



# *Uniya Jesuit Social Justice Centre*

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## **OCCASIONAL PAPER NUMBER 96**

### **THIRTY YEARS ON, DO WE NEED A BILL OF RIGHTS?**

The Case for Constitutionalising the Principle of Non-Discrimination on the Grounds of Race

Frank Brennan SJ November 1996

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#### **1. The Need for Change**

As a young lawyer in Brisbane in the 1970's I first had occasion to invoke the wisdom, judicial impartiality and political insight of Dame Roma Mitchell during the street march ban imposed by Premier Sir Joh Bjelke-Petersen. Another South Australian, Ray Whitrod was the Queensland Commissioner for Police. He did not understand our northern ways. After the premeditated police assault by use of a baton on a young woman protester was televised nationally, Sir Zelman Cowen, then Vice-Chancellor of the University of Queensland, complained of police behaviour that was unreasonable, irrational and unnecessarily provocative. Whitrod announced a police inquiry. After the next Cabinet meeting, the premier gave a press conference and said that there was to be no inquiry.

Q. "Mr., Premier, why won't there be an inquiry?"

A. "Well, Cabinet considered very carefully the report that Mr. Hodges (the Minister for Police) brought today on the information that we had decided that there wouldn't be an inquiry. We decided that if there should be an inquiry it ought to be against those who broke the law and those who defied the police order and the authority of the police."

Q. "Mr. Premier, has the Cabinet's decision today jeopardised the position of Commissioner Whitrod?"

A. "It hasn't jeopardised his position at all. It has assisted him and supported him in a very difficult job that he has."

Q. "Was there unanimous support in Cabinet for this decision?"

A. "Yes, unanimous decision. It was a final Cabinet decision." |

Q. "Where does this leave Mr. Whitrod and Mr. Hodges?"

A. "It leaves them to comply with Cabinet's decision."

No inquiry ever took place. Whitrod wrote in a weekly newsletter to police: "When a serious complaint, sponsored by a public figure of some standing is made against the police, there are two alternatives open to the administration. One is to adopt the view that police have nothing to hide; the other is seemingly to cover up." In just over three months, the Minister for Police had been transferred to a new portfolio and Whitrod had resigned. Whitrod said, "Interference with the commissioner's responsibility had reached the stage where I was no longer in command of the force."<sup>1</sup> The day after the resignation, the *Courier-Mail* editorial said, "Obviously the next Police Commissioner, whoever he is, will be expected to be a 'Yes man' to the Premier."<sup>2</sup> He was.

Meanwhile South Australia was having its own problems determining the proper relationship between government and police. Justice Roma Mitchell conducted a royal commission report on the dismissal of the South Australian police commissioner, Harold Salisbury. While dogmatic in confining the scope of ministerial directions to police, she acutely stated the complexity of the relationship.<sup>3</sup>

No Government can properly direct any policeman to prosecute or not to prosecute any particular person or class of persons although it is not unknown for discussions between the executive and the police to lead to an increase in or abatement of prosecutions for certain types of offences. That is not to say that the Commissioner of Police is in any way bound to follow governmental direction in relation to prosecutions. Nor should it be so. There are many other police functions in respect of which it would be unthinkable for the Government to interfere.

Queensland had to wait another generation for the Fitzgerald Inquiry for a proper assessment of the relationship. I come as a stranger from another jurisdiction grateful for the legal culture of South Australia which produced a Whitrod and a Mitchell whose views and actions carved a surer place for civil liberty even beyond the boundaries of this state. Having been a first year law student in Brisbane during the state of emergency proclaimed to facilitate the 1971 Springbok Rugby Tour in the face of anti-apartheid protests and having first appeared in court later that decade defending protesters arrested during the street march ban, you can understand my initial enthusiasm for a constitutional bill of rights entrenching the basic rights and freedoms such as, "Everyone has the right to freedom of peaceful assembly".

Having spent much of the last fifteen years engaged in public advocacy of Aboriginal rights and pleading equal protection of the laws and due process of law prior to any state-authorized interference with the lives, liberty and property of Aborigines and Torres Strait Islanders, I have been attracted to a bill of rights which enhances the capacity of courts to judicially review executive and legislative power as in the United States. Having spent six months watching the US Supreme Court in action, I have changed my mind. This is the first opportunity I have to detail my concerns. Before civil libertarians label my Fulbright to Washington a road to Damascus in reverse, might I make clear, I do not return as an apologist for the status quo in Australia.

Though a republican, I am opposed to the direct election of the Governor-General or President by the people. Given that the Prime Minister is elected by the majority party in Parliament I do not favour a head of state who could enjoy more popular political legitimacy than the Prime Minister. I would be happy to see the Governor-General elected by a super-majority of the Parliament. I see no point in a constitutional convention on the issue until the Australian people have sought change through an indicative plebiscite answering the question: "Should all references to the Queen be deleted from the Australian Constitution by 2001?" Though Great Britain be fortunate to have Queen Elizabeth II as its head of state, her personal stature can no longer stand in the way of a dispassionate consideration of Australia's need for a head of state representing the nation to itself and to the world. As Australia's ties to Britain loosen, it is unlikely that the next generation of Australians will grow closer to the next generation of the British royal family. Being a Catholic Australian of Irish heritage in favour of gender equality, I regard as an historic anachronism our continued reliance on the British monarchy which precludes Catholic marriage for the successor in title, and which gives priority to the male of the line as successor in title. A people's convention could be authorized to formulate referendum proposals for the constitutional change required by the omission of all references to the Queen. Aborigines and Torres Strait Islanders should have the option of electing their own representatives to such a Convention.

Next time we consider constitutional amendments, no doubt indigenous Australians will urge the adoption of a preamble describing the fullness of human history in this land and espousing the primacy of continued Aboriginal occupation and use. They are also likely to urge some positive reference to themselves rather than the constitutional silence which was the result of the 1967 referendum deleting the two negative references to them. Should the Northern Territory be moving towards statehood, Aborigines may also want some federal protection of their existing land rights which presently are immune from interference by the Northern Territory Parliament. The recent euthanasia debate in that jurisdiction highlights the irrelevance of Aboriginal views and concerns to the majoritarian process of the local parliament.

I favour limited constitutional guarantees of life, liberty and property, in particular a constitutional prohibition against capital punishment<sup>4</sup>, and increased constitutional guarantees of trial by jury<sup>5</sup>, freedom of religion and immunity from state interference with property rights without just compensation<sup>6</sup>. I favour a legislative bill of rights at the Commonwealth level binding on State governments and parliaments<sup>7</sup>. I also favour the repeal of the racist s.25 of the Constitution<sup>8</sup> and the constitutional entrenchment of the citizen's protection against discrimination on the grounds of race. But I do not favour preserving the last word on due process and equal protection to unelected judges.

## **2. Legislation Against Racism**

Tonight we celebrate the thirtieth anniversary of the first anti-discrimination legislation passed in Australia. South Australia led the way when the Hon D A Dunstan, QC, Attorney General, Minister for Aboriginal Affairs, and Minister of Social Welfare introduced the Prohibition of Discrimination Bill into the Legislative Assembly of the South Australian Parliament on 14 July 1966. He told Parliament,

"The purpose of this bill is to give effect to the Government's intimation to the Commonwealth government that the Government of South Australia<sup>9</sup> believes that the whole of the United Nations Draft Convention on Racial Discrimination should be ratified by the Commonwealth of Australia." Reading the parliamentary debate with the benefit of hindsight, one could be forgiven for thinking that the government wanted to underplay the extent of the problem and the effect of the legislation. Or was it that we were blinder or more benign in those days? Mr. Dunstan said, "Fortunately we do not have what may be called a racial or colour problem in Australia, but I think it will be agreed that, apart from the convention to which I have referred, everything possible should be done to ensure that such a problem does not occur."<sup>10</sup> He conceded that the main area of concern was Aborigines.

