**The 2003 Sir Ronald Wilson Lecture**

# The Law and Politics of Human Rights in an Isolated Country Without a Bill of Rights

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I well recall 29 May 1979. I was back in my hometown, Brisbane, during a term break in my theological studies that I was pursuing at the United Faculty of Theology in Melbourne. I was appearing in what was popularly called the demonstrator court. Queensland's then colourful premier had proclaimed that the day of the political street march was over. Some thousands of Queenslanders had been arrested and were being processed through the courts for disobeying the lawful directions of police officers and for marching without a permit. I was freshly admitted to the Bar and my religious superiors thought it a good idea that I lend a hand on this civil liberty issue as it was known that barristers appearing in such cases would be struck from the list of counsel available to receive crown briefs in Queensland. On the morning of 29 May, I took the opportunity to call in and watch a unique event in the history of Queensland. A new justice of the High Court of Australia was being sworn in, in Brisbane. What's more, he was a Western Australian, the first from the west to take a seat on the nation's highest court. Where better to be sworn in than Brisbane during the height of a street march ban? It was a great day for the remoter states. Another Western Australian, Peter Durack was the first to speak as the Attorney

General for the Commonwealth. After hearing the various tributes from the bar table, Justice Ronald Wilson then acknowledged that this was "indeed a very precious moment" and addressed us all as "friends". Of the tributes he said, "I find it very difficult to recognise me in them, but I find them not only humbling in that respect, but encouraging", and "thinking what a pity there was not some way for the members of the High Court - now my brothers - to have heard all this about five years ago, and then I could have continued to practise and it might just possibly have had some effect." In paying his own tributes, Justice Wilson acknowledged "first and foremost ..my wife, who is here with me today. She has borne with me for 30 years and maintained a happy and stable home life, without which I cannot believe that I could have done what I have done." At the end of his remarks, I turned to a friend who is now a solicitor in Alice Springs and said, "I think they have just put a saint on the High Court". I am aware that one with Sir Ronald's Uniting Church credentials cares little for intimations of canonisation by a Jesuit. But twenty four years later, I am delighted to be in Perth to pay tribute to Sir Ronald and to consider a topic that has occupied him before, during and since his decade of service on the High Court of Australia, namely: The Law and Politics of Human Rights in an Isolated Country Without a Bill of Rights. This evening I will be so bold as to suggest that Sir Ronald has embodied the tension as he has moved from advocate of State rights to judge and ultimately to advocate of human rights. His career and utterances, whether judicial or other, provide us with valuable pointers to the present problems and future possibilities.

He has always acted with great humanity. Recently, I was in Melbourne preparing to address the Commonwealth Law Conference on refugees. I met a silk from the Melbourne Bar who had been associate to one of Sir Ronald's colleagues. I told him I was to give this lecture and asked for an anecdote. He responded: "With pleasure. On the last day I was to leave my judge, Sir Ronald

called in to see me and said, 'I hear you are leaving. Could I take you to lunch?' And he did. He was a thorough gentleman and always generous. He treated all staff, not only his own, as equals. He is a fine man." The tribute rang all the more distinctively around the walls of the particular club where I happened to be in that most urbane city of the East, a club that was a second home for Sir Owen Dixon. I recalled Sir Ronald's acknowledgment at his swearing in "to all those brothers and sisters in the law who have journeyed with me from time to time and who have provided me with such rich personal relationships, for which I shall always be grateful." This acknowledgement is probably the key to the affection in which he is held by the Aboriginal community in the wake of the *Bringing Them Home* report.

## **Australia Without a Bill of Rights**

In recent years, properly restrained judicial supervision of human rights has been threatened in Australia on three fronts. First, the *Wik* controversy unleashed political attacks on the courts which would henceforth be neither refuted nor disapproved by the Attorney General. During the 1996 state election campaign here in Western Australia, Deputy Prime Minister Tim Fischer attacked the High Court for its delay in delivering a decision in *Wik.* He told miners and pastoralists in Kalgoorlie, “I am frustrated and angered by the delay in handing down of the decision by the High Court”. He believed the delay was “a legitimate matter for public consideration and I state my concerns on behalf of thousands of pastoralists in remote and regional Australia.” The Chief Justice took strong exception to the Deputy Prime Minister’s attack, reminding him that public confidence in the constitutional institutions of Government was critical to the stability of society:

By a convention which is based in sound practice, judges do not (and certainly should not) publicly attack the members of the political branches of government, and the members of the political branches of Government do not (and certainly should not) attack the judges except on a substantive motion in the Parliament.

Mr Fischer pleaded that his remarks were made "against the background of incorrect advice" he had received. Since then the Minister for Immigration has had carte blanche to criticise the courts whenever they make migration decisions which offend his sensibilities and go against the policy objectives of the government.

Second, the Howard government decided to break the momentum built by the likes of Gareth Evans and disregard decisions of UN human rights committees. In June 1993, Mr A , a Cambodian boat person who had arrived in Australia in November 1989 made a communication to the UN Human Rights Committee. The UN Human Rights Committee found that in Mr A's case, Australia was in breach of Article 9(1) of the International Covenant on Civil and Political Rights which provides that no one shall be subjected to arbitrary detention. The Committee observed that "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed." The State has to be able to provide appropriate justification for protracted detention. Imprisonment for four years simply because some one made an illegal entry would be arbitrary unless the State could demonstrate some justification such as the need to conduct inquiries, the likelihood of absconding and lack of co-operation. The Committee also found Australia in breach of Article 9(4) which entitles anyone in detention "to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention". The Parliament by setting up a legal regime of "designated persons" had attempted to emasculate this power of judicial review.

The Committee ruled that the court review had to be "real and not merely formal". The Committee ruled that Australia should provide Mr A with adequate compensation for his arbitrary detention.

In 1997 the decision was disregarded by Australian politicians on the basis that it was simply the opinion of an international committee. In his press release of 17 December 1997, Attorney General Daryl Williams defended the four year detention of Mr A on the basis that[1]

After giving serious and careful consideration to the other views expressed by the Committee, the Government does not accept that the detention of Mr A was in contravention of the Covenant, nor that the provision for review of the lawfulness of that detention by Australian courts was inadequate. Consequently, the Government does not accept the view of the Committee that compensation should be paid to Mr A.

