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ADDRESS TO A PUBLIC MEETING IN MELBOURNE

WEDNESDAY, 15 MARCH 1978, 8 P.M.

AN AUSTRALIAN BILL OF RIGHTS?

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

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INTRODUCTION

We meet tonight on the Ides of March :- the anniversary of the day when Caesar was felled by his political enemies and died near Pompey's tomb. There will, I hope, be no political knives visible tonight or hereafter in the important subject we are to discuss. Human rights and their protection are a matter of international concern. Our debate is merely a reflection of this wider, international concern. President Carter has elevated the long-standing American focus on human rights, as part of the American Constitution and as a humanitarian concern, into an attribute of national foreign policy. But this move began even before President Carter took office. It was President Ford who established, in the Office of the Secretary of State, a special Co-ordinator for Human Rights and Humanitarian Affairs. President Carter has made human rights a corner stone in his foreign policy. We hear a great deal about it from New York and Belgrade. The international debate inevitabl turns our attention upon our domestic situation in Australia. This attention inescapably raises the question whether we, in Australia, should have a bill of rights in our Constitution and if not, what steps, short of a bill of rights, should be adopte so that we are not left behind in the international movement to provide practical protection for the rights of man.

HISTORICAL PERSPECTIVE : THE U.S. BILL OF RIGHTS

The Australian Constitution contains no catalogue of the liberties of the Australian people. The American Constitution, from which we have borrowed so much else (including the federal system of our government) does contain such a list. But even the original Constitution of the United States did not have a bill of rights.

The delegates to the convention in Philadelphia were not overly solicitous for the liberties of the people. Most of them felt that the people had too much liberty. Alexander Hamilton once declared "Your people is a beast". It was hardly surprising, then, that the framers of the initial American Constitution showed little enthusiasm for the proposal by Mason (the author of the Virginia Bill of Rights) to preface the new instrument with a declaration of the liberties of the people. Roger Sherman of Connecticut was all for "securing the rights of the people when requisite". But was it really requisite here? The States themselves generally had declarations in their Constitutions. That was enough. The debate was short. When the motion to appoint a committee to draft a bill of rights came to a formal vote, not a single State delegation could muster a majority in favour. The motion was lost, ten States to none. The original American Constitution was as silent as ours on the issue of rights. Like ours, it contained a few provisions designed to protect civil liberties. It forbade the enactment of retroactive laws, laws condemning without trial by bills of attainder, and suspension of habeas corpus except in cases of rebellion or invasion. It guaranteed the right to trial by jury in federal criminal cases and prohibited religious tests as a requirement for holding public office under the new government.

The American instrument soon provoked criticism. State Constitutions were being enacted in which the declarations of

rights of citizens constituted the major part of the document. The influence of Locke and Rousseau which had fuelled the successful rebellion, was soon felt. After all, the notion that men were created free and with inalienable natural rights was the moral justification for the dissolution of the bands of kinship and loyalty which had connected the colonies with Great Britain. Yet for all this, the initial American Constitution contained in its preamble but one single phrase, relevant to this motive force. That was the reference to "securing the blessings of liberty" which was listed last among the purposes of the Constitution, almost as an afterthought.

Opponents of listing civic rights included the draftsmen and champions of the Constitution, particularly Hamilton and James Madison. They argued, in terms that will become familiar, that a separate bill of rights was not only unnecessary but even dangerous. It was unnecessary because the powers of the new government were limited to those specifically given to it in the Constitution. No power to abridge or deny liberties had been delegated to it. Hamilton asked why it was necessary to declare "that things shall not be done which there is no power to do". Why forbid Congress to abridge freedom of religion, when Congress had no jurisdiction whatever to enact religious laws? The inclusion of a separate bill of rights was dangerous, so it was said, because by listing them, you might infer their limitation. If you say that a legislative body may not abridge certain listed freedoms, do you imply that, otherwise, there is power to abridge them that needs to be checked?

Additionally, James Wilson of Pennsylvania asked "Who will be bold enough to enumerate all the rights of the people?" If, for brevity or by oversight (or failure of prophetic wisdom) the list is incomplete, is there an inhibition on the development of liberty that the absence of a list would not have caused

These arguments, which raged this time 200 years ago in the newly born United States are still relevant in today's Australia. They are, indeed, the issues before us tonight. So far, in Australia, the arguments of the opponents (of Hamilton, Madison, Sherman and Wilson) have prevailed. But they did not prevail in the United States. Ratification of the Constitution was only secured by the vow of those who supported a bill of rights that they would seek to amend the new Constitution to incorporate a list of agreed fundamental guarantees.

The man chosen to draft a bill of rights was James Madison. He was sceptical of the value of bills of rights. His draft was based on various proposals submitted by State conventions. It was debated at length in both Houses of the Congress. Ultimately it secured the requisite two-thirds vote in each House and was submitted to the States for ratification. On 15 December 1791, the first ten amendments became part of the Constitution when Virginia became the 11th State to ratify them, thus making up three-fourths of the States of the Union. These ten amendments are generally called the American Bill of Rights. They do not constitute all of the rights of American citizens. As I have said, some rights were already contained in initial Constitution. Others have been incorporated by later amendments (such as freedom from slavery or unequal treatment by government which came after the Civil War). Others exist in the inherited common law. Others have been conferred by specific legislation.

