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Human Rights and the Protection of Innocence Symposium

“Human Rights –
A Current Legal Perspective”

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**[Speaker] Commissioner Kevin Hammond, Corruption and Crime
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Ladies and Gentlemen

I am very pleased to have been invited here today to speak to you today on *Human Rights and the Protection of Innocence* and to support the promotion and observance of human rights throughout the world. Today's general theme is *Human Rights in Criminal Investigation*, with a particular focus on international covenants. I propose to examine human rights from a current legal perspective. By looking at the topical issues of the rights of suspected terrorists in international law, and the progression of an Australian *Bill of Rights*, I hope to demonstrate the extent to which our legal system reflects the modern values of our society. Another current issue of debate which I shall comment on is the recently released Discussion Paper by the Model Criminal Code Officers Committee (MCCOC) concerning the rule against Double Jeopardy, which some critics say is contrary to one of the fundamental principles of our common law system as reflected in the *Criminal Code*.



A topic of intense international debate at the moment concerns the rights of suspected terrorists, and whether and to what extent they should be afforded the protection of international law. There is currently a tension between the exercise of sovereign rights and the application of international laws which protect human rights. Sovereign rights are the powers of a State, which enable it to function in the first place, such as the right to enact laws. Human rights are entitlements that humans have simply by virtue of their existence, such as the right to life.

At present, countries exercise their sovereign rights by detaining those whom they suspect are terrorists in order to ultimately protect the citizens of their country from terrorist acts. In the process, the human rights of those who are detained may be infringed.

The controversy surrounding the Guantanamo Bay detainees is an example of this tension. Since September 11 2001, the United States has transferred about 650 men captured in connection with the Afghan war, or who are suspected of links to al-Qaeda, to the United States military base at Guantanamo Bay, Cuba, including at least two Australians. The detainees were originally held in makeshift open-air facilities with chain-link walls until they were moved to a newly constructed facility on 28 April 2002. According to press reports, the detainees spend twenty-four hours a day in small single-person cells, except for two fifteen minute periods of solitary exercise a week, as well as interrogation sessions. About 80 of the prisoners were held in special high security cells with steel walls that prevented them from communicating with other prisoners.



Although the United States has insisted that it treats the Guantanamo detainees humanely, the United States Government has refused to recognize the applicability of the *Geneva Conventions* to detainees with suspected al-Qaeda links and has refused to permit competent tribunals to determine whether any of the detained combatants are entitled to prisoner of war status. The Guantanamo detainees remain without a legal forum in which they can challenge their detention. A Federal Court Judge ruled on 30 July 2002 that United States Federal Courts do not have jurisdiction to hear constitutional claims brought by aliens held by the United States outside United States sovereign territory. Additionally, the United States denied the request made by the Inter-American Commission on Human Rights to provide for a lawful tribunal or court to determine the status of the detainees. It may be that the issue will be taken to the Supreme Court at some stage.

An initial question that arises in this context is who or what is a “suspected terrorist”. As the old adage says, “One man’s terrorist is another man’s freedom fighter”. There is no universally accepted definition of terrorism. Most definitions, however, usually have common elements, such as the systematic use of physical violence, actual or threatened, against non-combatants, but with objectives broader than the immediate victims in mind, to create a general climate of fear in a target population, in order to effect some kind of political and/or social change.



The next question that arises is whether suspected terrorists should be given the protection of international law. When we speak of the protection of human rights under international law, we are mainly referring to the *Geneva Conventions*. The *Geneva Conventions* are a series of treaties that provide international humanitarian legal standards for states parties during armed conflicts. The *Geneva Conventions* of 1949 and the two Additional Protocols of 1977 are the definitive written sources of international humanitarian law. They codify the standards that countries of the world have set for humane conduct in war, and represent an assertion that even in wartime there are limits to what is acceptable behaviour.

The protection and treatment of captured combatants during an international armed conflict is detailed in the *Third Geneva Convention relative to the Treatment of Prisoners of War*, which defines prisoners of war (“POWs”) and enumerates the protections of POW status.

It has been argued that the *Geneva Conventions* do not apply to the War against Terrorism. If the United States pursued terrorist suspects by traditional law enforcement means, the *Geneva Conventions* would not apply. However, the United States engaged in armed conflict in Afghanistan by bombing and undertaking other military operations. Consequently, it has been contended that the *Geneva Conventions* did apply to that conflict. By their terms, the *Geneva Conventions* apply to “all cases of declared war or of any other armed conflict which may arise between two or more of the High



Contracting Parties”. Both America and Afghanistan are High Contracting Parties, as is Australia.

The level of protection that captured combatants, such as the suspected terrorists held at Guantanamo Bay, will receive depends on their legal status under the *Geneva Conventions*. Under the Conventions, a captured combatant can have prisoner of war status. If this is the case, they will be entitled to the full protections of the *Third Geneva Convention*. Persons not entitled to POW status, are entitled to the protections provided under the *Fourth Geneva Convention on the Protection of Civilian Persons in Time of War*. There is an argument whether Guantanamo detainees should be given prisoner of war status or whether they are entitled to any protection at all.

In January 2002, shortly after a number of persons were detained at Guantanamo Bay, United States Secretary of Defence, Donald Rumsfeld labelled the Guantanamo prisoners “unlawful combatants” who “do not have any rights under the Geneva Conventions”. He indicated that the prisoners would be treated “for the most part...in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate.” Other governments and human rights groups condemned the United States for failing to respect human rights and humanitarian law. In February 2002, the United States changed its position and said that the *Geneva Conventions* would apply to Taliban members. Although the United States acknowledged the general applicability of the Conventions to the Taliban detainees, the government unilaterally decided to deny all detainees POW status. Further, the United



States government exempted al-Qaeda detainees from any coverage by the Conventions. Humanitarian groups and legal scholars maintain that in taking this stance, the United States has improperly interpreted its legal obligations under the Conventions.