The Committee is not a court, and does not render binding decisions or judgements. It provides views and opinions, and it is up to countries to decide whether they agree with those views and how they will respond to them.

Recently the Full Federal Court had cause to consider the UN decision about the arbitrariness of the detention of Mr A, observing:[2]

Although the views of the Committee lack precedential authority in an Australian court, it is legitimate to have regard to them as the opinions of an expert body established by the treaty to further its objects by performing functions that include reporting, receiving reports, conciliating and considering claims that a State Party is not fulfilling its obligations. The Committee's functions under the *Optional Protocol to the International Covenant on Civil and Political Rights*, to which Australia has acceded (effective as of 25 December 1991) are particularly relevant in this respect. They include receiving, considering and expressing a view about claims by individuals that a State Party to the *Protocol* has violated covenanted rights.

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[1] MPS 126a / 1997 Joint Statement of D Williams and P Ruddock
[2] *Al Masri* v *MIMIA* [2003] FCAFC 70 (15 April 2003), para 148

So we have reached the stage that the government can blithely dismiss as wrong a UN Committee's finding about Australia while the Full Federal Court is fortified in its finding about the ongoing arbitrariness of migration detention in Australia by referring to the professional findings of the UN Committee.

And third, the unthinkable occurred with the Blair government passing legislation to incorporate the European Convention on Human Rights into the domestic law of the UK. This left Australia isolated as the only first world country with the British heritage and without a bill of rights, whether in statutory or constitutional form. In the UK it is now routine for the courts to have recourse to the provisions of the European Convention on Human Rights when determining highly political cases such as the arbitrariness of migration detention. The courts there are even required to determine whether the denial of welfare rights to asylum seekers could constitute cruel and degrading treatment. The politicians dislike the judges' findings but they have to amend their procedures to ensure compliance with laws which are now to be consistent with the European rights charter.

There is now a need to rectify the isolation of the Australian judiciary - the only first world judiciary with the British common law heritage but without some bill of rights instrument to provide guidance in the shaping of the common law whenever there be conflict between the individual and the state. Given the clean sweep of state Labor governments, some of which have creative attorneys-general, the time may be ripe for a common State bill of rights which could have jurisprudential flesh put on its statutory bones by High Court decisions, given that special leave would be more likely in cases calling for interpretation of a bill of rights provision common to all States.

I remain unconvinced about the need for a constitutional bill of rights[3] except perhaps for the constitutional entrenchment of the principle of non-discrimination and I remain opposed to open textured "due process" or "equal protection" clauses which reserve to unelected judges the contemporary social-moral-political controversies which require a balancing of the individual right to self-determination and the community interest, or which provide an expansion of personal self-determination for the well endowed at the cost of the needs and fears of the weak and marginalised in society. For example, as a citizen interested in the moral well-being of the community, I would far prefer to give evidence to a parliamentary committee on matters such as euthanasia rather than being limited to the writing of an *amicus curiae* brief which must be put through the template of "suspect classes" and various levels of judicial scrutiny ranging from strict which is always fatal to intermediate to "rational basis" review as in the United States.

## The Need for a Clear Legislative Tune on Rights

There are three distinct functions performed by High Court Justices in the absence of a bill of rights:

?? Interpreting the Constitution
?? Interpreting Statutes
?? Applying and Developing the common law (and principles of equity)

The judge is permitted varying degrees of flexibility in the performance of each function. Without an overriding bill of rights, the judge does not have

[3] And I am absolutely convinced that there is no prospect of a constitutional bill of rights being passed at referendum, thereby making discussion of same quite academic.

guidance from the legislature or the people about the priority of individual liberty and the common good to be applied to particular statutes or to discrete situations calling for a development of the common law. Without recourse to a bill of rights, the judge who has taken the oath to administer justice according to law must define the jurisdiction of the court and interpret the law without the benefit of a prior comprehensive, legislative endorsement of a hierarchy of rights and interests. The judge must find his way through an increasingly complex thicket of legislation which is not subject to any overriding codified set of rights and she must develop the common law where statute is silent with less assistance from judges from other jurisdictions whose decisions are increasingly guided by their own bills of rights.

The judiciary are now fair game for uninformed criticism by community leaders who exhibit little understanding of the role of the judiciary, arguing that the judges should leave well alone, maintaining the status quo in the name of an appropriate separation of powers in which the rectification of any new social ill is seen to be the sole preserve of the legislature controlled by the Executive of the day. Judges are assumed to be social commentators or social experimenters. For example, Professor Geoffrey Blainey in his fourth Boyer Lecture during the centenary of federation, said:[4]

> There is little doubt that if the green movement had remained weak, and if the forces in favour of national development had remained powerful, Aboriginal land rights would today be less advanced. Even the High Court, in adjudicating on land rights in the Mabo case of 1992, had first cocked its ear to public opinion. It had to feel sure that a reasonable body of opinion sanctioned the potential freezing of huge areas of land from economic development.

Judges developing the common law need to cock their ear to some authorities other than themselves. It is time for our parliaments to provide our

judges with a clear tune on rights. Given recent Australian developments, I am slightly more in favour of an Australian bill of rights regime than when I wrote *Legislating Liberty* (UQP, 1998). When launching the book, Justice Tony Fitzgerald conceded, "A nation of ordered liberty is theoretically possible in Australia without a constitutional bill of rights through political changes and the mutual cooperation of the component groups in the Australian community." Given recent developments, I (like him) am now more sanguine about the possibility of that abiding political change and mutual cooperation. It is important for lawyers now to convince politicians and the public that we need to do more to protect rights in Australia - without vesting unelected judges with too much power.

