

**National Security versus Civil Liberties:
Towards an Australian Bill of Rights**

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From *A Man for All Seasons* (Bolt 1967:147):

MORE: And go he should if he was the devil himself until he broke the law!

ROPER: So now you'd give the Devil the benefit of law?

MORE: Yes. What would you do? Cut a great road through the law to get after the devil?

ROPER: I'd cut down every law in England to do that!

MORE: Oh? And when the last law was down, and the Devil turned round on you - where would you hide, Roper, the laws all being flat?... Yes, I'd give the devil the benefit of law, for my own safety's sake.

Why the urgent need for an Australian Bill of Rights?

Issues of border security were already at the forefront of the political agenda

(Brennan 2003) when the events of September 11 and the Bali bombings shocked the

Australian political landscape. Amidst this climate of fear, legislation was rushed¹

through Parliament to combat the 'terrorists'. The resulting terror laws, which

include new state powers to detain citizens not accused of crimes and the reversal of

the burden of proof on the state,² have been dubbed "some of the most draconian

'counter-terrorism' measures in the western world" (Hocking 2004; also Evans 2003).

Unfortunately, the frantic rush to pass legislation to protect the state may have

evoked Sir Thomas More's (Roper 1967:147) fear that in 'cutting down' the rule of

1 See the complaints by the Opposition Leader about the poor processes and short timeframes to consider legislation in *Security Legislation Amendment (Terrorism Bill) 2002 [No. 2]*, second reading, *Hansard*, HR, 13 March 2002, p. 1142-3. See also

2 See, for example, *Security Legislation Amendment (Terrorism) Act 2002* s 80.1 (1A) where a 'defendant bears an evidential burden' to prove that an act of providing humanitarian aid was not intended to support an act of treason. The reversal of the burden of proof is not an unusual practice for serious criminal offences under the *Criminal Code Act 1995*, and this burden is mediated by application of the balance of probabilities. However, under the *Australian Security Intelligence Organisation (Terrorism) Legislation Amendment Act 2003* s 34G (4), a 'defendant bears an evidential burden' to prove that they do not have information relating to a 'terrorist' act. This section bears a punishment of 5 years imprisonment and overrides the supposition of the right to remain silent.

law to 'get after the devil', citizens have 'nowhere to hide' from the abuse of state power.

But was it simply a case of 'better the devil we know' that inspired Parliament to pass legislation that may amount to usurping the rule of law (Hocking 2004:241), specifically the implicit protection from arbitrary arrest³, for the sake of national security? For some time, proponents of an Australian Bill of Rights have advocated a sense of political urgency (see, for example, Liverani 1995; Williams 1999; 2001) to eliminate the vagaries concerning the rights and freedoms of Australian citizens. In the interim, the concept of a 'war on terror' has apparently justified the need to maintain national security at the expense of civil liberties (Hocking 2004; Kingston 2004). Debate over the terror laws has raised such a multitude of issues that it is timely to reconsider an Australian Bill of Rights so that Parliament never again uses a threat to our freedom to consider taking our very freedom away.

On one hand, Australia is the only common law country in the world that does not have a Bill of Rights (Williams in Hocking 2004:viii; Kingston 2004:389). While we are constantly reminded of our responsibilities in obeying the law, which is increasingly enforced by the instruments of the state, there is no one statute or constitutional statement that sets out the basic rights and freedoms of the Australian people. On the other hand, the Prime Minister (Howard 2003; Kingston 2004:389) believes that our civil liberties are adequately protected by the 'three great pillars' of Australian

3 Arbitrary, in that a person can be arrested and detained for questioning in relation to a terrorist act, even if they are not suspected of actually committing a crime under the various laws.

democracy; that is, a 'vigorous Parliamentary system...[, an] incorruptible judiciary[, and a free and sceptical media'.⁴ Nevertheless, the effectiveness of constraints on state power to protect civil liberties cannot be taken for granted by Australians indefinitely (Saunders and Le Roy 2003:13). Although attempts by the Howard Government to exert power over citizens' implied rights to 'freedom of expression, freedom of association, protection from arbitrary detention, [and access to]... independent legal advice' (Hocking 2004:cover text) have largely been defeated by Parliament,⁵ we remain complacent about civil liberties at our own peril.

