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AUSTRALIAN LAWYERS ALLIANCE CONFERENCE

Convention Centre, Cairns

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Keynote Address: "An Australian bill of rights – Arguments for and against"

The Hon P de Jersey AC,
Chief Justice

Human rights protection in context[1]

Whether Australia adopts a bill of rights is of course an issue for the people. It has become topical again, and I congratulate the Alliance on its wish to foster the debate. It is an issue which should be talked about.

The Australian Lawyers Alliance deserves commendation for its 10 year history of protecting and promoting justice, freedom and the rights of the individual. The Alliance's position paper declares, "the rights of individuals in Australia have been seriously eroded in recent years on all fronts. Governments at both State and Federal level have chipped away at the common law, which provides the basis for the legal rights of individuals who have suffered injury as the result of someone else's wrong-doing. Other, equally fundamental rights have been progressively limited by statute...". I applaud the Alliance's primary focus on "protecting the rights of ordinary people against the legal tactics of the State and big corporations". The large attendance at this conference corroborates the dedication of those many who support these objectives.

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

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[1] I acknowledge the considerable assistance of my Associate, Mr M Tom Fletcher, in the preparation of this address.

Recent agitation for a constitutional bill of rights was overshadowed by the debate whether Australia should become a Republic. This meant the issue was not comprehensively canvassed. Given the content of this debate, there can be no question but that every Australian has a real and significant interest in its outcome.

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

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

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

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

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

Victoria is currently considering the adoption of a bill of rights, while New South Wales has, at least for the time being, struck it from the agenda. The New South Wales Standing Committee on Law and Justice in 2001 expressed this view:

> "… it is ultimately against the public interest for Parliament to hand over primary responsibility for the protection of human rights to an unelected Judiciary who are not directly accountable to the community for the consequences of their decisions. The Committee believes an increased politicisation of the Judiciary, and particularly the judicial appointment process, is an inevitable consequence of the introduction of a bill of rights."[2]

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

[2] New South Wales Standing Committee on Law and Justice, "A NSW bill of rights", 3 October 2001, <http://www.parliament.nsw.gov.au/prod/parlment/Committee.nsf/0/8569eddf131da5dbca256ad90082a3d3/$

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

Sir Gerard Brennan has pointed to the impact this would have on the judiciary: after all, "the very object of a bill of rights is to create a new role for the judiciary – by exercise of a new jurisdiction, the Courts are to protect human rights and fundamental freedoms."[3] "Over time, the function and significance of the third branch of Government will be substantially changed and the relationship between the Courts and the political branches of Government will be altered."[4] Before the Australian people made an informed decision they wanted a bill of rights, they would need to appreciate the likely shift in dynamics among the three branches of government.

I propose in what I say today, in the great tradition of judicial impartiality, to canvas the arguments on both sides of the equation; and ultimately leave the resolution to you, the jury. I may exercise some editorial licence, but being careful not to overbear you!

The status quo: arguments against a bill of rights for Australia

Parliamentary sovereignty

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

FILE/A%20NSW%20Bill%20of%20Rights%20Report%20October%202001.pdf>, accessed on 17 October 2005.

[3] Sir Gerard Brennan, "The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response" in P Alston (Ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Oxford University Press, Melbourne, Chapter 12, 454 at 458.

[4] Ibid, 457.

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

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

> "the debate about the rights of individuals and the rights of minority groups … has now reached a point of diminishing returns. … [there are] no more great gains that can be made in the battle for rights … for women, migrants, blacks, homosexuals or every other subgroup. … [T]he majority don't associate with any of these groups and there is a point at which the vast majority say, 'I have had enough, society is reasonably fair …'".[5]

Sir Harry Gibbs took a similar stance, asserting that minority groups these days sometime form pressure groups which exert excessive influence.[6]

Judicial independence

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

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[5] L Taylor, "Minorities Rights Irk Most: Mabo Minister", The Australian, 16 June 1994, cited in Chief Justice Malcolm, "Does Australia Need a Bill of Rights?" (1998) 5(3) *Murdoch University Electronic Journal of Law*, <http://www.murdoch.edu.au/elaw/issues/v5n3/malcolm53.html>, accessed 17 October 2005, [16].
[6] Sir Harry Gibbs, "Does Australia Need a Bill of Rights", *The Samuel Griffith Society*, Volume 6, Chapter 7, <www.samuelgriffith.org.au/papers/html/volume6/v6chap7.htm>, accessed 15 October 2005.

