

## **FREEDOM ON THE WALLABY: A COMPARISON OF ARGUMENTS IN THE AUSTRALIAN BILL OF RIGHTS DEBATE**

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### **Abstract**

Proponents of a bill of rights identify groups of people in Australia whose liberties have not been respected in the recent past and argue that this shows the need for a bill of rights. Critics dispute this, and point to Australia's constitutional and electoral systems, as ones that are capable of protecting liberties. In response, proponents argue that constitutional rights are too narrow, treaties are not widely implemented, and statutes offer only piecemeal protection.

Critics argue that democracy would be negatively impacted by a bill of rights because judges would decide political questions, judicial activism would be encouraged and people would become complacent. Proponents argue that, at present, democracy does not protect minorities and a more holistic concept of democracy is needed.

The legal system would be impacted by a bill of rights, according to proponents, through increased access to justice and improved education of judges. Critics argue that the judiciary would be politicised, litigiousness increased and respect for the courts reduced. It is also unclear whether a statutory bill of rights at the federal level would be constitutionally valid. Finally, critics and proponents disagree about the effect that a bill of rights would have on Australian culture and the overall level of freedom within the nation.

It is concluded that a constitutional bill of rights would address an inherent weakness in democracy but at the risk of significant adverse consequences, which at present outweigh the value of any gain. A statutory bill of rights would carry risks for the quality of democracy and the legal system, and its protection would be illusory. All benefits that may be obtained from a statutory bill of rights can also be achieved through other measures.

### **I INTRODUCTION**

In 1891 when Henry Lawson penned his famous poem, 'Freedom on the Wallaby'<sup>1</sup> in response to a shearer's strike, members of the Queensland Legislative Council called for his arrest for sedition. Nearly 120 years later, sedition laws have been revived and Australia has been condemned by the International Labour Organisation for denying

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<sup>1</sup> Originally published in *The Worker* (Brisbane), 16 May 1891.

workers' right to form collectives.<sup>2</sup> For these and other reasons, many are now calling for Australia to join other Western democracies and enact a bill of rights.

This paper compares the arguments for and against a federal bill of rights in Australia. Firstly, some background is provided on international human rights and the development of the domestic bill of rights debate, followed by a brief outline of current human rights protections in Australia. Arguments concerning the effectiveness of those protections are examined, including the claim by proponents of a bill of rights that liberties are insufficiently protected in practice, and critics' responses to that claim. Arguments from both sides concerning whether the system, as it stands, is capable of protecting liberties, are also discussed. The fifth section looks at arguments concerning the impact a bill of rights might have on the quality of Australia's democracy. The likely effect on the legal system is examined, followed by a brief explanation of some doubts that have been raised concerning the constitutionality of a statutory bill of rights. Arguments regarding the potential consequences for Australian culture and society, as well as the level of freedom enjoyed in Australia are also outlined. Finally, some conclusions are drawn and suggestions put forward. It is argued that a constitutional bill of rights would address an inherent weakness in democracy but at the risk of significant adverse consequences, which at present outweigh the value of any gain. A statutory bill of rights, on the other hand, would also carry significant risks for the quality of democracy and integrity of the legal system while only providing illusory protection from oppressive governance or legislation.

## II BACKGROUND

### A *International Human Rights*

The modern concept of human rights is similar in some respects to ideas that were held in many ancient societies.<sup>3</sup> It was also heavily influenced by developments in Western Europe during the Reformation and Enlightenment, and the English, American and French Revolutions.<sup>4</sup> However, human rights have, only recently, gained popularity. Thus, although human rights ideas formed part of the international campaigns to abolish slavery in the 19<sup>th</sup> century, they were not included in the *Covenant of the League of Nations* in 1919.<sup>5</sup> They only received international status with the adoption of the *Charter of the United Nations* in 1945. At that time, the atrocities that were committed in Nazi Germany during World War II, mostly under validly enacted laws, provided a stimulus for the international community to impose standards on governments and hold them accountable for the way that they treat their citizens.<sup>6</sup> Since then, the international

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<sup>2</sup> George Williams, *A Charter of Rights for Australia* (3rd ed, Sydney: University of NSW Press, 2007) 27-30; Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (North Sydney: Vintage, 2009) 67.

<sup>3</sup> Hilary Charlesworth, Andrew Byrnes and Gabrielle McKinnon, *Bills of Rights in Australia* (University of New South Wales Press, 2009) 2-7.

<sup>4</sup> Charlesworth, Byrnes and McKinnon, above n 3.

<sup>5</sup> Covenant of the League of Nations formed Part 1 of the *Treaty of Versailles*, opened for signature 28 June 1919, [1919] UKTS 4, [1920] ATS 1 (entered into force 10 January 1920); Charlesworth, Byrnes and McKinnon, above n 3, 8.

<sup>6</sup> Charlesworth, Byrnes and McKinnon, above n 3, 15-6.

community, through the United Nations, has produced treaties that set out civil and political rights, economic, social and cultural rights, and most recently, collective rights.<sup>7</sup> Treaties are legally binding on the states that sign and ratify them but in many states, including Australia, they do not form part of domestic law until incorporated into it through normal legislative processes.<sup>8</sup> Australia is a signatory to most human rights treaties and has sought to promote human rights in other countries, but has not systematically incorporated its treaty obligations into domestic law.<sup>9</sup>

### B *The History of the Bill of Rights Debate in Australia*

The drafters of the Australian Constitution, influenced by the Constitution of the United States, considered whether to include a bill of rights in it. Some, such as the Tasmanian Attorney-General, Andrew Inglis Clark, and Richard O'Connor, who became an early High Court judge, argued for its inclusion, but on the whole the framers believed that the common law, responsible government and parliamentary sovereignty were sufficient.<sup>10</sup> Indeed, Dawson J has observed that the framers 'saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process' preferring to trust Parliament to maintain individual freedoms.<sup>11</sup>

Since Federation, there have been several attempts to add a constitutional or statutory bill of rights to Australian law. In 1944, a proposal to amend the Constitution to include guarantees of freedom of speech and freedom of expression, and to extend freedom of religion, was rejected at a referendum.<sup>12</sup> In 1973, Senator Lionel Murphy introduced the Human Rights Bill 1973 (Cth) which would have incorporated the *International Covenant on Civil and Political Rights* (ICCPR) into domestic law, but the Bill was heavily opposed and lapsed with the prorogation of Parliament in 1974.<sup>13</sup> A decade later a weaker Bill that nevertheless would have implemented the ICCPR, the Australian Human Rights Bill 1985 (Cth), failed to pass the Senate and was withdrawn in November 1986.<sup>14</sup> Finally, in 1988, four proposals were put to a referendum including a proposal to insert a right to vote and a guarantee of 'one vote, one value', and a proposal to extend the right to trial by jury, the 'just terms' guarantee, and religious freedom guarantee to State and Territory laws.<sup>15</sup> All these proposals were resoundingly defeated.<sup>16</sup>

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<sup>7</sup> Ibid 17.

<sup>8</sup> Ibid 18-19.

<sup>9</sup> Ibid 20-1.

<sup>10</sup> Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18 *University of Queensland Law Journal* 249, 261; George Williams, *Parliamentary Library Research Paper 20: The Federal Parliament and the Protection of Human Rights* (11 May 1999) Law and Bills Digest Group <<http://www.aph.gov.au/library/pubs/RP/1998-99/99rp20.htm>>.

<sup>11</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 186 (Dawson J).

<sup>12</sup> Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 4<sup>th</sup> ed, 2006) 1449.

<sup>13</sup> Williams, above n 10.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

Meanwhile, jurisdictions throughout the common law world enacted bills of rights which partially or wholly incorporated United Nations treaties and catered for perceived domestic needs. The *Canadian Charter of Rights and Freedoms*<sup>17</sup> (*Canadian Charter*) was adopted in 1982 as a constitutional bill of rights, after initially being enacted as a statute. South Africa included a bill of rights in the constitution it adopted in 1996.<sup>18</sup> New Zealand enacted a statutory bill of rights in the form of the *New Zealand Bill of Rights Act 1990* (NZ) (*the NZ Act*) based mainly on the ICCPR. The United Kingdom then enacted a similar statutory bill of rights, the *Human Rights Act 1998* (UK) (*the UK Act*) based on the *European Convention on Human Rights 1950*, which largely mirrors the ICCPR. As a result, Australia is now the only Western democracy without a bill of rights.<sup>19</sup>

At the same time as these bills of rights were being enacted, most Australian States held inquiries into the advisability of adopting similar legislation. The Queensland Parliament's Legal, Constitutional and Administrative Review Committee and the NSW Parliament's Standing Committee on Law and Justice recommended against doing so in 1998 and 2001 respectively.<sup>20</sup> In WA, the Consultation Committee for a Proposed Human Rights Act recommended that a statutory bill of rights be adopted in 2007, but it has not yet occurred.<sup>21</sup> Inquiries in the ACT and Victoria<sup>22</sup> led to those States enacting the *Human Rights Act 2004* (ACT) (*the ACT Act*) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*the Victorian Act*).

In spite of the successive failures at achieving law reform of this type at a federal level, the idea continues to be supported by a considerable number of politicians, lawyers, academics and many in the community at large. In recent years advocates have supported a gradual transition, beginning with so-called core rights protected through a statute that can be amended in the normal fashion, before moving to constitutional entrenchment when community support grows, and fears abate.<sup>23</sup> Consistent with this, in 2008 the federal government launched the National Human Rights Consultation to take submissions from the community on the questions of: (1) which human rights should be protected and promoted; (2) whether those rights are sufficiently protected and promoted at present; and (3) how Australia could better protect and promote human rights.<sup>24</sup> A large number of submissions (35 014) were received and the overwhelming

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<sup>17</sup> *Constitution Act 1982* (Canada) enacted as Schedule B to the *Canada Act 1982* (UK).

<sup>18</sup> *Constitution of the Republic of South Africa 1996* (South Africa).

<sup>19</sup> Robertson, Geoffery, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Vintage, 2009) 43.

<sup>20</sup> Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *The Preservation and Enhancement of Individual's Rights and Freedoms in Queensland: Should Queensland Adopt a Bill of Rights?* (1998); Standing Committee on Law and Justice, Parliament of New South Wales, *A NSW Bill of Rights* (2001).

<sup>21</sup> Consultation Committee for a Proposed Human Rights Act, *A WA Human Rights Act* (2007).

<sup>22</sup> Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (2005).

<sup>23</sup> Williams, above n 10.

<sup>24</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009) 3-4.

majority were in favour of Australia adopting a statutory bill of rights.<sup>25</sup> The Committee noted, however, that ‘a substantial number’ of these ‘appeared to have been facilitated by campaigns run by lobby groups’.<sup>26</sup> The Committee recommended a number of measures to improve the protection of liberties in Australia, including, most contentiously, ‘that Australia adopt a federal Human Rights Act’.<sup>27</sup> In doing so, the Committee noted that ‘there is no community consensus on the matter, and there is strong disagreement in the parliament’.<sup>28</sup> Community reaction to the Report in the weeks following its release demonstrates the accuracy of this observation. Disputes immediately arose over how representative the submissions were.<sup>29</sup> Representatives of most major Christian denominations united against the proposal but one endorsed it.<sup>30</sup> The Law Council of Australia,<sup>31</sup> the Australian Human Rights Commission<sup>32</sup> and Amnesty International<sup>33</sup> supported it and politicians of all colours spoke varyingly for and against it.<sup>34</sup> The Government has not yet indicated how it will respond.<sup>35</sup>

### C Defining Human Rights

The term ‘human rights’ is widely used in a variety of legal and social contexts, and can signify more than one idea. Campbell identifies three broad ways that the term is understood. Firstly, there is a moral element to the concept of human rights, and an array of philosophical literature has been written in an attempt to identify a conceptual basis for these moral rights.<sup>36</sup> Secondly, some people understand human rights in an

<sup>25</sup> Of the 35 014 submissions received, 32 091 addressed the question of a bill of rights and 27 888 of those were in favour with only 4 203 opposed to it: National Human Rights Consultation Committee, above n 24, 5-6.

<sup>26</sup> National Human Rights Consultation Committee, above n 24, 6.

<sup>27</sup> National Human Rights Consultation Committee, above n 24, Recommendation 18, xxxiv.

<sup>28</sup> National Human Rights Consultation Committee, above n 24, 361.

<sup>29</sup> For example: James Madden, ‘Disputes Ahead Over Human Rights Charter’ *The Australian* (Sydney), 9 October 2009 <<http://www.theaustralian.news.com.au>>; Jim Wallace, ‘Rights Overkill isn’t Majority View’ *The Australian* (Sydney), 13 October 2009 <<http://www.theaustralian.news.com.au>>; Ed Coper, ‘Power to the Hi-Tech’ *The Australian* (Sydney), 14 October 2009 <<http://www.theaustralian.news.com.au>> .

<sup>30</sup> Nicola Berkovic, ‘Clergy Unite Over Human Rights Charter’ *The Australian* (Sydney), 23 October 2009 <<http://www.theaustralian.news.com.au>> .

<sup>31</sup> Jonathon Pearlman, ‘Call for Rights Act Sparks Fierce Debate’ *Sydney Morning Herald* (Sydney), 9 October 2009 <<http://www.smh.com.au>> .

<sup>32</sup> Australian Government, *Australian Human Rights Commission says Action Needed on Report Recommendations* (8 October 2009) the Gov Monitor: Public Sector News and Information <<http://thegovmonitor.com>>.

<sup>33</sup> Claire Mallinson, *Opinion: Human Rights Act* (16 October 2009) Amnesty International <<http://www.amnesty.org.au/news/comments/21890/>>.

<sup>34</sup> See for example: Paul Kelly and Chris Merrit, ‘Human Rights Charter a Recipe for Chaos as Frank Brennan Cites “Enormous Problems”’ *The Australian* (Sydney), 10 October 2009 <<http://www.theaustralian.news.com.au>>; Paul Kelly, ‘Human Rights Report Poisoned Chalice’ *The Australian* (Sydney), 10 October 2009 <<http://www.theaustralian.news.com.au>>.

<sup>35</sup> Australian Government, *National Human Rights Consultation Report* (30 September 2009) Australian Government: Attorney-General’s Department <<http://www.ag.gov.au>>.

<sup>36</sup> Tom Campbell, ‘Human Rights: The Shifting Boundaries’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 17.

intuitive way as a reaction to the wrongs they perceive in society.<sup>37</sup> Thirdly, there is the positivist approach that perceives a right as something granted by the law, so that only legal rights are truly human rights.<sup>38</sup> Confusion sometimes arises in the bill of rights debate when people speak of ‘human rights’ without making clear the sense in which they are using the term. All sides claim to be supportive of human rights in some sense, so it is important to be clear about what is in dispute and what is not. In this paper, the term ‘human rights’ is only used to refer to rights that are enforceable by law. When referring to ‘rights’ in a more general sense, or to moral rights that are not legally enforceable, the term, ‘liberties’ is used.

### III HUMAN RIGHTS IN AUSTRALIA

#### A *Rights in the Australian Constitution*

The Constitution contains some guarantees, expressed as limitations on government power. They are characterised as a shield and not a sword because when they are contravened the offending provision is struck down, but they cannot be used to force the legislature to act in any particular way.<sup>39</sup> This is different to the contemporary international conception of human rights, which includes not just immunities but also ‘positive claims of what society is deemed required to do for the individual’ such as, for example, to grant protection from torture, ensure freedom to assemble and provide for basic needs.<sup>40</sup>

Section 80 of the Constitution guarantees trial by jury for indictable Commonwealth offences. However, the High Court has repeatedly held that whether a particular offence is triable summarily or by indictment is a matter for Parliament to decide.<sup>41</sup> Consequently, the provision is said to, in effect, ‘offer no guarantee at all’.<sup>42</sup>

A limited freedom of religion is provided by s 116 of the Constitution.<sup>43</sup> This provision has been narrowly interpreted both in relation to the meaning of ‘free exercise of any religion’ and of ‘establishing any religion’. For example, it does not prevent a person from being legally obliged to perform an action that his or her religion forbids<sup>44</sup> and it does not prohibit government funding of church schools.<sup>45</sup> In addition, the freedom it grants is ‘subject to powers and restrictions of government essential to the preservation

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<sup>37</sup> Campbell, above n 36, 21-3.

<sup>38</sup> Ibid 24.

<sup>39</sup> George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999) 62.

<sup>40</sup> Louis Henkin, *The Age of Rights* (1990) excerpt in: Blackshield and Williams, above n 12.