This paper argues that an Australian Bill of Rights is necessary to provide 'a legally recognised base upon which citizens [can] assert a claim to rights' and to ensure that these rights are 'above politics and arbitrary government action' (Williams 2000). The paper concentrates particularly on the need to formalise civil rights in the light of the perceived threat to national security, rather than prescribing the means of implementing an Australian Bill of Rights. In doing so, this paper proposes legal positivism (Cook 2004:34), in the form of a Bill of Rights, as an achievable approach to protect civil liberties in Australia. While taciturn toward the purely legal and administrative aspects of the debate, this paper is unashamedly written from the perspective of contemporary Australian citizenship.

4 It is interesting that the Prime Minister's 'three great pillars' have changed over time. Previously, Howard (1997) proclaimed that the 'three great pillars' of a successful society were free speech, a vigorous democratic system and an incorruptible judiciary.

5 See the Opposition Leader's statement that the government had 'removed the offensive parts' of the original bill in *Security Legislation Amendment (Terrorism Bill) 2002 [No. 2]*, *Hansard*, HR, 13 March 2002, p. 1147.

A War on Terror: what does it mean?

A 'war on terror' (Hocking 2004:7) is not limited by scope to a particular nation or identifiable enemy. Within this elusive concept, national security encompasses not only geographic borders, but the borders of philosophy, politics, ideology and dissent (Hocking 2004). For example, during the debate of the *Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]*, the Coalition claimed that the Opposition Leader⁶ 'lack[ed] patriotism,... a commitment against terrorism... [and was] anti-Australian'. This type of language from our political representatives leaves us 'wide open to a totalitarian state' (Hocking 2004:248), where sensible public debate on democracy and citizenship is closed by the retort of '[e]ither you are with us, or you are with the terrorists'. The totalitarian nuances that appear in the 'language of terrorism' are a result of its constant 'apocalyptic references', where the "discourse of 'terrorism' supports the argument that anything is acceptable in countering terrorism" (Hocking 2004:7).

Not surprisingly, where the 'interests of national security have been unassailable' (Hocking 2004:11), civil liberties have been largely ignored. For example, criminal legislation⁷ sets out that peaceful and lawful advocacy, protest, dissent or industrial actions are not illegal under the terror laws. However, a planned street march in November 2002 was banned by the NSW Police Commissioner 'because of the risk to

6 See Cadman, Member for Mitchell, in the debate surrounding the *Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]*, *Hansard*, HR, 13 March 2002, p. 1148.

7 See Schedule 1—Amendment of the *Criminal Code Act 1995* s 100.1(3)

members of the public should protestors become violent' (Hocking 2004:237-8). This represents the underlying power of discourse where 'inconsistent and arbitrarily applied labelling' of 'terrorism' by security and police officials (Hocking 2004:5) can be used to ban political action that may actually be legal and peaceful. Moreover, this type of preventative punishment is reminiscent of the actions of totalitarian states (Kitto cited in Hocking 2004:248).

For our purposes here, and although the legal definition is expounded in the various laws, 'terrorism' (and therefore 'terrorists') can be identified by the use of the state's 'counter-terrorism' measures, "rather than [by] any objective features within the act of 'terrorism' itself" (Hocking 2004:6). For example, the bombing of the Sydney Hilton in 1978 was seen as an act of terrorism (Hocking 2004:83) that enabled the unprecedented use of the military to provide internal security. However, the bombings of Family Court buildings and the assassination of a Family Court judge during the 1980s "were never officially designated 'terrorism'", therefore highlighting the 'political dimension to labelling' terrorist action (Hocking 2004:5-6).

