

THE MEDDLING PRIEST

## Getting the balance right after the 2020 Summit

Frank Brennan May 26, 2008

### A Fence Sitter's Search for Balance

Fence sitting has been a long time occupation of mine. In 1993, The Australian published a profile of me recalling that one of my friends always greets me by asking how I am dealing with the splinters: 'It's a reference to him sitting on the fence', the report stated.

I am a long term, committed fence sitter in the bill of rights debate. I make no apology for this disposition and happily address how we might get the balance right after the 2020 Summit. Prior to the last federal election, the ALP published its platform with this modest commitment: 'Labor will establish a process of consultation which will ensure that all Australians will be given the chance to have their say on this important question for our democracy.'

I welcome the repeated commitment of the new Commonwealth Attorney General Robert McClelland made last week, '[T]he Government has signalled it will be consulting the Australian community on how best to recognise and protect human rights and responsibilities.'

Now is the time for all Australian jurisdictions to be considering the benefits of a bill of rights, whether it be constitutional or statutory, whether it include open textured rights such as freedom, equal protection, and due process or be confined to more restricted rights, and whether judges be required to interpret future statutes according to the usual principles of statutory interpretation or so far as possible in a way compatible with the defined rights. Law Week provides the opportunity for all citizens to engage in dialogue about the pros and cons of a bill of rights.

One of the priority themes to emerge at the 2020 Summit was the expression of strong support by the 'Australian Governance' stream for a statutory Bill or Charter of Rights, with minority support for a parliamentary Charter. They stressed the need for 'indigenous involvement in this process — as an integral part of the path to reconciliation'.

Even the stream dedicated to strengthening communities and supporting working families listed as its first top idea: 'the development and implementation of both a Charter of Rights (like the Future of Australian Governance stream) and a National Action Plan for Social Inclusion.'

Of the 800 pre-Summit submissions to the Governance stream, 'Another major theme was the human rights agenda — with many submissions supporting an Australian Bill or Charter of Rights either in the Constitution or in legislation. This included discussion of legal reform (e.g. legal enshrinement of basic freedoms) and structural safeguards (such as government review mechanisms and a fair and transparent justice system).'

Prior to the Summit, the NSW Attorney-General John Hatzistergos spoke on bills of rights and warned that the prevalence of Labor governments did not pave the way for charters of rights in all Australian jurisdictions. He told the Sydney Institute:

The election of the Rudd government last November has brought renewed focus to the issue of rights protection in this country. That focus — and the interpretation given to it — have in many cases ignored a significant change in Labor's position as reflected in the 2007 national platform. Whereas in previous times Labor had specifically committed itself and campaigned on the concept of a Charter of Rights, in 2007 it resolved instead to initiate a public inquiry about how to best protect human rights and freedoms....The change in Labor's position did not come about by accident. It came about because of a recognition that the party's previous position had failed to resonate with the electors and therefore the issue needed to be looked at afresh.

Immediately after the Summit, retired NSW Premier Bob Carr a long time opponent of bills of rights came out with all guns blazing declaring:

A bill of rights, or a charter, will lay out abstractions like the right to life, or privacy, or property, and thus enable judges to determine — after deliciously drawn-out litigation — what these mean.

A shift in power from elected parliaments to unelected judges, by a process of 'judicial creep', is part of the bill of rights package.

He warned Kevin Rudd that there would be many opponents of a bill of rights, no matter how modest, including some church leaders. Writing in *The Australian* Carr listed opponents of all forms of bills of rights including:

Churches (which) are becoming aware their immunity from anti-discrimination laws — a justified immunity — will end with a charter or a bill of rights.

Church leaders (who) can democratically lobby parliaments and cabinets, but not non-elected, tenured judges.

These NSW Labor figures found an ally in Cardinal George Pell who also opposes bills of rights of all forms. Back in 1988, he was very outspoken in opposing Bob Hawke's proposal to extend constitutional protection to freedom of religion. After the Summit, he claimed, 'Rights are best protected by the common law and by parliament when the people are equally aware of their responsibilities. Democratic law-making is imperfect, but preferable to rule by the courts.'

Even though Labor governments have introduced statutory bills of rights in the ACT and in Victoria, there is no guarantee that Labor governments elsewhere will do the same. There's no way that a bill of rights will pass Macquarie Street. There is no guarantee that civil society groups like churches will be automatically on board with 'feel good' statements about the benefits of bills of rights which after all come in all shapes and sizes. Now having a major State as well as a Territory with a statutory bill of rights, we are in a position to make a comparative study on Australian soil and see how the results stack up for the bill of rights jurisdictions over against those without one.

Even if politicians and judges in Adelaide are not much interested in a bill of rights, they will now be well advised to have an eye over their shoulder to see how things are developing in Victoria and the ACT. If the public detects a democratic deficit in those jurisdictions without a bill of rights there will be pressure for change.

One argument for a bill of rights is that it helps us to articulate and uphold community values when those values are most at risk, though not necessarily when they are most contested. A bill of rights is a legislative or constitutional text which sets down individual entitlements especially against the State, such entitlements being consistent with principles which are derived from acknowledged community values.

When a society is facing new challenges and rapid change, a bill of rights may provide bright line solutions for judges and legislators trying to navigate the challenges of change, remaining true to those values. Chief Justice Murray Gleeson says, 'In the past, religion provided many of the common values by reference to which conflicts of rights or interest were resolved. Our law still reflects many Christian values.' Reflecting on the nature of a pluralist society, he comments:

By definition, that means that there is competition, not only when it comes to applying values, but also in identifying values. Everybody is aware that our society is rights-conscious. A rights-conscious society must also be values-conscious. If it is not, then we have no way of identifying those interests that are rights, or of resolving conflicts between them. Rights cannot work without values.

So part the challenge in the bill of rights debate is identifying first, whose values are to be recognised and entrenched in the law, and second, who is to resolve conflicts when there is competition between values. No longer in a pluralistic, diverse society like Australia can we presume that the law can, or even should, reflect the values unique to Christianity. The bill of rights debate provides us with the opportunity to discuss and perhaps even to reach some consensus on what are our contemporary community values.

### **The contemporary shortfall in the protection of rights**

Last time I spoke in Adelaide on the bill of rights debate in 1996, I was delivering the Roma Mitchell Oration 30 years after the passage of the historic South Australian Prohibition of Discrimination Act 1966. I asked, 'Thirty Years on do we need a bill of rights?' Having then just returned from studying the US Bill of Rights up close, I answered diffidently:6

There is no need for our judges to be the exclusive arbiters of due process and equal protection when their American brethren, armed with their highly developed jurisprudence and the democratic legitimacy of Senate confirmation hearings, demonstrate time and again that one judge's animosity is simply another's rationality. We can import their rationality second hand without having to infect our own benches with the animosity inculcated by unelected judges trying to develop a judicial method for anti-majoritarian policy decisions benefiting those whose interests have never known special protection in the past.

Two years later I then published *Legislating Liberty* in which I opposed the introduction of a constitutional bill of rights for Australia. Conceding the shortfall for the protection of rights in our constitutional machinery, I suggested four means for making up the shortfall:

- The passage of a statutory bill of rights similar to the New Zealand Bill of Rights Act 1990;
- A constitutional amendment guaranteeing non-discrimination against persons so that we could permanently fetter the Commonwealth parliament and government from discriminating against people on the basis of race, gender or sexual orientation;
- Continued access to the First Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR) which provides for equal protection and a ban on arbitrary interference with privacy;
- A High Court open to the influence of international norms of human rights on statutory interpretation and development of the common law.

In the short term I suggested the creation of a Senate Committee for Rights and Freedoms which could complement and incorporate the existing Scrutiny of Bills Committee, the Regulations and Ordinance Committee and the Legal and Constitutional Committee by implementing a Commonwealth Charter of Espoused Rights and Freedoms as 'a precursor to a statutory bill of rights'.

