

Dissenting Report

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Introduction

Broadly speaking, I support the recommendation of the Committee that the Attorney General amend the *Interpretation Act 1987* to confirm that judges may refer in certain circumstances to international human rights instruments, although I wonder about the value of such a provision in the absence of a Bill of Rights. What benchmark would the judges use to decide a question of human rights that was not part of domestic law, for example? Many treaty laws are subscribed to by the executive government with little or no scrutiny by the legislature. The Committee's other recommendation – to establish a Joint House Scrutiny of Legislation Committee – is more realistic and I support it unreservedly. At present, parliamentary debate on bills that may involve breaches of human rights law takes place without the benefit of any benchmark principles and informed scrutiny of legislation would lift the level of debate.

Unfortunately I am unable to agree with the primary finding of the Committee that the public interest will not be served by a statutory Bill of Rights. This finding is against the weight of evidence received by the Committee, as I hope to demonstrate. It is also inconsistent with the policy platforms of the Australian Labor Party, the Australian Democrats and the Greens and it ignores the proud human rights record of the Liberal Party of Australia. The first Bill of Rights introduced into an Australian parliament was the work of the Nicklin Country Party/Liberal Coalition in Queensland in 1959. I believe the Committee has failed to address one basic question in its deliberations: why is it that the New South Wales parliament, now one of the oldest in the democratic world, is the last (along with other Australian parliaments) to adopt a declaration of the rights of its citizens?

In this dissenting report I hope to expand on some of the positive aspects of a Bill of Rights and address the principal objections. I do so in the context of the devastation and destruction in Washington and New York, apparently the work of Afghanistan-based terrorists. As I write, the flags on the New South Wales Parliament building are at half-mast, a mark of respect to the victims of the United States tragedy. And the world holds its collective breath for the American response. Human rights were never more important in my opinion. Not surprisingly, the fanatical Afghanistan government sponsors appalling atrocities of its own against Afghani people – atrocities on a par with the worst acts of the terrorists it harbours – making Afghans the world's largest refugee group at around 3.6 million people.

Points of Dissent to the Bill of Rights Report.

1. Access to justice

Some of the Afghani refugees find themselves on the high seas aboard the HMAS *Manoora*, a navy transport ship, waiting for the Australian legal system to decide their fate. At issue is a law of the Australian parliament, the *Migration Act*, as interpreted by ancient common law principles including prerogative rights and habeas corpus. The future of the refugees will be decided by judicial reasoning and the doctrine of precedent as directed by centuries of English heritage and tradition. To my mind, a statutory Bill of Rights that codifies the human rights of refugees would be a much more satisfactory benchmark for deciding what happens to these people.

I am not suggesting for one moment that the refugees would fare any better under a Bill of Rights regime than under the common law and statutory regimes that presently operate in Australia.

Refugees worldwide are treated with the bare minimum of human dignity, despite the UN convention on refugees and the right to protection against unlawful detention in international instruments. But the legal process for dealing with people who are the victims of tyrannical governments is much more transparent if we engage human rights principles rather than allow the vagaries of the common law and the inconsistencies of statute law to dominate debate.

People ought to have access to justice and the fundamental requirement is the need to know where to find the law – the benchmark principles – and it follows that those principles ought to be comprehensible. I am aware of the argument that a Bill of Rights is just another layer of law, an argument put succinctly by the NSW Bar Association,¹ but I call this ‘the law is junk argument’ in which the Bill of Rights is reduced to one more piece of junk on the legal junk-pile. In fact, human rights law is a new body of law with an evolving jurisprudence of its own that produces a stronger and more relevant system of common law rules.

