
Volume 31
Issue 1 *Volume 31, Number 1 (Spring 1993)*
Symposium: Towards the 21st Century
Canadian/Australian Legal Perspectives

Article 5

1-1-1993

The Australian Reluctance about Rights

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Citation Information

Charlesworth, Hilary. "The Australian Reluctance about Rights." *Osgoode Hall Law Journal* 31.1 (1993) : 195-232.

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Abstract

This article examines the way in which the Australian legal system protects human rights. It discusses the paucity of constitutionally protected rights and the failure of various attempts made to amend the Constitution in this respect. The paper looks at the inadequacy of the Australian common law and legislation in the protection of rights. It argues that the politics of both federalism and legalism have produced a culture wary of rights discourse. The paper concludes by considering how the Australian protection of rights can be improved and suggests that one way ahead would be to introduce an Australian charter of rights.

Keywords

Civil rights; Australia

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THE AUSTRALIAN RELUCTANCE ABOUT RIGHTS[©]

BY HILARY CHARLESWORTH*

This article examines the way in which the Australian legal system protects human rights. It discusses the paucity of constitutionally protected rights and the failure of various attempts made to amend the Constitution in this respect. The paper looks at the inadequacy of the Australian common law and legislation in the protection of rights. It argues that the politics of both federalism and legalism have produced a culture wary of rights discourse. The paper concludes by considering how the Australian protection of rights can be improved and suggests that one way ahead would be to introduce an Australian charter of rights.

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* My colleagues, Rosemary Hunter and Glenn Patmore, made valuable comments on an earlier draft of this paper. Anna Funder and Dianne Otto provided helpful research assistance, funded by the Australian Research Council.

I. INTRODUCTION

Australians are complacent about the protection of human rights in our country. In national and international fora we proclaim the satisfactory nature of our legal system in securing the rights of individuals. Occasionally we acknowledge that some groups, particularly the Australian Aborigines, may have legitimate complaints that the legal system does not go far enough in defending their rights.¹ But we believe that problems can be resolved by tinkering at the edges of an otherwise admirable human rights legal regime.²

This paper will argue that such confidence is misplaced. It first describes the haphazard and incomplete structure of human rights law in Australia, where no catalogue of constitutionally entrenched rights exists and common law protection of rights is minimal. Further, the Commonwealth government's legislative power to implement international obligations with respect to human rights has been only partially and inadequately exploited, and the states generally have given the protection of human rights a low legislative priority. Also, Australian participation in international human rights instruments has often been diffident. The structure of Australian human rights law has been shaped by both the politics of federalism and a dedication to legalism as the appropriate mode of legal reasoning. These two forces have operated in the same direction to create a culture wary of the discourse of rights. Recently, however, signs of change have emerged. The Australian High Court has indicated a new interest in the protection of rights, the rather moribund debate about an Australian bill of rights has been revived, and Australia has accepted a number of international human rights complaint mechanisms.³

This paper considers how the protection of human rights in Australia can be improved for the twenty-first century. What lessons can Australians draw from Canada? Although many Canadian scholars are ambivalent about the constitutional entrenchment of protection of rights, I argue here that one way to develop human rights protection in Australia would be to introduce an Australian bill or charter of rights.

¹ Australian Prime Minister, Paul Keating, gave a particularly frank statement of this problem at the Australian launch of the International Year of the World's Indigenous People. Reprinted in *The Age* (11 December 1992).

² See B. Hayden, "Human Rights: The Practical and Moral Imperative" (1987) 58 *Austl. Foreign Aff. Rec.* 240 at 243.

³ All these developments are discussed below.

II. THE STRUCTURE OF HUMAN RIGHTS LAW IN AUSTRALIA

A. *Constitutional Rights in Australia*

Although the United States Constitution greatly influenced the drafting of the Australian Constitution, the latter includes only partial and shadowy versions of the former's rights guarantees.⁴ One reason for this was the founding fathers' determination to preserve maximum autonomy for the states. A particular objection with respect to a proposed equal protection clause was that it would preclude existing state legislation that discriminated against non-Europeans.⁵ Another was the drafters' confidence in a philosophy of utilitarianism, securing the greatest happiness of the greatest number, and the sense that "the protections to individual rights provided by the traditions of acting as honourable men were quite sufficient for a civilized society."⁶

The absence of a catalogue of guarantees of rights in the Australian Constitution has since been explained as a consequence of the institution of responsible government. Thus, Sir Owen Dixon, an admired and influential member of the High Court, explained to an American audience in 1942 that a study of the American Constitution "fired no [Australian constitutional drafter] with enthusiasm for the principle [of guarantees of rights]." He continued: "Why, asked the Australian democrats, should doubt be thrown on the wisdom and safety

⁴ Except for a reference to freedom of conscience and practice of religion "subject to public order and morality" in the Tasmanian Constitution [*Constitution Act 1934* (Tas.), s. 34], the constitutions of the Australian states do not contain any explicit protection of human rights. The Legal and Constitutional Committee of the Victorian Parliament recommended in 1987 that responsibility for human rights should be vested in Parliament through the creation of a parliamentary committee to scrutinize all bills for their human rights implications. It also recommended the insertion of a non-enforceable "Victorian Declaration of Rights and Freedoms" in the Victorian Constitution. See Parliament of Victoria, Legal and Constitutional Committee, *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights* (April 1987). The recommendation was rejected by the Labor government, but may be revived by the Liberal government elected in October 1992. In 1988, the Labor government introduced a bill for a declaratory statement of rights, which was never enacted. The Queensland government's Electoral and Administrative Reform Commission is currently conducting an inquiry into whether Queensland should have a bill of rights.

⁵ H. Charlesworth, "Individual Rights and the Australian High Court" (1986) 4 *Law in Context* 52 at 53.

⁶ R.C.L. Moffatt, "Philosophical Foundations of the Australian Constitutional Tradition" (1965) 5 *Syd. L. Rev.* 85 at 86. See also J. La Nauze, *The Making of the Australian Constitution* (Melbourne: Melbourne University Press, 1972) at 231-32.

of entrusting to the chosen representatives of the people, sitting either in the federal Parliament or in the State Parliaments, all legislative power, substantially without fetter or restriction?"⁷ Prime Minister Menzies later offered a more detailed account of the protection of individual rights in the Australian political process:

Should a Minister do something which is thought to violate fundamental human freedom he can be promptly brought to account in Parliament. If his Government supports him, the Government may be attacked, and, if necessary defeated. And if that ... leads to a new General Election, the people will express their judgment at the polling booths. In short, responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights.⁸

This rationale for the absence of guarantees of rights in the Australian Constitution has been inaccurate. Reliance on the system of responsible government assumes that the legislature, of which, by definition, a majority will belong to the same political party as the relevant Minister, will have an interest in calling the Minister to answer for a particular executive action. The tenacity of the system of party loyalty in Australia means that this is unlikely to occur. For the same reason it offers no safeguard against arbitrary legislative action. Responsible government relies ultimately for its effectiveness upon the electorate's disapproval of the action, and that disapproval is unlikely if the action affects a minority.

Three provisions in the *Australian Constitution*⁹ deal directly with matters that can be categorized as human rights. These are: section 80, which provides a citizen, when charged on indictment for a federal offence, the right to a jury trial within the state where the alleged offence took place; section 116, which denies federal legislative power with respect to religion; and section 117, which protects residents of one state from special disability or discrimination, based upon residence, in other states. The traditionally narrow interpretation of these provisions by the Australian High Court has long prevented them from offering any real protection to human rights.¹⁰ The "original intent" of the drafters

⁷ O. Dixon, "Two Constitutions Compared" in Hon. J. Woinarski, ed., *Jesting Pilate and Other Papers and Addresses* (Sydney: Law Book Co., 1965) 100 at 102.

⁸ R. Menzies, *Central Power in the Australian Commonwealth* (London: Cassell, 1967) at 54.

⁹ *Commonwealth of Australia Constitution Act 1900*, 63 & 64 Victoria, c. 12 (U.K.)—the covering act—was the Act of Parliament at Westminster, which took effect from 1901 and established Australia as a federal nation-state. The *Australian Constitution*, all 128 sections of it, comprises section 9 of the covering act just referred to. All future references to the *Australian Constitution* refer to the document that forms section 9 of the covering Act.

¹⁰ Charlesworth, *supra* note 5 at 54-62.

has been invoked to support limited readings of constitutional rights according to a purported literal analysis of the language. Thus, Chief Justice Barwick could say rather ingenuously of the jury trial guarantee of section 80, “[w]hat might have been thought to be a great constitutional provision has been discovered to be a mere procedural provision.”¹¹ Two economic rights, those relating to freedom in interstate trade¹² and to payment of just terms for Commonwealth acquisitions of property¹³ have been more expansively interpreted. Peter Bailey has recently argued that the Constitution should be recognized as containing a much larger catalogue of rights.¹⁴ The jurisprudence generated by these provisions thus far, however, does not exploit their potential to protect human rights.

Since the late 1980s, the High Court has taken a keener interest in developing the constitutional guarantees of rights. For example, in *Street v. Queensland Bar Association*,¹⁵ the High Court used section 117 of the Constitution for the first time, to strike down Queensland legislation, which protected that state’s lawyers from interstate competition.

Three major reviews of the Constitution have taken place since federation. First, the Royal Commission on the Constitution in 1929 simply noted that the Constitution did little to regulate the relations between government and individuals.¹⁶ Second, the Joint Parliamentary Committee’s report on Constitutional Review in 1959 responded to submissions that endorsed the adoption of a charter of individual liberties by stating that “as long as governments are democratically elected and there is full parliamentary responsibility to the electors, the protection of individual liberties will, in practice, be secure in Australia.”¹⁷

Third, the Constitutional Commission, which reported in 1988,

¹¹ *Spratt v. Hermes* (1965), 114 C.L.R. 226 at 244.

¹² *Australian Constitution*, *supra* note 9 at s. 92.

¹³ *Ibid.* at s. 51(31).

¹⁴ P. Bailey, *Human Rights: Australia in an International Context* (Sydney: Butterworths, 1990) at 84-86.

¹⁵ (1989), 168 C.L.R. 461.

¹⁶ Australia, *Report of the Royal Commission on the Constitution* (Canberra: Australian Government Printer, 1929) at 18.

¹⁷ Australia, *Report from the Joint Committee on Constitutional Review* (Canberra: Australian Government Printer, 1959) at para. 328. On the background to this review, see B. Galligan, “Australia’s Rejection of a Bill of Rights” (1990) 28 J. Commonw. & Comp. Pol. 344 at 350-52.

was asked to consider including a bill of rights in the Constitution after the Commonwealth government abandoned an attempt to obtain a legislative bill of rights in 1986. The Commission's Advisory Committee on Individual and Democratic Rights proposed various constitutional restraints on governments' power to interfere with individuals and on guarantees of political rights, rather than a full bill of rights. It also recommended including an "opting out" procedure for governments in order to preserve the democratic nature of government.¹⁸ The Final Report of the Constitutional Commission went further than its Advisory Committee. It recommended the inclusion of a catalogue of rights and freedoms in the Constitution, modelled after the *Canadian Charter of Rights and Freedoms*.¹⁹ By a majority, the Commission recommended against an opt-out clause.²⁰ The Commission also recommended extending existing rights provisions in the Constitution.²¹ Although the Commission's detailed report appears thus far to have had very little political impact, more recent proposals for constitutional change have included guarantees of rights. The Constitutional Centenary Conference held in Sydney in April 1991 identified guarantees of rights generally as a key issue for the decade leading up to the centenary of the Constitution.