Prior to the passage of the UK Human Rights Act, your Chief Justice David Malcolm warned of the increasing isolation and risk of *ad hoc* responses to human rights issues in Australia. Responding to the question, "Does Australia Need a Bill of Rights?" he said in 1998:[5]

> Australia, without a Bill of Rights, is now outside the mainstream of legal development in English speaking countries, particularly those most comparable in their political and legal systems, including New Zealand and Canada..... The European Court has not regarded the common law in a number of areas as protecting human rights adequately. The new United Kingdom Government has announced its intention to legislate to make the Convention a part of the domestic law. It is disappointing to note that to date in Australia there has been very little sustained thought or research devoted to the fundamental issues of the detailed nature and content of a Bill of Rights. As Professor Philip Alston has pointed out: "As long as this continues to be the case, Australia runs a strong risk of either acquiring a Bill of Rights by default, or by sanctioning the adoption of one on the basis of poorly informed and ill-thought through political deal-making. It is therefore time to grasp the nettle and engage in a sustained national debate over the options which are realistically available to us as we enter into the twenty-first century.[6]

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[4] Boyer Lectures, This Land is All Horizons - Australian Fears and Visions, Program 4, Loyalties, 2

[5] D. Malcolm, "Does Australia Need a Bill of Rights?", Murdoch University Electronic Journal of Law, Vol 5, No 3, September 1998

[6] 1998 Murdoch University Electronic journal of Law Vol 5 No 3 Sept 1998

## Promoting Public Understanding of the Distinctive roles for those committed to Justice According to Law and Seeking Greater Harmony between Law and Conscience

With or without a bill of rights, judges will always confront hard cases in which law, morality and policy seem irreconcilable. Judges, legislators and concerned citizens all need to play their role in recasting the law so that justice according to law produces outcomes more acceptable to the formed and informed conscience of those seeking to resolve disputes in society. The judgment of Justice Wilson in Mabo *(No 1)* and his Public Advocacy Following *Mabo (No 2)* and *Wik* provide a good case study.

When asked in February 1994 if his Christianity influenced him as a judge, Sir Ronald Wilson replied:[7]

I've been rather firm in my belief that my integrity as a judge required me to apply this rigorous intellectual discipline...to the legal sources and to arrive at a solution that satisfied my mind. And this can be demonstrated by a couple of cases when the conclusion that I expressed in my judgment would not have accorded with my heart. Particularly, in the overruling of the Queensland legislation in *Mabo No 1*, I was glad the majority was 4/3. I was one of the three so I think I'm pretty firm on that answer.

In August 1997 he fielded the same question on Radio National:[8]

On the Court it was more difficult because I was sworn to do justice according to law, and I took that oath very seriously. There were some decisions in my ten years on the court of which I'm not proud. I'm not ashamed, because they are the best that I could do in pursuance of my oath. But

[7] "From Basement to Bench: An Interview with Sir Ronald Wilson", Brief, WA Law Society, February 1994, p. 21

[8] Transcript, The Law Report, Radio National, ABC, 5 August 1997

they're not the sort of decisions that I would have like to have made. In other words, my heart and my mind went in different directions.

[I]n each case that I'm thinking of particularly - a couple of cases - the court divided four / three, so they were obviously difficult cases where one could quite with integrity go down either track. The Court is often presented - the reason things go to the High Court is because there is no existing authority, and very often there is a choice, and the court has to do its best to make the choice. Now I strove to interpret certain sections of the acts that were in question and I interpreted them in a way that led me to be a dissentient. And I'm very grateful that I was in the minority, because I would have, I preferred the majority view, but couldn't bring myself to accept it.

The Mabo litigation had commenced in Queensland in 1982. When Sir Joh Bjelke-Petersen's legal advisers told him in 1985 that the Torres Strait Islanders may have a case, he decided he should do something about it. In his characteristic no nonsense style, he did. His Government introduced the Queensland Coastal Islands Declaratory Bill to the Queensland parliament. The Bill was only fourteen lines long. Its effect was to wipe out any property rights held by Torres Strait Islanders when the Torres Strait Islands became part of the colony of Queensland. The Bill attempted to wipe out any traditional native title rights as of 1879 with no compensation payable. The Bill did not affect any rights and interests granted by the crown to other persons. It attempted to wipe the slate clean one hundred and six years later, ensuring that the only property rights which existed in the Torres Strait were those granted by the crown. If the law applied by the courts did recognise native title rights which existed before colonisation and which survived the assertion of crown sovereignty, this Bill tried to do away with all such rights and interests.

The Deputy Premier, Mr William Gunn, who had Torres Strait Islander grandchildren, had the task of introducing the legislation to Parliament. He said the legislation would avoid the need for limitless research work and endless

argument in the Courts about mere matters of history. Another reading of it was that five Australian citizens who happened to be black had commenced legitimate proceedings in the highest court in the land claiming property rights against a Government which had the numbers in the single chamber Queensland parliament. That defendant government then attempted to pass a retrospective law extinguishing those rights and interests without compensation.

In 1975, just prior to the dismissal of the Whitlam Government, the Commonwealth Parliament passed the Racial Discrimination Act. That Act faithfully implemented the International Convention on the Elimination of All Forms of Racial Discrimination. It requires that State governments and State parliaments not discriminate against citizens on the basis of their race. Eddie's lawyers argued that the Queensland Act did discriminate on the basis of race. By four to three, the High Court struck down the Queensland legislation. The Court found that the Queensland law singled out the traditional rights of Torres Strait Islanders (if any such rights existed) and extinguished those rights without compensation. The Queensland law then left unaffected all other rights, including all property rights granted by the Crown to any other persons regardless of their race. Even though Torres Strait Islanders would be the only persons in that area who could enjoy traditional property rights, the Court ruled that the wiping out of those rights while leaving unaffected all other property rights was an act of racial discrimination. The result was that the Queensland law could not be used as a defence to Eddie Mabo's claim.

In dissent Justice Wilson J had said:

The Queensland Act purports to deny, retrospectively, the survival of those rights after the annexation and to exclude any question of compensation in respect of the loss of them. But if there are no other persons of another race who are shown to enjoy rights of the same kind

as those of which the plaintiffs have been deprived, then it will be impossible to find a foothold for s.10(1) of the Commonwealth Act.

On the contrary, its effect is to remove a source of inequality formerly existing between the plaintiffs and persons of another race because, on the facts as disclosed in the statement of claim, the plaintiffs were alone in the enjoyment of traditional rights. Henceforth, by virtue of the assumed operation of the Queensland Act, the plaintiffs will enjoy the same rights with respect to the ownership of property and rights ofinheritance as every other person in Queensland of whatever race. There will be equality before the law.

Of course, a deep sense of injustice may remain. This is because formal equality before the law does not always achieve effective and genuine equality. The latter will only be achieved by reason of the former when the factual circumstances in which the different groups are placed are comparable. The extension of formal equality in law to a disadvantaged group may have the effect of entrenching inequality in fact.

