# THE DEBATE WE DIDN'T HAVE TO HAVE: THE PROPOSAL FOR AN AUSTRALIAN BILL OF RIGHTS

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Address to the James Cook University Law School
Townsville
Thursday 14 August 2008

The world has known few more stable democracies than Australia. In the 107 years since federation, our democratic institutions have successfully managed and absorbed the challenges presented by two world wars, a depression, social change unimaginable to those who wrote our constitution, and the transition — still underway — to a globalised economy. And yet, from the time our nation was founded, not a single drop of blood has been spilled by Australian fighting Australian in civil conflict. Our disputes have always been fought by the exchange of words — often, as becomes the robust spirit of our people, aggressive words — but never blows. Even the event which placed our constitution under its greatest pressure, the dismissal of the Whitlam Government on 11 November 1975, was resolved in an utterly characteristic Australian manner. Large, angry crowds gathered outside Parliament House. They listened to indignant speeches. But the indignation never turned to violence and, at the end of the day, they adjourned to their homes — or adjourned to the pub, to maintain their rage over a beer. One social commentator of the time was foolish enough to say that, if Australia had been a truer democracy, there would have been blood on the streets. It is for the very reason that Australia is such a successful democracy that there was not, and the political crisis was resolved, as it should have been, at a spirited but peaceful election.

I wanted to begin this speech with an optimistic — but not, I hope, a Panglossian — tribute to the success of Australian democracy because it is something we all too often take for granted. Those who migrated to our shores from homelands riven by war and civil strife — most notably, the hundreds of thousands who settled in Australia from Europe after

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the Second World War — have often remarked on that great Australian vice: complacency. We take for granted rights and freedoms, liberal and democratic institutions, for which they and their forebears had to fight and for which, all too often, their parents and grandparents died. There are few things of which Australians should be more proud than that our democracy was itself created at the ballot box — at the great constitutional referenda of 1899 and 1900. But our experience is rare among democracies.

Perhaps it is because we take our democracy too much for granted, and appreciate its success too little, that some of us are so susceptible to the latest proposal to reinvent it. As a relatively young nation — although a comparatively old democracy — it is a feature of our national character to be receptive to new ideas, to take the side of the future over the past, to favour the optimistic attitude which tells us things can always be made better. Fortunately, that attractive habit of mind has been balanced by a worldly scepticism which is at least as important an element of the national character, and which dismisses with taciturn disdain Utopian schemes, particularly those sought to be imposed, from on high, by politicians, bureaucrats, academics and lawyers.

We are, in Australia, currently engaged in such a debate: the debate about whether Australia needs a bill of rights. Tonight, I want to use the opportunity of addressing the James Cook University Law School — a Law School which, from what I know of its graduates, prizes practical wisdom above self-indulgent Utopian fancy — to set out the Federal Opposition's position in this debate. Specifically, I want to explain why, in the view of the Opposition, Australia does not need a bill or charter of rights, and why we consider that any attempt to impose one upon us would be, at best, wholly unnecessary, and may result in unintended and potentially very dangerous consequences.

Shortly after last year's change of government, on 5 December 2007, the new Attorney-General Robert McClelland expressed his government's support for the enactment of the a statutory bill of rights. In doing so, he was giving voice to established Labor Party policy, in particular as articulated by the then Shadow Attorney-General, Nicola Roxon, in 2006. In fact, Mr McClelland had, in his earlier period of service as Shadow Attorney-General, advocated a bill of rights as long ago as 2000. In this year's Federal Budget, the government allocated $2.8 million over two years to 'facilitate national public consultations about the recognition and protection of human rights through a bill or

charter of rights'. While the Budget announcement stipulated that the money is to be used for 'national public consultations', I fear that it will only be used to assist to make the case for a bill of rights, and the case against a bill of rights will fail to receive the public attention that it deserves.