Parliament makes the law. When there is a dispute about how parliamentary law is to be interpreted, independent Judges are called upon to determine the dispute according to law. A partisan parliament may wish it to be interpreted in a particular way. A Judge's job is primarily concerned with applying existing laws free from political pressure. Particularly where one of the parties to a dispute is the State, the public relax in the confidence there is a clear separation between those who make the law and those who interpret it. There will be an objective, dispassionate interpretation: "the government" will not be there, pushing a barrow. At the adjudicative stage under our system, the decision-maker is utterly impartial, and especially, not constrained by governmental or party-political pressure. To ensure perceptions of this, Judges are accorded security of tenure, not removable except in specified circumstances.[7] By these means, judicial independence is upheld as the bulwark of justice according to law and the courts stand independently between citizen and state.

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

To Australians, the notion of anything but a completely a-political judiciary is anathema. Sir Harry Gibbs argued that if Australian courts were given the power to make determinations on social and economic policy, there would be temptation to appoint Judges for their political or ideological attitudes, rather than capacity for independence and legal ability.[8]

Following the most recent High Court appointment, it was reported that two former Chief Justices of the High Court, Sir Anthony Mason and Sir Gerard Brennan, expressed concern about lack of transparency in the process of appointment. Sir Anthony Mason in

[7] *Australian Constitution*, s 72; *Constitution of Queensland 2001* (Qld), ss 60 and 61.
[8] Sir Harry Gibbs, above n 6.

particular urged the government to reveal whether private discussions had been held between the Attorney-General and the prospective new Justice, and, if so, the content of those discussions: otherwise the "process could not be described as transparent and open".[9]

A bill of rights could exacerbate that concern. One only has to recall what followed the retirement of United States Supreme Court Justice Sandra Day-O'Connor; the appointment of John Roberts followed nearly 20 hours of questioning by the Senate Judiciary Committee, and we await the confirmation hearing for Harriet Miers. A recent editorial in *The Australian* commented:

> "With no disrespect, Crennan's appointment has already passed from newsprint to fish wrapping. And that is a very good thing. Why? Because in Australia, to the chagrin of many legal activists, most of our judges do not prance around as politicians in legal drag as they do in the US."[10]

Political character

A bill of rights would likely bring questions of high social and economic policy before the courts. The courts, as Sir Gerard Brennan points out, "in supervising the exercise of political power, would be constrained to base their decisions on political considerations,"[11] a departure from well-established current conceptions of the judicial function. As observed in the High Court in *Clunies-Ross v Commonwealth*:

> "It would be an abdication of the duty of this Court under the Constitution if we were to determine [this] important and general question of law … according to whether we personally agreed or disagreed with the political and social objectives which the Minister sought to achieve … As a matter of constitutional duty, [the] question must be considered objectively and answered in this Court as a question of law and not as a matter to be determined by reference to the political or social merits of the particular case."[12]

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[9] Chris Merritt and Elizabeth Colman, "Court choices too secretive: judges", *The Australian*, 22 September 2005, Editorial. See also "Right choice for High Court but wrong process", *Sydney Morning Herald*, 22 September 2005, Editorial.
[10] "Let's not turn our judges into politicians", *The Australian*, 28 September 2005, Editorial.
[11] Sir Gerard Brennan, above n 3, 455.
[12] (1984) 155 CLR 193, 204.