The list of "rights" contained in the first ten amendment constitutes, nonetheless, a roll of American liberties. They are learnt by heart in every American school. They are a source of pride in that great country. They have proved remarkably adaptable and relevant to the problems of modern America. Even if we do not agree with a notion of a bill of rights, the America

experiment, now nearly two centuries old, must command our thoughtful attention.

Briefly, the First Amendment forbade Congress to enact laws establishing religion or prohibiting its free exercise or abridging freedom of speech, press, assembly and petition. The Second Amendment guaranteed the right to bear arms. The Third prohibited quartering of soldiers in private homes in peacetime, without the owners' consent. The Fourth outlawed unreasonable searches and seizures. The Fifth guaranteed prosecution of felonies by indictment, forbade double jeopardy, compulsory self incrimination, deprivation of life, liberty or property without due process of law and the taking of private property for public use without just compensation. The Sixth guaranteed a speedy impartial public and local trial in all criminal prosecutions, guaranteed the right to subpoena witnesses and the assistance of legal counsel. The Seventh provided for jury trials in civil actions. The Eighth prohibited excessive bail, excessive fines and cruel and unusual punishments. The Ninth provided that the mere fact that rights were not specifically enumerated should not be taken to deny their existence. The Tenth underlined that powers not expressly delegated to the Federal Government are retained by the States and the people.[1]

THE AUSTRALIAN CONSTITUTION

When the protracted and agonising efforts were made to unite the Australian colonies in a Federal Commonwealth, it was inevitable that the draftsmen of the various bases for union should rely heavily on the American precedent. This they did. The Constitution is written. The system of government is federal. The Federal Parliament has limited, enumerated powers, the balance remaining with the States. There are, however, vital differences. The position of the Crown was preserved. The rigid separation of powers, critical to the American Constitution, was

1. This account of the American Bill of Rights is taken principally from L. Pfeffer, *The Liberties of An American*, 2nd Ed., 1963.

modified so that the Ministers of the Executive sit in and are responsible to the Parliament. There was no entrenched list of guaranteed rights of the Australian citizen.

There are a number of apparently important guarantees of personal liberty in the Constitution. Two, apparently important, been so interpreted by the High Court of Australia as to have a very limited application. The first is the provision in s.116 of the Constitution forbidding the Commonwealth from making any law establishing any religion or imposing any religious observance or prohibiting the free exercise of any religion. This provision was actually inserted in the Constitution basically as a "trade off" for the adoption in the preamble of the invocation to God "whereas the people ... humbly relying on the blessing of Almighty God have agreed to unite ...". Lest this invocation of the Deity should have untoward consequences, the guarantee in s.116 was included. In the opinio of Sir Owen Dixon it was a "probably unnecessary exception".[2] Certainly during the last war, when the pressures of wartime saw a conflict between perceived necessities and the desires of a small and unpopular religious sect, the prohibition took second place.[3] Likewise the guarantee in s.80 that the trial on indictment of any offence against the law of the Commonwealth "shall be by jury", has been quite simply circumscribed by the Commonwealth limiting the number of offences which are triable on indictment. The High Court upheld the contention that, despit its language, s.80 carries no implication that *any* offences must be made indictable.[4]

Indeed, the only provision in the nature of a "fundamenta guarantee" in our Constitution to have been given significant effect is that found in s.92 which guarantees the absolute freedo of trade, commerce and intercourse among the States. The provisi

2. O. Dixon, "Two Constitutions Compared", in *Jesting Pilate*, 19 100, 102 (the book hereafter called "Dixon").
3. *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth* (1943) 67 *C.L.R.* 116.
4. *R v. Archdall* (1928) 41 *C.L.R.* 125, 139.

in s.41 that no adult person shall be prevented from voting at elections for either House of the Parliament of the Commonwealth is limited to guaranteeing such persons only such a right as he has or acquires in State elections. Attempts to flesh out the voting provisions to accord rights to young people[5] or to ensure roughly equal electoral boundaries[6] met with little support in the High Court of Australia. The Australian Constitution, a somewhat curious and interesting document, is singularly devoid of the high sounding language normally to be found in a constitutional instrument nowadays. Its terse prose has attracted terse and, frequently, highly literal interpretation.

There is nothing in our Constitution of the self-confident language of the American Bill of Rights. But the possible inclusior of guaranteed fights *was* debated at the Constitutional Convention, particularly the Third Session held in Melbourne in 1898.

The debate was raised principally in relation to a suggestion by the Legislative Assembly of Tasmania that the Constitution should contain a provision prohibiting any State from making or enforcing :

> "any law or abridging any privilege or immunity of citizens of the Commonwealth, nor shall a state deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws".[7]

This suggestion became a test. The most valiant defender to emerge was R.E. O'Connor Q.C. from New South Wales. Though even he admitted :

> "The citizenship which is aimed at ... is not to be attained by a provision of this kind, but by the comity and friendship that must ensue when we are all one people. Any declaration of the rights

5. *King v. Jones* (1972) 46 *A.L.J.R.* 524.
6. *Attorney-General for Australia (ex rel. McKinlay v. Commonwealth* (1976) 50 *A.L.J.R.* 279.
7. Australian Federal Convention, *Official Record of the Debates*, 3rd Session, Melbourne, 1898, Vol. 1, 682.