I conceded that 'bipartisan intransigence by our federal politicians confronted with violations against unpopular, powerless minorities would remain a problem'. But I suggested, '[t]hat intransigence presents an even greater obstacle to a more entrenched proposal such as a statutory bill of rights or a constitutional bill of rights'.

I suggested that we had two distinctive Australian safeguards against majoritarianism:

- A Senate in which the balance of power will be held by minor parties whose political niche, in part, is carved from the espousal of individual and minority rights;
- A judiciary shaping the common law and interpreting statutes while responding to international developments in human rights jurisprudence.

In 2005, I gave my qualified support to the New Matilda bill of rights project. At the Canberra launch I said:

As we have seen recently in the United Kingdom, a statutory bill of rights provides no automatic right answer in striking the appropriate balance between security and liberty. But it does provide a template for public discussion which must precede any novel legislation interfering with long cherished rights and freedoms. The New Matilda draft bill provides some practical checks and balances which ought to have appeal to any political party wanting to ensure that Osama Bin Ladan does not make further incremental gains, by default or by proxy, stripping away the freedoms we cherish. The New Matilda draft proposes:

- \* The Attorney General will provide the House of Representatives with a compatibility statement assessing proposed legislation against the checklist of human rights in the Human Rights Bill
- \* A Parliamentary Joint Standing Committee on Human Rights which will receive submissions, hold hearings and scrutinise the Attorney-General's compatibility statements
- \* Power vested in the courts to read down subordinate legislation so that it is applied in a manner consistent with the Human Rights Act
- \* Power vested in the courts even to strike down some subordinate legislation which cannot be interpreted and applied in a manner compatible with the Human Rights Act<sup>8</sup>
- \* Power vested in the courts to declare primary legislation incompatible with the Human Rights Act. Such legislation would still be valid and applicable but the Attorney General would be required to report to the House of Representatives once he considered the court's reasons
- \* Public authorities, including courts and tribunals, are required to act consistently with Human Rights Act.

These are modest and sensible proposals. They are not anti-Howard, anti-Ruddock, or anti-Liberal Party. Our national fuel tank of checks and balances is running low. It needs to be topped up. In this realm, popularity cannot be equated with infallibility. Governors as well as the governed should welcome responsible checks and balances. In the legislative rush of recent weeks, we the public have become dependent on closed door assurances within the party room that the legislative outcomes strike the right balance, even when they cannot withstand scrutiny before a

parliamentary committee dominated by the government's own members. Then we are told that new sedition laws, which admittedly are not perfect, can be submitted for later review by the law reform commission.

Profound changes occurred to our checks and balances during the latter years of the Howard government including:

- The government gave up taking any notice of procedures under the first optional protocol of the ICCPR;
- In its last three years, the government controlled the Senate;
- The High Court became isolated from other final courts of appeal. With the passage of the UK Human Rights Act 1998, even the UK courts (like the courts in the US, Canada, South Africa and New Zealand) now work within the template of a bill of rights when confronting new problems, seeking the balance between civil liberties and public security;
- In the 2004 decision *Al-Kateb v Godwin*, the isolated High Court found itself unable to interpret a statute so as to avoid the possibility of a stateless asylum seeker spending his life in detention without a court order or judicial supervision.

Days prior to his retirement from the High Court, Justice McHugh had cause to lament publicly the 'tragic' outcome in *Al Kateb*. He told law students:

*Al Kateb* highlights that, without a Bill of Rights, the need for the informed and impassioned to agitate the Parliament for legislative reform is heightened. While the power of the judicial arm of government to keep a check on government action that contravenes human rights is limited, the need for those with a legal education, like yourselves, to inform the political debate on issues concerning the legal protection of individual rights is paramount.

Mind you, none of the Australian bills of rights could have provided any assistance to Mr *Al Kateb*. For example, under the Victorian Charter, the immigration officials could argue that *Al Kateb*'s deprivation of liberty was not arbitrary detention and that it was 'in accordance with procedures established by law' and as he was not detained on a criminal charge, there was no need to bring him before a court. (see s.21(2)(3)(5) Charter of Human Rights and Responsibilities Act 2006 (Vic)). There is no indication from Justice McHugh that the mere existence of a Charter with provisions not directly applicable to mandatory immigration detention of unvisaed persons would lead him to amend his judicial thinking and join with dissentients like Chief Justice Gleeson who was able to apply traditional methods of statutory interpretation to avoid the absurd result of possible life time detention without appearance before a court.

Now there is change in the air — in Parliament and the Executive, if not yet with the High Court. The government does not control the Senate any longer. The Rudd government has no realistic prospect of controlling the Senate for at least six years.

Just last week, the new Foreign Minister Stephen Smith issued a statement after the government had appeared before a UN Committee concerned with the Convention on Torture, noting: 'In its first appearance before a UN treaty body, the Government adopted a positive and helpful approach and will take the same approach to responding to the Committee. This shows Australia is re-engaging with UN processes, too long neglected by the previous Government.'

Last month, I made a return to appearing before Senate committees after a three year absence. I told the Senate's Legal and Constitutional Committee:

It is very heartening to be back appearing before a Senate committee when the government of the day does not control the Senate because I think in a country like Australia where we do not have a bill of rights deliberative democracy is greatly enhanced when there is the possibility of discussion about legislation when the government of the day does not control the Senate. So I think this is a heartening opportunity to review not only government legislation but also legislation which, in this instance, has come forward from Senator Brown.

In the past, I had suggested there was no point in any one State jurisdiction going it alone on a bill of rights and that we were better off waiting for a uniform bill of rights at the Commonwealth level. The ACT passed its Human Rights Act in 2004. The Victorian Parliament has now passed its Charter of Human Rights and Responsibilities Act 2006 which took effect on 1 January 2008. The Court of Appeal of the Supreme Court of Victoria will be well positioned to be the leading interpreter of human rights instruments in Australia, unless and until the High Court whets its appetite

for granting special leave applications to interpret bills of rights provisions which presently are confined to two jurisdictions.

The terrorist threat combined with the tight discipline of the government parties and the unwillingness of any parliamentary Opposition to invest much political capital in protection of minority rights in these uncertain times contribute added potency to the call from the community for a statutory bill of rights which can consolidate the checks and balances needed in a modern democracy. Drawing on the UK precedent, Petro Georgiou has now tabled in the House of Representatives his private member's bill entitled the Independent Reviewer of Terrorism Laws Bill 2008. The bill provides for the appointment of 'an independent person to ensure ongoing and integrated review of the operation, effectiveness and implications of laws in Australia relating to terrorism'.

The ACT and Victorian legislative measures generally recognise the rights set down in the International Covenant on Civil and Political Rights (ICCPR). The Victorian government claims that its Charter 'gives effect to the government's preferred model for protecting human rights, namely a parliamentary based model including a mechanism whereby legislation being introduced into Parliament is certified as compatible with the jurisdiction's human rights obligations.'

When a bill is introduced by the government (as most substantive bills are) the compatibility statement will be the work of lawyers in the Attorney General's department who are charged with assessing compliance with the Charter. The Parliament's Scrutiny of Acts and Regulations Committee is then required to consider every bill and all statutory rules, reporting on their compatibility with human rights. The Parliament retains the power expressly to declare that legislation will have its full effect despite being incompatible with a section of the Charter.

The Member of Parliament introducing legislation with an override declaration must make a statement to Parliament 'explaining the exceptional circumstances that justify the inclusion of the override declaration'.

The effect of such a declaration is that the Supreme Court is precluded for five years from being able to interpret the legislative measure consistent with the human rights which are specified as being overridden. Section 32 of the Victorian Charter provides, 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.'

