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FACES OF THE EIGHTIES

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WITH ROBERT MOORE

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DO WE NEED A BILL OF RIGHTS IN AUSTRALIA?

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INTRODUCTION

It is appropriate and timely that the United Nations Association should consider at this conference the debate about human rights protection in Australia. It is *appropriate* because the United Nations itself, born out of the ashes of the Second War, was founded in the hope of doing something better for the protection of peace and the rights of man, that can only really flouish in times of peace. It is *timely* because human rights and their practical protection are a matter of current international and local concern. Our debate in Australia is merely a reflection of the wider international debate. 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 inevitably 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 adopted so that we are not left behind in the international movement to provide practical protection for the rights of man.

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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, have 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 opinion of Sir Owen Dixon it was a "probably unnecessary exception".[2] Certainly during the last war, when the pressures of wartime set 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, despite its language, s.80 carries no implication that *any* offences must be made indictable.[4]

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

2. O. Dixon, "Two Constitutions Compared", in *Jesting Pilate* 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 is 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 inclusio of guaranteed rights 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 might actually 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 Constitution*: 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 Melbourne. 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 "Rights 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 interpretation of such legislation :

> "The complexities of the plural society 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 Victoria, 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 Science 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[31] 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. *Op. cit.*

> [illegible] to [illegible] approach would deal with issues where human rights in Australia are not [illegible] recognised or which need [illegible] 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 private 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 impe
it is perhaps appropriate to remind ourselves what anothe
Lord Reid, one of the most outstanding jurists of the Engl
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 d make law and, especially if the highest co
d decide between competing policy issues, Professor Reid's
attempt to put them into an isolation ward may be seen (by
at least) as an attempt to push judges back into Aladdin's
and revive the world of comfortable fairy stories. It does
to my mind, of Montesquieuian fundamentalism. At a federal
the pass was sold in 1904 when a judicial-type body was se
under one of the judges of the High Court, to regulate and
control industrial relations. Judges deciding human rights
does not seem to me conceptually different to judges decid
other policy questions. Harder, perhaps; but not differen

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

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.[37] 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 fundamental 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.

[illegible]

[illegible] a bill of rights in the constitution, or entrenching provisions for a secure judicial application. In Canada, which has a federal system and legal tradition similar to [illegible], the Parliament in 1960 passed an Act for the Recognition and Protection of Human Rights and Fundamental Freedoms. 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, both in Government and opposition. It has secured universal political support in Canada. The judicial reaction to it has been patchy but some 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 owes much to the ideals (and something to the actions) of the United Na[illegible] The U.N. 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 discrimination". 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 *Alberta L.Rev.* 58; N. Lyon, The Central Fallacy of Canadian Constitutional Law (1976) 22 *McGill L.J.* 40.

40. J.T. G. Triggs "Prisoner's Rights to Legal Advice and Access to the Courts: The Golder Decision by the European Court of Human Rights" (1976) 50 *A.L.J.* 229.

[illegible] these [illegible] Attorney-General [illegible] in the 1960s in the [illegible] this Covenant, [illegible] the Covenant [illegible] 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 Righ

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

Bill need not be recounted as most of them have already [illegible] the [illegible] Commonwealth' [illegible] to [illegible] in [illegible] general terms, [illegible] under the external affairs power, was [illegible] contested by certain of the States.

Following the change of Government at the end of 19 the incoming Administration showed itself equally keen to ratify the International Covenant but were 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 achievement.[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 8(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.

[illegible] It is [illegible] to [illegible] to [illegible] [illegible] no means of providing specific relief. In fact, Commonwealth [illegible] "wait and see".

The hope 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.

[illegible]

[illegible] there is some suggestion that it will be reintroduced in a different and more [illegible] form. Time will tell. [illegible] unlikely, in view of the [illegible] of some State [illegible] allowed, that the States will [illegible] part. [illegible] Victorian Attorney-General put it [illegible]

> "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.

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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. The New Zealand Bill has also been passed and a New Zealand Commission established. The Australian Commission is imminent.