> of the citizens, and any interference with the local rights of the states ... would be very mischevous ... In the ordinary course of things such a provision at this time of day would be unnecessary; but we all know that laws are passed by majorities, and that communities are liable to sudden and very often to unjust impulses - as much so now as ever. The amendment is simply a declaration that no impulse of this kind which might lead to the passing of an unjust law shall deprive a citizen of his right to a fair trial. ... It is a declaration of liberty and freedom in our dealing with citizens of the Commonwealth. Not only can there be no harm in placing it in the Constitution, but it is also necessary for the protection of the liberty of anybody who lives within the limits of any State".[8]

Chief amongst the opponents was Mr.Isaac Isaacs M.L.A., Attorney-General for Victoria.

> "[The debate] ... is far more than a question of drafting. ... The phrase "the equal protection of the laws" looks very well, but what does it mean? It was part and parcel of the 14th amendment of the American Constitution; it was introduced on account of the negro difficulty ..."[9]

Mr. Higgins then intervened :

> "It protects Chinamen too, I suppose, as well as negroes?"[10]

Isaacs, seized the debating point and grasped the nettle :

> "It would protect Chinamen in the same way. As I said before, it prevents discriminations on account of race or colour, whether those discriminations be by Parliament or by

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8. *Ibid*, 682-3.
9. *Ibid*, 686.
10. *Ibid*, 687. *Cf.* ss.51(xxvi) and 127 of the Constitution before the 1957 Referendum.

> administration. ... To put it in plain language, our factory legislation must be void. I put that one simple statement before Honourable Members, and I would ask them how they can expect to get for this Constitution the support of the workers of this colony or of any other colony, if they are told that all our factory legislation is to be null and void and that no such legislation is to be possible in the future. ... I say that there is no necessity for these words at all. If anybody could point to anything that any colony has ever done, in any way, of attempting to persecute a citizen without due process of law there would be some reason for this proposal".[11]

Dr. Cockburn of South Australia posed the same question :

> "Why should these words be inserted? They would be a reflection on our civilisation. Have any of the colonies of Australia ever attempted to deprive any person of life, liberty or property without due process of law? I repeat that the insertion of these words would be a reflection on our civilisation. People would say - "Pretty things these States of Australia; they have to be prevented by a provision in the Constitution from doing the grossest injustice"."[12]

Mr. O'Connor went to the defence of the clause :

> "We are making a Constitution which is to endure, practically speaking, for all time. We do not know when some wave of popular feeling may lead a majority ... to commit an injustice by passing a law that would deprive citizens of life, liberty or property without due process of law. If no State does anything of this kind there will be no harm in this provision, but it is only right that this protection should be given to every citizen of the Commonwealth".[13]

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11. *Ibid*, 687-8.
12. *Ibid*, 688.
13. *loc cit.*

Dr. Cockburn would not be silenced and declared, the American Civil War then fresh in mind :

> "The only country in which the guarantee exists is that in which its provisions are most frequently violated".[14]

The words were put to the vote. The committee divided. There were 19 ayes and 23 noes. The provision was lost. An attenuated version guaranteeing residents of the States against discrimination and disabilities became s.117 of the Constitution. The attempt to import a "due process" guarantee failed. The humour of the Convention was plainly apprehensive and anxious about the prospects of federation. Notions of "rights" got little attention in the lengthy debates about railways, the river question and so on.

SINCE THE CONSTITUTION

I have recounted the debates in Melbourne in 1898 because the issues they raised are still fresh. Put shortly, the Founding Fathers of this country turned their back on an Australian Bill of Rights for a practical reason. As it happened, the practical reason had strong support in the traditional thinking of British lawyers. The practical reason was the fear that anything controversial in the Constitution would spell its doom. As it is, though passed handsomely in Victoria, the Constitution was only narrowly approved in New South Wales and more narrowly still in Queensland. I shall not dwell on the Queensland opposition. The New South Wales reservations related principally to the inhibitions contained in the Constitution upon the democratic principle "one man one vote".[15] The fear expressed by Isaacs may sound unpalatable today. It was that Chinamen mightactually secure equal civil rights and not be subject to unequal laws. Perhaps the narrow passage of the Referenda in New South Wales and Queensland justifies Isaacs' caution. Like all efforts at uniformity in Australia, our Constitution was a compromise,painfully wrought after the most tiresome negotiation in one committee after another.

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14. *Ibid*, 689.
15. J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, 225.

Mere pragmatism might not have carried the day, if the argument did not have deep roots in Anglo-Saxon attitudes to "rights". The British Constitution does not contain any comprehensive statement of human rights. The debate is alive in Britain. But that is the present position. Jeremy Bentham put the traditional view thus in his comments on the Declaration of the Rights of Man made during the French Revolution :

> "Look to the letter, you find nonsense - look beyond the letter, you find nothing ... *Natural Rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense - nonsense upon stilts".[16]

Dicey, whilst lamenting the necessary weakness and inflexibility of federalism and its tendency to remit vitally important questions to the judiciary, acknowledged that "most foreign constitution makers have begun with declarations of rights". He suggested that they "have often been in no ways to blame", doubtless referring to the American history.

