

**Australia's First Bill of Rights – Testing Judicial Independence and
the Human Rights Imperative**

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Delivered at the National Press Club by Chief Justice Terence Higgins
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At around midnight last night, the Legislative Assembly of the Australian Capital Territory, Australia's smallest territory, enacted a legislative innovation that has the potential to fundamentally alter the way we think about, administer and protect the fundamental human rights of all people within our land. In time it may stand as an example for far wider, even constitutional, reform in other Australian jurisdictions.

I refer to the *Human Rights Act* 2004 (ACT) - Australia's first ever Bill of Rights.

Although there has been much debate in the assembly over the inclusion of further kinds of rights, the value of the ideals finally enshrined within the Act is surely beyond argument.¹ They are substantially derived from the *International Covenant on Civil and Political Rights*, to which Australia is already a party.² Without taking any view as to how they may be interpreted, they include such rights as the right to peaceful assembly, and freedoms of association (s 15), movement (s 13), expression (s 16), thought, conscience, religion and belief (s 14).

¹ Roderick Campbell, "Libs to Seek Change to Bill of Rights", *The Canberra Times*, 1 March 2004.

² Similar principles already permeate international resolutions and dialogue – eg. GA Resolution 55.2 *United Nations Millennium Declaration*, paras 4 'human rights and fundamental freedoms', 9 'respect for the rule of law' and Part V, 'Human Rights, Democracy and Good Governance'.

Under the terms of the Bill, those who are arrested or detained will be required to be brought promptly before a judge to determine the legality of their detention (s 18). Those in custody will have the right to be treated with humanity (s 19). Fundamentally, moreover, there will be recognition of the right of all people to enjoy the equal protection of the law without discrimination (s 8(3)), and the right to a fair trial, decided by a competent, *independent* and impartial court or tribunal (s 21(1)).³

Far from being universally welcomed, however, the protection of these rights through the enactment of a Bill of Rights has proved a deeply frightening prospect for many people. In 1789, Jeremy Bentham described the French Declaration of the Rights of Man as “rhetorical nonsense – nonsense upon stilts.”⁴ In that eloquent and considered way he had, he equated the rights it espoused with a bastard brood of monsters – “gorgons and chimeras dire”.⁵ More recently the NSW Solicitor-General, Mr Michael Sexton, compared the ACT Bill to a “scientific experiment gone wrong”.⁶ Only two days ago, Mr Bill Sefaniak MLA described it as “the most important and dangerous legislation” the Assembly has ever debated.⁷

Given that our Legislative Assembly have just unleashed the ACT’s particular version of these supposed monsters upon us, it is timely to ask ourselves why, if the theory is so laudable, we are so alarmed at the prospect of encoding what we already believe in?

³ All references to sections of the proposed Bill – *Human Rights Bill 2004* (ACT).

⁴ Jeremy Bentham, ‘Anarchical Fallacies’ and ‘Leading Principles of a Constitutional Code for Any State’, both reprinted in J Bowring (ed) “the Works of Jeremy Bentham”, W Tait, Edinburgh, 1843, cited in Charlesworth H, *Writing in Rights: Australia and the Protection of Human Rights*, UNSW Press, Sydney 2002 pp39.

⁵ *Op Cit.*

⁶ Michael Sexton, “A Bill of Rights would leave us all worse off”, *The Australian Financial Review*, Friday 22 August 2003.

⁷ Roderick Campbell, “Libs to Seek Change to Bill of Rights”, *The Canberra Times*, 1 March 2004.

There are many people who fear that a Bill of Rights will effectively take power to make laws on controversial issues away from the legislature and place it instead in the hands of an unelected elite – namely, the judiciary. In interpreting what the broadly worded phrases mean, the court is said to be taking on a role which is essentially the “stuff of politics”, and therefore beyond its proper role and power.⁸

Take, for example, the “right to life”, or “free speech”.⁹ Where does one draw the line between free speech and censorship? Or, between the right to life and a woman’s freedom to have an abortion?

