is circumscribed by the language of the Constitution.

Further, the High Court has frequently affirmed the rule that legislation must be interpreted so as to minimize the abrogation of fundamental human rights so far as the language of the legislation will permit. The Court recognized, this important principle in *Coco v The Queen*:

“The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.”³⁵

³³ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

³⁴ G. Winterton, quoted in: T. Blackshield, M. Coper and G Williams (eds.), *The Oxford Companion to the High Court of Australia* (2001), at p. 123.

³⁵ *Coco v The Queen* (1993-1994) 179 CLR 427, per Mason CJ, Brennan, Gaudron and McHugh JJ at 437.

While this interpretive technique minimises the impact of ambiguous legislation on human rights, it cannot be employed to alter the interpretation of unambiguous legislation. Where legislation falls within the ambit of a Commonwealth constitutional power and the intention of the Parliament is expressed in clear terms, there is no existing legal mechanism within Australia that allows judges to invalidate legislation on the ground that it breaches human rights standards or is fundamentally unjust.

In the absence of a national Bill of Rights, judges are unable to consider the effect of legislation on fundamental human rights as a primary reference point when considering the validity of that legislation. If legislation falls within a head of power in the Constitution, the substantive content of the legislation is irrelevant; Parliament can therefore legislate as unjustly as it sees fit. One advantage of a Bill of Rights is that the substantive content of legislation would become constitutionally relevant. A Bill of Rights would provide a mechanism by which every piece of legislation, regardless of the intention of Parliament, would be judged according to human rights standards.

Recent cases illustrating deficiencies in our protection of human rights

Recent High Court decisions illustrate the significant limitations of the role that the Australian judiciary can currently play in ensuring the protection of fundamental human rights and freedoms. High Court decisions concerning issues such as immigration, racial discrimination and the indefinite detention of habitual criminal offenders have revealed significant deficiencies in the protection of human rights within Australia. These decisions regarding

rights protection within Australia provide the background for discussing the need for a national Bill of Rights.

(a) Immigration Cases

Recent cases concerning immigration law have highlighted significant gaps in the protection of human rights within Australia. They have reinforced the need for a Bill of Rights. The most controversial of these cases was the majority decisions of the High Court in *Al-Kateb v Godwin*³⁶ and *Minister for Immigration and Multicultural Affairs v Al Khafaji*³⁷. These appeals challenged the legality of the detention of two unlawful non-citizens under sections 189, 196 and 198 of the *Migration Act 1958* (Cth) in circumstances where they were likely to be detained indefinitely for the foreseeable future. The High Court, by a 4:3 majority, upheld the legality of the detention.

As my judgment in *Al-Kateb* showed, it is at least arguable that indefinite detention of this nature is contrary to our international obligations, which have been voluntarily assumed, under various international treaties and conventions. The question before the court was not however whether or not the Australian detention regime conformed to international human rights standards. The question was limited to whether such rights were protected under Australian law. I pointed out the constraints on the Court when I said:

“It is not for the courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or

³⁶ *Al-Kateb v Godwin* (2004) 219 CLR 562; 78 ALJR 1099; (2004) 208 ALR 124.

³⁷ *Minister of Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664; 78 ALJR 1156; (2004) 208 ALR 201.

contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.”³⁸

The Australian Constitution offered, in this particular case, no protection for the individual rights of the men being detained. The power of detention and deportation fell squarely within the ‘aliens’ power provided to the Commonwealth under section 51(xix) of the Constitution. As the purpose of the detention was to eventually make removal possible it was, by definition, non-punitive. As the detention had no punitive purpose, it did not offend *Chapter III* of the Constitution and was not outside Executive power.

As I have already indicated, it is a well established principle that legislation should be read so as to conform to fundamental rights and freedoms where there is ambiguity.³⁹ In *Al-Kateb*, the majority held that there was no ambiguity in the intention of the legislation. Consequently, the majority held that there was no room for applying the principle that legislation should be read so as to conform to fundamental rights and freedoms where there is otherwise interpretive ambiguity. These cases are examples of legislation validly enacted by the people’s parliamentary representatives being given effect in accordance with its clear terms. The effect of the legislation on human rights provided a strong moral argument against the legislation, but under the current Australian system that did not equate to a legal argument against its validity.

³⁸ *Al-Kateb v Godwin* (2004) 219 CLR 562; 78 ALJR 1099; (2004) 208 ALR 124, at [74].

³⁹ *Coco v The Queen* (1993-1994) 179 CLR 427, per Mason CJ, Brennan, Gaudron and McHugh JJ at 437.

I described the outcome in this particular case as ‘tragic’. Although both men were subsequently granted bridging visas, this was achieved solely through the exercise of ministerial discretion. The law as it stood allowed for their indefinite detention and the much vaunted rights protection mechanisms that are supposedly inherent within our Westminster system of government failed to prevent legislation that was a clear infringement of human rights. It may have been a different story if Australia had a national Bill of Rights.