Because we never had a Revolution and achieved representative, responsible and then national government by orderly change, there was never the focus of attention in Australia upon "rights" and the need to assert and defend them. On the contrary, from England was inherited a political thesis that the best guarantee of freedoms and liberties was to be found in the common law, a responsible Parliament and an independent judiciary.[17] Sir Ivor Jennings put the traditional approach this way :

> "The English constitutional lawyer ... has never tried to express, and does not think of expressing, the fundamental ideas which are implicit in his Constitution. ... An English lawyer is apt to shy away from a general proposition like a horse from a ghost. ... On the whole, the politician of tomorrow is more

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16. Cited S.A. de Smith, *The New Commonwealth and Its Constitutions* 1964, 164.
17. H. Storey, Protection of Human Rights - Alternatives and Options, in *A Human Rights Commission for Australia*, 14 May 1977, *mimeo*, 21. For the views of the present Attorney-General of the Commonwealth, to similar effect, see P.D. Durack and R.D. Wilson, "Do We Need a New Constitution for the Commonwealth?" (1967) 41 *A.L.J.* 231, 242.

likely to be right than the constitutional lawyer of today".[18]

In similar vein was the defence by Sir Owen Dixon of our Constitution's rejection of a bill of rights:

> "In [the United States] men have come to regard formal guarantees of life, liberty and property against invasion by government, as indispensable to a free constitution. Bred in this doctrine you may think it strange that in Australia, a democracy if ever there was one, the cherished American practice of placing in the fundamental law guarantees of personal liberty should prove unacceptable to our Constitution makers. But so it was. The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except insofar as it might be necessary for the purpose of distributing between the States and the central government, the full content of legislative power. The history of their country has not taught them the need of provisions directed to the control of the legislature itself. The working of such provisions in [the United States] was conscientiously studied, but, wonder as you may, it is a fact that the study fired no one with enthusiasm for the principle. ... It may surprise you to learn that in Australia one view held was that these checks on legislative action were undemocratic, because to adopt them argued a want of confidence in the will of the people. Why, asked the Australian democratics, should doubt be thrown on the wisdom and safety of entrusting to the chosen representatives of the people sitting either in federal Parliament or in the State Parliaments all legislative power, substantially without fetter or restriction"?[19]

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18. Cited de Smith, 165.
19. Dixon, n.2, 102.

Sir Owen Dixon explained 11 years later, in 1955, how deep was this Australian prejudice against a bill of rights :

> "Civil liberties depend with us upon nothing more obligatory than tradition and upon nothing more inflexible than the principles of interpretation and the duty of courts to presume in favour of innocence and against the invasion of personal freedom under colour of authority. We did not adopt the Bill of Rights or transcribe the Fourteenth Amendment. It is, as it appears to me, a striking difference. It goes deep in legal thinking. The influence is far reaching that has been exerted upon the judicial and juridical thought of [the United States] by the functions which the courts must fulfil under those great constitutional guarantees".[20]

This, then, is the traditional view. It was the view adopted in 1898 in this city. It was the view adopted in 1901 in our Constitution. It was the view espoused by Sir Owen Dixon in 1944 and 1955. It was the view taught me and every lawyer present, trained in our legal tradition, until the past ten years or so. A British subject, and an Australian citizen, had all his liberties unless Parliament, acting within power, in the name of democracy, deprived him of liberties. The question we must ask ourselves tonight is whether all this was wrong and whether the time has come to do something more positive about the protection of human rights, and if so, how.

THE RECENT DEBATE

Though it is not unique for a national constitution to contain no reference to civic rights, it is, nowadays, unusual. At the last count of 147 national Constitutions, 108 of them contained provisions equivalent to a bill of rights. Thirty nine contained no such provisions. It must be said, however, that of the 108 the great majority are countries in which human rights that we regard as important might

20. In Concerning Judicial Method in Dixon, n.2, 153.

be considered precarious or even lacking in general respect. There is absolutely no doubt that the written bill of rights is no guarantee of the respect of human rights. This much is clearly not in dispute. It is also undoubtedly true that real respect for civil and political rights depends on relative prosperity, civic attitudes, traditions and history as much as upon the economic factors already referred to. Despite all this, there is now a vocal movement in Australia for the establishment of certain constitutionally guaranteed rights, enforceable at the behest of an individual citizen. The Australian Labor Party has in its platform the introduction into the Australian Constitution of provisions to protect "Fundamental Rights and Civil Liberties". The approach of the Liberal and National Country Parties is rather to establish a special commission and to introduce specific legislation to protect human rights.

In England the opponents of human rights provisions tend to come from the Labour side of politics, expressing fear about conservative judicial restraint on a radical, sovereign Parliament. On the other hand, the former Conservative Lord Chancellor, Lord Hailsham, has now come out strongly in favour of a bill of rights.[21] One of the most frequent and vocal supporters of a British Bill of Rights is Lord Scarman, a Lord of Appeal in Ordinary, and former Chairman of the English Law Commission.

In November last year, he suggested that in a complex, plural society, a bill of rights could, as the Americans have found, provide "a body of principle on which the legislature as well as the courts can build".[22] To meet the challenges to plural society, Britain, like Australia, took the path of specific legislation. Lord Scarman is critical of this approach :

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21. Lord Hailsham, The Richard O'Sullivan Memorial Lecturer, *The Times*, 26 May 1977, 2. See also his Dimbleby Lecture, 1976.

22. Lord Scarman, Annual Minority Rights Group Lecturer on "Righ and Obligations in a Plural Society". Reported, *The Times*, 17 November 1977, 1.