It follows that the only conclusion to which I can come is that theCommonwealth Act does not have the effect of rendering the Queensland law invalid or ineffective.

This view was not only rejected by the majority at the time but also by six of the judges in the *Native Title Act Case* and then by the reconstituted court post-Wik when Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Western Australia* v *Ward* observed:[9]

The Court has rejected the argument that native title can be treated differently from other forms of title because native title has different characteristics from those other forms of title and derives from a different source. This conclusion about the operation of the RDA should not now be revisited.

On 18 September 2000, Sir Ronald told the Victorian Synod of the Uniting Church in Australia:

[9] para 122

*Mabo (No 2)*was a wonderful decision, not because it had a terrific effect in terms of the return of traditional lands to Aboriginal people, but because it gave them the self-respect of knowing that their traditional ownership was recognised in the common law of Australia. Up till then they had no such legal right. They were simply mendicants going to the table with nothing to offer but pleading for the magnanimity and generosity of the dominant culture and people. After *Mabo* they come to the negotiating table with a legal right.

He thought the court's decision in *Mabo (No 2)* "should have been anticipated as a foregone conclusion, after the 4/3 majority in *Mabo (No 1)* struck down the Queensland attempt to stall it."[10] In good conscience, Sir Ronald as a public advocate could welcome the High Court's decision in *Mabo (No 2)* knowing that such a decision would not have followed had the court followed his line of reasoning in *Mabo (No 1).*

## The need to Affirm the Role of the Courts in Upholding Human Rights Even in Matters of Political Controversy and Even in A Jurisdiction Lacking a Bill of Rights.

When the Dutch relinquished West Papua to Indonesia in 1963, Australia for the first time confronted the reality of a land border with territory that could produce a steady refugee flow. Sir Garfield Barwick, Minister for Foreign Affairs, told parliament, "If any requests are received under the heading of political asylum, they will be entertained and decided on their political merits from a very high humanitarian point of view in accordance with traditional British principles."[11] But he told his departmental officers that they "should not be too infected with the British notion of being a home for the oppressed".[12] Once these determinations were subject to judicial and parliamentary scrutiny, there

[10] "From Basement to Bench: An Interview with Sir Ronald Wilson", Brief, WA Law Society, February 1994, p. 19
[11] (1962) CPD 752 (HofR), 23 August 1962
[12] Quoted in Neumann, K, "Asylum Seekers and 'Non-Political Native Refugees' in Papua and New Guinea", *Australian Historical Studies*, No 120, October 2002, 359 at p. 364

was bound to be a problem - not of national sovereignty but of Executive accountability.

In 1985, the Australian courts had started granting judicial review of migration decisions under the comprehensive *Administrative Decisions (Judicial Review) Act.* Under this Act, the courts were able to review decisions by public servants and tribunals and set aside those decisions if there had been a denial of natural justice or if the decisions were judged to be so unreasonable that no reasonable person could have made the decision. In 1989, a code for decision makers in the migration area was enacted in legislation in the hope that when the decision makers followed the code, there would be little chance of successful appeals to the courts. Those persons wanting to extend their stay in Australia by delaying a final decision would have less access to the courts. In 1993, the Refugee Review Tribunal (RRT) was established in the hope that all failed asylum seekers would be able to access the tribunal which would be able to give quick, fair and transparent decisions, reducing the need for any access to the courts.

Though Australia does not have a bill of rights, section 75(v) of the Constitution does provide:

> In all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, the High Court shall have original jurisdiction.

The effect of this clause is that when a decision is made by a Commonwealth public servant (including the RRT), the person affected by the decision has the right to appeal to the highest court in the land claiming that the decision was not made in accordance with the law. Usually, the judges and politicians are agreed that it is not a good idea to have the time of the High Court taken up in

considering such applications in the first instance. The jurisdiction is transferred to a lower court and the High Court retains its traditional role as the ultimate court of appeal.

When the courts have shown a willingness to overturn refugee decisions, the politicians have been less than impressed. For more than a decade, Philip Ruddock has been very impatient with the role of the courts. Back in March 1992, while in Opposition, he told the Joint Committee on Migration Regulations, "I have said to people that if we want the High Court of Australia to concentrate its mind on these matters, we should let 23,000 applicants put their cases to the High Court. It would quickly find a mechanism for dealing with them."[13] He went on to say:[14]

> I am still one of those who would be quite happy to remove that matter from the purview of the *Administrative Decisions (Judicial Review) Act* and leave the courts to see whether or not they would like to use their original jurisdiction. The High Court could willingly do that, I suppose. I guess that is the matter that the Government was not prepared to bite the bullet on, was it?

For some years, the politicians were concerned that the Federal Court was making decisions too favourable to asylum seekers and was reviewing too many decisions of the DIMIA case officers who were rejecting refugee claims. The politicians took a gamble and restricted the jurisdiction of the Federal Court hoping that the High Court itself would not want to fill the gap. The High Court made it clear that it had no option but to exercise its constitutional jurisdiction if the politicians were not going to allow lower courts to perform the role.

Ultimately, the Parliament in wake of Tampa decided to try and oust the jurisdiction of all the courts including the High Court with the use of a "privative

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[13] Joint Committee on Migration Regulations, *Hansard*, 10 March 1992, pp. 1601-2
[14] ibid., p. 1612

clause" which purported to exclude decisions under the *Migration Act* from judicial review by the courts. Minister Ruddock was furious when some of the Federal Court judges continued to overturn migration decisions on the basis that his privative clause did not exclude all review by the courts. On 30 May 2002, he told the Channel 9 *Today* program:

> What we are finding is that, notwithstanding that legislation, the courts are finding a variety of ways and means of dealing themselves back into the review game.
>
> And what I have said to the Parliament is, look, we've passed this legislation, this was a decision of the Parliament. The High Court of Parliament is saying decisions of the Tribunal should be final and conclusive and if we need to give the court some further advice we may need your support again.

Earlier he had told the Commonwealth Lawyers Association in London that it should be Parliament that decided the laws and not the "unelected and unresponsible officials" of the courts. This Ruddock approach would be arguable if Australia did not have a Constitution that sets limits even on the powers of a popular government and on an unsympathetic parliament acting against unpopular groups. Ultimately it is justices of the High Court who are charged with the constitutional function of ensuring that all persons and all institutions are subject to the law.