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 controver
on matters of policy as possible, so that they can go ab
their ordinary work, supported by the unquestioned confi
of the community. There is, as well, the fear that by en
rights, we suggest their limitations and inhibit their d
Tradition, tolerance of other points of view, relative
prosperity, a free press and an active Parliament are wha
should encourage, passing specific laws to deal with spec
rights, supplemented perhaps by a general watchdog commis
But nothing more. These are the arguments which would de
need for a general Bill of Rights for Australia.

As against these cogent arguments, which till lat
held the stage, a new appeal is made. It is an appeal fo
provision of general principles which would guide our nation and wou
bind all citizens together, above the passing political
controversies. Such a list would be available as a footh
for claims of legal right to challenge legislation or beh
that unacceptably infringe civil rights and privileges.
this country, we pass every year, more than 1,000 statute
There are more laws governing citizens if we include regu
by-laws and other subordinary legislation. The peril in t
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
20th and 21st centuries. Listing them in a public docume
available from schooldays, would inculcate in citizens th
accepted principles of our living together in Australian
It would provide a touchstone against which laws that are
hastily drawn could be measured. It would not prevent co
laws from being passed, but merely make it more difficult
so and give lawmakers time to reflect. According to this
Australia must play its part in the world-wide movement t
human rights protection.

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

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.

The rest of you are not so inhibited. As citizens you should all reflect on and take part in this debate. The challenges to our tolerant, peaceful and generally free society today are such that we cannot assume that our rights will remain intact if we simply do nothing. Big government, big business, big science and technology, industrial unrest, terrorism, civic disturbance and the occasional overreaction to the challenges they pose may erode our rights. They make it vital that we should sharpen new tools for the assertion, development and protection of our rights as Australians and as citizens of a wider world. It is a good thing that the United Nations Organisation and its Associations and supporters should help to focus attention on the human rights debate. It is also a good thing that in Australia there is a broad measure of bipartisan recognition that new tools *are* needed. That there is a division of opinion about the form the tools should take is less important. It may be nothing more than a reflection of an inevitable attribute of our Parliamentary democracy. Whilst allowing us the privilege of differences of opinion upon detail, this unites us in most fundamentals. And that, I suggest, is the position about human rights in Australia - and indeed in the wider world, at least in countries like Australia. Whilst there may be differences of view about the detail of human rights, there is a broad consensus about their fundamental content and about the need to uphold them in practical ways. Many of these fundamentals are already collected and stated in the United Nations Charter itself and in instruments forged under the impetus of the United Nations and its Agencies. Just as we should dedicate ourselves to vigilance in our domestic Australian situation, none of us is free of responsibility to our fellow man in the world community. The United Nations will be a vehicle for promoting practical protection for human rights and freedoms. It must translate windy rhetoric into practical action. That is why it remains the hope of the world. That is why I was honoured to receive your invitation to address you tonight.

A.B.C. TELEVISION

FACES OF THE EIGHTIES

THE HON. MR. JUSTICE M.D. KIRBY

SUMMARY

On 26 December 1979, A.B.C. Television broadcast an interview with Mr. Justice Kirby in which Robert Moore addressed a number of questions concerning the future of the law in Australia, the legal profession and Australian society.

In the course of the interview, Mr. Justice Kirby expressed views on a number of subjects relevant to the work of the Law Reform Commission. The A.B.C. proposes to publish this and other programmes in a booklet titled "Faces of the Eighties".

Among the issues discussed were :

FACES OF THE EIGHTIES NO 3

NOT FOR PUBLICATION BEFORE 10.00 P.M. WEDNESDAY 26TH DECEMBER 1979

ANNOUNCER — Mr. Justice Michael Kirby, Chairman of the Australian Law Reform Commission.
Mr. Justice Kirby practiced as a solicitor and then as a barrister before being appointed to the bench of the Conciliation and Arbitration Commission in 1974, at the age of 35. A few months later, he became the first Chairman of the Law Reform Commission.
Facing the Eighties, Mr. Justice Michael Kirby.

ROBERT MOORE — What about the law's delay and the law's cost which are the two I suppose, most common criticisms or worries that crop up. What can be done?

MR. JUSTICE KIRBY — Well, you start from the fact that the Legal Profession is a highly trained, highly educated, highly expert group of people and for that reason you're going to have to pay for services of such people. So that you start from that difficulty. But I think there's going to be a need to re-organise Court procedures, and perhaps to try to produce a remedy which fits into the mass produced society.