<sup>41</sup> *R v Bernasconi* (1915) 19 CLR 629; *R v Archdall & Roskrige; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *Zarb v Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v Rankin* (1978) 141 CLR 182; *Kingswell v The Queen* (1985) 159 CLR 264.

<sup>42</sup> Blackshield and Williams, above n 12, 1196.

<sup>43</sup> Section 116 reads: ‘The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth’.

<sup>44</sup> *Krygger v Williams* (1912) 15 CLR 366.

<sup>45</sup> *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559.

of the community'.<sup>46</sup> In spite of this narrow interpretation, a referendum in 1988 which sought to extend the protection so that the States and Territories would also be prevented from inhibiting religious freedom, failed in all States.<sup>47</sup>

Section 117 of the Constitution provides a limited protection against discrimination on the basis of State residence.<sup>48</sup> A narrow construction of this provision was unanimously overruled in *Street v Queensland Bar Association*.<sup>49</sup> According to Mason CJ and Brennan J, and consistently with the High Court's order, s 117 confers personal immunity on an individual against impermissible discrimination but does not render the law invalid.<sup>50</sup> The right was also said to be subject to limitations or exceptions, but the range and rationale for them varied among the judges.<sup>51</sup>

Section 51(xxxi) provides that Parliament has power to make laws with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'. The other grants of power in s 51 are construed in such a way that they do not circumvent this limitation.<sup>52</sup> The High Court has interpreted the word 'property' broadly.<sup>53</sup> However, the acquisition must be 'for a Commonwealth purpose',<sup>54</sup> so some forms of acquisition fall outside the scope of the guarantee.<sup>55</sup> Furthermore, 'just terms' do not always require that compensation be paid, but only that the acquisition is made on terms that a legislature could reasonably regard as fair.<sup>56</sup>

Finally, the separation of judicial power provided for in Chapter III of the Constitution has been said to constitute 'general guarantee of due process'.<sup>57</sup> According to former Chief Justice of the High Court, Murray Gleeson, this is because vesting judicial power in the courts, together with the separation of powers and independence of the judiciary prevents Parliament and the executive from administering justice, which effectively assures due process.<sup>58</sup>

In addition to these express guarantees, the High Court held in *Australian Capital Television Pty Ltd v Commonwealth of Australia (No.2)*<sup>59</sup> and *Nationwide News Pty Ltd*

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<sup>46</sup> *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 [149].

<sup>47</sup> Blackshield and Williams, above n 12, 1217.

<sup>48</sup> Section 117 reads: 'A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.'

<sup>49</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461 ('Street').

<sup>50</sup> *Street* (1989) 168 CLR 461, 486, 502, 592.

<sup>51</sup> *Street* (1989) 168 CLR 461, 491 (Mason CJ), 512 (Brennan J), 528 (Deane J), 571 (Gaudron J), 583 (McHugh J).

<sup>52</sup> Blackshield and Williams, above n 12, 1274.

<sup>53</sup> See *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284; *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1, 349.

<sup>54</sup> Blackshield and Williams, above n 12, 1276.

<sup>55</sup> *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 160; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 184-9.

<sup>56</sup> *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495.

<sup>57</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580.

<sup>58</sup> Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 63.

<sup>59</sup> (1992) 177 CLR 106.

*v Wills*<sup>60</sup> that a guarantee of freedom of political communication was necessarily implied in ss 7 and 24 of the Constitution.<sup>61</sup> The Court found that in order for ‘real’ or ‘substantial’, as opposed to ‘illusory’ representative government to exist, as provided for by the Constitution, there must be freedom of political communication.<sup>62</sup> Thus, there is a constitutional right to freedom of political communication, which includes political discourse, and discussion of governmental and political matters and the performance of politicians.<sup>63</sup> It may also extend to discussion of local and state politics.<sup>64</sup> Like the other constitutional guarantees, it can only be used as a shield where pre-existing rights are threatened by legislation, and not as a sword to generate rights or freedoms not otherwise recognised at law.<sup>65</sup>

## B Human Rights in Australian Statute Law

In the absence of extensive constitutional rights, State and Commonwealth statutes directly provide some human rights, and establish processes, procedures and bodies that contribute to the realisation of others. Administrative law plays an important role in safeguarding people’s rights and interests in their dealings with government agencies.<sup>66</sup> Government decision-making can be reviewed by bodies such as the Administrative Appeals Tribunal, a range of specialist tribunals,<sup>67</sup> and the Commonwealth Ombudsman, as well as through judicial review.<sup>68</sup> Information rights are protected through the *Freedom of Information Act 1982* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth) which confers a right to receive written reasons for a decision, and whistleblower protection legislation.<sup>69</sup> In addition, the Administrative Review Council oversees the administrative review system and makes reform recommendations.<sup>70</sup>

The Australian Human Rights Commission was established pursuant to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). It conducts research and

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<sup>60</sup> (1992) 177 CLR 1.

<sup>61</sup> Aroney, above n 10, 255.

<sup>62</sup> Ibid 259.

<sup>63</sup> *Theophanus v Herald & Weekly Times* (1994) 182 CLR 104; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 142 (Mason CJ), 168-169 (Deane and Toohey JJ), 216 (Gaudron J).

<sup>64</sup> See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 75 (Deane and Toohey JJ).

<sup>65</sup> *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

<sup>66</sup> Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2005) 13; Julian Leaser, ‘Responding to Some Arguments in Favour of the Bill of Rights’ in Julian Leaser and Ryan Haddrick (eds), *Don’t Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzie’s Research Centre, 2009) 55; Williams, above n 10.

<sup>67</sup> Including the Migration Review Tribunal, Native Title Tribunal, Privacy Commission, Refugee Review Tribunal, Social Security Appeals Tribunal and Veterans Review Board.

<sup>68</sup> Creyke and McMillan, above n 66, 13; Leaser, above n 66, 55.

<sup>69</sup> Creyke and McMillan, above n 66, 13; Leaser, above n 66, 55. Whistleblower protections are found in a range of statutes, most notably: *Crimes Act 1914* (Cth), *Criminal Code Act 1995* (Cth), *Public Service Act 1999* (Cth), *Privacy Act 1988* (Cth) and *Freedom of Information Act 1982* (Cth). In 2009 the House of Representatives Legal and Constitutional Affairs Committee recommended strengthening whistleblower protections and the Government has announced it will act on the Report later this year.

<sup>70</sup> Creyke and McMillan, above n 66, 13.



education, hears discrimination and human rights complaints, examines practices of Commonwealth authorities and reports to Parliament on law reform issues.<sup>71</sup>

In addition, the Commonwealth Parliament has enacted legislation that prohibits discrimination on the basis of:

- age, in employment, education, accommodation and the provision of goods and services;<sup>72</sup>
- disability, in employment, education and access to premises, including indirect discrimination;<sup>73</sup>
- race, colour, descent, national or ethnic origin, including the prohibition of racial vilification;<sup>74</sup> and
- sex, marital status or pregnancy, in relation to employment and family responsibilities, including the prohibition of sexual harassment.<sup>75</sup>

The Commonwealth enacted this legislation through its external affairs power<sup>76</sup> to give effect to international human rights treaties that it had ratified.<sup>77</sup> The legislation overrode any inconsistent State laws,<sup>78</sup> and was therefore an effective means of protecting individuals from discrimination in the specified circumstances.<sup>79</sup> Complaints about discrimination arising under Commonwealth law are heard by the Australian Human Rights Commission.<sup>80</sup> Each State also has agencies that hear complaints arising under State anti-discrimination legislation.<sup>81</sup>

The *Privacy Act 1988* (Cth) establishes principles that govern how government agencies and private sector organisations should handle the collection, use, disclosure, accuracy, storage and accessing of personal information.<sup>82</sup> It grants individuals rights to:

- know how their personal information is being collected and how it will be used;
- ask for access to their records;
- stop receiving unwanted direct marketing material;

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<sup>71</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11; Williams, above n 10.

<sup>72</sup> *Age Discrimination Act 2004* (Cth).

<sup>73</sup> *Disability Discrimination Act 1992* (Cth).

<sup>74</sup> *Racial Discrimination Act 1975* (Cth).

<sup>75</sup> *Sex Discrimination Act 1984* (Cth).

<sup>76</sup> *Australian Constitution* s 51(xxix).

<sup>77</sup> This is a valid exercise of the external affairs power: *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth (Tropical Rainforests Case)* (1989) 167 CLR 232; *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

<sup>78</sup> Pursuant to *Australian Constitution* s 109.

<sup>79</sup> Leeser, above n 66, 56; Williams, above n 10.

<sup>80</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11.

<sup>81</sup> Including: ACT Human Rights Commission, Anti-Discrimination Board of New South Wales, Anti-Discrimination Commission of Queensland, Anti-Discrimination Commission Tasmania, Victorian Equal Opportunity and Human Rights Commission, Northern Territory Anti-Discrimination Commission, South Australian Equal Opportunity Commission and Western Australian Equal Opportunity Commission.

<sup>82</sup> *Privacy Act 1988* (Cth) ss 14, 16.

- correct inaccurate personal information; and
- ensure their information is only used for the purposes stipulated.<sup>83</sup>

The *Privacy Act 1988* (Cth) also established the Office of the Privacy Commissioner,<sup>84</sup> granting it powers to investigate breaches, undertake research, conduct education within organisations and the community,<sup>85</sup> and to make enforceable determinations.<sup>86</sup> Recently, the *Act* has been criticised as outdated and overly complex, and for providing inadequate protection for the information age. As part of this, the Australian Law Reform Commission conducted an inquiry into privacy laws, handing down its final report in 2008 with 295 proposed changes.<sup>87</sup> The Government has said it is considering its response.<sup>88</sup>

Finally, criminal procedure and evidence law confer certain rights on people who are suspected or accused of crimes. They include, for example: restrictions on the use of entrapment and controlled operations; laws relating to searches, seizures, surveillance, identification and warrants; requirements relating to arrests, bail, questioning and confessions; and provisions that supplement the common law concerning the conduct of committals, trials and appeals.<sup>89</sup>

In addition to these statutory protections, the common law protects human rights through its principles of statutory interpretation.<sup>90</sup> The basic principle is that Parliament does not intend to invade fundamental rights, freedoms and immunities and that unless the intention to do so is clearly conveyed in the legislation in ‘unmistakable and unambiguous language’, courts should not impute such an intention upon Parliament.<sup>91</sup> In this way, ‘Parliament must squarely confront what it is doing and accept the political costs’<sup>92</sup> and courts will seek, if possible, to shield the community from the risk that a potential meaning that offends individual rights has passed unnoticed into a statute.<sup>93</sup> Where meaning is ambiguous, courts may be guided in their interpretation by

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<sup>83</sup> *Privacy Act* s 14.

<sup>84</sup> *Privacy Act* s 19.

<sup>85</sup> *Privacy Act* s 27.

<sup>86</sup> *Privacy Act* s 52, Division 3.

<sup>87</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report/Discussion 108 (2008).

<sup>88</sup> Australian Government, *ALRC Privacy Report* (2008) Department of the Prime Minister and Cabinet <<http://www.pmc.gov.au/privacy/alrc.cfm>> at 7 October 2009.

<sup>89</sup> For Commonwealth matters see: *Criminal Code Act 1995* (Cth), *Crimes Act 1914* (Cth), *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) *Evidence Act 1995* (Cth). For WA see: *Criminal Code*, *Police Act 1892* (WA), *Misuse of Drugs Act 1981* (WA), *Criminal Procedure Act 2004* (WA), *Criminal Investigation Act 2006* (WA), *Evidence Act 1906* (WA).

<sup>90</sup> James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 12, 23.

<sup>91</sup> *Potter v Minahan* (1908) 7 CLR 277 at 304; *Coco v The Queen* (1994) 179 CLR 427, 437; Spigelman, above n 90, 25-6.

<sup>92</sup> *R v Secretary for Home Department; Ex parte Simms* [2000] 2 AC 115, 131 quoted with approval in: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ) and *Daniels Corp v ACCC* (2002) 213 CLR 543, 582 (Kirby J).

<sup>93</sup> Paul de Jersey, ‘A Reflection on a Bill of Rights’ in Julian Leaser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre, 2009) 11.

international human rights treaties<sup>94</sup> because ratification is considered to be a signal from the executive to the world at large, that it intends to act on the treaty.<sup>95</sup>

The general principle is reflected in presumptions that, in the absence of express words to the contrary, Parliament does not intend to:

- retrospectively change rights and obligations;<sup>96</sup>
- infringe personal liberty;<sup>97</sup>
- interfere with freedom of movement;<sup>98</sup>
- restrict access to courts;<sup>99</sup>
- remove the right against self-incrimination;<sup>100</sup>
- allow a court to extend the scope of a penal statute;<sup>101</sup>
- alter criminal law practices based on the principle of a fair trial;<sup>102</sup>
- remove the right to procedural fairness in administrative law;<sup>103</sup>
- interfere with previously granted property rights;<sup>104</sup>
- interfere with freedom of speech;<sup>105</sup> and
- interfere with equality of religion.<sup>106</sup>

In addition, according to NSW Chief Justice, James Spigelman, ‘the legislative proscription of discrimination on the internationally recognised list of grounds [ ] could well lead to a presumption that Parliament did not intend to legislate with such an effect’.<sup>107</sup> This demonstrates the way that common law presumptions evolve and are responsive to legislative activity, and thereby indirectly responsive to community expectations.

<sup>94</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42.

<sup>95</sup> *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288, 291; de Jersey, above n 93, 10.

<sup>96</sup> *Newell v The King* (1936) 55 CLR 707, 711; *Maxwell v Murphy* (1957) 96 CLR 261, 267; *Rodway v The Queen* (1990) 169 CLR 515, 518; *Esher v Commonwealth* (1992) 174 CLR 430, 440-1.

<sup>97</sup> *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.

<sup>98</sup> *Commonwealth v Progress Advertising & Press Agency Co Pty Ltd* (1910) 10 CLR 457, 464; *Potter v Minahan* (1908) 7 CLR 277, 305-6; *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206.

<sup>99</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492; *Magrath v Goldsborough Mort & Co Ltd* (1932) 47 CLR 121, 134.

<sup>100</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Hamilton v Oades* (1989) 166 CLR 486, 495; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129.

<sup>101</sup> *Krakouer v The Queen* (1998) 194 CLR 202, 223.

<sup>102</sup> *Bishop v Chung Bros* (1907) 4 CLR 1262, 1273-4; *Tassell v Hayes* (1987) 163 CLR 34, 41; *Environmental Protection Authority v Caltex Refinery Co Pty Ltd* (1993) 178 CLR 477.

<sup>103</sup> *Commissioner of Police v Tanos* (1958) 98 CLR 363 at 395-396; *Annetts v McCann* (1990) 170 CLR 596, 598; *Ainsworth v Criminal Justice Commission* (1992) 199 CLR 564, 575-6.

<sup>104</sup> *Clunies Ross v Commonwealth* (1984) 155 CLR 193, 199-200; *Commonwealth v Haseldell Ltd* (1918) 25 CLR 552, 563.

<sup>105</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 125-7, 130.

<sup>106</sup> *Canterbury Municipal Council v Muslim Alawy Society Ltd* (1985) 1 NSWLR 525, 544.

<sup>107</sup> Spigelman, above n 90, 29.

#### IV ARGUMENTS ABOUT THE EFFECTIVENESS OF HUMAN RIGHTS PROTECTIONS

##### A *Experience Shows That Liberties Are Not Sufficiently Protected in Australia*

The starting point for many proponents of a bill of rights is the claim that human rights protections in Australia are currently inadequate. To illustrate the inadequacy, advocates point to recent examples of individuals and classes of people whose rights would have been better protected, either in other countries, or under international treaties if Australia had fully implemented them.

##### 1 *The Liberties of Refugees*

Australia's policy of mandatory detention of asylum-seekers has been criticised both in Australia and overseas. Robertson writes, for example, that Australia's treatment of asylum seekers has 'disgusted the world'.<sup>108</sup>

In 1992 the Keating government introduced mandatory detention for asylum-seekers while their right to asylum under the *Refugee Convention*<sup>109</sup> was determined.<sup>110</sup> In 1999, the Howard government introduced temporary protection visas that meant that refugees would only be granted protection in Australia for three years at a time.<sup>111</sup> The Rudd government abolished temporary protection visas in 2008<sup>112</sup> but mandatory detention continues, in spite of the fact that it is not an offence to be in Australia without a visa, or to request asylum as a refugee.<sup>113</sup>

After inspecting Australia's immigration detention system, the United Nations Working Group on Arbitrary Detention reported that 'a system of mandatory, automatic, indiscriminate and indefinite detention without real access to court challenge is not practiced by any other country in the world'.<sup>114</sup> The United Nations Human Rights Committee (UNHRC) has found that Australia's detention of asylum-seekers who arrive by boat breaches arts 9(1) and 9(4) of the ICCPR.<sup>115</sup> According to Robertson, the UNHRC has upheld fourteen complaints against Australia, which is the third-largest number of any state.<sup>116</sup>

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<sup>108</sup> Robertson, above n 19, 15.