Clearly, many people believe it is an illegitimate use of political power for the judiciary to presume to make such decisions.¹⁰ As Mr Sexton stated, the law “has no business in deciding issues that properly belong to parliament.”¹¹ The judiciary, it is said, is only there to interpret and apply the law – it is not there to make policy. As such, if judges take excursions into the field of political decision-making, they are simultaneously undermining democracy, and compromising their own independence by damaging the public’s view of judges as impartial and objective arbiters who merely apply the law to the facts.¹²

⁸ Sir Gerard Brennan, “The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective” in Alston P *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Oxford University Press, New York, 1999 pp458 and Bell, J *Policy Arguments in Judicial Decisions*, Clarendon Press, Oxford 1983, pp9 and Walker G, “Some Democratic Principles for Constitutional Reform in the 1990’s”, in BD Gray and RB McClintock (eds) *Courts and Policy*, pp196.

⁹ Example of Right to Life used in Michael Sexton, “A Bill of Rights would leave us all worse off” in *The Australian Financial Review*, Friday 22 August 2003, pp 54.

¹⁰ See particularly Sir Gerard Brennan, “The Impact of a Bill of Rights on the Role of the Judiciary” pp455 and Dr Janet Albrechtsen, “How a Bill of Rights Leads to Less Democracy”, *Sydney Morning Herald*, Tuesday October 9, 2001 and Bob Carr, *How a Bill of Rights Lays a Trap*, The Canberra Times, 20 August 2001.

¹¹ Michael Sexton, “A Bill of Rights would leave us all worse off”, pp 54 and Bell, J *Policy Arguments in Judicial Decisions*, pp2.

¹² Jason Briant “Arguments Not Convincing for an ACT Bill of Rights”, *Canberra Times*, 30 October 2003.

For the moment, at least, we may safely say that such fears are highly exaggerated. The way the ACT 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.

The Act does not attach rights immediately to every person. Instead, it outlines the rights which the Assembly should not legislate to override, and asks the courts simply to ‘ensure that...all Territory statutes...are interpreted in a way that respects and protects the human rights set out [within the Act]’.¹³ It is a check on the legislature, not a ‘free for all’ source of individual rights. Any feared “avalanche” of litigation as a result of its enactment is therefore hugely overstated.¹⁴

It has, moreover, a pre-emptive operation before the courts are even involved. The Legislative Assembly will scrutinise the human rights implications of all proposed legislation *before* it takes effect, by requiring the Attorney General to issue a compatibility statement with each Bill presented to the Assembly (s 37).

¹³ Legislative Assembly for the Australian Capital Territory, *Human Rights Bill 2003 – Explanatory Statement*, pp2.

¹⁴ Concerns expressed in, *inter alia*: Michael Sexton, “A Bill of Rights would leave us all worse off”; Jason Briant, “Arguments not Convincing for an ACT Bill of Rights”, and Bob Carr, *How a Bill of Rights Lays a Trap*.

If a piece of legislation is challenged in court, the courts will either interpret it's meaning to be consistent with the Human Rights Act¹⁵ or, if that is not possible, will issue a "Declaration of Incompatibility" (s 32(2)). This declaration does not affect the rights of parties, or the validity of the subject legislation, in any way (s 32(3)). The court simply will not have the power to strike down the legislation. The declaration goes to the Attorney General, who must table it before the Assembly and prepare a written response.

But simply focusing on this Bill does not address the wider issue. I am particularly concerned when I hear repeated attacks of the Human Rights Act on the ground that it is somehow "undemocratic" in its operation. Such arguments are misguided and display a shocking ignorance of both the nature of judicial independence and the role of that independence in a liberal democracy.

The fundamental rationale of an independent judiciary is to render individual justice to all people according to the law.¹⁶ In so doing it 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 group in society, and indeed even the majority of people through their representatives, may wish to oppress, but whose rights must nonetheless be respected.

¹⁵ Section 30 (1) and (2) – such interpretation is subject to the Legislation Act, s 139.