> "The reaction was typical - pragmatic, empirical. We have not yet thought out a solution of principle. We have simply acted to meet urgent difficulties, preferring to use administrative and legislative methods wherever possible."[23]

What the Americans had sought to achieve by reliance on a written Constitution and the Bill of Rights, interpreted by judges, the British had sought to do by detailed legislation. A bill of rights for Britain, Lord Scarman declared, would remind legislators that laws have to be consistent with the human rights of everyone. It would provide criteria for judicial interpretatic of such legislation :

> "The complexities of the plural sotiety are such that without a Bill of Rights we are in danger of losing our sense of direction. ... A bill of rights is imperative to keep alive our principles during a period of social development in which it is necessary to load the law in favour of deprived groups".[24]

In January of this year, Lord Scarman appeared before a House of Lords Committee inquiring into a bill of rights for Britain. He told the Lords that the time had come to "move over to the attack". Britain should not simply look on a bill of rights as a strange foreign import, yet another price to be borne for entering the European communities. A bill of rights he declared would :

> "freshen up the principles of the common law; it provides the judges with a revived body of legal principles on which they would go to develop the common law case by case as they had been doing for centuries".[25]

When the debate reaches such an open and vocal stage in Britain, from whom our inhibitions on this score were inherited, it is clearly worth pausing for a moment to collect again the major themes in the Australian debate for and against a bill of rights,

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23. *Ibid*, 1, 2.
24. *Ibid*, 2.
25. As quoted, *The Times*, 24 January 1978, 2.

entrenched in the Constitution. Before and since federation opinions have ranged from sceptical opposition to passionate support. Mr. Ellicott, adding to Sir Owen Dixon's list, says that we do not need a bill of rights because the true protections of our civil liberties are to be found in our system of representative and responsible government, the judiciary, a free press and our legal tradition.[26] Mr. Storey, the Attorney-General of this State, has expressed the fear, reminiscent of James Wilson of Pennsylvania, that the incorporation of vague and necessarily general statements of rights will lead not only to uncertainty, but by their very definition, to a *limitation* upon our rights and liberties.[27] What is a minimum may become the maximum.

Many Australians have expressed special reservations about the potential for a bill of rights to damage the role and standing of the judiciary. If judges have to "flesh out" the generalities of broad statements of rights, they may thereby assume the mantle of legislators : inventing and not simply applying the law.[28] An important recent address by Professor Gordon Reid of the University of Western Australia lamented, amongst other things, the recent transformation of the judiciary in Australia :

> "Most of the radicalism in Australian government in recent years is to be found in that part of its structure which has traditionally been classified as arch conservative. ... Australians are being encouraged to believe that with representative democracy failing us, the Judiciary - the least democratic component of our institutional arrangements - has the means to save us. ... We also have new statutes providing for a network of legal aid commissions throughout Australia, a newly created and active federal Law

26. R.J. Ellicott, "The Commonwealth Government's Proposal" in *A Human Rights Commission for Australia*, 5.
27. Storey, 22.
28. Storey, 23.

> Reform Commission, and legislation is now passed before the Parliament for a Human Rights Commission. In the midst, and in the wake, of this reforming turmoil [an] interesting trend [is] discernable - [which] I call "judicial imperialism". ... The federal judiciary has made obvious territorial gains ... There is unprecedented judicial activism in policy-making in Australian government ... The Executive's need for the help of Judges cannot be divorced from the declining reputation of, and our increasing impatience with, politics and politicians. One consequence of running-down the elected component of our system of government is that only the judiciary is acceptable to the public as being untainted by ideological preconceptions. Politicians, businessmen, trade unionists, academics, military personnel have already lost much of their public credibility ... So in using the judiciary in this way, the Executive Government is using the last available line of human resources to establish credibility for its policies. It is engaging in a risky strategy. If the judiciary is depicted publicly as fostering one set of political views, or of protecting one economic interest at the expense of another - where do we turn next? ... The practice is fraught with dangers for a fearlessly independent judiciary."[29]

Those who see the way the American judiciary has developed the bill of rights, by dealing not in the mechanical application of finely reasoned points of law but in the broad tenets of social and political philosophy fear that, if we were to do likewise, our judges would lose the authority which is the ultimate source of order and peace in society.

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29. G. Reid, *The Changing Political Framework*, address to 1978 Summer School of the Australian Institute of Political Scien 29 January 1978, *mimeo*, 22-30.

The faith in judges, which is often expressed by supporters of a bill of rights, is seen by radical critics as touching and naive. In Britain, but also in Australia, the background and training of judges is fairly uniform and generally conservatising. The faith in judges to fashion enforceable liberal rights is viewed by critics with scepticism".[30] As Professor Reid points out, our judiciary was, until lately at least, seen as "arch conservative". For those who point to the American Constitution, and the way the judges have developed it, critics say that the Americans had their Bill of Rights virtually from the start, have grown up with it over nearly two centuries and have developed it by a handful of judicial minds trained in its tradition. Over and over again critics of an Australian bill of rights point out that constitutional guarantees are no sure safeguard of rights. The experience in Africa and the Soviet Union are cited.[31] But so is the experience of the United States where, not until recently, was the Constitution used to assert the rights of the coloured minority and then, so it is said, only when the whole community had come round to a ready acceptance of such reforms.[32] Opponents of the Bill of Rights Movement in Australia condemn the moves as pointless, irrelevant and possibly dangerous self-indulgence. What is needed, they say, is not the vague statement of general rights but specific and enforceable legislation that will work. We are told that we can look to responsible and responsive Parliaments to do the job. Mr. Ellicott put it this way :

> "The government is committed to preserving human rights in this country. It does not however agree that it is necessary to have a Bill of Rights in order to do so. ... In