It has been argued that members of the Taliban's armed forces should not be entitled to POW status because the Taliban was not recognised as the legitimate government of Afghanistan. In response to this, human rights groups have argued that Article 4(A)(3) of the *Third Convention* makes clear that recognition of a government is irrelevant to the determination of POW status. It accords POW status without qualification to "members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power". That is, the four-part test of Article 4(A)(2) applies only to militia operating independently of a government's armed forces, not to members of a recognised (Article 4(A)(1)) or unrecognised (Article 4(A)(3)) government's armed forces. Thus, whether a government is recognised or not, members of its armed forces are entitled to POW status without the need to meet the four-part test.

Some argue that treating the detainees as POWs would force the United States to repatriate them at the end of the conflict, rather than prosecuting them for their alleged involvement in terrorist crimes against the Americans. For this reason, many are against treating the detainees as POWs.



POW status provides protection only for the act of taking up arms against opposing military forces. If this is the only act that a POW has done, then repatriation at the end of the conflict would be required. However, Article 82 explains that POW status does not protect detainees from criminal offences that are applicable to the detaining powers' soldiers. That is, if appropriate evidence can be collected, the United States would be perfectly entitled to charge the Guantanamo detainees with war crimes, crimes against humanity, or other violation of United States criminal law whether or not a competent tribunal found some of the detainees to be POWs. As Article 115 of the *Third Geneva Convention* makes clear, POWs detained in connection with criminal prosecutions are entitled to be repatriated only "if the Detaining Power consents".

Another argument for not according POW status to the detainees is that it would preclude the interrogation of people alleged to have information about possible future terrorist acts.

Article 17 of the *Third Geneva Convention* provides that POWs are obliged to give only their name, rank, serial number, and date of birth. Failure to provide this information subjects POWs to "restriction" of their privileges. However, nothing in the Third Geneva Convention precludes interrogation on other matters. The Convention only relieves POWs of the duty to respond. Whether or not POW status is granted, interrogators still face the difficult problem of encouraging hostile detainees to provide information, with only limited tools available for the task. Article 17 states that torture and other



forms of coercion cannot be used for this purpose in the case of POWs. But the same is true for all detainees, whether held in time of peace or war. This is a requirement under Article 2 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which the United States has ratified. Articles 4 and 5 of the Convention make violation of this rule a criminal offence of universal jurisdiction.

Article 17 of the *Third Geneva Convention* provides that POWs shall not be “exposed to any unpleasant or disadvantageous treatment of any kind” for their refusal to provide information beyond their name, rank, serial number and date of birth. That would preclude, for example, threats of adverse treatment for failing to cooperate with interrogators, but it would not preclude classic plea bargaining – that is, the offer of leniency in return for cooperation – or other incentives. Plea bargaining and other related incentives have been used repeatedly with success to induce cooperation from members of violent criminal enterprises, such as the mafia and drug traffickers. These would remain powerful tools for dealing with the Guantanamo detainees even if a competent tribunal finds some of them to be POWs.

One of the broader arguments often put forward for denying detainees the protection of international law is that detainees are highly dangerous and, consequently, should not be entitled to the more comfortable conditions of detention required for POWs.



It is very likely that at least some of the Guantanamo detainees are highly dangerous. However, nothing in the *Geneva Conventions* precludes appropriate security precautions. The Conventions do not allow detainees to be deprived of POW status because they are regarded as dangerous. Introducing unrecognised exceptions to POW status, particularly by the world's leading military power, could undermine the *Geneva Conventions* as a whole. That would not be in the interests of any Detaining Power. It is easy to imagine how that precedent could come back to haunt the Detaining Power in future wars. Enemy forces which might detain United States or allied troops would undoubtedly follow the United States lead and devise equally creative reasons for denying POW protections.

Article 5 of the *Third Geneva Convention* requires the establishment of a "competent tribunal" to determine individually whether each detainee is entitled to POW status "should any doubt arise" as to whether a detainee meets the requirements for POW status contained in Article 4. It has been argued that a competent tribunal is unnecessary because there is no "doubt" that the detainees fail to meet the requirements of Article 4(A)(2) for POW status. These requirements are that they have a responsible command, carry their arms openly, wear uniforms with distinct insignia, and conduct their operations in accordance with the laws and customs of war. However, it has also been argued that under the terms of Article 4(A)(2), these four requirements apply only to militia operating independently of a government's regular armed forces – for example, to those members of al-Qaeda who were operating independently of the Taliban's armed forces. However, under



Article 4(A)(1), these four requirements do not apply to “members of the armed forces of a Party to the conflict as well as members of militia...forming part of such armed forces.” That is, the four-part test would not apply to members of the Taliban’s armed forces since the Taliban, as the then de facto government of Afghanistan, was a Party to the Geneva Convention. The four-part test would also not apply to militia that were integrated into the Taliban’s armed forces, such as, the Taliban’s “55th Brigade” which we understand is to have been composed of foreign troops fighting as part of the Taliban.

In mid-2003 the US Government established a military tribunal in the US Navel base at Guantanamo Bay, where all potential charges carry a possible death sentence. The trials will be held in secret, the jurisdiction of U.S. courts is excluded and the military will act as prosecutors, defence counsel and judges. The trials will take place without juries and without appeal to a higher court, with only the President and Defence Secretary having the final say on the sentencing of the suspects, up to and including the death penalty.

