president's column

A BILL OF RIGHTS

Writing an article on the need for a Bill of Rights has a very Nietzscheian character about it given that the Northern Territory has yet to come to grips with basic freedom of information legislation and considering the climate of the current debate about mandatory sentencing. Yet write I will, for as Arnold Bennett put it *"pessimism, when you get used to it, is just as agreeable as optimism".*

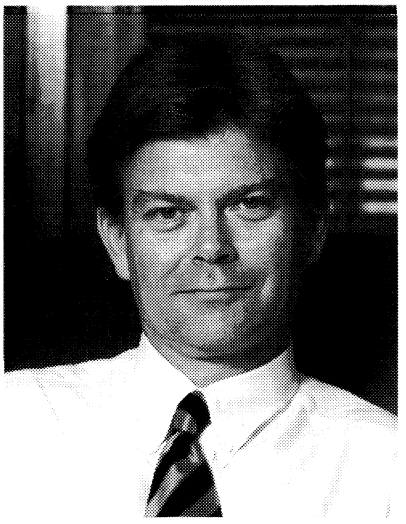
Most legal practitioners have experienced the client who swings into the office like a Spanish galleon under sail and starts fulminating almost immediately about his or her "rights". The mood of the conference takes on a funereal air once the person is told that the only rights they have are those that, by the grace of god and good luck, parliament has doled out. Things get worse when the client is told that he or she is not, in the circumstances, the recipient of any of them. People like the idea of having "rights". It is the idea of giving "rights" to everybody else that causes a fardel.

Australia has found the progression towards the introduction of a Bill of Rights a tortuous and, to date, barren exercise. In 1973 the then Attorney-General Lionel Murphy introduced a proposed Bill of Rights into the Commonwealth Parliament based on the *International Covenant on Civil and Political Rights* (ICCPR) to which Australia is a signatory. The bill lapsed when the Parliament was dissolved in 1974. Another attempt was made by Gareth Evans based on the same formula. That bill was given to cabinet for approval but was never introduced into Parliament. When Lionel Bowen replaced Gareth Evans as Attorney-General in 1984 he had the bill redrafted to water down its legal effect in the hope that the ever present detractors of a Bill of Rights might be placated. It was introduced into Parliament in 1985 and immediately encountered strong opposition. After it was clear that the legislation would not make it through the Senate it was abandoned by the Government. The Australian Democrats will soon introduce the *Australian Bill of Rights Bill 2000*. That proposed legislation is again based on the ICCPR.

Just the mention of a Bill of Rights makes some people in legal circles toey. They start going on about how we don't need such a thing, how it is only a feel good exercise and how the great expanse of the common law coupled with legislation already in place in the area of human rights is more than adequate to achieve the purpose. The piece de resistance of the argument of the detractors is to point to the United States experience and observe that the operation of that nation's Bill of Rights has had a pretty flaky history in the business of the articulation and preservation of rights. It is not long before any debate surrounding the introduction of a Bill of Rights takes on all the features of that old fairy tale about the two tigers that chase each other around a palm tree until they each turn into butter. Remember the Republic debate? It all sounds so reminiscent. Oscar Wilde observed that "public opinion exists where there are no ideas". The public level of discussion about the operation of the law in the Northern Territory is testament to that remark.

In a world increasingly dominated by large corporations that control unimaginable wealth, with the accompanying political influence that brings, and the "privatisation" of public utilities including prisons, the notion that individuals possess a few basic powers and freedoms which no political order can remove is a very attractive one. More immediately it provides a focus for the operation of the law that is meaningful to the citizens of the society it regulates.

Geoffrey Robertson in his recent book *Crimes Against Humanity-The Struggle for Social Justice* attributes the first modern step in the formulation of a philosophical foundation for human rights to the English Bill of Rights of 1688. He points out that the *Magna Carta* was a document that had nothing to do with the liberty of individual citizens as it was "signed by a feudal king who was feuding with thuggish barons and was forced to accede to their demands". The Bill of Rights 1688 was recognized as still in force in the state of South Australia by Legoe J in *Holden v State of South Australia (1992) 62 A Crim R* 308. It probably survives in the Northern Territory but it does have its severe limitations.



Jon Tippett, Law Society President

On 2 October this year the *Human Rights Act* came into force throughout the United Kingdom giving effect to the European Convention for the Protection of Human Rights and Fundamental Freedoms in English law. The Law Society of the UK observed in its publications to its members that "After the Act comes into force legislation will have to be interpreted subject to Convention rights". The Society pointed out that the Convention comes complete with highly developed case law which the Courts must take into account and that the operation of the legislation will impinge on every area of legal practice.

Chief Justice Spigelman of the New South Wales Supreme Court saw fit to comment on the introduction of the English Act in terms of warning. He said; "This is a transition of great significance for Australian lawyers. At the present time, for the vast majority of us American Bill of Rights jurisprudence is virtually incomprehensible. Within a decade it is quite likely that in substantial areas of the law, British and Canadian cases will be equally incomprehensible to Australian lawyers. The Australian common law tradition is threatened with a degree of intellectual isolation that many would find disturbing." He observed that one of the great strengths of Australian common law has been its ability to draw on the vast body of experience of other common law jurisdictions particularly Canada and England.