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30. Storey, 23.
31. *Ibid.*
32. *Loc. cit.*

> the Government's view,there should be a case by case approach to human rights. This approach would deal with areas where human rights in Australia are not basically recognised or which need clarification or codification or would deal with instances where it is demonstrated by the complaints of individuals that existing laws or practices failed to observe basic human rights. The Criminal Investigation Bill is a clear indication of the government's attitude. The privacy reference to the Law Reform Commission is another".[33]

Against these arguments the campaign for a general (and preferably constitutional) statement of rights attracts many ardent supporters. Doubtless there are many of them here. Some of them, like the Attorney-General for New South Wales, Mr. Walker, put the opposition down to nothing more than the "intellectual paralysis" of the traditionalist legal mind.[34] They point to the vulnerability of Australians to increasing concentrations of arbitrary power, whether in government, business or individuals. The theory that Parliament will step in to protect people's rights is assailed as a myth. It would be all right if it worked, but it does not. It assumes an independent and critical media, an active and informed electorate, politicians who are responsible and responsive to electoral needs, Members of Parliament who are prepared to fight against Party pressures and minorities who are well organised, articulate and persuasive. Short of the Millenium, we will not have all of these and accordingly, if we are to give legal protection where increasingly it is needed, we must arm the judiciary with new weapons. The judges can be trusted not to exceed proper functions, particularly given our judicial traditions.

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33. R.J. Ellicott, *Commonwealth Parliamentary Debates* (H of R), 1 June 1977, 2292. Second Reading Speech on the Human Rights Commission Bill.
34. Legislative Foundations of Human Rights - The Problems of Distrust and States' Rights, in *A Human Rights Commission for Australia*, 27.

To Professor Reid's caution against judicial imperialism it is perhaps appropriate to remind ourselves what another Reid, Lord Reid, one of the most outstanding jurists of the English law of our time, said about judges making law:

> "There was a time when it was thought almost indecent to suggest that judges make law - they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more. So we must accept the fact that for better or worse judges do make law."[35]

But if judges *do* make law and, especially if the highest courts, *do* decide between competing policy issues, Professor Reid's attempt to put them into an isolation ward may be seen (by some at least) as an attempt to push judges back into Aladdin's cave and revive the world of comfortable fairy stories. It does smack, to my mind, of Montesquieuian fundamentalism. At a federal level the pass was sold in 1904 when a judicial-type body was set up under one of the judges of the High Court, to regulate and control industrial relations. Judges deciding human rights issues do not seem to me conceptually different to judges deciding other policy questions.

The strongest argument for a bill of rights, enforceable in the courts, is that it provides the judiciary with general principles to which they can appeal to deal with the truly unacceptable and outrageous cases i.e. those instances where legal injustice has been allowed to be perpetuated by Parliamentary

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35. Lord Reid, The Judge as Law Maker (1972) *Journal of The Society of Teachers of Public Law*, 22
36. Walker, 28.

indifference, administrative complacency and judicial restraint.[36] The facility of a bill of rights could, as Mr. Trudeau has suggested, "withdraw certain subjects from the vicissitudes of political controversy, place them beyond the reach of minorities and officials, and ... establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech and a free press, freedom of worship and assembly and other fundamental rights ... depend on the outcome of no elections".[37]

Even Sir Owen Dixon, though a critic of bills of rights, conceded that in the hands of the American judiciary, the bill of rights has become a great engine for legal change :

> "[T]he American legal system provides a fertile field from which ideas spring; because it forms a lively stimulus to legal thought".[38]

Nothing has contributed so much to the stimulus as the catalogue of rights adopted in 1791. Its presence is generally conceded to have had a moral and educative force on American citizens. Indirectly, this has influenced thinking in many countries, including, lately, the uniting countries of Europe. In an age of increasing general education and civic awareness, it may be easier to enliven the mass interest and appreciation of our inherited liberties, if they are collected in a document which is readily accessible to the citizens. In Australia the danger to our rights is not in a frontal assault upon them. It is in their slow erosion by a mass of well-meaning legislation or the indifference of a community bent on material advancement alone.

The argument for a constitutional bill of rights rests here. There are no moves imminent to entrench a list of fundamenta rights in our Constitution. The action to protect rights in Australia is elsewhere.

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37. P.E. Trudeau cited by L.F. Bowen, "Will a Commission Be Effective?" in *A Human Rights Commission for Australia*, 9 at 13.
38. Dixon, 153.

GENERAL LEGISLATION

As is wellknown, there are means, short of incorporating a Bill of Rights in the Constitution, by which legal protection can be secured by general legislation. In Canada, which has a federal system and legal tradition similar to our own, the Parliament in 1960 passed an Act for the Recognition and Protection of Human Rights and Fundamental Freedom. The Act declares certain rights and freedoms which are specified and provides that every Act of the Federal Parliament or Regulation made under such an Act shall, unless expressly declared to operate notwithstanding the Bill of Rights, be "so construed and applied" as not to derogate from or authorise derogation from the declared rights and freedoms. This legislation was passed during a period of Conservative administration in Canada. It was a major article of faith of Mr. John Diefenbaker,[38] both in Government and Opposition. It has secured universal political support in Canada. The judicial reaction to it has been patchy but more recent decisions would appear to indicate that the judiciary is learning to live with this new creature.[39]

Meanwhile, the international community has moved quite rapidly in the construction of international statements of enforceable human rights. I say nothing of the moves in Europe[40] or in other regions. Undoubtedly, the worldwide moves for the expression and protection of human rights arose out of the ashes of the Second World War. The United Nations Charter itself speaks in its preamble of "fundamental human rights" of "the dignity and worth of the human person". Article 1 enjoins the Members to promote respect for "human rights and for fundamental freedoms for all without distinction". The Charter was in turn reflected in the Universal Declaration of Human Rights. Later International

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39. W.N. Tarnopolosky, "The Supreme Court and Civil Liberty" (1976) 14 *Albert L.Rev.* 58; N. Lyon, The Central Fallacy of Canadian Constitutional Law (1976) 22 *McGill L.J.* 40.

