ARE ANTI-DISCRIMINATION STATUTES A MODEL FOR A BILL OF RIGHTS?

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Justice R.G. Atkinson

Millenarianism is as irrational as it is fashionable. Indeed it sometimes appears as if every public address made in the last six months has commenced with the phrase "as we stand poised on the dawn of a new millennium" or words to that effect. For this one could substitute as we stand poised on the beginning of next week, next year, next decade, next century, but for us there exists the unique opportunity to justify the gravity of our situation by celebrating, albeit one year early, the dawn of the new millennium.

However, there are a number of contemporary and historical reasons for this to be an appropriate time to reflect upon human rights and the usefulness or otherwise of debating, legislating for, or indeed entrenching a bill of rights in this State or this nation. There is no doubt that the idea has spawned debate in this country but its legislative expression has occurred only in the form of some statutory law giving effect to international conventions, and the often fragile legacy of the common law and the expression of and the implication by the High Court of rights in the Constitution.

Perhaps these matters do have one hundred year cycles. At the end of the eighteenth century some great new societies were born either by the overthrow of unjust regimes or by national wars of independence to achieve separation from imperial regimes. The birth of such societies was imbued with great idealism and a deep rooted belief in democracy. The Declaration of the Rights of Man and the Citizen adopted by the National Assembly in France during the French Revolution on 26 August 1789 put great store on the value of liberty which it described in Article 2 as one of the "natural and imprescriptible rights of man." Article 4 defined liberty as follows:

> "Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law."

Inherent in this definition of liberty is the notion of equality reflected in the first article which provided that "men are born and remain free and equal in rights."

The United States Bill of Rights (1) to an even greater extent promulgated freedom as its highest value including a prohibition on Congress s making a law respecting the establishment of a religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the government for a redress of grievances. Other well known liberties originally included the right of the people to keep and bear arms; a citizen s right to a speedy and public trial by an impartial jury of the State and district wherein the crime was committed, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.(2)

By the end of the nineteenth century countries achieving their independence from, for example, Great Britain were not obliged to go to war or engage in bloody revolution to achieve that independence. Consequently their constitutions, for example those of Canada, Australia and New Zealand, revealed a more complacent view of the need to protect human rights constitutionally or by legislation and a greater belief in the power of the common law.(3) The 1898 Constitutional Convention in Australia rejected a proposal to include an express guarantee of individual rights based substantially on the 14th Amendment to the Constitution of the United States including a right to due process of law and the equal protection of laws.(4)

Perhaps it was the Second World War that finally destroyed western nations complacency about themselves and the human race. By the time the first half of the twentieth century was over, two terrible wars had engulfed the western hemisphere, one involving the mutual slaughter of millions of young men and the next an horrific realisation that contemporary, educated human beings were capable not only of discriminating against other human beings on the basis of their race or religion but of systematically setting out to kill them on that basis.

The United Nations adopted a Universal Declaration of Human Rights (5) in December 1948 which changed the landscape of the human rights debate forever (6). So far as discrimination is concerned, Article 2 provides, "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Australia was itself extremely influential through Dr Evatt (7)in the drafting of the original charter of the United Nations which begins by reaffirming a "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." The purposes of the United Nations were said to include developing "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . to achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex,

language, or religion . . ."

Since then Australia has adopted and ratified a number of other international human rights instruments which have found expression in Commonwealth and State legislation (8). However, there is no bill of rights in Australia either nationally or in any State and yet most of the countries with whom we share a similar constitutional history have now agreed to measure their laws and the behaviour of governments and other persons in accordance with values set out in a bill of rights.

The Canadian Charter of Rights and Freedoms enacted in 1982 says in clause one that it "guarantees the rights and freedoms set out in it subject to only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The Charter then deals with fundamental freedoms such as the freedom of conscience and religion; freedom of thought, belief, opinion and expression; freedom of peaceful assembly; and freedom of association. It sets out the citizens democratic rights, their mobility rights, and their legal rights which are best summarized in s. 7 which provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Section 15 of the Canadian Charter deals specifically with anti-discrimination measures. Under the heading "Equality Rights" it provides:

> "15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

This clause was expressed not to have effect until three years after the Charter came into force. The Charter applies to the parliament and government of Canada in respect of all matters within the authority of the parliament and to the legislature and government of each province in respect of all matters within the authority of the legislature of each province (9).