Once again with hindsight, one is struck by the modesty of the concern prior to the 1967 referendum, prior to land rights, prior to Mabo, prior to the Royal Commission into Aboriginal Deaths in Custody, prior to the Stolen Generation Inquiry, prior to any measures facilitating Aboriginal self-determination, prior to Abstudy, prior to ATSIC, and prior to CDEP. Of Aborigines, Dunstan said, "It is in relation to this particular section of the population that certain minor but known discriminatory practices exist in South Australia, and it is our intention to see that these cannot continue." The Opposition agreed with Dunstan. Mr. G Pearson who had been Minister for Aboriginal Affairs in the earlier Liberal Government said, "I do not believe there has been or will be any real problem in this State concerning racial discrimination."<sup>11</sup>

Mr. Robin Millhouse, seventeen years later the trial judge in *Gerhardy v Brown*, said<sup>12</sup>, "I could not possibly oppose the principle behind the Bill. I hope and believe that I have never practiced any form of discrimination, and I hope that I never will." As for the Bill's effect on Aborigines, he said, "Of course, that is the only possible practical problem of this nature that we face in this country. I am afraid that the passing of this bill is far more likely to draw attention to the problems than to do anything to prevent them or to overcome them."<sup>13</sup>

The provision prohibiting racial discrimination in employment had to be amended at the insistence of the Legislative Council outlawing discrimination only "where a person employs more than three persons at any one time."<sup>14</sup> To this day, the Equal Opportunity Act 1984 ban on racial discrimination in employment "does not apply in relation to employment within a private household" (s.56(1))

In 1966, the Liberal Opposition proposed conciliation rather than recourse to the courts as the preferred mode of dealing with racial discrimination complaints in the first instance. More recent experience in this State with the Racial Vilification Act 1996 reveals the governments, whatever their party political affiliation, are wary of the recurrent cost of conciliation mechanisms when there are few complaints. Back in 1966, the Opposition proposed a Racial Discrimination Advisory Committee. Attorney General Dunstan rejected the idea on the basis that "We have the Good Neighbour Council, and the Country Women's Association does an extremely good job in many country areas of South Australia." He said, "We do not need formal committees to be set up for this purpose, because we already have the necessary voluntary organizations that can promote understanding and integration. Why do we need some formal body with a common seal travelling around South Australia? That would be cumbersome and ineffective. The local people are already involved and the Aboriginal

Affairs Department is rapidly promoting organizations of this kind throughout the state."15

Almost thirty years later, Premier Dean Brown similarly rejected Opposition calls for conciliation procedures in the Racial Vilification Bill: "When an individual has taken the step to threaten seriously another person of that person's property on the basis of their race or nationality, then clearly in the context of modern society, these people have crossed the line which common decency has drawn. They do not deserve the status that conciliation confers and it would be difficult to contemplate that they would respond merely to programs of education.16

Mr. M D Rann, Leader of the Opposition, had great difficulty with "the decision not to involve the Equal Opportunity Commission in any way but, rather, to use the Wrongs Act therefore requiring victims to take their own action. The Equal Opportunity Commission can provide a conciliation framework which is flexible, accessible and inexpensive. The commission also has the capacity to operate effective education programs, backed by legislation17." Premier Brown responded, "We looked at the cases where equal opportunity provisions applied, and New South Wales is the classic case where, under equal opportunity, there have been no court cases and only one tribunal case since 1988-9. The cost since then though has been \$288,000"18.

I remain pessimistic about the utility of racial vilification laws with or without criminal sanctions and with or without conciliation. Debates in Australia about law and morality are usually caused by calls for the decriminalization of conduct that is no longer thought to be publicly harmful, or on which there is no longer a community consensus about the immorality of the conduct. Whether it be abortion or homosexual activity between consenting adults, there is room for disagreement not only about the morality of the conduct but also about the purposes and limits of the criminal law. Rarely have we debated the need for the creation of new criminal offences. While the Senate decided against making racist violence and racial vilification criminal offences punishable by substantial prison terms, the South Australian Parliament opted for criminal sanctions rather than conciliation.

Acts of violence are already punishable. The argument is that the law ought now to be more severe and specific in its treatment of attackers who choose their victim on the grounds of race. Irene Moss, as Race Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, reported that racist violence was on the increase and that greater legal sanctions were needed to stem the tide. Violent physical attacks on persons are already criminal acts. A judge or magistrate sentencing an offender is already entitled to take the attacker's motivation into account in considering sentence. While being repelled by racist violence, the judge may be equally repelled by sexist violence, religious violence, or what we will now have to call person-specific violence.

When introducing the Commonwealth bill to outlaw racist violence in December 1992, the Federal Minister, Peter Duncan, said in his second-reading speech, 'For instance, if an Anglo-Saxon woman who has converted to Islam is more likely to be attacked wearing the hijab, or Muslim women's headscarf, she is attacked not because the attacker believes she is a Muslim but because the attacker thinks she is an Arab woman.' Really? One might ask 'Why?' The attacker can already be convicted of any number of offences that include assault as an element. Even the threat of violence is punishable. Presumably, in future if the jury could be

convinced beyond reasonable doubt that the attacker had been motivated by a mistaken belief that the victim was Arab, the court would have to consider the offence more serious than if the attacker had merely been motivated by a belief that the woman was a Muslim, or by the certainty that she was his estranged wife or long time enemy, or simply because she was an innocent bystander on whom he decided to vent his nonracial specific aggression. In creating a special-category offence of racist violence, the Parliament presumably wants to punish the attacker not only for the harm done to the victim but also for the fear instilled in others of the same race. I doubt the practicality of the distinction, unless one sort of violence is to be judged more ideologically unsound than another, since it is more likely to be reported sensationally by the media.

With due respect to the South Australian Parliament, I say criminal sanctions for racial vilification are even more questionable. Incitement to racial hatred and hostility, or hate speech as it is sometimes called, is conduct by an offender or a group that is likely to cause a second person or group to act in an adverse manner towards a third person or group on the grounds of their race, causing that third person or group to fear that violence may be used against them because of their race. Each element—cause, likelihood and grounds—would have to be proved beyond reasonable doubt in order to secure a conviction. Advocates of such laws concede that there is little prospect of successful prosecutions—there have only been one or two in Canada, for example—and argue instead for the symbolic value of the law.

Elliot Johnson QC, of the Royal Commission into Aboriginal Deaths in Custody, advocated legislative prohibition of racial vilification but expressed strong reservations about its being made a criminal offence. He concluded: 'In this area conciliation and education are likely to be more effective than the making of martyrs: particularly when it is words, not acts, which are in issue.' This approach has also been adopted by the Gibbs Committee on the Reform of Australian Criminal Law, and by the majority of the Australian Law Reform Commission in their report, multiculturalism and the Law.

Such a law may fulfil a useful purpose in a society that habitually persecutes members of one ethnic minority. But in Australia, most vilification is exchanged between members of warring minorities whose relatives are at each other's throats back in the home country. It would be a brave Director of Public Prosecutions who decided to prosecute the Greek agitator and not the Macedonian organiser. It would be an unenviable task for the police officer, having to decide whether to arrest and charge the Croat or the Serb. Presumably the advocates of this law would espouse a selective prosecution procedure under which one would leave warring minorities to themselves while making a show trial of the mainstream community member who had singled out one racial group.

Such a law could be invoked not only by members of the persecuted minority, but also against them. Or would a selective prosecution policy preclude that, too? Take, for example, the 1993 sometimes vitriolic Mabo debate. For every elected politician who said that Aborigines had not evolved to the stage of developing the wheeled cart, there was an Aboriginal leader fulminating that white public servants were using word processors as the modern-day equivalent of strychnine to exterminate his people. For every mining magnate who claimed that Aborigines were stone-age people with uncivilised ways, there was an

Aboriginal leader alleging that white members of the Liberal Party were like members of the Ku Klux Klan crusading for blood. In such an atmosphere, even threats of criminal prosecution would have been counter-productive as they are now when people of goodwill are wrestling with the political fallout of Pauline Hanson's unwillingness fairly to represent Aborigines and Asians in her electorate.

The criminal law is a very blunt instrument for reshaping the hearts of racists and clearing the air of racist sentiment. Such interference with civil liberty does nothing to enhance further the human rights of the woman wearing the hijab. It does not help in the resolution of inter-ethnic conflict. It does nothing to produce more reasoned public discussion about migration or Aboriginal rights, which are the two key issues relating to race and which play upon the public's racial fears. It will bring the criminal law and its governors into disrepute, if the criminal sanctions are ever invoked. At this time, in this part of the world, thought-police armed with criminal sanctions are not the answer.