Two formal attempts were made to amend the Constitution to include greater guarantees of rights. The first attempt occurred in 1944. At the instigation of a Labor government, a referendum was held to obtain approval of constitutional amendments that would transfer some state legislative powers to the federal government to aid in post-war reconstruction.²² The amendments were to remain in effect for five years from the end of Australia's engagement in the Second World War. One part of the proposal, designed apparently to mollify those who feared the amendment would allow the imposition of a socialist programme by greatly increasing governmental power, prevented both state and federal governments from making "any law for abridging the freedom of speech or expression." Another clause would have extended

¹⁸ Constitutional Commission, *Report of the Advisory Committee on Individual and Democratic Rights* (Canberra: Australian Government Publishing Service, 1987).

¹⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²⁰ Constitutional Commission, *Final Report* (Canberra: Australian Government Publishing Service, 1988) at 445-592.

²¹ *Ibid.* at 592-617.

²² *Constitutional Alteration (Post-War Reconstruction and Democratic Rights) Bill 1944* (Cth). See Galligan, *supra* note 17 at 348-50 for the background to this legislation.

the guarantee of religious tolerance in section 116 of the Constitution to the states. The proposals, which were voted upon as a package, were decisively defeated at the referendum.²³

The second attempt to insert fuller guarantees of rights into the Constitution occurred in 1988. In a hasty and politically clumsy bid to achieve constitutional change during the bicentenary celebrations of white settlement in Australia, the Labor government submitted four proposals to the referendum. These proposals included some of the recommendations of the Constitutional Commission relating to the extension of existing rights. The Commonwealth *Constitutional Alteration (Rights and Freedoms) Bill 1988* would have extended the right to trial by jury, to freedom of religion, and to fair terms for governmental acquisition of property by the states. All four referendum proposals were defeated, with the rights proposal receiving the least support of all at 31 per cent. This figure also represents the lowest level of support for any referendum proposal ever put to the Australian electorate.²⁴

The Australian suspicion of constitutionally entrenched rights has been enduring. It has been supported by arguments that constitutional rights could both politicize the judiciary and legalize public policy, thus undermining our legal culture. The suspicion also rests on regional instincts of preserving states' rights. At a more fundamental level, reservations about rights are linked to a utilitarian confidence in our existing governmental structure.

B. *Common Law Protection of Rights*

The quality of the protection granted to individual rights by the Australian common law is often cited as a reason for resisting a constitutional entrenchment of rights,²⁵ despite its vulnerability to legislative change. But, the common law has traditionally regarded individual rights as residual and has provided for their protection only indirectly. This has been done chiefly through developing institutional principles such as the rule of law and the independence of the judiciary, procedural guarantees such as those found in administrative law, and

²³ G. Sawyer, *Australian Federal Politics and Law 1929-1949* (Melbourne: Melbourne University Press, 1963) at 171-73.

²⁴ See Galligan, *supra* note 17.

²⁵ P. Durack & R. Wilson, "Do We Need a New Constitution for the Commonwealth?" (1967) 41 *Austl. L.J.* 231 at 242.

principles of statutory interpretation.²⁶ These common law principles have not generally been utilized to support substantive individual rights in Australia. Again, while the considerable legislative extension of administrative law has offered greater protection from the arbitrary administrative process, it has not touched the substance of governmental action.²⁷

For most of its life, the Australian High Court has taken a narrow, legalistic approach to the protection of common law rights. In the *Australian Communist Party v. Commonwealth*,²⁸ the High Court declared invalid federal legislation abolishing the Australian Communist Party and making connection with it a crime. By contrast, a contemporary United States Supreme Court decision on comparable legislation upheld its validity.²⁹ The Australian decision has been interpreted as an example of how reliance on the rule of law can operate to protect individual rights.³⁰ The judgments, however, were cast almost completely in a federal/state idiom. The legislation was ruled invalid because it went beyond the assigned federal power to legislate for the naval and military defence of Australia. The Court did not regard the substance of the legislation as antithetical to the rule of law. Various judges pointed out that the legislatures of the Australian states, which hold residual legislative power, could validly abolish a political party.³¹

In other cases, the High Court has been reluctant to develop common law protection of human rights. For example, in *Dugan v. Mirror Newspapers Ltd.*³² a prisoner's right to bring a civil action for libel was denied on the basis of a common law rule, which was extended to the colony of New South Wales by English statute in 1828. This rule precluded a civil action by a prisoner under a life sentence for a capital felony. The majority viewed the historical fact of incorporation of the attainder rule as the only relevant issue in the case. The dissenter, Justice Murphy, argued that the courts have the duty to develop the common law so that it keeps pace with other developments, particularly

²⁶ B. Gaze & M. Jones, *Law, Liberty and Australian Democracy* (North Ryde, N.S.W.: Law Book Co., 1990) at 30-32.

²⁷ *Ibid.* at 31.

²⁸ (1951), 83 C.L.R. 1.

²⁹ *Dennis v. U.S.* (1950), 341 U.S. 494.

³⁰ E. Campbell & H. Whitmore, *Freedom in Australia*, 2d ed. (Sydney: Sydney University Press, 1973) at 239.

³¹ *Supra* note 28 at 152, 199, and 242.

³² (1979), 142 C.L.R. 583.

international human rights standards.³³ In *McInnis v. R.*³⁴ the High Court refused special leave to appeal to a man who had been left without representation in a criminal trial because of the failure of his application for legal aid. The majority held that the strength of the evidence against the accused meant that representation would have had no effect upon his conviction.³⁵ The lack of an explicit legislative or common law guarantee of the right to counsel in Australia was regarded as conclusive. The dissenter, Justice Murphy, arguing on more general principles, contended that the notions of justice and a fair trial should imply a right to counsel.³⁶

More recent cases indicate a greater judicial willingness to consider the implications of particular decisions for human rights. In *Dietrich v. R.*,³⁷ whose facts were very similar to *McInnis*, the High Court identified a common law right to a fair trial which, generally, is compromised because the person charged with a serious offence lacks legal representation.³⁸ And in *Davis v. Commonwealth*³⁹ the High Court referred to the right to freedom of expression as a limit on the use of the Commonwealth's incidental legislative power.⁴⁰ The High Court's use of the language of rights tends to be cautious and limited. It has been prepared to infer the existence of particular, limited rights, such as freedom of political communication, into the Constitution as the consequence of that document's commitment to responsible government and to the functioning of the states.⁴¹ Some members of the Court have

³³ *Ibid.* at 611.

³⁴ (1979), 143 C.L.R. 575 [hereinafter *McInnis*].

³⁵ *Ibid.* at 580, 583, and 594.

³⁶ *Ibid.* at 586-93.

³⁷ (1992), 109 A.L.R. 385.

³⁸ *Ibid.* at 398, 417, 435, and 443. Members of the Court seemed reluctant to concede that this decision directly overruled *McInnis*, although, as Justice Toohey noted, "the philosophy underlying the judgments of the majority [in *McInnis*] is inimical to the applicant's case ..." *Ibid.* at 430.

³⁹ (1988), 166 C.L.R. 79 at 100 and at 116.

⁴⁰ *Australian Constitution*, supra note 9 at s. 51(39). See also *Attorney-General (U.K.) v. Heinemann Publishers (No. 2)* (1988), 165 C.L.R. 30 at 45; *Union Steamship Co. of Australia v. King* (1988), 166 C.L.R. 1 at 10.

⁴¹ See *Nationwide News Pty. Ltd. v. Wills* (1992), 108 A.L.R. 681; *Australian Capital Television Pty. Ltd. v. Commonwealth (No. 2)* (1992), 108 A.L.R. 577.

emphasized, however, that there is no constitutional foundation to imply general guarantees of fundamental rights and freedoms.⁴²

A clearer statement of intent to introduce notions of human rights into the common law was made in the 1992 case *Mabo v. Queensland*.⁴³ At issue were the legal rights to land of the indigenous inhabitants of certain Torres Strait Islands and the status of the common law doctrine that, at the time of European settlement of Australia, its territory was *terra nullius*. In the leading judgment, Justice Brennan said:

In discharging its duty to declare the common law of Australia, this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. ... [The Australian legal system] can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. ... [However] no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.⁴⁴

He went on to describe the *terra nullius* doctrine as based on “a discriminatory denigration of indigenous inhabitants,”⁴⁵ “frozen in an age of racial discrimination” and unable to be sustained as a modern common law principle.⁴⁶ Justice Brennan’s analysis of the common law was based in large measure on international law, which he held to be “a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.”⁴⁷ However, the uncertain ambit of his qualification that the “skeletal principle[s]” of the Australian legal system had to be preserved, whatever their implication for fundamental rights and freedoms,⁴⁸ reduces the radical potential of Justice Brennan’s argument.

⁴² See *ACTV v. Commonwealth* (1992), 108 C.L.R. 577 at 592, Mason C.J. In a speech delivered a short time after this judgment, a member of the High Court, Justice Toohey, speculated whether “the courts should ... conclude that where the people of Australia, in adopting a constitution, conferred power to legislate upon a Commonwealth government, it is to be presumed that they did not intend that those grants of power extend to the invasion of fundamental common law liberties.” *The Age* (10 October 1992) at 9. This suggestion of an “implied bill of rights” created considerable controversy, and a stern rebuke from Senator Tate, the federal Justice Minister. See *The Age* (10 October 1992) at 9.

⁴³ (1992), 107 A.L.R. 1.

⁴⁴ *Ibid.* at 18-19.

⁴⁵ *Ibid.* at 27.

⁴⁶ *Ibid.* at 28.

⁴⁷ *Ibid.* at 29.

⁴⁸ *Ibid.*

C. Proposals for Legislative Bills of Rights

Over the last twenty years there have been various attempts to introduce federal legislation guaranteeing individual rights, almost entirely at the initiative of Labor governments.⁴⁹ Immediately after the election of the Labor government in 1972, Australia signed the *International Covenant on Civil and Political Rights*⁵⁰ and the *International Covenant on Economic, Social and Cultural Rights*.⁵¹ In order for Australia to observe the terms of the *Civil and Political Rights Covenant*,⁵² the new government argued that certain individual rights must receive explicit legal recognition. In 1973 a *Human Rights Bill* was introduced into Parliament by the Attorney-General (and later High Court Justice), Lionel Murphy. In the second reading speech, the Attorney-General described his final aim as the amendment of the *Australian Constitution* to provide for individual liberties, and implied that the legislation was a prelude to this.⁵³ The *Human Rights Bill* defined fundamental rights and freedoms in terms virtually identical to the *Civil and Political Rights Covenant*. It included individual rights to non-discrimination; equal protection of the laws; freedom of thought, expression, and movement; and the right to vote, to privacy, and to certain procedural rights. Certain rights were explicitly circumscribed. The right to freedom of expression, for example, was made subject to limitations of respect for others' reputations; of national security and public health; of regulation of time, place, and manner; and of prevention of involuntary exposure to offensive matter.