The Charter itself set out guidelines to its construction. They provide that the Charter can not be construed as to abrogate or derogate from any Aboriginal rights or freedoms (10); it does not deny the existence of other rights and freedoms which exist in Canada (11); it must be interpreted in a manner consistent with the

multicultural heritage of Canadians (12); the rights and freedoms are guaranteed equally to male and female persons(13); and that nothing in the Charter extends the legislative powers of any body or authority (14).

Perhaps most important paragraph however is that which deals with enforcement. Section 24 provides:

> "(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

This enforcement procedure has ensured that the Canadian Charter is not just a statement of pious hope but a rigorous piece of law-making (15).

The Canadian Charter has been the subject of extensive litigation both in the lower courts and in the Supreme courts of provinces and of the nation. And yet apparently it enjoys a very high degree of public support with public opinion polls consistently showing approval rates of 70 to 80%. All four national political parties and most lawyers, including judges, have supported the Charter(16). Associate Professor Hiebert of Queens University in Canada has described a pre-Charter Canada which is not unlike a present-day Australia (17):

> "Before the Charter was adopted in 1982, human rights were not often a focal point for Canadian political debates. Rights were not a prominent lens through which to assess the justification of State actions (or inaction). Rights may have been an important part of Canadians vocabulary ...; however, until rights were entrenched in the Constitution they had little more currency than any other claim in political debates, such as demands, wants, preferences or interests.
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> Nevertheless, Canadian political actors, like those in other parliamentary systems based on the Westminster model, historically were confident about the extent to which rights were protected, despite the absence of a bill of rights. Defenders of this parliamentary heritage had argued that the institutions themselves, the combination of the rule of law, responsible government, the

> sovereignty of Parliament, along with regular elections, ensured that human rights would be respected in the course of governing. However, such confidence was exaggerated, if not misplaced, in light of the obvious ill fit between the theory behind these claims and how parliamentary institutions actually work in practice. Executive dominance and party discipline combine to make it too easy for governments to undertake discretionary policy decisions that may be insensitive to rights, particularly the rights of vulnerable members of society or minorities who lack the political power necessary to mount an effective voters protest."

But it did not come to pass without strong proponents. The credit for its passing should be given to the indefatigable energy and political will of Prime Minister Trudeau (18)and the intellectual leadership provided by Chief Justice Laskin (19).

Lest it be thought that Australians are any less likely to favour their rights being protected by a bill of rights, a thorough and carefully designed survey undertaken in the early 1990s by Dr Fletcher of Toronto University and Dr Galligan of the ANU Research School of Social Sciences, found that no less than 72% of the community generally favours a Bill of Rights of Australia (20).

The Canadian Charter is part of the constitution of Canada. Part of the political compromise which enabled it to be passed was that a legislative override was inserted by s 33(1) of the Charter which provided:

> "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."

This however has been hailed as a strength rather than a weakness. It has given rise to what has been described as a "constitutional conversation" between the legislature and the judiciary. Associate Professor Hiebert has described post-Charter Canada in the following terms (21):

> "The Charter has introduced a new framework for facilitating conversations between Parliament and courts about the importance that should be attached to rights claims and the justification of State actions that conflict with protected rights."

> "This recognition of institutional disagreement, in the form of a legislative override, is by far the most controversial aspect of the Charter. Some view it as a final and residual element of the principle of Parliament s supremacy. Depending on one s views, this is either a desirable retention of a by-gone era, one that celebrated Parliament s

> ultimate wisdom, or a miscaluation that undermines the very purpose and vitality of a bill of rights. Yet neither of these views appreciates fully the significant change to political culture introduced by a judicially reviewable bill of rights. While it is true that a legislative override allows Parliament to ensure the primacy of its views, this power will be exercised within the framework of a bill of rights. Affirming, in a bill of rights, the ability of Parliament to override a judicial decision, is not simply the retention of the principle of parliamentary supremacy, unadulterated, as it existed in a previous and less rights-conscious era. To assume that a legislative override renders a bill of rights impotent is to dismiss the substantial changes that a judicially reviewable bill of rights will introduce into the political culture of the polity.
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> The Charter s introduction into Canada has forever changed the Canadian political landscape. Pressure on governments to give due consideration to the rights dimensions of political conflicts has come both from courts and the public. Yet this increased focus on rights has not resulted in frequent or destabilising political/judicial conflicts. This is one of the Charter s most significant contributions to the Canadian polity."