Unfortunately, normalisation⁸ of extreme measures is often too readily institutionalised in times of emergency (Hocking 2004:89,237). This process has been facilitated by extraordinary cooperation between the states and the federal government in relation to internal security matters, particularly where the task of

8 See the argument by the Opposition Leader about the need for proper scrutiny to ensure hasty attempts at normalisation did not interfere in the due process of considering legislation in *Security Legislation Amendment (Terrorism Bill 2002 [No. 2]*, second reading, *Hansard*, HR, 13 March 2002, p. 1142-3.

'policing terrorism' has meant that state police forces have maintained close and often unregulated relationships with national security bodies. It has been argued (Hocking 2004:10) that these relationships have actually contributed to current attempts to curtail the 'sacrosanct' notions of trial by jury and the presumption of innocence in the conduct of the 'war on terror'.

So how successful have the terror laws been in capturing terrorists? The unprecedented use of telecommunications interception powers enabled ASIO to monitor 'keystroke by keystroke' electronic communication by alleged terrorist Faheem Lodhi in Sydney, to prevent a 'terrorist' plot to disrupt Australia's energy supply network (Connelly 2004). It has also been alleged that Lodhi had links with Willie Brigitte, who is imprisoned in France on terrorist charges, so it is reasonable to assume that ASIO's new powers are assisting in preventing terrorist activities to some degree. The unfortunate consequence of such surveillance techniques is a lack of protection for innocent Australian citizens from being monitored by any government agency should they be vaguely interested in our political activities. It is inevitable, however, that even a perceived threat to our freedom means that we cannot be truly free, especially where the rule of law is usurped in the interests of the state.

The Parliament: Where is the rule of law in Australia?

The rule of law in Australia is inextricably linked to the Constitution (Saunders and Le Roy:11) and in concert with the separation of executive, legislative and judicial power, is traditionally assumed (Cook 2004:3) to protect citizens from the abuse of power by the state. In practice, the rule of law is not entirely entrenched in the Australian Constitution because it 'does not preclude retrospective legislation and its implications for arbitrary legislation are unclear' (Saunders & Le Roy 2003:12). Moreover, a paradox exists where the Parliament, on which the rule of law depends, is also a threat to it (Saunders & Le Roy 2003:9), should Parliament achieve ultimate power.

According to Owen Dixon (Saunders & Le Roy 2003:8), arguably Australia's most eminent judge, the institution of Parliament is sovereign, subject to the Constitution, in that it represents the people, and is credited with the historical evolution of the rule of law with the aid of the common law courts. In this sense, the alliance between Parliament and the courts denies 'to the executive the capacity to make law, as defined in the common law'. The judiciary, then, interprets and applies statutes, mindful of the intentions of Parliament, to preserve the central principles of the common law and to declare the limits of executive power.

Within the historical context described by Dixon, the threat posed by Parliament to the rule of law is not insurmountable if both government and Parliament

'understand, respect and give priority to the rule of law beyond other more specific political gains' (Saunders and Le Roy 2003:9). To function appropriately, the system depends on self-restraint in the interests of constitutionalism, and is made even more stable when 'reinforced by an informed and vigilant citizenry' (Saunders & Le Roy 2003:9). With the additional scrutiny of a free and independent media, the historical context described by Dixon reflects the implicit assumptions of the Prime Minister's (Howard 2003) 'three great pillars' that protect the rights of Australian citizens.

If we consider each of the Prime Minister's 'three great pillars' in turn, however, it is not difficult to see why an Australian Bill of Rights is not only necessary, but timely to preserve our civil liberties. Howard's (2003) claim that the Parliamentary system is vigorous does not stand scrutiny, if for any reason, that the rule of law has been usurped as a result of the terror laws. Moreover, and in the rush to enact legislation, Parliament 'forgot' to prevent terrorists being allowed bail (AAP 2004) when drafting the terror laws. How can our civil rights, which are obviously not high on Howard's political agenda, be protected by a vigorous Parliamentary system that was not even able to get the government's own strict terror law agenda right?