The draft legislation purported to bind both federal and state

⁴⁹ In discussing the partisan nature of the Australian debate over bills of rights, Brian Galligan points to the apparent paradox of the Labor party's concern with rights and the antipathy of the conservative Liberal party to them. One might expect that the latter's philosophy of individualism would make that party more receptive to constitutional entrenchment of rights, while the Labor party's "traditional collective concerns and statist strategy" sit awkwardly with its commitment to individual liberties. *Supra* note 17 at 345 and at 356.

⁵⁰ 16 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter *Civil and Political Rights Covenant*].

⁵¹ 16 December 1966, 99 U.N.T.S. 3 [hereinafter *Economic Covenant*].

⁵² The obligation of implementation in the *Economic Covenant* is phrased in weaker language than in the *Civil and Political Rights Covenant*. Article 2 provides that a party will undertake "steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised ... by all appropriate means, including particularly the adoption of legislative measures." The *Economic Covenant* was ratified by Australia in 1976, without reservations, but no specific legislation has implemented its provisions.

⁵³ Australia, Parliament, *Senate Debates* (21 November 1973).

governments. Federal laws inconsistent with the human rights legislation were deemed to be inoperative unless they expressly declared that they would operate in spite of the legislation. State laws inconsistent with the legislation would be invalid because of section 109 of the Constitution, which provides for the supremacy of federal laws. An Australian Human Rights Commissioner was to be in charge of the investigation of actual or imminent infringements of human rights, prompted either by a complaint or on the Commissioner's own initiative. The Commissioner's powers included securing a settlement of the complaint and bringing an action against the offender in the Australian Industrial Court. An aggrieved individual could also bring a court action directly. The Court had the power to make a declaration that a particular action violated the legislation and could grant a variety of remedies, including injunctive measures and the award of damages.

The *Human Rights Bill* attracted considerable controversy. After its second reading speech in November 1973, the Bill was not further debated. It lapsed with the prorogation of Parliament in early 1974 and was not reintroduced in the new parliamentary session.

The Fraser Liberal-National Coalition government (1975-1983) finally ratified the two Human Rights Covenants. The *Economic Covenant* was ratified in 1976, the *Civil and Political Rights Covenant* in 1980. The Fraser government insisted that there was no need for a comprehensive bill of rights to implement the latter, on the grounds that "[h]aving regard to the existence of such safeguards as the common law, statutory and procedural remedies ... the system of representative and responsible government, the rule of law, the independence of the judiciary and the freedom of the press, Australia is already in substantial conformity with the Covenant."⁵⁴ To deal with the few areas that it conceded did require attention, the government drafted legislation, which provided solely administrative remedies for violation of rights recognized in various international instruments. After two false starts,⁵⁵ the *Human Rights Commission Act* was enacted in 1981. The *Act* contained a sunset clause limiting the life of the Commission to five years.⁵⁶

The *Act* was very limited. It applied only to actions of the federal government. The Commission's ultimate sanction after investigation of

⁵⁴ Australia, Parliament, *Senate Debates* (25 September 1979) at 918.

⁵⁵ The government introduced a *Human Rights Commission Bill* into Parliament in 1977, and a revised bill in 1979. For an account of these developments see Bailey, *supra* note 14 at 107-111.

⁵⁶ *Ibid.* at s. 36(1).

a human rights complaint was reporting it to the Attorney-General. The rationale for this modest mechanism was that the most effective protection of human rights came from drawing the legislature's attention to them and that parliamentary scrutiny of complaints about infringements of human rights enabled it to modify the law to deal with the violations. The Labor Party criticized the *Act* as a "toothless tiger" and called for a judicially enforceable bill of rights.⁵⁷

A second attempt to enact a bill of rights was made in 1983 on the return of a Labor government to power. As with the *Murphy Human Rights Bill*, this draft legislation was regarded as a precursor to constitutional amendment.⁵⁸ The new Attorney-General, Senator Gareth Evans, described his proposals for a legislative bill of rights as a generalized version of the *Civil and Political Rights Covenant*. His legislation was to differ from the 1973 *Murphy Bill* in that it would recognize rights of "limited justiciability."⁵⁹ "What I have in mind," he said, "is the use of the Bill of Rights in the courts not so much as an aggressive weapon in its own right, but rather as an aid to the interpretation of existing rules." According to the Attorney-General, the legal role of the proposed legislation in protecting individual rights would be "a shield, not a sword."⁶⁰

The federal government's anxiety to minimize controversy was evident in Senator Evans' description of the legislation. He distinguished it from the 1973 *Human Rights Bill*, whose provisions, he said, were "just too vague and far-reaching."⁶¹ Though he referred to the new draft as "a dynamic social document," he argued that:

[t]he kind of Bill of Rights which is likely to gain most ready acceptance, and which would arouse least fears from both within and outside the legal profession about the capacity and appropriateness of the judiciary to handle it, would be one where the guarantees laid down had effect only as "rules of construction."⁶²

The definition of the rights protected by the draft legislation generally followed the scheme of the *Human Rights Bill* of 1973 and the *Civil and Political Rights Covenant*. The rights were set out in the portion

⁵⁷ See Australia, Parliament, *Senate Debates* (8 and 13 November 1979) at 2093 and at 2213.

⁵⁸ Attorney-General, Press Release (7 July 1983).

⁵⁹ J. Faine & M. Pearce, "An Interview with Gareth Evans: Blueprints for Reform" (1983) 8 *Leg. Services Bulletin* 117 at 118.

⁶⁰ *Ibid.*

⁶¹ Quoted in *The Age* (26 October 1983).

⁶² Attorney-General, Press Release (7 July 1983).

of the legislation styled "The Bill of Rights." The remainder of the legislation dealt with the interpretation, operation, and enforcement of the Bill of Rights, creating a complex and indirect scheme. Protection was to be secured in three distinct ways. First, the Bill of Rights would be an interpretative guide for the judiciary in the case of ambiguous provisions of federal and state legislation; the draft stated that "a construction that is not in conflict with the Bill of Rights or that would further the objects of this Act, shall be preferred to any other construction." Second, the status of the Bill of Rights itself was declared to be that of a federal law. Its provisions would automatically prevail over prior federal legislation and, by virtue of section 109 of the Constitution, over all prior and subsequent state legislation. Subsequently enacted federal legislation could, however, validly declare that its provisions were to operate notwithstanding the Bill of Rights. Third, rights were protected by administrative procedures. The legislation would enable the Human Rights Commission to investigate complaints about federal or state governmental actions apparently violating the Bill of Rights. The Commission's powers to resolve complaints included conciliation, settlement, and report to Parliament through the Attorney-General. Unlike the 1973 *Human Rights Bill*, the 1984 *Bill of Rights Bill* gave the Commission no power to seek a judicial determination of any complaint.

The "shield not sword" epithet given to the legislation by its drafters was a reference to its explicit provision that the Bill of Rights conferred no right of civil action nor imposed any criminal liability for the infringement of a protected right. Apart from invocation of the Bill of Rights as a device in the interpretation of statutes, the only individual initiative possible under the legislation was application to the Federal Court for a declaration that a federal or state law was in conflict with the Bill of Rights, and therefore deemed repealed or inoperative. This course, however, was unavailable if the applicant was a party to proceedings arising under the impugned legislation in which the alleged infringement of rights could be relevant.

The legislative proposals were thus far weaker than those presented to Parliament in 1973. They applied only to governmental action whereas the earlier *Human Rights Bill* had extended to any action that infringed protected rights. Moreover, the rights would be relevant only as a modest interpretative aid in an action arising out of legislation that allegedly infringed protected rights, and the legislation's validity could be challenged by a person only if no action had been taken against him or her under it. The proposed legislation did not exploit the

Commonwealth government's (by then) clear legislative power to implement international treaties.⁶³

A controversy over the proposed legislation, fuelled by arguments of "states' rights," and the calling of an early federal election in December 1984, made the Labor government less eager to proceed with this legislative project. Indeed the Evans Bill was never introduced into Parliament. Although the Labor Party won the election, Prime Minister Hawke signalled his intention to take a less controversial line on human rights issues by moving Attorney-General Evans, the most consistent proponent of an Australian Bill of Rights, to another ministry. Evans was replaced by Lionel Bowen, who had publicly questioned the need for human rights legislation.

Bowen's apparent lack of enthusiasm for any type of legislative bill of rights was temporary. In May 1985 the new Attorney-General announced that a revised bill of rights Bill would be brought before the federal Parliament. It was introduced into Parliament along with a Bill establishing a Human Rights and Equal Opportunity Commission.⁶⁴ The Bowen Bill followed the structure of the Evans Bill, but the latter's force was considerably attenuated by a revision of the provisions dealing with its operation. The Bill of Rights itself was still deemed to take precedence over other laws, but only with respect to federal common law and federal legislation enacted *after* the Bill was passed. Only federal legislation was required to be interpreted in accordance with the Bill of Rights. All state common and statutory law was expressly removed from its operation. The Bowen Bill also completely removed the already very restricted possibility for an individual to seek a declaration that particular legislation infringed the Bill of Rights. The powers of the Human Rights Commission remained the same under the Bowen Bill and included the investigation of and reporting to Parliament about alleged infringements of the Bill of Rights by a state.

Despite the extremely limited nature of human rights protection offered by the Bowen Bill, it caused great controversy in its passage through Parliament.⁶⁵ The legislation was eventually allowed to lapse in March 1986. Its companion legislation establishing the Human Rights and Equal Opportunity Commission was, however, finally enacted.

⁶³ *Koowarta v. Bjelke Petersen* (1982), 153 C.L.R. 168 [hereinafter *Koowarta*]; *Commonwealth v. Tasmania* (1983), 158 C.L.R. 1 [hereinafter *Tasmanian Dam*]. See below at 212.

⁶⁴ *Human Rights and Equal Opportunity Commission Bill 1986* (Cth).

⁶⁵ See Bailey, *supra* note 14 at 55.