Yet the override is not used widely. Outside of Quebec it has only been used once, in 1986. But the existence of the override means that a democratically elected Parliament is not forced to accept and abide by a judicial outcome to which it is opposed.

Other nations similar to Australia have introduced legislative bills of rights which appear to be relatively effective. In 1990 New Zealand passed a Bill of Rights Act, which is not entrenched, whose purpose was said to be:

> (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
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> (b) To affirm New Zealand s commitment to the International Covenant on Civil and Political Rights.

It applies only to acts done by the legislative, executive or judicial branches of the government of New Zealand or by any person or body in the performance of any public function, power or duty conferred or imposed by that person or body by or pursuant to law. As a matter of statutory interpretation wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights that meaning is to be preferred to any other meaning (22). The rights covered are civil and political rights, including life and security of the person; democratic and civil rights; limitation on powers of search, arrest and detention and

what are called "non-discrimination and minority rights." These are covered by s. 19 of the *Bill of Rights Act* which provides:

> "19. Freedom from discrimination - (1) Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.
>
> (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief do not constitute discrimination."

In other words, like its Canadian counterpart, it allows affirmative action for disadvantaged groups while prohibiting discrimination. But it should be noted that importantly it has no enforcement procedures, without which the bill of rights is lofty in tone but far less effective in practice.

Freedom from discrimination to give effect to our right to equality is a relatively modern concept. Justice Kirby described modern democracy as "not brutal majoritarianism, but a complex system which reflects the will of the majority while protecting the rights of minorities, vulnerable groups and individuals within society (23)."

Why Have a Bill of Rights in Australia?

Although Australia was created as a nation at a time when the need to protect human rights in the Constitution was not a priority, we have often been in the vanguard of reform. As Sir Ninian Stephen remarked in his foreword to Justice Murray Wilcox s informative study *An Australian Charter of Rights?*(24):

> "A century or so ago Australia was very much a world leader in measures of constitutional and democratic reform. It had pioneered the secret ballot, was in the course of introducing adult franchise with the grant of votes to women, and the text of its new federal Constitution was not only being hammered out in public sessions by popularly elected delegates but was to depend for its adoption upon the vote of the people. These are but notable examples of what was an era of enterprising ventures in political reform.
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> The same cannot be said of the Australia of the present day, at least in the area of constitutionally entrenched declarations of human and other rights. We now occupy a position almost unique among nations with which we otherwise tend to compare ourselves since we have nothing in the way of any comprehensive Bill of Rights. "

The former Chief Justice of Australia Sir Anthony Mason is a convert to the idea of a bill of rights. He has said:

> "The majority of countries in the western world do subscribe to a Bill of Rights on the basis that individual and minority rights often need protection, and that the only effective protection is by a Bill of Rights. If we don t adopt a Bill of Rights I m inclined to think that we will stand outside the mainstream of legal development in the western world. These are factors which tend to make me favour a bill of rights."(25)

A bill of rights of course represents the legislative expression of a nation or a community s core values, core values that have united the nation and which underpin its continued existence. These core values are not fragile as they are deeply held but they are nevertheless capable of being lost through our failure as a people to protect them. It has been suggested that as a nation we Australians have a core cultural value of fairness. It would be deeply challenging in a mature and sophisticated society to consider our common core values and how they can be protected in a bill of rights. The debate may even be painful to some and potentially divisive and it might well be overly optimistic to think such a debate possible even if it would be productive. After all, in 1959, the Nicklin government in Queensland produced the *Constitution (Declaration of Rights) Bill* said to have been based on the Universal Declaration of Human Rights but it was never put to the vote(26). The Constitutional Commission s 1988 recommendation(27) for an Australian Charter of Rights and Freedoms to be inserted as a new Chapter 6 in the Constitution has never been put to the vote either of the parliament or the people, and the Electoral and Administrative Review Commission s recommendation for a bill of rights for Queensland in its August 1993 Review of the Preservation and Enhancement of Individuals Rights and Freedoms ("the EARC Report") similarly has not been voted on by the parliament or the people.