Controversy has already arisen inside the ranks, as a team of military lawyers recruited to defend the alleged terrorists has been dismissed by the Pentagon as a result of their protests against the unfair way the trials have been designed¹. In the Australian context Major Michael Mori, in charge of the defence of David Hicks, has been outspoken in his visits to Australia, attempting to persuade the Australian government to take some action on the inherent unfairness of the trials. Major Mori echoed a popular sentiment when



he expressed that you would “have to go back to 1942” to find any precedent for the military commission.

In November 2003, one of Britain’s most senior judges, Lord Steyn condemned the treatment of prisoners in Guantanamo as a “monstrous failure of justice” and said that the detainees were “beyond the rule of law, beyond the protection of any courts and at the mercy of their victors”². It is rare for such a high level judge to speak out in such strong terms on a contentious political issue, let alone attack the conduct of a foreign government. The intervention of such a senior Judge is, perhaps, an illustration of the seriousness of the issue. In February 2004, the first charges against two foreign detainees were laid, but the Pentagon has confirmed that they may still be detained even if they are found not guilty. No doubt, the international community will maintain a keen interest in the human rights issues involved in these trials.

Bill of Rights

The guarantee of certain basic human rights to the individual is an important aspect of the recognition of human dignity and integrity. There is however a broad range of approaches to human rights adopted by countries which share similar origins.

¹ <http://www.guardian.co.uk/print/0,3858,4810734-111575,00.html>, *US fires Guantanamo defence team*, The Guardian, 3 December 2003

² http://news.bbc.co.uk/1/hi/uk_politics/3238624.stm, *Top UK judge slams Camp Delta*, 26 November 2003



The omission of a *Bill of Rights* from the Australian Commonwealth Constitution is one of the elements which marked it as different from the United States Constitution from which a number of principles were derived. It was not, however, an omission by accident. The inclusion of a *Bill of Rights* was proposed and debated at the Constitutional Conventions which lead up to the drafting of the Australian Constitution. Its inclusion was defeated, somewhat ironically, on the basis that a “due process” provision would undermine some of the discriminatory provisions in place at that time, including those laws which were enacted to the detriment of Aboriginals and Asian immigrants.

A number of attempts have since been made to amend the Constitution to include a *Bill of Rights*. Commonwealth Parliamentary enquiries in 1929 and 1959 rejected the proposal. A referendum in 1942 which proposed *inter alia* a limited measure of protection for freedom of expression and the extension of freedom of religion to the States was also defeated³. In 1985 the Australian Government introduced into the Commonwealth Parliament the *Australian Bill of Rights Bills*. Following a strong and lengthy debate in the Parliament the Government decided on 18 August 1986 not to proceed with the Bills. In 1988 the Constitutional Commission recommended an entrenched *Bill of Rights* of the kind adopted in Canada and proposed that a new chapter be added to the Australian *Constitution* for that purpose.⁴ This proposal was not taken up by the Government. However, referenda on a number of specific

³ Sir Anthony Mason, “A *Bill of Rights* for Australia - But Do We Need It?”, (1995) 32 *Briefing; Australian Institute of Jewish Affairs Inc* 1 at 2

⁴ Final Report of the Constitutional Commission, 435-888 (1988); and draft Bill No 17 for “*An Act to Alter the Constitution so as to guarantee certain rights and freedoms*” at 1018-1021



proposals were held late in 1988. There were three human rights provisions that bound the Commonwealth which it was proposed should also bind the States, namely freedom of religion, compulsory acquisition of property only on just terms and trial by jury. These proposals attracted a vote in favour of only 30 per cent. This was the lowest "Yes" vote in any Commonwealth referendum to date.

The context in which the current debate over a *Bill of Rights* is occurring follows the celebration of the centenary of Australia's existing *Constitution* in 1901, and Australia's first ever *Bill of Rights* recently enacted in Canberra, namely the *Human Rights Act 2004* (ACT). These events have helped stimulate a series of reflections on the *Constitution* which have found their main political expression in the debate over whether and, if so, when Australia should become a Republic. From the standpoint of constitutional lawyers and the future of democracy in Australia, a more significant issue has been raised by the discussion of the need for fundamental reforms to the Australian system of government. In the latter context, a *Bill of Rights* began to loom large as one of the component parts of an overall package of recommended reforms.⁵ At the Constitutional Centenary Conference of 1991 to celebrate the *Sydney Constitutional Convention* of 1891 a proposal to incorporate a guarantee of basic rights was put at the forefront of the agreed statement of the Conference. The Conference said:

⁵ Alston, P (1994) "An Australian *Bill of Rights*: By Design of Default?", in *Towards an Australian Bill of Rights*, Ed. Alston, P., Centre for International and Public Law, Canberra and Human Rights and Equal Opportunity Commission, Sydney 1 at p.3



“There was strong support for a guarantee of basic rights in some form, entrenching basic rights and especially democratic basic rights.”⁶

A similar consensus has been demonstrated at subsequent conferences and conventions organised by or in conjunction with the Constitutional Centenary Foundation which was established following the Sydney Conference.