The progressively weaker form of the successive attempts to obtain a legislative bill of rights in Australia was due in large part to federal pressures. A recurring constraint on the introduction of an Australian bill of rights has been the nature of Australian federalism. One of the most persuasive arguments against the inclusion of individual rights in the *Australian Constitution* at federation was that they would usurp the power of the states. So too more recently, a bill of rights has been described as inimical to the federal system.⁶⁶ Some of the states predicted a dismantling of the federation because of the erosion of their rights. One effect of the guarantee of equal suffrage in the 1984 proposed Bill of Rights, for example, would have been to allow judicial scrutiny of state electoral boundaries. This created fears in Queensland that the federal government would attempt to enforce a "one vote-one value" system in electoral divisions, thus replacing a zonal system (said to ensure adequate representation of underpopulated rural areas).⁶⁷ Another specific anxiety over the 1984 proposals was that the Human Rights Commission, a federal agency, would be empowered to examine proposed state legislation and call state officials before it.⁶⁸ The 1984 draft was also described as interfering with the criminal justice systems of the states and other essential aspects of their decision making.⁶⁹ The states raised no objections to the successfully enacted *Human Rights Commission Act* of 1981 precisely because it did not impinge on state legislation.⁷⁰

The contention and failure of all the proposals for an Australian bill of rights were caused by concerns that they would disturb the democratic process and the status quo. What was missing from the debate was recognition that the traditional elements of Australian legal and political culture ignore minority concerns. The recent revival of the bill of rights debate, in the context of constitutional reform proposals generated by the centenary of the *Australian Constitution* in 2001, has put the concern of minority protection squarely on the agenda.⁷¹

⁶⁶ R.D. Lumb, *Australian Constitutionalism* (Sydney: Butterworths, 1983) at 142-43.

⁶⁷ *Australian Financial Review* (12 November 1984).

⁶⁸ *The Age* (24 October 1984).

⁶⁹ *The Age* (1 May 1985).

⁷⁰ Bailey, *supra* note 14 at 109.

⁷¹ See G. Brennan, "The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response" (Paper delivered at the Conference on Australia and Human Rights: Where to From Here?, Centre for International and Public Law, Australian National University, 15-17 July 1992) [unpublished].

D. *Legislative Protection of Rights*

The *Australian Constitution* assigns specified concurrent legislative powers to the Commonwealth government, and the residue to the states. It apparently allocates exclusive legislative competence over many human rights matters to the states.⁷² Indeed the first Australian legislation prohibiting discrimination was the *South Australian Prohibition of Discrimination Act* of 1966. A series of High Court decisions in the 1980s⁷³ indicated, however, that the Commonwealth government had power to implement international obligations, such as those arising under a treaty or at customary international law, under its power to legislate "with respect to ... external affairs."⁷⁴ This has allowed the Commonwealth to legislate with respect to discrimination based on race,⁷⁵ sex,⁷⁶ or disability,⁷⁷ and with respect to human rights generally.⁷⁸ Commonwealth privacy legislation has been enacted under the federal incidental power.⁷⁹

Before the extent of the external affairs power was judicially confirmed, the Commonwealth government was occasionally prepared to invoke other legislative powers, particularly the power to make laws

⁷² One exception is the federal power to make laws with respect to the people of any race: *Australian Constitution*, *supra* note 9 at s. 51(26). The original intention of this provision was to allow the Commonwealth to legislate to exclude Kanaks who were imported as "coolie" labour on Queensland sugar plantations. J. Quick & R. Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus & Robertson, 1901) at 622-3.

⁷³ *Koowarta*, *supra* note 63; *Tasmanian Dam*, *supra* note 63. See also, *Richardson v. Forestry Commission of Tasmania* (1988), 164 C.L.R. 261.

⁷⁴ *Australian Constitution*, *supra* note 9 at s. 51(29).

⁷⁵ *Racial Discrimination Act 1975* (Cth) (implementing the UN Convention on the Elimination of all Forms of Race Discrimination 1963) (Cth) [hereinafter *Racial Discrimination Act*].

⁷⁶ *Sex Discrimination Act 1984* (Cth) (implementing the UN Convention on the Elimination of All Forms of Discrimination Against Women 1979). The *Act* goes further than the terms of the Convention in covering discrimination against men on the grounds of sex. In these respects it depends on various other Commonwealth legislative powers including the corporations, banking, insurance, and trade and commerce powers [*Australian Constitution*, *supra* note 9 at ss. 51(20), (13), (14), and (1)].

⁷⁷ *Disability Discrimination Act 1992* (Cth).

⁷⁸ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) [implementing the *Civil and Political Rights Covenant* 1966, ILO Convention No 111—Discrimination (Employment and Occupation) 1958, the UN Declaration on the Rights of the Child 1959, the UN Declaration on the Rights of Mentally Retarded Persons 1971 and the UN Declaration on the Rights of Disabled Persons 1975] (Cth).

⁷⁹ *Privacy Act 1988* (Cth). This legislation was in part designed to fulfil Australia's obligations under Article 17 of the *Civil and Political Rights Covenant*. See Bailey, *supra* note 14 at 275-6.

with respect to "the people of any race for whom it is deemed necessary to make special laws"⁸⁰ to interfere directly in states where clear violations of human rights had occurred. In Queensland, for example, Aborigines and Torres Strait Islanders were subject to a variety of restrictions with respect to holding property, maintaining residence, and working on reserves.⁸¹ In 1975, after negotiations with Queensland to amend the law failed, the Commonwealth government passed the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act*.⁸² Its preamble declared its aim as "preventing discrimination in certain respects ... under the laws of Queensland." The legislation directly contradicted many of the provisions of the Queensland legislation and was a rare confrontation with a regional unit by a centre traditionally deferential to regional treatment of human rights.⁸³

The development of the Commonwealth external affairs power has been strongly resisted because of its reduction of the legislative spheres of the states. The dissenting judgments in both *Koowarta* and *Tasmanian Dam* strongly expressed state concerns. They argued that the nature of federation required limiting the external affairs power as a basis for Commonwealth legislation to matters clearly within federal legislative competence. In *Koowarta*, Chief Justice Gibbs warned that "[t]he distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed."⁸⁴ While High Court majorities have decisively rejected such arguments, the Commonwealth government has been reluctant to fully exploit the legislative potential of its external affairs power to protect human rights due to political pressure from the states.⁸⁵

⁸⁰ *Australian Constitution*, *supra* note 9 at s. 51(26).

⁸¹ See generally, G. Nettheim, *Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law* (Sydney: Australia and New Zealand Book Co., 1973).

⁸² See also, *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self Management) Act 1978* (Cth).

⁸³ Compare *Queensland Electricity Commission v. Commonwealth* (1985), 159 C.L.R. 192, where federal legislation designed to override state legislation that implicated international human rights standards of workers was held invalid on the ground that it placed a discriminatory special burden on Queensland.

⁸⁴ *Koowarta*, *supra* note 63 at 168.

⁸⁵ The Australian Parliament's bipartisan Joint Committee on Foreign Affairs, Defence and Trade has recently recommended a bolder use of the external affairs power in relation to international human rights obligations. Joint Committee on Foreign Affairs, Defence and Trade, *A*

The ambit of Australian human rights legislation generally is limited in scope. It operates only within a public sphere of activity, it deals mainly with individual complaints and remedies; and many of the concepts it relies on, such as "discrimination" or "merit," are defined to promise very limited forms of equality.⁸⁶ The limitations of Australia's anti-discrimination legislation prevent it from extending to major sites of discrimination. Likewise, the assumption that the role of discrimination law is to deal with only anomalous, irrational discrimination masks the reality of structural discrimination.

Moreover, the Australian approach to human rights protection is much weaker and more attenuated than that in Canada. An initial problem in Australia has been the polarization of the major political parties with respect to rights. Most initiatives on rights have come from the Labor Party and have been strongly resisted by the Liberal-National Coalition.⁸⁷ This has led to significant amendment of draft legislation in the Senate, which has been controlled for long periods by the conservative parties. For example, the *Racial Discrimination Bill 1974* was amended by the Senate, which was then controlled by the Opposition Liberal-National Party Coalition, to remove provisions relating to incitement and promotion of racial hatred, to increase the burden of proof with respect to claims of discrimination, and to weaken the powers of the Commissioner for Community Relations to enforce the legislation.⁸⁸ The *Sex Discrimination Bill* was amended in the Senate to except religious institutions from the prohibition of discrimination in job selection.⁸⁹

A second cause of Commonwealth human rights law's weakness is its deference to the pressures of federalism. As we have seen, the *Human Rights Commission Act* of 1981 excluded state legislation from its scope. So, too, the 1986 *Human Rights and Equal Opportunity Commission Act* affects only the acts of the Commonwealth government. The sole exception to this is Division 4 of the Act, implementing International Labour Organization *Convention 111 on Discrimination in*

Review of Australia's Efforts to Promote and Protect Human Rights (Canberra: Australian Government Publishing Service, 1992) at 30. The shadow Attorney-General, Peter Costello, however, refused to endorse a role for the external affairs power in overriding state laws that violate human rights. See *The Age* (10 December 1992).

⁸⁶ See generally, M. Thornton, *The Liberal Promise of Anti-Discrimination Legislation in Australia* (Melbourne: Oxford University Press, 1990); and Gaze & Jones, *supra* note 26 at 408-12.

⁸⁷ See Galligan, *supra* note 17.

⁸⁸ See "Australian Practice in International Law 1974-1975" (1974-1975) 6 *Austl. Y.B. Int'l L.* 189 at 309.

⁸⁹ Bailey, *supra* note 14 at 152.

Respect of Employment and Occupation, which covers state and territorial practices. The essentially recommendatory nature of the Human Rights and Equal Opportunity Commission's activities does not make this a significant inroad on state or territorial powers. The *Sex Discrimination Act* does not apply to employment practices of the states or self-governing territories or their instrumentalities,⁹⁰ although it precludes discrimination in the implementation of Commonwealth laws or programmes, even when these are administered by a state.⁹¹ The *Racial Discrimination Act*, by contrast, binds state governments fully.⁹²

Given the wide interpretation of the external affairs power by the Australian High Court, there is no constitutional reason why all Commonwealth human rights legislation cannot bind the states and create uniform national standards of human rights protection.⁹³ One problem of the limited nature of Commonwealth human rights laws is that employees of the Tasmanian and Northern Territory governments have considerably fewer remedies for discrimination than other Australian workers.⁹⁴ Moreover, the co-existence and overlap of federal and state or territorial anti-discrimination legislation leads to complex jurisdictional choices for complainants.⁹⁵ These concerns are mitigated

⁹⁰ *Sex Discrimination Act*, *supra* note 76 at ss. 9 and at 13. The exclusion of state employment from the *Sex Discrimination Act* is sometimes attributed to the principle of the *Melbourne Corporation v. Commonwealth* (1947), 74 C.L.R. 31 [hereinafter *Melbourne Corporation*], which prohibited use of Commonwealth legislative power to interfere directly with the internal business of a state government. Human rights standards are by definition restrictive, but it seems curious to regard them as an unwarranted burden on state activity in the same way that a proposed federal right of veto over state banking was held to be in *Melbourne Corporation*. Moreover, it is unclear why the *Melbourne Corporation* principle applies to sex discrimination legislation but not to race discrimination legislation.

⁹¹ *Sex Discrimination Act*, *ibid.* at s. 26.

⁹² *Supra* note 75 at s. 6.

⁹³ See *supra* note 73.

⁹⁴ An anti-discrimination bill was introduced into the Northern Territory Parliament in November 1992. A draft Tasmanian anti-discrimination legislation was reintroduced as a private member's bill in April 1992.