In these times of economic stringency and rationalism, it is revealing how few racial discrimination complaints have been brought in all Australian jurisdictions. Under the Commonwealth Racial Discrimination Act, only 51 complaints were reported between 1984 and 1995 of which 31 were dismissed. Of the 20 complaints upheld, 11 related to service in hotels. Only five related to employment, and two of those were successfully appealed. Over the same decade, there were only 48 complaints in State and Territory jurisdictions, 23 of which were dismissed. 14 of the 25 complaints 'upheld related to employment. Professor Margaret Thornton concludes that "racism may be immunised by the processes of legal formalism"<sup>19</sup> and "The fact that the preponderance of successful complaints under the RDA have dealt with the relatively trivial issue of service in hotels supports the view that, in Australia, race discrimination theory and practice is less sophisticated than that of sex discrimination".<sup>20</sup>

On 16 February 1990, an Aboriginal employee of ATSIC, Mr. Harry Brandy, racially abused and acted in a threatening manner towards a non-Aboriginal employee, Mr. John Bell who was competing for the same promotion as Brandy<sup>21</sup>. Subsequently, Brandy falsely denied the event in writing<sup>22</sup> and orally when queried by the Chief Executive Officer of ATSIC. Although Brandy's racist attack on Bell was openly witnessed by independent persons, ATSIC officers did not take any disciplinary action against Brandy. Neither were Bell's subsequent complaints acted on by ATSIC. Ron Castan QC, the experienced counsel for many Aboriginal claimants in constitutional cases including Koowarta and Mabo, conducted an inquiry for the Human Rights and Equal Opportunity Commission. He found that ATSIC "placed a much higher premium on achieving peace in the work place than in determining what had actually occurred, and in so doing, acted in a way different from the way in which they would have acted had the racist attack been perpetrated by a non-Aboriginal". Castan reached the inevitable conclusion<sup>23</sup>:

*Mr. Bell's complaints were treated in the way in which they were because in circumstances where a non-Aboriginal officer had been subject to racist attack by an Aboriginal officer, the best way to achieve peace in the work place was to ensure that all parties got on with the job rather than to seek to determine what actually occurred, and to deal with the situation accordingly.*

*It is thus impossible to resist the conclusion that the conduct (of ATSIC)...all amounted to conduct involving a restriction upon (Mr. Bell) based on his race, which had the effect of impairing the enjoyment by him on an equal footing of the right to just and favourable conditions of work. Such conduct therefore amounted to unlawful conduct pursuant to s. 9 of the Racial Discrimination Act.*

Despite Mr. Castan's recommendations and after Mr. Brandy successfully challenged the constitutionality of HREOC's purported exercise of judicial power, neither Brandy nor ATSIC has ever apologised to Bell. Racial vilification legislation, like Racial Discrimination legislation, will be viewed as a partisan instrument of political correctness unless it is applied equally to people of all races including Aborigines. No doubt ATSIC has changed its administrative procedures but Mr. Bell remains a victim of racism by an individual and by a Commonwealth Commission set up by statute.

The most effective invocation of race discrimination laws has not been in conciliating or punishing the racist behaviour of persons but in setting a legislative standard for governments and parliaments otherwise minded to view equality as sameness. Many academics have claimed this could be even more the case were the High Court to revisit the rationale for its decision in *Gerhardy v Brown*<sup>24</sup>. The Pitjantjatjara Land Rights Act 1981 vested the title to 10 percent of the South Australian land mass in a body corporate whose members had unrestricted rights of access to the land though no individual member had the power to invite a non-member onto the land without the written approval of the management. Non-members on the land without the requisite permit were guilty of a criminal offence. The High Court upheld this legislative regime of land rights buttressed by criminal sanction for unauthorised presence on the ground that it was a special measure for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms. The High Court's critics claim racial discrimination "refers not to any distinction or differential treatment, but only to that which is arbitrary, invidious or unjustified"<sup>25</sup>. In *Western Australia v The Commonwealth*, the High Court considered the Native Title Act in light of the Racial Discrimination Act and observed that the Native Title Act could be regarded "either as a special measure under s.8 of the Racial Discrimination Act or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the Racial Discrimination Act or the International Convention on the Elimination of All Forms of Racial Discrimination."<sup>26</sup> Sarah Pritchard has observed:

*This dictum suggests that in its approach to the RDA, ...the High Court might not be disinclined to embrace an understanding of racial discrimination which refers not to any distinction or differentiation, but only to those which are arbitrary, invidious or unjustified. On such analysis, measures adopted by reference to race would not constitute discrimination under the RDA, where the criteria for differentiation are reasonable and objective.<sup>27</sup>*

But there is a world of difference between a statute setting up a mechanism for the recognition, registration and protection of common law native title rights and the Pitjantjatjara legislation which vested the traditional country of a number of groups in a corporation, granting members of any of those groups unrestricted rights of access to all the land and forbidding others, even Aborigines from elsewhere invited by the traditional owners



of one area onto their land, from access without written approval of management and subject to criminal sanction. In my view, the unique provisions of the Pitjantjatjara legislation can only be upheld temporarily as a special measure. But this does not reduce the scope of racial discrimination legislation being invoked to counter unacceptable legislative proposals contrary to Aboriginal interests.

We saw this played out in the 1993 negotiations of the Native Title Act. The principles of the Racial Discrimination Act were to be paramount. We see it again now with Aborigines countering the Howard government's proposed amendments. Where government pleads workability, Aborigines plead discrimination. This clash is clearest in the proposals permitting pastoralists greater rights.

In the oral argument of the Wik case before the High Court, the QC appearing for the pastoralists claimed that pastoralists' titles were being disturbed by uncertainty over the renewal and mortgagability of leases. Questioned by the bench, counsel had to admit that the Native Title Act guaranteed renewal of leases on identical terms and conditions to the existing leases. He limply claimed that native title could be a concern to a mortgagee, "perhaps not strictly a legal effect but disturbance of the title". Eleven days previously, Ian Gilbert, Director (Legal) with the Australian Bankers Association, told a national meeting of Aborigines, miners and pastoralists that "banks have been unable to identify instances (or) circumstances in which (native title) rights and the exercise of them would come into conflict with the bank's interests as a security holder." Gilbert said, "I have canvassed a number of member banks very carefully over recent days about the issues raised in Senator Minchin's paper and the issue of native title generally and, without exception, I have been unable to turn up any incidents, from any member with whom I have spoken, of a concern over native title as an issue in so far as a bank and its lending and security position is concerned."

In the amendment bill, the government now proposes to grant pastoralists rights additional to those they enjoyed before Mabo. They will be permitted to expand their titles and put their land to non-pastoral purposes, without payment. The bill proposes new categories of pastoral interests including "permissible pastoral lease renewals", "permissible pastoral lease variations" and "permissible pastoral lease related acts". Should these additional rights interfere with native title rights, government and not the pastoralist will pay for the reduction in any native title rights. Given that pastoralists do not suffer any native title interference with their existing rights, a wise government wanting to respect the Racial Discrimination Act would have left this issue until the High Court gave judgment in the Wik case clarifying whether native title does survive on any pastoral leases.

Even before and apart from Mabo, there were limits to what a pastoralist could do on a pastoral lease. Often a pastoralist would freehold a block or obtain later government approval for a special non-pastoral use of land. If native title exists on pastoral leases (and that is a matter for determination by the High Court in the Wik case), it does not affect mortgagability nor renewal of leases. A lease can automatically be renewed without need to negotiate with native title holders provided the lease contains identical terms, conditions and reservations for the protection of Aboriginal access. The Minchin amendment would allow a pastoralist to renew a lease for longer terms than the original lease and to vary terms of the lease permitting the pastoralist to engage in non-pastoral activities. If native title were affected by the extension of lease terms or conditions or by "permissible pastoral lease related acts", the

native titleholder would be entitled to compensation.