Prior to considering the merits and pitfalls of a *Bill of Rights*, it is important to understand that certain individual rights are already recognised at common law. The “common law”, in its broadest sense, means judge-made law and judge-developed law. As such, I include the interpretation of statute law, that is, the law as enacted by parliament, and the interpretation of constitutional provisions by the judiciary. The common law has protected civil and political rights in four main ways. First, it has recognised and protected a number of rights and freedoms which it has seen as fundamental. Secondly, responding to the avalanche of legislation which regulates our conduct, it has developed rules of statutory construction which limit the degree of legislative encroachment onto our rights and freedoms. Thirdly, the Australian High Court has in recent years given some new life to express guarantees in the *Constitution*. Fourthly, some judges have suggested that limitations on legislative competence to contravene fundamental rights are to be found in the “peace, order and good government” formulae in our Constitutions, or in implications to be drawn from the structure of the

⁶ Constitutional Centenary Conference, Sydney (April 1991)



Australian Commonwealth *Constitution* and the free and democratic nature of Australian society.⁷

For example, in the context of the right of an accused person to a fair trial, the High Court has applied this as a general principle and found a new set of circumstances which have been held to have deprived an accused of that right. This is a shift away from the traditional approach of looking at specific circumstances, such as a misdirection to the jury or the wrongful admission of evidence, to see whether the accused was deprived of a fair trial. In *McKinney v The Queen* the majority said that:

“The central thesis of the administration of criminal justice is the entitlement of an accused person to a fair trial according to the law.”⁸

This was the justification for laying down a rule of practice requiring a trial judge to give a warning to the jury about uncorroborated police evidence of a confession. This was in the context where corroboration was readily available by means of video recording of interviews with the police. Brennan J dissented on this point, saying that the improvement sought to be made by laying down a rule of practice, which would in future require investment in the necessary equipment by the executive government, was not a proper function

⁷ Doyle J. & Wells B., “How Far Can the Common Law Go Towards Protecting Human Rights?”, in *supra* n. 3 at p. 109

⁸ (1991) 171 CLR 468 at 478 per Mason CJ, Deane, Gaudron and McHugh JJ



of a court and was “more appropriate to the exercise of legislative power than it is to the exercise of judicial power”.⁹

The right to a fair trial was also the basis for holding in *Jago v District Court of NSW*¹⁰ that a court has the power to permanently stay proceedings if by reason of undue delay there will be a situation in which there will be “nothing a trial judge can do in the conduct of the trial (which) can relieve against its unfair consequences”¹¹. This approach was taken a substantial step further in *Dietrich v The Queen*¹² in which it was held that, while the common law of Australia did not recognise the right of an indigent accused person, on trial for a serious offence, to be provided with counsel at public expense, a court had power to stay criminal proceedings that will result in an unfair trial. This power extends to a case in which representation of the accused by counsel is essential to a fair trial. This will be so in most cases in which an accused is charged with a serious criminal offence. In such a case an application for an adjournment or a stay by an accused, who is indigent and who is unable to obtain representation through no fault of his or her own, should be granted until representation is available. This requires a prognosis to be made about the likely unfairness of the trial if the accused is unrepresented. If the trial goes ahead without representation and is unfair, the conviction will be liable to be quashed on the ground that there has been a miscarriage of justice. This was so held by Mason CJ, Deane, Toohey, Gaudron and McHugh JJ. Brennan J dissented, again asserting that the court

⁹ Ibid at p.486

¹⁰ (1989) 168 CLR 23

¹¹ *Barton v The Queen* (1980) 147 CLR 75 at p.111 per Wilson J

¹² (1992) 177 CLR 292



was making an unwarranted intrusion into executive and legislative functions by declaring a common law entitlement to legal aid.¹³.

In terms of international human rights norms, Australia's accession to the Optional Protocol to the *International Covenant on Civil and Political Rights* has brought "to bear on the common law the powerful influence of the Covenant and the international standards it impacts".¹⁴ It may be expected that the results of individual petitions to the United Nations Committee could have similar results in Australia to those which occurred in England as a result of the accession of the United Kingdom to the *European Convention on Human Rights* and the decisions of the European Court. It must be acknowledged, however, that except for the ACT which ratified most of the rights in the form of the *Human Rights Act 2004*, many of the rights recognised by the International Covenant on Civil and Political Rights are not currently protected by the common law or statute in Australia.

In Australia, some recent developments in the common law have been expressed to be made consistently with international norms. In *Mabo v Queensland [No 2]* in which Brennan J (with whom Mason CJ and McHugh J agreed) said:

"The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human

¹³ Ibid at p.323-324

¹⁴ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at p.42 per Brennan J



rights. A common law doctrine founded on unjust discrimination in the enjoyment of a civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.¹⁵

This was a significant part of the rationale for abandoning the fiction of *terra nullius* which was the basis for the “discriminatory rule” of the common law departed from in *Mabo*.

While the common law has developed to protect some civil rights, the question of the ability of the common law to develop so as to deal with ongoing infringements of those rights was examined by the Chief Justice of South Australia, the Hon John Doyle (then Solicitor General of South Australia) and Ms Belinda Wells in 1992. They strongly suggested “no-one should underestimate the capacity of the common law to adapt to change in society”¹⁶. It was conceded, however, that there are two “obvious limitations” on the ability of the common law to protect human rights. The first is the principle of parliamentary supremacy which, in the context of common law protection of civil rights, holds that parliament may legislate to alter, restrict or negative any protection created by the common law. The second is the basic approach of the common law to the question of rights, in terms of the

¹⁵ *Mabo v Queensland [No 2]* at p.42



identification of what is left after the limitations and restrictions imposed by law. For example, freedom of speech is a residual right, being what is left subject to the application of the law of defamation, contempt, sedition, official secrets, confidentiality, etc.

To these limitations, two further limitations might be added. The first is that, while the courts are increasingly responding to society's attitude to human rights, the capacity of the common law is limited to the extent that it is opportunistic. No general statement of relevant rights can be developed in response to the individual case. The Court is restricted to a declaration of rights as between the parties before it. The second limitation is that the development of the common law is dependent upon the doctrine of precedent. To the extent that the courts develop an approach based upon general rights, such as the right to a fair trial or the right to freedom of speech or expression, the approach must be a reasoned and principled, based on a balancing of the interests involved and with an eye to consistency¹⁷ with previous decisions.