If we are to have this debate — and, from the Opposition's point of view, it is a debate that we didn't have to have — we need to hear equally from both sides. It should not be just a party political debate. Indeed, there are many influential figures on the Labor side of politics who have already expressed their strong opposition to the enactment of a bill of rights in Australia — among them, the former Labor Premier of New South Wales Bob Carr[2] and that State's current Attorney-General John Hatzistergos.[3] Even the Young Labor Association has recently announced its opposition to the proposal.[4]

It is notable that the government has elected not to pursue a constitutionally entrenched bill of rights such as that in the United States. I suspect the Government's reluctance to go down that path has more to do with the political reality of achieving constitutional change in Australia, rather than any sound, considered constitutional policy on the part of Government. The last Australian Government to have attempted to amend the constitution by the entrenchment of substantive rights, the Hawke Government in 1988, failed to persuade the public that such constitutional change was either necessary or desirable; the previous such attempt of another Labor Government, at the urging of Dr Evatt in 1944, also failed.

Let me make it clear at the outset what this debate should *not* be about. It should *not* be a debate about whether Australian citizens should enjoy the full range of civil, political and other rights which are the defining characteristic of modern liberal democracies. The reason why we need not have such a debate is that the issue is uncontroversial: no public figure I can think of doubts that proposition. Rather, the debate about a bill of rights is about means, not ends. It is, in particular, about two

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2 'The Rights Trap: How A Bill of Rights Could Undermine Freedom', *Policy* Winter 2001, 19.

3 'A Charter of Rights or a Charter of Wrongs?' Speech to the Sydney Institute, 10 April 2008.

4 'Young Labor votes to reject charter of rights', *Weekend Australian*, 7 June 2008.

things: first, whether the protection of the rights which our citizens undoubtedly have would be better served by the enactment of a bill of rights than they are under the existing law; and secondly, whether the debate on the question of what substantive rights Australians should enjoy takes place in the open forum of elected and accountable Parliaments, or is determined by unelected and largely anonymous judges in the cloistered environs of the courts.

The rights which we Australians enjoy are to be found in many sources of our law. The constitution expressly provides a number of rights. For instance, s 80 guarantees the right to trial by jury for indictable offences against Commonwealth law. Section 51(ii) guarantees non-discriminatory taxation. Section 51(xxxi) — one of the few constitutional provisions to have found its way into our popular culture courtesy of the film *The Castle* — provides that the acquisition of property must be 'on just terms'. Section 116 guarantees religious freedom. With the benefit of more than a century of judicial interpretation, we now know that the constitution also impliedly provides a number of other rights, for example the right to freedom of political communication.[5]

But the constitution's recognition of certain rights — either expressly or by implication — is, admittedly, piecemeal. One looks to the common law for the recognition of most of our fundamental rights and freedoms, such as those protecting freedom of expression and belief, the right to liberty and security of the person, the right to freedom of movement and the right to a fair trial. The common law also enshrines important presumptions which protect substantive rights through the canons of statutory interpretation: for example, the presumption that penal provisions are to be construed in the favour of the accused and the presumption that Parliament did not, unless expressly stated, intend to limit personal liberty or freedom of speech.

Additionally, the Commonwealth Parliament has enacted specific legislation which guarantees certain rights. One good example is the recognition and protection of the right to equal treatment, embodied in the suite of antidiscrimination laws contained in the *Human Rights & Equal Opportunity Commission Act 1986*; the *Racial Discrimination Act 1975*; the *Sex Discrimination Act 1984*; and the *Disability Discrimination Act 1995*. Much of this legislation in one way or another

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5 *Theophanous v Herald & Weekly Times* (1993-94) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

enacts many of Australia's international obligations under instruments like the *International Convention on the Elimination of All Forms of Racism*; the *International Convention of the Elimination of All Forms of Discrimination*, and the *International Covenant on Civil and Political Rights*. Australia was, of course, one of the earliest signatories to the *Universal Declaration of Human Rights.*

What the Attorney-General must demonstrate, and what proponents of a bill or charter of rights in Australia have, to date, failed to establish, is why Australia needs a bill of rights. Given that our legal system, one way or another, already provides for the full range of civil and political rights, what is it about our current arrangements that require us to restate those rights (or some of them, or different ones) in another enactment, and in abstract form? What balance do they seek to adjust? What rights do they believe are not adequately protected, and what new rights do they believe to be necessary?

Two Australian jurisdictions have chosen to enact statutory bills of rights: Victoria and the Australian Capital Territory. Section 5 of the Victorian *Charter of Human Rights and Responsibilities* 2006 exposes the logical difficulty faced by proponents of bills of rights. This section provides:

> A right or freedom not included in this Charter that arises or is recognized under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

Section 7 of the ACT *Human Rights Act 2004* provides, more tersely:

> This Act is not exhaustive of the rights an individual may have under domestic or international law.