To legislate in this way before the decision in the Wik Case, the government will have to admit that the legislation is inconsistent with the RDA and to the extent of the inconsistency, this later specific Commonwealth Act will prevail. Mercifully, we will be spared any talk of special measures. Expanding pastoralists' rights, thereby interfering with native title rights even with compensation, while not countenancing any such expansion of one group's rights to the detriment of another in any other case is an act of racial discrimination.

So as to make the Commonwealth Parliament's legislative competence subject to the principle on non-discrimination on the grounds of race, while permitting legislative recognition of indigenous rights and interests, I favour the addition of a new clause to the Constitution:

*Chapter VI A Rights and Freedoms*

*s. 124A "Everyone has the right to freedom from discrimination on the ground of race, colour, ethnic or national origin. This right is not infringed by measures taken to overcome disadvantages arising from race, colour, ethnic or national origin. Neither is it infringed by measures recognising the entitlement to self-determination of Aborigines and Torres Strait Islanders or protecting their sacred sites, native title, land rights, customary law, or cultural traditions."*

### **3. Due Process, Equal Protection and US Judicial Creativity**

Approaching the first centenary of our Constitution, some Australians are wondering whether we should have a bill of rights. Having been mildly attracted to a constitutional bill of rights, I have returned to Australia thinking we can probably continue to get by without one. Why?

It is sometimes said that the US is the land of freedom; Australia is the land of the "fair go". Whereas individual liberty is the hallmark of public argument in the United States, in Australia the discussion is more likely to focus on equality, what is good for everyone. The individualism of the US produces a sharp divide between the public and private; it encourages initiative; and rights are trumps. There is a strong sense that there are many things the state cannot and should not do, even in the public interest. It is for individuals to determine for themselves what is the public interest, how they want to contribute to it, and the extent to which they wish to forego their liberty in the interests of others. Political liberals accept that there can be no useful discussion about the common good. By the common good, I mean "the social, economic and political conditions which are necessary to assure that the minimum human needs of all will be met and which will make possible social and political participation for all"<sup>28</sup>. People of good will confronting new social problems are limited as to how far they can impinge on the private realm, even if they be legislators or judges. Gridlock is accepted as an inevitable cost of the separation of powers.

I have sympathy with many of these limits. But I have been surprised at how complex, incomprehensible and unworkable these limits have become in the US constitutional framework. I cannot imagine the US without a bill of rights. But it is another question whether other societies, even those committed to freedom and equality, would want to adopt a US style bill of rights now that it has become so home grown and on

its face insufficient to resolve the issues of the age. The present issues of abortion, euthanasia, gay rights, women's rights, affirmative action, free speech on cable television and the internet, commercial free speech, and electoral redistricting all require the judges to balance conflicting interests which rest on essentially political value laden scales. The present court which is ideologically very divided has had to wrestle with all these questions.

The court which gives decisions in only 150 of the 6,000 applications it receives each year, has many devices available to it to choose the moment and extent of judicial intervention. Justice Brennan, the most liberal and interventionist judge this century, once said, "High Court judges interpreting a bill of rights may at times lead public opinion; but in a democratic society they cannot do so often, or by very much. Sometimes that means practicing the passive virtues, exercising discretion not to hear cases or invoking various jurisdictional principles to postpone resolution of an issue best left undecided or best resolved by public officials." For the last two decades, the Court has wrestled with the issue of abortion. It is now about to take on euthanasia for the first time.

To avoid an overtly political role, the judges try to set up barriers to fence themselves out from the difficult political questions which they as unelected officials trying to apply a transparent judicial process are ill-equipped to resolve. Or else when they simply have to make a decision, they design tests such as "undue burden" to disguise their value judgments. The result is that where there is a need for someone to balance the conflicting claims, the legislators are banned by the judges and the judges proceed to place restrictions on themselves. The balancing process is left incomplete and the only result is the vindication by default of individual rights over the interests of all.

Countries such as Canada and South Africa which have only recently constitutionalised a bill of rights have set down a catalogue of rights but then expressly conceded the power of the elected legislators to limit the exercise of the rights in a manner which is reasonable and justifiable in an open and democratic society based on freedom and equality. To United States lawyers, these words of qualification seem to take away with one hand what was given with the other. The courts of these other countries have always looked to the United States jurisprudence for guidance in the interpretation of the key rights and their limits. US judges rarely look elsewhere.

Though the US Constitution does not contain any similar words of permissive limitation on the rights and liberties set down, the Supreme Court has long accepted that the ban on deprivation of life, liberty or property without due process as set down in the fifth and fourteenth amendments requires the judges to strike a balance between individual liberty and the demands of organised society. They say the balance is struck by having regard for the traditions from which the country developed as well as the traditions from which it broke. The fourteenth amendment also requires states to extend to everyone "the equal protection of the laws". The equal protection clause was first breathed into life by means of a footnote in the 1938 case *United States v. Carolene Products Co.* in which the Court said that the instant case was not one where there was a need to inquire:

*whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial*

*inquiry.*

Professor Ronald Dworkin says:29

*The essential difference between the two clauses lies in their rationale. The due process clause forbids compromising certain basic rights altogether, except for a particular compelling reason. The equal protection clause is less stringent: it requires only that states not discriminate unfairly in the liberties and other privileges it chooses to allow.*

*But both clauses are exceedingly abstract. How should judges decide which liberties the due process clause treats as basic, and what kinds of discriminations the equal protection clause treats as unfair?*

Judges anxious to confine the scope of judicial review on moral and political questions have insisted that the due process clause protects only those rights which if sacrificed, "neither justice nor liberty would exist" or which are "deeply rooted in the nation's history and tradition". On the present court, this viewpoint is represented by Chief Justice Rehnquist and Justices Scalia and Thomas.

Recently Justice Scalia wrote:30

*I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that "equal protection" our society has always accorded in the past. But in my view the function of this Court is to preserve our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede - and indeed ought to be crafted so as to reflect those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down."*

When we Australians come to consider the desirability of a constitutional bill of rights reserving the ultimate decision to judges, we ought to be attentive to the observations of the dissenting judges on the US bench. Coming from a bill of rights tradition which they think susceptible to abuse by their judicial colleagues, they can sound salutary warnings to jurisdictions without a bill of rights tradition which would be required to constitutionalise many questions for the first time overnight. Even those unattracted to Justice Scalia's political philosophy and social morality have to concede the validity of his observations about the diversity in judicial technique, his colleagues in the majority acting more as legislators and social commentators. Justice Scalia indicated just how divided is the present bench when he went on to say:

*It is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a "more perfect Union," (a criterion only slightly more restrictive than a "more perfect world"), can impose its own favoured social and economic dispositions nationwide. As today's disposition, and others this single Term, show, this places it beyond the power of a "single courageous State," not only to introduce novel dispositions that the Court frowns upon, but to reintroduce, or indeed even adhere to, disfavoured dispositions that are centuries old. The sphere of self-government reserved to the people of the Republic is progressively narrowed.<sup>31</sup>*

Other judges have insisted that the liberty protected "is not a series of isolated points. It is a rational continuum which, broadly speaking, includes freedom from all substantial arbitrary imposition and purposeless restraints". The problem confronting all judges is that most legislation classifies persons for one purpose or another, with resulting disadvantages to others. As Justice Kennedy has said, "We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." <sup>32</sup>It is then for the judges to decide what is a fundamental right or a suspect class. This has meant that elected legislators have not had the last say in striking the balance. Rather it has been the prerogative of unelected judges choosing to bind themselves by precedent or to free themselves in what Dworkin calls a "moral reading" of the Constitution. The judges are free to determine the relative weights of entrenched and broken traditions in defining the national ethos, once they have been chosen by a President and run the gauntlet of Senate confirmation hearings. But what is weighed on the other side of the balance to individual liberty? Political liberalism in contemporary America dictates that there can be no thick notion of the good. There can be no agreement on the common good. The public interest is a figment of the collectivist imagination.