Apart from the limitations upon the development of the common law to protect human rights that I have outlined, it should also be remembered that there is also a current controversy in Australia regarding the extent to which the judiciary should be entitled to develop and make new law. In comparatively recent times, the judiciary, and in particular the High Court, have been the subject of criticism by the public, politicians and some media for seeking to

¹⁶ Supra n. 5 at p.107

¹⁷ Supra n. 5 at p.116. The tendency of material published before trial to prejudice a fair trial led to a finding of contempt in *Hinch v Attorney General of Victoria* (1987) 164 CLR 15. A different balancing of interests led to the conclusion that the directions given by the trial judge about that same material meant that the trial which took place was not unfair: *Glennon v The Queen* (1992) 173 CLR 592. It was held that there was no need to stay the trial



make new law. This is said to be the exclusive function of Parliament. As a matter of fact, the process of judges and courts developing, making and occasionally changing the common law has been going on for a very long time. The common law developed and modified by judges over the centuries is as much a part of our law as an Act of Parliament. Parliament is supreme, however. Within the limits of its constitutional power parliament can change the law which has been declared by the Courts. There is no reason to change this system. As Justice McHugh of the High Court pointed out in 1988:

“Law-making by judges is likely to remain controversial, but its existence seems essential. The need for and the right of the judge to make law in appropriate cases is now well-established.”¹⁸

Doyle and Wells, however, caution that:

“In considering the proper role of the common law in the protection of human rights we have to bear in mind that in Australia the High Court is working within a system in which there is no *Bill of Rights*, entrenched or unentrenched, to guide it. The court has no clear mandate from society to strike down legislation for contravening human rights and no guidance as to the rights to be protected. The courts might act more confidently in this area

¹⁸ The Hon Justice McHugh, *The Law-Making Function of the Judicial Process: Part II* (1988) 62 ALJ 116 at p.127



if parliament provided some indication of the rights which are to be given the greatest weight.”¹⁹

A systematic and extensive survey of popular opinion conducted in 1993 found that 54 per cent of Australians did not think that human rights are well protected under the existing system. Seventy-two per cent were in favour of the Adoption of a *Bill of Rights* and 61 percent believed that the final decision in relation to human rights matters should rest with the courts rather than the Parliament.²⁰ In more recent times, a survey conducted in 1999 determined that 60 per cent of Australians felt that migrants and women were granted equal opportunities in Australia. The same survey found that whilst Australians were becoming more concerned with having a just and equal society, they have also experienced a decline in trust for politicians at all levels and a majority believed that Federal politicians “don’t know what ordinary people think”²¹.

Previously, the comprehensive 1993 survey also found that the views of most politicians were significantly different from those of the people they represent. Thus 78 per cent of Members of Parliament, at both Commonwealth and State levels, concluded that human rights were already well protected within Australia. Not surprisingly, 76 per cent also considered that Parliament rather than the courts should be the final arbiters in matters affecting human rights. While the views of Labor Parliamentarians (89 per cent

¹⁹ Supra n. 5 at p.110

²⁰ Galligan, B (1993) “Protection of Rights”, in *Constitutional Centenary* at p.17 cited in supra n. 3 at p.6

²¹ http://www.hreoc.gov.au/human_rights/human_rights_dialogue/opinion.html#4, *Human Rights in Australian opinion polls*, 2 December 2001



of whom favoured a *Bill of Rights*) were radically different from those of their Liberal Party and National Party colleagues (with 68 and 78 per cent, respectively, opposed), there are presumably at least some who support the views expressed by the former Commonwealth Minister of State, Mr Gary Johns. According to Mr Johns, “the debate about the rights of individuals and the rights of minority groups . . . has now reached a point of diminishing returns”. In his view, there is, there are “no more great gains that can be made in the battle for rights . . . for women, migrants, blacks, homosexuals or every other subgroup”. In Mr Johns’ opinion, this view is shared by most Australians: “the majority don’t associate with any of these groups and there is a point at which the vast majority say, ‘I have had enough, society is reasonably fair . . .’”²²

This approach seems to rest on two assumptions. The first is that the status quo will not deteriorate any further and therefore no additional protection is required. The second is that the rights of groups such as women, Aborigines, gays and migrants are already protected to the greatest extent possible, or at least feasible, within our society. Anti-discrimination legislation exists at both State and Commonwealth levels. Other commentators have also expressed the view that the existing degree of protection is essentially adequate. Thus, for example, one author has concluded that “we have not been blind to the threat to liberty and we have

²² Taylor, L “Minorities Rights Irk Most: Mabo Minister”, *The Australian* (16 June 1994) cited in supra n. 3 at p.1



developed our own ways of dealing with it. In practice our civil rights are as safe here as anywhere on earth.”²³

This perspective finds scant support in other quarters. In 1986, the then Chief Justice of the High Court of Australia, Sir Anthony Mason, wrote that:

“ . . . the common law system, supplemented as it presently is by statutes designed to protect fundamental human rights, does not protect fundamental rights as comprehensively as do constitutional guarantees and conventions on human rights . . . The common law is not as invincible as it was once thought to be”.²⁴

This view is echoed by Professor Hilary Charlesworth who considers that:

“Common law protection of rights is minimal; the Commonwealth government’s power to legislate to implement international obligations with respect to human rights has been only partially and inadequately exploited; the States generally have given the protection of human rights a low legislative priority; and Australian participation in international human rights instruments has often been diffident.”²⁵

²³ Hirst, J (1994) *A Republican Manifesto*, Oxford University Press: Sydney at p.30 cited in supra n. 3 at p.6

²⁴ Mason, Sir Anthony, (1986) “The Role of A Constitutional Court in A Federation. A Comparison of the Australian and United States Experience”, *The Federal Law Review*, Vol. 16, 28 at p.12 cited in *Australia, Advisory Committee on the Individual and Democratic Rights Under the Constitution Report*, Canberra AGPS, 1987 at p.13

²⁵ Charlesworth, H (1994) “The Australian Reluctance About Rights”, cited in supra n. 3 at p.21



The arguments for and against a *Bill of Rights* have been well expounded in the 1987 *Report of the Advisory Committee to the Constitutional Commission on Individual and Democratic Rights*.²⁶ I now briefly outline these arguments, some of which I have already touched upon.