ROBERT MOORE — To what extent is justice denied to people because of it's cost? Are there groups within the community to whom, if you like, access to justice, to the Courts, is just not practical or feasible

MR. JUSTICE KIRBY — Well, of course there are, and even as recently as a week or so ago, when the report of the Commonwealth Commission on Legal Aid was tabled in parliament, it was revealed that in Western Australia even on the very strict requirements for Legal Aid which are in force there, disposable income of no more than $52.00 per week, 20% of people who qualified, could not get aid, because the amount of money wasn't there.

ROBERT MOORE — Is there any fundamental reform to the Legal system, which would fairly to all parties, reduce the cost of litigation in particular? I mean, Legal Aid is one thing, but in a sense that's a hand-aid approach I suppose. Is there any way of reducing the cost of the law?

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MR. JUSTICE KIRBY — Well, Sir Richard Eggleston has said that one of the obligations of lawyers, by the end of the century, will be to so present a cas that it can be resolved within one day of the busy time of a Judge or Magistrate. In other words, that the time available for the resolution of the dispute will be limited, and the skill of the Lawyer will be devoted to finding ways of so presenting the case that it can be resolved in the short time available.

ROBERT MOORE — To put it simply then, Court cases are likely to be much shorter?

MR. JUSTICE KIRBY — I think if that is a means of reducing the cost, and the delay of Court proceedings, I think it gives the clue of the solution. And the Law Reform Commission has recently received a reference on the Reform of the Law of Evidence, and this provides the opportunity for us to examine whether or not that's a feasible possibility.

ROBERT MOORE — Now, what you're saying does suggest in a way, that at present, there is a degree of, if you like, unnecessary consumption of time in Courts. Is there?

MR. JUSTICE KIRBY — I think there is, and I think that's generally acknowledged. It's said that in the United States when efforts were made to reform the law of Evidence and Procedure, that a great deal of oppositio came from the practising profession, because it's out of the procedures of the Courts, the adversary system, that the professi secoures it's enjoyment, and it's benefit, it's profits. I think that's putting it too high, but I think there is an element that exists, where we could cut down on the costs, the time that is involved in the Court proceedings and thereby in the cost of the proceedings and delay in bringing them to finality.

ROBERT MOORE — And what do you think would be the response of the Legal Professai to reforms in that particular area?

MR. JUSTICE KIRBY — I think the hope of reform is that there is a tremendous shift in the age composition of the Legal Profession. Whereas, ten years ago, 20% of the Legal Profession had practised for five years, or less, now that's 40%. In other words, there's a great shift to the young. And I think there is amongst the young, enthusia for reform. I think that's a good thing. Promising.

ROBERT MOORE — Yes. In a sense, I suppose to most of us laymen, the Law is a mystery. Need it be such a mystery to us?

MR. JUSTICE KIRBY — We l, there are some things in the Law, as in life, that are

MR. JUSTICE KIRBY just complicated, and they're not simple, and every effort on the part of people like myself to try and simplify it, is bound to fail in the end, because the Law is complicated, because the fact of the situation is complicated. But I think more can be done, and more is being done to communicate the problems of the Law to society. And I think, for example, the teaching of Law in schools and the teaching of Law through the Media to the community generally are ways in which this is being tackled now.

ROBERT MOORE Yes. It's often said that the Law as it stands now is, or has been traditionally - let's put it that way - has been traditionally and may still be, more concerned with the rights of property than with the rights of people, the individual. Do you think that's a fair comment, or an undue over-simplification?

MR. JUSTICE KIRBY I think there's an element of truth in the statement. It oughtn't to be exaggerated. For example, there are Civil Laws for trespass and assault, and criminal laws to protect the person, but the fact is that some laws that are available today, are unsuitable Some laws don't exist to solve problems of today, as for example the protection of privacy; and some laws, though they exist, are not in truth available for groups such as Aboriginals, the disadvantaged, the unemployed, the poor and so on. So that it is true, that when one looks at Law Courses at Law Schools, the distinct concentration is on the Law of Property, Property Rights That's been the class of people in the community who have worked the machinery of the Law and it's therefore a very large part of the common Law of England, which we've inherited.