⁹⁵ The grounds of illegal discrimination under Commonwealth and state or territorial laws vary considerably. See Thornton, *supra* note 86 at c. 3; R. Hunter, "Equal Opportunity Law Reform" (1991) 4 Austl. J. Lab. L. 226 at 230-3. The issue of inconsistency between Commonwealth and state anti-discrimination legislation had been raised in *Viskauskas v. Niland* (1983), 153 C.L.R. 280; and *University of Wollongong v. Metwally* (1984), 158 C.L.R. 447. In both cases the High Court had struck down state legislation that covered the same area as the *Racial Discrimination Act* under section 109 of the Constitution, which makes a state law inconsistent with a Commonwealth law invalid. To cope with this problem, under both the *Racial Discrimination Act* (s. 6A) and the *Sex Discrimination Act* (ss. 10-11), a complainant must now opt to use either state or Commonwealth law. If state law is chosen, no subsequent recourse can be had to the federal

somewhat in practice by cooperative arrangements between the Human Rights and Equal Opportunity Commission and the state agencies responsible for administering equal opportunity laws. This allows a state agency to handle all human rights issues initially and to refer only those within the federal body's jurisdiction, and vice versa.⁹⁶

A third deficiency in much state and Commonwealth human rights legislation is the practice of exempting various areas of activity from their scope.⁹⁷ For example, a major area for discrimination, industrial awards, remains outside the federal *Sex Discrimination Act*.⁹⁸ Legislation has been recently introduced into federal Parliament to extend the coverage of the Act,⁹⁹ but this will only affect prospective awards. Combat and combat-related duties in the Defence Force are exempt,¹⁰⁰ as are the admission and servicing of members of voluntary bodies¹⁰¹ and many sporting activities.¹⁰² Both the *Sex Discrimination Act* and the *Human Rights and Equal Opportunity Commission Act* exempt the employment of staff of religious educational institutions from their scope if the discrimination is "in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or

legislation (to remove any doubts about the consistency of the legislation). If the federal law is selected, this does not preclude later reliance on state legislation. These provisions do not, however, prevent problems of inconsistency in legislation. In *Dao v. Australian Postal Commission* (1987), 162 C.L.R. 317, the High Court found a direct inconsistency between the Commonwealth *Postal Services Act 1977* and the New South Wales *Anti-Discrimination Act 1977* because the federal legislation gave a wide discretion to the Postal Commission to appoint employees. See also *AMP Society v. Goulden* (1986), E.O.C. 92-164. For narrower approaches to inconsistency between federal and state human rights legislation see *Duncan v. Commonwealth Banking Corp.* (1985), 12 I.R. 198; and *Gerhardy v. Brown* (1985), 159 C.L.R. 70.

⁹⁶ Bailey, *supra* note 14 at 120-22. In some cases, however, complainants are required to choose whether to proceed under state or federal legislation because of a concern by agencies to be seen to be acting impartially.

⁹⁷ A recent critique of many of the exemptions in the context of federal sex discrimination legislation is found in a report: Australia, Sex Discrimination Commission, *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* (Canberra: Australian Government Publishing Service, 1992) (Commissioner: Q. Bryce).

⁹⁸ *Supra* note 76 at s. 40(1).

⁹⁹ *Sex Discrimination and Other Legislation Amendment Act 1992* [hereinafter *Sex Discrimination Amendment Bill*]. Legislation has recently been enacted by the Federal Parliament.

¹⁰⁰ *Ibid.* at s. 43.

¹⁰¹ *Ibid.* at s. 39.

¹⁰² *Ibid.* at s. 42.

creed."¹⁰³ State legislation contains even wider lists of exemptions.¹⁰⁴

Another problem with Commonwealth human rights legislation is its indirect method of enforcement. With respect to issues of human rights generally, section 11 of the *Human Rights and Equal Opportunity Commission Act* empowers the Commission, among other things, to examine federal or territorial legislation to determine whether it is inconsistent with the human rights set out in the *Civil and Political Rights Covenant* and the declarations attached to the *Act*.¹⁰⁵ The Commission can also inquire into federal or territorial acts or practices that may be inconsistent with these human rights and attempt conciliation of the matter giving rise to the inquiry. It can promote understanding of these rights generally, undertake research and educational programmes for the Commonwealth on human rights matters and intervene, with the leave of the court, in court proceedings involving human rights issues.¹⁰⁶ The Commission's strongest sanction in its general human rights activities is its power to report to the Attorney-General. Its work cannot be directly or indirectly enforced by the courts. The Commission and its predecessor have done valuable work in investigating and settling human rights complaints¹⁰⁷ and particularly, in researching and reporting on general human rights issues.¹⁰⁸ However, there has been very little governmental response to this research.

The Commission also has the function of administering the race, sex, and disability discrimination legislation as well as the 1988 *Privacy Act*. The primary mode of dispute resolution under the discrimination legislation is conciliation. While conciliation has the advantages of economy, confidentiality, informality, flexibility, and the avoidance of an

¹⁰³ *Sex Discrimination Act*, *supra* note 76 at s. 38; *Human Rights and Equal Opportunity Commission Act 1986*, *supra* note 78 at s. 3(1).

¹⁰⁴ See Hunter, *supra* note 95 at 230-3.

¹⁰⁵ Proposed legislation can be examined only at the request of the Attorney-General.

¹⁰⁶ See *Re Jane* (1988), 94 F.L.R. 1; *Re Marion* (1990), 14 Fam L.R. 427 (H.C.); *R. v. Cheung Ying Lin* (N.S.W. Sup. Ct. 1992, unreported); and *Mt. Isa Mines Ltd. v. Marks* (1992), E.O.C. 92-420.

¹⁰⁷ Bailey, *supra* note 14 at 123-29. The most common issues of complaint to the Human Rights Commission in the general human rights field were immigration and deportation. *Ibid.* at 114 and at 23.

¹⁰⁸ A list of the Human Rights Commission's reports is contained in *ibid.*, Appendix 1. Three major reports of the Human Rights and Equal Opportunity Commission are *Report of the Inquiry into the Social and Material Needs of the Residents of Toomelah, Goondiwindi and Boggabilla* (Canberra: Australian Government Publishing Government, 1988); *Our Homeless Children* (Canberra: Australian Government Publishing Service, 1989); and the *Report of the National Inquiry into Racist Violence in Australia* (Canberra: Australian Government Publishing Service, 1991). A report on the human rights of people with mental illness will be published in June 1993.

adversarial resolution of disputes, it works best when the parties have similar bargaining power.¹⁰⁹ Some observers have argued that, in the context of discrimination law, conciliation may reinforce inequality.¹¹⁰ So, too, while the confidentiality and informality of its procedures may encourage complainants to use the legislation, they preclude public scrutiny and offer a “privatized” form of justice.¹¹¹ Moreover, the final outcome cannot be directly enforced under federal law.¹¹² Thus if conciliation is not successful, the Commission has the power to make a recommendation on complaints but the determination does not bind the parties.¹¹³ To enforce a Commission determination, proceedings must begin in the Federal Court, and the matter is heard anew by the Court, which is not bound by any findings of fact made by the Commission.¹¹⁴ In a reform announced in December 1992, the federal government introduced legislation to make Commission determinations registrable in the Federal Court. In the absence of an application to review the determination, the determination will become enforceable as an order of the Federal Court.¹¹⁵

A fourth concern with legislative human rights protection in Australia is the generally restrictive interpretation of human rights legislation by tribunals and courts. For example, attempts have been made to persuade Australian courts to give some force to the text of the international instruments appended to the predecessor to the *Human Rights and Equal Opportunity Commission Act*. In *Kioa v. Minister for*

¹⁰⁹ M. Thornton, “Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia” (1989) 52 Mod. L. Rev. 733 at 743-6.

¹¹⁰ Gaze & Jones, *supra* note 26 at 427.

¹¹¹ Thornton, *supra* note 109 at 741-2. At 754, Thornton also points to “creeping legalism” in conciliation procedures. He cites, for example, the application of the rules of natural justice to the conduct of compulsory conciliation conferences in *Koppen v. Commissioner for Community Relations* (1986), 11 F.C.R. 360.

¹¹² The High Court decision in the *R. v. Kirby* (1956), 94 C.L.R. 254, required the separation in federal bodies of judicial and other powers. This has been thought to preclude a non-judicial body from making binding determinations. State legislation is not subject to the same constitutional requirement of separation of powers.

¹¹³ *Racial Discrimination Act*, *supra* note 75 at s. 25ZA; and *Sex Discrimination Act*, *supra* note 76 at ss. 81(1), 82(1), and (2).

¹¹⁴ For example in *Maynard v. Nielson* (1987), E.O.C. 92-199, the Human Rights and Equal Opportunity Commission made a finding of race discrimination when a Hobart hotel refused to serve the Aboriginal complainant. When the complainant sought an order from the Federal Court to enforce the Commission’s award of damages, the Court overturned the Commission’s findings on the basis of new evidence [(1988), E.O.C. 92-226].

¹¹⁵ *Sex Discrimination Amendment Bill*, *supra* note 99.

Immigration,¹¹⁶ the High Court rejected arguments that a Minister was required to take the provisions of the *Civil and Political Rights Covenant* and the *United Nations Declaration on the Rights of the Child*¹¹⁷ into account when making a decision about deportation.¹¹⁸ There are some recent signs, however, that the High Court will be influenced by international human rights law in its development of the common law.¹¹⁹ Over the past two years, the High Court has also interpreted discrimination legislation in an expansive manner.¹²⁰

Finally, Australian human rights legislation is fundamentally limited in focus: it covers only the traditional canon of civil and political rights. Our skewed distribution of wealth¹²¹ indicates major problems of economic and social justice and the need for a guarantee of income support to prevent poverty. The definition and recognition of economic and social rights is a major task in the development of human rights in Australia.

E. *Australia and the International Law of Human Rights*

The development of the external affairs power as a basis for federal legislation has given the international law of human rights particular significance in Australia. Australia's participation in international human rights instruments has been strongly influenced by its federal structure. The reluctance observed generally with respect to entry into treaties in many federations¹²² is evident also in Australian practice, although in a more attenuated form than that found, for example, in the United States. The *Australian Constitution* contains no

¹¹⁶ (1985), 159 C.L.R. 550.

¹¹⁷ GA Res. 1386/45, 20 Nov. 1959.

¹¹⁸ The status of international instruments annexed to legislation was discussed at length in *Re Marion* (1990), 14 Fam L.R. 427.

¹¹⁹ For example, *Dietrich v. R.* (1992), 109 A.L.R. 385; and *Mabo v. Queensland* (1992), 107 A.L.R. 1. See also M. Kirby, "Implications for Australia of the Continuing Internationalisation of Human Rights" (Paper delivered at Conference on Australia and Human Rights: Where to From Here?, Centre for International and Public Law, Australian National University, 15-17 July 1992) [unpublished].