Acts of Parliament which are incompatible with a human right are still valid. However once the Supreme Court issues a declaration of inconsistency or incompatibility, the Minister who administers the Act is required to provide a written response to parliament within six months. These various procedures before and after the passage of legislation are designed to ensure maximum public disclosure by Parliament of its attempts to have all legislation comply with the human rights set down in the Charter.

### **Bills Of Rights and the 'Living Tree' Approach To Interpretation**

Victorian judges may be minded to adopt a 'living tree' approach to their interpretation of the Charter and to their task of ensuring that as far as possible they interpret all statutory provisions consistent with the Charter. In Canada, the 'living tree' approach to constitutional interpretation was originally adopted by judges anxious to ensure that the Dominion Parliament had the requisite legislative power needed by an emerging independent polity. But once that approach came to be applied to the interpretation of a bill of rights, the effect was to restrict the legislative power and to enhance the domain of judicial power.

Some 'living tree' advocates argue that it is the difficulty of legislative amendment of a bill of rights that warrants the 'living tree' approach. But, Canadian academic Grant Huscroft observes, 'There is no reason why the difficulty in amending the Charter should be borne by those opposed to change rather than those who favour it.'<sup>17</sup> Given that a statutory bill of rights might protect exactly the same rights as a constitutional bill of rights, there is no reason to give a broader scope to a right constitutionally entrenched than to a mere statutory right. The substance of rights should not depend on the form of the protection. If a living tree interpretation is justified for a constitutional bill of rights, so too for a statutory bill of rights.

In the Victorian Legislative Council, the government minister introducing the Charter said:

The bill will benefit all Victorians by recording in one place the basic civil and political rights we all hold and expect government to observe. There are, of course, many laws operating at both commonwealth and state level that protect human rights and set out the responsibilities of governments, organisations and citizens in the general community. However, as these rights are included in a variety of places they are often hard to find. In addition, there are gaps in the existing legal protection of human rights.

The speech was short on content about what the gaps were and how they would be filled.

Amongst the advocates for the living tree approach, Huscroft finds no coherent, self-imposed judicial constraints, whether the bill of rights be constitutional or statutory, other than the judge's own comfort zone, self-perception of her role, and inherent humility.

He then asks whether there are any extra-judicial constraints. Could judicial discretion be constrained by judicious drafting of the bill of rights by the legislature and their legal advisers? He thinks 'attempts to lock in particular conceptions of particular rights at the drafting stage are doomed to fail'. A case in point is the Canadian jurisprudence on Section 7 of the Canadian Charter of Human Rights and Freedoms 1982 which was drafted to avoid the wholesale importation of substantive due process from the United States.

The drafters were specific in permitting deprivation of life, liberty and security only in accordance with 'the principles of fundamental justice'. They thought that fundamental justice would include procedural due process but exclude substantive due process. Had the drafters used the more familiar common law term 'natural justice', they might have avoided the judicial over-reach. Judicial over-reach was, in part, justified by some judges who thought that the drafters were committed to something more than natural justice, though less than full-blown substantive due process.

The Canadian experience shows that a fundamental change in the intended meaning of a provision is possible even within a very short time after the passage of a bill of rights. Even when the result and reasoning should be manifestly clear, as when the Canadian Charter excludes economic and social rights, the living tree proponents are willing to rework the meaning of a provision such as section 7 so as to recognise those rights that deserve protection and not just those that are granted protection under the Charter.

The more diffident living tree proponents when confronted with a deserving case are not prepared to shut the door on a proposed interpretation. They leave open the possibility that 'one day (the provision) may be interpreted' to include the wish list of the unsuccessful litigant, and so they 'leave open the possibility' that a new right will be made out at some point in the future.

I do favour a limited statutory bill of rights for all Australian jurisdictions. I think there is presently a growing popular appeal for bills of rights. Tonight I want to temper my overall preference for a bill of rights by confronting the four difficult issues any bill of rights presents:

- \* dealing with hotly contested moral, political issues
- \* the limited function of a statutory bill of rights in getting the balance right in the face of terrorism
- \* the added uncertainty of statute law when laws do not mean what they say
- \* the human rights cases that still fall through the gaps

### **Dealing with hotly contested moral, political issues**

— eg: Surrogacy, Adoption and Assisted Reproduction for Same Sex Couples, and Same Sex Marriage

This living tree approach causes increased uncertainty for citizens other than those who are agitating for the new right. The Canadian Supreme Court applied the living tree approach to the interpretation of Section 91(26) of the Constitution Act 1867 whereby the parliament has power to make laws in respect of 'marriage and divorce'.

It was able to give an Advisory Opinion approving a proposed Bill redefining marriage as the 'lawful union of two persons to the exclusion of all others'. It was then not in a position to give an unequivocal answer to those religious authorities wanting to know if they could restrict the religious celebration of state recognised marriages to unions between one man and one woman.

The Court was prepared only to state that compulsory recognition of same sex marriage would 'almost certainly' run afoul of the Charter's guarantee of freedom of religion. Huscroft expects that religious freedom will be made to give way 'not all at once, but incrementally', dying 'a death of a thousand small cuts rather than one fatal blow.' The winners will be same sex couples of a secularist mindset, and the losers will be religious folk who would like to have their church marriages recognised by the State.

Huscroft expects that judges will exercise greater de facto power under an Australian bill of rights than its statutory form and inherent limitations might suggest.<sup>19</sup> He has 'no doubt that proponents of an Australian bill of rights are

counting on them doing so'. The approach of the Victorian Human Rights Consultation Committee to family rights for same sex couples is a case in point.

Section 8 (3) of the Victorian Charter contains the tell-tale broad legislative statement of equal protection:

Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

It remains to be seen if this equal protection clause might be used as a vehicle to attempt a change of the law and policy on the availability of assisted reproduction of children by family units other than those headed by one adult male and one adult female. In the past, state policy has given some acknowledgement of the natural right of a child to have, know and be nurtured by their natural parents.

Section 17(1) of the Victorian Charter provides, 'Families are the fundamental group unit of society and are entitled to be protected by society and the State'. This wording departs from the ICCPR which states that the family is the 'natural and fundamental group unit of society'. Legislative drafters of bills of rights now regard the descriptor 'natural' as otiose. There is no such thing as a natural group unit any more. We have only fundamental group units. Presumably a two man or two woman unit could now be described as a fundamental group unit, a family.

Article 12 of the UK Human Rights Act 1998 states: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.' This provision echoes Article 23(2) of the ICCPR which recognises 'the right of men and women of marriageable age to marry and to found a family'.

In the Convention, the right is stated in the singular. One has the right to marry and (then or in the process) to found a family. The Victorian Consultation Committee took the view that there are two separate rights — the right to marry, which is a Commonwealth concern under s 51 (xxi) of the Commonwealth Constitution, and the right to found a family which might be exercised by single persons or by couples who do not have the right to marry each other — a right which might be recognised at State level regardless of the Commonwealth law on marriage.

The Committee considered that 'the right to found a family' (not as an incident of marriage, but as a separate free standing right) 'is an essential civil and political right that people would expect to see in a human rights instrument'.<sup>20</sup>

The Committee said it was only because the Victorian Law Reform Commission was undertaking a detailed reference on assisted reproduction and adoption that the committee did not want to pre-empt the findings. They urged that the matter be re-visited in four years time when the Charter is reviewed. It would then be appropriate for elected parliamentarians to consider whether a new legislative provision should be enacted permitting judges to extend the right to found a family to all persons seeking state assistance with the creation of children who would then not have the opportunity to know and be nurtured, nor perhaps even to have, a natural father and a natural mother.

There may not be a need to wait four years. By creating two rights out of one, judges of the living tree school could regard themselves as free to recognise the right to non-discriminatory state assisted ART for the creation of children by same sex couples. This could be done without any consideration of the 'natural right' of a child to be created with a known biological mother and a known biological father. It is worth noting that the House of Lords, in the context of a custody dispute, has recently reaffirmed that the gestational, biological and psychological relationship between a mother and child is 'undoubtedly an important and significant factor in determining what will be best' for a child 'now and in the future'.