Rather than considering the need to reform the Parliamentary system, it is worth looking at the way in which the Howard Government has conducted itself in governing Australia, as its behaviour has certainly not helped to improve the public perception of politicians, and by implication, the Parliament. For example, the integrity of Australian political institutions is increasingly dubious as information

about the way that the government has behaved is disclosed to the public by the media. For example, the leaked 'Defence Scandal' (Lyons 2004) report informed us about the Australian intelligence community and how the 'Jakarta lobby' had failed to adequately assess the security risk in Bali. This scandal followed the lies surrounding the MV *Tampa* and the 'children overboard' debacle that potentially damaged Australia's human rights record. Not to be outdone, the Howard Government attempted to hide⁹ a Human Rights and Equal Opportunity Commission (HREOC) report (ABC 2004) that informed us of the way Australia treats children in detention centres. Individual moral integrity and the subsequent risking of one's career appear to have replaced the responsibility typically borne by government institutions to behave ethically.

Legal Positivism: defining our rights

So why is legal positivism a rational approach to dealing with the current national security versus civil liberties dilemma? To answer this question, we must consider the theoretical perspectives to the relationship between the law and government. Put simply, the role of Parliament is sovereign, in that it represents the citizens. While the Westminster system historically has provided this 'sovereignty of the people' concept in its functioning, the manner in which the Australian system has developed seems to have outdated the original purpose of Parliament in that it appears no

⁹ Howard (2001) specifically stated that 'we're an open society and if the Human Rights and Equal Opportunity Commission has a statutory... power... to carry out an inquiry it won't be tripped up or derailed by the Government'.

longer able to keep the executive in check. One of the fundamental problems with this approach is that the House of Representatives, or 'the people's house', should be an area of first review of the executive. If we consider the issues raised by the terror laws debate, however, it is obvious that the people's house is more appropriately the house of the government of the day. Particularly with the current government, where voting is strictly controlled, the people's house is more or less a testing ground for gauging the opinion of the Senate and, through the media, the people. However, while the role of the Senate historically may have been to represent the interests of the states, this role has evolved to include an ad hoc checking function to keep the government on the 'straight and narrow'. The Senate, therefore, has a role in mediating legislation and 'is often our last protection against draconian laws' (Williams 2003). The current government argues that the Senate is stifling the government's ability to pass legislation. Governments, which often claim to hold a mandate, cite this stifling effect as a reason to reduce the Senate's power. Citing section 57 (Evans 2004) of the constitution as an area of focus for reform of Parliament, both the Coalition and Labor appear willing to change our current system of government so that the Senate, and in particular the minor parties, no longer have the power to amend the government's legislation.

Troper (in Saunders and Le Roy 2003) discusses the merits of the 'positivist' position, where the state is not subordinate to natural law, but to positive law, particularly a Bill of Rights. A positivist approach avoids the vagaries of natural law and does not

require a belief in one form or another of a superior or universal truth (especially in relation to human rights), and that this is not an appropriately reliable basis for individual 'legal security', especially while the West is reinventing, to some extent, a 'crusade' (Hocking 2004:7) against predominantly Muslim militant groups. Not having a Bill of Rights means that ordinary Australian citizens must rely on the High Court's interpretation of civil rights implied in the Constitution. This effectively limits the ordinary citizen's accessibility to the means of protecting civil rights (Sackville 2003).