There is no doubt however we have core values, and many of these are reflected in the proposed preamble to the Australian Constitution such as the "rule of law" and "equality of opportunity". At the very least if there were public and parliamentary debate about our core values as a nation and from this the introduction of a bill of rights initially passed by the parliament to be entrenched in the constitution once that bill of rights was accepted, then there would be a full and open debate about what should and should not be in the bill of rights. One of the problems that besets our judicial system and body politic at present is the lack of established consensus as to core beliefs and fundamental human rights which tends to undermine the legitimacy of their expression.

A number of rights are, for example, recognised and usually protected by the common law. These include the right to silence, the right to a fair trial (28), native title (29), the right to natural justice and many others but these rights are

vulnerable (30) to being removed by statute. As Brennan J held in *Nationwide News Pty Ltd v Wills*:(31)

> "A court will interpret the laws of the Parliament in the light of a presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms but the court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political rights which, in the court s opinion, should be preserved. A function of that kind may be conferred on a court exercising a jurisdiction to review judicially laws enacted under a Constitution containing a Bill of Rights, but our Constitution does not contain a Bill of Rights."

The common law protection of human rights may also be thought to be quite haphazard as there are a number of important rights and freedoms that are not necessarily recognized (32) including, for example, universal suffrage or freedom of speech. When the common law has been measured against international human rights standards it has been found wanting (33). The common law is necessarily directed towards specific issues rather than general statements. Common law rights are the result of inductive reasoning from cases that deal with specific facts and try to find specific solutions to them. The common law so generated does not necessarily reflect or embody fundamental rights (34) and cannot be certain to protect them.

However, it must be acknowledged that the common law can provide powerful protection of minority rights by reference to such core concepts as equality before the law. As Brennan J said in *Mabo v Queensland [No 2]*(35):

> "It must be acknowledged that, to state the common law in this way involves the overruling of cases that have held the contrary. To maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land."

The Commonwealth Constitution provides for certain limited fundamental rights in respect of religion(36), trial by jury(37), the acquisition of property on just terms (38), the right to vote at federal elections(39), immunity from certain legislative interference with interstate trade, commerce and intercourse(40) and freedom from discrimination by any State against the citizens of other States(41).

Thirdly, Australian courts actively consider the norms of international human rights instruments to which Australia is a party in their interpretation of the law(42).

Further, the Commonwealth government has acceded to the First Optional Protocol on Civil and Political Rights which permits people to complain to the United Nations Human Rights Committee about interference with their rights by government as set out in that covenant(43).

Lastly, the High Court has controversially been prepared to find implied rights in the constitution(44). Senator Bolkus was quoted in the *Weekend Australian* of 9 January 1993 (45) as hailing the High Court s striking out of the law banning political advertising as the "start of a judicially created Australian bill of rights." But that of course has proved illusory and perhaps it is dangerous(46). There is community uncertainty about court developed rights and they are developed away from public debate.

This is a matter of public concern. On 30 June 1999, *The Australian* published an article by George Williams where he canvases many of the problems thrown up by the inadequate, haphazard and judicially led statement of fundamental rights in this country.

> "The courts, not parliaments, have taken the lead in the protection of human rights under Australian law. This cannot be sustained. Some judges have given a glimpse of the Constitution as a document embodying many rights; indeed, almost as an implied Bill of rights. While they might be applauded for their sympathy for human rights, their reasoning presents dangers.
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> The Constitution was not drafted to include a Bill of rights. To interpret it as containing a general scheme of protection for fundamental freedoms would compromise the legitimacy of the High Court as the arbiter of the Constitution. It would also compromise the role of the Australian people as the only body able to sanction basic constitutional reform.
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> The baton of reform must be passed from the courts to the federal parliament ...
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> Certain core rights should be protected before others and then in legislation, subject to a legislative override, before any constitutional entrenchment. This approach is a pragmatic means of protecting a limited range of the Australian people s fundamental rights. Importantly, this approach would allow the federal parliament to oversee it at every step. It would also provide a workable balance

> between enabling the judiciary to foster the rights of Australians and not vesting misplaced faith in the courts to solve Australia s pressing social, moral and political concerns."