Even if the legal junk-pile argument were true, computer technology is such that the law should be readily accessible to ordinary people on the Internet with the Bill of Rights on top of the heap. A Bill of Rights is the human face of the law, reflecting the values that underpin our system of government and the justice system. In the past few days I have been frequently moved by the human stories of devastating loss and the soaring acts of courage and compassion that emerged from the rubble of New York. I saw none of this on the HMAS *Manoora*, its cargo of refugees dehumanised by the banning of television cameras and journalists. The people whose lives we are considering are as far removed as the legal principles that guide us in our deliberations.

2. **Protection of minorities**

One consequence of our failure to recognise basic values of human dignity in the legal system can be seen in the religious vilification that has emerged in the aftermath of the tragic events in the United States. Anti-Muslim threats and attacks have been reported across Australia, including vandalism directed at mosques, schools and Islamic businesses. Muslim women in particular are vulnerable targets of hooligans. We should not be surprised to learn that the common law offers few protections against religious vilification. The common law has always taken a narrow view of fundamental human rights, failing to outlaw slavery, failing to provide equal rights for women and failing to recognise the inherent historical inequality between employers and their employees.²

Statute law offers no more comfort than the common law for those New South Wales citizens who practise the Muslim faith, given that the New South Wales *Anti-Discrimination Act* does not prohibit religious vilification, although I note in passing that homosexual vilification is proscribed. The Australian Federation of Islamic Councils was compelled to issue a press release appealing ‘to the Australian people to act with rationality’. Politicians and the media were asked ‘not to inflame the already volatile situation’. A significant feature of a Bill of Rights is the protection it affords to minority groups such as members of the Islamic community who have absolutely no connection with terrorism.

¹ The NSW Bar Association, *Written Submission* 14 April 2000 and *Oral Evidence* 25 July 2000.

² Justice Murray Wilcox, *An Australian Charter of Rights*, Law Book Company, 1993, as quoted in Justice Rod Madgwick, *Written Submission* 19 May 2000.

As the Australian Federation of Islamic Councils pointed out in its press release, ‘the teachings of Islam do not condone the taking of innocent lives and the destruction of property’. Islam, Christianity and Judaism have shared origins and each religion is a tributary of the same river. Like the proponents of human rights principles, mainstream religions seek to promote justice, equality and the search for truth. Religious faiths and the human rights movement have a shared vision of the inherent dignity of the human person and the expression of this shared vision is the protection of basic human rights by the rule of law. After Israel, Australia is the most culturally diverse country on earth, and the need to recognise and respect people of different cultures and faiths is both immediate and pressing.

The fact is, statute law and the common law have both failed us in our multicultural experiment. Apart from laws preventing religious vilification, laws about racial discrimination are also thin on the ground. A feature of the Australian Constitution that ought to be confronted is the fingerprints of racial prejudice that appear throughout the document. When progress is made in the High Court in cases such as *Mabo* and *Wik*, the legislative response is to lurch backwards towards the security of our past. The *Native Title Act* and the *Wik* amendments clearly reduced the rights of indigenous people in spite of the provisions of the *Racial Discrimination Act*. In 1998 the High Court skirted around the issue in the *Hindmarsh Island* case, although few commentators now would question the power of the federal parliament to pass laws discriminating against a particular racial group.

3. Hosing down the race issue

One right that the Australian Constitution does preserve (although hardly a ‘human’ right) is the right of State governments to pass racist laws. I would like to see a benchmark principle in our legal system that says such laws are always inconsistent with the value we place on human dignity. A provision in a statutory Bill of Rights that prohibits racial discrimination could certainly be removed by subsequent statutory amendment. But at least the debate would take place before the event and in the parliament, rather than the situation we have at present: people being required to justify their existence simply on the basis that they happened to be born into a particular ethnic group. Without a benchmark statement in the legal system that racial discrimination is always wrong, the rule of law is constantly on the back foot.