Pragmatism: the politics of popular prejudice?¹⁰

Mackay (1993:169) argued in the early 1990s that a 'level of anxiety about politics' existed in Australia at that time and that 'political philosophy [was] being largely replaced by pragmatism and the politics of personality'. A decade later, people are still anxious as political philosophy is relegated to pragmatism. Pragmatic and populist John Howard (Barns 2003:121; Mackay 2001) appears to have skilfully fused Machiavellian approaches to politics to 'divide and conquer' (Kingston 2004) the public service, while using our patriotic nature (Kingston 2004:49) to build an intellectual panopticon that is effectively reforming public morality through a grand

¹⁰ The concept of the politics of popular prejudice (see Lees 2003) for the purposes of this paper relates to attitudes reflected through popular anecdotes. This includes the current government's rhetoric (see, for example, Greenfield & Williams 2003:281) that directs attention to those who do not represent the so-called majority interests. For example, typical targets of popular prejudice include single mothers, the unemployed, the homeless (all who are targeted for being a drain on the national 'purse'), so-called left wing extremists and environmental activists who publicly protest government policies and the Aboriginal and Torres Strait Islander Commission (ATSIC). It is argued that the war on terror has added any Australian citizen of non-Western origin (or, for that matter, anybody who disagrees with the war on terror) to the ranks of the typical targets of government rhetoric.

scheme of discipline (Foucault in Merquior 1991:91;Ball 1990:30-1). So what does it mean to be pragmatic? In a Machiavellian sense, pragmatic may be defined as 'solving problems in a way which suits the present conditions rather than obeying fixed theories, ideas or rules' (Botha 2002). For example, consider John Howard's pragmatic approach to dealing with issues of a moral nature, such as Opposition Leader Mark Latham's policy on the war in Iraq. In Howard's (2004:3) words, 'cutting and running' from Iraq would result in 'handing over the country to the terrorists'. Not to mention that supporting the 'Latham policy' (Howard 2004) would result in crude oil prices increasing. This example of pragmatism overlooks the fact that Australia was participating in an invasion of a foreign country of no direct threat and without the support of the United Nations. When no evidence of Iraqi weapons of mass destruction was found, John Howard's (cited in Kingston 2004:51) political 'spin' changed as he addressed Australian soldiers returning from Iraq: 'You went abroad in our name in a just cause, and you joined others in liberating an oppressed people'.

Unfortunately, Prime Minister Howard (2003) 'belong[s] to that group of Australians who is resolutely opposed' to Australia 'entrench[ing] formally in its law a Bill of Rights' and it is unlikely that such a bill will be forthcoming unless the subject is elevated on the political agenda. The current culture of pragmatism, coupled with the speed with which legislation is passed by Parliament, means that the ability of the Parliamentary system to be truly vigorous has been reduced. The Senate's ability

to consider legislation is also under threat, in that John Howard (Williams 2003) is currently attempting to thwart the Senate's power through measures to reduce the need for a double dissolution election to pass legislation that is blocked by the Senate (Evans 2004).

The advent of the terror laws has revealed the darker side of our collective opinions on what it means to be an Australian citizen. We seem to have regressed on our tolerant and multicultural society in our war against an elusive and predominantly Muslim enemy. Not surprisingly, the Coalition (Barns 2001) Government picked up on the politics of popular prejudice that were revealed by the brief electoral success of Pauline Hanson's One Nation and incorporated these old fashioned and unspoken 'White Australia Policy' values into public policy. John Howard has skilfully used this collective sentiment to reinforce mainstream views along lines similar to the discourse of the war on terror – 'either you are with us [the mainstream] or you are with the terrorists [or special and sectional interests]' (see Barns 2001).

DEMG: The politics of popular prejudice in action

In May 2003, a confidential government report revealed that the Defend and Extend Medicare Group (DEMG) was being run by professional protestors who were 'anarchists and extreme socialists' (Moore and Miranda 2003a), after DEMG had staged a protest rally to save the Medicare system. Moreover, the government accused Labor frontbencher Martin Ferguson (Moor 2003) of supporting the group

and Health Minister Tony Abbott criticised Opposition health spokesperson Julia Gillard of supporting DEMG. The health activists deemed responsible for the group were actually named and profiled in the confidential government report (Moor & Miranda 2003b). Undoubtedly, the records of some of the leaders (see Moor & Miranda 2003b) of DEMG indicated a history of violent protest that would lead a reasonable person to doubt their motives for being involved with the activist group, however, this was not the case for all the leaders. In fact, two of the leaders were 'lumped' in the same category for simply being 'strongly against any Australian involvement in the war against Iraq' and for approving of a '14 year old daughter marching in anti-war rallies'.