¹⁶ Sir Ninian Stephen, "Southey Memorial Lecture: Judicial Independence – A Fragile Bastion" (1982) 13 *Melbourne University Law Review*, 334; Sir Anthony Mason, "The Appointment and Removal of

The voice of that majority is indeed no proof of justice.¹⁷ As Hilary Charlesworth has noted, the major political parties in Australia typically agree on the groups whose rights can be conveniently and, indeed, popularly, trampled upon.¹⁸ The rights of asylum seekers and other non-residents, prisoners in the criminal justice system and terrorist suspects, whether or not they have been actually charged, are obvious instances of that tendency today.

In the fight against terrorism, truly draconian legislation has been passed which allows anyone to be detained on the mere suspicion, held by the Attorney-General, that such detention will “substantially assist the collection of intelligence”. It provides for no proper legal representation, and takes away the right to be brought before a court and even the right to silence. It also attacks the right to freedom of association, by introducing “guilt by association”: if a particular group is declared ‘illegal’, simply being a member is a crime.¹⁹

In our history, legislative abuses of human rights have also been inflicted upon members of the communist party, and conscientious objectors – some of the latter I once had the pleasure of defending in court against just such majoritarian tyranny.

Judges” in Cunningham (ed) *Fragile Bastion – Judicial Independence in the Nineties and Beyond*, Judicial Commission of NSW, Sydney, 1997 pp32.

¹⁷ JCF Schiller.

¹⁸ Charlesworth H *Writing in Rights: Australia and the Protection of Human Rights*, UNSW Press, Sydney 2002, pp38. See also, Bill O’Shea, “Why Australia Needs a Bill of Human Rights”, *The Age*, 10 December 2003.

¹⁹ Australian Security Intelligence Organisation Act 1979 (particularly Division 3 ‘Special Powers Relating to Terrorism Offences’) and Intelligence Services Act 2001 as amended by the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (No.77/2003). In historical context, see generally: Hocking J, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy*, UNSW Press, Sydney, 2004.

In the ACT right now, reference may be made to the plight of the mentally ill, who are being left to languish in jail cells while on remand, because the lack of a secure mental health facility has left magistrates and judges with no other choice consistent with public safety. As many people have said, this is a human rights issue about which the courts can, at present, do nothing.²⁰

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 that those rights have been breached. This is undemocratic only if our understanding of “democracy” is limited to “brute majoritarianism”²¹; if we believe democracy to be little more than “might is right”, or take the utilitarian perspective of Bentham, and believe that the majority’s happiness is worth the suffering of the few.

Any true commitment to “rule by the people”, however, must surely mean rule by *all* people, *for* all people, with all people having the political and social freedom and equality necessary to participate and live in that democracy in a meaningful way.²²

²⁰ See generally: Monica Boogs, *Blast for System that Jails the Sick*, The Canberra Times, 18 February 2004; Danielle Cronin, *Don't Mix Mad with Bad: Criminologist*, The Canberra Times, 19 February 2004; Danielle Cronin, Monika Boogs and Roderick Campbell, *Furore on Mentally Ill Grows: Dire Need for a Secure Facility*, 18 February 2004.

²¹ The Hon Justice Michael Kirby AC CMG, *A Bill of Rights for Australia – What Role Should the Courts Play*, Speech to the Constitutional Centenary Foundation, 31 October 1995.

²² Millbrook Commonwealth Action Programme on the Harare Commonwealth Declaration (1991), 1995, Part (i) “Advancing Commonwealth Fundamental Political Values” – noted in Daryl Williams AM QC MP, “Independence of the Judiciary – Some Federal Government Initiatives” in Cunningham E, *Fragile Bastion*, pp 84.

An independent judiciary enforces these rights on the basis that there must be some things that even a majority, through Parliament, must never be allowed to do, because to do so would constitute an attack on the very people whose interests they supposedly represent. This is not to be seen as undemocratic, but as the operation of democracy properly understood.²³

If this, then, is the rationale for judicial independence, it must be openly admitted that “strict and complete legalism”²⁴ as the only legitimate justification for judicial power is dead, and it has been killed by sheer force of reality.