The potential of a Bill of Rights to provide some measure of protection in cases such as this can be illustrated by contrasting the outcome in these two cases with similar cases in other countries. For example, in the United States of America, the constitutional due process clause has been held to extend protection against indefinite detention to both citizens and aliens. One example of this is *Zadvydas v Davis*, in which the United States Supreme Court ruled that the effect of the Fifth Amendment was that a law:

“... permitting indefinite detention of an alien would raise a serious constitutional problem.”⁴⁰

This point is further highlighted by considering the rulings of the United Nations Human Rights Committee in this area. In *A v Australia*⁴¹, the Committee held that holding an asylum seeker in detention for four years while the application for refugee status was being assessed amounted to arbitrary detention and breached the *International Covenant on Civil and Political Rights*. In the absence of a Bill of Rights incorporating the

⁴⁰ *Zadvydas v Davis* 533 U.S. 678 (2001), at p. 693.

⁴¹ *A v Australia* (560/93), UNHCR, 3 April 1997.

freedoms enshrined in the *International Covenant on Civil and Political Rights*, Australian courts not only have no obligation to adopt the interpretive approach and conclusions of the United Nations Human Rights Commission regarding arbitrary detention but would be breaching their judicial obligations if they did so.

*Al-Kateb v Godwin*⁴² and *Minister for Immigration and Multicultural Affairs v Al Khafaji*⁴³ are not the only recent cases that illustrate the failure of our parliamentary democracy in recent years to adequately protect human rights in the area of immigration. Both *Re Woolley; ex parte Applicants M276/2003 by their next friend GS*⁴⁴ and *Minister for Immigration and Multicultural and Indigenous Affairs v B*⁴⁵ provide further examples of this point. In these cases the High Court confirmed that Australia's system of immigration detention extended also to children. The fact that numerous international and domestic bodies, including the Human Rights and Equal Opportunity Commission, had condemned the continued detention of children as being in violation of both the *Convention on the Rights of the Child* and the *International Covenant on Civil and Political Rights* was irrelevant in terms of reaching a conclusion in these cases under Australian law.⁴⁶ Similarly irrelevant, in terms of the legal outcome, were numerous

⁴² *Al-Kateb v Godwin* (2004) 219 CLR 562; 78 ALJR 1099; (2004) 208 ALR 124.

⁴³ *Minister of Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664; 78 ALJR 1156; (2004) 208 ALR 201.

⁴⁴ *Re Woolley; ex parte Applicants M276/2003 by their next friend GS* (2004) 79 ALJR 43; (2004) 210 ALR 369.

⁴⁵ *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737; (2004) 206 ALR 130.

⁴⁶ Human Rights and Equal Opportunity Commission, *A Last Resort? National Enquiry into Children in Immigration Detention* (2004), at [6.10]

articles and reports outlining the damaging effects of detention on children. The courts simply do not have the tools to protect individual rights in the face of legislation demonstrating unambiguous legislative intent and operating under a clearly defined constitutional power.

One writer has commented in relation to these particular cases that:

“These outcomes amount to an extraordinarily clear demonstration of the inability of the Australian system to protect the rights of some of the most vulnerable people in society ... The High Court found unanimously that neither concerns for the proper treatment of children nor international obligations stand in the way of the executive’s power to lock children indefinitely in immigration detention centres.”⁴⁷

This inability of courts was further demonstrated in *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*.⁴⁸ The High Court held, by a 6-1 majority, that the conditions of detention at the Woomera Detention Centre did not provide a defence to the charge of escaping from immigration detention. Under domestic law, the detention of a non-citizen relating to matters of immigration entry and deportation will be, by definition, non-punitive in nature. The conditions of detention are therefore entirely irrelevant to the question of whether the detention is lawful, despite this being a central question from the perspective of complying with international human rights obligations.

⁴⁷ K. Gelber, “High Court Review 2004: Limits on the Judicial Protection of Rights” (2005) 40 *Australian Journal of Political Science* 307, at p. 316.

⁴⁸ *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; 78 ALJR 1056; (2004) 208 ALR 271.

Another recent example is the denial of special leave to appeal against the decision of the Federal Court in *Vadarlis v Minister for Immigration and Multicultural and Indigenous Affairs & Ors*⁴⁹. The case related to the *MV Tampa* incident of August 2001. The appellant filed an application in the Federal Court seeking essentially to have the actions of the federal government declared unlawful and to facilitate the entry of the *MV Tampa* asylum seekers into Australia. Justice North initially made a *habeas corpus* order, requiring the release of the asylum seekers on the grounds that they were held without lawful authority. This order was, however, set aside on appeal by a full bench of the Federal Court in a 2-1 decision. It was against this decision that the appellant applied for special leave to appeal to the High Court. Special Leave was denied on the grounds that there were insufficient prospects of the appeal succeeding.

The most obvious systemic failure in this area has been the failure of the Parliament and the inability of the judiciary to prevent the breaches of human rights that have occurred as a direct result of the policy of mandatory detention of asylum seekers. It is not the case that we have been unaware of the human rights issues raised by this policy or of the fact that the policy arguably breaches various international human rights instruments that Australia has voluntarily signed. The policy has been subject to much criticism both domestically and internationally.

One example is the 2002 report presented by Justice P.N. Bhagwati, the Regional Advisor for Asia and the Pacific of the United Nations High

⁴⁹ *Vadarlis v Minister for Immigration and Multicultural Affairs & Ors* (unreported, HCA, M93/2001, 27 November 2001).