A *Melbourne Herald Sun* editorial (6 December 2003) stated that intelligence officers "say 'serial activists' have chosen Medicare as their next ideological battleground". Unfortunately, such political labelling is too convenient for a government to attack dissenters as 'anarchists and socialists'. Nevertheless, by doing so, the support of popular prejudice against 'serial activists' is preventing political action on issues of community concern, not to mention that if any of us were to take a stand and protest, we now run the risk of being labelled 'disruptive' and therefore subject to profiling by the government simply because of our ideology or association with 'disruptive' groups. It is interesting that both Ghandi and Mandela (Hocking 2004; Kingston 2004) were labelled criminals and terrorists before being acknowledged for their bravery in resisting oppression by the state. Without a Bill of Rights, Australian

citizens are at risk of similar labelling simply for voicing an opinion against the government's (and therefore mainstream) opinion. These are hardly the ideal circumstances for a 'vigilant and informed citizenry', a requirement for our system of government to work effectively.

What, then, are the boundaries for ideological expression within the context of the 'war on terror'? What is to stop the government labelling protestors as 'terrorists', or simply manipulating popular prejudice to control citizens' political actions? Without a Bill of Rights, there are only the 'three great pillars', one of which has already been shown to be less than adequate. If we consider the second 'great pillar', namely the judiciary,¹¹ our civil liberties are no better off. For example, Justice Dowd (Gibbs 2004) stated in 2002 that Australia's terrorist legislation was specifically 'aimed at Muslims'. Both Carr and Howard (Gibbs 2004) attacked Justice Dowd for his comments, saying that he was 'irresponsible' and was 'ignoring the separation of powers' by attacking the legislation 'in a very partisan way'. Justice Dowd has since quit the Supreme Court bench and is citing the personal attacks by Carr and Howard as his reason for leaving. While the judiciary may be 'incorruptible', it is certainly not beyond the powers of the government through persuasion.

¹¹ It is not intended to suggest that the judiciary is inadequate in protecting civil liberties, particularly given the trend of judicial activism that has developed in interpreting the Constitution (see, for example, Lindell 1994) and that the judiciary is more respected than politicians and the media (see Colebatch in Howard 2001a). Nevertheless, it is argued that the judiciary alone is not adequate to protect civil liberties, particularly given both Carr's (2001) and Howard's (2001) opinion that civil rights is a legislative responsibility.

The third 'great pillar' of Australia's democracy, the media, is even less able to assist us in holding the government accountable for its actions. For example, the majority of the Australian media is effectively under the control of Rupert Murdoch and Kerry Packer. Combined with the Howard Government's willingness to amend media ownership legislation (Kingston 2004), it is reasonable to assume that the media is not sufficiently reliable to advance the interests of Australian democracy. Moreover, and while it has been claimed (Cordeaux in Howard 2001b) that an element of paranoia exists within the community about media ownership, that the media has an impact on the political process¹² is undeniable (Flint 2001; Herman & Chomsky 1994; Hocking 2004; Kingston 2004; Tiffen cited in Cunningham & Turner 2002; Warhurst & Simms 2002).

A Bill of Rights: Abdicating our responsibilities?