The arguments in favour of a *Bill of Rights* include the following:

(i) *The Inadequacy of Present Constitutional Provisions*. Many submissions made to the Committee drew attention to the narrow scope and interpretation of existing Constitutional guarantees. Section 80 of the *Constitution* provides that “The trial on indictment of any offence against any law of the Commonwealth shall be by jury . . .”. This guarantee has been side-stepped by the Commonwealth Parliament legislating to have offences tried summarily, ie, without indictment, even when offences attract the possibility of substantial terms of imprisonment. In 1928 the High Court held that the Parliament was not bound to provide for a trial on indictment for offences carrying more than one year’s imprisonment.²⁷ This situation led Deane J to comment that: “The guarantee of trial by jury which is contained in s.80 of the Constitution has been drained of most of its strength by the combined effect of the Parliament and the decisions of this Court . . .”.²⁸ Other concerns include the right to vote and freedom of religion. There is no direct right confirmed by s41 of the Commonwealth *Constitution*. The right is derivative and dependent upon the right to vote at an election “for the more numerous House of the Parliament of the State”. Freedom of religion may be

²⁶ Commonwealth of Australia (1987)

²⁷ *R v Archdall* (1928) 41 CLR 128 at 139-140 per Higgins J

²⁸ *Clyne v Director of Public Prosecutions* (1984) 58 ALJR 493 at p.498



cut down by State laws except to the extent restricted by anti-discrimination legislation.

(ii) *The Inadequacy of the Common Law*. I have already dealt with the debate surrounding this issue, so I will not dwell on it except to say that the Committee noted that usually such rights that are recognised under the common law are those left after all the exceptions and limitations to them have been dealt with. Take the example of free speech: the right to free speech at common law is that which is left after the censorship laws, defamation, contempt of court, contempt of parliament, sedition, criminal libel, blasphemy, radio and television programme standards, and many other minor limitations have made frequently and quite proper but occasionally excessive inroads.

(iii) *Statutory Erosion of Rights Upheld by the Common Law*. It was also emphasised to the Committee that all common law rights and freedoms can be overridden by otherwise valid Commonwealth, State and local government legislation. The will of the legislature is paramount and no matter how harsh or oppressive, it can override the individual's common law rights and freedoms.

It is sometimes said that Parliament is the great bastion of our liberties. However, a government wishing to be seen as doing something decisive when confronted with a problem that is inconveniencing many people or causing public pressure for a response can and will infringe fundamental rights and freedoms of all. It is argued that the approach of the Parliamentary process to human rights is illustrated by the relative absence of any safeguards in the law-making system itself as against infringements of these rights. The amount of



legislation enacted by Parliaments has increased greatly, and that increase is exceeded only by the amount of delegated legislation that is produced.

Legislation is supposed to be scrutinised by the Parliament, but the strong party discipline and the entrenched power of the executive have diminished this safeguard significantly. In most of our legislatures there is little or no evidence of effective safeguards in respect of delegated legislation. In recent times, however, lack of control by the party in Government in the Senate has seen much closer scrutiny of Commonwealth legislation.

(iv) *Enhancement of Democratic Government.* The twentieth century trend toward judicial review of governmental actions would be extended by entrenching limits on governmental power in the *Constitution*. The idea that governments are not rulers but the servants of the people has only slowly gained acceptance in Australia. Once it is appreciated that governments exist to govern for the people, it follows that individuals have rights which governments cannot transgress or transgress only to the extent necessary to uphold the rights of other people.

(v) *A Means of Meeting Australia's Treaty Obligations.* It was submitted to the Committee that the growth of international concern about human rights had given rise to an expectation that civilised countries will guarantee for their citizens clearly stated and readily enforceable rights.

When in Government, both major political parties have undertaken obligations on behalf of Australia in international law by ratifying many



treaties²⁹. Australia has also signed numerous International Labour Organisation Conventions. To date Australia has met its international obligations to varying degrees. In some cases it was suggested to the Committee that Australia had failed to fulfil its obligations to protect relevant human rights, and constitutional entrenchment of a *Bill of Rights* would ensure that these obligations are fulfilled. The entry into international treaties has no direct impact on Australian domestic law in the absence of legislation to implement the treaty, particularly when the international obligation undertaken by the Commonwealth can only be implemented by a State. The significance of an international treaty to which Australia is a party was discussed by Mason CJ and Deane J in *Minister for Immigration v Teoh*.³⁰

The arguments against a *Bill of Rights* in Australia have principally relied upon the protection afforded by the common law. Sir Harry Gibbs, former Chief Justice of the High Court, has said:

“In Australia there seems to be no reason to fear such gross violations of human rights as those which regularly occur in some other countries. . . . The common law has proved to be a flexible and effective instrument for the protection of freedom and

²⁹ such as the *International Covenant of Civil and Political Rights*, the *International Covenant on Economic Social and Cultural Rights*, the *International Convention on the Elimination of All Forms of Discrimination Against Women*, the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *International Convention on the Rights of the Child*

³⁰ (1995) 69 ALJR 423 at pp.430-431



the mitigation of injustices that might otherwise be brought about by ill-considered legislation.³¹

Some of the arguments are based on the contention that a *Bill of Rights* would confer too much power on the courts and, in particular, the High Court. Others contend that existing constitutional protections are sufficient.