What then are the demands of organised society? How does the court determine the values of a society which has both maintained and broken traditions through its history? There is never any evidence which can be put before the court, but only bold assertions of the historic tradition. For example when the court was reconsidering *Roe v Wade* four years ago, the attorney for Planned Parenthood said the judges had to "look very generally at whether the nation's history and tradition has respected interests of bodily integrity and autonomy and whether there has been a tradition of respect of equality of women". The attorney insisted that guidance in determining the scope of liberty was not to be obtained by looking at whether or not abortion was lawful at the time of the adoption of the fourteenth amendment.

In trying to weigh the balance without articulating what is on the other scale of the balance, judges have tried to convert questions of substantive content into questions of judicial procedure using content neutral categories or, worse, indeterminate value judgments. It all depends on whether the right in question is "fundamental" or whether the petitioner is from "a suspect class" (for example, being classed on the basis of race).

In scrutinising the abortion code of the various States, the court now attempts to determine if the law places an "undue burden" on the woman making her decision. There is no agreement among the judges as to what constitutes an undue burden. While Justice Blackmun the author of *Roe* said, "Roe's requirement of strict scrutiny as implemented through a trimester

framework should not be disturbed", he lost out in *Planned Parenthood v Casey*. The plurality of Justices O'Connor, Kennedy and Souter whose thinking is determinative of the outcome of any split decision on the present court, said, "The trimester framework no doubt was erected to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting foetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective". No wonder the conservatives on the court led by Chief Justice Rehnquist said, "Roe continues to exist, but only in the way a store front on a western movie set exists: a mere facade to give the illusion of reality".

It is an illusion of reality that the US Supreme Court can strike a balance between the woman's right to choose and the State interest in promoting foetal life using a judicially applicable criterion of "undue burden" as if it were not just a political decision or personal preference of the individual judge. In *Planned Parenthood v Casey* the middle votes of the present court thought they were consolidating the Court's task by calling upon "the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution". And this in a country which remains the most politically polarised over abortion of any country in the world. A foreigner privileged to sit and watch the Court in action over some months, I have no doubt this was not judicial conceit; it was a humble, failed attempt to discharge a mandate which can never be performed by unelected persons in a pluralistic, democratic society. Whatever the rights and wrongs of abortion, its legally permissible limits have been further politicised and rendered unresolvable in the US precisely because the issue has been constitutionalised.

Commencing his epic decision in *Roe v Wade*, Justice Blackmun said, "Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and predilection". The spectacular failure of this effort is found in Justice Blackmun's last judicial utterance on the matter two decades later: "A woman's right to reproductive choice is one of those fundamental liberties. Accordingly that liberty need not seek refuge at the ballot box. I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process of my successor well may focus on the issue before us today. " More than a dose of emotion and predilection in all that. The limits of the fundamental liberty depend not on the ballot box directly but on the view of the judge chosen and confirmed by those at the ballot box.

It is a bold step to assume that by constitutionalising an issue, everyone gains: the judges by becoming more important to the national life, the legislators by being able to sidestep the hard decisions, the unpopular and powerless by making gains across the board nationally which could not be achieved locally, and the citizenry generally by being assured that there is a sphere of personal conduct which cannot be invaded by the State. But there are other ways which can be less costly for all parties. And when the issue impacts on all, it may be too one-dimensional a view of the human person to portray the issue as a conflict between the individual David and the Goliath State.

The biggest case this last term has been the gay rights case from Colorado, *Romer v Evans*. After three cities in Colorado enacted policies outlawing discrimination against gays, a statewide referendum was carried in the name of putting an end to special rights for special

groups. The amendment provided:

*Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.*

The legal problem was that the citizen initiated referendum inserted a very broad provision in the State Constitution banning any branch of government adopting a policy whereby sexual orientation could be the basis for a claim of discrimination. If gays were a "suspect class" or if "fundamental rights" were in question, the court would apply "strict scrutiny" to the State law, which inevitably has fatal consequences for the State law. Colorado argued that gays were not a suspect class and therefore the State need only show that there was a rational basis for the law such as maintaining uniform statewide laws for the protection of marriage or for discouraging homosexual activity. The gay rights groups argued that the issue was not one of special rights or special protection but the right of every person to be free of arbitrary discrimination. Justice Scalia, in argument, put it as a case of reversing special laws which gave favoured treatment to those engaging in homosexual activity.

Given that the Supreme Court in the 1986 case, *Bowers v Hardwick*, decided that the State could criminalise homosexual activity conducted in private by consenting adults, Scalia asked, "Why can a State not take a step short of that and say, 'We're not going to make it criminal, but on the other hand, we certainly don't want to encourage it, and therefore we will neither have a State law giving special protection, nor will we allow any municipalities to give it special protection.?' " Counsel was asked specifically, "Are you asking us to overrule *Bowers v Hardwick*?" She replied, "No, I am not." This shows just how fickle is the present law of privacy in the United States. A woman exercising her right to privacy can abort a foetus in which the State has an interest, but homosexuals engaged consensually in private sexual behaviour have no similar right to privacy. And in the first gay rights case before the Supreme Court in ten years, the Court, even when it inquired, was not being invited to overrule *Bowers v Hardwick*.

The majority in that case once again constitutionalised the issue with breath-taking particularity: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." They found there is "in constitutional terms, no such thing as a fundamental right to commit homosexual sodomy". There is a constitutional right to abortion but not to consensual sodomy. In his strong dissent Justice Blackmun said the court had refused to recognise "the fundamental interest all individuals have in controlling the nature of their intimate associations with others". For him, the Constitution has sheltered certain rights associated with family "not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life."

In *Romer v Evans*, the Supreme Court struck down the Colorado provision by a vote of 6-3. Colorado's principal argument in defence of Amendment 2 was that it put gays and lesbians

in the same position as other persons. It simply denied them any special rights. Justice Kennedy wrote the majority opinion. He found the State's reading of the amendment implausible. The Court did not classify gays and lesbians as a suspect class. If the challenged law did not relate to a suspect or quasi-suspect class, it would survive a facial challenge if there were any rational basis for its existence. Presumably the majority did not want to buy into Justice Scalia's categorisation of homosexuals as people who "tend to reside in disproportionate numbers in certain communities", "have high disposable income", and who "care about homosexual-rights issues much more ardently than the public at large", possessing "political power much greater than their numbers, both locally and statewide" - thereby being hardly suspect at all!

Those seeking to uphold the validity of Amendment 2 had given many reasons for it including: the maintenance of freedom of choice for employers and landlords in matters of personal and familial privacy, religion and association; promotion of the integrity of civil rights laws and the contours of social and moral norms; the achievement of statewide uniformity; targeting rare resources of anti-discrimination machinery to assist truly suspect classes. Proponents of the amendment produced evidence that gays on average are wealthier and have higher education. In Aspen, the sexual orientation ordinance required churches to make their facilities open to homosexual organizations if there were open to any community organisation. They submitted that the amendment was a rational means of ensuring that core religious values were protected from infringement. The court majority was dismissive of these rationales, saying:<sup>33</sup>

*The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.*

Justice Scalia had great pleasure in his dissent in turning up a 1980 decision of Justice Kennedy before he went to the Supreme Court. The case involved the discharge of homosexuals from the Navy. On that occasion, Kennedy said, "Nearly any statute which classifies people may be irrational as applied in particular cases. Discharge of the particular plaintiffs before us would be rational, under minimal scrutiny, not because their particular cases present the dangers which justify Navy policy, but instead because the general policy of discharging all homosexuals is rational." <sup>34</sup>Sixteen years later, writing for the majority on the Supreme Court, Kennedy said the Colorado amendment was "born of animosity toward the class of persons affected" and quoting a 1973 decision, he confirmed that "a bare desire to harm a politically unpopular group cannot constitute a legitimate government interest":

*We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.*

One judge's rationality is a community's animosity within a generation. Writing for the minority, Justice Scalia entered a spirited dissent:<sup>35</sup>



*The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare ... desire to harm" homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles or righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.*

*In holding that homosexuality cannot be singled out for disfavoured treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is precisely the cultural debate that give rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed).*

Scalia was particularly scathing about the majority's failure even to refer to *Bowers v Hardwick*. He noted that the respondents' brief did not urge the overruling of *Bowers* and that "counsel expressly disavowed any intent to seek such overruling"<sup>36</sup>. He said:

*If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.*

*If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.*

*The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as un-American. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible - murder, for example, or polygamy, or cruelty to animals - and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.*

*But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens.*

Justice Scalia concluded:<sup>37</sup>

*When the Court takes sides in the culture war, it tends to be with the knights rather than the villeins - and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the*

*applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member-schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals. This law-school view of what "prejudices" must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws and which took the pains to exclude them specifically from the Americans With Disabilities Act of 1990.*

One Australian State, Tasmania, has also retained anti-sodomy laws. Though it has no bill of rights, Australia is a signatory to the First Optional Protocol of the International Covenant on Civil and Political Rights which permits citizens who have exhausted all domestic remedies to communicate with the Human Rights Committee of the United Nations in Geneva. In 1994 the Committee found that the prohibition by law of consensual homosexual acts in private was a violation of the right to privacy in the international covenant. The Covenant says, "No one shall be subjected to arbitrary or unlawful interference with his privacy" and "Everyone has the right to the protection of law against such interference". Responding to the Committee's finding, the Australian Parliament passed a law that sexual conduct involving only consenting adults in private is not to be subject to any arbitrary interference with privacy. So homosexuals in Australia are guaranteed their privacy without judges having to constitutionalise the question<sup>38</sup>. Politicians can weigh notions of individual liberties and public welfare and strike a balance.

The bill of rights has probably given politicians greater licence over time to pass the buck to the judges. It has allowed the legislative process to be more loose and inconsistent. Politicians can pass laws for the display of the Ten Commandments knowing they will be struck down. They can wildly promise to ban abortion even in cases of rape knowing that the courts will not permit it. Meanwhile, they satisfy their more fundamentalist constituents.

If it ever comes to balancing competing rights or interests, the best the court has been able to do is to ask whether an undue burden or substantial obstacle has been placed in the way of the individual. Having constitutionalised the questions, the court has failed to provide a judicial method for balancing the incommensurable interests of the citizen as an independent individual and of the citizen as a member of a society, each contributing well or adversely to the life of the other and to the common good.

Its next foray into moral and political minefields will be constitutional challenges to state laws prohibiting physician assisted euthanasia which is also a live issue here in Australia in the wake of Marshall Perron's personal crusade while in his political death throes in Darwin.

The Northern Territory's Rights of the Terminally Ill Act 1995 has legalised voluntary euthanasia for the first time. The decision of the Northern Territory Parliament has been opposed by the AMA and the Northern Territory church leaders. Having failed to hold the numbers on the floor of the parliament, these community leaders have now turned to the

courts seeking to delay the implementation of the legislation and claiming it is beyond the scope of the Northern Territory's legislative power. At times of such change, all parties concede that democracy in a pluralistic, developed society is about more than implementing the will of fifty percent plus one. Australians, unlike Americans, have been more imbued with the sovereignty of parliaments. We have never expected courts regularly to restrict the activities of parliaments except where there is a conflict over the powers of the Commonwealth Parliament against state parliaments. The US was founded as a reaction to a sovereign parliament and an unelected monarch. It is commonplace for the US Supreme Court to strike down acts of Congress, not for trespassing upon the legislative competence of the states but for infringing the unalienable rights of the citizen.

While NT church leaders and doctors place their last hope in the courts striking down the NT legislature's attempt to extend the freedom of the individual to end life, Americans are preparing for Supreme Court challenges which will strike down state attempts to limit the individual freedom. In 1994, a Federal District Court judge for the first time struck down a state anti-assisted-suicide law. She relied upon the claim by the three centre voters in Planned Parenthood that "matters involving the most intimate and personal choices a person may make in a lifetime...are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, or meaning, of the universe, and of the mystery of human life." Given that this was part of the Supreme Court's new rationale for a woman's right to choose abortion, the trial judge thought it pointed to a right of a competent dying person to take her own life with state authorized assistance. This decision was affirmed by the Ninth Circuit of the United States Court of Appeals in March 1996 (Compassion in Dying v State of Washington39). It remains to be seen whether the Supreme Court judges this the opportune case to consider the constitutional right to die with assistance. Professor Ronald Dworkin has recently published *Freedom's Law: The Moral Reading of the American Constitution* claiming that "Making someone die in a way others approve, but he believes contradicts his own dignity, is a serious, unjustified, unnecessary form of tyranny." Church leaders, the AMA and many others concerned to maintain the integrity of the doctor-patient healing relationship and the relationship between the dying person and relatives whom they do not wish to burden want to limit the options available to the dying person so that all dying persons, doctors and relatives at the time of death may be spared the burden of choice. Some of these also espouse a principle of life's sanctity which they think the state ought to uphold. Such arguments have no place in the American balancing of ordered liberty.

Those who think such factors ought to be weighed by the ultimate decision-makers have to accept that parliaments rather than courts are the better decision-makers. Courts are neither equipped nor mandated to weigh the balance. If Australia in the wake of the Northern Territory law were to seek greater powers for the courts, over time the courts would go down the American path of giving primacy to laws enhancing individual choice regardless of common good considerations such as the ethos of health care facilities offering death as a service and the quality of relationships between doctor and patient, a dying person and family.

There can be no getting away from a balancing of interests. Who best to do the weighing, the legislators elected by all or the judges nominated by the few? I fear the bill of rights ethos not only quashes any sustained public discussion of the common good; it also inculcates the

notion that rights are protected not because they contribute to the general public welfare but only "because they form so central a part of an individual's life" as Justice Blackmun put it. Without a constitutional bill of rights unelected judges and elected politicians can each play a role in getting the balance right and in imposing the fetters upon the executive. The judges have a role not only in applying the Constitution but also in interpreting statutes and in reforming the common law. Chief Justice Brennan has observed, "In the development of the common law, judicial policy has a role to perform In the interpretation of the Constitution, judicial policy has no role to play"<sup>40</sup>. Were the Australian constitution to contain equal protection and due process clauses, there would be a whole set of controversial policy issues reserved as the exclusive province of the judges.

In the US, as in Australia, there is ongoing controversy about gender issues and equality. Until this year the state of Virginia had continued to provide some government assistance for the Virginia Military Institute (VMI) which was founded in 1839 with the distinctive mission of producing "citizen-soldiers" who exercised leadership in civilian life and military service. VMI's alumni are exceedingly loyal. The college boasted the largest endowment per student of all undergraduate colleges in the United States. The college authorities were loath to admit women because their presence would affect the ethos of the training when it came to physical training, the absence of privacy and the adversative approach. On 26 June 1996, the Supreme Court by majority ruled that the equal protection clause precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. Justice Ruth Bader Ginsburg said "the question is whether the State can constitutionally deny to women who have the will and the capacity, the training and attendant opportunity that VMI uniquely affords"<sup>41</sup>. As ever, the outcome of this equal protection litigation would depend not on the balancing of individual liberty and public interest or on the rationality of discrimination but on the judges' prior decision as to how closely they would scrutinize the practice. The majority raised the bar of scrutiny on earlier gender cases, presumably rendering women a quasi-suspect class and proffered a new test: "Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive' <sup>42</sup>". The burden of proof lies with the State. The majority could not find any persuasive evidence that VMI's male-only admission policy was in furtherance of a state policy of diversity.

During the course of the litigation, Virginia presented a remedial plan for the setting up of VWIL, a women only college. The State argued that it had an interest in providing diverse educational experiences including use of the adversative method which would not be a realistic option unless people could choose single sex education. The majority found that the women students at VWIL "do not experience the 'barracks' life 'crucial to the VMI experience', the spartan living arrangements designed to foster an 'egalitarian ethic'."<sup>43</sup> The lower court found that the most important aspects of VMI educational experience occurred in the barracks, yet "Virginia deemed that core experience non-essential, indeed inappropriate, for training its female citizen-soldiers". On the majority's reasoning, it was impossible for Virginia to make up the shortfall because even if the course and techniques mirrored those at VMI, the women from VWIL could not "anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network"<sup>44</sup>. The majority implied that the only adequate remedy would be the admission of women to VMI. It would not matter what was provided at VWIL. In other words, single-sex education is

unconstitutional.