So in both cases where Australian Parliaments have enacted bills of rights, they have expressly acknowledged that pre-existing rights remain unaffected. So what, logically, is the point of the bill of rights? If it is merely declaratory of existing rights, it is superfluous. That would not be the case if those instruments created new rights hitherto unknown to the law. But in neither the Victorian nor the ACT bill of rights does that appear to be the case. Nor has the Attorney-General foreshadowed that it is his intention to use a Commonwealth bill of rights to create or

acknowledge hitherto-unrecognised rights. As a matter of mere logic, the exercise foreshadowed by Mr McClelland fails the test of utility.

One of the reasons why many in the community advocate the adoption of a bill of rights is that they mistakenly assume that such an instrument will be a *source* of rights. There are some countries — the United States of America is a good example — in which that is true, at least in part: the first fourteen amendments to the US constitution, born of the revolutionary war and the Civil War, may properly be regarded as the source of the rights they describe, in the sense that, at the time, those rights were not secured — or sufficiently secured — elsewhere in American law. The same may be said of *Magna Carta*, which secured certain rights extracted from the King by the nobles, or the English *Bill of Rights* of 1689, which guaranteed the constitutional settlement of the Glorious Revolution. But, as the provisions of the Victorian and ACT bills of rights to which I have referred demonstrate, those instruments are not — and do not purport to be — *sources* of rights. They create no new rights at all. In fact, if they have any effect on rights already acknowledged and protected by the legal system, it is only likely to be the effect of attenuating those existing rights, by limiting them.

It is therefore the view of the Opposition there is no case for the enactment of a bill or charter of rights, in the absence of any demonstrated need for one. That view is not, as I have said, a partisan one. Our scepticism is shared across the political, legal and cultural spectrum, by voices as various as Mr Carr and Mr Hatzistergos, the Chief Justice of New South Wales Jim Spigelman[6] (whose current view reflects a revision of his Honour's earlier support for the proposal),[7] Justice Keane of the Queensland Court of Appeal,[8] Michael Sexton QC, the Solicitor-General of New South Wales,[9] and Professor Jim Allen, the Garrick Professor of Law at the University of Queensland,[10] alongside more

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6 'The Common Law Bill of Rights', 2008 McPherson Lecture, University of Queensland, 10 March 2008.

7 'Rule of Law — Human Rights Protection' (1999) *Australian Bar Review* 29; 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141.

8 'In Celebration of the Constitution', Address to the Australian National Archives Commission, Supreme Court of Queensland, 12 June 2008.

9 'A bill of rights would leave us all worse off', *Australian Financial Review* 22 August 2003.

10 Notably in 'Portio, Bassanio or Dick the Butcher? Constraining Judges

conservative voices such as Cardinal George Pell[11] and the columnist Janet Albrechtsen.[12] Three State Labor Governments — those of New South Wales, Queensland, and most recently Western Australia — have within the last decade held Parliamentary inquiries into the desirability of enacting bills of rights for their states, which either rejected the idea (in the cases of Queensland and New South Wales) or (in the case of Western Australia) left the matter in abeyance. Both common experience and practical wisdom dictates that, when an idea attracts significant opposition not merely from the conservative side of politics, but from significant and intellectually respectable elements of the Labor movement as well, there is little likelihood that it will generate the community consensus which would make it politically feasible.

On the other hand, the proponents of the idea are largely confined to a relatively small but voluble group of academic lawyers, loosely assembled under the banner of Professor George Williams. Certainly, the campaign for a bill of rights does not reflect either a deep-seated community need, or a priority identified as significant by political leaders on either side of the party divide. As John Hatzistergos pointed out in his address to the Sydney Institute on 10 April this year, 'the constituency for such change has come not from ordinary citizens but rather professional lobbyists and law school elites.'[13]

So the bill of rights argument fails two tests at the threshold: the test utility — the absence of a demonstrated need for one — and the test of public opinion — the absence of a demonstrated demand for one. Beyond those considerations, however, there are other powerful arguments why such a proposal is not merely unnecessary, but in its operation potentially dangerous to those very democratic rights and liberties it would seek to secure.