Commissioner for Human Rights. Justice Bhagwati examined conditions at the Woomera detention centre and found that they raised serious concerns pursuant to international human rights instruments such as the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*.⁵⁰ In the same year Justice Louis Joinet, as head of the United Nations Working Group on Arbitrary Detention, purportedly called Australia's policies the grossest abuse of human rights that he had seen in any mandatory detention facility in the world.⁵¹

The report of the Working Group on Arbitrary Detention to the United Nations strongly criticized Australia's policy of mandatory detention of unauthorized arrivals to this country:

“The present report raises several concerns about the mandatory detention of unauthorized arrivals in Australia because of its automatic and indiscriminate character, its potentially indefinite duration and the absence of juridical control of the legality of detention, the psychological impact of detention on asylum-seekers, who suffer “collective depression syndrome”; the denial of family unity in several cases; children in detention; and the recent amendments to the *Migration Act 1958* that restrict judicial review. The Working Group is particularly concerned with regard to the detention of vulnerable persons, particularly children; about the whole legal process governing the detention of asylum-seekers, and about the lack of adequate information given to the detainees. Other matters of concern mentioned in the report are the lack of proper complaints mechanisms and the implications of the management of the detention centres by a

⁵⁰ “Report of Justice P.N. Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights”, *Mission to Australia 24 May to 2 June 2002: Human Rights and Immigration Detention in Australia* (2002).

⁵¹ M. Millett, “Worst I’ve seen, says UN asylum inspector”, *Sydney Morning Herald* (6 June 2002).

private company.”⁵²

Reports such as these illustrate clear deficiencies in the existing mechanisms for ensuring the protection of human rights within Australia. The existence of a Bill of Rights may make a difference in these types of cases by allowing for the judicial enforcement of individual rights in a domestic setting.

(b) Protection against racial discrimination

Australia’s track record in relation to protecting racial groups against discrimination provides a similar illustration of significant gaps in Australia’s protection of human rights. Professor George Williams has called the failure to guard against racial discrimination as being:

“Perhaps the most dramatic illustration of the shortcomings of our present system.”⁵³

There was an attempt at the 1897 Constitutional Convention in Sydney to insert an equal protection clause into the Constitution, based upon that of the United States Constitution. The primary supporter of this clause was the Tasmanian Attorney-General, Andrew Inglis Clark but delegates rejected it. A similar clause was again proposed at the 1898 Constitutional Convention in Melbourne by Richard O’Connor. This proposal was defeated, by a margin of 23 votes to 19 votes.⁵⁴

⁵² “Report of the UN Working Group on Arbitrary Detention”, *Visit to Australia* (E/CN.4/2003/8/Add.2) (24 October 2002), at p. 2.

⁵³ G. Williams, *The case for an Australian Bill of Rights: Freedom in the War on Terror*, at p. 20.

⁵⁴ R. Sackville, “A Bill of Rights: Form and Substance” (2000) 19 *Australian Bar Review* 101, at p. 102.

The clause was rejected on both occasions primarily because of fears as to the effect that it would have on policies in Western Australia limiting the mining rights of coloured people and legislation in Victoria that discriminated against Chinese labourers. The Premier of Western Australia, Sir John Forrest, typified the opposition to this provision by stating:

“It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already be done in Western Australia, in regard to that class of persons.”⁵⁵

The delegates at the Conventions did however endorse the inclusion of the race power, which became section 51(xxvi) of the Constitution. This section provides that federal parliament has the power to enact laws with respect to “the people of any race for whom it is deemed necessary to make special laws.”

The inadequacy of section 51(xxvi) as a tool to protect against racial discrimination was highlighted in the *Hindmarsh Island Bridge Case*.⁵⁶ The case concerned the validity of the *Hindmarsh Island Bridge Act 1997* (Cth). One of the issues that arose was whether the race power is limited to only allowing the passage of laws that are for the benefit or advancement of a particular race. The High Court was split on this question, which currently

⁵⁵ G. Williams, *The case for an Australian Bill of Rights: Freedom in the War on Terror* (2004), at p. 21.

⁵⁶ *Kartinyeri v Commonwealth of Australia (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337.

remains unsettled. It is worth noting, however, that two Justices did leave open the possibility that section 51(xxvi) could authorise legislation that has an adverse effect on a particular race⁵⁷. Under this approach, provided that legislation falls within section 51(xxvi) by being a law with respect to a particular race, the positive or negative impact of the law is irrelevant when considering the constitutional validity of the provision.

During the appeal, Justice Kirby asked the Solicitor-General whether the introduction of Nuremberg-style race laws or South African apartheid laws would be valid if enacted by the federal parliament under section 51(xxvi). The Solicitor-General unhesitatingly replied that the race power would authorise such legislation, a power which he described as “inherently a discriminatory law”.⁵⁸ I regret to say that I think the Solicitor-General answer was legally correct.

The *Hindmarsh Island Bridge Case* therefore raises the possibility that section 51(xxvi) provides the Commonwealth Government with direct constitutional authority to enact legislation directly discriminating against or disadvantaging a particular race. The case provides an example of a legal ambiguity that could be easily clarified by reference to an Australian Bill of Rights that includes equal protection as one of its fundamental aims.

Section 51(xxvi) of the Constitution is an example of a provision that has

⁵⁷ *Kartinyeri v Commonwealth of Australia (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337, per Gummow and Hayne JJ at pp. 379-380.