As even any new Australian observer to the court would expect, Scalia was scathing in his dissent. He thought the court's conclusion that single sex education was unconstitutional was "not law, but politics-smuggled-into-law". He did not spare his judicial colleagues:<sup>45</sup>

*Much of the Court's opinion is devoted to deprecating the close-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed-minded they were - as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: they left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law.*

I return to Australia without any passionate desire to see the complex issues of the day constitutionalised, taken out of the hands of politicians, and reserved to judges who will go to great lengths in judicial reasoning to avoid simply having to apply their own values in weighing the conflicting claims. I am delighted that the US has a robust tradition for debating the issues from an individual rights perspective. In Australia, we do not have capital punishment; the US does. We do not interfere with the privacy of gays. In the US some states still retain anti-sodomy laws which have been upheld by the US Supreme Court. We accord much the same level of protection to the foetus and the woman's choice. We do not have judges as the final arbiters of abortion codes and redistricting maps. We allow government to restrict indecent material on the television, and I do not lose too much sleep over that.

Though the High Court of Australia in recent weeks has been asked to consider issues relating to gay rights, euthanasia, and abortion, it is not the Court alone which finally determines the law and social policy on these vexed issues. The court is free to develop a consistent jurisprudence through the application of the judicial method and the parliaments remain free within constitutional restraints to legislate the will of the people. Public debate about fundamental rights and the common good may inform the judges' assessment of contemporary values insofar as judicial policy shapes the common law but it also influences the politicians who legislate the compromises. In the US, once the divided bench sets the limits on abortion, the politicians are powerless to do anything. In Australia, the High Court may be in a position to clarify the 25 year old Levine ruling on abortion but it is ultimately the politicians who by legislation or inaction will determine the social practice which is presently government-funded abortion on demand. Presumably a consistent jurisprudence from the Court can assist in the shaping of a coherent law and policy. While elected politicians retain the power to legislate, their silence can be a useful popular endorsement of the judges' articulation of the common law.

When under greatest pressure, the US system, as Justice Blackmun admits, depends on just one vote. So too in Australia - only there the person with the one vote is elected. As ever, I will continue to look to the US Supreme Court for a jurisprudence of individual rights which can be a corrective for those with a parliamentary system which places more trust and accountability in the elected law makers who have to face all the people who come to the polling booth not just to exercise their right, but to perform their lawful duty.

I am not convinced that the complex issues of the day need to be constitutionalised, taken completely out of the hands of politicians, and reserved exclusively to judges who will go to great lengths in judicial reasoning to avoid simply having to apply their own values in weighing the conflicting claims. I am delighted that the US has a robust tradition for debating the issues from an individual rights perspective. The US Supreme Court will continue developing a jurisprudence of individual rights which can be a corrective for those with a parliamentary system which places more trust and accountability in the elected law makers. The robust American ideas on rights and freedom are an antidote to Australia's populist notions of equality and the common good, all of which are needed for a healthy enjoyment of liberty in an organised society.

In South Africa, it was the minority whites who insisted on a judicial bill of rights as a fetter on the newly enfranchised majority blacks. The "bill of whites" has been designed to provide judicial protection of those whose rights may be targeted by the majority. The shortfall in Australia's machinery for the protection and enhancement of individual rights could be rectified by the passage of a statutory bill of rights which could be overridden by specific later enactment of the Commonwealth Parliament. A Senate Committee on Human Rights could scrutinize any bill proposing a limitation on the stipulated rights. Like the Racial Discrimination Act, the parliament's bill of rights would become a comprehensive legislative standard. Departure from the standard would require political argument more compelling than a routine invocation of the popular mandate by the major political parties. This way, the controversial issues would not regularly become the sole preserve of judges constitutionalising them; they would be resolved by the legislators and judges playing their respective roles.

The US Supreme Court will continue developing a jurisprudence of individual rights which can be a corrective for those with a parliamentary system which places more trust and accountability in the elected law makers. The robust American ideas on rights and freedom are an antidote to Australia's populist notions of equality and the common good, all of which are needed for a healthy enjoyment of liberty in an organised society.

For Australia, a statutory bill of rights similar to that in New Zealand, a constitutional guarantee of non-discrimination, continued access to the First Optional Protocol which provides for equal protection and a ban on arbitrary interference with privacy, and a High Court open to the influence of international norms of human rights on statutory interpretation and development of the common law are likely to be sufficient to make up the shortfall in our constitutional machinery. We could avoid the costs and tensions involved in constitutionalising the full gambit of human rights claims under the rubrics of equal protection and due process. Citizens concerned that our parliaments and judges pay insufficient regard to due process and equal protection in the application of s.117 of the Constitution<sup>46</sup>, the

construction of statutes and the reform of the common law could still utilize the first optional protocol of the International Covenant on Civil and Political Rights bringing their complaints to Geneva. Those alleging a want of equal protection could design a complaint around Article 26 of the Covenant which provides:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Those complaining an interference with their liberty without due process could design a complaint around Article 17:

1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks.*

#### **4. The Political Hurdles of Constitutional Reform**

I am happy to see a non-discrimination clause included in the Commonwealth Constitution which can permanently fetter the Commonwealth Parliament and government from acting in a racially discriminatory way. I am opposed to a comprehensive constitutional bill of rights that reserves the determination of the most pressing legal, moral and political questions to the judges who shy away from controversial balancing of interests informed only by their personal values and preferences. The only way the US Supreme Court has been able to perform the task with any credibility is by designing hurdles which keep the judges from scrutinising laws too closely unless the affected party be a member of a suspect class or be invoking a fundamental right or liberty. Given the creativity of our judges in the shaping of the common law, the vigilance of the Senate in scrutinising legislation, and the access of our citizens to the first optional protocol procedure in Geneva, I think we could have the best of both worlds were we to legislate a Commonwealth bill of rights scrutinized by a Senate Committee for Rights and Freedoms<sup>47</sup>. Some persons, including the boat people at Port Hedland, may still be denied some basic rights but the continued bipartisan commitment of our federal politicians to such denial would preclude any universal constitutional protection of such rights<sup>48</sup>.

Bearing in mind that only eight of the 42 referendums proposed since 1901 have been passed, one becomes even more sanguine when it is appreciated that only one of those eight successful referendums was a Labor initiative. And that was the provision empowering the Commonwealth to provide social service payments after the High Court had struck down the pharmaceutical benefits scheme. Any enthusiasm I have had for more wide-ranging constitutional reform has been stilled and my energies redirected in light of the present Prime Minister's remarks at the time of the 1988 referendum. Launching the Coalition's "No" campaign at the 1988 referendum, Mr. Howard said, "Proposals to change Australia's Constitution should only be put to a referendum when there is a clear, widespread and compelling public demand for, and public interest in, the proposed changes."<sup>49</sup> According to

Mr. Howard,

*The Constitution was never intended to be a document spelling out the chapter and verse of individual human rights and freedoms. In our system these have always been guaranteed by the free and effective functioning of institutions such as Parliament, the Courts, the Common Law and a free press.*

*The Founding Fathers carefully considered and deliberately rejected the American Bill of Rights model.*

*I have long held a strong personal view that the common law approach to basic human freedoms is the most effective one.*

As we have seen with the Mabo decision, the common law can develop at the hands of the judges. That development can then contribute to a shaping of the political priorities for our politicians. In a remarkably short time, it can also shape the mindset and approach of business leaders and opinion makers. On 14 August 1996, Australia's most senior mining company executive, Mr. Leon Davis, the Chief Operating Officer, RTZ CRA, gave an address to the Australian Business in Europe group. He said:

*There is no doubt that our current Native Title legislation is complex and parts of it will need to be improved. But, as I have said before, the sentiments behind the Native Title Act are a credit to its architects and its core tenets deserve to stand, even though translating them into workable legislation has been difficult.*

*RTZ-CRA's experience of negotiating with Aboriginal communities has taught us that Aboriginal leaders face a Herculean task. It is very difficult to represent others in a society which has for thousands of years practiced collective leadership.*

*I understand this difficulty. It is the greatest challenge facing the current generation of Aboriginal leaders. So I urge more acknowledgment of the efforts of those Aboriginal leaders representing the spirit of reconciliation and an understanding of the pressures upon them. Sometimes Aboriginal leaders have to act outside their traditional authority and to speak for others. The difficulties of doing so are immense.*