<sup>109</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, (entered into force 22 April 1954).

<sup>110</sup> Julian Burnside, 'Foreword' in Linda Briskman, Susie Latham and Chris Goddard, *Human Rights Overboard: Seeking Asylum in Australia* (Scribe, 2008) 11.

<sup>111</sup> Burnside, above n 110, 11.

<sup>112</sup> Chris Evans, *Budget 2008-2009: Rudd Government Scraps Temporary Protection Visas* (13 May 2008) Senator Chris Evans: Minister for Immigration and Citizenship <<http://www.minister.immi.gov.au/media/media-releases/2008/ce05-buget-08.htm>>.

<sup>113</sup> *Migration Act 1958* (Cth) s 196; Burnside, above n 110, 13.

<sup>114</sup> Working Group on Arbitrary Detention, no 85 quoted in: Linda Briskman, Susie Latham and Chris Goddard, *Human Rights Overboard: Seeking Asylum in Australia* (Scribe, 2008) 58.

<sup>115</sup> Frank Brennan, 'The Law and Politics of Human Rights in an Isolated Country without a Bill of Rights: 2003 Sir Ronald Wilson Lecture' (2003) 30 (5) *Brief* 9, 10.

<sup>116</sup> Robertson, above n 19, 39.

In 2001, the Howard government, with Opposition support, excised 4,000 islands from Australia's migration zone in order to prevent asylum-seekers who reached them from accessing Australia's judicial system or benefiting from Australia's obligations under the *Refugee Convention*. Those who arrived by boat and were intercepted by the Coastguard or Navy were sent to Christmas Island or Nauru. The detention centre at Nauru was closed by the Rudd government in February 2008, but the islands remain excised and Christmas Island continues to be used for detention.<sup>117</sup> Asylum-seekers who are taken there are deliberately and purposefully denied the rights that are afforded to those who reach the mainland.<sup>118</sup>

The Australian Council of Heads of Social Work conducted the People's Inquiry into Detention after the government refused to hold an official inquiry. It travelled around Australia, hearing almost 200 verbal accounts and receiving around 200 written submissions from a range of people with experience of immigration detention including former detainees, supporters, medical professionals, former Department of Immigration officials, detention centre employees, migration agents and lawyers.<sup>119</sup> The report of the Inquiry makes for harrowing reading. It tells of deaths occurring after boats sank while being intercepted by the Navy,<sup>120</sup> conditions in detention centres that forced people to steal food to feed their children,<sup>121</sup> assaults,<sup>122</sup> seriously inadequate physical<sup>123</sup> and mental<sup>124</sup> health care leading to long-term health problems, deaths, violence and widespread self-harm.<sup>125</sup> The effects of these conditions on children, towards which Australia has obligations not only under the *Refugee Convention*<sup>126</sup> but also the *Convention on the Rights of the Child*,<sup>127</sup> were devastating.<sup>128</sup> The Inquiry also heard evidence concerning ten people who died after their refugee claims were rejected and they were deported back to their home countries.<sup>129</sup>

The High Court has not found any constitutional basis on which to impugn Commonwealth laws providing for the mandatory detention of asylum-seekers in Australia.<sup>130</sup> This is even the case if conditions of detention are not humane,<sup>131</sup> and the

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<sup>117</sup> *Detention on Christmas Island* (2009) Amnesty International Australia  
<<http://www.amnesty.org.au/refugees/comments/20442/>> at 23 July 2009.

<sup>118</sup> *Detention on Christmas Island* above n 117.

<sup>119</sup> Briskman, Latham and Goddard, above n 114, 19.

<sup>120</sup> *Ibid* 23.

<sup>121</sup> *Ibid* 118-120.

<sup>122</sup> *Ibid* 171-184.

<sup>123</sup> *Ibid* 122-132.

<sup>124</sup> *Ibid* 132-157.

<sup>125</sup> *Ibid* 158-161, 167-171.

<sup>126</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, (entered into force 22 April 1954).

<sup>127</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990).

<sup>128</sup> Briskman, Latham and Goddard, above n 114, 164-215.

<sup>129</sup> *Ibid* 233-253.

<sup>130</sup> *Re Woolley & Anor; Ex parte Applicants M276/2003 (by their next friend GS)* (2004) 225 CLR 1.

<sup>131</sup> *Behrooz v Secretary Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.

length of detention is indefinite.<sup>132</sup> Yet while the High Court has repeatedly upheld provisions of the *Migration Act 1958* (Cth), successive governments have sought to restrict asylum-seekers' access to courts. For example, in 1992, fifteen asylum seekers who had been in detention for three years applied to the Federal Court to be released. Two days before their case was to be heard, the government introduced legislation taking away the Court's power to order their release.<sup>133</sup>

In spite of the high level of media and political interest that this issue generates, neither mainstream political party as indicated an intention to restore the rights of people who seek asylum in Australia, and the High Court has proved unable to do so. As a result, proponents of a bill of rights claim that current protections are inadequate.

## 2 The Liberties of Terrorism Suspects

Another example of legislation that is inconsistent with international human rights standards is Australia's anti-terrorism laws. These comprise a series of measures, the first of which were introduced by the federal government in 2002.<sup>134</sup> They were supplemented by the *Anti-Terrorism Act (No.2) 2005* (Cth) and similar State legislation.<sup>135</sup> The measures have been criticised because they 'directly and explicitly remove or interfere with a number of individual rights'.<sup>136</sup> The concern is that by enacting these laws the government has given away too many of the very liberties it is seeking to protect.

Some of the provisions that have attracted particular concern include: changes to the onus of proof,<sup>137</sup> the banning of organisations and the extension of the definition of 'terrorist organisation',<sup>138</sup> the revival of sedition laws,<sup>139</sup> the requirement for lawyers to obtain security clearances before representing clients,<sup>140</sup> restrictions on the right of suspects to consult lawyers,<sup>141</sup> the extension of inchoate liability to a variety of preparatory offences,<sup>142</sup> expanding the definition of a terrorist act to one that relies heavily on intention,<sup>143</sup> provision of different rules for trials involving security issues,<sup>144</sup>

<sup>132</sup> *Al-Kateb v Godwin and Others* (2004) 219 CLR 562.

<sup>133</sup> Briskman, Latham and Goddard, above n 114, 60.

<sup>134</sup> *Security Legislation Amendment (Terrorism) Act 2002* (Cth); *Suppression of the Financing of Terrorism Act 2002* (Cth).

<sup>135</sup> *Terrorism (Police Powers) Act 2002* (NSW); *Preventative Detention Act 2005* (Qld); *Terrorism (Preventative Detention) Act* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic); *Terrorism (Preventative Detention) Act 2006* (WA); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT).

<sup>136</sup> Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders Under Federal Law: The Case for a Bill of Rights' (2007) 31 *Monash University Law Review* 1072, 1072.

<sup>137</sup> Williams, above n 2, 27-30.

<sup>138</sup> *Criminal Code Act 1995* (Cth) s 102.1(1); Williams, above n 2, 27-30.

<sup>139</sup> *Criminal Code Act* s 80.2; Williams, above n 2, 27-30.

<sup>140</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 39,46; Wendy Lacey, 'Restoring the Rule of Law Through a National Bill of Rights' (2008) 84 *Precedent* 28, 28.

<sup>141</sup> *Criminal Code Act* s 105.37; Lacey, above n 140, 28.

<sup>142</sup> *Criminal Code Act* s 100.4; Fairall and Lacey, above n 136, 1075.

<sup>143</sup> *Criminal Code Act* s 100.1; Fairall and Lacey, above n 136, 1075.

<sup>144</sup> Fairall and Lacey, above n 136, 1075.

changes to discovery rules that erode a person's right to see the evidence against them,<sup>145</sup> and restrictions on the availability of bail.<sup>146</sup>

The two measures that have perhaps attracted the greatest criticisms are preventative detention orders (PDOs) and control orders. PDOs allow a person who is suspected of involvement with terrorism to be detained for up to 48 hours under a Commonwealth law or 14 days under a State law.<sup>147</sup> When an order is made, the detained person is not permitted to disclose that fact to others, or to disclose the period for which they have been detained, and if they do so, it is an offence for the person who receives the information, to pass it on.<sup>148</sup> Furthermore, proceedings in relation to a PDO, or to the treatment of a person in relation to a PDO, cannot be brought in a State court or the Administrative Appeals Tribunal while the Order is in force.<sup>149</sup> Fairall and Lacey describe PDOs as an 'anathema to liberal democracy' because they allow for the detention of individuals by executive order without there necessarily being an allegation of criminality.<sup>150</sup> They maintain that the government's claim that PDOs are necessary to prevent harm to the public represents a slippery slope if accepted, because most forms of criminal behaviour are harmful to the public.<sup>151</sup>

Control orders can be made where a court is satisfied, on the balance of probabilities, that making an Order would 'substantially assist in preventing a terrorist act', or that the subject 'has provided training to, or received training from, a listed terrorist organisation'.<sup>152</sup> They may be imposed for up to 12 months and may require a person to comply with a range of conditions such as staying at or away from a place, wearing a tracking device, not communicating with certain people and not using communications technology.<sup>153</sup>

The constitutionality of the Control Order provisions was challenged in *Thomas v Mowbray*<sup>154</sup> where the plaintiff argued that the power to restrain liberty on the basis of possible future conduct was an exercise of non-judicial power and therefore could not be made by a Chapter III court.<sup>155</sup> The majority held, however, that the relevant provisions were supported by the defence power and did not breach Chapter III of the

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<sup>145</sup> Ibid 1075.

<sup>146</sup> Ibid 1075.

<sup>147</sup> *Criminal Code Act* s 105.9; *Terrorism (Police Powers) Act 2002* (NSW) s 11(3)(a); *Preventative Detention Act 2005* (Qld) s 12(2); *Terrorism (Preventative Detention) Act* (SA) s 10(5)(b); *Terrorism (Preventative Detention) Act 2005* (Tas) s 9(2); *Terrorism (Community Protection) Act 2003* (Vic) s 13G(1); *Terrorism (Preventative Detention) Act 2006* (WA) s 3(3); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) s 8.

<sup>148</sup> *Criminal Code Act* ss 105.41(1), 105.41(6).

<sup>149</sup> *Criminal Code Act* ss 105.51.

<sup>150</sup> Fairall and Lacey, above n 136, 1075.

<sup>151</sup> Ibid 1075.

<sup>152</sup> *Criminal Code Act* s 104.4(1)(c).

<sup>153</sup> *Criminal Code Act* Division 4, s 104.5(3).

<sup>154</sup> (2007) 237 ALR 194

<sup>155</sup> *Australian Constitution*, Chapter III; *R v Kirby & Others; Ex parte Boilermakers' Society of Australia* (*Boilermakers' Case*) (1956) 94 CLR 254; *Thomas v Mowbray* (2007) 237 ALR 194, 204-5.

Constitution.<sup>156</sup> Fairall and Lacey claim that control orders cannot be reconciled with international human rights such as rights to personal liberty and security, freedom of movement, privacy, and freedom of assembly and association.<sup>157</sup> They further claim that in cases such as *Thomas v Mowbray* the High Court has relaxed the standard concerning what is deemed compatible with Chapter III, and in so doing is altering the nature of the separation of powers, which has historically been a ‘vital constitutional safeguard’.<sup>158</sup> Consequently, they maintain that the legislative and judicial arms are both contributing to the erosion of liberties in Australia.

### 3 *The Liberties of Indigenous Australians*

According to the *Bringing Them Home Report*, ‘between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970’ and ‘[i]n that time not one Indigenous family has escaped the effects of forcible removal’.<sup>159</sup> The vast majority of people who were removed as children have been unable to obtain redress through the courts, however in *Trevorrow v State of South Australia*,<sup>160</sup> the South Australian Supreme Court awarded damages to an Aboriginal man who was taken unlawfully from his parents when he was 13 months old. His mother had taken him to Adelaide Children’s Hospital with gastroenteritis, and when he recovered he was given to a white family. First the Hospital and then the Aborigines Protection Board actively prevented her from finding him. The Court heard that he had displayed signs of emotional distress including anxiety and depression throughout his childhood and into adulthood. He died less than year after the judgment, at the age of 51.<sup>161</sup>

Just as in the case of refugees and terrorism suspects, the Stolen Generations have found no assistance in the Constitution. In 1997 the High Court held that a law which enabled Aboriginal children to be forcibly removed from their communities was not unconstitutional.<sup>162</sup>

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<sup>156</sup> *Thomas v Mowbray* (2007) 237 ALR 194 at 203 (Gleeson CJ, 236 (Gummow, Crennan JJ), 316 (Hayne J), 352 (Callinan J), 371 (Heydon J).

<sup>157</sup> Fairall and Lacey, above n 136, 1087.

<sup>158</sup> *Ibid* 1087. Kirby J would appear to agree. In a strong dissent in *Thomas v Mowbray* (2007) 237 ALR 194, 293 he stated:

To allow judges to be involved in making such orders, and particularly in the one-sided procedure contemplated by Div 104, involves a serious and wholly exceptional departure from basic constitutional doctrine unchallenged during the entire history of the Commonwealth. It goes far beyond the burdens on the civil liberties of alleged communists enacted, but struck down by this court, in the Communist Party case. Unless this court calls a halt, as it did in that case, the damage to our constitutional arrangements could be profound.

<sup>159</sup> Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (April 1997), Chapter 2.

<sup>160</sup> *Trevorrow v State of South Australia (No.5)* (2007) 98 SASR 285.

<sup>161</sup> Julian Burnside, *On Privilege* (Melbourne University Press, 2009) 32.

<sup>162</sup> *Kruger v The Commonwealth* (1997) 190 CLR 1 cited in: Williams, above n 39, 61.



Today Indigenous Australians have higher imprisonment rates, lower life expectancy and higher suicide rates than the general population.<sup>163</sup> The Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse reported in 2007 that ‘poor health, alcohol and drug abuse, unemployment, gambling, pornography, poor education and housing, and a general loss of identity and control have contributed to violence and to sexual abuse’ in Aboriginal communities which is ‘serious, widespread and often unreported’.<sup>164</sup> In addition, Williams claims that mandatory sentencing in the Northern Territory discriminates against Indigenous people because it disproportionately affects them and leads to harsh sentences being imposed for minor offences.<sup>165</sup> Proponents maintain that all these inequalities and injustices could be relieved by a bill of rights.<sup>166</sup>

#### 4 *Problems Dealing with Government Departments and Agencies*

The Consultation Committee for a Proposed WA Human Rights Act reported that a large number of people believe government departments and agencies demonstrate a lack of respect for their rights and liberties.<sup>167</sup> Some of these complaints involved treatment during the delivery of services to, for example, family members of hospital patients, elderly people in nursing homes, families involved in the child protection system, land owners and people who had had land resumed, public service employees, ratepayers, mental health care consumers, and users of the criminal justice system.<sup>168</sup> Other people said that they had difficulty accessing services due to language difficulties, dyslexia or intellectual disability.<sup>169</sup> The Committee heard that Aboriginal Australians, disabled people and Muslims suffer discrimination from government and the broader community.<sup>170</sup> Poor availability of services, especially in regional areas, was also considered by many to prevent them from enjoying their rights. Of particular concern was the lack of mental health services, and impeded access to the justice system due to a lack of lawyers in country areas, and the practice of sentencing being carried out by Justices of the Peace rather than magistrates.<sup>171</sup> As previously mentioned, the Committee recommended that a statutory bill of rights be enacted in response to these concerns.<sup>172</sup>

### B *Critics’ Responses*

The claim that experience reveals inadequacies in Australia’s protection of liberties is disputed by most critics of a bill of rights. Some argue that a bill of rights is

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<sup>163</sup> Robertson, above n 19, 15.

<sup>164</sup> Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, NT, *Ampe Akelyernemane Meke Mekarle ‘Little Children are Sacred’* (2007) <[http://www.inquirysaac.nt.gov.au/report\\_summary.html](http://www.inquirysaac.nt.gov.au/report_summary.html)>

<sup>165</sup> Williams, above n 2, 20-21.

<sup>166</sup> Robertson, above n 19, 15; Williams, above n 2, 20-21.

<sup>167</sup> Consultation Committee for a Proposed Human Rights Act, above n 21.

<sup>168</sup> *Ibid* 23-26.