⁵⁸ *Kartinyeri v Commonwealth of Australia (Hindmarsh Island Bridge Case)* (HCA, A29/1997, transcript of proceedings on 5 February 1998).

often been cited as providing a measure of constitutional protection to rights but which, in reality, does not necessarily do so. Depending on the way section 51(xxvi) is interpreted by the High Court in the future, it is possible that it permits the federal Parliament to enact discriminatory laws to disadvantage a particular racial group and provides direct constitutional authority to override anti-discrimination legislation. As the Law Society of New South Wales acknowledged in a discussion paper released in 2005:

“When compared to the standard set by the equal protection clause in the United States Constitution and the guarantees provided by the Canadian *Charter of Rights and Freedoms*, the existence of the races power provides a strong case for constitutional change.”⁵⁹

Another case that highlights the inadequacy of existing rights protection mechanisms within Australia and the need for a Bill of Rights is the *Stolen Generations Case*.⁶⁰ The appellants in this case were all children of the Stolen Generation who challenged the laws that had previously allowed authorities to remove them from their families. The laws were challenged on the basis that they violated the constitutional rights of the appellants, including their right to freedom of religion and implied rights to due process, legal equality and freedom of movement. The legislation was ultimately upheld by the High Court, which found that there is nothing within the Australian Constitution to prevent or invalidate such laws.

This decision effectively conceded that there was no constitutional barrier

⁵⁹ V. Thampapillai, “A Bill of Rights for New South Wales and Australia”, *The Law Society of New South Wales Discussion Paper* (January 2005), at p. 43.

⁶⁰ *Kruger v Commonwealth of Australia; Bray v Commonwealth of Australia (Stolen Generations Case)* (1997) 190 CLR 1.

within Australia to protect indigenous Australians from policies that the *Bringing Them Home* report concluded led to the forcible removal from their families and communities of between one in three and one in ten indigenous children in the period from 1910 to 1970.⁶¹ Professor Larissa Behrendt sees the *Stolen Generations Case* as a case that:

“... starkly highlights the void of rights protections in our Constitution and shows that even where rights might be specifically protected, they are not easily invoked. In that way, it becomes a case that can reflect the inadequacies of rights protection within the written document of the Constitution. What we can see from *Kruger* is that a lot of the rights that we would think are protected are not.”⁶²

A final illustration of the role that an Australian Bill of Rights could play in protecting against racial discrimination and inequality may be seen in the debate surrounding mandatory sentencing. The disproportionate effect that the mandatory sentencing regime that operated in the Northern Territory from 1997 to 2001 had on indigenous people has been well documented. One of the most tragic stories is that of the 15 year old Aboriginal boy who committed suicide in jail after being sentenced under mandatory sentencing legislation to a term of 28 days imprisonment for stealing coloured textas and a can of spray paint.⁶³

⁶¹ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).

⁶² L. Behrendt, “It’s Broke so Fix It and Quit Getting Us to Pay the Highest Price for Its Faults: Arguments for a Bill of Rights”, *Paper presented at the 2002 Bill of Rights Conference* (2002), at pp. 2-3.

⁶³ G. Williams, *The case for an Australian Bill of rights: Freedom in the War on Terror* (2004), at p.1.

A study subsequently conducted by the Northern Territory Office of Crime Prevention found that 73% of individuals that were subject to a mandatory minimum term of imprisonment on at least one occasion under the legislation were indigenous.⁶⁴ The United Nations Committee on the Elimination of Racial Discrimination concluded that the mandatory sentencing policy breached Australia's international human rights obligations by virtue of its racially discriminatory impact.⁶⁵

A legal challenge against the mandatory sentencing legislation was commenced but ultimately failed. After the legislation was upheld by the Supreme Court of the Northern Territory the appellants sought special leave to appeal to the High Court. Special leave was denied, with the High Court concluding that the appeal did not enjoy sufficient prospects of success.⁶⁶ It is possible that the existence of a Bill of Rights may have changed the outcome of this legal challenge by providing Aboriginal people with constitutional grounds to challenge legislation that had such a disproportionate impact upon them.

(c) Indefinite detention of habitual criminal offenders

There have been many other examples of cases in recent years that raise serious human rights issues but which are ultimately determined on more limited legal grounds. A recent example of this is *Fardon v Attorney-*

⁶⁴ Ibid, at p.3.

⁶⁵ Ibid, at p.2.

⁶⁶ *Wynbyne v Marshall* (unreported, HCA, D174/1997, 21 May 1998).

General for the State of Queensland.⁶⁷ In that case, the High Court upheld State legislation that allowed the Supreme Court to order the continued detention of a prisoner convicted of a serious sexual offence where he had completed his initial sentence but was judged to represent an “unacceptable risk” of re-offending. This legislation effectively allows the Supreme Court to approve the continued imprisonment of an individual based purely upon the estimated risk of future offending and without a new offence having been committed.

Chief Justice Gleeson noted in his judgment in that case that the question of indefinite detention:

“... raises difficult questions involving the reconciliation of rights to liberty and concerns for the protection of the community.”⁶⁸

The Court also acknowledged that such questions will be determined from a different perspective in countries, such as the United States of America, which have a Bill of Rights. In these jurisdictions the protection of due process under a Bill of Rights allows the legal question of indefinite detention to be expressly approached from a rights perspective. The absence of a Bill of Rights in Australia means, however, that such an approach cannot be adopted here. The effect of such legislation on human rights is not a factor that will directly impact upon constitutional validity in Australia.