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in the Twenty-First Century', Inaugural Lecture as Garrick Professor of Law, the University of Queensland, July 2005; 'Human Rights — Can We Afford to Leave Them to Judges?', and; 'Don't entrust liberty to madcap judges', *The Australian* 17 July 2008.

11 'Four Fictions: An Argument Against a Charter of Rights', Address to the Brisbane Institute 29 April 2008.

12 'Beware the galloping imperialist judiciary', *The Australian* 23 April 2008.

13 Above n 2.

As I said a moment ago, the effect of bills of rights which are not *sources* of rights, but merely restatements of them may, paradoxically, be to limit them. That may occur in several ways. First, as has often been pointed out, one may limit rights by defining them. Of course, every judicial decision depends at one level upon the delimitation of categories. By the very exercise of deciding whether or not a particular cause of action, or a particular defence, applies to a given set of facts, one is defining the boundaries of a right. But one is only defining it in the limited sense of determining its application in a particular case. The inductive process of reasoning by which the common law develops, memorably described by Tennyson as

> That codeless myriad of precedent
> That wilderness of single instances
> Where freedom slowly broadens down
> From precedent to precedent

is a very different thing from the establishment of generic categories of abstract rights, which are to be applied *a priori.* In fact, to determine the application of rights by that means is to turn the inductive processes of the common law on their head.

This was essentially the same point made by Sir Robert Menzies when, after his retirement in 1966, he delivered an influential series of lectures on the Australian constitution at the University of Virginia Law School. He said:

> I am glad that the draftsmen of the Australian Constitution, though they gave close and learned study to the American Constitution and its amendments made little or no attempt to define individual liberties. They knew that, with legal definition, words can become more important than ideas. They knew that to define human rights is either to limit them — for in the long run words must be given some meaning — or to express them so broadly that the discipline which is inherent in all government and ordered society becomes impossible.[14]

There is a second way in which the cataloguing of rights may limit them. It may not only limit them by definition; it may just as easily limit them by omission. The point of a bill of rights is that, although

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[14] Sir Robert Menzies, *Central Power in the Australian Commonwealth* (1967), 52.

necessarily general, it is also intended be comprehensive. That is the case notwithstanding saving provisions like s 5 of the Victorian *Charter* and s 7 of the ACT *Human Rights Act* to which I have referred. In interpreting such statutes, it is hardly likely that a Court would fail to take cognizance of the fact that some particular rights have been identified, but not others. By the very fact of identifying certain rights (however defined), it declares that those identified rights have a certain status or privilege, which other putative rights, which are not recognised by the bill of rights, do not enjoy.

Take, for example, the right to private property. I suspect that most Australians would be very surprised to learn that the right to own and enjoy property was not a fundamental right. Yet the ACT Charter, while making extensive provision for civil and political rights which citizens of that Territory already enjoy, contains *no* provision recognising the right to own or enjoy the use of property, nor any other form of protection of economic relationships — for instance, the right to participate in commerce — whatsoever. The Victorian *Charter of Human Rights and Responsibilities* is scarcely better. The full extent of its protection of property rights is that afforded by s 20, which provides:

> A person must not be deprived of his or her property other than in accordance with law.

How, in heaven's name, is that a protection? And what on earth does it add to the existing law? And yet the ACT Act does not even contain so lame a provision — no recognition of property rights at all.

A further and related problem with bills of rights, particularly in a federal system, is the consequences of inconsistency of legislative language. This problem is already evident in the comparison between the Victorian *Charter* and the ACT's *Human Rights Act*. For example, the Victorian *Charter* states: 'Every person has a right to life and has the right not to be arbitrarily deprived of life'.[15] Whereas, the ACT *Act* states: 'Everyone has the right to life. In particular, no-one may be deprived of life'.[16] The ACT *Act* goes on to qualify that statement by saying that: 'This section applies to a person from the time of birth'.[17]

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15 Section 9.

16 Section 9(1).

17 Section 9(2).

What are judges to make from this inconsistent language? Does an unborn baby fall within the definition of 'every person' under the Victorian *Charter*? Does the ACT's *Act*, by expressly making the right contingent upon being born, deprive that soon-to-be-born child a right to life?