While the Canadian Parliament handballed same sex marriage to the courts for determination, the issue is being much more hotly contested just to the south, in the US.

Just last week, the Californian Supreme Court became the second State superior court in the US to uphold same sex marriage as a constitutional right. Four years ago, the Massachusetts court had set the first precedent. Nine other state and federal court have maintained that traditional marriage laws are still valid, there being a rational basis for distinguishing same sex relationships from traditional marriage relationships.<sup>22</sup> The Californian Court by 4-3 struck down a State law which resulted from a citizens' initiated referendum (with 61.4% support) inserting the assurance that marriage was limited to a relationship between one man and one woman (known as Proposition 22 which states 'Only marriage between one man and one woman is valid and recognized in California.'). The Californian legislature had already passed the Domestic Partner Rights and Responsibilities Act in 2003 which gave gay and lesbian couples all the same substantive rights and privileges as married couples.

The majority wrote:

It also is important to understand at the outset that our task in this proceeding is not to decide whether we believe, as a matter of policy, that the officially recognized relationship of a same-sex couple should be designated a marriage rather than a domestic partnership (or some other term), but instead only to determine whether the difference in the official names of the relationships violates the California Constitution. We are aware, of course, that very strongly held differences of opinion exist on the matter of policy, with those persons who support the inclusion of same-sex unions within the definition of marriage maintaining that it is unfair to same-sex couples and potentially detrimental to the fiscal interests of the state and its economic institutions to reserve the designation of marriage solely for opposite-sex couples, and others asserting that it is vitally important to preserve the long-standing and traditional definition of marriage as a union between a man and a woman, even as the state extends comparable rights and responsibilities to committed same-sex couples. Whatever our views as individuals with regard to this question as a matter of policy, we recognize as judges and as a court our responsibility to limit our consideration of the question to a determination of the constitutional validity of the current legislative provisions.

As is now usual in US jurisprudence, the issue was decided by the judges making a preliminary decision as to what level of scrutiny to apply. Usually strict scrutiny is reserved for laws which discriminate on the basis of race, alienage or national origin. Other levels of scrutiny are intermediate or heightened scrutiny (applied to gender and illegitimacy) and rational basis review. In this case, the majority took the novel approach of including sexual orientation as a new category requiring strict scrutiny. They concluded:<sup>24</sup>

That strict scrutiny nonetheless is applicable here because (1) the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents — like gender, race, and religion — a constitutionally suspect basis upon which to impose differential treatment, and (2) the differential treatment at issue impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple.

They ruled:

[I]n contrast to earlier times, our state now recognizes that an individual's capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual's sexual orientation, and, more generally, that an individual's sexual orientation — like a person's race or gender — does not constitute a legitimate basis upon which to deny or withhold legal rights. We therefore conclude that in view of the substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.

Justice Baxter in dissent (with Chin J concurring) wrote:

Only one other American state recognizes the right the majority announces today. So far, Congress, and virtually every court to consider the issue, has rejected it. Nothing in our Constitution, express or implicit, compels the majority's startling conclusion that the age-old understanding of marriage — an understanding recently confirmed by an initiative law — is no longer valid. California statutes already recognize same-sex unions and grant them all the substantive legal rights this state can bestow. If there is to be a further sea change in the social and legal understanding of marriage itself, that evolution should occur by similar democratic means. The majority forecloses this ordinary democratic process, and, in doing so, oversteps its authority.

I have considerable sympathy for Justice Baxter who states:

Recent years have seen the development of an intense debate about same-sex marriage. Advocates of this cause have had real success in the marketplace of ideas, gaining attention and considerable public support. Left to its own devices, the ordinary democratic process might well produce, ere long, a consensus among most Californians that the term 'marriage' should, in civil parlance, include the legal unions of same-sex partners. But a bare majority of this court, not satisfied with the pace of democratic change, now abruptly forestalls that process and substitutes, by judicial fiat, its own social policy views for those expressed by the People themselves. Undeterred by the strong weight of state and federal law and authority, the majority invents a new constitutional right, immune from the ordinary process of legislative consideration. The majority finds that our Constitution suddenly demands no less than a permanent redefinition of marriage, regardless of the popular will.

Baxter is surely right when he says:

History confirms the importance of the judiciary's constitutional role as a check against majoritarian abuse. Still, courts must use caution when exercising the potentially transformative authority to articulate constitutional rights. Otherwise, judges with limited accountability risk infringing upon our society's most basic shared premise — the People's general right, directly or through their chosen legislators, to decide fundamental issues of public policy for themselves. Judicial restraint is particularly appropriate where, as here, the claimed constitutional entitlement is of recent conception and challenges the most fundamental assumption about a basic social institution. The majority has violated these principles. It simply does not have the right to erase, then recast, the age-old definition of marriage, as virtually all societies have understood it, in order to satisfy its own contemporary notions of equality and justice.

Justice Baxter is not just fear mongering when he highlights that the majority's approach of judicial activism could pave the way to future judicial striking down of legislation restricting polygamous and incestuous marriage. He asserts that 'marriage is, as it always has been, the right of a woman and an unrelated man to marry each other.' Especially in California, one would need to concede Justice Baxter's assertion that 'gays and lesbians in this state currently lack the insularity, unpopularity, and consequent political vulnerability upon which the notion of suspect classifications is founded.'

Baxter says:

I would apply the normal rational basis test to determine whether, by granting same-sex couples all the substantive rights and benefits of marriage, but reserving the marriage label for opposite-sex unions, California's laws violate the equal protection guarantee of the state Constitution. By that standard, I find ample grounds for the balance currently struck on this issue by both the Legislature and the People.

He concludes his judgment:

As the New Jersey Supreme Court observed, 'We cannot escape the reality that the shared societal meaning of marriage — passed down through the common law into our statutory law — has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin.' (Lewis v. Harris, *supra*, 908 A.2d 196, 922.)

If such a profound change in this ancient social institution is to occur, the People and their representatives, who represent the public conscience, should have the right, and the responsibility, to control the pace of that change through the democratic process. Family Code sections 300 and 308.5 serve this salutary purpose. The majority's decision erroneously usurps it.

Justice Corrigan in dissent said:

In my view, Californians should allow our gay and lesbian neighbours to call their unions marriages. But I, and this court, must acknowledge that a majority of Californians hold a different view, and have explicitly said so by their vote. This court can overrule a vote of the people only if the Constitution compels us to do so. Here, the Constitution does not. Therefore, I must dissent.

Justice Corrigan says, 'Requiring the same substantive legal rights is, in my view, a matter of equal protection. But this does not mean the traditional definition of marriage is unconstitutional.' He says:

What is unique about this case is that plaintiffs seek both to join the institution of marriage and at the same time to alter its definition. The majority maintains that plaintiffs are not attempting to change the existing institution of marriage. (Maj. opn., ante, at p. 53.) This claim is irreconcilable with the majority's declaration that '[f]rom the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman.' (Id. at p. 23, fn. omitted.) The people are entitled to preserve this traditional understanding in the terminology of the law, recognizing that same-sex and opposite-sex unions are different. What they are not entitled to do is treat them differently under the law.

Justice Corrigan puts the four member majority in his sights when he declares:

The principle of judicial restraint is a covenant between judges and the people from whom their power derives. It protects the people against judicial overreaching. It is no answer to say that judges can break the covenant so long as they are enlightened or well-meaning.

The process of reform and familiarization should go forward in the legislative sphere and in society at large. We are in the midst of a major social change. Societies seldom make such changes smoothly. For some the process is frustratingly slow. For others it is jarringly fast. In a democracy, the people should be given a fair chance to set the pace of change without judicial interference. That is the way democracies work. Ideas are proposed, debated, tested. Often new ideas are initially resisted, only to be ultimately embraced. But when ideas are imposed, opposition hardens and progress may be hampered.