However, the Courts as well as Civil Liberties groups must be aware of attempts by the Legislature to restrict the independence and power of the judiciary, and in turn, impede upon individual civil rights. This is evident in the form of the controversial mandatory three-strikes laws. Recently there have been concerns raised over the proposed introduction of prosecution appeals against acquittals – effectively allowing for circumstances where Double Jeopardy can occur.

Since 1990, the Model Criminal Code Officer Committee (MCCOC) has been developing a National Model Criminal Code, and has released many discussion papers dealing with a wide range of criminal law issues. The most recent is the discussion paper on “Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals”³². The paper deals with the possibility of re-trying very serious offences where the verdict of not guilty has been tainted. According to the Councils for Civil Liberties³³ the MCCOC proposals read “like a prosecutor’s wish-list, ignore the civil liberties of Australians and fail to strike a satisfactory and just balance between the

³¹ *A Constitutional Bill of Rights*, in Baker, K: *An Australian Bill of Rights, Pro and Contra*, Institute of Public Affairs, 1986

³² MCCOC Discussion Paper (2003) *Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, November 2003



individual accused and the State’³⁴. It has been argued that attempting to permit the State to re-open closed cases where persons have been acquitted, citizens who believe their trial is over will live in fear that they may have to relive the entire ordeal again someday in another courtroom. Further, in their attempts to make the operation of the legislative change *retrospective*, this may undermine the presumption of innocence, which underpins the ‘golden thread’ of the criminal law. The main concern which has been expressed about the proposal is the Committee’s underlying assumption that there is an equivalence between a wrongful conviction and a wrongful acquittal.

There is an argument which can be mounted that just as the Court has jurisdiction, whether by reference by the Attorney General or otherwise, to re-open and re-examine a criminal case to review a conviction in the light of fresh or new evidence, so the prosecution should, in certain limited cases, have the same opportunity. This is a controversial topic. It is one which requires extensive and calm consideration and discussion.

To return to the argument against a written *Bill of Rights*, another issue is that many rights may be left out and over the course of time, those that are left out may be perceived to be of lesser value and consequently more readily susceptible to extinction.³⁵

When legislation such as the proposed Australian *Bill of Rights* gives very wide powers to courts to decide issues which may involve questions of

³³ NSW Council for Civil Liberties and the UNSW Council for Civil Liberties

³⁴ Submission of the Councils for Civil Liberties to the MCCOC’s (2004) *Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, 17 February 2004



social policy, the fear is expressed that results may differ according to the social or political philosophy of the judges that decide each case. In these circumstances it is argued uncertainty and injustice may be introduced into the law. This seems to be the most fundamental argument against constitutional entrenchment of a *Bill of Rights*. A number of commentators see the issue of rights the subject of a *Bill of Rights* as the exclusive domain of the elected representatives of the people. An active judicial role in relation to a *Bill of Rights* is therefore seen as an affront to “Parliamentary sovereignty” and the inherently democratic nature of the operation of Parliamentary system. It is contended that the judges are not elected, not representative and not sufficiently accountable. This argument proceeds on the basis that broad written principles entrenched in the *Constitution* will probably result in incompatibility with the present structure of the common law and will involve judges in the policy and politics of a nation to an excessive extent³⁶. I do not believe that this accords with the experience in comparable jurisdictions such as Canada, Hong Kong, the United Kingdom, New Zealand and South Africa.

As of late, the debate over an Australian *Bill of Rights* has come to the forefront again, as the Australian Capital Territory has become the first jurisdiction in the country to adopt a *Bill of Rights*. Drawing from the *International Covenant on Civil and Political Rights* (ICCPR) as a basis for the new laws, a human rights treaty to which Australia has been a signatory for over 20 years, the *Human Rights Act 2004* (ACT) was passed on 2 March 2004. The Chief Minister and Attorney General Jon Stanhope declared it

³⁵ Parliament of Western Australia (1991), *Joint Select Committee of the Legislative Assembly and the Legislative Council on the Constitution*, Final Report, Vol. 1 at p.6



landmark legislation” and “hope[d] [that] other jurisdictions would follow [their] lead”³⁷. In these times of heightened security, Chief Minister Stanhope echoed the thoughts of the 2000-plus individual submissions, who could see the incremental erosions of rights, such as the abuse of surveillance powers and restrictions on freedom of speech, all in the name of the ‘war against terror’. The Commonwealth Government made clear that it was not in favour of any form of a *Bill of Rights*, and expressed concerns that ACT was “going down this path”.

The *Human Rights Act 2004* (ACT) includes such rights as the right to peaceful assembly, as well as freedoms of association³⁸, movement³⁹, expression⁴⁰, thought, conscience, religion and belief⁴¹. Under the terms of the Act, those who are arrested or detained will be required to be brought promptly before a judge to determine the legality of their detention⁴². Those in custody have the right to be treated with humanity⁴³. Significantly, there is recognition of the right of all people to enjoy the equal protection of the law without discrimination⁴⁴, and the right to a fair trial, decided by a competent, independent and impartial court or tribunal⁴⁵.

³⁶ Supra n. 33 at pp.26-27

³⁷ Stanhope, J (2004) Human Rights at the heart of a just society: a *Bill of Rights* for the Act [Media Release], 2 March 2004

³⁸ *Human Rights Act 2004* (ACT) s.15

³⁹ s.13

⁴⁰ s.16

⁴¹ s.14

⁴² s.18

⁴³ s.19

⁴⁴ s.8(3)

⁴⁵ s.21(1)



In response to the many critics who said that a *Bill of Rights* would lead to an overexertion of judicial independence, the Chief Justice Terrence Higgins of the Australian Capital Territory Terence Higgins said:

“For the moment, at least, we may safely say that such fears are highly exaggerated. The way the [Human Rights] Act is designed to operate makes it clear that it will not lead to any such transfer of political power to the judiciary.