In my view legislation is a much more open and transparent way of protecting what the community sees as fundamental rights. This has been done by the State governments through anti-discrimination legislation and by the Commonwealth government through race, sex and disability discrimination legislation which might be seen as a trial run of the legislative protection of human rights. Clearly a bill of rights would protect rights other than the right to be free of discrimination but it nevertheless provides an interesting first step. The *Anti-Discrimination Act* 1991 (Qld), for example, sets out as its statutory objects:(47)

> "The Parliament considers that -
>
> > (a) everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination; and
> >
> > (b) the protection of fragile freedoms is best effected by legislation that reflects the aspirations and needs of contemporary society; and
> >
> > (c) the quality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone."

This legislation clearly sets out the prohibited grounds, types and areas of discrimination and exemptions from liability. It has a number of significant elements seen in constitutionally protected rights:- it recognizes a right to substantive equality, not just formal equality(48), it protects affirmative action to redress inequality and the rights given under it have an enforcement regime. Its advantage over the constitutional bills of rights is that its rights and duties apply in favour and against all and not just against the State. Importantly, it is the product of public and parliamentary debate.

My own experience as the first member and then first president of the Anti-Discrimination Tribunal in Queensland was of a perhaps surprising degree of public acceptance of the decisions of that tribunal which vindicated rights given to minority groups of disadvantaged people by the *Anti-Discrimination Act* 1991 (Qld).

The police service after the decision in *Flannery v OSullivan*(49), introduced recruitment procedures free of irrelevant discriminatory requirements. The decision of *ONeill v Steiler*(50) tested a race discrimination complaint in Cairns. The

complainant was denied work, to which he was eminently suited, because he was Aboriginal. The decision was widely publicised with the local press, radio and television supportive of his right to be given employment free of irrelevant discrimination. The decision in *Cocks v State of Queensland*(51), commonly known as the Convention Centre Case, changed the rights to an expectation of access to public buildings for people with a mobility impairment. Very few in our community today support an employer s right to sexually harass his or her employees or to discriminate in recruiting on irrelevant considerations such as sex, age, national origin or religion. Not all decisions of the tribunal were greeted with wide approval (52). But my experience in that field makes me optimistic about our ability to debate and agree upon core values to be included in a bill of rights and to give them public expression.

Section 106 of the *Anti-Discrimination Act* 1991 (Qld) provides a statutory exemption from provisions of the *Anti-Discrimination Act* for an act that is necessary to comply with or is specifically authorised by a provision of another Act in existence as at 30 June 1992. No legislation passed after that date provides an exemption to unlawful discrimination under that Act although the Act has been refined by amendment. Indeed in the *Industrial Relations Act* 1999 (Qld), the grounds of discrimination have been extended to include discrimination on the basis of sexual preference and family responsibilities.

The great democratic advantage of a bill of rights is that, although the principles are interpreted by judges(53), who are often criticised as an unelected elite(54), the bill of rights is itself passed by the parliament. It is an expression of parliament s will and the court is given the usual task of interpretation of the legislation. This view is supported by Lord Scarman(55) who has said:

> "The judges do not usurp the role of parliament when interpreting and applying a Bill of Rights. Let me explain why: the bill of rights, if it comes in this country, would itself be an Act of parliament. It will be passed into law by the legislative will of our sovereign parliament. Faced with that Act, the judges will merely carry out their traditional duty - the duty which falls upon them in respect of each and every Act that comes into their court, namely, understanding the Act, interpreting it and applying it. There is no question here of judges taking over a legislative function. They will be confined to a strictly judicial function which is the interpretation and application of a statute, that statute being, in this case, the Bill of Rights."