⁶⁷ *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575; 78 ALJR 1519; (2004) 210 ALR 50.

⁶⁸ *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 57578 ALJR 1519; (2004) 210 ALR 50, per Gleeson CJ at [20].

(d) Counter-terrorist legislation

Another area that exposes deficiencies in Australia's ability to protect human rights at a domestic level and that sharply illustrates the limited ability of the judiciary to protect human rights in the absence of a national Bill of Rights, is the introduction of new counter-terrorist legislation over recent years. The measures introduced have sparked considerable debate as regards the balance to be struck between the protection of national security and the protection of individual liberties. The absence of a Bill of Rights affects the the very nature of this debate. A national Bill of Rights would provide a bench-mark against which the Australian people could measure the rights and freedoms that they are being asked to compromise and would allow for the rights element of the national security debate to take place in a more tangible context.

Protection of national security is of primary importance. Given the actions by terrorists over the past few years, no one could rationally deny that some counter-terrorist measures are necessary. Furthermore, Australia has an international obligation to put certain measures into place.⁶⁹ It is important to recognize, however, that national security and individual rights and freedoms are not mutually exclusive concepts. A national Bill of Rights would not, in itself, prevent an effective response to terrorist threats. Rather, it helps to ensure that any response is consistent with the very democratic rights and freedoms that we are trying to protect against the threat of terrorism.

⁶⁹ See, for example, *International Convention for the Suppression of Terrorist Bombings* and *Resolution 1373*, United Nations Security Council (28 September 2001).

The counter-terrorism legislation that has been introduced over the past few years raises real questions about the balance that is being struck within Australia. I have commented on the human rights problems inherent in this legislation in a recent article⁷⁰, and I need not reiterate them.

The recent deportation of Scott Parkin provides a disturbing example of the way that these types of laws may extend beyond the context of preventing an immediate terrorist act. The US peace activist was detained for almost a week, at his own expense, before being flown home. His visa was cancelled under the *Migration Act* following an assessment by ASIO that he was a “direct or indirect risk to security.” The factors that led to this assessment being made have remained undisclosed under provisions introduced as part of the *National Security Information Act*. The only explanation given by a spokesperson for the Attorney-General was that Park had been detained for “encouraging spirited protest.”⁷¹ The cancellation of Dr Haneef’s visa on character grounds has also given rise to concerns about the exercise of ministerial powers in the context of migration and security legislation. Dr Haneef’s case is currently before the Federal Court, and it would not be appropriate for me to comment on it.

The most disturbing aspect of the Parkin case is not the chilling effect that these laws may have on freedom of speech and legitimate public protest, but rather the fact that the government can take such actions without having to provide any substantive explanation or justify their actions in any

⁷⁰ “Terrorism Legislation and the Constitution” (2006) 28 Aust Bar Rev. 117.

⁷¹ I. Munro, “The Secret Country”, *The Age* (17 September 2005), at p. 8.

meaningful sense. How is it possible for an individual to challenge the actions of the government if the individual does not know the reasons behind that deportation? The fate of Parkin bears a frightening parallel to that of Josef K in Kafka's *The Trial* where K is arrested and subjected to a judicial inquiry in respect of a crime that is never specified. The government's response in the Parkin's case raises the question of who exactly is able to test the validity of an assessment made by ASIO.

The President of the Human Rights and Equal Opportunity Commission, John von Doussa QC, has made the point that the *National Security Information Act*:

“... may very well have the effect of protecting incorrectly made decisions. Perhaps more significantly, they have the potential to deny people the right to an effective remedy for violations of fundamental human rights.”⁷²

Professor George Williams has concluded that Australia's legislative response to terrorism over the past years:

“... demonstrates how much our legal system, and underlying principles such as the rule of law and the liberty of the individual, can come under considerable strain in the aftermath of a terrorist attack. Bills of Rights can play an important role at such a time. They remind governments and communities of a society's basic values and of the principles that might otherwise be compromised at a time of grief and fear. After new laws have been made, a Bill of Rights can also allow courts to assess the changes against human rights principles. This can provide a final check on laws that, with the benefit of hindsight, ought not to have been passed. The absence of such a check is one reason

⁷² Quoted in: M. Wilkinson and D. Marr, “Rough Justice”, *Sydney Morning Herald* (17 September 2005), at p. 30.

why, in some respects, Australian law after September 11 has restricted individual rights more than the equivalent regimes in Canada, the United Kingdom and the United States.”⁷³

This last statement can be tested by considering judicial decisions regards counter-terrorist legislation in other jurisdictions. In Australia the absence of a Bill of Rights has left the judiciary without a way of scrutinizing counter-terrorist legislation in the context of the protection of individual rights. Such scrutiny has been possible in other jurisdictions through the existence of a Bill of Rights. For example, in *A (FC) & Ors (FC) v Secretary of State for the Home Department*⁷⁴ the House of Lords ruled that the detention of nine individuals under section 23 of the *Anti-Terrorism, Crime and Security Act 2001* (UK) breached section 5(1) and 14 of the *European Convention of Human Rights and Fundamental Freedoms*, which is given domestic effect under the *Human Rights Act 1998* (UK). In jurisdictions such as the United Kingdom, judicial review of counter-terrorist legislation that affects the balance between national security and civil liberties will be informed by the individual rights protected under a Bill of Rights.