<sup>169</sup> *Ibid* 24-25.

<sup>170</sup> *Ibid* 24-5.

<sup>171</sup> *Ibid* 25-6.

<sup>172</sup> *Ibid* Recommendation 1.

unnecessary because there are no major problems of this type in Australia. For example, Moens concedes that if Parliament regularly and seriously ‘violated rights and freedoms’ through the laws it passed then a bill of rights ‘would presumably become necessary or justifiable’ but he asserts that in fact, ‘severe abuses of human rights by the legislature are few’.<sup>173</sup> There is obviously some validity to this argument inasmuch as the world’s most serious human rights abuses have not occurred in Australia. However, there is no clear line between a severe and a moderate abuse, or regular abuses as opposed to occasional abuses. Furthermore, the predicament of refugees and Indigenous Australians demonstrate that international human rights standards are not always met in Australia. It is no doubt little consolation for a person who happens to be Aboriginal, or an asylum seeker, for example, to know that the oppression they are suffering from, is not widespread.

Other critics appear to find it acceptable that liberties are imperfectly respected. For example, Anderson claims that cases such as Cornelia Rau’s and Vivian Alvarez’s<sup>174</sup> should not be taken to indicate a ‘structural flaw’ because a perfect system will never exist and isolated cases of administrative failure are inevitable.<sup>175</sup> The problems with Australia’s treatment of refugees extend far beyond these two cases, however, as the discussion in the previous section demonstrates. Furthermore, Burnside points out that it is far easier to believe that the liberties of our family and friends should be respected, than the liberties of those we fear, hate or simply do not relate to.<sup>176</sup> As a result, the claim that liberties are adequately respected may simply reveal the location of our blind spots.<sup>177</sup>

### 1 *Past Mistakes Are Being Remedied Through the Present System*

Other critics point out that some of the deficiencies identified by proponents have been rectified by democratic means, or via the common law. For example, Carr maintains that Mohamed Haneef, who was detained under anti-terrorism laws, was vindicated by courts in the common law tradition, and that the Coalition lost government partly because of its treatment of refugees.<sup>178</sup> Similarly, Leeser points out that the potentially indefinite detention of unlawful non-citizen, Al-Kateb, was ended by the government as a result of political pressure.<sup>179</sup> It might also be argued that the federal government is now making a concerted effort to improve conditions in remote Aboriginal communities, and reduce the life expectancy gap between black and white Australians as a result of political, and not legal, pressures.

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<sup>173</sup> Gabriel A Moens, ‘The Wrongs of a Constitutionally Entrenched Bill of Rights’ in MA Stephenson and Clive Turner (eds), *Australia: Republic or Monarch? Legal and Constitutional Issues* (University of Queensland Press, 1994) 247.

<sup>174</sup> Australian citizens who were detained in immigration detention centres and in the case of Alvarez, deported. After these cases came to light the government investigated and referred 248 cases of wrongful detention to the Ombudsman, according Briskman, Latham and Goddard, above n 114, 305.

<sup>175</sup> Alan Anderson, ‘The Rule of Lawyers’ (2005) 21 (4) *Policy* 34, 36.

<sup>176</sup> Burnside, above n 161, 25.

<sup>177</sup> *Ibid* 25-6.

<sup>178</sup> Bob Carr, ‘Bill of Rights is the Wrong Call’ *The Australian* (Sydney), 9 May 2009.

<sup>179</sup> Leeser, above n 66, 38.

However, according to Burnside, improvements in refugee policy, which have in any case, not alleviated all the concerns, came too late for many: 19 people have died in immigration detention centres in the past 10 years and many more have developed physical and mental illnesses from which they will never fully recover.<sup>180</sup> In addition, although Parliament has apologised to the Stolen Generations the government has refused to provide compensation. Therefore it appears that citing individual cases, such as Haneef's and Al-Kateb's, where the political system has ultimately brought about a resolution, does not answer the whole of the argument. Furthermore, proponents are justified in asking whether a bill of rights could have caused the government to respond sooner and how many lives could have been saved if it had.

## 2 *A Bill of Rights May Not Have Prevented the Identified Injustices*

Some critics acknowledge that international human rights standards are sometimes infringed in Australia, but argue that a statutory bill of rights would not prevent this from occurring. In a statutory model, the Parliament determines the provisions of the bill of rights, and also has the ability to determine that a given piece of legislation should operate notwithstanding its inconsistency with the bill of rights.<sup>181</sup> This means that where legislation that infringes rights is nevertheless popular, or at least not unpopular, with the electorate, the presence of the bill of rights has no effect on its passing.

Former Justice of the High Court, Michael McHugh has said that a statutory bill of rights such as the *ACT Act* would probably not have been sufficient to enable the High Court to find that the indefinite detention of Al-Kateb was unlawful.<sup>182</sup> The *ACT Act* provides that '[s]o far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights'.<sup>183</sup> According to McHugh, Al-Kateb's right to freedom from arbitrary detention would have been inconsistent with the purpose of the *Migration Act 1958* (Cth), which was to detain irregular entrants until they were deported or given a visa.<sup>184</sup> The immigration reforms of the last decade have been undertaken largely with public support, so this would have greatly limited the effect that a statutory bill of rights could have had on them.

In a similar way, Anderson argues that although Australia's terrorism legislation is 'legislative error' in the eyes of civil libertarians, it has the support of the majority of the community, so a statutory bill of rights would not have prevented it being passed.<sup>185</sup> The *ACT Act* prohibits arbitrary detention<sup>186</sup> and provides for prompt judicial review of detention,<sup>187</sup> subject 'only to such reasonable limits set by Territory laws that can be

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<sup>180</sup> Burnside, above n 110, 21.

<sup>181</sup> See for example *Human Rights Act 2004* (ACT) s 40B(2), Part 5; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31; *Human Rights Act 1998* (UK) s 19(1).

<sup>182</sup> Michael McHugh, 'A Human Rights Act, the Courts and the Constitution' (Speech delivered at the Human Rights Commission, Location, 5 March 2009) 30-3.

<sup>183</sup> *Human Rights Act 2004* (ACT) s 30.

<sup>184</sup> McHugh, above n 182, 30-3.

<sup>185</sup> Anderson, above n 175, 36.

<sup>186</sup> *Human Rights Act 2004* (ACT) s 18(1).

<sup>187</sup> *Human Rights Act 2004* (ACT) s 18(4)(a), (6).

demonstrably justified in a free and democratic society'.<sup>188</sup> In spite of this, Brennan writes that the terrorism legislation is only 'a little more protective of civil liberties' than the legislation of States that lack a bill of rights.<sup>189</sup> When the federal government sought the States' co-operation for uniform terrorism legislation, the ACT Human Rights and Discrimination Commissioner advised the Chief Minister that the proposed legislation was inconsistent with the *ACT Act* and that she was unable to assess the reasonableness of that inconsistency because she did not have access to national security briefings. The ACT Parliament went on to pass the *Terrorism (Extraordinary Powers) Act 2006* (ACT), in the same form as the other States, with the sole exception of precluding the preventative detention of people aged 16-18 years.<sup>190</sup> Brennan concedes that this variation may have been due to the influence of the *ACT Act*, but if so, it is a very minor effect given the extent of the inconsistency between the two Acts.<sup>191</sup>

Critics have also questioned the effectiveness of the *Victorian Act*. Leeser examined how the issues that were presented to the Victorian Human Rights Consultation<sup>192</sup> have been affected by the passage of the *Victorian Act*. He found that the *Victorian Act* addressed concerns about: retrospective criminal legislation; torture and cruel, inhuman or degrading treatment; freedom of speech; and humane treatment in detention.<sup>193</sup> In regards to this last issue, however, there is documented evidence that the standard is still being transgressed.<sup>194</sup> Of the other concerns put to the Committee, the gaps identified in discrimination and privacy laws remain, due process and family rights remain unprotected, and procedures concerning the presence of male officers during female prisoners' medical appointments have not changed.<sup>195</sup> Several other concerns were dealt with by legal and regulatory changes prior to the enactment of the *Victorian Act*, including changes to regulations governing searches of female prisoners, and to the accessibility of Electoral Commission services for people with disabilities and homeless people.<sup>196</sup> Overall, Leeser maintains that the *Victorian Act* has so far, not made a discernible difference to most of the problems the Committee identified.<sup>197</sup>

The argument that a bill of rights will not prevent governments from restricting liberties is less relevant to an entrenched bill of rights. Although the Constitution can be amended with public support, Australians are notoriously reluctant to authorise changes. A constitutional bill of rights may, therefore, have prevented successive governments from introducing mandatory detention for asylum seekers, even if the community was generally supportive of mandatory detention. This cannot be stated with certainty however, because constitutional provisions require judicial interpretation, and the judiciary is not immune to changes in cultural attitudes and beliefs. Historically, judges

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<sup>188</sup> *Human Rights Act 2004* (ACT) s 28.

<sup>189</sup> Frank Brennan, *Getting the Balance Right After the 2020 Summit* (26 May 2008) Eureka Street <<http://www.eurekastreet.com.au/article.aspx?aeid=7284>>.

<sup>190</sup> Brennan, above n 189.

<sup>191</sup> Brennan, above n 189.

<sup>192</sup> See Human Rights Consultation Committee, above n 22.

<sup>193</sup> Leeser, above n 66, 57-8.

<sup>194</sup> *Ibid* 58.

<sup>195</sup> *Ibid* 58-9.

<sup>196</sup> *Ibid* 58-60.

<sup>197</sup> *Ibid* 32.

in countries with constitutional bills of rights have sometimes interpreted them in a way that allowed the oppression of minorities, when the dominant culture was supportive of that oppression.<sup>198</sup>

### C *The Political and Legal Systems Are Capable of Protecting Liberties*

Critics of a bill of rights maintain that Australia's current political and constitutional system is capable of protecting liberties.

#### 1 *Australia Has a Unique Historical and Political Context*

Although Australia shares many characteristics with other Western and common law countries, critics of a bill of rights point out that there is much about Australia's socio-legal environment that is unique. For example, rights were entrenched in the constitutions of the United States, France and South Africa following political upheaval which required the restoration of trust and the rule of law.<sup>199</sup> A bill of rights was desirable for Hong Kong because it is a relatively recently formed democracy where the risk of judges abusing their power is of less concern than fear of the executive will.<sup>200</sup> Meanwhile, the *UK Act* arose, in part, from a desire that the remedies citizens could obtain from British courts would be as adequate as those they could receive from the European Human Rights Commission.<sup>201</sup> Australia, on the other hand, is not linked to international regimes in the way that the United Kingdom is linked to the European Union, and it has a history and tradition of stable, democratic governance and adherence to the rule of law, so the concerns that applied to the United States, South Africa and Hong Kong when their bills of rights were adopted, are not relevant here.

#### 2 *Australia's Constitutional System Contains Checks and Balances*

Australia's Constitution does not guarantee a wide array of personal rights, but critics point out that Australian constitutional law does provide important checks on executive and legislative power. As in other common law countries, the Australian Constitution and common law are understood to be the source of the state's power.<sup>202</sup> This means that constitutional guarantees restrict the Commonwealth's power, rather than being subject to it.<sup>203</sup> This is a fundamental difference between constitutional rights and international human rights.<sup>204</sup> The latter are frequently expressed as being subject to limits imposed by the law of State parties.<sup>205</sup> For example, in the ICCPR the 'inherent

<sup>198</sup> James Allan, 'A Defence of the Status Quo' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 183.

<sup>199</sup> John Hatzistergos, 'A Charter of Rights or a Charter of Wrongs?' (Speech delivered at the Sydney Institute, Parliament House Theatre, 10 April 2008).

<sup>200</sup> Allan, above n 198, 176.

<sup>201</sup> Hatzistergos, above n 199, 123-4.

<sup>202</sup> Zimmermann, Augusto, 'Eight Reasons Why Australia Should Not Have a Federal Charter of Rights' (2008/09) 79 *National Observer* 34, 35-6.

<sup>203</sup> *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 cited in: Moens, above n 173, 252.

<sup>204</sup> Moens, above n 173, 253.

<sup>205</sup> *Ibid* 253.

right to life', the 'right to liberty and security of the person', the 'right to liberty of movement', 'freedom to manifest one's religion or beliefs', the 'right to freedom of expression', the 'right of peaceful assembly', and the 'right to freedom of association' are all subject to the domestic law of State parties.<sup>206</sup> The primacy of constitutional law in Australia, on the other hand, means that the checks and balances established by the Constitution are powerful.

The federal system established by the Constitution is, in theory, one such check.<sup>207</sup> By restricting the legislative powers of the federal government and submitting oversight of the division of powers to the High Court, the Constitution reduces the capacity of either level of government to exercise power arbitrarily.<sup>208</sup> However, this check is now limited due to the extent to which the High Court has allowed the Commonwealth to accumulate legislative power at the expense of the States. The High Court's method of characterising the s 51 heads of powers and its reluctance to find mutual exclusiveness in them has destroyed the States' financial independence and aggregated financial and political power in the federal government.<sup>209</sup> In addition, under the external affairs power<sup>210</sup> the Commonwealth can legislate in any area in which it has ratified an international treaty, regardless of whether it concerns a matter that falls within s 51 or not.<sup>211</sup> This has given the Commonwealth sole legislative power over increasingly large areas.<sup>212</sup> As a result, the argument that federalism limits arbitrary government is no longer as strong as it once was.

Another relevant feature of Australia's constitutional system is responsible government. This requires that ministers be Members of Parliament and therefore be accountable to Parliament, and ultimately to the electorate.<sup>213</sup> Sir Owen Dixon called responsible government the 'ultimate guarantee of justice and individual rights',<sup>214</sup> and the framers of the Constitution believed that, together with the common law, it was sufficient to guarantee individual liberty.<sup>215</sup> Some modern critics of bills of rights maintain that this is still the case today.<sup>216</sup>

It is widely recognised, however, that responsible government now operates in a diluted form. There are two reasons for this, which are relevant to the bill of rights debate. Firstly, the chain of accountability from government departments to Parliament, via ministers, is questionable because departments are now vast bureaucracies employing

<sup>206</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, (entered into force 23 March 1976) arts 6,9,12,18,19,21, 22.

<sup>207</sup> This is acknowledged by proponents. See for example: Williams, above n 39, 52.

<sup>208</sup> Allan, above n 198, 180; Moens, above n 173, 248.

<sup>209</sup> Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassell, 1967) 3; Aroney, above n 10, 252.

<sup>210</sup> *Australian Constitution* s 51(xxix).

<sup>211</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1; Sir Harry Gibbs, 'Decline of Federalism' (1994) 18 *University of Queensland Law Journal* 1, 5.

<sup>212</sup> Gibbs, above n 211, 5.

<sup>213</sup> Blackshield and Williams, above n 12, 563.

<sup>214</sup> Sir Owen Dixon in speech to American Bar Association, 'Jesting Pilate' in August 1942, cited in: Menzies, above n 209, 220.

<sup>215</sup> Williams, above n 10.

<sup>216</sup> Moens, above n 173, 248.

many thousands of people, for whose actions a minister cannot be responsible in any meaningful way.<sup>217</sup> There are also a growing number of statutory corporations that carry out various public functions and are not under the control of ministers.<sup>218</sup> Secondly, the House of Representatives, and sometimes the Senate as well, is so completely controlled by the party that forms the Executive that Parliament is increasingly seen as the agent of the Executive, rather than a check on it.<sup>219</sup> As a result, ministers now rarely resign when called upon to do so by the Parliament, and it is no longer feasible for Parliament to dismiss the Executive.<sup>220</sup> As a result, the public is increasingly forced to trust the judgment and processes of the party room, rather than Parliament.<sup>221</sup> Responsible government is, in reality, far from the limiting force that the Constitutional framers believed it would be.

Allan identifies the strict requirements that must be met before the Constitution can be altered, as another check on government.<sup>222</sup> Section 128 of the Constitution ensures that a proposal must pass through one or both Houses of Parliament and then be put to electors in a referendum, where it must achieve the assent of the majority of voters in the majority of States, as well as of the overall majority. Since Federation, only 8 out of 44 proposals that have been put to the Australian people have been passed.<sup>223</sup> Allan claims that the high hurdle is a valuable protection and a significant difference between Australia on the one hand and the United States and Canada on the other.<sup>224</sup>

While it is certainly true that the Constitution is hard to change, the value of that is limited because, as discussed earlier, the Constitution contains very few explicit guarantees of liberties. Highly oppressive laws could therefore, be passed by Parliament without any constitutional change. The value in the strict requirements for constitutional alteration would therefore appear to be largely limited to extreme situations, such as for example, where a government sought to change the structure or system of government.