¹²⁰ *Australian Iron & Steel v. Banovic* (1989), E.O.C 92-271; *Slater v. Brookton Farmers Co-op.* (1990), E.O.C. 92-321; and *Waters v. Public Transport Corporation* (1991), E.O.C. 92-390.

¹²¹ Sixty per cent of Australia's wealth is owned by 10 per cent of the population; over a quarter of the wealth is held by 1 per cent of the population. Gaze & Jones, *supra* note 26 at 468.

¹²² See L. Wildhaber, *Treaty-Making Power and Constitution* (Basel: Helbing & Lichtenhahn, 1971) at 341.

explicit grant of treaty-making power, but such a power is considered inherent in the prerogatives of the Executive, which have devolved from the Crown.¹²³ From federation, however, the Commonwealth had acted on the assumption that its power to implement treaties, especially of an economic or humanitarian character, was limited by the federal division of powers.¹²⁴ A practice developed whereby the states were consulted by the Commonwealth government on treaties whose subject matter fell within state legislative power.¹²⁵ The federal government would not become a party to such treaties until it was satisfied that state laws were in accordance with their requirements.¹²⁶ These statements appeared to accept that a refusal by even one state to amend a law inconsistent with the requirements of a treaty, which the federal government wished to ratify, was sufficient to prevent ratification. In 1942 the federal Minister for External Affairs, Dr. Evatt, described Australia's record in ratifying International Labour Organisation [ILO] Conventions as "acutely disappointing" and argued that it was due to the recalcitrance of the states. "It has been difficult to obtain their views with any degree of despatch," he noted, "and practically impossible to secure unanimous action."¹²⁷

When the Australian states were first consulted on the draft United Nations Covenants on Human Rights, over most of whose subject matter they retained direct legislative power, they tended to react so as to preserve their full legislative domain. The Tasmanian government, for example, insisted that the provisions in both Covenants, extending their operation to all parts of a federation, were "entirely unacceptable." And the Victorian government regarded the Covenants as purporting to alter "the fundamental relationship between the federal and constituent bodies under their own constitution."¹²⁸ The Australian delegate to the Third Committee of the General Assembly predicted in 1950 that, "[f]or the central government unilaterally to accept and ratify the [Civil and Political] Covenant would not only be provocative to State

¹²³ See *Australian Constitution*, *supra* note 9 at s. 61.

¹²⁴ G. Doeker, *The Treaty-Making Power of the Commonwealth of Australia* (The Hague: M. Nijhoff, 1966) at 40-41, 60-64, and 182.

¹²⁵ *Ibid.* at 109-11.

¹²⁶ D. De Stoop, "Australia's Approach to International Treaties on Human Rights" (1970-1973) 5 *Austl. Y.B. Int'l L.* 27 at 30.

¹²⁷ Quoted in K. Bailey, "Australia and the International Labour Conventions" (1946) 54 *Int'l Lab. Rev.* 285 at 290.

¹²⁸ Quoted in Doeker, *supra* note 124 at 224.

feeling, but would be a breach of the whole spirit of the federation."¹²⁹ Australia campaigned unsuccessfully to have a "federal" clause inserted in the draft Covenant similar to that contained in Article 19(7) of the ILO Constitution. It provided that the obligation of federal states with respect to ILO Conventions and Recommendations was to refer them to regional authorities for action when it regarded them as "appropriate under its constitutional system ... for action by the constituent states ... rather than for federal action."¹³⁰ The Australian states' strong defence of their legislative powers meant that the Commonwealth government's practice of consultation and obtaining the consent of the states prior to ratification produced, particularly in the area of human rights treaties, "delays, misunderstandings and, in some cases, outright refusal to cooperate with federal authorities."¹³¹

The Whitlam Labor government, elected in 1972, announced a commitment to ratify a variety of human rights agreements, including the two Human Rights Covenants and the Race Discrimination Convention, within a year of taking office.¹³² An implication of this policy was that state cooperation was not essential for ratification. The fate of the legislation designed to allow ratification of the *Civil and Political Rights Covenant*, Lionel Murphy's Bill of Rights, has been discussed above. The *Race Discrimination Act* was, however, eventually enacted.

After the Labor government lost power in 1975, the perceived demands of federalism were reasserted to limit Australia's implementation of human rights conventions. The Commonwealth government formally announced in 1977 a return to the pre-Whitlam practice of extensive consultation with the states on treaties whose implementation would touch on legislative areas "traditionally regarded as being within the responsibility of the States."¹³³ At the same time, it was stated that Australia would seek federal clauses in treaties in "appropriate cases." In 1979 the Ministerial Council on Human Rights, comprising the Attorneys-General of the Commonwealth, the states, and Northern Territory, was established as a forum for dealing with the cooperative implementation of human rights agreements.

¹²⁹ UN GAOR, 5th Sess., 3d Cite. (1950) at 134.

¹³⁰ UN ESCOR, 6th Sess., UN Doc. E/600, Supp. No. 1.

¹³¹ De Stoop, *supra* note 126 at 32.

¹³² *Ibid.*

¹³³ Quoted in H. Burmester, "The Australian States and Participation in the Foreign Policy Process" (1978) 9 Fed. L. Rev. 257 at 281.

The implications of the Fraser policy of state consultation for the implementation of human rights agreements became clear when Australia finally ratified the *Civil and Political Rights Covenant* in 1980, announcing this as “an important achievement in the area of the Government’s Federalism Policy.”¹³⁴ The instrument of ratification had attached to it a list of “Reservations and Declarations” which affected a third of the Covenant’s provisions. One “reservation” was apparently designed to protect Australia’s federal structure in the implementation of the Covenant; others related to specific provisions, most of which would have had impact on the operation of the states’ criminal justice systems.

The “federal” reservation was drafted in a confusing and contradictory way. Australia advised that it had a federal constitutional system, and that it accepted that “the provisions of the Covenant extend[ed] to all parts of Australia ... without any limitation or exceptions.” Since, however, the obligation to enforce the Covenant in Article 2 refers to implementation “in accordance with [a State Party’s] constitutional processes,” Australia argued that its federal constitutional processes demanded that “the implementation of those provisions of the Covenant over whose subject matter the authorities of the constituent States exercise legislative, executive and judicial jurisdiction will be a matter for those authorities.” The Australian reservation undermined the clearly intended meaning of both the implementation obligation in Article 2 of the Covenant and Article 50, which extends the provisions of the Covenant “to all parts of federal States without any limitations or exceptions.” It also breached the principle of treaty law that a party may not invoke its internal law as justification for failure to perform a treaty.¹³⁵

After the re-election of a Labor government in 1983, most of Australia’s reservations and declarations to the *Civil and Political Rights Covenant* were removed.¹³⁶ The ratification still has attached to it a “Declaration,” which notes that the federal constitutional system in

¹³⁴ Tabling Statement by the Attorney-General, 5 August 1980, quoted in G. Triggs, “Australia’s Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?” (1982) 31 *Int’l & Comp. L.Q.* 278.

¹³⁵ *The Vienna Convention on the Law of Treaties*, 23 May 1969, U.N. Doc. A/CONF.39/27 (1969), 8 *I.L.M.* 679, Art. 27.

¹³⁶ Australia still has reservations to Article 10(2) and (3), relating to the segregation in custody of accused and convicted persons and of juvenile and adult offenders; to Article 14(6), relating to procedures for the payment of compensation for miscarriage of justice; and to Article 20, relating to the prohibition of propaganda for war or advocacy of racial hatred.

Australia will affect the domestic implementation of the Covenant.¹³⁷ Certainly since the *Koowarta* and *Tasmanian Dam* cases this qualification has little basis in Australian law and suggests a curious and inappropriate nostalgia for the past. Its status in international law is also questionable.

The present Labor government has continued to seek the views of the states before ratifying international human rights agreements, but has stated that it will not tolerate unreasonable delays in treaty participation. Australia has become a party to most recent United Nations human rights conventions: the *Convention on the Elimination of all Forms of Discrimination Against Women* of 1979, the *Convention on the Elimination of Torture* of 1984, and the *Convention on the Rights of the Child* of 1989.¹³⁸ A "federal declaration" similar in terms to that attached to the *Civil and Political Rights Covenant* accompanied ratification of the *Women's Convention*. It is still possible for the states to slow the signature, ratification or accession process down considerably. Ratification of the *Torture Convention* took almost four years because of state concerns about the effect it might have on state laws; and the signature of the *Children's Convention* was delayed because of state pressure. Australia was slow to accede to the First Optional Protocol to the *Civil and Political Rights Covenant*, which would allow individuals the right to make a direct complaint against Australia to the Human Rights Committee, which supervises the implementation of the Covenant, because of opposition by some states and territories, and in particular because of concern about the impact of accession on their prison systems.¹³⁹

¹³⁷ The Declaration set out in the *Multilateral Treaties Deposited with the Secretary-General: Status as of 31 Dec 1989*, UN Doc. ST/LEG/SER.E8 (1990) states:

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

¹³⁸ *Convention on the Elimination of All Forms of Discrimination against Women*, 1 March 1980, Can. T.S. 1982 No. 31, 19 I.L.M. 33 [hereinafter *Women's Convention*]; *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, Can. T.S. 1984 No. 859, 23 I.L.M. 535 [hereinafter *Torture Convention*]; and *Convention on the Rights of the Child*, 20 November 1989, U.N. Doc. A/RES/44/25 (1989), 28 I.L.M. 1448 [hereinafter *Children's Convention*].

¹³⁹ See H. Charlesworth, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 Melbourne Univ. L. Rev. 481. From 31 January 1993, Australia has accepted the optional complaints mechanisms under three human rights conventions: Article 41 of the *Civil and Political Rights Covenant*, which allows states to bring complaints against other states for violation of the Covenant; Article 14 of the *Convention*

The politics of federalism have thus played a significant role in Australia's acceptance of international human rights instruments. "Federalism" has become a weasel word, allowing Australia to rationalize its tardy participation and ambivalent implementation of human rights agreements.¹⁴⁰

III. DEVELOPING HUMAN RIGHTS PROTECTION IN AUSTRALIA

If the current structure of Australian human rights law is lopsided and precarious, how can it be improved for the next century? There is much room for development. For example, Donna Greschner's¹⁴¹ insistence on the need to rethink the paradigm at the centre of Canadian human rights legislation is directly applicable to Australia also. Unless laws respond to the perspective of the oppressed and tackle subordination by systems and institutions, they cannot work any real change. I want, however, to consider a more general method of improving the legal protection of rights in Australia—the introduction of constitutionally entrenched guarantees of rights.

Supporters of constitutional guarantees of rights generally point to the importance of protecting individual autonomy as the major justification for rights guarantees. For example, Alexander Bickel argued that the protection of individual rights is aimed at the support of "enduring general values," one of the tasks of any good society.¹⁴² Ronald Dworkin sees respect for human rights as based on a Kantian recognition of the value of human dignity and a belief in the value of the political equality of all citizens.¹⁴³ Legal protection of human rights

on the Elimination of All Forms of Racial Discrimination, which allows individual complaints to the Committee on the Elimination of Racial Discrimination; and Articles 21 and 22 of the *Torture Convention*, which allow individual and state complaints for violation of the Convention. See *The Age* (18 December 1992) at 4.