There was a time when the Commonwealth conducted itself as a model litigant before the courts. Because of the politics of refugees, those days have gone and we now pay the price of losing such sensible conventions. When the Federal Court constituted a special five member bench to consider appeals on the new privative clause provision, Chief Justice Michael Black saw fit to call

Minister Ruddock to account for his public statements critical of the courts. He addressed the Solicitor General of the Commonwealth:[15]

Despite these statements I have not previously responded to any of them publicly. The most recent statement however raises a new issue since it would appear that it could only refer to the issues before the Court on these appeals – appeals to which your client is a party. He is the respondent in four appeals, in which he was successful before the trial judge, and he is the appellant in one appeal in which he was unsuccessful before the trial judge. The statement was made only a matter of days before the date fixed weeks ago for the hearing of the appeals.

You would of course know Mr Solicitor that the court is not amenable to external pressures from Ministers or from anyone else whomsoever, but we are concerned that members of the public might see the Minister's statements as an attempt to bring pressure on the Court in relation to these appeals to which he is a party.

All this simply earned Mr Ruddock a pat on the back from the Prime Minister and a round of applause in the party room.

In February 2003, all seven justices of the High Court threw out Minister Ruddock's attempt to deny asylum seekers access to the courts.[16] The government's intention was that once the Refugee Review Tribunal had reviewed a decision to refuse a protection visa there would be no appeal possible to the courts. In the main test case on the privative clause, a Bangladeshi person who was refused a protection visa appealed to the courts on the ground that he was denied natural justice. He argued that the tribunal took into account adverse material which was relevant to his case without giving him notice of the material and without giving him any opportunity to address it. The High Court has said that persons in this situation can still appeal to the courts. They can appeal not only to the High Court, but also to the Federal Court and the new

[15] "Text Of Statement Made By Chief Justice Black Of The Federal Court Of Australia", NAAV of 2001 v MIMIA (N265 of 2002), NABE of 2001 v MIMIA (N282 of 2002), Ratumaiwai v MIMIA (N399 of 2002), Turcan v MIMIA (V225 of 2002), MIMIA v Wang (S84 of 2002), 3 June 2002

Federal Magistrates' Court. Importantly the High Court, despite attempts by the government to stop this practice, can still remit such matters to lower courts to avoid the High Court being clogged with such cases.

Chief Justice Gleeson insisted on the need for decision makers not only to act in good faith. They must also act with fairness and detachment: "the requirement of a fair hearing is a limitation upon the decision-making authority of the Tribunal of such a nature that it is inviolable".[17] The Chief Justice said that the broad reading, which the Commonwealth tried to give to its privative clause, was inconsistent with four principles of statutory interpretation:

?? If the words are ambiguous, the court should interpret the words consistent with Australia's international obligations
?? The court should not impute to the Parliament an intention to abrogate or curtail fundamental rights or freedoms
?? The Australian Constitution is framed on the assumption that the rule of law applies to actions by the executive government
?? The court presumes that the parliament does not intend to deprive a person access to the courts except to the extent expressly stated or necessarily implied.

It is not enough for the immigration officers or the RRT simply to establish that they acted in good faith. Asylum seekers, like the rest of us, are entitled to expect fairness. The Chief Justice concluded: "Parliament has not evinced an intention that a decision by the Tribunal to confirm a refusal of a protection visa, made unfairly, and in contravention of the requirements of natural justice, shall

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[16] *Plaintiff S157/2002* v *Commonwealth of Australia* [2003] HCA 2; 4 February 2003
[17] ibid., para 26

stand so long as it was a *bona fide* attempt to decide whether or not such a visa should be granted."[18]

Five of the other justices pointed out that the *Migration Act* is a very complex piece of legislation and any decision made by the Minister or the RRT must be "a decision made under the Act". They said, "It is impossible to conclude that the Parliament intended to effect a repeal of all statutory limitations or restraints upon the exercise of power or the making of a decision."[19] As the *Migration Act* and Regulations contain an exhaustive list of the criteria for the grant of various classes of visa, Justices Gaudron and Kirby pointed out that the privative clause could not be invoked to shield a wrong decision on the basis that the decision maker had acted in good faith when failing to be satisfied that the conditions for the grant of the visa had been fulfilled. If the criteria for the grant of a visa have been misconstrued or overlooked, the decision maker's error is a jurisdictional error reviewable by the courts.[20] Also the courts retain the power to review RRT decisions which have been reached without according procedural fairness to an applicant. The privative clause comes into play, excluding court review, only if the error made by the decision maker is a "non-jurisdictional error" i.e. an error made within the jurisdiction which the decision maker has. The Australian Constitution guarantees that Courts must always be able to assess whether a Commonwealth decision maker has made a decision within their jurisdiction. Five of the justices were very scathing in stating that "the fundamental premise" for the privative clause legislation was "unsound". They went out of their way to make it plain that the litigation was not a mere word game. They said:[21]

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[18] ibid. para. 37
[19] ibid., para. 67
[20] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*, [2003] HCA1 at para 82-85, 4 February 2003
[21] *Plaintiff S157/2002* v *Commonwealth of Australia* [2003] HCA 2 at para. 98; 4 February 2003

It is important to emphasise that the difference in understanding what has been decided about privative clauses is real and substantive; it is not some verbal or logical quibble. It is real and substantive because it reflects two fundamental constitutional propositions, both of which the Commonwealth accepts. First, the jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Chapter III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.

There is guaranteed constitutional access to the courts to correct jurisdictional errors by the RRT and the Minister. This guarantee covers any application based on the claim that the minister or the tribunal has not acted with fairness and detachment. Back in 1994, the parliamentary committee investigating mandatory immigration detention in remote areas had acknowledged the inconvenience and problems with accessing appropriate services, including the additional travel costs for lawyers . Justice Callinan highlighted the constitutional problem:[22]

There are certain matters which cannot be ignored for the purposes of judicial notice. Those matters include that the persons seeking the remedies may be incapable of speaking English, and will often be living or detained in places remote from lawyers.

Justice Callinan pointed out that Parliament could not even set time limits on access to the courts "as to make any constitutional right of recourse virtually illusory".