40. *Cf.* G. Triggs "Prisoner's Rights to Legal Advice and Access to the Court The Golder Decision by the European Court of Human Rights" (1976) 50 *A.L.J.* 229.

Covenants were prepared, designed to give teeth to the earlier general statements. The most important of these Covenants is the International Covenant on Civil and Political Rights. Australia, with a delegation led by Attorney-General Nigel Bowen, took an active part in the 1960s in the negotiations which led up to the conclusion of this Covenant. Sufficient numbers of States having ratified the Covenant it has now come into force as part of international law. It was signed by Australia on 18 December 1972 but has not yet been ratified or subscribed to by this country. The intention of successive Australian Governments has been that we should ratify the Covenant and, within our constitutional arrangements, do what is necessary to provide for its enforcement in this country.

During the Labor Government, the Human Rights Bill 1973 was introduced by Attorney-General Murphy.[41] The Bill, by clause 6, provided for approval to be given to ratification by Australia of the International Covenant on Civil and Political Rights (as well as the Convention on the Political Rights of Women). The Bill purported to bind Australia "and each State".[42] It set out in its clauses substantially, but not exactly, the provisions of the International Covenant. It then established certain machinery for the enforcement of the rights stated in general terms. This machinery included a Human Rights Commissioner with powers of conciliation and, ultimately, access to the federal courts for enforcement. It also provided for an Australian Human Rights Council and various other machinery provisions. The Bill lapsed with the dissolution of the Parliament in mid 1974. It was never reintroduced. It engendered much heat and passion during its short life. It was attacked by churchmen, the *Australian Medical Journal*, Sir Robert Menzies and the then Chief Justice of Victoria who, before retiring to take up the position of Governor, wrote a letter to the State Attorney criticising its terms and purpose.[43] The arguments raised for and against the Human Rights

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41. *Commonwealth Parliamentary Debates (Senate)*, 21 November 1973, 1971.
42. Clause 5(1).
43. As reported in *The Age*, 1 February 1974, 3.

Bill need not be recounted as most of them have already been listed. The question of the Commonwealth's power under our Constitution to pass legislation in such general terms, even under the external affairs power, was hotly contested by certain of the States.

Following the change of government at the end of 1975, the incoming Administration showed itself equally keen to ratify the International Covenant but more prepared to do so after consultation with the States. It was hoped that this consultation would secure a broad national agreement on human rights and participation in general national machinery for their enforcement.[44] The result was the Human Rights Commission Bill 1977. This followed a Canadian and New Zealand decision to establish a Human Rights Commission. The major purpose of the Bill was to "ensure that Commonwealth and Territory laws, acts and practices conform with the International Covenant on Civil and Political Rights".[45] The Bill establishes a Human Rights Commission comprising between six and ten members. The functions of the Commission include the examination of enactments (or when requested to do so by the Minister, proposed enactments) -

> "for the purpose of ascertaining whether the enactments or proposed enactments are or would be inconsistent with or contrary to the rights and freedoms recognised in the [International Covenant on Civil and Political Rights]." (Clause 8(a)).

The Commission may also inquire into acts and practices and suggest action that should be taken to comply with the provisions of the Covenant. Furthermore, it has general research and educational functions. Clause 9(3) empowered the Commission to inquire into and report upon a complaint made in writing by a particular individual. The limitations

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44. Ellicott, *C.P.D.*, 2292.
45. Ellicott, 2291.

of the Commission are clear and are acknowledged. It is limited to Commonwealth laws. Its functions are limited, upon complaint, to inquiry and report. It has no means of providing specific relief. It is, in short, a Commonwealth monitor or "watchdog".

The hopes for participation of the States of Australia appears to have come to nothing. Mr. Ellicott, introducing the Bill, explained why :

> "Consistently with the notion that the Commission should be established as a joint Commonwealth-State venture, I proposed that the Commission should be subject to the direction of a body called the Human Rights Council, in relation to that part of its work that related to the examination of State and Commonwealth laws and practices. I proposed that the Council should be empowered to lay down criteria to be taken into account in determining whether laws or practices fell within the scope of the International Covenant and that membership of both the Commission and the Council should consist of State as well as Commonwealth members. ... Accordingly there have been discussions with the States on this matter and I anticipate that further discussions will be held shortly. However, most of the States have indicated that at this stage they would not propose to join in a scheme that involved functions relating to State legislation and State practices being vested in a Commonwealth Commission. Having regard to these discussions the functions in the Commonwealth's Commission as set out in this Bill will be limited to Commonwealth and Territory laws and practices."[46]

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46. Ellicott, 2292-3.