I raise this issue because of an opinion expressed by the Premier in the context of the Bill of Rights inquiry,³ in which he argues that an Australian Bill of Rights in 1901 ‘would most likely have enshrined the White Australia policy’. This is a perverse view of our constitutional origins and a rewriting of history of David Irving-like proportions. The reason we have no Bill of Rights is precisely because of our racist history. Australia’s draft Constitution as prepared by Tasmania’s Inglis Clark included about 12 citizens’ rights. Most of these rights had to be removed from the draft Constitution because they contradicted our racist factory and immigration laws, not to mention laws discriminating against Aboriginal people. An accurate assessment of our history identifies racial discrimination as a significant aspect of our heritage.

At the Melbourne constitutional convention in 1898, following the removal of the right to equal protection of the laws from Clark’s draft constitution, delegates argued about a suitable substitution

³ Hon R J Carr, ‘The rights and wrongs of law’, *Daily Telegraph*, 21 August 2001, quoting *Written Submission* 31 March 2000.

clause. People who were not British subjects were described as ‘aliens’ and ‘barbarians’. Delegates agreed that ‘there will be races within the nation that remain distinct; that do not blend with our people; that are by their existence and by their rapid increase inimical to the well-being of the whole community’.⁴ The clause finally agreed on to replace the legal equality provision is today section 117 of the Australian Constitution, a provision so incomprehensible it has been largely ignored over the years, and serves no useful purpose in promoting human rights. The High Court has consistently held that there is no right to legal equality in the Australian Constitution.

To my mind, it is a tragedy beyond description that we have made such little progress in our democracy since colonial days. Failure on the part of parliament and the courts to recognise legal equality allows governments made up of the two major parties to build policy on the back of the poor and the disadvantaged. Frequently this policy emerges as racial discrimination and the current refugee crisis is but the latest example.⁵ The way we deal with refugees now stands in stark contrast to the approach taken by the rest of the developed world. In our public policy we fail to recognise refugees as fellow travellers equal in dignity and human rights. Boat people are the modern equivalent of the Chinese in the goldfields, singled out for discrimination because of the fear they will take too much gold. For most of us, prejudice and discrimination can be traced to unreasonable concern about our economic security. This is fertile soil for growing the support needed to maintain a bipolar political system which is focused primarily on the fears of the middle class rather than the human rights of the poor.

4. Fairness as a cultural value

During television coverage of the scenes of devastation from the Pentagon and the World Trade Centre, I was struck by a brave soul carrying a placard that read ‘No revenge, no war.’ It was a challenging message in the circumstances and said something about freedom of expression in the United States. Personal freedom has been an enduring value in America since Thomas Jefferson (1743-1826) wrote the original draft for the Declaration of Independence:

We hold these truths to be sacred and undeniable: that all men are created equal and independent, that from the equal creation they derive rights inherent and inalienable, among which are the preservation of life and liberty, and the pursuit of happiness.⁶

One consequence for the Americans of placing such a high value on personal freedom is that competitive individualism and equality of opportunity tend to be the values that underpin the United States Bill of Rights. The Americans also tolerate a highly politicised judiciary. Australians value fairness above personal freedom and we support equality of outcomes over equality of opportunity. Most of us down under were appalled when the United States Supreme Court decided 5 to 4 on party lines that George W Bush should be president in preference to Al Gore. Americans seemed to demand the right to vote but not the right to have their vote counted. Australians would not want a

⁴ Australasian Constitutional Convention Debates, Melbourne, 3 March 1898.

⁵ See Malcolm Fraser, ‘Stumbling on a path of inhumanity’, *Sydney Morning Herald*, 18 September 2001.

⁶ *Dictionary of Quotations*, Oxford University Press, London, 1985.

Bill of Rights that delivered such a potentially unfair outcome, and the idea that judges should decide political questions is anathema – as the Premier also pointed out in his submission.