No one today could seriously make Montesquieu’s contention that judges are merely “but the mouth which pronounces the words of the law.”²⁵ Such a view promotes a view of justice as being merely bureaucratic and mechanical, with no thought for ideals, principles or consequences.²⁶ As though judges just recite the law like “human ciphers, lacking emotions and beliefs about the society in which they live.”²⁷

²³ Bell, *J Policy Arguments in Judicial Decisions*, pp16.

²⁴ As propounded by Sir Owen Dixon in (1952) 85 CLR at xiv; noted in The Hon Justice Murray Gleeson AC, “The Centenary of the High Court: Lessons from History”, 13th AIJA Oration in Judicial Administration, 2 October 2003, pp3.

²⁵ Montesquieu in Bell J, *Policy Arguments in Judicial Decisions*, pp1.

²⁶ *Ibid*, pp247.

²⁷ The Hon. John Doyle CJ, “The Well-Tuned Cymbal” in Cunningham E, *Fragile Bastion*, pp 47.

Such a view was denounced in 1972 as being little more than a “fairy tale” in which we no longer believe.²⁸ To quote Justice Michael Kirby, I respectfully agree that it is amazing that generations of highly intelligent people fell victim to this fiction and were able to sell it to a naïve community for so long.²⁹

Not only is it unrealistic, it is also not desirable. If an independent judiciary is to enforce the rights of all, it must do so even in situations where it may lead to politically inconvenient outcomes. This simple fact has been recognised over decades of national and international debate.³⁰ The fact that the particular issue may lead to political controversy is a flimsy rationale for abdicating this role, for it is in politically sensitive cases that the rights of individuals are most frequently trampled upon.

If the judges have some discretion in how to interpret words or phrases, what of it? They have always done so. If judges did not make decisions with some consideration of the policy implications, they would be considered “out of touch”.

²⁸ Lord Reid, “The Judge as Lawmaker” (1972) 12 JPTL 22, cited in The Hon Justice Michael Kirby, “The Exciting Australian Scene” in BD Gray and RB McClintock (eds) *Courts and Policy*, pp237.

²⁹ The Hon Justice Michael Kirby, “The Exciting Australian Scene” in BD Gray and RB McClintock (eds) *Courts and Policy*, pp261.

³⁰ See generally: United Nations Basic Principles on the Independence of the Judiciary, Principles 2 and 3, in Julie Debeljak, “Judicial Independence” pp5, 6. Principle enshrined in the International Commission of Jurists (ICJ), *The Rule of Law and Human Rights: The Judiciary and the Rule of Law*, 1959-62; Declaration of the First World Conference on the Independence of Justice (‘Montreal Declaration’) 1983, particularly paras 2.02 and 2.05; *Domestic Application of International Human Rights Norms*, (‘Bangalore Principles’) Judicial Colloquium in Bangalore 1988; *The Independence of the Judiciary*, Australian Bar Association Statement, 1990; *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, (‘Beijing Statement’) Sixth Conference of Chief Justices of Asia and the Pacific Region, 19 August 1995 – for an overview of these texts see Julie Debeljak “Judicial Independence”.

Consider a claim for medical negligence, in which a court must weigh up the considerations of awarding an appropriate sum of damages to an aggrieved person, against the probable effect that will have on Medical Indemnity Insurance. Consider a sentence in which the need to protect the community is balanced against the desirability of attempting to rehabilitate a drug-dependent offender. When people call for harsher sentencing of repeat offenders, what is that if not an appeal for judges to consider matters of policy?

So-called “policy” issues must occasionally have some influence. These influences do not result in the exercise of personal choice or the political opinion of the judge in question, as was so naively and cynically claimed by critics of Justice Michael Kirby’s appeal to ‘natural legal principle’ recently.³¹ They are greatly constrained by legal principle and precedent, and are only ‘political’ in the narrow sense that they are considered to have political significance.³²

This is the role the courts have always played, and most probably will always play. A Bill of Rights – particularly a legislative Bill - does not fundamentally alter that role; it merely expands the repertoire of rights recognised, which may thereby be enforced.