¹⁴⁰ See Joint Committee on Foreign Affairs, Defence and Trade, *supra* note 85 at 30: "... Federal Governments have been as culpable as the States in their willingness to let inertia prevail." The first Australian communication registered with the Human Rights Committee under the Optional Protocol, *Toonen v. Australia*, (1992), Communication No. 488, which questions the validity of a Tasmanian law criminalizing homosexuality, will require the Australian government to confront squarely its international responsibility for breaches of human rights by the states and territories.

¹⁴¹ "Human Rights Legislation in Canada" (Paper presented at the Toward the 21st Century: Canadian/Australian Legal Perspectives Conference, 23-25 June 1991) [unpublished].

¹⁴² A. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962) at 27.

¹⁴³ R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 198-99.

requires that a government treat its people with equal concern and respect.¹⁴⁴ Rights are “the majority’s promise to the minorities that their dignity and equality will be respected.” They are the “one feature that distinguishes law from ordered brutality.”¹⁴⁵ Dworkin deems human rights “trumps” in the political card game, which is otherwise run according to a majoritarian notion of the collective good of the community.¹⁴⁶ It is the individual and non-majoritarian nature of human rights protection that founds arguments for their special entrenchment in a legal system. Thus Laurence Tribe observes that a political majority will tend to operate with short-term goals and sacrifice the concerns of minorities to them. Constitutional protection of individual rights allows the limitation of future freedom of choice of the majority “in order to reap the rewards of acting in ways that would elude them under pressures of the moment.”¹⁴⁷

However, the emphasis on the protection of individual autonomy from government interference as the rationale for human rights law has been strongly challenged. For example, radical criticism of the notion of rights has been an important aspect of the attack on the liberal legal order made by the Critical Legal Studies movement. It draws on the Marxist tradition of criticism of rights for inspiration, but stops short of identifying rights as a product of capitalism alone or accepting Marx’s prediction of the obsolescence of rights in a properly communal society.¹⁴⁸

The Critical attack on rights as the heartland of liberal legalism has several aspects. There is the charge that the content of that category of rights asserted to be universal and fundamental is in fact culturally relative, and that modest developments in technology or gentle shifts in public temperament could render particular freedoms redundant.¹⁴⁹ Connected to this is the claim that statements of rights are indeterminate and thus highly manipulable both in a technical and a

¹⁴⁴ *Ibid.* at 179-80 and at 273-74.

¹⁴⁵ *Ibid.* at 205.

¹⁴⁶ *Ibid.* at xi.

¹⁴⁷ L.H. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978) at 10. John Hart Ely, by contrast, attempts to avoid the anti-majoritarian character of human rights entrenched in the United States Constitution by interpreting them as limited to the eradication of obstacles to popular representation in the political process. See *Democracy and Distrust* (Cambridge, Mass.: Harvard University Press, 1980) at 75-77 and at 92-93.

¹⁴⁸ S. Luke, “Can a Marxist Believe in Human Rights?” (1982) 1 *Praxis Int’l* 344.

¹⁴⁹ M. Tushnet, “An Essay on Rights” (1984) 62 *Tex. L. Rev.* 1363 at 1364-71. See also M. Tushnet, “Rights: An Essay in Informal Political Theory” (1989) 17 *Politics & Soc’y* 403.

more basic sense. Recourse to the language of rights may give a rhetorical flourish to an argument, but this provides only an ephemeral polemic advantage and masks the fact that what is really needed is political and social change.¹⁵⁰ To assert a legal right, some Critical scholars argue, is to mischaracterize our social experience and to assume the inevitability of social antagonism by affirming that social power rests in the state and not in the people who compose it.¹⁵¹ The individualism promoted by traditional understandings of rights limits their possibilities by ignoring "the relational nature of social life."¹⁵² Talk of rights is said to make contingent social structures seem permanent and to undermine the possibility of their radical transformation; the only consistent function of rights has been to protect the most privileged groups in society.¹⁵³

A parallel, but quite distinct, critique of rights has been made by some feminist scholars. They have argued that a continuing focus on the acquisition of rights may not be beneficial to women. According to them, rights discourse overly simplifies complex power relations, and the promise of rights may be thwarted by structural inequalities of power.¹⁵⁴ The balancing of "competing" rights often reduces women's power¹⁵⁵ and particular rights, such as the right to freedom of religion or the protection of the family, can in fact justify the oppression of women.¹⁵⁶

A premise of both these critiques of rights is that rights discourse is inherently political: the search for "neutral principles" as the basis of a scheme of rights protection is quixotic. Legal phenomena cannot rest

¹⁵⁰ Tushnet, "An Essay on Rights," *ibid.* at 1371-72.

¹⁵¹ P. Gabel & P. Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law" (1982-3) 11 N.Y. Rev. L. & Soc. Change 369 at 375-76.

¹⁵² Tushnet, "An Essay in Informal Political Theory," *supra* note 149 at 410.

¹⁵³ D. Kairys, "Freedom of Speech," in D. Kairys, ed., *The Politics of Law* (New York: Pantheon Books, 1982) at 140-41.

¹⁵⁴ For example, E. Gross, "What is Feminist Theory?" in C. Pateman & E. Gross, eds., *Feminist Challenges: Social and Political Theory* (Sydney: Allen & Unwin, 1986) 190 at 192.

¹⁵⁵ For example, C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 145.

¹⁵⁶ For example, H.B. Holmes, "A Feminist Analysis of the Universal Declaration of Human Rights," in C. Gould, ed., *Beyond Domination: New Perspectives on Women and Philosophy* (Totowa, N.J.: Rowman & Allanheld, 1983) at 250. Canadian feminists have made a distinctive contribution to this critique in their analysis of judicial interpretation of the *Canadian Charter of Rights and Freedoms*. See, for example, E. Sheehy, "Feminist Argumentation before the Supreme Court of Canada in *R. v. Seaboyer*, *R. v. Gayme*: The Sound of One Hand Clapping" (1991) 18 *Melbourne Univ. Law Rev.* 450; and J. Fudge, "The Effect of Entrenching a Bill of Rights Upon Political Discourse: Feminist Demands and Sexual Violence in Canada" (1989) 17 *Int'l. J. Sociology L.* 445.

on an unquestionably "objective" basis for they are optional and deeply controversial. The quest for objectivity, it has been said, rests on a fear of the vulnerability of responses that come from deep within us.¹⁵⁷ This search distracts us from the responsibility of openly choosing the political values to inform a constitutional text, and persuades us to accept unchallenged the traditional distribution of political and economic power.

The spasmodic debate over the last two decades over whether or not a bill of rights should be introduced into Australian law has generally not been influenced by the critical challenge to rights. Advocates and critics in the debate share basically similar assumptions. "We have no Bill of Rights and that means our work is strictly legal work," said Sir Garfield Barwick, when he was Australian Chief Justice.¹⁵⁸ The identification of guarantees of rights as a political gesture is a consistent theme with opponents of a bill of rights. For them, guarantees of rights are futile because they are ultimately dependent on politics since abstract rights lead to uncertain or political interpretations, and divert the judiciary from their otherwise non-political tasks.¹⁵⁹

Advocates of an Australian bill of rights employ the law-politics distinction in a more subtle way than their opponents. By asserting the fundamental nature of rights and the necessity of their guarantee in any truly democratic order, the advocates imply that rights should be beyond the vagaries of the political process: rights should be given legal, rather than political, status.¹⁶⁰ The advocates associate legality with calm and rational decision, and politics with arbitrary action. Legality is linked with the permanent and unchangeable, while the political is associated with the contingent and changeable. While opponents of a bill of rights warn of the danger of a politicized judiciary, advocates suggest that judicial involvement in rights protection will depoliticize the issues.¹⁶¹ They argue that political protection alone subverts the very purpose of

¹⁵⁷ L.H. Tribe, *Constitutional Choices* (Cambridge, Mass.: Harvard University Press, 1985) at 6.

¹⁵⁸ G. Barwick, "Address to the National Press Club" (1976) 50 *Austl. L.J.* 433 at 434.

¹⁵⁹ For example, H. Gibbs, "The Constitutional Protection of Human Rights" (1982) 9 *Monash L. Rev.* 1 at 11-12.

¹⁶⁰ For example, E. Thompson, "A Bit of Paper Called a Bill of Rights" in S. Encel, D. Horne & E. Thompson, eds., *Change the Rules! Towards a Democratic Constitution* (Ringwood, Vic.: Penguin Books, 1977) 84 at 85.

¹⁶¹ For example, A. Mason, "A Bill of Rights for Australia?" (1989) 5 *Austl. Bar Rev.* 79 at 83.

recognition of individual rights: guarding against the tyranny of the majority and the preservation of diversity in society.¹⁶²

Both sides in the Australian debate assume the separation of the worlds of politics and law; advocates and opponents of a bill of rights couch their arguments in legal terms and distinguish their adversaries' case as "political." Thus, the dialogue takes place within the theoretical context of legalism, assuming the existence of rules that distinguish between "proper" and "improper" conduct, law and non-law, and that every issue can be decisively resolved by finding and applying an appropriate rule.¹⁶³

How can the Australian debate about rights profit from the Critical debate? The advice given by some critics of rights to those legal systems that do not offer formal protection to human rights is to resist their introduction. For example, Mark Tushnet claims that the Left in Great Britain is "properly opposed to the adoption of a Bill of Rights; in that culture a Bill of Rights would enhance the political power of the privileged without bolstering the position of the Left."¹⁶⁴ And Professor Ison has described the Canadian *Charter* as "a calamity" and counselled Australian lawyers to avoid the role of "sorcerer's apprentice" in introducing bills of rights.¹⁶⁵ Canadian critics of the *Charter* have argued against the entrenchment of rights because of the danger of what they term the "legalization" or "judicialization" of politics, the "basic democratic dilemma" that unelected judges will decide issues of policy.¹⁶⁶

Whereas without the *Charter*, the nature of rights can be, and is, largely worked out and made concrete by legislation, with the *Charter*, a more or less substantial chunk of this job is handed over to the courts. The task is taken from people who must be elected on the basis of universal adult suffrage ... and handed over to a handful of lawyers appointed once and for all. ... What is presented by the government as a strengthening of popular power, turns out to be a restricting on the universal suffrage for which so many bloody struggles were fought ...¹⁶⁷

¹⁶² *Ibid.* at 88.

¹⁶³ J. Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964) at 8.

¹⁶⁴ Tushnet, "An Essay On Rights," *supra* note 149 at 1381.

¹⁶⁵ T. Ison, "The Sovereignty of the Judiciary" (1985-6) 10 *Adelaide L. Rev.* 1 at 17 and at 31.