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In San Francisco in 1945 Australia was in the vanguard of those nations calling for an international bill of rights. Australia together with Britain led the demand for a binding document. The Australian delegates were the first to propose an international court of human rights and in so doing pointed out that " a mere declaration of principles would not offer assurance against the revival of oppression". It is historically unfortunate that Australians could not see that what was internationally obvious was also domestically wise and introduce such legislation at home. The events in Cubillo v Commonwealth of Australia (2000) 174 ALR 97 may never have taken place if they had. During this year's Vincent Lingiari Memorial Lecture Malcolm Fraser called for the introduction of a Bill of Rights. He said it was clear that in many areas the legal system is prevented from satisfactorily dealing with important national issues by the absence of such legislation. He observed that the failure of successive governments both at a state and federal level to address some of the big issues in our society is directly related to the lack of it.

In assessing the value of the introduction of a Bill of Rights the New South Wales Law Society's Human Rights Committee took the approach that such a bill in that state would enhance the standing of New South Wales in the international community and set an example for Australia to follow. All Stand! Of course Australians are very glad that New South Wales has not yet chosen to secede from the Commonwealth of Australia and leave the rest of us rudderless. However, irritation aside, the work of that committee has been valuable indeed in reigniting the debate for the introduction of a bill of rights in this country.

Dr George Williams in his book A *Bill of Rights for Australia* states that "Formulating a Bill of Rights would engage the community in a reform process without the need for a referendum. It would produce a document that sets out the place of Australians within the political system, without transferring the power to solve our pressing social, moral and political concerns from the Parliament to the courts". In other words Government would have to face up to the need to take responsible and constructive steps in dealing with the many social problems that beset the less fortunate, disadvantaged youth, the physically, mentally or intellectually disabled and which so often at the present time introduces them to the garbage bin of a "corrections facility". It may also result in the community wising up to the law and order auction. In making such a statement I am reminded of the fathers refrain to the son in the film "The Castle", "Tell him he's dreamin".

The message of Justice Kirby in his address at the 1999 Bali Conference was that the precepts of international law and in particular the operation of the ICCPR would increasingly find their way into the operation of domestic law. In the United Kingdom and other jurisdictions that has already occurred by the introduction of strikingly similar legislation. As a legal community we in the Territory are just as well to heed the warning of Chief Justice Spigelman. It is time a Commonwealth Bill of Rights was introduced. After all we need it in the Territory more than anybody else.

Finally, and probably tangentially in the contexj: of a discussion about a Bill of Rights, I recommend every lawyer read again that powerful piece by Oscar Fingal O'Flahertie Wills Wilde "The Ballad of Reading Gaol". To my mind it is one of the most powerful statements ever made about mans inhumanity to man. Who can forget these words:

> Yet each man kills the thing he loves,
> By each let this be heard,
> Some do it with a bitter look,
> Some with a flattering word.
> The coward does it with a kiss,
> The brave man with a sword!

PS. *Geoffrey Robertson* QC's *book* (published by Penguin Books) to which I earlier referred is a corker and must read stuff for lawyers. There is also a film on video that is worth a look called "Nuremberg". It deals with the establishment of the Nuremberg Trials by Justice Jackson of the United States Supreme Court. If you are interested in "The Ballard of Reading Gaol" you can find it in the new work "The Oscar Wilde Anthology" edited by Merlin Holland published by Harper Collins.

ELLE MCFEAST TO MODERATE DARWIN FOI DEBATE

A public forum to discuss the pros and cons of Freedom of Information (FOI) legislation for the NT will be held in Darwin on 3 November 2000 and moderated by Australian TV and radio personality Elle McFeast.

The FOI Forum coincides with the NT Government's intention to consider introducing privacy and FOI legislation in the near future. Consultants have been employed to prepare proposals for the Government to consider, with indications that legislation will be introduced early in 2001.

Speakers at the forum include NT legal practitioners Judith Kelly and Peter Barr, political and media representatives, including Peter Adamson MLA and Opposition Leader Clare Martin, visiting ANU lecturer and one of Australia's leading authorities on administrative law and constitutional law, Mr John McMillan, and the Editor of the journal Freedom of Information Review Mr Rick Snell.

The forum will be hosted by the NT chapter of the Australian Institute of Administrative Law (AIAL) and aims to inform the public on the advantages and disadvantages of FOI, allowing an opportunity for the issues involved to be publicly debated.

Guest moderator Elle McFeast, who is well known for her satirical observations on life and society, will ensure that an informative and humourous discussion takes place.

The FOI Forum will be held at MV Caterers, 64 The Esplanade, Darwin commencing 1.30pm on 3 November 2000.

Registration forms can be obtained from Marion Tobbiani who can be contacted on telephone 8999 1978 or via fax on 8999 1828. Corporate, intermediate or general tickets are available.