³¹ Padraic P McGuinness, “Under Kirby’s Law, we are all Subject to the Whim of Judicial Adventurism“, *Sydney Morning Herald*, 9 December 2003.

³² Bell, *J Policy Arguments in Judicial Decisions*, pp2.

If this was never a problem before, why should it be a problem under the Human Rights Act? The only difference is that such an Act gives more scope for this function to restrict the actions of the legislature on a wider variety of issues. But what kind of argument is this? Are we to seriously suggest that the legislature should be given the power to deprive people of their right to life, or to restrict freedoms of movement or conscience as it sees fit? True, these rights are not absolute, and they must be balanced with competing considerations. But the judiciary has undertaken such a role ever since it's creation, and if they are not protected at all, surely this is a matter for concern?

The independent and impartial enforcement of rights therefore, far from being a thing to fear, is in itself the very mark of a secure and mature democracy.³³

So what else is there in the argument against a Bill of Rights? Some commentators feel it is drawing a "long bow" to argue that the ACT requires human rights protections³⁴ and in the Federal arena the ex-Attorney General Mr Daryl Williams has confidently asserted that he is, to use his words:

"...hard pressed to think of anything that you would want to protect in the bill of rights that isn't already appropriately protected under our legal system."³⁵

³³ *Op Cit.*

³⁴ Jason Briant "Arguments Not Convincing for an ACT Bill of Rights"; Opinion of Ms Helen Cross MLA, quoted in Roderick Campbell "Libs to Seek Change to Bill of Rights", 1 March 2004.

³⁵ Banham, C "Carr's Stance on Bill of Rights Angers Lawyers, Democrats", *Sydney Morning Herald*, Tuesday 9 January 2001; Daryl Williams, "Against Constitutional Cringe: the Protection of Human Rights in Australia", *Australian Journal of Human Rights: Special Edition "A Bill of Rights for Australia?"* (2003) 9(1) AJHR pp184-185.

This is nothing short of an attempt to exploit the lack of knowledge which abounds among the public as to exactly what the constitutional and legal position is, and which allows such populist oversimplifications to gain currency.³⁶

A cursory glance at how inadequately rights are currently protected compels one to the view that more needs to be done.

The Commonwealth Constitution enshrines only a meagre smattering of protections, such as the right to vote (s 41), trial by jury (s 80), freedom of religion (s 116) and the acquisition of property on just terms (s 51xxxii). These protections are not individual rights. They only restrict the Commonwealth Parliament and Government, not the State or Territory Parliaments and Governments.

They have typically been given a very narrow meaning by the High Court. The ‘free exercise’ of religion, for example, does not encompass any right to principled conscientious objection to military service.³⁷ Trial by jury is only required for “indictable offences”, but, although some judges have dissented from this view, the current position is that this still allows the legislature to decide which offences are indictable.³⁸

³⁶ The Hon Justice Michael Kirby, “The Judiciary in Federation Centenary Year – Good News, Bad News, No News”, 11th AIJA Oration in Judicial Administration, Banco Court, NSW Supreme Court, 22 June 2001, pp14.

³⁷ *Krygger v Williams* (1912) 15 CLR 366; (1912) 18 ALR 518. See generally: Blackshield: *The Oxford Companion to the High Court*, pp93-95; Coper, M *Encounters with the Australian Constitution*, CCH Australia, North Ryde, 1988 pp293-300.