It seems that discussions with the States are continuing.[47] The Bill, like its predecessor, lapsed with the dissolution of the Parliament. It has been promised for reintroduction and there is some suggestion that it will be reintroduced in a different and more vigorous form. Time will tell. It seems unlikely, in view of the comments of some State law officers, that the States will agree to participate. The Victorian Attorney-General put it thus :

> "Objections to such a proposal in the context of a federation such as Australia might be that it creates one body answerable to one government with the responsibility of overseeing the activities of seven parliaments and governments. This could be seen as an intrusion upon democratic processes of the governments who do not participate in the formation of the Commission".[48]

Nevertheless, he did concede :

> "In the Australian context it would be best for the Commonwealth and the States to act together in a spirit of co-operation to achieve for the Australian citizen protection of their civil and political rights but ultimately those rights can only be protected if the community is determined to see that they will be protected".[49]

Critics of the Bill in the Labor Party have condemned it as "almost totally ineffective",[50] and "window-dressing".[51] Nevertheless, they have generally welcomed it whilst promising to do more. It is there that this debate rests and we will have to wait for the reintroduction of the Human Rights Commission Bill during the current session of Parliament to see the final form of the proposed Human Rights Commission. It

47. Ellicott, 2292-3.
48. Storey, 23.
49. Storey, 25.
50. Bowen, 9.
51. Bowen, 12.

should be said that the Canadian legislation has now been passed and the Canadian Human Rights Commission established, and began operations on 1 March 1978.

PROSPECTS?

We in Australia are in the midst of international movements, of which we must be part. Our legal and political system is not devoid of notions of civic rights and privileges. A tradition that traces its ancestry through the Bill of Rights, 1688, to Magna Carta, can scarcely be said to be one devoid of such notions. But it is the international movement which turns the spotlight on to the actual legal machinery that exists in a country, by which human rights can be, in practice, asserted, developed and defended. In our country we must face up to certain complications. We have inherited a strongly felt bias, particularly amongst lawyers, against enumerated bills of rights. We have a federal constitutional structure which divides responsibility for the subject matter of civic rights between the Commonwealth and the States. We have relatively few entrenched guarantees in our Federal Constitution. Those that exist have, in many cases, been emasculated by judicial decisions partly borne of the traditional approach to the rights of subjects of the Crown. The waters have been muddied of late by the fact that the debate has become caught up in party political viewpoints. I regard this as an extremely unhappy development. It is not necessary when one compares contemporary developments in Britain and Canada. We ought to be able to look at the issue dispassionately and weigh the arguments for and against, unhampered by ephemeral partisan allegiances that are forced upon us by the compulsory vote.

The objections which moved our Founding Fathers to reject an Australian Bill of Rights remain to be answered. They include the ultimate faith in sovereign and democratic Parliaments, the sensitivity to change inherent in the system of ministerial responsibility

the need to protect the judiciary from as much controversy on matters of policy as possible, so that they can go about their ordinary work, supported by the unquestioned confidence of the community. There is, as well, the fear that by enumeratin rights, we suggest their limitations and inhibi their developmen Tradition, tolerance of other points of view, relative prosperity, a free press and an active Parliament is what we should encourage, passing specific laws to deal with specific rights, supplemented perhaps by a general watchdog commission. But nothing more.

As against these cogent arguments, which till lately held the stage, a new appeal is made. It is an appeal for the provision of general principles which would guide our nation and would bind all citizens together, above the passing political controversies. Such a list would be available as a foothold for claims of legal right to challenge legislation or behaviour that unacceptably infringe civil rights and privileges. In this country, we pass every year, more than 1,000 statutes. There are more laws governing citizens if we include regulations, by-laws and other subordinary legislation. The peril in this proliferation of law-making is the erosion of rights by oversight. A bill of rights, so it is said, would arm the judiciary with new tools with which to fight the battles of the 20th and 21st centuries. Listing them in a public document, available from schooldays, would inculcate in citizens the accepted principles of our living together in Australian society. It would provide a touchstone against which laws that are often hastily drawn could be measured. It would not prevent contrary laws from being passed, but merely make it more difficult to do so and give lawmakers time to reflect. According to this view, Australia must play its part in the world-wide movement towards human rights protection.

You will forgive me if I do not express my own preference in this debate. As the matter has become, however unnecessarily, caught up in party political debate, I must, in accordance with

established traditions of the judiciary, refrain from expressing a preference. I should not want to be accused of "judicial imperialism". In any event, my view would have no more weight than any citizen's.

Nor must I, for the same reason, take part in the meeting which will follow and the attempt to establish an organisation aimed at promoting public discussions of constitutio reform in Australia. There is, of course, an official Constitutio Convention which has now had three meetings and which convenes again in the middle of this year. Anyone who reads the history of the making of the Australian Constitution will know what an important part was played by the parallel popular movement which accompanied the official debate and the meetings of the Federal Convention. The Australian Natives' Association which was formed in Victoria took the lead in this. The Corowa Federation Conference in August 1893 and the People's Federal Convention in Bathurst in 1896 undoubtedly fuelled the official machine which ultimately produced our Constitution. This popular movemen ought not, therefore, to be seen as something unorthodox or unseemly. It may generate ideas with a freedom that is not always possible for those in political life. One of the priceles advantages of our democracy is the opportunity it affords us to engage freely in debate, even debate about our constitutional fundamentals. It is for that reason that I was glad to receive the invitation to canvass before you the bill of rights debate. The resolution of the arguments I must leave to you.