ROBERT MOORE What do you see, yourself, as the major challenges to the Law and to Law Reform in the 1980s? What areas will be the most difficult and perhaps the most necessary?

MR. JUSTICE KIRBY Well I think the..... One of the great problems of course is the advance of terror, the increase in crime, the increasing vulnerability of our society in the age of computers and data

MR. JUSTICE KIRBY banks. I think the increase in unemployment, especially amongst the young, will cause a number of stresses, which we're beginning to see in evidence in Australian society today. I think there ar many perils and problems of this kind that we're going to have to come to grips with in the Law, and I think many of them are bound up in the impact of science and technology on our society. I think that is going to require major overhaul of the Legal System and I can only hope that parliaments will be ready to see this and that bodies such as the Law Reform Commission will be able to help parliament.

ROBERT MOORE When you mention science and technology, could you be a bit more specific on that? What particular aspects?

MR. JUSTICE KIRBY Take for example the impact of computers on society. I was at a French conference recently, and they identified many aspects of the impact of computers. The aspect of the diminution in personal liberties by reason of the great storage of information on data banks; the impact on employment; the impact on culture; the dependence of France on American data banks; the alienation of workers in computerized industries, and so on. These are the sorts of problems that I think France and Australia, and all countries, are going to have to grapple with.

ROBERT MOORE Yes, and this is not, obviously, not unrelated to something that you've spoken about a great deal, the question of really fundamen privacy in the 1980s, for the individual, the right to be in so far as one can be, one's self, and to have certain parts of onese not known, unless one wants to have it known.

MR. JUSTICE KIRBY Yes, well what I have been saying is only reflecting an Internati debate. It is an amazing thing really that the laws of North America and Western Europe have developed so rapidly along such similar lines, given the different backgrounds of countries with different languages, different legal traditions and so on, it's a remarkable thing that they have all reacted quite rapidly to th

MR. JUSTICE KIRBY issue of the impact of data banks on individual liberty, and I can't believe that we in Australia are going to be immune from the same sort of legislation. I think we're going to need to pro the individual in respect of information stored on him in data banks. I think that goes without question.

ROBERT MOORE And what would be the general guidlines for that kind of protection?

MR. JUSTICE KIRBY Well, again, it's a remarkable thing that when one looks at the legislation of such diverse countries as Canada, United States, France, Sweden, and so on, there is in fact, a common thread, and the common thread is the right of the individual to have access to personal data about himself. In other words, i said that if you can perceive through the data that's stored on you, how others are seeing you and have redress to correct data which is unfair, or unjust or wrong or inaccurate, then that is a way in which you keep some control over the information which others are seeing you by. People invade privacy in the future, not through the keyhole, but through the data base.

ROBERT MOORE Do you think there's a - I mean maybe there is now - but one has the feeling it might be needed more in the future, that there should be a strong onus on the data collecting agency, presumably at most times, not necessarily a government agency, a strong onus on them to show that the information they are seeking is genuinely needed. In other words, what I'm saying, is there a danger that maybe governments might just get to know too much about us unless we watch it carefully?

MR. JUSTICE KIRBY Well, that is certainly a strongly felt view in Europe, and in fact in many European countries they've developed certain categories of data which without special authorization, ought not to be collected. Data on a person's religion, their racial background, their philosophical views, trade union membership, an things of that kind, and I think they are more alert to this in Europe, because they've been through the problem of the Gestapo who without the benefit of computers, were able to maintain extremely detailed and highly efficient personal information

MR. JUSTICE KIRBY systems on just about everybody under their regime.

ROBERT MOORE In this area of privacy in so far as it applies to government agencies, we run into a conflict with freedom of information legislation, too, don't we? Clearly, I might want to have some information withheld from public consumption on the grounds of my privacy. At the same time, other people may have compelli reasons to get to find out what the government is doing with that information, as an illustration of their policy and actions. No what's going to happen here?

MR. JUSTICE KIRBY I wouldn't have said it's a conflict; I agree it's an interface, a modern word that comes from this technology, that even under the Freedom of Information Bill, which is before parliament, there is a provision for an exemption in the case that revelation would unduly interfere with a person's privacy and that is a similar device that's been adopted in the United States. But the important point is that under the U.S. legislation, and under the Australian legislation, there's a common theme, namely the Right of Access. Under the Freedom of Information Bill, and under the proposed privacy legislation, there will be the rig of the individual's access to data in the hands of government and ultimately in the hands of private and other organizations.