³⁸ *R v Archdall and Roskrige; Ex parte Carrigan and Brown* (1928) 41 CLR 128 per Higgins J at 139-140 and Knox CJ, Isaacs Gavan, Duffy and Powers JJ at 136; *Kingswell v R* (1985) 159 CLR 264; 62 ALR 161 per Gibbs CJ, Mason, Wilson and Dawson JJ. For a dissenting view, see: *R v Federal Court of Bankruptcy: Ex parte Lowenstein* (1938) 59 CLR 556 per Dixon and Evatt JJ at 180-184. See generally: Zines L *The High Court and the Constitution* (4th Ed), Butterworths, Sydney 1997, pp403-405.

A Commonwealth law enabling Aboriginal children to be forcibly taken from their homes and placed in the care of a government authority also, apparently, did not constitute an attack on the free ability of those children to practice their particular faith³⁹ - a decision which highlights the lack of status afforded Aboriginal spirituality as a religion in mainstream thought.⁴⁰

In the past, the High Court has recognised certain rights as implied from the Constitution, including a freedom of political communication.⁴¹ It has recognised that certain international legal norms may be a “legitimate and important influence” on the development of our common law, particularly where they relate to human rights – so said the court in the famous *Mabo* decision.⁴²

Various legislatures have passed enactments protecting various rights. In 1975 the Commonwealth Parliament passed the *Racial Discrimination Act 1975* (Cth), which gave effect to the *International Convention on the Elimination of All Forms of Racial Discrimination*, and passed the *Human Rights and Equal Opportunity Commission Act 1986* establishing the Commission to promote and protect human rights.⁴³

³⁹ *Kruger v Commonwealth* (1997) 190 CLR 1; (1997) 146 ALR 126.

⁴⁰ On this issue, see generally: Dr M. Maddox, *For God and Country: Religious Dynamics in Australian Federal Politics*, Department of the Parliamentary Library, Canberra, 1999: Chapter 6: Sacred Sites and the Public Square, pp245-277.

⁴¹ *Australian Capital Television P/L v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; cited in Sir Anthony Mason, *Human Rights and Australian Judges*, Center for International and Public Law, ‘Law and Policy Paper No. 3’, ANU, Canberra 1996 pp4 and Williams G *A Bill of Rights for Australia*, UNSW Press, Sydney, 2000 pp18/19.

⁴² *Mabo v Queensland (No.2)* (1992) 175 CLR 1, per Brennan J at 42. See also: *Dietrich v The Queen* (1992) 177 CLR 292 at 306-7, 319-21 per Mason CJ and McHugh J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288-89 per Mason CJ and Deane J.

⁴³ Both cited in The Hon Sir Anthony Mason “The Role of the Judiciary in Developing Human Rights in Australian Law” in Kinley D (ed) *Human Rights in Australian Law: Principles, Practice and Potential*, The Federation Press, 1998 pp27.

But these measures, even taken together, provide no protection of even some of the most basic human rights. Political communication, for example, is strictly limited to political discussion – it does not protect any wider freedom of speech, thought or communication.⁴⁴ Any thought of a wider suite of rights implied generally due to the ‘nature of our Constitution’ has been roundly rejected.⁴⁵

Indeed, if we look to history, the drafters of the Constitution debated whether or not to include a Bill of Rights, but rejected the idea, and included instead a racial provision specifically for the purpose of regulating the affairs of, in Edmund Barton’s words, “the people of coloured or inferior races”.⁴⁶ The legacy of that decision can be seen in the *Hindmarsh Island Case*, in which the opinion of the High Court was split on the issue of whether or not this power allowed Parliament to make Nazi-style race laws in 1998.⁴⁷

It is ludicrous to suggest that our system provides for anything like a comprehensive scheme of rights protection. Fundamental rights like a right to the equal protection of the law, or the right to peaceful assembly or freedom of conscience - rights that we all assume we have and take largely for granted - simply do not exist at law.

⁴⁴ *Australian Capital Television P/L v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; cited in Sir Anthony Mason, *Human Rights and Australian Judges*, Center for International and Public Law, ‘Law and Policy Paper No. 3’, ANU, Canberra 1996 pp4 and Williams G *A Bill of Rights for Australia*, UNSW Press, Sydney, 2000 pp18/19.