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

The situation here is quite different from that obtaining in the United States. There, Judges sometimes appear comfortable applying personal perceptions of values in making their decisions. Public expectations are different here. Also, because a bill of rights throws up wide issues of social policy, decisions can differ according to the multitude of life defining experiences of the Judge. On this basis it is argued that uncertainty and injustice would be introduced into the law.[13]

Evolving nature of rights

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

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

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

An example is the right to keep and bear arms, enshrined in the United States *Bill of Rights* via the Second Amendment in 1791. The American Revolution had officially ended seven years earlier. The drafters of that amendment considered the right "necessary to the security of a free state". It is hardly suitable today. As we know its exercise has probably contributed to a culture of violence in that country. Moreover, two centuries of technological development in weaponry has meant many more lives may be vulnerable where the right is abused. The former Commonwealth Attorney-General, Mr Darryl Williams, pointed out that "the Government … establishing the National firearms Buyback Scheme was not hampered by a constitutional entrenched right to bear arms. This would have been the case in the US."[14]

Conversely, a static bill of rights could fail to embrace new, but equally basic and fundamental, rights. Justice Kirby predicts particular problems for the future will emerge from computer technology, biotechnology and the human genome project.[15] The traditional rights model would not necessarily be broad enough to accommodate those challenges. If Australia adopted a bill of rights constitutionally entrenched, it would be difficult to secure amendments to ensure it remained a "living document". Parliament could of course legislate to protect new rights through specific legislation, but this could produce a hierarchy, in which the constitutionally protected rights were seen to take precedence over others "merely" statutorily enshrined.

"Paper rights"

Does a bill of rights really guarantee protection of those rights it specifies? International human rights treaties abound. There is near universal ratification of the *International Covenant on Civil and Political Rights*, in particular. It would be difficult to argue that the

[14] Daryl Williams, "Against constitutional cringe: the protection of human rights in Australia" (2003) 9(1) *Australian Journal of Human Rights* 1 at 5.
[15] Justice Kirby, "A bill of rights for Australia – But do we need it?", Speech delivered to the Queensland Chapter – Young Presidents Association, Brisbane, 14 December 1997, <http://www.lawfoundation.net.au/resources/kirby/papers/19971214_austlaw.html>, accessed 15 October.

rights contained in that treaty are anything but basic and fundamental. But some states who are parties to that Covenant regularly disregard them. Some of these countries have even incorporated a national bill of rights which goes further than the *International Covenant*.

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

> "I am not at all sure … that a bill of rights would enable the courts to check the worst abuses of political and bureaucratic power. It is unlikely to prevent a political party which had secured the requisite majority in the houses of parliament from stacking the courts and the public service, or from engaging in ruinous commercial ventures, or from subverting the conventions of the Parliament itself. …Constitutional guarantees may provide some protection to human liberties, but in the end freedom depends on the willingness of a community to defend it."[16]

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

The second is maintaining appropriate mechanisms to enforce respect for and protection of the rights. This is the primary reason why international human rights instruments provide no guarantee. The early operation of the United Nations Commission on Human Rights, the instrumental body in the drafting of the *Universal Declaration on Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, involved simply cataloguing complaints received. No action was taken upon them, the result being "the world's most elaborate waste paper basket."[17] While the situation has improved somewhat (for example, the Sub-Commission on the Promotion and Protection of Human Rights can exert pressure on governments

[16] Sir Harry Gibbs, above n 6.

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

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

<u>Adequacy of current protections under statute, the common law and the Constitution</u>

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

As Chief Justice Doyle pointed out when Solicitor-General of South Australia, "no-one should underestimate the capacity of the common law to adapt to change in society".[18] For example, it is accepted that where a statute is cast in ambiguous terms, or there is a gap in the common law, courts may in their response legitimately be guided by international human rights treaties and jurisprudence.[19] In *Mabo v Queensland [No 2]* it was held the common law doctrine of *terra nullius* warranted reconsideration.[20]

[17] Phillip Alston (Ed), *The United Nations and Human Rights: A Critical Appraisal*, Clarendon Press, Oxford, 1992, 141.
[18] J Doyle and B Wells, "How far Can the Common Law Go Towards protecting Human Rights?" in P Alston (Ed), *Towards an Australian bill of rights*, Centre for International and Public Law, Canberra and Human Rights and Equal Opportunity Commission, Sydney, 107.
[19] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J; Mason CJ and McHugh J agreeing).
[20] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J; Mason CJ and McHugh J agreeing).