How then did the government get it so wrong? Weren't they warned? Yes they were. Locking out the courts has been one of Minister Ruddock's abiding passions. He first tried introducing this legislation in June 1997, and

[22] ibid., para. 174

again in September 1997. Back then, the Labor Opposition opposed the legislation and accurately predicted that "the Coalition will probably fail in this objective. The jurisdiction of the High Court cannot be totally excluded"[23]. Mr Ruddock claimed that the legislation had been given the tick by a bevy of silks including Tom Hughes QC, once a Liberal Attorney General.[24] That seemed a dubious claim once Mr Hughes appeared before the Senate committee in January 1999 saying, "the entrenched constitutional jurisdiction of the High Court to grant what is called prerogative relief...cannot be eradicated and abrogated, except by passage of legislation after a referendum". He warned that the "passage of this bill would produce the altogether undesirable effects to which two former chief justices, Sir Anthony Mason and Sir Gerard Brennan, had alluded".[25] A month before Mr Hughes had come out and given evidence in his personal capacity, Minister Ruddock was so cock sure of his position (which has now been discredited 7 - nil in the High Court) that he told Parliament, "My good friend Sir Gerard Brennan has misunderstood in part the nature of the provisions that we are proposing."[26] Hughes, Mason and Brennan understood all too well.

It was only in the aftermath of Tampa that the government was bold enough and the Opposition defeated enough for the Parliament to retreat from legal principle, enacting the ambiguous and suspect privative clause. There will continue to be added uncertainty with future litigation because the government wanted to play fast and loose, tampering with constitutional principle despite all the warnings. Now any disaffected asylum seeker can appeal to the courts (including the Federal Magistrates Court) alleging that they have been denied a fair hearing before the RRT. A week after the High Court decision on the

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[23] Martin Ferguson, (1997) CPD (HofR) 8278; 24 September 1997

[24] Philip Ruddock told Parliament, "The privative clause is one that we believe will work. We have had opinions from very eminent counsel, admittedly - two distinguished former Attorneys-General, Tom Hughes and Bob Ellicott, from Richard Tracey, David Bennett and Dennis Rose. They tell me that it is constitutional and they tell me that it is legal." (1997) CPD (HofR) 8304-5; 24 September 1997

[25] Legal and Constitutional Legislation Committee, Senate, *Hansard*, 29 January 1999, L&C 50

privative clause, the Government published some information for the thousands of TPV holders who were applying for renewal of their visas. They were told:[27]

A TPV holder whose application for another protection visa is refused will have the right to seek review of the decision from the Refugee Review Tribunal or the Administrative Appeals Tribunal.

If the review fails, or they decide not to seek review, they will need to leave Australia once any review proceedings have been completed.

What will be the situation for those persons seeking judicial review of their RRT rejection? Will they be removed from Australia? Will they be taken back into immigration detention? Will they be eligible for a bridging visa? If so, will they have to provide a bond or security? Will they have the right to work? These are not academic questions given that the appeals process could take some time. It is conceivable that some TPV holders who have been living in the community for three years might now take many more years to exhaust their appeals in the courts once the RRT has rejected the renewal of their visa.

Rather than complaining about this outcome, Minister Ruddock should heed the call of Tom Hughes when he addressed the Senate Committee four years ago:[28]

It seems to me that the driving force behind this proposed legislation is economy of administration—a very laudable objective in itself, although perhaps it can sometimes be carried as an objective to undue lengths. What the committee might like to ask itself, looking at the matter on a more general level than the strictly legal, is this: we are, as I said, an affluent and a free society. It is in the nature of things, that being such a society, people claiming to be

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[26] (1998) CPD (HofR) 1135; 2 December 1998. Sir Gerard Brennan is the author's father.
[27] DIMIA Fact Sheet 68 "Temporary Protection Visa Holders Applying for Further Protection", 13 February 2003
[28] Legal and Constitutional Legislation Committee, Senate, *Hansard*, 29 January 1999, L&C 64

oppressed and to be the victim of injustice in their own countries will be forever knocking on our doors. It is one of the burdens of being a free society that we should, you may think, provide a system of dealing with persons claiming to be refugees which is as legally certain as any branch of the law can be and that has established and clearly understood legal criteria of exemption or liability.

Now that the High Court has established beyond doubt that a privative clause cannot be devised to exclude refugee decisions from the courts, it is time for the executive government to design a process for the orderly determination of these matters in the courts. Back in September 1997, Mr Ruddock told Parliament that he would look after matters once the courts were excluded:[29]

I do not intend to leave the system flawed. I intend to ensure that the system is run with integrity. I intend to ensure that the former government's measures to contain abuse of our judicial system are given effect. I want to assure the House that I am intent on ensuring that those people who are genuine are accommodated and at the end of the day there is a safety net; and that safety net is me, as minister.

Unfortunately, the other decision delivered by the High Court on the same day as the test case on the privative clause revealed that the Minister is not your ordinary safety net. Mrs. Bakhtyari and her five children were denied a protection visa by the safety net minister. It was revealed in the course of the litigation that Mrs Bakhtyari only learnt two days after the RRT decision that her husband was lawfully resident in Australia on a TPV. He had already applied for a permanent protection visa. The Minister's department knew this but did not see fit specifically to inform the RRT. If the RRT had known this, the RRT would have issued the family with protection visas as a matter of course back in July 2001 because their spouse and father was already recognised as a refugee. Instead the woman and five children spent an additional 18 months in detention in Woomera and Baxter. The South Australian Family and Youth Services (FAYS)

reported to the state premier in August 2002 that the anti-social behaviour of the boys was a coping mechanism "that can be seen as basically 'healthy' within a hostile environment (i.e. detention). However, they are maladaptive behaviours that, outside of detention, would be seen as indicating disturbance."[30] The RRT, Mrs. Bakhtyari and her children were left in the dark about their lawful entitlements to be issued with the same visa as the spouse and father. Presumably, the departmental officials decided not to reveal the lawful presence of Mr Bakhtyari in Australia because they suspected that his protection visa had been obtained under false pretences. Government officials often have information available to them which is not in the public forum and which is adverse to the interests of asylum seekers. In this case, journalist Bob Ellis got hold of a statement by Montezar, one of the Bakhtyari children, and published it in the *Canberra Times* a year after the RRT had given its decision. Montezar had told his lawyer in July 2002, "I do not know the date of my birth but I know that I am 12 years old. In Afghanistan the way we count our ages is by the winters passing." He "was about 7" when he left Afghanistan. He had been in Australia in detention for 18 months at this time. He said:[31]

When we left Afghanistan we went to Pakistan. My family and I were hiding in a room all the time. We were there a long time and we did not go out very much. I remember that my father was with us for a while in Pakistan. My dad's mother and my dad's brother were also in Pakistan with us. I remember that they left and went back to Afghanistan.