⁴⁵ As argued initially by Justice Lionel Murphy in *R v Director-General of Social Welfare*, but rejected by the majority in that case. See generally Williams G, *A Bill of Rights for Australia*, pp18.

⁴⁶ Robert McClelland, “How is a Bill of Rights Relevant Today?”, in *Australian Journal of Human Rights: Special Edition: “A Bill of Rights for Australia?”*, Vol 9 Issue 1 2003, pp 18.

⁴⁷ *Kartinyeri v Commonwealth* (1998) 195 CLR 337. Noted in: Williams G, *A Bill of Rights for Australia*, pp18; Charlesworth H, *Writing in Rights*, pp31-33.

I would close with the following post-script. Mr Bob Carr, and others, have argued that a Bill of Rights should not be enacted, even in statutory form, because to do so would be “an admission of failure”.⁴⁸ True rights protection, he says, springs from the spirit of respect for human rights that must lie with the general public themselves and, quoting Learned Hand, “when it dies there, no constitution, no law, no court can save it”. In that sentiment he is joined by Ralph Waldo Emerson, who said:

“Nothing is more disgusting than the crowing about liberty by slaves...and the flippant mistaking for freedom of some paper preamble”

A weaker and more paltry argument against a Bill of Rights would be hard to come by.

A Bill of Rights is not something advanced as a substitute for that spirit, but rather as a vitally important mechanism of instilling and reinforcing that spirit even more among the people whom it serves to protect. It serves as a permanent reminder that no matter how fully that spirit is imbued in the hearts of the people, if it is not equally imbued in the hearts of our legislators and administrators then the people must have a means of recourse.

However, taken by itself, and removed of its attempted criticism of the Bill, the point is still an important one, and I will leave you with this thought. The very nature of our society, and the place of the judicial system within it, is such that it relies upon the support and acquiescence of those people for whose benefit it exists.

⁴⁸ Bob Carr, *How a Bill of Rights Lays a Trap*; in substantial agreement is Bill Stephaniak – see: Daniel Landon, “Stefaniak Against a Bill of Rights”, *The Canberra Times*, 24 August 2001.

The bottom line is that whether or not we accept this Human Rights Act as a part of our law in the longer term will be, and must be, the choice of the people of the Australian Capital Territory.⁴⁹ It is, essentially, a political choice.⁵⁰ This is why it is so welcome that our legislature, with its democratic mandate, has taken the initiative in proceeding with this Bill.

How we approach this Act – whether we view it as something to be afraid of, or whether we take up the challenge of human rights protection in the spirit of our shared human values – is something we must each decide for ourselves. I would only say that I hope that when forming our view of the subject, we may all do so from a genuine position of knowledge and understanding of what the judiciary does, and why; and be healthily sceptical of anyone who attempts to lull us into a sense of false security, while supporting legislative moves to curtail our human rights in the name of a false conception of democracy.

⁴⁹ Williams, *G A Bill of Rights for Australia*, pp36.

⁵⁰ Sir Gerard Brennan, “The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective” in Alston P *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Oxford University Press, New York 1999, pp463.

As Sir Harry Gibbs said:

“In a democracy, every...citizen should have an understanding of the role of the judiciary, the manner in which the courts function and the history of the relationship between the courts and other organs of government. This is particularly important because...the independence and authority of the judiciary, upon which the maintenance of a just and free society so largely depends, in the end has no more secure protection than the strength of the judges themselves, and the support and confidence of the public.”⁵¹

Once that understanding is reached, I would suggest that far from running scared over how much power we give to unelected judges under this new Act, we should be far more concerned about where our current political climate will take us without it.

END OF SPEECH

⁵¹ Sir Harry Gibbs GCMG AC KBE, quoted in Cunningham (ed) *Fragile Bastion*, pp v. Similarly stated principle of The Right Honourable Sir Ninian Stephen AK GCMG GCVO KBE, “Judicial Independence”, The Inaugural Annual Oration in Judicial Administration, University of Queensland, Friday 21 July 1989.