### 3 *Australia's Bicameral System Is a Protection against Arbitrary Governance*

The single transferable vote system used to elect candidates to the Senate means that it is unusual for the government to also hold a majority in the Senate. This can be beneficial because it makes the passage of bills more difficult and strengthens the control of the legislature over the executive.<sup>225</sup> For Allan, it is therefore an important means of limiting executive power and a safeguard against arbitrary governance. Brennan points out that the presence of minor parties in the Senate also helps to protect

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<sup>217</sup> Blackshield and Williams, above n 12; Geoffery Robertson, *Freedom, the Individual and the Law* (Penguin, 6th ed, 1989) 388.

<sup>218</sup> JR Archer, 'The Theory of Responsible Government in Australia' in Alastair Davidson and Roger D Spegele (eds), *Rights, Justice and Democracy in Australia* (Longman Cheshire, 1991) 228.

<sup>219</sup> Blackshield and Williams above n 12, 564; John Toohey, 'A Government of Laws and Not of Men?' (1993) 4 *Public Law Review* 158, 163; Brennan, above n 189.

<sup>220</sup> Blackshield and Williams above n 12, 564; Archer, above n 218, 226.

<sup>221</sup> Brennan, above n 189.

<sup>222</sup> Allan, above n 198, 180.

<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.*

<sup>225</sup> *Ibid* 178.

minorities from the will of the majority, because the ‘political niche’ of minor parties is often linked to individual and minority rights.<sup>226</sup> Furthermore, the bicameral system itself plays a part in diffusing political power and maximising opportunities for democratic input.<sup>227</sup>

#### D *Australia’s Political and Legal Systems Are Flawed or Inadequate*

In reply to the above arguments, proponents of a bill of rights claim that the reason that international human rights have been able to be infringed in Australia is that its constitutional and legal arrangements are inadequate.

##### 1 *Immunities Do Not Reach Far Enough*

Firstly, as discussed earlier, Australia’s constitutional guarantees place limits on what the government may do, but do not require it to act or to refrain from inaction.<sup>228</sup> For some advocates this is insufficient, particularly because many economic, social and cultural rights in international law require positive interventions by government in order for them to be realised.<sup>229</sup>

##### 2 *International Human Rights Treaties Are Not Widely Implemented*

Although Australia has ratified most of the major United Nations human rights treaties and a number of the optional protocols, successive governments have failed to systematically implement the treaties they have signed.<sup>230</sup> Some proponents claim that a bill of rights would be beneficial because it would implement the remainder of Australia’s treaty obligations.<sup>231</sup>

For critics, however, implementing human rights treaties on a mass-scale through a bill of rights would not be a positive development. The international human rights system seeks to hold governments accountable to external, internationally agreed-upon standards.<sup>232</sup> Some critics have argued that rather than looking to external standards, Australia’s law should be focussed on its own unique circumstances and needs.<sup>233</sup> In 2000 and 2009 the UNHRC recommended that Australia adopt a more ‘comprehensive legal framework for the protection of Covenant rights at the Federal level’, including provisions for remedies to be awarded for breaches and training programs for the judiciary.<sup>234</sup> Shearer claims that the UNHRC’s desire for Australian courts to submit to its own authority has caused it to ignore Australia’s needs and circumstances in favour

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<sup>226</sup> Brennan, above n 189.

<sup>227</sup> Hatzistergos, above n 199.

<sup>228</sup> Williams, above n 39, 64.

<sup>229</sup> *Ibid* 64.

<sup>230</sup> Charlesworth, Byrnes and McKinnon, above n 3, 20-21.

<sup>231</sup> Fairall and Lacey, above n 136, 1094; Williams, above n 10.

<sup>232</sup> Charlesworth, Byrnes and McKinnon, above n 3, 15-6.

<sup>233</sup> Ivan Shearer, ‘The Australian Bill of Rights Debate: the International Law Dimension’ (Paper presented at The Samuel Griffith Society: Twenty-first Conference, North Adelaide, 28 August 2009).

<sup>234</sup> Review of Australia’s Fifth Periodic Report cited in: Shearer, above n 233.



of a standardised approach, namely a bill of rights.<sup>235</sup> Thus Shearer reminds proponents that a bill of rights is not the only means by which international treaties can be implemented.

### 3 *There Are Weaknesses in Statute and Common Law*

Proponents claim that the common law cannot securely protect rights because all common law principles and presumptions can be overridden by Parliament. Some scholars claim that there is a convention based on constitutionalism and the rule of law that Parliament ‘does not use its unlimited sovereign power of legislation in an oppressive or tyrannical way’.<sup>236</sup> However, there is still a great deal of legislative freedom that falls short of what may be characterised as tyrannical but is nevertheless oppressive enough that it would be prevented by an entrenched bill of rights.<sup>237</sup>

Furthermore, even when the common law is not overridden by legislation, it may be less supportive of human rights than specific statutory protections are. Robertson writes that one reason that the *UK Act* was enacted with cross-party support was that the United Kingdom was embarrassed by cases in the European Human Rights Commission that revealed gaps in United Kingdom statute and common law, as well as by Privy Council decisions for Commonwealth nations who had bills of rights, which showed that people in those former colonies had more rights than people in the United Kingdom.<sup>238</sup>

### 4 *Constitutional and Statutory Rights Are Not Universal*

An addition problem identified by proponents is that neither the constitutional guarantees, nor the rights provided by statutes, apply universally to residents of Australia. Some constitutional rights do not extend to those in the Territories, including the guarantee of a trial by jury and possibly the guarantee of religious freedom.<sup>239</sup> In addition, non-citizens have very limited protection under the Constitution, and this factor has been relevant to the High Court in its decisions to uphold legislation allowing for the detention of asylum seekers.<sup>240</sup> Thirdly, the Constitution does not protect people from the actions of other individuals or corporations.<sup>241</sup> Gaps and inconsistencies also exist in legislation, with different jurisdictions providing different levels of protection in different areas. Even anti-discrimination legislation, which is widely adopted and endorsed, does not prohibit all forms of discrimination. For example, it does not deal with systemic discrimination and there are exceptions concerning the grounds upon which race or sex discrimination can be based.<sup>242</sup>

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<sup>235</sup> Shearer, above n 233.

<sup>236</sup> Geoffery Marshall, *Constitutional Conventions* (Clarendon, 1984) 9 cited in: Toohey, above n 219, 161.

<sup>237</sup> Toohey, above n 219, 163.

<sup>238</sup> Robertson, above n 19, 123-5.

<sup>239</sup> Williams, above n 39, 61.

<sup>240</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 cited in: Williams, above n 39, 61.

<sup>241</sup> Williams, above n 39, 61.

<sup>242</sup> Williams, above n 10.

## 5 *Guarantees without Remedies Are Insufficient*

Robertson points out that, legally speaking, a ‘right’ that cannot be enforced is not really a right.<sup>243</sup> Enforcement requires laws that empower courts to provide remedies and injunctions.<sup>244</sup> An immunity and an enforceable right may both produce the same environment when they are respected, but when a breach occurs, the results are very different because no remedy flows from the breach of an immunity.<sup>245</sup> Thus, the High Court has the power to declare offending legislation *void ab initio*, and where actions conducted under the unconstitutional law are also tortious or otherwise contrary to law, damages may be obtained in common law, but for the breach of constitutional immunity, there is no remedy.<sup>246</sup> Proponents find this unsatisfactory because obtaining redress through tort or contract law is frequently complicated and difficult, sometimes requiring a person to undertake more than one action.<sup>247</sup> At other times there may not be a relevant common law action and the person will have no redress.<sup>248</sup>

## 6 *Dominant Methods of Constitutional Interpretation Are Not Conducive to the Fostering of Liberties*

Some scholars have criticised the High Court’s methods of constitutional interpretation, claiming that it has contributed to the erosion of human rights in Australia, and therefore to the need for a bill of rights. According to Lacey, the Court has ‘treat[ed] the text of the Constitution as the foundation of the rule of law in Australia, rather than the supreme manifestation of the rule of law that rests on a broader, but less explicit, foundation’.<sup>249</sup> This has led to it to construe Commonwealth’s powers widely, and governments have taken advantage of that and used their powers to their fullest extent, legislating in a way that has eroded rights.<sup>250</sup> When legislation is challenged, the majority of the High Court has compared it only to the Constitutional text, which for Lacey and Fairall has undermined the assumptions of Chapter III and the rule of law upon which the Constitution rests.<sup>251</sup>

There is no indication that the High Court is likely to change its approach in the near future, however. Furthermore, the approach suggested by Lacey and Fairall would be strongly opposed by critics of a bill of rights who are concerned with upholding democracy, and are reluctant to hand more law-making power to the judiciary.

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<sup>243</sup> Robertson, above n 19, 41-2.

<sup>244</sup> Ibid 42.

<sup>245</sup> Williams, above n 2, 65.

<sup>246</sup> *James v Commonwealth* (1939) 62 CLR 339, 362 re-affirmed in: *Kruger v Commonwealth* (1997) 146 ALR 126; Williams, above n 39, 65.

<sup>247</sup> Williams, above n 39, 66.

<sup>248</sup> Ibid.

<sup>249</sup> Lacey, above n 140, 29.

<sup>250</sup> Ibid 29-30.

<sup>251</sup> Ibid 30; Fairall and Lacey, above n 136, 1094.

## V ARGUMENTS ABOUT THE IMPACT OF A BILL OF RIGHTS ON DEMOCRACY

Critics and most proponents of a bill of rights agree that the enactment of a bill of rights would be likely to have implications for the nature of democracy in Australia. They disagree, however, on whether those implications would be beneficial or harmful.

### A *Bills of Rights Require a High Degree of Judicial Interpretation*

Typically, bills of rights are framed by way of broad principles rather than precisely formulated provisions, with exceptions, and exceptions to those exceptions, as is the case with other legislation.<sup>252</sup> This is necessary in order for their provisions to cater for the range of situations to which they are applied, however it also means that they are vague and open to various interpretations.<sup>253</sup> It inevitably falls to judges to interpret them and determine their application to particular situations. Controversy arises because although virtually everyone agrees that the principles contained in bills of rights are good principles, there is far less agreement over how they should be applied, and determining their application often requires political and ethical judgments to be made.<sup>254</sup>

Some proponents have responded by pointing out that the common law and some statutes are also written in general terms and that, in such cases, judges narrow the language in a way that is appropriate to the circumstances before them.<sup>255</sup> In doing so, judges are restrained by the prospects of appeal and the need to publicise their reasoning, which ensures that their work is highly scrutinised.<sup>256</sup> In the case of a statutory bill of rights, it is unclear how much room there would be for appeal. The National Human Rights Consultation Report recommended that only the High Court be given jurisdiction to issue declarations of incompatibility.<sup>257</sup> It did not address the question of which court would have jurisdiction for actions arising from breaches. If the Federal Court was given jurisdiction, appeal could be made to the Full Federal Court and the High Court with leave. Given the status that a statutory bill of rights would have, however, it is also possible that only the High Court would have jurisdiction to interpret it. From the High Court, there would, of course, be no further appeal, and the High Court does not readily overturn its own decisions.<sup>258</sup> Judgments would certainly be subjected to scrutiny, particularly when controversial issues were involved, and at times there would be a strong belief within the community, legislature or legal profession that

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<sup>252</sup> David Bennett, 'Principles and Exceptions: Problems for Bills of Rights' in Julian Leaser and Ryan Haddrick (ed), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre, 2009) 120.

<sup>253</sup> Moens, above n 173, 234.

<sup>254</sup> James Allan, 'Bills of Rights as Centralising Instruments' (2006) 27 *Adelaide Law Review* 183, 183; James Allan, 'Oh That I Were Made Judge in the Land' (2002) 30 *Federal Law Review* 561, 573; Zimmermann, above n 202, 37.

<sup>255</sup> Robertson, above n 19, 174.

<sup>256</sup> *Ibid* 175.

<sup>257</sup> National Human Rights Consultation Committee, above n 24, Recommendation 29.

<sup>258</sup> *Queensland v Commonwealth (Territory Representation Case No 2)* (1977) 139 CLR 585, 599.

a particular interpretation was unfortunate.<sup>259</sup> However, if the prospects for appeal were limited, it is unclear how much of a restraint scrutiny alone would provide.

### B *Parliament is the Proper Forum for Political Decisions*

Experience overseas has shown that it is the politically and ethically contentious provisions in bills of rights that most frequently come before courts for interpretation.<sup>260</sup> Typically, the court itself cannot agree on these matters and they are decided by the majority of a divided bench.<sup>261</sup> For some critics, the fact that judges are not directly responsible to the electorate suggests that they are not the best people to be making these contentious ethical judgments for the nation. For example, Carr maintains that in a democracy only a directly-elected body is qualified to make political decisions.<sup>262</sup>

This argument is less strong when applied to an entrenched bill of rights because such a text could only be adopted if the majority of people in Australia supported it. It would therefore represent the will of the people and when invoked, it would be mainly the will of the legislature that was being frustrated.<sup>263</sup> However, an entrenched bill would still require significant judicial interpretation and there is no guarantee that courts would interpret it consistently with popular opinion. Given that judges have no way to reliably assess the community's values or will, their judgments inevitably rely to a large degree on their own values.<sup>264</sup> In any case, proponents, in Australia, are no longer openly supporting a constitutional model. A statutory bill of rights, enacted without a referendum, would more directly reflect the government's will than the people's, and would still give the judiciary greater responsibility for making political and ethical decisions than they currently have.

In addition to concerns about representation, some critics point out that the legislature and judiciary are designed for and suited to different activities. Courts are limited by the facts, issues and arguments in the matters that come before them and cannot take into account as many factors as Parliament can.<sup>265</sup> They are designed to resolve private conflicts<sup>266</sup> and to use reasoned decision-making.<sup>267</sup> On the other hand, Parliament is designed and equipped for consultation, discussion and compromise.<sup>268</sup> Interpreting a bill of rights requires the interests of different individuals and sections of society to be balanced against each other because rights aren't absolute, and they sometimes conflict

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<sup>259</sup> Hatzistergos, above n 199.

<sup>260</sup> James Allan, 'Siren Songs and Myths in the Bill of Rights Debate' (Senate Occasional Lecture, 4 April 2008) 3; Zimmermann, above n 202, 39.

<sup>261</sup> Allan, above n 260, 3.

<sup>262</sup> Bob Carr, 'The Rights Trap: How a Bill of Rights Could Undermine Freedom' (2001) 17(2) *Policy* 19, 19.

<sup>263</sup> Toohey, above n 219, 172.

<sup>264</sup> Harry Gibbs, *Chapter 7: Does Australia Need a Bill of Rights?* (1996) Samuel Griffiths Society <<http://www.samuelgriffith.org.au/papers/html/volume6/v6chap7.htm>>.

<sup>265</sup> Carr, above n 262, 19.

<sup>266</sup> Hatzistergos, above n 199.

<sup>267</sup> Sir Anthony Mason, 'A Bill of Rights for Australia?' (1989) 5 *Australian Bar Review* 79, 83.

<sup>268</sup> Hatzistergos, above n 199; Mason, above n 267, 83.

with each other.<sup>269</sup> Thus critics argue that the large-scale allocation of rights and responsibilities to individuals and groups should be done by the legislature and not the courts.

### C Bills of Rights Encourage Judicial Activism

The blurring of lines between the political and legal spheres is seen by some writers as part of a wider movement towards using the law to achieve social goals. Gava writes that at the time of the United States Constitution being drafted, the law was seen as a check on government and individual behaviour, but now it is increasingly seen as an instrument through which to achieve political, economic and social goals.<sup>270</sup> Judges are not immune to this trend, and therefore Gava claims they are now more inclined to judicial activism than in previous times.<sup>271</sup> According to Moens, bills of rights such as the *Canadian Charter*, that provide that rights are subject to ‘such reasonable limits as can be demonstrably justified in a free and democratic society’ expressly sanction judicial activism because there is no legal meaning that can be given to such a clause, only a personal assessment of what those values might be.<sup>272</sup> This has been borne out in New Zealand where a similar provision in the *NZ Act*<sup>273</sup> has been held to require the Court of Appeal to weigh the value to society of the particular right in question against the value to society of the legislation’s objective.<sup>274</sup> Judicial activism has been said to exist in the eye of the beholder.<sup>275</sup> However, Moens’ insight suggests that the form in which a law is drafted can make it harder for judges to escape the charge of activism, even when their desire is to avoid it.