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[29] (1997) CPD (HofR) 8304; 24 September 1997

[30] Department of Human Services, Family and Youth Services, *Social Work Assessment Report on the Bakhtyari Family*, 9 August 2002, p. 3

[31] *Canberra Times*, 2 August 2002. Ellis later wrote to the lawyers apologising for his publishing activity. His letter of apology was quoted at length in Piers Akerman's column in the *Daily Telegraph*, 17 December 2002: "My going into Woomera may have harmed your cause and I am sorry. I quickly became a devious undercover journalist, sniffing about for scandals in the usual way. Members of your team were very upset, I know, and conveyed to me in some distress and rage that my breach of trust might wreck your efforts to help the Bakhtyaris to their freedom. I said I believed, but I wasn't sure, the publicity would hasten their release. I emphasised that I wasn't sure, but made what I called 'a political judgment' in acting as I did, illegally and sensationally." The lawyers presume that DIMIA officers leaked the letter to the media.

These statements confirmed the departmental suspicion that the family had been living in Pakistan for some years and that the father had gone ahead of them to seek a better life in Australia. These statements, if true, put in doubt the RRT's finding that Mrs. Bakhtyari "is not an Afghan national and there is no evidence the children have any nationality other than hers (the Tribunal does not accept that the husband is an Afghan national as there is no evidence supporting this claim)."[32] There are many Afghan nationals who have been living in Pakistan for years having fled persecution in Afghanistan.

An appropriate safety net for asylum seekers demonised by the nation's radio shock jocks requires four strands: public servants with integrity, a dispassionate minister, an informed tribunal and accessible courts. It is time for the executive to respect the role of the courts. Despite ten years of fine tuning the decision making system, the government has not been able to get it right. There is an ongoing need for court supervision, especially of decisions relating to boat people who, despite the government claims that their detention makes them more available for prompt processing, are more susceptible than other asylum seekers to wrong decisions being made about them. Given the government and popular hostility to boat people, it is essential that the process for determining their claims be supervised by judges with secure tenure rather than by RRT members whose appointments expire in June 2004. The statistics continue to reveal a systemic problem with the determination of claims of those in detention. If court supervision of the RRT were removed, it could be only a matter of time before tribunal members, hand-selected by government on short term contracts, sitting in private, were assessing the claims of those in detention more in conformity with the views of the departmental case officers.

[32] Usually RRT decisions are not published in a form that permits identification of the applicant. But in this case, the High Court reproduced part of the decision in its judgment, *Re Minister for Immigration and*

In 2002, DIMIA chartered a plane and took Mr Mohib Sarwari and his family into detention, flying them from their home in Launceston to the Baxter detention centre. The government claimed that Mr Sarwari was a brother of Mr Bakhtyari and a Pakistani national. The local community in Launceston was so outraged by the government's high handed, presumptuous detention of community members that they raised the money for refugee advocate Marion Le to fly to Afghanistan so she could obtain first hand evidence about the nationality and background of the Sarwari family from their local village near Kabul. She returned with irrefutable evidence which was presented to the RRT and the minister. The family was then released and returned to Launceston. In this case, the government's witch-hunt had badly misfired. The strands of the minister's safety net were looking distinctly frayed.

## A Modern Instance of Courts Playing Their Traditional Role, Protecting the Unpopular David from the Excesses of the Goliath State: Habeas Corpus for Asylum Seekers

There has been a tussle between the judiciary and the executive about extent to which aliens awaiting deportation or removal from the country can be held in detention, especially when there is no reasonable prospect of the alien being removed to another country. Not having a bill of rights, Australia has a very simplistic law passed by the Parliament providing that unlawful non-citizens who cannot obtain a visa must be kept in immigration detention until they are removed from Australia or deported. The US Congress could never pass such a law because the due process clause of the Constitution forbids the government from depriving any person of liberty without due process of law. The US Congress passed a more complex law. During removal proceedings, a person could still be released on parole. Once a court made a removal order, the person

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*Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*, [2003] HCA1 at para 6, 4 February 2003

must be held in detention for up to 90 days awaiting removal from the country. If the authorities have been unable to remove the person, the law provided that any alien held in custody would be transferred to a post-order detention unit where the INS would conduct an initial custody review within another 90 days. A two member panel of INS officers would then interview the alien and make a recommendation to the INS headquarters having regard to the alien's criminal history and flight risk. If detention were ongoing, there would have to be an annual review of the detention with the alien being given 30 days notice of the reviews and the opportunity to submit any relevant material.

These checks and balances were not sufficient for the law to pass constitutional muster. By the narrowest margin of 5-4, the US Supreme Court in 2001 struck down this legislative arrangement because it would have permitted indefinite detention of some aliens who could not be removed to any other country.[33] The Court read an implicit limitation into the law so that the post-removal period of detention after the initial 90 days was a period reasonably necessary to bring about that alien's removal from the United States. The government was able to invoke only two reasons for indefinite detention: ensuring the appearance of aliens at future immigration proceedings and preventing danger to the community. If there were no reasonable prospect of removing someone, there would be no reasonable prospect of future immigration proceedings. The court reaffirmed a 1972 decision that "where detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed".[34] The majority was adamant that "once an alien enters the country, the legal circumstance changes,

[33] *Zadvydas* v *Davis* No 99-7791, 28 June 2001, (2001) 533 US 701
[34] *Jackson* v. *Indiana*, (1972) 406 U.S. 715 at p. 738

for the Due Process Clause applies to all 'persons' within the United States, whether their presence here is lawful, unlawful, temporary or permanent."[35]

The court was careful to make it clear that the choice was not between indefinite detention and freedom within the US but between indefinite detention and "supervision under release conditions that may not be violated" thereby substantially reducing any danger to the community. In Australia, the Executive has been spared any judicial insistence that unlawful non-citizens be treated with due process because there is no bill of rights. However the Federal Court of Australia has followed the US jurisprudence.