I disagree with the Premier, however, that a Bill of Rights ‘will further engender a litigation culture’. Several witnesses to the inquiry, including the Public Interest Advocacy Centre, gave evidence that a Bill of Rights will ultimately generate less litigation, not more. This opinion is based on a few assumptions. One is that a Bill of Rights is a statutory instrument that confirms parliamentary supremacy over the courts. Specific guidelines can be included in the Bill of Rights requiring judges to refer back to parliament any question of incompatibility between the objectives of the legislation and its application in particular circumstances. Another assumption is that the existing body of human rights law will be the principles underlying the Bill of Rights – we are not exactly sailing in uncharted waters. And I, for one, would not give corporations any legal standing under a human rights instrument, as this appears to be the main cause of the plethora of litigation resulting from the Canadian and American constitutional models.

Instead of a litigation culture, I would expect a statutory Bill of Rights to engender a culture of participatory democracy which we have not experienced in Australia. The current divide that exists between politicians and their constituents is attributable in part to the way our political and legal institutions exclude ordinary citizens. Democracy works best when decisions are made collectively. In other words, individual citizens need to feel involved in the democratic process. ‘Law must be made by individuals, with each individual having a political weight equal to that of any other person.’⁷ In a secure society, individuals make decisions knowing those decisions are consistent with the principles that underpin the institutions of government. Without a statement of basic rights and freedoms in the legal system, however, it is not possible to say with any degree of certainty what principles are the driving force behind the democratic process.

Individual citizens are excluded from vast areas of decision-making because the major parties give lip service to most of the important social objectives, including prevention of crime, immigration, full employment, education, housing, health and so on. In a sense, this consensus undermines the democratic process. People do not feel empowered when they are unable to exercise their individual autonomy, which is the basis of all human rights law. As an individual, I am not inclined to recite constitutional principles or otherwise advance the cause of a political system which I know in my heart protects many interests, but not the one that reflects my core cultural value of fairness.

5. Questions of certainty and allocation of resources

The argument is frequently advanced that a Bill of Rights will create uncertainty in the law. My experience is the exact opposite. Human rights law today is well established in the common law world. If we were to follow George Williams’ suggestion⁸ and include in a Bill of Rights only those rights and freedoms that are uncontroversial, the result would be greater certainty in the law, not less. I say this in the context of decisions of the High Court such as *Dietrich*, where the judges ruled that a person charged with a serious criminal offence will not receive a fair trial unless he or she has legal assistance. Although this is the common law as declared by the highest court in the land, it can

⁷ Brian Galligan and Charles Sampford, *Rethinking Human Rights*, Federation Press, Sydney, 1997.

⁸ George Williams, *Written Submission* 28 February 2000 and *Oral Evidence* 10 April 2000.

be overruled by legislation (Commonwealth or State) and must, in any event, be applied on a case by case basis by the courts in a legal system strapped for cash.

Examples were provided to the committee of cases under the New Zealand and Canadian Bill of Rights, where major changes were forced on the criminal justice system as a result of the new rights protection regime. In the Canadian case of Askov, for example, the Supreme Court ruled that the applicant had not been given a trial within a reasonable time, and following this decision, charges against 34,000 people in Ontario were dropped because their cases could not be dealt with expeditiously. This was presented to the committee as an example of an appalling consequence of a Bill of Rights since an additional US\$39 million had to be allocated to the justice system to reduce court delays. To my mind the case demonstrates the positive aspects of a Bill of Rights and I would argue that creating certainty in the justice system about the need to avoid delay is a good thing.

It is true on one level that judges should not be involved in questions about the allocation of resources. On the other hand, judges are part of the government and they need to speak out on behalf of those people who are the victims of injustice and oppression. Uncertainty in the law benefits the government, not citizens, and the more we are compelled to rely on the vagaries of the common law and the ambiguities of statute law, the easier it becomes for the government to divert resources away from the criminal justice system. In a perverse way, the law and order rhetoric feeds on itself when scarce resources force cost-cutting in the courts. I contend that a statutory Bill of Rights would protect the criminal justice system from the kind of neglect by government that leads to cases such as Askov.