By entrenching a Bill of Rights we go further and ensure that it has been debated and is supported by the citizens of the nation or the State, a much more satisfactory situation in a democracy than the present five or six fold rather haphazard means of upholding fundamental human rights. As Associate Professor Hiebert describes:(56)

> "A bill of rights represents more than a codified set of principles that judges interpret and apply when State actions are impugned. It represents a normative and symbolic statement of those rights and values that a society believes ought to be respected in, and by, the polity."

As well as that democratic advantage, is the fact that entrenchment makes the values expressed part of the constitutional fabric of the nation(57). When the courts regard themselves as guardians of the constitution, they will then be acting as guardians of agreed constitutional rights and freedoms.

The Canadian Charter adapted for Australian conditions, and in my view extended so that the rights given are enforceable against as well as by citizens and other legal persons, would be a well tried model for this country to adopt. We could then give constitutional expression to our national values of fairness and egalitarianism and protect the freedoms we expect to be able to take for granted.

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1. The first amendments, known as the Bill of Rights, were adopted by the Congress in 1789 and ratified by the States by December 1791; the eleventh amendment was ratified in 1795 and the last amendment, the twenty-seventh, was ratified in 1992

2. While the Supreme Court interpreted the Fourteenth Amendment s "equal protection" guarantee to strike down State discrimination in some cases, it failed to do so in a number of cases which, today, would be regarded as highlydiscriminatory: Wilcox, MR, *An Australian Charter of Rights?*, Law Book Company, Melbourne, 1993, p.11.

3. Dawson J in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 183 said "... in this country the guarantee of fundamental freedoms does not lie in any constitutional mandate but in the capacity of a democratic society to preserve for itself its own shared values."

4. Official Record of the Debate of the Australasian Federal Conventions (Melbourne, 8 February 1898) pp 664-691 particularly at p 673; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 43.

5. Adopted unanimously by the member States.

6. The rights were elaborated in the International Covenant on Civil and Political rights adopted by Australia in 1990.

7. Buckley, K, Dale, B and Reynolds, W, *Doc Evatt, Patriot, Internationalist, Fighter and Scholar*, Longman Cheshire, Melbourne, 1994, Chapter 23; Tennant, K, *Evatt, Politics and Justice*, Angus and Robertson, Melbourne, 1970, p 211; Crockett, P, *Evatt, A Life* Oxford University Press, Melbourne, 1993 p. 5.

8. Convention relating to the Status of Refugees and Protocol relating to the Status of Refugees; Declaration on the Rights of the Child; ILO Convention on Discrimination (Employment and Occupation); International Convention on the Elimination of all Forms of Racial Discrimination; Declaration on the Rights of Mentally Retarded Persons; Declaration on the Rights of Disabled Persons; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; First Optional Protocol to the ICCPR; Convention on Elimination of Discrimination Against Women; Declaration on the Elimination of All Forms of Religious Intolerance; Convention against Torture and other Cruel Inhumane and Degrading Treatment or Punishment; Convention on the Rights of the Child: see Kinley, D, (ed) *Human Rights in Australian Law*, Federation Press, Sydney, 1998, pp xxxii-xxxiii.
9. *Constitution Act 1982, Part 1 - Canadian Charter of Rights and Freedoms* s. 32.

10. Section 25.

11. Section 26.

12. Section 27.

13. Section 28.

14. Section 31.

15. The earlier statutory Bill of Rights was largely a failure as an effective instrument for redress of grievances: *Robertson and Rosentanni v The Queen* [1963] SCR 651; *Curr v The Queen* [1972] SCR 889 at 899; 26 DLR (3d) 603 at 613-614.

16. Liverani, MR, "A Bill of Rights Now, Proponents Urge" (1995) *Law Society Journal* 42 at 43.

17. Hiebert, JL "Why Must a Bill of Rights be a Contest of Political and Judicial Wills? The Canadian Alternative" (1999) 10 PLR 22 at 23.