Similarly, while the British Government has passed counter-terrorist laws with similar effect to those in Australia, it was forced to formally suspend the operation of the *Human Rights Act 1998* (UK) in order to implement the sections of the proposed legislation that abrogate human rights. This effectively focuses public, parliamentary and judicial attention on the fact that there are human rights issues with the legislation. It thus ensures that the

⁷³ G. Williams, *The case for an Australian Bill of Rights: Freedom in the War on Terror* (2004), at pp. 27-28

⁷⁴ *A (FC) & Ors (FC) v Secretary of State for the Home Department* [2004] UKHL 56.

debate about the legislation is conducted with human rights considerations at the forefront.

This rights-based debate is currently not possible in Australia. Certainly a Bill of Rights can never provide absolute protection against draconian laws. A discussion paper released by the Law Society of NSW in 2005 noted however that:

“... a comparative analysis of countries which share similar values and systems of government, namely the United States, Canada, the United Kingdom and New Zealand, indicate that protection of rights is better served within the framework of a legislative or constitutionally entrenched Bill of Rights.”⁷⁵

This will be the case because a Bill of Rights forces governments to consider the human rights consequences of the legislation they are introducing, allows the judiciary to view legislation through the prism of human rights, and provides the public with a clearer overview of the rights they are being asked to give up in the name of national security. In the area of counter-terrorism, where legislative changes are often classified as urgent and are being introduced at a rapid pace, scrutiny of this nature is particularly important.

(e) Mental Illness

Mentally ill persons who have engaged in or are suspected of having or are supposed to have engaged in behaviour that is contrary to the norms of criminal legislation represent a group whose human rights are particularly

⁷⁵ V. Thampapillai, “A Bill of Rights for New South Wales and Australia”, *Law Society of New South Wales Discussion Paper* (January 2005), at p. 3.

vulnerable to interference by the executive government. The federal *Crimes Act* 1914 (Cth) permits the federal government to detain a person found not guilty of a criminal charge on the ground of mental illness or who is not fit to be tried on the charge for the duration of the maximum period the person would have spent in custody if found guilty of the relevant offence. This power may be exercised even if there is unanimous psychiatric opinion that the person in question is not a risk to him or herself or other members of the community if released. The exercise of this power by a government, if not unchallengeable, is practically unchallengeable.

The power of the executive government in New South Wales concerning mentally ill persons in the context of criminal charges is even more draconian. In New South Wales, persons suffering from a mental illness who have committed or are suspected of having committed a criminal act can be deprived of their liberty on the discretionary judgment of the executive government in three different situations. The *Mental Health Act* 1990 (NSW) permits the executive government to detain a person indefinitely after an acquittal on the ground of mental illness even though psychiatrists believe that the individual is not a risk to him or her self or to the community. The *Mental Health Act* also provides that persons suffering from a mental impairment which renders them unfit to be tried in the ordinary courts are nevertheless to be tried at a special hearing. If they are found guilty, the executive government may detain them in circumstances even where the psychiatric opinion is at one in holding that the individual is not a risk to him or her self or to the community. A recent decision of the New South Wales Court of Appeal in *Commissioner of Corrective Services v Wedge* [2006] NSWCA 271 indicates a third situation. In New South Wales,

persons can be detained for a longer period than other persons who commit the identical crime if after conviction they develop a mental illness. Decisions by the executive government of New South Wales concerning any of these persons cannot be challenged in the courts of that State or, for that matter, any Australian court.

Anyone who thinks that, in exercising their discretionary powers to continue to detain such persons, governments do not take into consideration such matters as the public reaction to their release do not live in this world. And, in cases where governments, with their eyes on the electorate, act to satisfy public opinion, however ill informed, instead of listening to expert psychiatric opinion, the persons detained can be described with no loss of accuracy as political prisoners. As Deane J. pointed out in *State of South Australia v O'Shea*⁷⁶:

“[I]t is manifest that a discretionary power to reject, on 'political' grounds such as the state of public opinion, independent medical advice and the recommendation of a specialist board for the release on licence of a person detained under such an order lies ill with acceptable minimum safeguards of human liberty and dignity. Indeed, one could be led to speculate about what kind of prisoner Mr O'Shea is in circumstances where he is 'at pleasure' and non-punitive incarceration is now being continued, against expert and specialist advice, as a result of a discretionary decision made by a political body.”

The former Australian Human Rights Commissioner, Brian Burdekin, commented in 1994 that:

“It is beyond question that our current legal system is seriously

⁷⁶ (1987) 163 CLR 378 at 414.

inadequate in protecting many of the rights of the most vulnerable and disadvantaged groups in our community.”⁷⁷

Regrettably, this comment is particularly pertinent to the rights of the mentally ill.

Would a national Bill of Rights actually make a difference?