Perhaps the most significant feature of a Bill of Rights is that it represents a line in the sand against all aspects of government. Any government literally gives away power when it hands over to the people a charter of basic rights and freedoms, because citizens exercising those rights and freedoms do so at the expense of the government. In other words, a Bill of Rights is enforceable against the government and represents the ultimate watchdog. As Geoffrey Robertson has pointed out, incorporation of the European Convention on Human Rights into British law under the UK Human Rights Act means the courts will be equipped 'with better principles and procedures for identifying and remedying abuses of power perpetrated against citizens by government departments'.⁹

It would be naive to suggest that protecting citizens in this way does not come at a cost to the government. Under an appropriate Bill of Rights model, however, courts would not be given any greater power to determine resource allocation. The opportunity would always be available for parliament to override or modify a court decision under a model such as the UK Human Rights Act. Besides, the impact of court decisions upon resource allocation is likely to be small if the rights and freedoms listed are limited to the more important forms of civil and political rights.

6. The role of judges and politicians

Something more needs to be said about the role of judges and politicians in our system of government and the argument that a Bill of Rights would politicise the judiciary. It is worth repeating that nobody wants to see a politicised judiciary in Australia. I do not believe a Bill of Rights such as the UK Human Rights Act will cause judges to make political determinations,

⁹ Geoffrey Robertson, *The Justice Game*, Chatto & Windus, London, 1998.

because of the need to refer back to parliament any decision incompatible with the legislation. Judges in Australia receive trenchant criticism when they make decisions at odds with the perceived will of the parliament, as demonstrated by the response to the Federal Court decision (single judge) in the case of the refugees aboard the HMAS Manooka.

The Federal Court is not a forum for the bleeding hearts at the expense of taxpayers . . . one wonders how many more times we have got to put up with the charades of Mr Justice North, Mr Julian Burnside [counsel for the plaintiffs] and others.¹⁰

From a historical perspective, judges have always taken a stand against various forms of tyranny, even though they are not permitted to comment about cases outside the court.¹¹ After all, with the rise of parliamentary supremacy in the seventeenth and eighteenth centuries and a diminishing role for the monarch in the affairs of government, the judges came to be identified as protectors of the rights of the people. Judges in Australia, however, have not had the same opportunities to exercise power as their counterparts in the United States and Great Britain since the Australian Constitution has only two human rights of any significance: the right to freedom of religion and the right to trial by jury for certain Commonwealth criminal offences.

It is against this historical backdrop that we need to judge our judges ‘who are a good whipping post because they cannot whip back’.¹² Following the Mabo and Wik decisions in the High Court, our top judges were variously described by politicians of the day as ‘basket weavers’ and ‘a pack of historical dills’. The most strident critics of the judiciary are in fact politicians seeking to make political capital out of the law and order agenda, and one reason we do not have a Bill of Rights, I believe, is that the legal vacuum is easily filled with the empty rhetoric of politicians. If we had a Bill of Rights along the lines of the UK Human Rights Act that referred back to parliament any question of interpretation, public condemnation of any unexpected outcome of the legislation would fall where it belongs – in the political arena.

In 1997 I undertook private research of Australia’s judges on their attitude to a statutory Bill of Rights. I mailed a survey to 454 judges across the country and received an effective response rate of 25 per cent to the following question: If a legislative Bill of Rights were in place which provided for its enforcement in any court, would the legislation improve the delivery of justice in your court? Of the 112 judges who answered the question, 71 per cent said a Bill of Rights would not assist the delivery of justice. Contrast this response of judges with that of the people in the Australian Rights survey¹³ carried out at the Australian National University. Some 1500 citizens responded to the following question: Generally speaking, are you for or against the idea of a bill of rights for Australia which provides these sorts of guarantees [freedom of speech, freedom from discrimination etc] or don’t you have an opinion either way? Results of the survey are as follows:

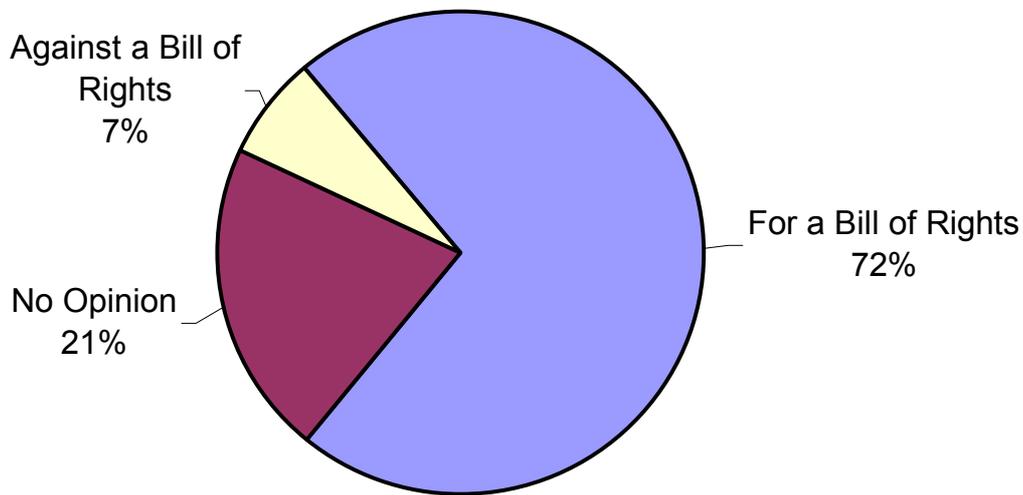
¹⁰ Alan Jones, Talkback Radio 2UE, Sydney, 18 September 2001.

¹¹ See Nicholas Cowdery, *Getting Justice Wrong*, Allen & Unwin, Sydney, 2001.

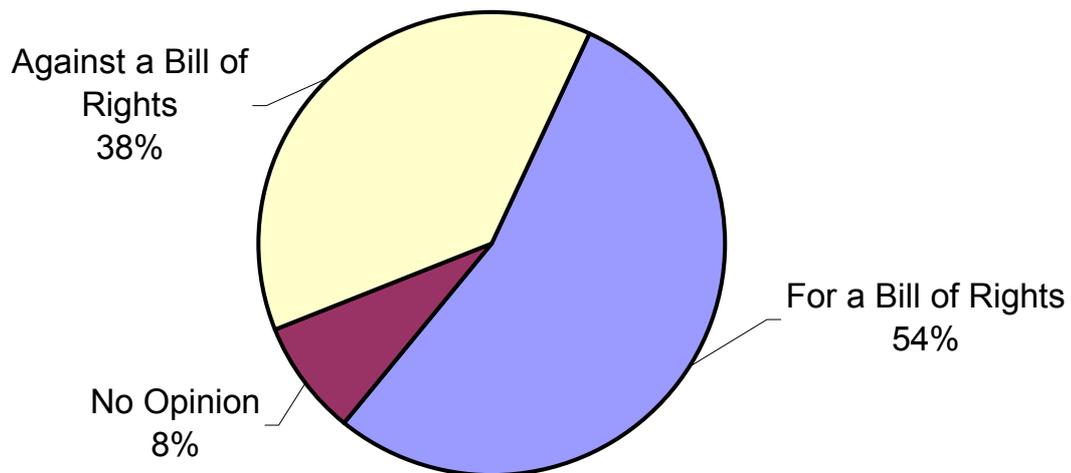
¹² Ibid.

¹³ Brian Galligan and Ian McAllister, *Citizens and Elite Attitudes Towards an Australian Bill of Rights*, in Galligan and Sampford, op cit.