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

> "ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights … Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention".[21]

The courts have shown some willingness to use the common law to protect basic human rights, notwithstanding the controversy about judge-made law. Justice McHugh has expressed the view that "[l]aw-making by judges is likely to remain controversial, but its existence seems essential. The need for and the right of the judge to make law in appropriate cases is now well-established."[22] In *Dietrich v R*[23], notably, the High Court held that while an indigent person accused of committing a serious offence did not have a constitutional right to be represented by counsel at public expense, the court could stay a criminal trial which was unfair. While the court would look at each case on its facts, in most cases in which an accused were charged with a serious crime, it would be unfair for the trial to proceed without his being afforded legal representation.

Courts are guided by a large battery of presumptions when faced with the task of interpreting statutes which impinge on human rights. In a passage quoted with approval by Chief Justice Gleeson[24] and Justice Kirby,[25] Lord Hoffman termed this the "principle of legality":

> "The principle of legality means that Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by

[21] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288, 291 (Mason CJ and Deane J).
[22] Justice McHugh, "The Law-Making function of the Judicial Process: Part II" (1988) 62 *Australian Law Journal* 116, 127.
[23] (1992) 177 CLR 292
[24] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ)
[25] *Daniels Corp v ACCC* (2002) 213 CLR 543, 582 (Kirby J).

> general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."[26]

Chief Justice Spigelman has helpfully listed presumptions which manifest this principle.[27] These include that Parliament does not intend to:

- invade fundamental rights, freedoms and immunities;[28]
- restrict access to the courts;[29]
- exclude the right to claims of self-incrimination;[30]
- permit a court to extend the scope of a penal statute;[31]
- deny procedural fairness to persons affected by the exercise of public power;[32]
- interfere with vested property rights;[33]
- alienate property without compensation;[34] or
- interfere with equality of religion.[35]

Those presumptions do not allow Judges to construe legislation inconsistently with its clear and unambiguous language. Rather, the "principle of legality" impinges by requiring

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26 *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115, 131.
27 Chief Justice Spigelman, "Statutory Interpretation and Human Rights", Address to the Pacific Judicial Conference, Vanuatu, 26 July 2005, <http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_260705>, accessed 17 October 2005. See also Pearce & Geddes, *Statutory Interpretation in Australia*, 5th ed, Butterworths, Sydney (2001), 515-529.
28 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 493; *Bropho v Western Australia* (1990) 171 CLR 1; *R v Bolton ; Ex parte Beane* (1987) 162 CLR 514, 523, 532.
29 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492; *Magrath v Goldsborough Mort & Co Ltd* (1932) 47 CLR 121, 134.
30 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.
31 *Krakouer v The Queen* (1998) 194 CLR 202, 223.
32 *Commissioner of Police v Tanos* (1958) 98 CLR 363, 395-396.
33 *Clunies Ross v Commonwealth* (1984) 155 CLR 193, 199-200.
34 *Commonwealth v Haseldell Ltd* (1918) 25 CLR 552, 563.
35 *Canterbury Municipal Council v Muslim Alawy Society Ltd* (1985) 1 NSWLR 525, 544.

Parliament to indicate clearly where it intends to interfere with basic rights, liberties and expectations.[36] Chief Justice Gleeson views it as an aspect of the rule of law:[37] courts will look for a "clear indication that the Parliament has directed its attention to the rights and freedoms in question and has consciously decided upon abrogation or curtailment."[38] One would of course hope that in a robust democracy, with strong institutional checks on the exercise of executive power, there would be few instances where Parliament deliberately curtailed basic and fundamental rights.

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

The High Court has also been able to imply certain rights and freedoms. The best known is the freedom of political communication.[39] Also guaranteed is procedural fairness in the exercise of judicial power. Chapter III of the Australian Constitution is premised on the separation of powers; through the vesting of judicial power of the Commonwealth exclusively in Chapter III courts, Chapter III requires observance of "judicial process". This means Parliament cannot pass a law requiring a Chapter III court to exercise judicial power inconsistently with the essential character of a court or with the nature of judicial power – for example, Parliament could not require a court to act contrary to natural justice.[40] In a way fortuitously, this also protects State courts, because they may exercise Commonwealth jurisdiction. Applying similar reasoning, Justice Deane and Justice