NSW Premier Bob Carr (2001) argues that Australia should avoid a Bill of Rights at all costs as it would only engender a culture of litigation¹³ and an abdication of responsibility. Put simply, Carr (2001) believes that a Bill of Rights, whether through 'legislative enactment or constitutional entrenchment[,]... transfers decisions on major policy issues from the legislature to the judiciary'. Carr (2001) states that '[p]arliaments are elected to make laws [and] they make judgements about how the rights and interests of the public should be balanced'. Moreover, Carr (2001) believes

¹² The *Broadcasting Services Act 1992* s 4(1) recognises a 'degree of influence that different types of broadcasting services are able to exert in shaping community views in Australia' (see Flint 2001).

¹³ John Howard (2001) agrees with Bob Carr on the issue of a culture of litigation developing as a result of a Bill of Rights.

that a Bill of Rights 'is an admission to the failure of parliaments, governments and the people to behave in a reasonable, responsible and respectful manner'. At the time Carr's (2001) article was written, his arguments may well have swayed many people to believe that a Bill of Rights would only increase the litigation concerning 'naked strollers, vegetarian menus, and new ways to avoid losing your licence for drink driving'. In the wake of the terror laws, however, the Australian Parliament has shown that it is failing to adequately protect our civil liberties, and its sovereignty is under threat from a government that is committed to absolute power.

Another argument that is often used to refute a Bill of Rights is the inherent protection of liberty under natural law. Not only is this a farce, but the vagaries of natural law just add to the 'inaccessibility' (Sackville 2003) of contemporary civil rights law in Australia. Sackville (2003) argues that a lack of constitutional discourse requires Australians, when compared to Americans, to rely upon lawyers and specialists to understand their fundamental civil rights. From the perspective of Australian citizenship, it is argued that these circumstances result in inadequate protection from the state. How educated must we be before we can understand what our civil rights are? Moreover, if natural law inherently protects our liberties, why was it such a surprise (Carr 2001) when the New Zealand Parliament found 'that it was subject to the Bill of Rights and had to apply natural justice'? The answer is that a Bill of Rights will improve the protection of our rights, making parliamentarians more accountable for their actions than ever before.

Conclusion

As the only common law country in the world that does not have a Bill of Rights, the arguments against legal positivism in clearly enunciating the rights *of* the people and *to* the people are insufficient. Even if a society better educated about its civil liberties were to engage in a litigious culture, would that not mean that parliamentarians had to work harder at their jobs? Besides, any Centrelink customer will be able to tell you that 'work' is good for our self esteem. Rather than be constantly reminded of our responsibilities in obeying the law, and attempting to rule by force, one statute that sets out the basic rights and freedoms of the Australian people will provide an avenue for Australians to defend their civil liberties, rather than relying on the good intentions of judicial activism. It is not enough to leave our freedom to a not-so-vigorous Parliamentary system, scrutinised by a self-interested media that prays on the politics of popular prejudice.

We can no longer take for granted our rights to express ourselves and associate freely, while being protected from arbitrary detention and with access to independent legal advice. Our own democracy is at stake. This paper has argued that an Australian Bill of Rights is necessary to ensure citizens can assert their claim to civil rights and to ensure these rights cannot be infringed by politics and arbitrary government action. While it is the realm of experienced law makers to establish the means of implementing an Australian Bill of Rights, legal positivism in the form of a Bill of Rights is an achievable approach to protect civil liberties in Australia. If we

continue to rely on ambiguous concepts to protect our civil liberties, the future of Australian citizenship remains at the whim of those in power, whether those in power are our legitimate government or our national enemies. An Australian Bill of Rights will effectively give the power back to where it rightfully belongs – to the Australian people. This may challenge the executive and frustrate the law makers, but isn't it the people (through Parliament) who are sovereign? Rather the government is held accountable to Parliament, as rightly it should be, than individuals are exposed to abuse by state power. If we can spend billions of dollars on fighting elusive terrorists to defend the state, surely it is worth 'fighting' for our civil liberties in a less devastating field of battle?