We should allow the significant achievements embodied in the domestic partnership statutes to continue to take root. If there is to be a new understanding of the meaning of marriage in California, it should develop among the people of our state and find its expression at the ballot box.

Here in Australia, we are also debating same sex marriage. On 30 April 2008, Mr McClelland, the Commonwealth Attorney General announced, 'The Rudd Government is delivering on its election commitment to remove discrimination against people in same-sex relationships from a wide range of Commonwealth laws and programs.' The government says it is committed to removing discrimination in the areas of tax, superannuation, social security, health, aged care, veterans' entitlements, workers' compensation, employment entitlements, and other areas of Commonwealth administration.

The Attorney also announced, 'In keeping with the election commitment, the changes do not alter marriage laws.' At his press conference announcing the measures, he was asked whether the government would permit a marriage ceremony for a same sex couple. He replied, 'No, these reforms won't change the Marriage Act. Consistently with Labor Party policy we made it clear before the election that the government regards marriage as being between a man and a woman; and we don't support any measures that seek to mimic that process.'

There have been tensions between the Rudd government and the ACT Government on this issue. Last week the ACT Civil Partnerships Act 2008 came into effect. It provides 'a way for 2 adults who are in a relationship as a couple, regardless of their sex, to have their relationship legally recognised by registration as a civil partnership'.

For the moment, the major political parties in our Commonwealth Parliament have made the assessment that the community would endorse a raft of measures guaranteeing that there is no financial or other discrimination against same sex couples, while at the same time they have decided that the institution of civil marriage should be maintained as a relationship between one man and one woman who are not closely related. For what it's worth, I think the 'non-discrimination plus maintain the distinction between marriage and a same sex relationship' approach is a fairly accurate reflection of community sentiment at this time.

I suspect that over time, Australians will become more accepting of the idea that civil marriage could include same sex partners. But there are still many Australians who when they married and who for the course of their married life have viewed marriage as a unique institution involving a man and a woman who are usually open to the bearing of each other's children.

The younger generation may well have a different view of marriage, not just because of the greater public acknowledgement of gay and lesbian relationships but also because of the advances in technology which widen the possibilities for shared parenthood. I am one of those Australians who think there is a legitimate state interest in maintaining social contours which enhance the prospects that children will be born into family units where there is a father and a mother, where the genetic, gestational and nurturing parents are one and the same.

In considering the bill of rights question, the issue is whether vexing problems like the availability of surrogacy, adoption and assisted reproductive technology are best resolved by elected legislators acting on advice from law reform commissions, community lobby groups and committees of experts or by judges receiving amicus curiae briefs in court then making determinations according to open textured provisions of a bill of rights.

For example, is the issue of same sex marriage which divides the Commonwealth and ACT governments best resolved by the political process playing itself out or by the High Court making a decision whether the restriction of marriage to opposite sex partners is consistent with the ACT Human Rights Act or some Commonwealth equivalent? For example, s.8 ACT Human Rights Act provides:

(2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.

(3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

Some judges might like to force the social pace by deciding that homosexual persons in the ACT have a s.8 equality right 'to marry' their partners of choice.

On these social issues we tend to track with other equivalent societies like the US but without the same social angst as we see presently played out in California where the decision of the Californian Supreme Court will now flow over into the US presidential campaign and will likely result in yet another citizen initiated referendum negating the court decision.

My concern is not to debate the rightness or wrongness of civil marriage being expanded to include same sex relationships. My concern is to determine what is the best constitutional/legal/political process for agitating and resolving this and other hotly contested moral and political issues. I do think the four judge majority in California has well overstepped the mark of judicial discretion and competence. The minority judges have nicely highlighted the arrogance of their judicial colleagues appropriating to themselves the role of social legislators.

Here in Australia we are doing well in ridding the statute books and government handbooks of discriminatory measures which disadvantage gay and lesbian couples and their children. We have also remained attentive and respectful to those many married Australians who view the contours of their civil marriage as fixed, namely that it is an exclusive relationship with their spouse with whom they have borne and nurtured their children. They have no desire to discriminate against same sex couples. Without animus or prejudice, they just do not think or imagine that a loving, monogamous same sex relationship is the same as their marriage. They say, 'I don't want to discriminate against same sex couples but neither do I see why the State should identify their relationship as being the same as my marriage.'

In Canberra, the elected legislators (and not the unelected judges) have reached the stage of providing same sex couples registering a civil partnership with 'a non-legal ceremony...conducted by the Registrar General or her delegates'. In light of their disagreement with the Commonwealth Government they have not been able to provide 'gay and lesbian couples with the opportunity to affirm their relationship in a legally recognised public ceremony'.

There are citizens who while grateful that same sex couples and their children will not suffer legal discrimination will continue to distinguish a marriage from a same sex relationship. They are not necessarily guilty of animus or irrational prejudice. They see civil and common law marriage as a social institution for nurturing the next generation. They acknowledge that all other domestic arrangements whether involving sexual relations or not deserve appropriate legal protection. They do not see same sex relationships as being primarily or predominantly about the producing and raising of children.

Which ever way the debate on same sex, civil marriage ultimately resolves itself, I cannot see that it would be assisted in Australia by judges becoming involved as the arbiters of what is rational and fair. Same sex marriage just happens to be one of the hot button issues of the moment. There will be others in future. As I said here in Adelaide in 1996, 'The pace of change and the balancing of rights and the public interest should still lie principally with the people through their elected representatives while the judges maintain the rule of law and avoid politics-smuggled-into-law.'

We will continue to enjoy the benefit of seeing what US, UK and Canadian judges are up to with their bills of rights, without being bound by their decisions as we wrestle with novel moral and political complexities. You can see why I am a fence sitter.

### **Bills Of Rights In An Era Of Terrorism**

Post September 11, 2001, citizens have heard government's plea 'Trust us' in setting the balance right between liberty and security. Confronting terrorism, we need to enhance the checks and balances so that government, police and security services will remain trustworthy. Government alone, unchecked and unfettered, sometimes makes mistakes, especially in the wake of populist sentiment and when the focus falls on an unpopular minority of outsiders. To any government pleading, 'Trust us', the people are entitled to reply, 'Maintain that trust with appropriate checks and balances.' Many citizens now see a case for a bill of rights, as well as a free press.

A bill of rights, whether statutory or constitutionally entrenched, does little for most citizens most of the time because they do not run foul of the law enforcers nor of the government which is popularly elected attending to their needs for security and economic well being. Anti-terrorism laws too widely drawn are unlikely to have an adverse impact on the person of Anglo-Celtic appearance going about his or her daily affairs. They are far more likely to have an adverse impact on the person of Middle Eastern appearance or on the Muslim person wearing distinctive head dress. Migration detention laws too widely drawn are unlikely to have an impact on the citizen who is mentally well and able to explain himself.

Our problem is not just that we are without a national bill of rights. The general populace is oblivious of laws which abandon traditional safeguards including the provision that persons be not taken into lengthy detention by the state without a court order and without court supervision.

After the Council of Australian Governments Meeting in September 2005, Prime Minister John Howard announced a new raft of anti-terrorism measures which required the co-operation of the states and territories. The Australian government was convinced of the need for the power to impose preventative detention on terror suspects for up to fourteen days without arrest, charge or trial. The government conceded that detention in these circumstances for more than 48 hours would be constitutionally suspect at the Commonwealth level as protracted detention could be classed as a penalty which should be imposed only by one able to exercise the judicial power of the Commonwealth. The states and territories are not subject to any such constitutional constraint. The Commonwealth obtained agreement from the States and Territories to pass complementary legislation.