[36] Chief Justice Spigelman, above n 27.
[37] *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40, [21].
[38] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 492.
[39] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television P/L v Commonwealth* (1992) 177 CLR 106.
[40] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 26-27 (Brennan, Deane and Dawson JJ); *Leeth v The Commonwealth* (1991) 172 CLR 455, 486-487 (Deane and Toohey JJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

Gaudron have suggested through *obiter dicta* that the requirement that a trial be fair is impliedly entrenched in the Constitution.[41]

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

> "[w]hile not perfect, Australia has an excellent human rights record. … [L]et there be no doubt about the effectiveness of the arrangements that are already in place. … They are both strong enough to provide firm protection for the rights that are fundamental to a modern democratic society, and flexible enough to respond to the needs of changing times."[42]

<u>General language of a bill of rights</u>

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

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

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

By contrast, there is a host of legislation in Australia outlawing discrimination; as examples, the *Age Discrimination Act* 2004, the *Human Rights and Equal Opportunity Commission Act* 1986, the *Racial Discrimination Act* 1975, the *Sex Discrimination Act* 1984, and the *Disability Discrimination Act* 1992. It is the practical machinery set in place by those Acts which helps avoid discrimination and remedy its occurrence. This is not to say the United Kingdom does not have detailed legislation dealing with discrimination as

[41] *Dietrich v R* (1992) 177 CLR 292, 326 (Deane J), 362 (Gaudron J).
[42] Daryl Williams, above n 14, 1.

well. Those who argue against a bill of rights assert it is better that rights be protected in this more detailed manner, with legislation establishing specific mechanisms for their protection.

That aside, generality in the form of prescription of the rights themselves may lead to inconsistent and unpredictable applications. Examples may be drawn from the United States *Bill of Rights*. The Fifth Amendment, which forbids any State to "deprive any person of life, liberty or property without due process of law", has been interpreted to govern laws prohibiting abortion.[43] The Second Amendment, which prevents Congress from making laws "abridging the freedom of speech or of the press", was held to justify the Supreme Court's determination of the question whether a student could be lawfully prevented from wearing braided long hair.[44] It is unlikely the drafters envisaged recourse to the amendments to resolve disputes like those.

Content of a bill of rights

And what of the "grading" of rights.

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

[43] *Roe v Wade* (1973) 410 US 113; *Webster v Reproductive Health Services* (1989) 492 US 490
[44] *New Rider v Board of Education* (1974) 414 US 1097.

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

Practical issues: cost and extent of litigation

Then there are some particularly practical considerations.

In Canada, it has been noted the vast array of new legal conundrums presented by the *Charter of Fundamental Rights and Freedoms* has increased the time and cost of legal preparation and presentation, and also the amount of litigation, delaying judgments.[45] According to Sir Gerard Brennan, while the aim of a bill of rights is to protect individual rights, it is likely most people would be unable to afford the litigation.[46] Further, he argues that the ordinary manner of adducing evidence would be inappropriate:

> "The issues under an entrenched bill of rights are constitutional issues and the decision affects the powers of Government and the interests of all who live under the Constitution: such issues cannot be made to depend upon the choice or the capacity of the parties to adduce the evidence necessary for the making of an informed decision."[47]

Keeping step with other countries: arguments for a bill of rights for Australia

Protection of minority groups

At the risk of exhausting you, may I turn now to the other side of the ledger? Proponents of a bill of rights invariably concentrate on the protection of minority groups.

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[45] Gerry Ferguson, "The Impact of an Entrenched bill of rights – The Canadian Experience" (1990) 16 *Monash University Law Review* 211, 219.
[46] Sir Gerard Brennan, above n 3, 459.
[47] Ibid, 458-459.

Democracy cannot operate perfectly. It is the majority which elects the party or parties which form government. That same majority may be indifferent to the plight of minority groups. Likewise, political parties, primarily concerned with securing enough votes to form government, may shy away from steps to protect the rights of minority groups where that action would be unpopular with the majority, or at least not the kind of action likely to grab headlines and attract votes. Worse still, Parliament may pass laws prejudicing minority rights. Professor Charlesworth suggests major political parties sometimes agree on which minority groups' rights can be popularly and conveniently trampled upon.[48]