ROBERT MOORE Getting back to the cost of the law in Australia in that broad sense, do you think lawyers make too much money?

MR. JUSTICE KIRBY I don't know how to answer that. I think many, many lawyers make a handsome income. There is no more gruelling occupation than that of a top lawyer. They generally work seven days a week; they work with great devotion and skill for their clients, they are rewarded most handsomely. It is true that Lawyers are in the very top percentiles of the income earning groups in the profession, but there are many poor lawyers. And there are many young lawyers, qualified, who are now out of work. And I think we are going to see increasing numbers of these as the numbers of people coming into the legal profession increases. It's trebled in the last ten years, and I think that is going to have a necessary, market effect on bringing down the cost of the delivery of the law to the clients.

ROBERT MOORE — The reason I asked you about Lawyers' incomes, was that apart from the obvious straightforward reason for asking it, it does seem to me to raise the question of a degree of public cynicism about professions in general. Not just the Law; I think the other obvious one is medicine. Medicine has had a bad press in many ways recently, and the Law in the case of some solicitors anyway has not done too well either.
Are you aware, in your work, of a degree of decline in the esteem of the law as a profession in the public eye?

MR. JUSTICE KIRBY — I think there's a decline in the esteem of professions generally, and I think this arises from the larger numbers who are entering the professions; The greater access which individuals of all classes have to professional people; the larger numbers of people claiming to be professionals. There are 130 bodies in Britain, claiming to be professionals. I agree with you that the unhappy stories on front pages of Medibank frauds and Lawyers defaulting with large sums of money doesn't help the professional image.
I think there is a general decline in the status of the professional man. I think it's inherent in the advent of great government funding for the professions. I think some of it is inevitable and can't be avoided, though I would agree that the cases of default are regrettable and do great damage to the professional standing.

ROBERT MOORE — Do you think in the 1980s there'll be a change in the concept, let's say of a Barrister in particular, if I've got it right, let's say of a Barrister in particular, that instead of being seen, in a sense, as partly standing at arms length from his client, he does his best as an advocate, but he's meant to keep his emotional distance in a sense; he's seen as an officer of the Court; he's expected to have some degree, of, if you like, social objectivity about what he's doing for his client. Do you think that may be superseded by a much more committed kind of Lawyer who unashamedly espouses his client's case, and unless he does, won't accept the brief?

MR. JUSTICE KIRBY Well, of course there are some who say that the rules which you've mentioned are designed by the hams, to prevent able lawyers workin with vigour for the social causes of the disadvantaged. I think there probably will be efforts for Lawyers and for Doctors and for other professionals to step outside the regime which has hitherto bound them, but I think it is important that the Lawyer's duty to the Court should be retained, because I think it's this that gives a certain remove and dispassionate assessment of the facts and of the Law and ensures that Justice according to Law is done by the Courts. Don't forget of course, that 98% of the Law's business is not done in the Courts. But if that's what you're talking about, I think there will be public interest advocates, wh will be deeply committed to their causes, but I think it's importa to keep the element of dispassion as well.

ROBERT MOORE It's often struck me that even Lawyers whom I know, who have priva if you like, quite radical political standpoints, are none-the-les quite conservative, professionally as Lawyers. And it does seem to me arguable that there's an unnecessary degree of well, I suppose, hypocrisy in that. In your experience, does that strike any chord?

MR. JUSTICE KIRBY Well I don't see that it's hypocrisy; It's simply that they wear two hats. Like every other citizen, they have their personal and political views, they're forced to have a political view by the compulsory vote, but in terms of what they do in Court and what they do in their professional life, they're bound by fairly strict rules which have been established over hundreds of years in some cases, and I don't think they find that dichotomy at all difficult. Many laymen wonder how it is that a Lawyer can defend a person whom he knows to be guilty. But unless a Lawyer does defend guilty people, then there'll be nobody to stand for the guilty, and argue their case, as they would, if they had the skills and knowledge, and it would mean that Lawyers were making decisions in their offices, that at the moment are made in

MR. JUSTICE KIRBY Courts of Law and by Juries and Judges.