All of the cases I have discussed illustrate the significant limitations inherent within the mechanisms that we rely upon within Australia to protect our fundamental human rights. Would a Bill of Rights make a difference? Given the matters alleged in Schedule 2 of the Control Order directed to Mr Joseph Thomas, for example, I doubt that his case would have fared better under a Bill of Rights than it did last week when the High Court upheld the validity of that Order and the legislation supporting it. Moreover, a Bill of Rights in itself does not guarantee respect for human rights. There are many examples of gross abuses of human rights occurring within regimes that ostensibly provide their citizens with the protection of a Bill of Rights.

But it is a serious mistake to draw conclusions from the operation of Bills of Rights under such regimes. In Australia, a Bill of Rights would not operate in isolation. It would be supported by an elected government, an independent judiciary, an independent press and a culture that values respect for human rights. In that environment, a national Bill of Rights would reinforce our national commitment to respecting human rights, would

⁷⁷ G. Williams, “Human Rights and the Second Century of the Australian Constitution” (2001) 24 *University of New South Wales Law Journal* 782, at p. 783.

provide an increased level of entrenched protection for human rights, and would offer individuals a mechanism through which they could defend those rights against government intrusion.

Advantages of adopting a national Bill of Rights

Those in favor of adopting an Australian Bill of Rights argue that it would directly improve rights protection by providing a legal framework against which the abrogation of individual rights by government could be measured and challenged. By any reckoning, the examples I have mentioned reveal a need for improved human rights protection within Australia. A Bill of Rights provides a guarantee of fundamental rights to all individuals, including those from minority or disadvantaged groups, and a means of seeking justice against government infringement of those rights. In terms of Australia, as Professor George Williams has noted:

“While it is fair to say that white middle-class Australia has little to fear from oppressive laws, this is not the right indicator. What matters is how we treat the vulnerable and weak, such as the poor with little or no economic power, or people living in rural areas with little political clout and dwindling access to basic services. Examined from this angle, our human rights record is not strong. Moreover, we have not put structures and laws in place to reduce the chances of further violations of basic rights.”⁷⁸

By expressly outlining the minimum human rights standards that government is required to meet in its dealings with individuals, a Bill of Rights also assists in improving both government policy making and

⁷⁸ G. Williams, *The case for an Australian Bill of Rights: Freedom in the War on Terror* (2004), at p. 26.

administrative decision making. It requires the government to view all decisions through a human rights framework. It provides a clear standard against which the government can evaluate both proposed legislation and administrative actions. In this way, as a New Zealand judge has noted, a Bill of Rights can act as:

“... a set of navigation lights to the executive and legislature when they prepare legislation.”⁷⁹

In a more general sense, a Bill of Rights would enhance Australian democracy by promoting a stronger culture of respect for human rights and being an important educational tool. The importance of this educational aspect was emphasized by Francesca King in a recent paper presented about the United Kingdom’s experience with a Bill of Rights:

“... every society needs a basic statement of its fundamental values that not only sets the boundaries between state and citizens but acts as an ethical code for how individuals should behave toward one another. Those in favor of the bill argued, and continue to argue, that in diverse, democratic societies where there is no single dominant religion or moral code, it is the values of human rights, inspired by all the great religions and philosophies of east and west, that have a unique capacity to unite and heal.”⁸⁰

There is also an international dimension to be considered in the decision to adopt a Bill of Rights. Australia is very much the odd man out amongst other Western liberal democracies. The adoption of the *Human Rights Act 1998 (UK)* has left Australia as the only major country with British heritage

⁷⁹ K J Keith, “The New Zealand Bill of Rights Experience: Lessons for Australia”, *Paper presented at the 2002 Bill of Rights Conference*, 21 June 2002, at pp. 6-7.

⁸⁰ F. Klug, “The United Kingdom Experience”, *Paper presented at the Comparative Perspectives on Bills of Rights Conference*, National Museum of Australia (18 December 2002), at pp. 8-9.

that does not have some form of a Bill of Rights.

A Bill of Rights would also reflect the international obligations that Australia has already assumed voluntarily through our signing of human rights treaties such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

Indeed, it can be argued that by failing to adopt a Bill of Rights Australia is failing to meet its obligations under international law. For example, under Article 2 of the *International Covenant of Civil and Political Rights* Australia has agreed to ensure that individuals have access to “effective and enforceable remedies” if their rights are violated. The United Nations Human Rights Committee observed in 2000 that:

“... in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the *Covenant*, there remain areas in which the [Australian] domestic legal system does not provide an effective remedy to persons whose rights under the *Covenant* have been violated.”⁸¹

Arguments against a national Bill of Rights

Of course, these advantages are criticized and countered by critics of a national Bill of Rights. They argue that the current Australian political system provides the best guarantee for human rights, through traditions such as responsible parliamentary government, separation of powers, free and regular elections, federalism and an independent judiciary. They suggest

⁸¹ E. Evatt, “Bill of Rights and International Standards”, *Paper presented at 2002 Bill of Rights Conference* (21 June 2002), at p. 2.

that the adoption of a Bill of Rights is inconsistent with the principle of parliamentary sovereignty because it would transfer power from elected parliamentarians to unelected judges by giving an unrepresentative judiciary the ability to invalidate legislation adopted by the people's own parliamentary representatives. They argue that giving judges this type of power over central social issues would politicize the courts, diminish respect for the judiciary by allowing "activist" judges to flourish and result in judges being appointed primarily on political rather than legal merits.