Similarly, the Victorian *Charter* provides an abstract right to 'freedom of expression … by way of art',[18] but the *Charter* qualifies that right by saying that there are 'special duties' which are attached and which are 'reasonably necessary' for such other competing interests like national security, public order or public morality.[19]

This right to 'freedom of expression by way of art' under the Victorian *Charter* should be contrasted with the equivalent provision in the ACT's *Human Rights Act 2004*. The ACT *Act* states that: 'Everyone has a right to freedom of expression', including 'by way of art'.[20] But importantly, the ACT *Act* does not expressly qualify that right to freedom of expression by way of art by other competing public interests, like morality. In fact, in section 28 of the ACT *Act* — the general limitation clause — there is no reference to national security, public order or public morality.

The problem is that inconsistent expressions in the statutory words in each jurisdiction presents considerable difficulties to courts, who are charged with deciding (particularly in borderline cases), whether there is difference between these sections in substance, and how the jurisprudence of each of these abstract rights, variously described, is developed. Should a judge, seeing that there is no express qualification regarding public morality, define the ACT freedom of expression right in a broader and more liberating sense than the equivalent provision in the Victorian *Charter*?

The problem will become more, not less, acute with a Commonwealth bill of rights, since courts will undoubtedly seek to achieve comity with the existing State and Territory instruments, and to draw upon the jurisprudence which develops around them. What happens when even the most careful judicial reasoning fails to reconcile an inconsistency? Is something to be a fundamental right for Victorians under the Victorian

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18 Section 15(2).

19 Section 15(3).

20 Section 16.

Charter, but not a fundamental right for Victorians, as Australians, under the Commonwealth bill of rights?

Which brings us to the issue which is, in the minds of many commentators, notably Professor Jim Allen, the most powerful objection to the proposed bill of rights. The enactment of a bill of rights which makes those rights justiciable effects a massive transfer of the power of the Parliament to define and give meaning to rights, to un-elected judges, who are not best suited to exercising that discretion.

The strength of our legal system is the age old maxim: judges determine what the law *is*, as opposed to what the law *should* be. When we ask judges to give meaning to abstract rights, with little or vague guidance, we are asking judges to become legislators. By training and experience, the role of deciding what should be, as opposed to are, is best left with those who enjoy — from time to time — the democratic mandate of the electorate.

In the words of John Hatzistergos:

> A Charter is wrong because it moves the debate about rights out of the political arena and places it in the judicial sphere. It is wrong because it removes from democratic Parliamentary processes and distances ordinary citizens from an important part of political life.[21]

Bob Carr makes a similar point about the antidemocratic consequences of a bill of rights. In his submission to the New South Wales Parliament's inquiry into a bill of rights for that State, he said:

> Parliaments are elected to make laws. In doing so, they make judgements about how the rights and interests of the public should be balanced. Views will differ in any given case about whether the judgment is correct. However, if the decision in unacceptable, the community can make its views known at regular elections. This is our political tradition. A bill of rights would pose a fundamental shift in that tradition, with the Parliament abdicating its important policy making functions to the judiciary… A bill of rights is an admission of the failure of parliaments, governments and the people to

[21] Above n 2, 13.

> behave in a reasonable, responsible and respectful manner. I do not believe that we have failed.[22]

As rights are not absolute, then rights, abstractly expressed in a legislative enactment must be justiciable. Judges would be called on to decide when a right begins or finishes. If we are to require judges to decide when a right should, or should not, apply in any given factual circumstance, then we are requiring judges to decide what the law should or should not be.

This problem is best illustrated by looking at the qualification contained in the Canadian *Charter of Fundamental Rights and Freedoms* which are said to be 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[23] In Canada, the Charter requires judges to determine the reasonable limits of the many enumerated rights. What is so striking about this provision, and its equivalent in the Victorian *Charter of Human Rights and Responsibilities 2006*[24] and the ACT's *Human Rights Act 2004*[25] is their utter generality — and, I might add, banality.