This is not a Constitutional amendment. It is merely an Act of the Assembly and can be changed, altered or abolished as the Assembly sees fit”⁴⁶

The key function of the ACT *Human Rights Act* 2004 is that it has a pre-emptive operation. The Act does not grant rights automatically to every person. Rather, it outlines the rights which the Assembly should not legislate to override, and asks the courts to simply ensure that all “Territory statutes...are interpreted in a way that respects and protects the human rights [set out within the Act]⁴⁷. By requiring the Attorney to issue a compatibility statement with each new Bill presented before the Legislative Assembly⁴⁸, there is a significant requirement for the proposed legislation to be scrutinised for all human rights implications *before* it comes into effect. If the legislation is challenged, the courts will either determine it to be consistent with the terms of the *Human Rights Act*, or alternatively, will issue a “Declaration of

⁴⁶ Chief Justice Terence Higgins (2004) *Australia’s First Bill of Rights – Testing Judicial Independence and the Human Rights Imperative*, delivered at the National Press Club 3 March 2004.

⁴⁷ Ibid.

⁴⁸ s.37



Incompatibility”⁴⁹. This shifts the Bill back to the Attorney General who is required to provide a written response to the Assembly, but this does *not* affect the rights of parties, or the validity of the subject legislation in any way⁵⁰.

Speaking on the role of an independent judiciary and the enforcement of individual human rights under the *Human Rights Act*, Chief Justice Higgins said:

“In [rendering individual justice to all people according to the law, an independent judiciary] provides a crucial means by which rights may be enforced independent of the political process. It is founded on the understanding that there are groups or individuals in society who may not have political power, and who some other groups in society...may wish to oppress, but whose rights must nonetheless be respected...The voice of the majority is indeed no proof of justice...The rights of asylum seekers...prisoners in the criminal justice system and terrorist suspects, whether or not they have been charged, are obviously instances of that tendency today...

It is the role of the judiciary to defend the rights of these people to the fullest extent of the law, and inform the Legislature when it considers those rights have been breached...

The fact that [an issue] may lead to political controversy is a flimsy rationale for abdicating this role, for it is in politically

⁴⁹ s.32(2)



sensitive cases that the rights of individuals are most frequently trampled upon”⁵¹

Chief Justice Higgins also noted that fundamental rights that many Australians assume we have and largely take for granted, such as equal protection of the law or the right to peaceful assembly, simply “do not exist at law”. However, I believe he made his strongest point when he said:

“The independent and impartial enforcement of rights...far from being a thing to fear, is in itself a very mark of a secure and mature democracy”⁵²

Australia, without a Commonwealth *Bill of Rights*, is now outside the mainstream of legal development in English speaking countries, particularly those most comparable in their political and legal systems, including New Zealand and Canada⁵³, and most recently the United Kingdom. Incorporating the *European Convention on Human Rights* directly into UK domestic law, the United Kingdom’s *Human Rights Act* has invigorated debate and action about human rights. Speaking at the 2003 Commonwealth Law Conference in Melbourne, Ms Cherie Booth QC (better known as the wife of British Prime Minister Tony Blair) spoke of how the United Kingdom had effectively followed the lead of former Commonwealth colonies, which were given a *Bill of Rights* based on the *European Convention on Human Rights* at their time

50 s.32(3)

51 Ibid.

52 Ibid.

53 Burdekin, B (1994) “The Impact of a *Bill of Rights* on Those Who Need it Most”, in *Towards an Australian Bill of Rights*, Ed. Alston, P., Centre for International and Public Law, Canberra and Human Rights and Equal Opportunity Commission, Sydney 147 at p.150



of independence. Being the final court of appeal to many Commonwealth colonies, Law Lords on the Privy Council on Commonwealth learnt much through their experience in interpreting and applying provisions of *Bills of Rights* substantively similar to the *European Convention*. In regards to the UK initiation, Ms Booth QC commented:

“After two years of the [*Human Rights Act*] being in force, British democracy has been strengthened by giving each member of the public the right to seek the help of courts to protect his or her human rights in a manner that was not previously available”⁵⁴

It is disappointing to note that to date in Australia there has been very little sustained thought or research devoted to the fundamental issues of the detailed nature and content of a federal *Bill of Rights*. As Professor Philip Alston has pointed out:

“As long as this continues to be the case, Australia runs a strong risk of either acquiring a *Bill of Rights* by default, or by sanctioning the adoption of one on the basis of poorly informed and ill-thought through political deal-making. It is therefore time to grasp the nettle and engage in a sustained national debate over the options which are realistically available to us as we enter into the twenty-first century.”⁵⁵

I hope that in the years to come, and following the lead of the ACT, we will see a rational and detailed national debate on the desirability, scope and

⁵⁴ Booth, C (2003) “*Common Wealth*”, 13th Commonwealth Law Conference Speeches, Melbourne



content of a *Bill of Rights*. While much has been achieved through the development of the common law, the courts have had to pay a price for this in terms of criticisms that they have taken too much power to themselves. The guidance provided by a *Bill of Rights* would be one way of both assisting the courts as well as re-asserting the supremacy of Parliament. At the same time it will need to be acknowledged by Parliament that the courts will become more involved in the weighing of competing considerations, including those of a policy nature in the interpretation and application of a *Bill of Rights*, whether entrenched or unentrenched. This is what has occurred in Canada. While some decisions have been controversial, the status of the Supreme Court of Canada has been enhanced by its work in this area.

In my opinion, Australia has everything to gain and nothing to lose by the adoption of a *Bill of Rights* along the lines adopted in other significant countries in the Commonwealth.

55 *Supra* n. 3 at p.17