Attitude of Citizens – Australian Rights Survey



Attitude of Politicians – Australian Rights Survey



The same survey asked 549 politicians (roughly half Labor and half Liberal/National Party) the same question and the results were quite different:

It is difficult not to draw the conclusion from these surveys that judges and politicians are out of step with the people. Here is evidence (if we needed it) that the three arms of government – legislative, judicial and executive – are acting in one way on the issue of a Bill of Rights while the people they are supposed to serve expect something quite different. The people have never been given the opportunity to have their say on the question of a Bill of Rights. One question in the Australian Rights survey asked respondents: *Are you in favour of holding a referendum to decide whether Australia should have a bill of rights?* Overwhelmingly, 88 per cent of the general population favoured a referendum.

Judges and politicians need to enter into formal dialogue about human rights if they are to reflect the will of the people. A statutory Bill of Rights along the lines of the UK *Human Rights Act* would provide an ideal forum for the proper consideration of human rights by our lawmakers. A declaration of incompatibility by a judge in a particular case, as the English legislation is expected to operate, will allow parliament to consider the law in the light of practical experience and reasoned argument. This can only serve to advance the human rights cause and promote plain language laws. Far from politicising the judiciary, this process would serve to inform citizens that it is their elected representatives in the parliament who are the ultimate decision-makers. Under the UK legislation, judges are effectively barred from making decisions inconsistent with the intention of the legislation.

One important feature of our system of government is that it recognises the doctrine of separation of powers between politicians and judges. I know judges who will not visit parliament even for a social function for fear of compromising the doctrine. Recently the Premier attended the Chief Justice to raise concerns about sentences handed down to multiple offenders involved in serious sexual assaults. Questions were asked in some quarters about the doctrine of separation of powers but, more importantly, the meeting highlighted the need for reasoned dialogue between the different arms of government. Ideally, such a dialogue would be based on basic human rights principles as codified in a statutory Bill of Rights. Our democracy would be strengthened and the process of government opened up for greater scrutiny.

Conclusion

Like most respondents to the Australian Rights survey, a large number of citizens and interest groups who made submissions to the parliamentary inquiry were in favour of a statutory Bill of Rights. Of the 80 submissions I had the opportunity to peruse, 21 were against the idea of a Bill of Rights, five were neutral and 54 were supportive. These submissions are listed in Attachment 1, which indicates the general level of support for a Bill of Rights and the strength of support. Further analysis indicates legal and political individuals and groups clearly in support of a statutory Bill of Rights. Overall, 68 per cent of submissions supported the idea of a Bill of Rights, suggesting the committee has made its decision without a thorough evaluation of the majority view.

Governments of both major parties have had the opportunity to put the question of a Bill of Rights to a plebiscite or referendum of the people, but other questions are always more pressing. Our democracy is the poorer for this lack of political will. Basic human rights ought to have first priority in a healthy democratic society since these are far more enduring values than the changing political fortunes of parliamentary representatives. This inquiry has added to the work of similar committees in other States and Territories, but the Bill of Rights cause will stall in Australia if political leaders fail to live up to the expectations of the people who elect them. A Bill of Rights is the people's statement of their basic entitlements and I hope I have demonstrated our strong desire to express an opinion at the polls on whether we want to remain out of step with the rest of the common law world on this important issue.

Today the newspapers are filled with talk of war and the precautions that need to be taken to protect life and property. People look at the sky as they have never done, wondering about interlopers in commercial aircraft. I am waiting for the hoary argument that a Bill of Rights will not assist us when the bombs begin to fall. We live in splendid isolation in Australia and bombs are unlikely, but we have always taken a compassionate and generous attitude to the surviving victims of war. Indeed, our nation is built on the backs of migrants and refugees from previous wars, and their descendants. It has always

been the case that we function on a personal level almost in spite of our governments and the racist heritage they continue to promote in subtle and unsubtle ways.

As for the future, our human rights record and our poor relationship with the government will continue to mirror our colonial past until we acknowledge in our legal system the paramount importance of basic human rights principles.

Peter Breen MLC
September 2001