Some argue that especially given most law making today is via subordinate legislation, there needs to be some yardstick against which these laws can be compared, and remedied if found in breach of basic human rights. That yardstick could be a bill of rights. Professor Charlesworth points out that too often marginalized groups view our legal system as an instrument of oppression, and presents a bill of rights as their vehicle for freedom.[49] Moreover, accepting a government must govern for the benefit "of the people", it is not a large leap to conclude that <u>all</u> people have rights which should be recognized and protected, by any government.[50]

In a passage recently printed in *The Age*, Professor Allan, arguing against a bill of rights for Victoria, emphasizes what he considers its undemocratic nature:

> "Without a bill of rights in place, these difficult, debatable social policy lines are drawn on the basis of elections, voting and letting the numbers count. I think that's a good thing, both in terms of the consequences it generates and morally. With a bill of rights in place, the unelected judges decide, though they too decide by voting – four justices' votes beat three. It is just that with a bill of rights in place the franchise becomes noticeably more restricted. (Victory does not go to the judge writing the most moving judgement or the one with the most references to moral philosophy.) What makes a bill of rights, and its transfer of power to judges, appear

[48] Hillary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights*, University of New South Wales Press, Sydney (2002), 38.
[49] Hillary Charlesworth, "The Australian Reluctance about Rights" (1993) 31 *Osgoode Hall Law Journal* 199, 299.
[50] Chief Justice Malcolm, above n 13, [22(iv)].

> attractive is the unspoken assumption that the moral lines drawn by judges are somehow always the right lines – that a committee of former lawyers somehow has a pipeline to godly wisdom and greater moral perspicacity than secretaries, plumbers and regular voters. A good many judges, human rights lawyers and legal academics may happen to think this. I do not. Most Australians so far do not."[51]

In response to those who argue that strong democratic institutions are better placed to protect human rights than a paper bill of rights, Justice Kirby says:

> "No-one says that a bill of rights alone will protect the rights of the people. But nor does majoritarian democracy in parliament. The modern notion of democracy is more subtle than the primitive idea of according full power to the transient majorities of parliament by a transient vote in a periodic election, accompanied by media jingles and superficial electoral slogans. Democracy now requires respect for minorities and protection of basic constitutional principles: such as the rule of law, the independence of the judiciary, and regard for fundamental human rights."[52]

Lord Scarman sees this as the principal argument in favour of a bill of rights:

> "… if you are going to protect people who will never have political power, at any rate in the foreseeable future …, if they are going to be protected it won't be done in Parliament – they will never muster a majority. Its got to be done by the Courts and the Courts can only do it if they've got the proper guidelines."[53]

But would that not unduly politicize the courts and blur public perceptions of the judicial function, where judges would be required to determine matters of "policy"?

Justice Kirby contends this argument is naïve:

> "What is necessary is a recognition of the inherently political nature of the judicial branch of government and a harnessing of that function to ensure that judges, above party politics, protect the basic fundamentals of all the people living in our form of society."[54]

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[51] Jim Allan, "Rights that are all wrong", *The Age*, 27 September 2005, Opinion.
[52] Justice Kirby, above n 15.
[53] Lord Scarman, "Britain and the Protection of Human Rights" [1984] *New Zealand Law Journal* 175, 177.
[54] Justice Kirby, above n 15.

Courts confront the difficult issues

There is no doubt that if difficult issues are committed to courts, they will resolve them. Those who argue for a bill of rights claim that political parties tend to avoid really difficult issues, however pressing. This is said to be a product of the political process: ability to form government necessitates appealing to the broad populace. By contrast, courts are in a position to make decisions on these issues, not being controlled by popular opinion.

A well-known example is the decision of the High Court in *Mabo v Queensland [No 2]*,[55] recognizing native title and quashing *terra nullius*. That development was enormously significant for all Australians in terms of societal (as opposed to legal) consequence, seen as, at the least, an acceptance of the profound attachment of Aboriginal peoples to their traditional lands, not only in terms of ownership, but as a veritable life force. Yet it was a step neither of the major political parties was willing or able to take. Rather, it was left to the High Court, the unelected and independent arm of government, to discern any significance, in law, in the circumstance that Aboriginal people occupied Australia at the time of European settlement.