ROBERT MOORE What's your own feeling about, well I suppose it's straight-forwardly the future of individual freedom in the 1980s? And in-so-far as it does survive, to look at it optimistically, to what extent will it be because of the Legal Profession, and what it might do?

MR. JUSTICE KIRBY Well, I think the Legal Profession in the past has been a doubty fighter, sometimes of unpopular causes, and I think that's a very useful function which the training of Lawyers, trained in upholdin individualism, plays an important part to maintain. But I think it probably is true to say that Liberty is under threat. It's under threat from big government, big technology, big bucines the vulnerability of society, and I think it will be vital that Lawyers and citizens generally, are alert to these perils, so that they can see them and make sure that we avoid the slippery path into over-reaction, to dealing with these problems.

ROBERT MOORE Just look at some of the, I was going to say paraphernalia, but some of the symbols of the law that reinforce the idea in a Lay mind, that it is something of a mystery, and they may be small things but I think they symbolise a lot.
What about wigs? Will Barristers wear wigs, ten years from now, do you think, in Australia?

MR. JUSTICE KIRBY I thought you'd ask me this. Well, it's always seemed to me to be a minor debate.

ROBERT MOORE Yes.

MR. JUSTICE KIRBY Of course wigs are now not very much in use in say the industrial areas, the Industrial Courts and Tribunals. They're no longer us in the Family Court; they're not used by Judges sitting in Chamber hearing certain legal matters. So that wigs are on the way out. And whilst I know they upset some people as symbols of a past time I really think there are much more important debates about the rol of the Legal profession, and the symbols of the Law, than the wearing of a Periwig. I think that's a minor matter.

ROBERT MOORE — What about the two tier system of Barristers, of Junior Barrister and Q.C's? Do you think that division will survive?

JUSTICE KIRBY — Yes I do. I think it will survive under different conditions. Until now there's been a fairly rigid rule that a Queen's Council has to be accompanied by a Junior. In a sense that's been a form of apprenticeship which has been paid for by the client, but in England it's now been ruled by the Monopolies Commission that that's not to be a firm rule, and I think as a firm rule it's breaking down in Australia as well. I think it will be left to the market to decide whether or not a case warrants two Barrister or not and there are many cases which warrant two Council. And there is no doubt that the system of Juniors and Silks, Q.C's has been a system that's worked well for the training of the successive generations of the Legal Profession.

ROBERT MOORE — Do you think that the energy crisis will raise particularly difficult or interesting problems for the Legal profession?

MR. JUSTICE KIRBY — I think it will raise tremendous problems for society. It will add to the pressures, which are unemployment, unemployment of you and which the technological revolutions which I've mentioned are going to cause, but I don't see any specific, particular issues which the energy crisis will cause for the law unless it be the litigati n of public interest issues in relation to Uranium mining, and matters of that kind. I think that may be a matter for the Courts and for Lawyers of the future but I don't think....

ROBERT MOORE — Let me tell you what I had in mind. I was quite intrigued by something you said in one of your speeches that I was reading about this. You were referring to Solar Energy and you mentioned that a consequence of this, as I undersantd it anyway, could be more interesting and more profound litigation about the right to sunshine, because it's no longer a matter of a tall building blocking out an amenity of sunshine; it's blocking out your sourc of power. That was the kind of thing I had in mind. Would you think of any other examples of that kind?

MR. JUSTICE KIRBY — Well, I was there referring to a report or a working paper of the South Australian Law Reform Committee on the question of

MR. JUSTICE KIRBY Solar energy, where it was estimated that by the turn of the centu we'd have about 15% of Australia's energy needs from solar heat. And it was suggested that the right to light, the right to sunshin access to the sun would become more important. I think that is one issue. But you see the basic problem is, unless there is a cause of action, unless there is some law which confers a right, then you can have all the anguish and concern in the community that you like, but you can't bring it to a Court of Law to be resolved according to law. Courts are not there to dispense "palm tree" justice; they're there to dispense justice according to law, and it's therefore important to search for, and find if you can, any course of action which the law gives.