As well as this, bills of rights are often interpreted in light of contemporary values, using a ‘living tree’ approach.<sup>276</sup> According to Brennan, the use of a ‘living tree’ approach in Canada has shifted power from the legislature to the judiciary.<sup>277</sup> As an example, he cites the clause, ‘in accordance with the principles of fundamental justice’, in s 7 of the *Canadian Charter*. It was inserted in order to afford individuals natural justice, while avoiding United States-style substantive due process, but its meaning has already been extended a long way towards just that end.<sup>278</sup> Consequently, Brennan

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<sup>269</sup> Anderson, above n 175, 35-6.

<sup>270</sup> John Gava, ‘We Can’t Trust Judges Not to Impose Their Own Ideology’ *The Australian* (Sydney) 29 December 2008.

<sup>271</sup> Gava, above n 270.

<sup>272</sup> Moens, above n 173, 236.

<sup>273</sup> *Human Rights Act 1993* (NZ) s 5 reads: ‘Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.

<sup>274</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-7.

<sup>275</sup> WW Justice, ‘Two Faces of Judicial Activism’ in DM O’Brien (ed) *Judges on Judging: Views from the Bench* (Chatham House, 1997) 304 cited in: Michael Kirby, ‘Judicial Activism? A Riposte to the Counter-Reformation’ (2005) 11 *Otago Law Review* 1.

<sup>276</sup> Allan, ‘Oh That I Were Made Judge in the Land’ above n 254, 574.

<sup>277</sup> Brennan, above n 189.

<sup>278</sup> *Ibid.*

writes that the only effective constraints upon judges who use a living tree approach are ‘the judge’s own comfort zone, self-perception of her role, and inherent humility’.<sup>279</sup>

On the other hand, however, courts in Australia have not endorsed a living tree approach and they overwhelmingly seek to discern and honour the intention of Parliament as expressed in the texts before them.<sup>280</sup> There is, as Lavarch writes, ‘no reason to believe that a Charter of Rights will inspire judges to suddenly become social engineers on a “wild activist” journey’.<sup>281</sup> Secondly, proponents point out that judges in the common law tradition have been making law for centuries and that the idea that the law exists somewhere out there, and judges simply declare it, is no longer credible.<sup>282</sup> Stanton writes that laws, such as negligence, are based on concepts that are every bit as abstract as ‘fair trial’ or ‘free expression’ and that in both cases judges can ‘determine the boundaries of these legal concepts by considering the political context of societies’.<sup>283</sup> Similarly, Fairall and Lacey write that interpreting a bill of rights would be essentially the same process as the one the High Court uses to interpret the Constitution, so it is well equipped for doing so.<sup>284</sup> Anderson counters these points, however, by claiming that although there is a ‘small zone of ambiguity’ between making and interpreting law, in most cases the distinction is clear and maintaining the idea that a distinction always exists is a ‘useful myth’ because it keeps the law-making activities of judges to a minimum.<sup>285</sup> Finally, some commentators have suggested that far from encouraging judicial activism, a statutory bill of rights could actually give Parliament more control over the common law than it has now, because courts would be obliged to develop the common law consistently with the Parliamentary-enacted charter.<sup>286</sup>

#### D Override Provisions Induce Complacency

Statutory bills of rights can be amended by Parliament and typically Parliament can also choose to enact statutes that are inconsistent with the bill of rights, provided that a certain procedure is followed.<sup>287</sup> Some constitutional bills such as the *Canadian Charter* also allow this through clauses that permit the legislature to expressly declare that a statute ‘shall operate notwithstanding’ rights in the *Charter*.<sup>288</sup> Some critics see this situation as dangerous because it can induce false sense of complacency in the

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<sup>279</sup> Ibid.

<sup>280</sup> Spigelman, above n 90, 96.

<sup>281</sup> Michael Lavarch, ‘Towards an Australian Bill of Rights: The Affirmative Case’ (2008) June *Proctor* 17.

<sup>282</sup> Sir Owen Dixon, ‘Concerning Judicial Method’ (1956) 29 *Australian Law Journal* 468, 472, 476; Lord James Reid, ‘The Judge as Law Maker’ (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22; Kenneth Hayne, ‘Concerning Judicial Method - 50 Years On’ (Speech delivered at the Monash University, 17 October 2006); Michael Kirby, ‘Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty’ (2006) 30 (2) *Monash University Law Review* 576.

<sup>283</sup> Michael Stanton, ‘Fighting Phantoms: A Democratic Defence of Human Rights Legislation’ (2007) 32 (3) *Alternative Law Journal* 138, 139.

<sup>284</sup> Fairall and Lacey, above n 136, 1096.

<sup>285</sup> Anderson, above n 175, 35.

<sup>286</sup> Brennan, above n 115, 12.

<sup>287</sup> For example *Human Rights Act 2004* (ACT) ss 37-9; *Human Rights Act 1998* (UK) s 19.

<sup>288</sup> *Constitution Act 1982* (Canada) Part 1, s 33(1).

population.<sup>289</sup> The protection that the bill of rights offers is illusory because Parliament can simply disregard it when it chooses. Individuals who do not fully appreciate this may believe that their liberties are better protected than they actually are, and cease to be vigilant as a result, potentially leading to a greater likelihood of oppressive legislation.<sup>290</sup>

### E *Democracy Does Not Protect Minorities*

One powerful argument in support of a bill of rights concerns an inherent weakness in democracy, as explained by former Chief Justice of the High Court, Murray Gleeson:

A democratic government seeks to represent the will of the majority... The electoral process is designed to ensure that governments are responsive to the wishes of the majority; but majorities cannot always be relied upon to be sensitive to the interests and the legitimate concerns of minorities. The problem is compounded because society is not neatly divided into one majority and a number of minorities. The attribute that makes a person a member of some minority group does not define that person for all purposes. In reality, most of us belong to some kind of minority. How then does a democracy, which functions on the basis of majority rule, institutionalise protection of legitimate minority interests? This is the essential problem underlying debate about human rights.<sup>291</sup>

According to this argument, democracy protects people whose interests coincide with the majority because if governments do not respect those interests, they are voted out, but minorities lack the power to vote governments out, and so are inherently vulnerable.<sup>292</sup> Robertson considers the vulnerable groups to be those who are 'insufficiently numerous to wield electoral power but large enough to attract obloquy or resentment'.<sup>293</sup> Many of the groups identified earlier in this paper as having been deprived of the liberties that others in Australia enjoy, fit this description.

The argument about minorities turns one of critics' concerns about a bill of rights – that the judiciary are not directly responsible to the electorate – into an argument in support of a bill of rights. It is the very fact that judges are not elected that allows them to make rulings based on principle, in favour of individuals who are unpopular with the majority of citizens. They are able to protect those that democracy does not.

Some critics do not accept that minorities need special protection, maintaining that the political system is responsive to their needs, as well as those in majority groups.<sup>294</sup> Others respond by pointing out that historically, courts interpreting bills of rights in other jurisdictions have not always been protective of minorities. Some examples include the 1896 interpretation of the Fourteenth Amendment to the United States Constitution which allowed racial segregation, and the United States Supreme Court

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<sup>289</sup> Moens, above n 173, 251.

<sup>290</sup> Ibid.

<sup>291</sup> Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 68-9.

<sup>292</sup> Mason, above n 267.

<sup>293</sup> Geoffery Robertson, *Freedom, the Individual and the Law* (6th, London: Penguin, 1989) 388.

<sup>294</sup> Ian Callinan, 'In Whom We Should Trust' in Julian Leaser and Ryan Haddrick (ed), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Canberra Menzies Research Centre, 2009) 75; Gibbs, above n 264.

ruling on the internment of Japanese-Americans during World War II.<sup>295</sup> In a similar argument, Brennan notes that in Australia there are significant barriers preventing disadvantaged groups from accessing justice and the legal system, and he therefore questions how much benefit disadvantaged minorities would actually receive from a bill of rights.<sup>296</sup>

#### F *A Bill of Rights Need Not Be Seen as Undemocratic*

Some advocates of a bill of rights respond to critics' assertions that bills of rights are inherently undemocratic by pointing out that democratic governance has not always, and should not still, mean absolute supremacy of the majority through Parliament.<sup>297</sup> As the doctrine of parliamentary sovereignty developed, the independent judiciary and separation of powers also came to be seen as vitally important.<sup>298</sup> Therefore the judiciary's power to interpret and apply law, including common law rights, is granted to enable it to serve and protect the interests of the community.<sup>299</sup> Some proponents therefore contend that merely equating democracy with electoral power robs it of much of its meaning.

Ballot-box democracy is also a poor alternative to an understanding that recognises the interrelated roles of the various arms of government in serving and protecting the community's interests.<sup>300</sup> As discussed above, the dominance of party discipline in modern Parliaments, the vast bureaucracies for which Ministers are responsible, and the sheer volume of bills put before Parliament each year have undermined traditional notions of responsible government. One consequence of this is that quite apart from concerns about minorities, 'parliamentary decisions often fail to coincide with majority opinions' as well, according to proponents.<sup>301</sup> It is overly simplistic, they point out, to claim that governments who disregard public opinion suffer at the ballot box because elections are only held every three years, and people determine their votes on a range of issues that usually have more to do with the economy than human rights and liberties.<sup>302</sup> To illustrate this point, former High Court Justice, John Toohey reminds readers that after the *Communist Party Case*<sup>303</sup> the Menzies government sought to amend the Constitution through a referendum but was unsuccessful. The government was, nevertheless, re-elected soon after, demonstrating that the electorate may prefer a particular government over the available alternatives without necessarily endorsing all its legislative goals.<sup>304</sup>

As a result, proponents claim that a concept of democracy that is both better, and truer to its origins, is one where the population legitimately looks to all arms of government

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<sup>295</sup> Moens, above n 173, 246.

<sup>296</sup> Brennan, above n 115, 11.

<sup>297</sup> Fairall and Lacey, above n 136, 1090; Robertson, above n 19, 20.

<sup>298</sup> Robertson, above n 19, 21.

<sup>299</sup> Fairall and Lacey, above n 136, 1090-1; Robertson, above n 19, 21.

<sup>300</sup> Robertson, above n 19, 172.

<sup>301</sup> Mason, above n 267, 81.

<sup>302</sup> Robertson, above n 19, 172.

<sup>303</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

<sup>304</sup> Toohey, above n 219, 173.



to protect their rights and interests. In this way, rather than handing power to the judiciary, a bill of rights would give individuals greater power to challenge the government.<sup>305</sup> At the same time, it would make the values and principles underlying statutes<sup>306</sup> and case law<sup>307</sup> clearly visible. This argument, however, begs the question of whose values law should be based upon. Furthermore, all the reasons that proponents give to support their contention that ‘ballot-box democracy’ is insufficient to protect liberties can also be used to demonstrate why a statutory bill of rights will not prevent liberties from being infringed with majority and/or bipartisan political support. Finally, the claim that sharing responsibility between the judicial and legislative arms of government can result in a more transparent and holistic regime of protection fails to recognise that it does so by moving control of the law further away from the people.

### G *Incompatibility Models and Democracy*

Proponents of statutory bills of rights argue that models that only permit courts to make declarations of incompatibility do not, in fact, pass legislative power from the Parliament to the judiciary.<sup>308</sup> The *UK Act* is an example of such a model. Section 4 provides that:

... (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility. ... (6) A declaration under this section ... (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made’.<sup>309</sup>

The *ACT and Victorian Acts* have similar provisions.<sup>310</sup> In each case, when a declaration is made, the government is able to decide whether to remove the incompatibility by seeking to amend the legislation or to allow it to stand. Alternatively, Parliament may, of course, repeal the entire Act.<sup>311</sup>

These provisions are obviously designed to preserve the legislative sovereignty of Parliament but critics claim that, in practice, this has not occurred because the political cost of ignoring an incompatibility provision forces Parliaments to always defer to judges’ views and amend or repeal offending legislation.<sup>312</sup> This claim is disputed by Robertson who writes that British parliamentarians are not ‘intimidated’ by declarations, however he is only able to cite one case where a declaration has not led to the legislation being amended or repealed.<sup>313</sup> If the critics are correct then, in practice, judges under a statutory model have as much power that they would under a

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<sup>305</sup> Robertson, above n 19, 179.

<sup>306</sup> Williams, above n 10.

<sup>307</sup> Stanton, above n 283, 139.

<sup>308</sup> Robertson, above n 19, 170; Stanton, above n 283, 141; George Williams and Dominique Dalla-Pozza, ‘The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights’ (2007) 12 *Deakin Law Review* 1, 13-4.

<sup>309</sup> *Human Rights Act 1998* (UK) s 4(2), (6).

<sup>310</sup> *Human Rights Act 2004* (ACT) s 32; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.

<sup>311</sup> Robertson, above n 19, 170.

<sup>312</sup> Allan, above n 260, 12-13; Zimmermann, above n 202, 38.

<sup>313</sup> Robertson, above n 19, 131-133 esp. 133.

constitutional model. Moens believes that if the legislature loses responsibility over certain areas of law to the courts, then over time it may 'acquiesce in this transfer of power', effectively removing decisions about controversial matters from the democratic sphere.<sup>314</sup> Stanton, on the other hand, has pointed out that if it is difficult, politically, for governments to ignore declarations of incompatibility, that means that judicial pronouncements on human rights have legitimacy in the eyes of the public and Parliament is therefore merely being indirectly influenced by public opinion.<sup>315</sup>

#### H Interpretation Provisions and Democracy

The dominant statutory model contains provisions that instruct courts to take the bill of rights into account when interpreting other legislation. For example, the *UK Act* provides that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.<sup>316</sup> The *Victorian Act* is similar, providing that, '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.<sup>317</sup>

Allan has criticised interpretation provisions such as these because of the level of discretion they grant to judges, particularly when, as has occurred in the United Kingdom, the clause, 'as far as it is possible to do so' is interpreted broadly. In *Ghaidan v Godin-Mendoza*, the Court said,

Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning. Section 3 may require the court to depart from the intention of the Parliament which enacted the legislation. It is also apt to require a court to read in words which change the meaning of the enacted legislation.<sup>318</sup>

This development in methods of statutory interpretation is so significant that Lord Steyn has referred to it as creating 'a new legal order'.<sup>319</sup> It allows judges to effectively 'rewrite laws' to make them fit with what they believe the bill of rights means.<sup>320</sup> In Brennan's words, 'the law is no longer what it says it is'.<sup>321</sup>

Former Justice of the High Court, Michael McHugh has argued that if a federal bill of rights contained the same provision as s 3 of the *UK Act* it would be inconsistent with the doctrine of separation of powers in the Constitution.<sup>322</sup> The High Court would therefore be likely to interpret the clause, 'as far as it is possible to do so' in a way that limits possible interpretations to those that are consistent with the purpose of the

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<sup>314</sup> Moens, above n 173, 240.

<sup>315</sup> Stanton, above n 283, 142.

<sup>316</sup> *Human Rights Act 1998* (UK) s 3(1).

<sup>317</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1).

<sup>318</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571-572; cited in James Allan, 'All Bets Are Off When a Bill of Rights Comes In' *Sydney Morning Herald* (Sydney), 18 April 2006.

<sup>319</sup> *Jackson v Attorney General* [2006] 1 AC 262 [102].

<sup>320</sup> Allan, above n 260, 4.

<sup>321</sup> Brennan, above n 189.

<sup>322</sup> McHugh, above n 182, 27.

relevant legislation.<sup>323</sup> In other words, the provision would be given the same meaning as it has in the *Victorian and ACT Acts*. For McHugh, the legislative sovereignty of Parliament would therefore be preserved, but human rights would be better protected because courts could take account of them when interpreting a statute even when there was no ambiguity in it.<sup>324</sup>

For Allan, however, the need to refer to a statute's purpose is not much consolation. He points out that most statutes have more than one purpose, so that if a judge is so inclined, he or she can 'discern a purpose' that suits the result she seeks.<sup>325</sup> It should be remembered however, that judges in Australia do not tend to be prone to 'wild activist journeys',<sup>326</sup> and generally appear to be very reluctant to infringe on the role of Parliament. For example, the High Court chose to implement the common law right to a fair trial by staying proceedings in serious criminal cases where the accused is unrepresented, rather than forcing the legislature to provide legal representation, so as to avoid infringing on the legislative role of Parliament.<sup>327</sup>

## VI ARGUMENTS CONCERNING THE EFFECT OF A BILL OF RIGHTS ON THE LEGAL SYSTEM

### A *A Bill of Rights Would Increase Access to Justice*

Robertson claims that a bill of rights would have profound positive consequences for people's ability to access the legal system, allowing them to 'reclaim their law from judges'.<sup>328</sup> This is firstly because he believes that the entire basis of law will shift from precedents to first principles, and as this happens, decisions will become logical, commonsensical and comprehensible to people who do not have legal training.<sup>329</sup> He claims that many people in the United Kingdom have benefited from the *UK Act* without going to court because the mere presence of the *Act* has caused public servants to change their practices. He provides examples of nursing home residents, prisoners, and mentally ill parents who have benefited from improved practices brought about by the *UK Act*, without having to enforce their rights through the legal system.<sup>330</sup> In addition, contrary to the claims of some commentators in the Australian media that a bill of rights would only benefit lawyers,<sup>331</sup> Robertson claims that reliance on principles rather than precedents actually reduces people's need for a lawyer.<sup>332</sup> He cites the

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<sup>323</sup> Ibid 29.