¹⁶⁶ H. Glasbeek & M. Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian *Charter of Rights and Freedoms*" (1984) 2 *Socialist Studies/Etudes Socialistes* 84 at 100. See also A. Petter, "Legitimizing Sexual Equality: Three Early Charter Cases" (1989) 34 *McGill L.J.* 358. For similar arguments in the British context, see K. Ewing, *A Bill of Rights for Britain?* (London: Institute of Employment Rights, 1990).

¹⁶⁷ Glasbeek & Mandel, *ibid.* at 100.

In Australia, Peter Hanks has made similar warnings about the sporadic enthusiasm for an entrenched bill of rights.¹⁶⁸

Is the legalization of politics a different danger from the politicization of law, the fear of more conservative critics of constitutionally entrenched rights? Both derive from a belief that the province of the judiciary is qualitatively different from that of the legislature. And yet the tolerance of any form of judicial review (for example to protect the federal division of power) weakens the argument against judicial interpretation of rights guarantees because all judicial review is inherently political, depending on interpretative choice.¹⁶⁹ Courts are a political forum. Moreover, concern about legalizing politics as a result of introducing guarantees of rights tends to idealize inaccurately the political realm as responsive to democratic pressures. Our present "democratic" structures are controlled and manipulated by various powerful interest groups and do not readily respond to the concerns of individuals. Finally, even if parliamentary institutions could more readily be identified with the authentic "popular will" of the majority,¹⁷⁰ it is unlikely that human rights would be given better protection; the interests of individuals, outsiders, and minorities simply do not enter the short term majoritarian calculus.

We should not abandon the potential of guarantees of rights upon recognizing that they do not rest on a neutral "scientific" base and are not panaceas for oppression. They indeed give new interpretative power to an unelected judiciary and are capable of distortion in preserving existing structures of domination. But, the assertion of rights can have great symbolic force for oppressed groups within a society offering a significant vocabulary to formulate political and social grievances which is recognized by the powerful. Thus, Patricia Williams

¹⁶⁸ P. Hanks, "Moving Towards the Legalisation of Politics" (1988) 6 *Law in Context* 80.

¹⁶⁹ *Ibid.* at 91, Hanks distinguishes these forms of judicial review: "The fundamental difference between the federal 'boundary-riding' role and the enforcement of fundamental rights lies in the focus on legislative policies which the latter function involves. A Bill of Rights demands judicial policy-making—an assessment of the wisdom of legislative choices, the striking of a balance between competing values or interests, whether they be individual or collective interests." But the distinction is difficult to maintain in practice as many "boundary-riding" decisions involve fundamental questions of legislative policy. David Dyzenhaus points out that such distinctions depend on a form of positivism: the legitimacy of judicial decisions depend on their reflection of the decisions of the representatives of the majority, "The New Positivists" (1989) 39 *U.T.L.J.* 361 at 377.

¹⁷⁰ Peter Hanks proposes that this might be done by, for example, ensuring the opportunity of citizens to participate in the electoral process and the equality of voting rights. Hanks, *supra* note 168 at 95.

has argued that for African-Americans talk of rights has been a constant source of hope:

[r]ights' feels so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and a gift of selfhood that is very hard to contemplate restructuring ... at this point in history. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power ...¹⁷¹

And Martha Minow observes the problems in denying rights discourse to traditionally dominated groups: "I worry about criticizing rights and legal language just when they have become available to people who had previously lacked access to them. I worry about those who have, telling those who do not, 'you do not need it, you should not want it.'"¹⁷²

Rights discourse also offers a focus for political consciousness which can translate into action if legal remedies are inadequate.¹⁷³ David Dyzenhaus has pointed out that a legal system that contains formal guarantees of rights provides a framework for rethinking political questions: "[l]awyers can aim to raise consciousness and provoke participation by focussing public attention on the ways in which society fails to live up to its formally enacted promise."¹⁷⁴ Moreover, the open-textured language of rights can allow debate on legal and political choices without assuming a settled social agenda. In this sense, the language of rights can be interpreted as a communal rather than individualistic discourse, "a brave and fragile assertion that the weak have rights against the strong."¹⁷⁵ It affirms "a community dedicated to invigorating words with a power to restrain, so that even the powerless can appeal to those words."¹⁷⁶

In a culture of legalism like Australia's, the discourse of rights has a further dimension: it is an "abnormal" or revolutionary language in the sense described by Richard Rorty: discourse that will "take us out of our old selves by the power of strangeness, to aid us in becoming new beings." The task of "abnormal" discourse is to stress the contingency of all social institutions and to keep the conversation going rather than

¹⁷¹ "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 Harv. C-R C-LL. Rev. 401 at 431.

¹⁷² "Interpreting Rights: An Essay for Robert Cover" (1987) 96 Yale L. J. 1860 at 1910.

¹⁷³ Dyzenhaus, *supra* note 169 at 374.

¹⁷⁴ *Ibid.* at 378.

¹⁷⁵ S. Sedley, "Freedom of Speech for Rupert Murdoch?" (19 December 1991) 13:24 London Review of Books 3 at 5.

¹⁷⁶ Minow, *supra* note 172 at 1881.

ending it through the search for absolute foundations or answers.¹⁷⁷ It offers an alternative language to that of the mainstream culture and challenges the mythology of the neutrality of the law, making clear the political choices in any constitutional catalogue of rights. In this sense, rights discourse can disturb and reshape existing patterns of Australian legal thought.

Australians have much to learn from Canada's ten years experience with its *Charter of Rights and Freedoms*. For example, the importance of access to the legal process must be understood for rights guarantees to have any impact on social injustice. Appreciation that "private" abuses of power are as dangerous as "public" state abuses and that rights should extend to protection by the state from corporate invasions of individual rights is another lesson from Canada, as is the restriction of corporate access to human rights.¹⁷⁸ The need to draft guarantees of rights so that they acknowledge disparities of power, rather than assuming all people are equal in relation to all rights, must also be recognized.¹⁷⁹ The challenge is then to invest a rights vocabulary with meanings that challenge the current skewed distribution of economic, social, and political power.¹⁸⁰

IV. CONCLUSION

From the antipodes, the Canadian human rights structure seems enviable: a constitutionally entrenched *Charter of Rights and Freedoms*, broad federal and provincial human rights legislation, and impressive participation in international human rights agreements. Although some Canadian scholars may warn us of the disappointments, even deceptions, of the *Charter*, Canada's system offers at least a much richer debate and jurisprudence on human rights. In comparison, Australian discussion about rights seems locked into a repetitive debate about the legitimacy of judicial scrutiny of governmental action.

Moving beyond the assumptions of legalism and recognizing the political nature of the judicial role allows the debate over the

¹⁷⁷ R. Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1963) at 315-22, 357-65, and 377-89.

¹⁷⁸ See Sedley, *supra* note 175; and Ison, *supra* note 165.

¹⁷⁹ Canadian commentators have pointed out, for example, that the equality rights in the Canadian *Charter* tend to be invoked by socially dominant groups or interests. See Greschner, *supra* note 141; Sheehy, *supra* note 156; and Petter, *supra* note 166 at 360.

¹⁸⁰ Minow, *supra* note 172 at 1910.

introduction of a bill of rights to take new directions. It challenges both the claim that democratic principles will be undermined by formal guarantees of rights and the assertion that a bill of rights will radically improve the position of individuals *vis-à-vis* government. The debate can focus instead on whether rights can be absolute or whether they are inevitably contingent; on the development of new forms of rights guarantees; on whether and/or how the indeterminacy of formulations of rights enables their manipulation. It can raise the question of whether guarantees of rights distract attention from deep inequalities in society and end up simply protecting the position of the privileged, or whether rights talk has important symbolic significance for oppressed groups, whatever its practical outcome.

The Australian reluctance about rights has produced a precarious and lopsided structure for human rights protection. Aspects of the 1991 National Report of the Royal Commission into Aboriginal Deaths in Custody underline its inadequacy.¹⁸¹ The report found a vastly disproportionate representation of Aborigines held in custody, and criticized various practices of state police and prison officers. Although the response of the states to interim reports of the Royal Commission had been desultory, the final report did not recommend federal action to force the states to implement reforms. Paul Coe, Chair of the National Aboriginal and Islander Legal Service, criticized this federal deference:

By allowing the states to say whether they will or won't bring about changes and by allowing the Commonwealth the option of backing off as to whether it will use its constitutional powers to force the states to bring about changes, I think they have reneged on their responsibility. ... [W]hen it comes to the use of their external affairs powers and their race relations powers they lack the will to take on the states ...¹⁸²

Are there signs of change in the design of Australian human rights law on the threshold of the twenty-first century? The Australian debate about rights has involved the polarization of the two major political parties: a bill of rights has been part of the official platform of

¹⁸¹ Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report*, (Canberra: Australian Government Publishing Service, 1991) (Commissioner: E. Johnston).

¹⁸² "Aboriginal Group Slams Death in Custody Report" *The Age* (11 May 1991). A recent exception to this federal deference to state action is the Commonwealth government's decision to use its power under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* to block the construction of a dam by the Northern Territory government on Aboriginal sacred sites. See, "Win for Aborigines as Dam is Ruled Out" *The Age* (18 May 1992) at 5. The federal government has recently introduced legislation to create the office of Aboriginal and Torres Strait Islander Commissioner within the Human Rights and Equal Opportunity Commission. See *Human Rights and Equal Opportunity Legislation Amendment Act 1992*.

the Labor party since 1951 and most initiatives on rights have been taken by Labor governments.¹⁸³ The Liberal-National Coalition, however, is presently committed to the abolition of the Human Rights and Equal Opportunity Commission. This divergence may be reducing slowly. Certainly talk of rights has received the imprimatur of the Chief Justice,¹⁸⁴ although his interest in bills of rights seems to stem more from concern that Australia was outside this "mainstream legal development" than with dissatisfaction with the status quo.¹⁸⁵ Conservative commentators have also recently begun to support constitutional guarantees of rights.¹⁸⁶ Australia's accession to the *First Optional Protocol to the Civil and Political Covenant*, and its acceptance of other international individual and state complaint mechanisms,¹⁸⁷ will allow a formal, international level of scrutiny of rights protection for the first time.

But perhaps what is most crucial is for Australians to develop a new, non-utilitarian notion of democracy, a sense that something is wrong if minorities and disadvantaged groups within our society have less possibility of having their human rights observed than socially dominant groups. Our present complacency about the protection of human rights in Australia is our greatest weakness.

¹⁸³ The Commonwealth Minister for Justice has recently stated that the Labor government has no present intention of introducing a bill of rights. *The Age* (25 May 1992) at 20.

¹⁸⁴ In his address on being sworn in as Chief Justice in 1987, Sir Anthony Mason had argued against judicially enforceable bills of rights. See "New Chief Justice Sees No Need for Bill of Rights" *Weekend Australian* (7-8 February 1987).

¹⁸⁵ Mason, *supra* note 161 at 80.

¹⁸⁶ For example, P.P. McGuiness, "Bill of Rights Robust System of Protection" *Weekend Australian* (30-31 March 1991); and "Law Institute Calls for a Bill of Rights" *The Age* (9 October 1992) at 3.

¹⁸⁷ See *supra* note 139.