ROBERT MOORE Well that raises the question of standing, and in particular - well I'd like to make it in particular obviously - the matter of class actions. I know they're not synonomous but one is subsumed by the other. Are there any general rules or guidelines that you would like to see governing Standing, which we now don't have? Would you like to see it broadened in some way, to be less restrictive than it is, or what?

MR. JUSTICE KIRBY Well, the Law Reform Commission has a reference to report to the government on the question of Standing. Generally speaking you've got to have some personal financial or other similar intimate stake in a matter before you can take it to a Court. They can't, they don't allow people to take matters to Courts simply because they're taxpayers, or simply because they're citizens. That isn't sufficient interest to move the Court and the Commission has put forward a discussion paper suggesting that there ought to be a liberalisation of this principle, in a time when public interes is a more volatile, active force. That discussion paper was genera favourably received, but we haven't delivered our report yet so we'r still considering it. I'm interested to hear that you think it should be widened.

ROBERT MOORE Oh, I raise it as a possibility, that's all. What about Class

ROBERT MOORE — Actions, can we achieve what they achieve in another way? What is it that makes them so worth discussing, worth a reference to you?

MR. JUSTICE KIRBY — Well in America, Class Actions have developed as a means of aggregating lots of little claims into one big claim. So that one person can bring a suit on behalf of many, who perhaps, because of apathy or lack of funds or other disadvantages, wouldn't have brought the case at all. It is only an action for a cause of action known to the law. Where in other words there must be a legal case, which can be aggregated. And the essentia argument that's put forward by proponents of Class Actions, is tha here is a means of bringing to justice people who otherwise wouldr get to Court. Making Court deliver justice in a mass produced way, just as problems are now mass produced, so the Courts should be able to deliver the remedy in a mass produced way.

ROBERT MOORE — Isn't that, in a sense, a recognition by the law that society has indeed changed? Well, as you mentioned, it's a mass society in more ways than one, and the law ought to recognise it and does in the case of Class Action.

MR. JUSTICE KIRBY — Well of course we don't have Class Actions yet in Australia.

ROBERT MOORE — No, no. They have it in the States.

MR. JUSTICE KIRBY — There have been abuses of Class Actions in America and opponents c them say, our Laws are established on the premise that a lot of people won't bring cases, and why should you permit one person to rope into a case, hundreds and possibly thousands of people who wouldn't bring the case? I think it's a matter of judging between these two competing arguments.

ROBERT MOORE — My point really was, isn't it an example of, and obviously I don't have the technical legal knowledge of this, but an example of, if you like, the law recognising social realities? That the community now, more than ever, no man is an island now, one could argue.

MR. JUSTICE KIRBY Well, this is what the proponents say I mean, it is a finely balanced debate, because there is no doubt that the procedure has been abused in the United States, and I think that what we've got to do, is to find a procedure that isn't just a matter of picking up an American remedy that's worked over there, but finding a system that would be suitable for our situation, not least, our rather different legal profession. In America, class actions are fuelled by the contingency few system. The fact that the Lawyer gets a slice of the action. Whereas, in Australia, that is generally regarded as a breach of professional ethics. So that we've got to find a system which will fit into our legal environment and isn't simply adopting a system with all it's abuses, which has been developed in the United States.

ROBERT MOORE Could I come back to the matter of the layman's relationship to the legal profession? Do you think there's a place for lay people to be on the various disciplinary bodies, or other professional bodies that govern the legal profession?

MR. JUSTICE KIRBY Oh, I think that battle's been fought and won. I think it's now generally recognised that laymen ought to be there, that the professional bodies in the past were pretty good in dealing with venality, with corruption, with the taking of money from clients and so on, but pretty bad in dealing with just overlooking a client's indifference to them, failing to return phone calls and the little things that bring down the good name of a profession. So I think the move now is strongly afoot to put laymen into disciplinary and professional governing bodies generally, and the question now is how many, not whether.....

ROBERT MOORE Yes. Do you have any thoughts on the ways in which judges are appointed, and I must admit I'm not too clear on the mysteries of that but I've got a rough idea I think. Any ideas on ways in which the laymen could be involved in that? I'm avoiding here, I'm not including Attorneys-General, or politicians as being laymen.