<sup>324</sup> McHugh, above n 182, 29-30.

<sup>325</sup> Allan, above n 260, 9-11.

<sup>326</sup> Lavarch, above n 281.

<sup>327</sup> *Dietrich v R* (1992) 177 CLR 292, cited in Lacey, above n 140, 29.

<sup>328</sup> Robertson, above n 19, 105.

<sup>329</sup> Ibid 103-5.

<sup>330</sup> Robertson, above n 19, 139-40.

<sup>331</sup> For example, Carr has claimed: 'The main beneficiaries of a bill of rights are the lawyers who profit from the legal fees it generates and the criminals who manage to escape imprisonment on the grounds of a technicality'. Carr, above n 262, 21.

<sup>332</sup> Robertson, above n 19, 141.

example of a resident who was able to enforce his right to privacy against the local council and obtain a remedy without legal representation.<sup>333</sup>

In 2003, an extensive survey of Australian social attitudes found that 71% of Australians had little or no confidence in the courts or legal system and only 4% reported having a great deal of confidence in them.<sup>334</sup> If Robertson is correct that a bill of rights would increase access to and understanding of the legal system then this would clearly be a strong point in favour of adopting one. However, not all proponents seem to agree with Robertson about how profound the impact on the law would be. Williams, for example, seems at pains to play down the impact, writing that any effects will be 'gradual and incremental'.<sup>335</sup> It is difficult to reconcile these two positions.

### B *A Bill of Rights Would Prevent our Judges from Becoming Isolated*

Australia is now the only advanced democracy without a bill of rights.<sup>336</sup> Some proponents fear that, as a result, its judiciary will increasingly become isolated from judges overseas, unable to benefit from the pooling of knowledge, insights and resources.<sup>337</sup> Robertson writes that 'the most important and far-reaching debates and developments in the highest courts of all advanced countries except Australia concern[ ] the application of human rights principles' into diverse areas of law.<sup>338</sup> He further maintains that in order for judges to be responsive to the community, they must be able to exchange concepts, theories and methods with others internationally.<sup>339</sup> This latter claim appears to over-reach somewhat, however, because if the judiciary needs to be responsive to any community it is the Australian, and not the Canadian, United Kingdom or New Zealand communities, that is important.

### C *A Bill of Rights Will Politicise the Judiciary*

One of the reasons that the NSW Parliamentary Standing Committee on Law and Justice recommended against NSW enacting a bill of rights was that it believed that if it did so, courts would frequently be required to make controversial decisions on political issues, and that this would have the effect of politicising the judiciary.<sup>340</sup> Governments would inevitably seek to appoint judges whose opinions on human rights coincided with their own, and as the line between the judiciary and legislature blurred, the public's expectations of the judiciary would change.<sup>341</sup> Hatzistergos claims that this effect is now being seen in Canada, where the bill of rights has encouraged people to look to the

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<sup>333</sup> *Amin v Secretary of State for the Home Department* (2004) 1 AC 653; cited in Robertson, above n 19, 140-141.

<sup>334</sup> Clive Bean, 'Is There a Crisis of Trust in Australia?' in Shaun Wilson et al (eds), *Australian Social Attitudes: The First Report* (University of New South Wales Press, 2003).

<sup>335</sup> Williams, above n 10.

<sup>336</sup> Brennan, above n 115, 11; Robertson, above n 19, 43; Williams, above n 10.

<sup>337</sup> Brennan, above n 115, 12; Mason, above n 267, 80.

<sup>338</sup> Robertson, above n 19, 103.

<sup>339</sup> *Ibid* 102.

<sup>340</sup> Hatzistergos, above n 199.

<sup>341</sup> Anderson, above n 175, 38.

Supreme Court to ‘to guarantee good government and correct all bad legislating’.<sup>342</sup> It is also said to have occurred in the United States where public anger is frequently directed at the Supreme Court over their rulings on issues such as abortion.<sup>343</sup> The American situation is complex, however, because public expectations of the judiciary may also be shaped by lower court judges being directly elected.

Former Chief Justice of the High Court, Sir Anthony Mason identifies the central concern underlying this argument as being a ‘fear that Australian courts will come under political pressure... and judges will begin to think politically’ and that public confidence in the impartiality of the legal system will be undermined as a result.<sup>344</sup> Given the present low levels of public confidence in the legal system, this concern has resonance. The media is not slow to criticise courts’ decisions and this would surely increase if matters, and therefore decisions, became more controversial.

Some proponents have responded to these concerns by advocating an independent commission to appoint judges.<sup>345</sup> However, Anderson dismisses this suggestion on democratic grounds, pointing out that at present, judges are appointed by elected representatives, but under a commission system they would be appointed by commission members who were appointed by elected representatives.<sup>346</sup> Judges would therefore be a step further removed from democratic accountability.

A related concern has been expressed by former Justice of the High Court, Ian Callinan.<sup>347</sup> He believes that ‘constant exposure to the political and social questions thrown up for decision under the United States’ Bill of Rights may have infected the decision making processes of the courts in that country’.<sup>348</sup> He identifies American judges’ practice of making deals and trade-offs with each other as a consequence of this exposure. At present, Australian courts do not engage in such activities and have a ‘genuine commitment to apolitical decision making’, which Callinan fears could be in jeopardy if a bill of rights was enacted.<sup>349</sup>

#### D *A Bill Of Rights Will Create a Litigious Culture and Overload the Courts*

Other critics claim that a bill of rights would make Australian society more litigious, increasing the load on courts and reducing access to justice.<sup>350</sup> Moens writes that the *Canadian Charter* has had this effect and that the backlog of cases that has resulted,

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<sup>342</sup> Hatzistergos, above n 199.

<sup>343</sup> Moens, above n 173, 241.

<sup>344</sup> Mason, above n 267, 84.

<sup>345</sup> George Williams, ‘Judicial Appointments are Political Appointments’ *Australian* (Sydney) 16 November 2004.

<sup>346</sup> Anderson, above n 175, 38.

<sup>347</sup> Callinan, above n 294, 81.

<sup>348</sup> *Ibid.*

<sup>349</sup> *Ibid* 81-82.

<sup>350</sup> Carr, above n 262, 20; Zimmermann, above n 202, 42.

together with the right conferred by the *Charter*, to be tried within a reasonable time,<sup>351</sup> has led to prosecutions being abandoned.<sup>352</sup>

## VII DOUBTS ABOUT THE CONSTITUTIONALITY OF STATUTORY MODELS

Some scholars have warned that incompatibility declarations in the proposed statutory models may be unconstitutional at the Commonwealth level.<sup>353</sup> Section 71 of the Constitution vests judicial power in the High Court and other federal courts that Parliament creates. The High Court has interpreted this to mean that only courts created under s 71 can exercise Commonwealth judicial power and that judicial power cannot be conferred on other bodies, unless it is ancillary or incidental.<sup>354</sup> If the power to make a declaration of incompatibility was found to be an exercise of non-judicial power, then a provision in a statutory bill of rights that purported to confer that power on the Federal or High Court would be invalid.<sup>355</sup> A related question is whether cases concerning the potential incompatibility of statutes with the bill of rights would constitute ‘matters’ within the meaning of ss 75-77 of the Constitution.<sup>356</sup>

Proponents of a statutory model obviously believe that incompatibility provisions are likely to be constitutionally valid, but serious doubts have been raised. There is agreement from both sides that judicial power is ‘difficult if not impossible’ to define<sup>357</sup> and that, ultimately, it requires a judgment to be made after weighing indicators and contra-indicators.<sup>358</sup> One strong indicator of judicial power is the capacity of a body to give a ‘binding and authoritative decision’.<sup>359</sup> Absence of this capacity is an even stronger indication of non-judicial power.<sup>360</sup> Statutory models expressly state that declarations of incompatibility do not affect the rights or obligations of the parties.<sup>361</sup> Former Justice of the High Court, Michael McHugh believes that there is therefore a strong likelihood that they would be unconstitutional.<sup>362</sup>

However, the model does impose certain obligations on the government when a declaration is made. For example, under the *ACT Act* the Registrar must give a copy of the declaration to the Attorney-General<sup>363</sup> who must present it to the Legislative

<sup>351</sup> *Constitution Act 1982*, Part 1 Canadian Charter of Rights and Freedoms, s 11(b).

<sup>352</sup> Moens, above n 173, 242.

<sup>353</sup> McHugh, above n 182.

<sup>354</sup> *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v (1931) 46 CLR 73, 98; R v Kirby; Ex parte Boilermakers Society of Australia (Boilermakers' Case) (1956) 94 CLR 254.*

<sup>355</sup> McHugh, above n 182, 13.

<sup>356</sup> McHugh, above n 182, 13.

<sup>357</sup> *Ibid* 39, citing *Precision Data Holdings v Wills (1991) 173 CLR 167, 188; Williams and Dalla-Pozza*, above n 308, 9, citing *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361, 394* and *Precision Data Holdings Ltd v Wills (1991) 173 CLR 167, 188.*

<sup>358</sup> McHugh, above n 182, 40, Williams and Dalla-Pozza, above n 308, 10.

<sup>359</sup> McHugh, above n 182, 16, citing *Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330.*

<sup>360</sup> McHugh, above n 182, 16.

<sup>361</sup> See *Human Rights Act 2004 (ACT) Act s 32(3)(b); Charter of Human Rights and Responsibilities 2006 (Vic) s 36(5)(b); Human Rights Act 1998 (UK) s 4(5)(b).*

<sup>362</sup> McHugh, above n 182, 16.

<sup>363</sup> *Human Rights Act 2004 (ACT) s 32(4).*

Assembly within six sitting days of receiving it<sup>364</sup> and prepare and present a written response to the Legislative Assembly within six months.<sup>365</sup> Williams and Dalla-Pozza claim that these obligations placed on the Attorney-General, ‘seen in the light of the responsibility of ministers to Parliament’ are binding obligations.<sup>366</sup> However, McHugh points out that the Attorney-General is not a party to the initial dispute that gives rise to the declaration, and therefore imposing an obligation on the Attorney General through the declaration does not determine the controversy between the parties, and neither does it bind them.<sup>367</sup> Furthermore, the obligations imposed on the Attorney-General are imposed by the bill of rights, not by the court making the declaration.<sup>368</sup>

McHugh acknowledges that parties might be entitled to enforce the prescribed process if the Attorney-General failed to comply with it and that if so, there is an argument that those secondary proceedings would be ‘sufficiently connected’ to the original proceeding as to be incidental or ancillary to them, allowing the first to be considered binding.<sup>369</sup> However, in his opinion, this would not be enough to persuade the High Court.<sup>370</sup> He writes that if the High Court continues to interpret ‘judicial power’ and ‘matter’ the way it has done in the past, then declarations of incompatibility would be deemed invalid.<sup>371</sup>

Williams and Dalla-Pozza point to Parliamentary statements relating to the *Victorian Act* and the fact that human rights in statutes of these types are intended to be applied through a dialogue between Parliament and the judiciary, in order to show that declarations of incompatibility are a new type of legal remedy in Australia.<sup>372</sup> They disagree with McHugh on the question of whether declarations resolve a controversy between the parties<sup>373</sup> but acknowledge that they are not binding on them.<sup>374</sup>

There is further disagreement over the degree of importance that the High Court will attach to the fact that declarations are not binding on the parties. Williams and Dalla-Pozza see it as negative factor that is ultimately outweighed by favourable factors,<sup>375</sup> whereas McHugh contends that ‘more often than not [it] is decisive of the presence or absence of judicial power’.<sup>376</sup>

Both sides agree that it is impossible to predict with certainty whether the High Court would uphold such provisions. The concepts are complex and judicial opinion is divided

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<sup>364</sup> *Human Rights Act 2004* (ACT) s 33(2).

<sup>365</sup> *Human Rights Act 2004* (ACT) s 33(3).

<sup>366</sup> Williams and Dalla-Pozza, above n 308, 14.

<sup>367</sup> McHugh, above n 182, 16, 44.

<sup>368</sup> McHugh, above n 182, 16, 44.

<sup>369</sup> McHugh, above n 182, 14, 18, citing similarity with *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Abebe v Commonwealth* (1999) 162 ALR 1; *Croome v Tasmania* (1997) 191 CLR 119.

<sup>370</sup> McHugh, above n 182, 14, 18.

<sup>371</sup> McHugh, above n 182, 14-15.

<sup>372</sup> Williams and Dalla-Pozza, above n 308, 16

<sup>373</sup> *Ibid* 13.

<sup>374</sup> *Ibid* 17.

<sup>375</sup> *Ibid* 16.

<sup>376</sup> McHugh, above n 182, 14, 43.

in much of the relevant case law.<sup>377</sup> This uncertainty weighs heavily against a statutory model that involves declarations of incompatibility. Furthermore, because declarations are such a prominent part of the proposed statutory models, ultimately the uncertainty weighs against the adoption of a statutory bill of rights.

### VIII ARGUMENTS ABOUT THE EFFECT OF A BILL OF RIGHTS ON AUSTRALIAN CULTURE AND SOCIETY

Critics and proponents agree that, on its own, a bill of rights cannot create a culture that respects and supports liberty.<sup>378</sup> Proponents argue, however, that a bill of rights would be a means through which the community could be educated about international human rights, and awareness and appreciation of liberty could be increased.<sup>379</sup> Robertson acknowledges that this effect would not be automatic, but maintains that if Australians see that a bill of rights reflects their own values, they will take ownership of it and the impact on society will be positive.<sup>380</sup> Other proponents consider that the process of community discussion, about what the nation's values are, may itself help to foster an appreciation of human liberties.<sup>381</sup>

On the other hand, critics maintain that a bill of rights would make the law uncertain because the meaning of each provision would not be known until it was determined by judges in incremental steps, according to the cases that came before them.<sup>382</sup> They claim that this uncertainty will make it difficult for people to know what their rights and responsibilities are, which would be 'destabilising' for society.<sup>383</sup>

In addition, as mentioned earlier, some critics maintain that a bill of rights would make Australia a more litigious society.<sup>384</sup> Robertson refutes this claim saying that the bill of rights he proposes would only provide modest compensation for 'real pain that has been carelessly or callously inflicted in breach of a civil right', and that less serious cases may be screened out before reaching court.<sup>385</sup> It is difficult to evaluate who is correct in this regard. Robertson claims that most problems in the United Kingdom are resolved without court hearings, as often merely reminding a government authority of the existence of the *UK Act* is enough to bring about a change of practice.<sup>386</sup> Moens claims, however, that Canadian courts were overloaded as a result of the enactment of the *Canadian Charter*.<sup>387</sup> It certainly seems likely that in criminal law cases, which are already before the courts, a bill of rights may lead to an increase in processing time as extra issues are raised. However, it is less clear that a bill of rights would lead to a

<sup>377</sup> Williams and Dalla-Pozza, above n 308, 23-24.

<sup>378</sup> For example: Robertson, above n 19, 153; Carr, above n 178; Williams, above n 10; Zimmermann, above n 202, 35.

<sup>379</sup> Mason, above n 267, 88.

<sup>380</sup> Robertson, above n 19, 149-150.

<sup>381</sup> Brennan, above n 189.

<sup>382</sup> Moens, above n 173, 237-238.

<sup>383</sup> *Ibid* 235.

<sup>384</sup> *Ibid* 242; Zimmermann, above n 202, 42.

<sup>385</sup> Robertson, above n 19, 177.

<sup>386</sup> *Ibid* 139-141.

<sup>387</sup> Moens, above n 173, 242.



culture that is generally more litigious. The dramatic decline in personal injury actions that followed the nationwide civil liability reforms<sup>388</sup> suggests that Robertson may be correct in asserting that, generally, litigiousness is linked to compensation levels rather than the availability of additional causes of action.