But a fortnight ago, Sir Anthony Mason, while acknowledging the controversy, justified our adopting a bill of rights on this ground alone:

> "The adoption of such a Bill would promote a culture of respect for the autonomy and dignity of the individual and, at least, ensure that politicians, government and administrators pay closer attention to the impact of legislation on individual rights and freedoms. It would also encourage them to focus their attention on the personal needs and concerns of the citizens of this country."[56]

[55] (1992) 175 CLR 1.
[56] Sir Anthony Mason, "Democracy and the Law", 2005 Law and Justice Address, 6 October 2005, <http://www.lawfoundation.net.au/justice_awards/2005address.html>, accessed 17 October 2005, [25].

Inability to uphold basic rights under current system

While, as I have said, human rights are protected in this country through a combination of statute, common law and constitutional guarantees, there are those who argue these protections simply do not go far enough, including Sir Anthony Mason, who has said:

> "the common law system, supplemented as it presently is by statutes designed to protect fundamental human rights, does not protect fundamental rights as comprehensively as do constitutional guarantees and conventions on human rights … The common law is not as invincible as it was once thought to be."[57]

While the High Court's decision in *Mabo* sees our highest court developing the law to recognize and protect rights, Judges are of course limited to making determinations in the cases which are before them. Parliament makes the law: courts apply it. Judges' hands are effectively tied. Faced with a law which is unambiguous, but arguably breaches what may be perceived as basic and fundamental rights, Judges must nevertheless apply it. A bill of rights would operate to give Judges the ability to assess such legislation against a higher standard. In the words of Chief Justice Doyle:

> "The court has no clear mandate from society to strike down legislation for contravening human rights and no guidance as to the rights to be protected. The courts might act more confidently in this area if parliament provided some indication of the rights which are to be given the greatest weight."[58]

And where the common law does protect fundamental rights, they tend to be narrowly construed. Chief Justice Malcolm notes that:

> "usually such rights that are recognised under the common law are those left after all the exceptions and limitations to them have been dealt with. Take the example of free speech: the right to free speech at common law is that which is left after the censorship laws, defamation, contempt of court, contempt of parliament, sedition, criminal libel, blasphemy, radio and television programme standards, and many other minor limitations have made frequently and quite proper but occasionally excessive inroads."[59]

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[57] Sir Anthony Mason, "The Role of A Constitutional Court in A Federation. A comparison of the Australian and United States Experience" (1986) 16 *The Federal Law Review* 1, 12.
[58] J Doyle and B Wells, above n 18, 110.

Such constitutional protections as there are, have been seen as limited or vulnerable. For example, the guarantee of trial by jury for an indictable offence has been met in some cases by the Commonwealth Parliament's legislating to permit a person charged with a serious offence, attracting a lengthy prison term, to be tried summarily. The 1928 High Court decision in *R v Archdall and Roskruge; Ex parte Carrigan and Brown*[60] confirmed Parliament's power to do this. Justice Deane observed: "[t]he guarantee of trial by jury which is contained in s 80 of the Constitution has been drained of most of its strength by the combined effect of the Parliament and the decisions of this Court ....".[61] As another example, freedom of religion, guaranteed under s 116, has been held not to include the right to principled conscientious objection to military service.[62]

The erosion of common law rights by Parliament

Australian governments, Commonwealth or State, have not deliberately extinguished basic and fundamental rights without cause. But the process of law making can by nature be reactive. A law can come into effect quickly, especially in response to a crisis, with limited consideration of its impact on basic rights. Chief Justice Malcolm describes this situation: "a government wishing to be seen as doing something decisive when confronted with a problem that is inconveniencing many people or causing public pressure for a response can and will infringe fundamental rights and freedoms of all."[63] In this context, I mention the public debate on terrorism responses and, albeit much less significant, tort law reform.