The ACT Chief Minister, Jon Stanhope, sought advice from the ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs. She advised that such detention would be contrary to the Human Rights Act 2004 (ACT) which provides a general prohibition on arbitrary detention, specifying that anyone detained 'is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful'.

She advised that 'the period of 14 days detention is too long and an alternative should be considered, such as lesser periods that may be renewed, but all of which at least are subject to judicial authorisation or review.'

For these reasons, she did not consider that a breach of the right to liberty and security would be proportionate. She thought that the restrictions on liberty were not within reasonable limits which could be demonstrably justified within a free and democratic society.

A month later, Jon Stanhope received legal advice from prominent legal academics that the Commonwealth's proposed regime for preventative detention orders 'breaches international human rights standards'.

The ACT Human Rights Commissioner then advised that the enactment of ACT legislation to mirror the Commonwealth's Anti-Terrorism Bill 2005 'would contravene the Human Rights Act 2004 (ACT)'. She did concede that 'In all instances the central question is whether the means suggested are proportionate to the legitimate objective of protecting the Australian community from the risk of terrorism, which is difficult to assess without specific briefing on national security issues'.

Nonetheless she was convinced that the Commonwealth's main accountability mechanisms for the detention regime were 'not adequate to fully protect human rights' and that any ACT mirroring legislation 'allowing detention for preventative detention without charge, with limited access to a lawyer and circumscribed judicial review is contrary to the right to liberty'. Having reviewed the Commonwealth provisions, she concluded, 'For these reasons I do not consider it likely that the breach of the right to liberty... would be proportionate'. She expressed the hope that the legislation could be made 'more human rights compliant' with more community consultation.

In May 2006, the ACT Legislature passed the Terrorism (Extraordinary Temporary Powers) Act. Jon Stanhope provided the necessary compatibility statement having obtained legal advice from the ACT Human Rights Office. He then tabled the explanatory memorandum on the bill noting:

The advice did note possible arbitrary interference with some human rights.

It noted that detention under preventative detention orders may be arbitrary (s 18 HRA) as a consequence of the duration of detention up to 14 days, and the incommunicado nature of detention. It also suggested that interference with the right to privacy may be arbitrary (s 12 HRA) as a consequence of the way in which a person would be detained and held in custody under a preventative detention order and the special powers allowing preventative and investigative authorisations.

However, it concluded that these interferences are likely to be 'reasonable limits' that can be 'demonstrably justified in a free and democratic society' for the purposes of s 28 of the HRA on the basis that:

- The obligation to respond to the threat of terrorism, including through legislative means, is an important and significant objective;

- The restrictions on rights are reasonable and necessary, taking into account the importance of achieving consistency within a national regime; and
- The bill incorporates extensive safeguards, which, in the context of a national regime, represent the least restrictive options available.

The ACT's legislation complied with the Commonwealth's template with only two exceptions. The Commonwealth Attorney General Philip Ruddock threatened to override the ACT provisions which preclude preventative detention of persons aged between 16 and 18 years. The Commonwealth wanted the states and territories to permit detention of terrorist suspects over 16 years of age. The Commonwealth was also concerned about the higher threshold of evidence required under the ACT law before preventative detention could be imposed.

Without access to national security briefings, legal advisers and state or territory politicians are not able realistically to assess whether restrictions on liberty are within reasonable limits that can be demonstrably justified in a free and democratic society. If the legislators in a bill of rights jurisdiction concede that the need for national consistency is a relevant criterion in determining reasonable limits on rights, those rights will enjoy no more privileged protection than in those jurisdictions without a bill of rights.

The ACT anti-terrorism laws are little more protective of civil liberties than the laws of the Commonwealth and other States. The minor variations may be traceable to the need for preliminary dialogue between the legislature and executive before the passage of such contested security laws. But the ACT Human Rights Office has not been any better situated than the recent Sheller Review in affecting the outcome of anti-terrorist legislation, given that each is denied access to national security briefings so as to assess the threat. The UK Anti-Terrorism laws are not markedly better in the protection of civil liberties than the Commonwealth laws, even though Westminster is constrained by a Human Rights Act and the Commonwealth Parliament is not.

Statutory bills of rights have counted for little in reigning in the executive's desire to have Parliament legislate tight constraints on civil liberties for terror suspects. When the Victorian Charter was introduced to Parliament, the minister was insistent that the bill would 'not stop the government from taking strong action to protect the community from terrorist threats or criminal activity'.

When considering the history of our anti-terrorism laws and the similarity of outcomes in the ACT as in other jurisdictions, we need to ask whether a limited statutory bill of rights is worth the candle.

### **The Uncertainty Created in the Law**

Given the lack of judicial and extra-judicial constraints, Huscroft wonders whether the problem can be resolved by the enactment of a statutory rather than constitutionally entrenched bill of rights. Once again he finds no comfort here. It is difficult to amend or repeal even ordinary legislation.

Commentators like me have long espoused the ping pong theory: that a statutory bill of rights sets up a game to and fro whereby the legislature and judiciary can play out their differences, rather than the judiciary having the capacity to deliver an unreturnable ace. Huscroft finds any such 'dialogue theory' unsatisfying and mischievous because 'the relationship of courts and legislators is hierarchical'. De facto, judges have the last word whether or not the bill of rights is statutory or constitutionally entrenched. A statutory bill 'simply precludes the de jure finality' of any judicial decision.

In the ACT, Chief Justice Higgins in *SI bhnf CC v KS bhnf IS42* has shown how the living tree approach to a statutory bill of rights can result in the statute meaning just what the judge wants it to mean. Section 30(1) of the Human Rights Act 2004 (ACT) used to provide: 'In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.'

In a dispute involving two minors, a magistrate had issued an ex parte, interim, personal protection order requiring the appellant to keep away from the other minor. The court had to consider the application of section 51A(3)(b) of the Domestic Violence And Protection Orders Act 2001 (DVPO) which provides: 'The interim order becomes a final order against the respondent if the respondent does not return the endorsement copy to the Magistrates Court at least 7 days before the return date for the application for the final order.'

On its face, the protection order became final when neither the appellant nor his mother who had been appointed his litigation guardian took any action. Chief Justice Higgins had to 'work out the meaning' of this legislative provision. Having considered the rights set down not just in the Human Rights Act 2004, but also those rights in Articles 14 and 24 of the ICCPR, and Magna Carta, he concluded:

It would be incompatible with those rights if the DVPO Act and regulations were to be interpreted as permitting a final order, of whatever duration or, even, an interim order, save as mandated by an urgent need for personal protection of the applicant, without the child respondent to the application for it being represented by a litigation guardian and given a proper opportunity to be heard.

He concluded:

It is, therefore, apparent that the DVPO Act and Regulations, to be Human Rights Act compliant, as the Attorney-General has certified them to be, can only have been intended to be interpreted as I have determined above.

Section 51 of the DPVO Act is a valid law of the ACT legislature. It just does not mean what it says. An interim order becomes final only once the recipient of the order has been given a proper opportunity to be heard, and no court could be satisfied that such an opportunity was provided if the recipient simply failed to return a document or to appear within seven days.

The old s.30 of the ACT Human Rights Act which Chief Justice Higgins applied in reaching this decision is similar to s.3 (1) UK Human Rights Act which provides:44

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

In Ghaidan v. Godin-Mendoza, the House of Lords had to consider what scope the legislature had accorded the judiciary when interpreting future statutes. Some judges when instructed to do what 'is possible' with the meaning of words have the same imagination as Lewis Carroll, thinking almost anything is possible when giving words a meaning compatible with human rights:

'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.'

'The question is,' said Alice, 'whether you can make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'

Lord Nicholls of Birkenhead said, 'The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's Convention rights.' The court had to interpret a tenancy law which guaranteed a surviving spouse continued enjoyment of a statutory tenancy which carried distinct benefits including rent payments significantly less than the market rate. A person who was living with the original tenant as his or her wife or husband was to be treated as the spouse of the original tenant.