## IX ARGUMENTS ABOUT THE IMPACT OF A BILL OF RIGHTS ON LIBERTY

Finally, some critics are concerned that enacting a bill of rights may actually reduce protection of liberties in the long term. A constitutional bill of rights would eventually become outdated and would be hard to change.<sup>389</sup> This same result may occur if governments were to find that amending a statutory bill was too difficult politically, and so avoided ever doing so.<sup>390</sup> It might be thought that this problem could be prevented by restricting rights to those liberties that are most fundamental and enduring. However, the former Chief Justice of the High Court, Sir Harry Gibbs pointed out that even in the case of rights that are widely endorsed, such as the right to non-discrimination, the circumstances in which they are thought to apply, change over time.<sup>391</sup> Thus the forms of discrimination that are prohibited have changed in the past and will likely change again in the future. If the current conception of non-discrimination was enshrined in the Constitution, it would be very difficult to change it as society's needs and beliefs about discrimination changed.<sup>392</sup>

Other critics complain that the process of defining liberties in a bill of rights inevitably limits them. Whether this is done by drafters in an attempt to allay concerns about the power that a bill of rights gives to judges, or whether it is done by judges as they apply broad principles to the individual cases that come before them, the end result is that rights are defined.<sup>393</sup> They come to apply in some circumstances and not in others, to mean this and not that, to require these actions on the part of officials, but not those actions, and so on. While there is logic to this argument, in practical terms its force would seem to be limited because, in the alternative, if liberties are not encoded in law, they are not enforceable. A wide, open-ended concept of personal liberties may well produce a society that is a more pleasant place to live, but it cannot ensure that liberties are universally respected, and individuals who are wronged need enforceable rights. Both a liberty-respecting culture and the capacity to obtain redress when things go wrong are important.

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<sup>388</sup> See EW Wright, 'National Trends in Personal Injury Litigation: Before and After "Ipp"' (2006) 14 *Torts Law Journal* 233, 237, 266-7; *Civil Liability Act 2002* (NSW); *Civil Liability Act 2003* (Qld); *Law Reform (Ipp Recommendations) Act 2003* (SA); *Recreational Services (Limitation of Liability) Act 2002* (SA); *Civil Liability Act 2002* (Tas); *Wrongs and Limitation of Actions Act (Insurance Reform) Act 2003* (Vic); *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act 2001* (WA).

<sup>389</sup> Carr, above n 262, 20.

<sup>390</sup> *Ibid* 20.

<sup>391</sup> Gibbs, above n 264.

<sup>392</sup> *Ibid*.

<sup>393</sup> Menzies, above n 209, 219; George Brandis, 'The Debate We Didn't Have to Have: The Proposal for an Australian Bill of Rights' in Julian Leeser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre, 2009).

Another long term implication that critics fear may flow from a bill of rights is the further undermining of federalism. As mentioned above, federalism can be a protection against arbitrary government. According to Allan, a constitutional bill of rights would further centralise power in the Commonwealth at the expense of the States, exacerbating a process that has been occurring for some time.<sup>394</sup> He believes that the first place centralisation would manifest would be in criminal law, where at the moment there is considerable diversity between States.<sup>395</sup> A particular right at the federal level would be interpreted to impact on the criminal law of one State and then the laws of all other States may need change in order to comply with the right. For example, laws on racial vilification, abortion, euthanasia, suicide and prostitution which currently vary from State to State, could be affected by a right to freedom of speech or a right to life, and would then become uniform throughout the country.<sup>396</sup> In addition, Allan believes that just as in the United States, the right to a fair trial and right not to be subjected to unreasonable searches have led to a uniform judge-created 'code of criminal procedure', an Australian bill of rights would also remove the ability of States to control their own procedure laws.<sup>397</sup>

Allan acknowledges that, in the case of a statutory bill of rights, this centralising effect would depend on the Act being used to expand the reach of Commonwealth legislation and override State laws.<sup>398</sup> However, Sir Harry Gibbs has pointed out that it is not difficult to see this occurring.<sup>399</sup> The Commonwealth government has ratified a large number of international treaties and a Commonwealth statutory bill of rights could implement the rights contained in those treaties under the external affairs power of the Constitution.<sup>400</sup> State legislation that was inconsistent with the bill of rights would then be invalid to the extent of that inconsistency and the States would have been restricted in the exercise of their powers.<sup>401</sup> Finally, Allan also maintains that a centralising effect would flow from the requirement for legislation to be interpreted consistently with the bill of rights and this would apply to both constitutional and statutory bills.<sup>402</sup>

## X CONCLUSIONS

The campaign for a federal bill of rights has no doubt been impacted by other Western democracies, particularly the United Kingdom and New Zealand, adopting human rights statutes, but the argument that international pressures are the whole force behind the movement cannot be supported. Australia has fallen short of international human rights standards in a number of areas in the recent past, particularly in its treatment of refugees, Indigenous people and minorities who are feared or disliked by the community. New anti-terrorism laws seriously curtail freedoms and while this may be

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<sup>394</sup> Allan, above n 254 'Bills of Rights as Centralising Instruments', 187-8.

<sup>395</sup> Ibid, 189.

<sup>396</sup> Ibid 190-192.

<sup>397</sup> Ibid 190.

<sup>398</sup> Allan, above n 254 'Bills of Rights as Centralising Instruments', 194.

<sup>399</sup> Gibbs, above n 264.

<sup>400</sup> *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; Gibbs, above n 264.

<sup>401</sup> Gibbs, above n 264.

<sup>402</sup> Allan, above n 254 'Bills of Rights as Centralising Instruments', 193.

justified in the circumstances, at present there is no reviewable procedure for assessing whether that is the case. Furthermore, inquiries in several States have heard from a diverse range of people who feel that their liberties are routinely disrespected. These people and their concerns should not be ignored, or dismissed as insignificant in light of Australia's generally good human rights record.

#### A *A Constitutional Bill of Rights?*

The strongest argument in favour of a bill of rights is the inherent weakness in democracy that means that the interests of minorities are not as well protected by the electoral system, than those of the majority. Indeed, when the will of the majority is to restrict the liberties of a particular minority, democracy can actually be damaging to that minority's interests. A constitutional bill of rights would be effective in addressing this problem because it would permanently and powerfully prevent the legislature from acting in certain ways that are oppressive. Judges, by virtue of their unelected status, are in the best position to enforce a constitutional bill of rights in favour of unpopular minorities, because they can better afford to be unpopular with the majority than politicians can. A statutory bill of rights, on the other hand, provides only illusory protection for unpopular minorities because the Government is free to exclude legislation from the requirement to be consistent with it, or indeed to amend the bill of rights itself. For this reason, it is highly unlikely that a statutory bill of rights would have prevented the mandatory detention of asylum seekers, or the removal of the rights of terrorism suspects.

However, this very real power behind a constitutional bill of rights means that any negative consequences can also be significant. Sometimes unpopular minorities are unpopular for a reason, and while their most basic freedoms should, arguably, always be respected, society is entirely justified in limiting their liberties in order to prevent them from causing harm. To the extent that a constitutional bill of rights would prevent such limits being imposed, it would be detrimental to overall liberty in Australia. There are also serious concerns regarding the difficulty of amending a constitutional bill of rights, and of changing judicial interpretations of it as societal needs change. It is unlikely that a constitutional bill of rights could ever be drafted in way that ensured it would remain relevant and useful well into the future so this lack of flexibility weighs heavily against it as an option.

Thus, a constitutional bill of rights may become a more attractive option in the future if the political and cultural circumstances of Australia change, but presently the need for a shield between the population on the one hand, and the legislature and executive on the other, does not appear to be so great as to warrant the risk of adverse consequences. For this reason it is widely accepted that a constitutional bill of rights in Australia would not pass a referendum in the foreseeable future, causing even those who ultimately support one, to no longer publically call for it.<sup>403</sup>

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<sup>403</sup> For example, Williams writes that the failed referendums show that a 'gradual and incremental path' is needed, beginning with a statutory bill of rights: Williams, above n 10.

## B *A Statutory Bill of Rights?*

Following the recommendation of the National Human Rights Consultation Committee that Australia adopt a statutory bill of rights, this is clearly the most likely option. However, doing so would expose Australia's political and legal systems to significant risks with few positive benefits.

Because Parliament would determine which rights were conferred by the Act and when and how it would be amended, as well as which legislation would be subject to it and which would be exempt, it would not be an effective limit on Parliament. Governments would comply with it when there was an electoral necessity for them to do so, but when it was electorally attractive for them to exempt legislation from it, then they would do that. For this reason, a statutory bill of rights will not protect minorities, just as it would not have assisted Al-Kateb<sup>404</sup> or terrorism suspects.<sup>405</sup>

The fact that a statutory bill of rights would be ineffective would matter less if it were not for the fact that it is also likely to be detrimental to the quality of Australia's democracy and legal system. The broad principles within a bill of rights require judges to exercise a greater degree of personal judgment when interpreting them, than required for ordinary legislation.<sup>406</sup> At the same time, the cases that end up in court tend to be those that are the most politically and ethically contentious<sup>407</sup> and there is an explicit requirement in many bills of rights, for judges to assess community values.<sup>408</sup> The resulting movement of law-making responsibility away from Parliament towards courts, and corresponding pressure on judges, is likely to have at least some tendency to politicise the judiciary.<sup>409</sup> Add to this the very real risk that people will become less vigilant, falsely believing that the Act can protect them, and the impact of a statutory bill of rights becomes far from benign.<sup>410</sup>

## C *Alternatives to a Statutory Bill of Rights*

Many of the issues that proponents of a bill of rights have raised are legitimate areas of concern and should not be dismissed or ignored because a statutory bill of rights is not the most desirable way of addressing them. Several alternative measures have been suggested by experts that could prove worthwhile.

### 1 *Targeted Legislation*

At present in Australia, rights are most effectively protected by means of legislation. Rights in administrative law, rights to non-discrimination and privacy, and rights in relation to the investigation and prosecution of criminal law are protected by State and

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<sup>404</sup> McHugh, above n 182, 30-33.

<sup>405</sup> Brennan, above n 189.

<sup>406</sup> Allan, above n 254 'Bills of Rights as Centralising Instruments', 183; Allan, 'Oh That I Were Made Judge in the Land', 573; Zimmermann, above n 202, 37.

<sup>407</sup> Allan, above n 260, 3; Zimmermann, above n 202, 39.

<sup>408</sup> Moens, above n 173, 236.

<sup>409</sup> Anderson, above n 175, 38; Callinan, above n 294, 81-82.

<sup>410</sup> Moens, above n 173, 251.

Commonwealth statutes, which also establish bodies to investigate complaints, educate the community and make recommendations to government. These statutes are worded in precise, detailed terms and apply in specific situations.

Sir Harry Gibbs recommended that rights continue to be protected through legislation, rather than through a bill of rights.<sup>411</sup> Proponents criticise the current statutory protections as being alternatively too piecemeal or too complex.<sup>412</sup> If there are gaps, then the gaps in legislation can and should be filled. For example, Leeser writes that identified gaps including: the effect of the criminal law on intellectually disabled persons, the absence of a legal prohibition on torture,<sup>413</sup> concerns surrounding the reversal of onus of proof in certain situations, the use of video surveillance, issues concerning juries, and racism against Muslims, Indigenous Australians, sexual minorities and the mentally ill, can all be remedied via legislation.<sup>414</sup>

Unlike a bill of rights, when rights are protected in legislation and the government becomes aware of the need to extend their protection, or to focus it on a new area or in a particular way, it is a relatively simple procedure to amend the statute accordingly. Furthermore, legislation is written with the objective of making the law clear, rather than, as in the case of a bill of rights, applying to all circumstances for all time. As a result, law in statutory form is readily ascertainable and open to scrutiny. The ALRC's inquiry into the *Privacy Act 1988* (Cth) was able to make a large number of specific recommendations,<sup>415</sup> precisely because the relevant law was ascertainable and relatively static, and it was entirely within the power of the legislature to change it. If, instead, privacy law had been contained in a statutory bill of rights, a range of case law determining the meaning of that bill of rights, and a dedicated Privacy Act, this task would have been greatly more complex, and any predictions made by the ALRC about the impact of suggested changes would have been far less certain.

## 2 *Improve Parliamentary Accountability*

The greatest constitutionally-based protections that Australians have are not individual rights. They arise indirectly through the separation of powers that gives rise to due process, as well as through federalism and responsible government. Goldworthy points out that laws that govern how parliaments are constituted and the procedures they must follow 'exert a powerful kind of legal control'.<sup>416</sup> The flipside of this is that deficiencies in those procedures can have a profound effect on the nature of parliamentary democracy, and public confidence in it. The presence of deficiencies, however, does not mean that the entire system should be overhauled in favour of judicial supervision of

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<sup>411</sup> Gibbs, above n 264.

<sup>412</sup> Williams, above n 10.

<sup>413</sup> Since Leeser wrote, torture has in fact been prohibited by statute, see: *Criminal Code Act 1995* (Cth) s 268.13.

<sup>414</sup> Leeser, above n 66, 34-5.

<sup>415</sup> Australian Law Reform Commission, above n 87.

<sup>416</sup> Jeffrey Goldworthy, 'Legislative Sovereignty and the Rule of Law' in KD Ewing, Tom Campbell and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) 75.

legislation, but rather that improvements should be made that address those deficiencies.<sup>417</sup>

Williams wrote in 1999 that, as a first step to gaining acceptance of a constitutional bill of rights, a joint parliamentary committee could be established to scrutinise legislation and ‘publicly examine ways in which the Federal Parliament could work to enhance the level of protection afforded to fundamental freedoms in Australia’.<sup>418</sup> This would be a positive step – not as a precursor to a bill of rights but as a means of encouraging elected representatives to consider the impact of legislation on those people in the community who are less able to make their voices heard in other ways. Legislation that passed through such a process would be more likely to support liberties and far less likely to impinge upon them in unintended ways. Media reporting of the Committee’s work would also foster an understanding in the community that Australia is a place where liberties are valued.

The importance of fostering a culture of liberty cannot be overstated. Gava writes that, regardless of whether or not Australia has a bill of rights, it will not be a place of liberty unless it is also a place ‘where people argue and struggle for their rights and for the political, social and economic changes that they want’.<sup>419</sup> Thus, a robust democracy where the needs of both the majority and minority groups are noticed and respected, can foster liberty, rather than being relinquished to it, as a bill of rights is liable to do.<sup>420</sup>

### 3 *The Australian Human Rights Commission*

In 1998 and 2003 the government sought to curb the power of the AHRC.<sup>421</sup> Fortunately, on both occasions they were ultimately unsuccessful. The AHRC plays a vital role in handling complaints, conducting education, providing submissions and advice to Parliament and government, and undertaking research. They should continue to be supported in this and could provide valuable input to the joint parliamentary committee. In addition, Shearer suggests they could play an increased advisory role if the government committed to implementing international human rights obligations through legislation.<sup>422</sup>

### 4 *The Role of International Human Rights in Statutory Interpretation*

The High Court has said that where there is ambiguity a statute may be interpreted in a way that is consistent with international law, following from the presumption that Parliament intends to give effect to Australia’s international obligations.<sup>423</sup> Shearer

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<sup>417</sup> Goldsworthy, above n 416, 75-78.

<sup>418</sup> Williams, above n 10.

<sup>419</sup> Gava, above n 270.

<sup>420</sup> Ibid.

<sup>421</sup> Human Rights Legislation Amendment Bill (No2) 1998 (Cth) and Australian Human Rights Commission Legislation Bill 2003 (Cth) cited in: Charlesworth, Byrnes and McKinnon, above n 3, 39.

<sup>422</sup> Shearer, above n 233.

<sup>423</sup> *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529; *Kioa v West* (1985) 159 CLR 550; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

suggests that the *Acts Interpretation Act 1901* (Cth) may also be amended to direct courts to do this when the meaning of a statute is ambiguous.<sup>424</sup>

If these measures were adopted there would be a greater range of enforceable human rights in Australia, and Australian law and culture would afford liberty greater respect and appreciation. Furthermore, this would be achieved without the risks associated with a bill of rights.

‘Freedom on the Wallaby’ ends with a call to arms, as freedom is under threat:

So we must fly a rebel flag,  
As others did before us,  
And we must sing a rebel song  
And join in rebel chorus.  
We’ll make the tyrants feel the sting  
O’ those that they would throttle;  
They needn’t say the fault is ours  
If blood should stain the wattle!<sup>425</sup>

Australian’s rights and liberties have been obtained and retained in a remarkably peaceful way from Lawson’s time until now. It cannot be said that no blood has stained our wattle, and freedom and advantages continue to be enjoyed unequally, but in our eagerness to remedy such injustices we must take care not to trade away the legal, political and cultural institutions that have given us the rights and liberties we have. If this must be our ‘rebel song’ to the international community, so be it.

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<sup>424</sup> Shearer, above n 233.

<sup>425</sup> Lawson, above n 1.