Under the regimes in Victoria and the ACT, a judge will not be able to strike out legislation that is inconsistent with the Charter. Instead, judges will be encouraged to adopt whatever reading of the legislation that makes it consistent with the rights (and which of these if the rights compete with each other, I might ask) contained in the Charter. This, of course, is a mere invitation to judicial legislating. Considering a similar provision in the United Kingdom's *Human Rights Act*, the House of Lords held, 'the interpretative obligation [in the Act] is a very strong

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22 'Submission to the Standing Committee on Law and Justice Inquiry into a NSW Bill of Rights' 9 January 2001, <http://premiers.nsw.gov.au/prem_docs/bill_of_rights.htm.>

23 *Charter of Fundamental Rights and Freedoms*, Article 1.

24 *Charter of Human Rights and Responsibilities Act 2006*, section 7(2): 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including …'.

25 *Human Rights Act 2004* (ACT), section 28(1): 'Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society'.

and far reaching one, and may require the courts to depart from the legislative intention of Parliament'.[26]

Speaking extra-judicially, NSW Chief Justice Spigelman describes the 'rights compliant' provision in the *UK Human Rights Act* as 'a substantial change in the relationship between Parliament and the judiciary'. He identifies a conundrum, whereby 'the intention of Parliament expressed in s 3 of the *Human Rights Act* is applied to override the intention of Parliament at the time that the other legislation, including subsequent legislation, is enacted… In substance, it constitutionalises the *Human Rights Act*'.[27]

Parliaments are the proper institutions under our system to decide what rights should be further developed or qualified by competing interests. Parliaments are the proper institutions to decide when free speech becomes pornography, the circumstances when security agencies should be able to limit an individual's liberty, or the circumstances when public assemblies jeopardise public order. Yet, under a bill of rights, these would be questions not for Parliaments, but for the judiciary.

The transfer of power from Parliaments to the judiciary may be, if the Canadian and New Zealand experience is any guide, more extensive than the effect it might have on individual cases. In Canada, the Charter of Rights has been used to subject the decisions of governments and Parliaments about resource allocation, to judicial review. Bob Carr cites the Canadian example, where the provincial legislature of British Columbia sought to redress the issue of the shortage of rural doctors — an issue with which those in this audience would be well familiar — by a scheme of incentives to attract new graduates to the Province. This measure was challenged successfully in the Supreme Court of the province, on the grounds that it violated the provisions of s 6 of the Canadian Charter ('mobility rights') and s 7 (the 'right to life, liberty and security'). As Carr notes, 'Canada's rural population is still under-served by doctors, thanks to judges who want to write society's rules.'[28]

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[26] *Sheldrake v Director of Public Prosecutions, Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264.

[27] Hon James Jacob Spigelman AC, 'The Application of Quasi-Constitutional Laws', Lecture delivered at University of Queensland, 11 March 2008.

[28] Cited in Carr, 'Lawyers are already drunk with power', *The Australian* 24 April 2008.

In New Zealand, an increase in public housing rental was challenged on the ground that it was a violation to a tenant's 'right to life'.[29]

It may well be that, in each of those cases, there were good reasons to question the decisions of government on *policy* grounds. But are these really decisions which judges should be making? There are two related vices in subjecting such decisions to judicial review. First, it changes the discourse from an argument about how best to allocate resources to serve the interests of society as a whole, to an argument about the (asserted) rights of a particular individual. It changes an argument about social benefit to an argument about individual claims. And so, it decontextualises what should be a decision about public policy, in which the claims of all stakeholders are weighed against each other and placed in the context of overall social benefit, and replaces it with a litigious process in which all such considerations must yield to a claim of right, once established, and in which there are no — or very limited — opportunities for the voices of other interests to be heard.

The second vice follows from the first: it means that decisions which determine social policy outcomes are transferred from the elected government, answerable to a representative Parliament, to a judiciary which is neither elected nor representative — nor, I might add, equipped by its training and experience to make such decisions. This leads to yet another problem: by charging judges to apply the law's traditional decision-making techniques to what are, often, properly matters of public policy, it risks exposing judges to the complaint that they are acting politically, not judicially, and thus potentially undermines the Courts' reputation for neutrality. In Carr's words: '… a bill of rights will unduly politicise the judiciary. Judges will be seen more and more as policymakers, undermining the role and independence of the judiciary.'[30]

Let me next deal with the claim, made by proponents of the case for a bill of rights, that Australia is almost alone among developed democracies in not having one. Indeed, in his press conference of 5 December, this was actually the only substantive argument advanced by Mr McClelland as to why Australia needed a bill of rights. The simplest rejoinder is that Australia does not have a bill of rights because it has never felt the need of one — that fact alone demonstrates the strength of our protection of

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29 *Lawson v Housing NZ* [1997] 2 NZLR 474.