Civics education

It is often argued that the combination of statute law, the common law and the Constitution sufficiently protects basic rights. Yet, it is said, how many ordinary Australian can identify

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[59] Chief Justice Malcolm, above n 13, [22(ii)].
[60] (1928) 41 CLR 128, 139-140 (Higgins J), 136 (Knox CJ, Isaacs, Gavan, Duffy and Powers JJ).
[61] *Clyne v Director of Public Prosecutions* (1984) 154 CLR 640, 652-653.
[62] *Krygger v Williams* (1912) 15 CLR 366.
[63] Chief Justice Malcolm, above n 13, [22(iii)].

what those rights are? A bill of rights could be an important educative tool, informing people of their own rights, the rights of others and the manner in which the rights co-exist. If one accepts an important element of protecting fundamental rights is cultivating a society which respects them there may be something to be said for prescribing the rights in one instrument accessible to the people.

Keeping step with other nations

Then there is the argument based on our place in the democratic world.

Most democratic countries have adopted a bill of rights, including those sharing a common legal heritage with Australia. The major provisions of the *European Convention on Human Rights* have been incorporated into the laws of the United Kingdom via the *Human Rights Act* 1998 (UK). Canada has adopted its *Charter of Fundamental Rights and Freedoms*, entrenched as part of its constitutional law. Our neighbour, New Zealand has a statutory bill of rights.

There has been some positive juristic response to those bills of rights.[64] Sir Anthony Mason, who originally opposed a bill of rights for Australia, changed his mind in the late 1980s because he felt Australia was ignoring international trends:[65]

> "Human rights are seen as a countervailing force to the exercise of totalitarian, bureaucratic and institutional power – widely identified as the greatest threats to the liberty of the individual and democratic freedom in this century. One result has been the wide-spread entrenchment of fundamental rights in Constitutions throughout the world."[66]

[64] See for example: Justice Keith, "The New Zealand bill of rights experience: lessons for Australia" (2003) 9(1) *Australian Journal of Human Rights* 119; Justice Sharpe, "The Impact of a Bill of rights on the Role of the Judiciary: A Canadian Perspective" in P Alston (Ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Oxford University Press, Melbourne, Chapter 11, 431.
[65] See Sir Anthony Mason, "A bill of rights for Australia?", Address to the Australian Bar Association Bicentennial Conference (1988), cited in Chief Justice Malcolm, above n 13, [19].
[66] Sir Anthony Mason, "A bill of rights for Australia", (1989) 5 *Australian Bar Review* 79 at 79-80.

The proliferation of these instruments at the national level has been sparked by efforts internationally to define basic and fundamental rights, and to encourage states to bind themselves by ratifying human rights treaties. Australia has been party to this movement, ratifying the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Convention on the Rights of the Child*, the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *International Convention on the Elimination of All Forms of Discrimination Against Women*.

It cannot be denied that the governments of some countries which parade bills of rights display a disgraceful human rights record. These governments, in breach of their own laws, flagrantly breach their international obligations by abusing the rights of the same citizens they are charged to protect. But those countries may not have strong democratic institutions in place to enforce the law, to ensure that governments themselves abide by their own mandates. Here, with our healthy democratic system, the proponents argue, the result must be positive.

Not all commentators, though, accept that just because most other democratic nations favour a bill of rights, Australia is missing out on a good thing. Darryl Williams has referred to such an argument as "a bizarre kind of constitutional cringe".[67] Sir Harry Gibbs posed this pertinent question:

> "Nowadays bills of rights are to be found in most democratic countries in the world – like Aids, one might add, if one were tempted to be frivolous and to adapt Malcolm Williamson's remark about the music of Andrew Lloyd Webber. Does Australia lack something which is essential to modern democracy, or have we simply resisted the temptation to follow fashion for fashion's sake?"[68]

[67] Daryl Williams, above n 14, 6.
[68] Sir Harry Gibbs, above n 6.

Conclusion

I again congratulate the Alliance in facilitating and fostering this important debate. Its doing so corroborates its relevance in contemporary Australian conditions – that is, if I may say, not just in testing the consciences of lawyers but the consciousness of many Australians.

The question whether Australia should adopt a bill of rights is essentially a small "p" political one. As Sir Gerard Brennan has pointed out, "[t]he question is essentially political and should be answered by reference to the political needs that might be satisfied by an entrenched bill of rights and the burdens which might be imposed by its introduction."[69] And it remains a question for serious community debate. So there is no harm, and potential utility, in you the jury, having heard my impartial summing-up, now retiring to consider your verdict!

[69] Sir Gerard Brennan, above n 3, 455.