18. Wilcox, MR (supra) p 313; Hiebert, JL (supra) at 24.

19. Finkelstein, N, *Laskins Canadian Constitutional Law*, (Vol 2), Carswell, Toronto, 1986, Ch 16; Laskin, B, "An Inquiry into the Diefenbaker Bill of Rights" (1959) 37 Can Bar Rev 77 at 80-82.
20. Fletcher, JF and Galligan, B, *Australian Rights Project*, Preliminary Findings, Research School of Social Sciences, Australian National University, 1993; Bailey, P "Australia - How Are You Going, Mate, Without a Bill of Rights? or Righting the Constitution" (1993) 5 *Canterbury Law Review* 251 at 267; Gibb, S and Eastman, K, "Why are We Talking About a Bill of Rights?" (1995) *Law Society Journal* 49; "The Australian Rights Project Presentation to the Law Foundation of New South Wales" by Fletcher, JF and Galligan, B, 23 July 1993.
21. Hiebert, JL (supra) at 23, 34.
22. *New Zealand Bill of Rights Act* 1990 s. 6.
23. Liverani, MR (supra) 42 at 43.
24. (supra) p.v.
25. Sturgess, G and Chubb, P, (eds) *Judging the World: Law and Politics in the Worlds Leading Courts*, Butterworths, Melbourne, 1988, p 70.
26. EARC Report para 5.4.
27. Constitutional Commission: Final Report, June 1988, Ch 9.
28. *Dietrich v The Queen* (1992) 177 CLR 292.
29. *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
30. See *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 109; *Polyukovic v The Commonwealth* (1990) 172 CLR 501.
31. *Nationwide News Pty Ltd v Wills* (supra) at 43.
32. Mason, A, "Judges, Values and a Bill of Rights" (1997) 9 Judicial Officers Bulletin 65 at 66.
33. For example the European Court of Human Rights found that the English common law of contempt was in breach of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms see *Sunday Times v The United Kingdom* (1979) 2 EHRR 245. The courts in the United Kingdom will soon be giving effect to the British Human Rights

Act 1998.

34. EARC Report para 2.58.

35. (supra) at 57-58.

36. Section 116.

37. Section 80.

38. Section 51 (xxxi).

39. Section 41.

40. Section 92.

41. Section 117; *Street v Queensland Bar Association* (1989) 168 CLR 461.

42. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 204; *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75 at 78: *Dietrich v The Queen* (1992) 177 CLR 292 at 343 per Dawson J; *Mabo v Queensland [No 2]* (supra) at 42; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1990) 183 CLR 273.

43. "The Communication of Nicholas Toonen Concerning Australia: Communication No 488/1992 - Explanatory Note by Professor IA Shearer" (1995) 69 ALJ 600.

44. *Australian Capital Television Pty Ltd v The Commonwealth* (supra); *Nationwide News Pty Ltd v Wills* (supra); Zines, L, "A Judicially Created Bill of Rights" (1994) Sydney Law Review 166.

45. EARC Report para 2.9.

46. See the discussion in Smallbone, DA, "Recent Suggestions of an Implied "Bill of Rights" in the Constitution, considered as part of a general trend in constitutional interpretation", (1993) 21 FLR 254

47. *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359.

48. EARC Report paras 8.1040 - 8.1059; *Cocks v State of Queensland* (supra); *Waters v Public Transport Corporation* (supra) at 357-358 per Mason CJ and Gaudron J, 392 per Dawson and Toohey JJ and 402 per McHugh J: "... discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons

whose circumstances are not materially different."

49. [1993] EOC ¶ 92-500, ¶ 92-501.

50. (1994) EOC ¶ 92-607

51. [1994] EOC ¶ 92-612, 92-652.

52. See for example *JM v QFG* (1997) EOC ¶ 792-876.

53. *Marbury v Madison* 2-7 US 368 (1803); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 262: "in our system the principle of *Marbury v Madison* is accepted as axiomatic."

54. Hiebert JL (supra) at 27; Allen J and Cullen R *"A Bill of Rights Odyssey for Australia: The Sirens are Calling"* (1997) 19 UQLJ 171 at 172, 177, 190.

55. Sturgess, G and Chubb, P (supra) at 281-282.

56. Hiebert JL (supra) at 24.

57. *Law Society of Upper Canada v Skapinker* [1984] 1 SCR 357; 9 DLR (4th) 161.