Other family members were entitled only to an assured tenancy which though providing ongoing occupancy would require the payment of market rent. The issue was whether a same sex partner could avail himself of the statutory tenancy provision even though there was no ambiguity in the statute. The House of Lords decided that 'the reason underlying this social policy, whereby the survivor of a cohabiting heterosexual couple has particular protection, is equally applicable to the survivor of a homosexual couple.'

Considering the operation of s.3 Human Rights Act, Lord Nicholls said:

All legislation must be read and given effect to in a way which is compatible with the Convention rights 'so far as it is possible to do so'. This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention.

Unfortunately, in making this provision for the interpretation of legislation, section 3 itself is not free from ambiguity. Section 3 is open to more than one interpretation. The difficulty lies in the word 'possible'. Section 3(1), read in conjunction with section 3(2) and section 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant by application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which 'possibility' is to be judged?

He went on to say:

It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning. The decision of your Lordships' House in *R v A (No 2)* [2002] 1 AC 45 is an instance of this. The House read words into section 41 of the Youth Justice and Criminal Evidence Act 1999 so as to make that section compliant with an accused's right to a fair trial under article 6. The House did so even though the statutory language was not ambiguous.

From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character.

And then:

From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.

In light of this open-ended ruling by the House of Lords which results in the Human Rights Act often operating as if it were a constitutionally entrenched bill of rights overriding later statutes even if they are not ambiguous, the drafters of the Victorian Charter were a little more restrictive on the possibilities allowed to judicial imaginations. s. 32(1) of the Victorian Charter requires that any interpretation of a statute by the judges must be not only possible but also consistent with the purpose of the statute:

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

It remains to be seen just how restrictive these words are. They would presumably result in the same decision in *Ghaidan v. Godin-Mendoza*. Since the legislative overreach by Chief Justice Higgins and the House of Lords decision in *Ghaidan v. Godin-Mendoza*, the ACT provision has now been amended making it less like the UK provision and more like the Victorian provision:

So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

It is one thing for a court to resolve an ambiguity in a statute consistent with human rights. It is another thing for a court to re-word a specific, unambiguous statute consistent with human rights. Even when the words of a statute are not ambiguous, it may still be possible for a Court to reinterpret them so that the effect of the statute is compatible with the human rights enunciated in the statutory bill of rights. The law is no longer what it says it is. This is a significant cost to certainty, one of the cherished aims of any legal positivist.

### **The gaps which still remain in the protection of human rights**

Many of our elected politicians are convinced that unelected judges are bad news when it comes to detention of persons suspected of being unlawful non-citizens. The Migration Act imposes an obligation on authorised migration officers to detain any person who is 'reasonably suspected' of being an unlawful non-citizen. Persons once detained are not brought before any court.

The Commonwealth Ombudsman reported the case of Mr T. An Australian citizen since 1989, he has been taken into immigration detention three times for a total of 253 days. He was held in detention from 19-23 March 1999, 17 January — 16 September 2003, and a month later from 17-22 October 2003. The ombudsman concluded, 'Mr T's case is disturbing as it involved the detention on three occasions of an Australian citizen. Mr T's mental illness, his homelessness and lack of an effective personal social support structure, his poor English language skills and his ethnic background were all factors that contributed to the decisions taken by DIMA officers to detain and continue to detain him as a suspected unlawful non-citizen'.

The Ombudsman listed the following systemic failures in the department which has the power to remove anyone off the streets and put them in detention should an ill-trained officer of the department suspect someone who is schizophrenic of being a non-citizen:

- a negative organisational culture;
- a poor understanding of the requirements and implications of the Migration Act 1958;
- a rigid application of policies and procedures that do not adequately accommodate the special needs of persons suffering from mental illness;
- poor training of DIMA officers, including the management of mental health, language, cultural and ethnic issues;
- an abrogation of duty of care responsibilities;
- poor instructions, procedures and practices relating to the identification of detainees, including the failure to use fingerprints as a means of identification;
- information systems and database shortcomings;
- poor case management, including no effective review process, a failure to follow up on information and poor record keeping; and
- a lack of appropriate arrangements to facilitate the gathering of important information that may assist in the identification of a detainee from Immigration Detention Centre (IDC) service providers.

If there were a Commonwealth Bill of Rights, it would presumably contain a clause similar to section 18(6) of the ACT Human Rights Act 2004 (ACT) which provides that 'Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful'.

Mr. T would still need someone to assist him in his lamentable state so that he might gain access to a court. His case could then be considered in open court, and a department with a negative organisational culture would be more likely to be called to account more promptly. Hallowed national values would be more evident in a polity that ensured Mr T access to a court at the time of his detention rather than access to the Ombudsman years after his release once there has been a political purge on a government department.

Perhaps a future bill of rights should provide that a person detained on suspicion of being an unlawful non-citizen is entitled to a statement of grounds for the official's suspicion, such a statement of grounds being required to be produced to a magistrate for review within a prescribed period. In these matters, it is always a question of how far are we prepared to go ensuring justice for all, thereby witnessing to Australian values. There will always be cases that fall through the gaps. One temptation for citizens enjoying the benefit of a bill of rights is to think that all meritorious human rights claims would be covered by the provisions of the bill of rights.

Consider the case of Jonathan Peter Bakewell who was convicted of murder on 17 May 1989, he having broken into a house and raped his victim who died of asphyxiation. Back then there was no automatic parole procedure available in the Northern Territory. Such a prisoner would spend his life in prison unless granted executive clemency. The sentencing judge said to Bakewell, 'Whether you should ever be permitted to live again as an ordinary member of society is something which cannot at this time be determined.' Bakewell's prison term was backdated to 27 February 1988, the date he was first taken into custody after the murder.

In 2003 the NT Labor Government introduced new laws to provide parole for life time prisoners. The usual non-parole period was set at 20 years, while 25 years was set for aggravated murders such as those committed during the commission of a sexual assault. There was a need for transitional provisions to deal with prisoners like Bakewell who were serving life terms prior to the introduction of the new parole provisions. Under s. 18, Sentencing (Crime of Murder) and Parole Reform Act (NT) 2003, the non-parole period for such prisoners was set at 20 years. Under s.19, the DPP could apply for a longer non-parole period or even for a declaration that there be no parole period granted.

The Supreme Court had the power to fix a longer non-parole period in accordance with the tariff prescribed (25 years for a murder resulting from a sexual assault), to refuse to fix a non-parole period, or to dismiss the application, thereby leaving in place the mandatory 20 year non-parole period under s. 18.

Bakewell has been a model prisoner. Late in his prison term, he applied for transfer to prison here in South Australia to be close to his dying father. The NT Attorney-General wrote to Terance Roberts, the S A Minister for

Correctional Services, stating that a transfer would be in the interests of the prisoner's welfare and informing him that Bakewell had been given a non-parole period of 20 years, 'and is eligible for consideration by a parole board for release on 28 February 2008'. He was moved to South Australia.

The Parole Board of South Australia noted, 'Non-parole period of 20 years commencing 27 February 1988; transferred to South Australia on 15 April 2005.' As Bakewell's release on parole here in South Australia drew near, the politics of his pending release started to hot up in the Northern Territory. On 11 October 2007, the DPP applied to the Supreme Court of the NT to have the non-parole period increased from 20 years to 25 years under s. 19(3). Justice Southwood thought he had no option but to accede to the application.

Bakewell appealed to the Court of Criminal Appeal of the Northern Territory which was unanimously of the view that Justice Southwood was mistaken. Indeed the judges did retain a discretion whether to grant or dismiss the DPP's application to have the mandatory 20 year non-parole period revised. It was common ground that if the application were granted, the court would have no option than to substitute the 25 year non-parole period. What was contested was whether the court could dismiss the DPP's application thereby leaving the 20 year non-parole period in place.