For a year, I have visited centres such as Woomera, Port Hedland and Baxter every month; each time coming away emotionally drained by the contact with desperate men, women and children behind the razor wire. Every two months I go to Parliament House Canberra and meet with the political architects of this policy, thinking there must be a better way than rhetorical stand-offs in the media. The politicians are as convinced of their decency in implementing the policy as am I in decrying it.

Wrestling with the moral and political difficulties, I have been inspired by the resolute hope in the midst of the despair of the detained asylum seekers. At Woomera for many months, I would meet with a group of Palestinians whose refugee claims had been rejected. They were awaiting removal to the Gaza Strip. Not surprisingly, the Australian Government was having great difficulty in moving them. In the end, one of the Palestinians, Akram Ouda Mohammad Al Masri decided to challenge the legality of his detention in the Federal Court. His case was then listed before Justice Merkel. I felt obligated to inform the Palestinians that the judge was Jewish with a fine reputation for upholding

[35] Breyer J, *Zadvydas* v *Davis* No 99-7791, 28 June 2001, Section IIIA

human rights. Akram won his case and was released from detention. Next time I returned to Woomera, the three remaining Palestinians decided they would also like to take a case to court. Their first question to me, with a smile: "Do you think we could get the Jewish judge?" In the middle of the Australian desert, some of the most complex conflicts seem resolvable. There is hope when persons are treated with dignity and respect under the rule of law regardless of the history and the politics.

When the Australian Parliament enacted the law for mandatory detention until removal, it "must be taken to have intended that the power to detain be limited to the period during which the Minister is taking reasonable steps to secure the removal and be exercisable only for so long as removal is reasonably practicable".[36] There must be a real likelihood or prospect of removal in the reasonably foreseeable future. After the Federal Court gave decisions to this effect in Iraqi and Bidoon cases as well as the initial Palestinian test case, Minister Ruddock still declined to release other members of these national groups who had exhausted all remedies. He declined even to offer an identity card to those released by the courts on the basis that the courts should accept responsibility for those whom they ordered released into the community without ministerial approval. Instead he appealed the original Palestinian decision to the Full Federal Court. Though the Palestinian had long since returned to the Gaza Strip, the minister was anxious to pursue the litigation to retrieve his costs and to get a Full court decision limiting the capacity of individual judges to grant habeas corpus.

On 15 April 2003, the full bench of the Federal Court unanimously dismissed Minister Ruddock's appeal in the Palestinian test case. All three appeal judges agreed with Justice Merkel that there must be "a real likelihood or

prospect of the removal of the person from Australia in the reasonably foreseeable future" if the detention were to be lawful once a failed asylum seeker has formally requested removal from Australia[37]. The appeal judges considered Australia's international obligations under the International Covenant on Civil and Political Rights when interpreting the statutory power to detain an asylum seeker and concluded "conformably with Australia's obligations under Art 9(1) of the ICCPR, it would be necessary to read it as subject, at the very least, to an implied limitation that the period of mandatory detention does not extend to a time when there is no real likelihood or prospect in the reasonably foreseeable future of a detained person being removed and thus released from detention".[38] Migration detention is reviewable by the courts and subject to *habeas corpus* when the minister is unable to return a failed asylum seeker back home or to a third country after the applicant has requested removal from Australia. The minister and his department are now rendered more accountable to the courts for the protracted detention failed asylum seekers. Following the High Court's decision on the privative clause, this was Mr Ruddock's second major setback in the courts in 2003. He had to release into the community another 8 Iraqis and Palestinians who were languishing in detention centres with no hope of returning home in the foreseeable future. The judges have started to set legal limits on the Howard/Ruddock post-Tampa firebreak.

## Conclusion

After the 2002 Christmas fires in the gulag of our immigration detention centres, one detainee who offered to assist police with their inquiries was given a guarantee by senior immigration officials in Canberra. He would not have to

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[36] Merkel J, *Al Masri* v *Minister for Immigration & Multicultural and Indigenous Affairs*, [2002] FCA 1009 at p
[37] *Minister for Immigration & Multicultural & Indigenous Affairs* v *Al Masri* [2003] FCAFC 70 (15 April 2003), para 136

return to a detention centre. He was moved to a motel for nine days and provided information to the police. The guarantee from Canberra was then withdrawn. He had no legal remedy and no political leverage. I thought the treatment he received was unAustralian. But on reflection, I concluded in the wake of Tampa that the treatment was very Australian. Asylum seekers who have arrived in Australia without visas have been used by government as a means to an end. Their detention has been used to transmit a double signal - warning other asylum seekers to take a detour to any other country but ours and luring those voters who appreciate a government prepared to take a tough stand against the one who is "other". It is time for the nation once again to respect the dignity and basic rights of all persons within our jurisdiction, including those who come to our shores seeking asylum.

The law and politics of human rights in an isolated country without a bill of rights will always be complex and piecemeal. We Australians may continue to get by without a bill of rights. Our politicians will continue to lampoon the judges for stepping into what the politicians regard as their sacred domain, namely public policy mandated at the ballot box. When such policy impacts on the basic rights and liberties of persons, even though they be members of despised minorities such as detained asylum seekers, the judges will continue to have a role to play: upholding the Constitution, strictly interpreting statutes consistent with fundamental rights and liberties and shaping the common law in harmony with contemporary international legal standards and social norms. Public advocates will also have their role in defending the courts and in criticising the politicians who trample the rights of unpopular minorities claiming a popular mandate and an overriding public interest such as national sovereignty or border protection. Being attentive to the judges and the public advocates as well as to the opinion polls and political spin doctors, we will be

[38] ibid., para 155

better placed to constitute a society in which all are assured their due under the rule of law.

Honouring Western Australia's gift to the nation, Ronald Wilson judge and public advocate, we recall his 1996 observation that for us "Australians there is such a fear of difference, or alternatively, a commitment to self-interest, that the interests of the majority will always take precedence until such time as there is a widespread commitment, at all levels of the community, to the principle that human rights matter for everyone".[39] Courts and public advocates are indispensable whether or not we have a bill of rights.

[39] R. Wilson, "Why Human Rights Matter for Everyone", Murdoch University Electronic Journal of Law, Vol 3, No 3, September 1996