Other arguments frequently espoused against a Bill of Rights include the question of whether it would make any practical difference to the actual protection of rights; that it could actually restrict rights by "freezing" them and leaving them unable over time to adapt to reflect changing community standards; that it would frustrate government business and the ability of government to respond to pressing problems; and that it would encourage an increasingly litigious environment.

At a practical level, however, it is clear from a brief examination of Australia's recent record in areas such as immigration, race relations, counter-terrorism and mental health policy that the existing mechanisms for protecting human rights within Australia are inadequate in many respects. The examples I have outlined evidence a need to place a greater focus on human rights and freedoms within Australia and support the argument for the introduction of a Bill of Rights.

Like many others, I am a late convert to favouring a Bill of Rights. Like most lawyers of my generation, brought up on Dicey's Law of the

Constitution, I believed in the need for the supremacy of Parliament and the purifying effect of elections. But times change. Whether we like to admit it or not, the much trumpeted Westminster system of government no longer works satisfactorily in Australia, if it ever did. The reasons are not hard to find.

The growth of the party system with the express or tacit understanding that members of the party must follow the party line means that most elected members of Parliament have no independent decision making power. Woe betide the party member who crosses the floor and votes against or abstains from voting in favour of the party's legislation. The spectre of a withdrawal of pre-selection is enough to keep most parliamentarians in line. True it is, that party members may and do express opposition to proposed legislation in the privacy of the party room. But the times when a majority of party members overthrow a Cabinet proposal, particularly one supported by a Prime Minister or Premier, appear to be so rare that they can be disregarded. It is the dictatorship of Cabinet, not the dictatorship of the proletariat, that has triumphed.

Another factor that has undermined the Westminster system of government is the opinion poll. In the heyday of the Westminster system, political leaders made public opinion by well constructed, reasoned arguments to an electorate that could be persuaded by the force of argument. The political leaders of that era did not react to public opinion. They adhered to the principles which they believed best served the public interest even if it meant loss of government. But the Age of Disraeli and Gladstone has long gone. Today, the leaders of political parties frequently take fright at the first

sign that the public or a section of the public does not favour their policies. Their eyes are always fixed on the next election. That is not to say that legislatures only enact laws that the majority of electors favour. Frequently, for ideological reasons, political parties with parliamentary majorities will enact legislation that does not then have community support. But if public opinion threatens the re-election of the government, changes to the legislation will be made or promised. Politicians justify the changes by asserting that they are responding to public opinion. Acting out of self-interest is a more accurate explanation.

Now in a democracy it is hard to criticize politicians for reacting to public opinion even if the reaction is motivated by self-interest. But public opinion is often transient and poorly informed. Given the ascendancy of the “spin doctors”, the rise of the “shock jocks”, the dominance of the 30 second television grab, the decline of the newspaper as an organ of record and the sanitized annual Conferences of political parties that permit little dissent, it could hardly be otherwise. But ill informed or unwise public opinion is no friend of human rights because it leads too easily to support for laws and policies that undermine those rights.

Furthermore, it is not the fact that, because a majority of electors have elected a government, they must be taken to have supported all its legislation and policies. Many people may think that, on balance, a particular party will best serve the public interest but are strongly opposed to particular legislation enacted by that party. And one may suspect that there are cases – perhaps an increasing number of them – where a significant number of electors cannot stand the policies of a particular government but feel

compelled to vote for them because the Opposition is either incompetent or has worse policies. Some mechanism is needed that is not hostage to the changing tides of public opinion and that will ensure the protection of human rights, irrespective of public opinion at a particular time. I can think of no better mechanism than a national Bill of Rights.

What form should an Australian Bill of Rights take?

Once the primary question of whether Australia needs a national Bill of Rights has been answered in the affirmative, the next question is what form it should take? The most obvious distinction is between a Bill of Rights that is constitutionally entrenched, such as the American *Bill of Rights* or the *Canadian Charter of Rights and Freedoms*, and one that is an ordinary statute, such as the *United Kingdom Human Rights Act 1998* or *New Zealand Bill of Rights Act 1990*. The advantage of constitutional entrenchment is that it provides a more enduring form of protection for human rights, with future constitutional amendment being more difficult than amending ordinary legislation.

However, this is not the occasion for me to discuss the form that a Bill of Rights should take. This Lecture, as its title implies, is concerned only with the need for a Bill of Rights, not its form.

Conclusion

There is clearly a need within Australia for an increased focus on human

rights. Recent High Court decisions have highlighted gaps in our existing system of rights protection. They have also unfortunately highlighted the inability of Australian judges to prevent unjust human rights outcomes in the face of federal legislation that is unambiguous in its intent and that falls within a constitutional head of power.

A national Bill of Rights would change this. As I noted in *Al-Kateb v Godwin*:

“Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments. It is an enduring – and many would say a just – criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights.”⁸²

The debate about an Australian Bill of Rights can no longer be considered simply an academic or abstract debate in a country that already boasts an exemplary human rights record. In light of current deficiencies it is, instead, increasingly becoming a debate that holds great practical significance for all Australians.

⁸² *Al-Kateb v Godwin* (2004) 219 CLR 562; 78 ALJR 1099; (2004) 208 ALR 124, per McHugh J at [73].