This change of corporate mindset was taken one step further at the national conference marking the twentieth anniversary of the Aboriginal Land Rights (Northern Territory) Act 1976 in the old Parliament House, Canberra. Mr. Paul Wand, Vice President of CRA, told Aboriginal Australia:

*CRA has three large mining activities in remote parts of Australia. Each of them impinges upon local Aboriginal communities. The mines are, in order of age, the Comalco Weipa bauxite mine on Cape York, the Hamersley Iron mining province in the Pilbara and the Argyle diamond mine in the Kimberley region. At a conference last year I heard a past Director of the Northern Land Council open his talk by saying that a mining company had burnt the homes in Mapoon and another mining company had destroyed a significant site—he didn't name the companies!*



*From my research of the history I am sure that although the Comalco people did not involve themselves in the burning of Mapoon they did not act to prevent it.*

*For most of the time of iron ore mining and infrastructure development in the Pilbara the local Aboriginal people were ignored.*

*There is a large scar on the site of the barramundi dreaming at Argyle—there is a similar scar on the spirit of the women of the area.*

*In the light of CRA's present position on Aboriginal relations—a position that I believe will endure—I feel that it is appropriate to express regret to Aboriginal people in general and the communities of Cape York, the Pilbara and the eastern Kimberley region in particular.*

No doubt the High Court will contribute to ongoing resolution of conflicting claims and world views about the most desirable law and policy on vexed issues such as abortion, euthanasia, discrimination, gay rights, gender issues, and free speech. The contemporary US experience is that by giving judges the last word, you undermine the integrity of their jurisprudence, you do not resolve social conflicts and you let politicians off the hook. By giving judges a participative role through a legislative bill of rights, you improve the accountability of the politicians and you allow disaffected individuals to utilize litigation as a political strategy. Equal protection and due process have become such divisive categorizations applied with such esoteric distinctions in US jurisprudence that their Trans-pacific importation to a country bereft of that judicial tradition would make us captive to the American view of fundamental rights and suspect classes. Our jurisprudence would be the poorer and less consistent; our disadvantaged citizens would be none the better off; and our politicians less able to respond to community values and concerns.

If we continue robustly to shape our common law in the courts, to legislate for the federal protection of basic human rights, to avail ourselves of international instruments, and to constitutionalise the principle of non-discrimination on the basis of race, our body politic will be in good shape, our citizens being adequately protected from even the whim and animosity of the majority. When there is a shortfall, we will be able to look to the United States and distil the principles of due process and equal protection from that most divided bench which wields political power under the guise of judicial determination. I counsel selective importation of the fruits rather than a transplant of the tree of fundamental rights, suspect classes, due process and equal protection which could kill off the shrubs of the common good and public interest.

The Australian garden of rights and freedoms should continue to be pruned and fertilized 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-fertilized by seeds and pollens from every value system on earth. Our elected representatives must remain the custodians of the common good and not simply the readers of the opinion polls lest our judges be cast as philosopher kings of a Platonic bent as they are expected to be

in the United States. In Australia, the rights of minorities and unpopular individuals still face threats from the primitive majoritarianism of the major political parties seeking government. But those threats are best countered at the national level by 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, and by a judiciary shaping the common law while responding to international developments in human rights jurisprudence.

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.. In Australia, 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.

1 Courier Mail. 8 September 1977

2 Courier Mail, 17 November 1976

3 Justice R Mitchell, Report on the Dismissal of Harold Hubert Salisbury, Royal Commission, 1978 (Adelaide: Government Printer 1978) p. 20

4 eg. Neither the Commonwealth nor any State or Territory may impose the death penalty.

5 eg. No person can be imprisoned for a term of more than one year for any offence in any jurisdiction unless the person had the option of trial by jury for that offence.

6 I favour provisions similar to those proposed in 1988.

7 The Commonwealth Parliament, having the power to make laws for the peace, order and good government of the Commonwealth with respect to external affairs, could pass a law faithfully implementing the International Covenant on Civil and Political Rights.

8 s.25 provides: "For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted." S.24 relates to elections for members of the House of Representatives.

9 1966 SAPD 491; 14 July 1966

10 Ibid. 492

11 Ibid. 2556

12 Ibid. 2572; 26 October 1966

13 Ibid. 2573

14 Ibid. 3224, 17 November 1966

15 Ibid. 2583, 26 October 1966

1 1995 SAPD 781; 29 November 1995

- 2 1996 SAPD 873, 6 February 1996
- 18 Ibid. 889, 6 February 1996
- 19 M. Thornton, "Revisiting Race" in *Racial Discrimination Act 1975: A Review*, Race Discrimination Commissioner, 1995, p.90
- 20 Ibid 96
- 21 In the workplace, prior to the job interview, Brandy, unprovoked, said to Bell in the hearing of other employees:  
"Rednecked racist c---"; "You're taking the job off an honest Aboriginal person"; "The new Commissioners in the ATSIC Commission will fix you"; "I'd like to fix you up"; "You are trying to take the job off an honest Aboriginal " and "You'll be taken care of".
- 22 He wrote: "I flatly deny this allegation and accusation by Mr Bell and call upon him to prove these allegations. It appears Mr Bell is paranoid towards myself and any other Aborigine that is involved in Sport and Recreation."
- 23 Human Rights and Equal Opportunity Commission, *Application for Registration of Determination*, Federal Court of Australia, 23 December 1993, G 998-1993, pp55-6
- 24 (1985) 159 CLR 70
- 25 S. Pritchard, "Special Measures" in *Racial Discrimination Act 1975: A Review*, Race Discrimination Commissioner, 1995, p.198
- 26 (1995) 128 ALR 1, 62
- 27 S. Pritchard, *op. cit.* 203
- 28 D. Hollenbach, *Claims in Conflict*, (New York: Paulist, 1979) 152
- 29 R. Dworkin, "Sex, Death and the Courts", *The New York Review of Books*, 8 August 1996, p. 44
- 30 *United States v Virginia*, No 94-1941, decided 26 June 1996, pp 3-4
- 31 Scalia J, *United States v Virginia*, 37-8
- 32 *Romer v Evans*. No 94-1039, decided 20 May 1996, p. 10
- 33 Kennedy J, p 14
- 34 *Beller v Middendorf* 632 F. 2d 788, 808-9
- 35 Scalia J, p 1
- 36 Scalia J, p. 6
- 37 Scalia J, p. 19
- 38 Though in *Croome v Tasmania*, two Tasmanians, Croome and Toonen, are seeking standing and a declaration from the High Court invalidating the Tasmanian Criminal Code provision.
- 39 79 F. 3d 790 Also the Second Circuit has reached a similar conclusion in *Ouill v Vacco*, 80 F. 3d 716.
- 40 *Theophanous v Herald & Weekly Times* (1993-4) 124 ALR 1, 28
- 41 *United States v Virginia*. p. 25
- 42 Ibid. 15
- 43 Ibid. 32
- 44 Ibid. 34
- 45 Scalia J, 1-2
- 46 s.117 which guarantees equal protection to interstate residents has been given new life in the High Court's decision *Street v Queensland Bar Association* (1989) 168 CLR 461
- 47 Such a committee could complement or incorporate the Scrutiny of Bills Committee, the Regulations and Ordinance Committee and the Legal and Constitutional Committee. 48 The Migration Legislation Amendment Bill (No 2) Z996 precludes people held in detention being able to obtain independent legal advice on the legality of that detention. The Constitutional

Commission in 1988, recommended that the Constitution be amended to provide that "Everyone has the right not to be arbitrarily arrested or detained." The Constitutional Commission went on to say:

"The ancillary right to 'consult and instruct a lawyer without delay and to be informed of that right' should, we believe, be constitutionally guaranteed because without it, the further right to obtain a judicial determination of the legality of the arrest or detention would be ineffectual." (#9.599, Final Report of the Constitutional Commission, Volume 1, p. 573, 1988)

49 J. Howard's Address to the National Press Club, "Formal Launch of the Coalition's Referendum Campaign", 23 June 1988, p.3