It is worth noting that if Bakewell had been convicted after the introduction of the new parole law, he could have applied to the sentencing judge to have his non-parole period set at less than 20 years. The transitional provisions contained no such provision. The appeal court noted that 'the discretion to dismiss an application conferred by s. 19(1)(b) is not expressed to be subject to any other provision of the Act. If the Legislature had intended that the discretion be constrained by subs (3), it could have followed the form of the direction now found in s 53A of the Sentencing Act by prefacing s 19(1) with the words 'subject to this section'.<sup>52</sup>

Chief Justice Martin rightly observed, 'The court is concerned with transitional provisions in a penal statute that have application only after a prisoner has served at least 20 years imprisonment. In that context, it would not be surprising if the Legislature intended to confer upon the court an unfettered discretion to determine whether the period fixed by s.18 should be revoked or the application dismissed.'<sup>53</sup> This judicial observation was surprising to the Legislature which proceeded to pass retrospective legislation this month in the Sentencing (Crime of Murder) and Parole Reform Amendment Bill 2008.

Introducing the retrospective measure, the Attorney general referred specifically to the Bakewell decision and said, 'The purpose of this bill is to clarify the original intent of this Parliament.'<sup>54</sup> In the explanatory memorandum to the bill, the Attorney General states, 'The minimum non-parole period which must be served by prisoners who fall under the transitional provisions of the Act, where circumstances of aggravation accompanying the crime of murder are found to exist, is 25 years imprisonment.'

Following the lead from Chief Justice Martin, Parliament has now enacted a new s.19(1) which commences with the words 'Subject to this section, the Supreme Court may...' There then follow detailed provisions requiring the DPP to bring an application in circumstances of aggravation and excluding the Supreme Court's power to dismiss an application in such circumstances. There are then provisions designed to deal specifically with Mr Bakewell permitting either the DPP or the Attorney General himself to bring a further application to the court.

There are aspects of this case which offend basic principles of law making including the avoidance of retrospectivity and the need for a citizen to be accorded certainty by the finalisation of litigation. It is extraordinary that not only has the NT Government legislated retrospectively to clarify its original intention in this case, the DPP has also filed an application for special leave to appeal to the High Court contesting the decision of the NT Court of Criminal Appeal. This is a case of legislative and litigious overkill. All to deny one model prisoner the option of release on parole after 20 years imprisonment, more than three years after he was officially informed that his non-parole period had been set at 20 years.

No matter how lamentable the case of Mr Bakewell, he might not receive any relief in either of the Australian jurisdictions with a bill of rights. The Victorian Charter would be of no avail on any conceivable construction. Section 27 of the Victorian Charter provides:

(2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

(3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

When Mr Bakewell committed his offence, the penalty was life imprisonment with no prospect of parole. If there was any reduction of his penalty, it did not occur before he was sentenced. So neither Victorian provision assists him.

Section 25(2) of the ACT Human Rights Act provides:

A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty for an offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.

There may be argument whether Mr Bakewell failed to benefit from the reduced penalty for murder by virtue of his being made eligible for parole after 25 years rather than after 20 years as was first proposed.

Consider next the case of an Indonesian fisherman La Bara from Pulau Buton in Indonesia. Nowadays it is commonplace to find more than 200 Indonesian fishermen in detention in the Darwin immigration detention facility. The Indonesian consulate in Darwin in kept busy visiting their nationals held there.

Mr La Bara's fishing boat the 'Kembar Jaya' was destroyed by Australian government officials on 29 March 2008. His was one of nine vessels apprehended which were not in fact being used for illegal fishing. His was one of four such vessels which were destroyed by Australian officials 'because they presented serious risks to safety had they been towed.' On 15 May 2008, the Minister for Fisheries, Tony Burke, told Parliament that 'as can be the case in any law enforcement activity, genuine errors can be made'.

What is distinctive about Mr La Bara is that he carried with him a GPS system and has always maintained that he was not fishing in Australian waters. He realised that his claim was causing concern to the Australian officials who decided there was insufficient evidence to prosecute him and that he should be promptly removed from Australia. Having been forcibly brought to Australia once his boat was destroyed, Mr La Bara was not so keen to leave Australia. He wanted to remain and agitate his legal rights, asserting that his boat was unlawfully destroyed and he was unlawfully detained given that he was peaceably fishing in Indonesian waters.

Once again, there is nothing in either of the Australian bills of rights which could assist Mr La Bara in the face of Commonwealth demands that he be removed from the jurisdiction immediately rather than being allowed to cause embarrassment to the lawless Commonwealth by remaining within the jurisdiction and agitating his claim for adequate compensation.

## **Conclusion**

For us Australians, whether or not we have a national bill of rights, the question will always be how to nurture a deep rooted culture of respect for human rights among governors and the governed. It will be increasingly difficult for the jurisprudentially and geographically isolated Australia to strike the right balance, maintaining respect for the freedom and dignity of the individual, a commitment to the rule of law, and a spirit of egalitarianism that embraces tolerance, fair play and compassion for those in need.

When Prime Minister, John Howard was fond of referring to the three great institutional pillars of our democracy: 'our parliament with its tradition of robust debate; the rule of law upheld by an independent and admirably incorruptible judiciary; and a free and sceptical press of the sort that we politicians simply adore.' Following the British trend, a statutory bill of rights will probably be the needed fourth institutional pillar on which will rest an Australian democracy true to Australian values.

But judges will need to refrain from the Alice in Wonderland temptation of declaring that the law, being deemed to be human rights compliant, is what they want it to be, regardless of what Parliament has said. They will also need to be wary about jumping in too quickly to resolve moral and political debates about new emerging rights and interpretations of cherished social institutions. Citizens will still need to scrutinise closely the claims of politicians and bureaucrats about necessary anti-terrorism measures. And we will all need to keep an eye out for the outsider, the little person or the forgotten one like Mr Al Kateb, Mr T, Mr La Bara, or Mr Bakewell who will continue to fall between the gaps.

If more assured these commitments, I just might get down off the fence and dedicate some energy to planting statutory bills of rights in the Australian garden of rights and freedoms. Meanwhile I remain convinced as I said here in Adelaide 11 years ago: 'The Australian garden of rights and freedoms should continue to be pruned and fertilised by our judges and legislators playing their respective roles with an eye to outcomes in the United States.'

I see no benefit in excluding the legislators from the garden and in creating a monopoly for the judges. Judges alone are unlikely to satisfy the people that the right balance is struck in times of rapid change in the multicultural, increasingly globalised garden cross-fertilised by seeds and pollens from every value system on earth.'

Those of us who do not live in Victoria or the ACT now have the opportunity to look objectively from afar to see whether a statutory bill of rights bears good fruit in the Australian garden of rights and freedoms. It can undoubtedly enhance our commitment to values such as equality and non-discrimination against suspect classes. I am not so sure about the cost benefit analysis and the capacity of a statutory bill of rights to enhance our balancing of other rights and interests, including the long term best interests of children and the maintenance of what UN instruments call 'the just requirements of morality, public order and the general welfare in a democratic society'.

My chief fear is that bill of rights advocates might too readily overlook the importance of the law and government policy in maintaining morality and the general welfare even in a pluralistic, democratic society such as Australia where there is no religious or philosophical consensus about the requirements of morality and the general welfare.

Just because there is no consensus does not mean that morality and the general welfare are now irrelevant to the calculus of rights. here are valuable public restraints on individual freedom which are essential for the flourishing of all citizens. Provided a bill of rights does not shut down respectful public dialogue about those restraints, we might build a broader Australian consensus for bills of rights in all jurisdictions, thereby getting the balance right after the 2020 Summit.



Brennan SJ AO is a professor of law in the Institute of Legal Studies at the Australian Catholic University and Honorary Visiting Fellow, Faculty of Law, University of NSW.