30 Carr, above n 1.

rights and liberties, not its weakness. I said at the start of this speech that one of Australia's proudest claims was that our democracy was itself created at the ballot box. That fact itself — the peacefulness with which our institutions came into being — has had an important bearing upon our political and legal culture, which distinguishes us from those democracies whose freedom was won by wars of independence, and purchased with the blood and treasure of their citizens. For instance, the United States bill of rights reflected the birth pangs of the republic: where nationhood was achieved by revolutionary war, and built upon the Enlightenment belief 'that all men are created equal, that they are endowed by their creator with certain inalienable rights', it was both appropriate and necessary for the founders to enshrine those beliefs in its foundational document.

But we in Australia have had no such searing experience, and if that makes our constitutional history a little more prosaic, we are none the worse for it. Indeed, just as the revolutionary wars defined America's political culture and have fundamentally shaped its course ever since; so the peaceable, intrinsically — indeed, presumptively — democratic circumstances of Australia's birth have defined ours. And they have defined and shaped them in a particularly understated, low-key and pragmatic way, in which the rhetoric of demagogues, and passionate assertions about the rights of man, have seldom struck a chord. We are, if I may borrow a phrase from the former Prime Minister, 'relaxed and comfortable' about ourselves as a nation, so confident in our liberal democracy have we been. And if, as I said earlier, this sometimes gives rise to the national vice of complacency that is the defect of our quality: the strength and success of our institutions.

A bill of rights can be appropriate and effective where it reflects the public culture of a nation, as it does in the United States. But where the public culture is inhospitable to the rights of the individual, no amount of grandiose language will change it, and bills of rights become meaningless constitutional baubles — as the Nazi bill of rights (which guaranteed 'the dignified existence of all people'), the Soviet Constitution, and the bill of rights of modern Zimbabwe, chillingly attest. Conversely, in a nation such as Australia, the very strength of our liberal democratic culture is the strongest reason why such an instrument is redundant. In the words of the distinguished American jurist, Learned Hand:

> This much I think I do know — that a society so riven that the spirit of moderation is gone, no Court can save; that a society where that spirit flourishes, no Court need save; that in a society which evades its responsibility by thrusting upon the Courts the nurture of that spirit, that spirit in the end will perish.[31]

Lastly, the case against a bill of rights which does not spring spontaneously from the circumstances of a nation's very creation, but merely embodies the values of one particular generation of politicians and academics, is that it is a conceit. It is a claim to take the received opinions of one random point in time — 2008 — and say that we alone, not the founding fathers, not those who built the nation over successive generations, not all the generations yet to come, have the right to say what is fundamental to being an Australian.

In the words of Justice Keane:

> Our Framers were not indifferent to the rights of individuals; they were, however, content to entrust those rights to a legislature composed of citizens with an equal stake in individual rights as a check upon executive governments which depended for their existence upon the continuing confidence of the legislature … In embracing this ideal our Framers were taking a gamble on the political wisdom of future generations. They were, at this same time, exhibiting a modest appreciation of their own wisdom. That is to say, they were not so arrogant as to attempt to entrench their own views and priorities whatever the wishes of future generations. Had they done so, we might still be wrestling with the White Australia Policy.[32]

And so, the Founding Fathers created a democratic structure which left it to each succeeding generation to determine what was best for the Australia of its time, decided not by the unelected arm of government, but by elected governments and Parliaments. It would be difficult, given the century of the Australian experience, to say that they were not wise to do so. At constitutional referenda in 1944 and 1988, successive generations have followed the Founding Fathers' wisdom and have resisted the temptation, urged by the politicians of their day, to entrench

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31 Learned Hand, *The Spirit of Liberty* (1954) 164.

32 Keane, above n 6.

their own views, priorities and prejudices for all time. As we yet again embark on the bill of rights debate, the question is: are we modest enough to trust our children to make their own decisions in another generation's time?

ARTICLES