MR. JUSTICE KIRBY Well in the United States of course, in many of the States, Judges are elected, and that's on the basis that the judicial arm is the third arm of government. And that they should therefore be responsive t· the electorate. I think that is taking democracy too far. At least it's not been our tradition. And generally speaking, I think our system has worked pretty well, namely that people are appointed. They're appointed by political officer, who often perhaps appoint them with all sorts of hopes in mind but once appointed, there is a firm tradition, dating 800 years of complete independence. And I think it's worked pretty well, and many Americans look at our system with envy.

ROBERT MOORE There could be though, couldn't there, in cases, a conflict between the independence of the judiciary and efficiency at least of one or two members of it? I mean, who judges the judges? Ther must be a Latin tag for that, but I won't struggle through it.

MR. JUSTICE KIRBY Well, at the moment the position is, with superior Court Judges that they can only be removed by an address to the parliament and by a vote of both Houses of Parliament of varying and sizeable majorities. Lower Judges and Magistrates can be removed by a more pre-emptory means. But the history of our country is that I think only one judge has ever been removed in this way, and that before Federation, in one of the Colonies, and it doesn't therefore happen very often; where there are problems, other means, more gentlemanly means are found to solve the problem and...

ROBERT MOORE And do you think they're adequate? I mean, the more gentlemanly means? Do they do the job?

MR. JUSTICE KIRBY I think this is going to be a matter that we're going to have to address. In the United States, for exaplem, they have Judicial Commissions which look at the skills, physical and mental health, competence, other infirmities of Judges, and its a sort of peer review and it may well be that we'll move to some form of review of that kind in the future. It's not really a matter I've given a great deal of attention to. But I don't think in fairness, it's a matter that's a great problem in our country if it's a problem at all.

ROBERT MOORE No, but it could happen, couldn't it, in individual instances

ROBERT MOORE there could be.....

MR. JUSTICE KIRBY It could happen, and it has happened, but I think generally speaking, we've been able in a rather British way to muddle our way through to a satisfactory solution up to now. But as the numbers of the judiciary expand, and as the business of the Courts increases, I think we'll probably have to go down the American path with some form of monitoring body which judges the Judges. There's no inherent reason why they should be exempt. Judges, like any other human being, can become ill. Mentally and physically ill, and this is I think, a problem which we'll have to address in the future. Until now, we've muddled through pretty well.

ROBERT MOORE Yes. We're talking at a time, when, I suppose, you could fairly say that if terrorism isn't on the increase, it's certainly more widespread than it's been, and I imagine it's more likely to happe tomorrow or the day after tomorrow than we'd expected. What problems does this raise for the law? There could easily be a pretty solid campaign for a Law and Order stance in the community, understandably, but that raises problems too doesn't it?

MR. JUSTICE KIRBY I think the great problem is keeping our sense of balance. You see, in Uruguay they had a democracy. It was one of the few in South America. and then they had the problem with the Tupermaros. As a response to that, they gradually introduced the paraphanalia of the Police State. Phone tapping without judicial warrant, detention without trial, limitless questioning, and slowl but surely they dismantled the democracy. They beat the Tupermar but in the process, they destroyed the society which they were seeking to uphold. And I think we've got to face quite squarely and brutally the fact that there is a price tag to a liberal western democracy and theprice tag is that some vicious, wicked people get away. And I think it's clear sighted recognition of t fact which will be the best protection of our form of society.

FACES OF THE EIGHTIES NO 3

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ROBERT MOORE — Thinking ahead to the late eighties, presumably, how would the law cope with the landing of a Martian on earth? Would such a thing be recognised as a natural person, a legal person, or what? I mean, are people like yourself thinking about that kind of extra-terrestrial, or whatever the word is, jurisdiction?

MR. JUSTICE KIRBY — I have so many problems on my mind of an earthly kind, that I have turned my attention to the problems of Mars. I think there are enough problems here on earth, though I think it's probable that if such an extroardinary event occurred, that many of the problems which we have on earth would suddenly disappear, and there would be a strange unanimity. There'd be an enormous force for Law Reform, I should think, to get done those things which had been left undone, but it's not a problem which is high on my calendar of attention.

(FACES OF THE EIGHTIES THEME)

ANNOUNCER — Mr. Justice Michael Kirby. Chairman, Australian Law Reform Commission.

AUSTRALIAN BROADCASTING COMMISSION