Overall, the Prime Minister's three great pillars of democracy are inadequate to protect civil liberties in Australia. Nevertheless, the impact of the events of September 11 and the Bali bombings have justifiably raised our awareness of the fragile nature of national security in the face of an elusive enemy. However, protecting the state should never result in 'cutting down' the rule of law to 'get after the devil', and a Bill of Rights will provide citizens with better protection from the abuse of state power. Rather than 'better the devil we know', it is better we establish laws that protect us from the 'devil', in whatever form the 'devil' may appear. To remain accountable and transparent to the people in its actions, Parliament must act to eliminate the vagaries concerning the rights and freedoms of Australian citizens so

that it never again attempts to justify taking away our freedom. The very threat of terrorism is doing well enough at that already.

Bibliography

Australian Associated Press (AAP) (2004) '“Serious Error” in Federal Terror Laws' in *The Australian*. 25 June 2004. URL:

http://news.com.au/common/story_page/0,4057,9949817%255E1702,00.html

Australian Broadcasting Corporation (ABC) (2004) *Child detention breaches UN convention: human rights report*.

URL: <http://www.abc.net.au/news/newsitems/s1104160.htm> (Accessed 8 May 2004).

Australian Government (2004) *Protecting Australia Against Terrorism*. Canberra: Department of Prime Minister and Cabinet. URL:

http://www.pmc.gov.au/protecting_australia/index.htm (Accessed 26 June 2004)

Australian Government (2004) *Legislation Proposed for Introduction in the 2004 Autumn Sittings*. Canberra: Department of Prime Minister and Cabinet. URL:

<http://www.pmc.gov.au/pdfs/proposedlegislation.pdf>

Ball, S.J. (ed) (1990) *Foucault and Education: Disciplines and Knowledge*. London: Routledge.

Barns, G. (2001) 'Thinkers stick it to populist PM' in *The Sydney Morning Herald*. 21 October 2001. URL: www.crikey.com.au/politics/2001/10/21-barnsmackay.html (Accessed 26 June 2004).

Bolt, R. (1967) 'A Man for All Seasons: A Play in Two Acts'. In *Three Plays*. London: Heinemann.

Botha, A. (2002) 'Glossary' in *Niccolo Machiavelli – The Prince*. URL: <http://www.the-prince-by-machiavelli.com/glossary/pragmatism.html> (Accessed 26 June 2004).

Brennan, F. (2003) *Tampering with Asylum: A Universal Human Problem*. St Lucia: University of Queensland Press.

Carr, B. (2001) 'The Rights Trap: How a Bill of Rights Could Undermine Freedom' in *Policy* magazine, Centre for Independent Studies, Winter 2001 edition. URL:

<http://www.cis.org.au/Policy/winter01/polwin01-4.htm> (Accessed 2 June 2004).

Connolly, E. (2004) 'Documents link suspect to Brigitte' in *The Age*. 11 June 2004. URL:

<http://www.theage.com.au/articles/2004/06/10/1086749839472.html?from=storylhs&oneclick=true#> (Accessed 21 June 2004).

Cunningham, S & Turner (eds) (2002) *The Media and Communications in Australia*. Sydney: Allen and Unwin.

Evans, H. (2004) 'The Australian Parliament: Time for Reformation'. Speech given to the National Press Club by the Clerk of the Senate on 24 April 2003. URL: <http://www.smh.com.au/articles/2003/06/09/1055010921399.html?oneclick=true> (Accessed 19 June 2004).

Evans, H. (2004) 'The Australian Parliament: Time for Reformation'. Speech given to the National Press Club by the Clerk of the Senate on 24 April 2003. URL: <http://www.smh.com.au/articles/2003/06/09/1055010921399.html?oneclick=true> (Accessed 19 June 2004).

Flint, D. (2001) *How the News is Made In Australia: Some Personal Views*. URL: <http://www.onlineopinion.com.au/view.asp?article=1119#bio> (Accessed 26 June 2004).

Gibbs, S. (2004) 'PM, Carr attacked as judge pulls plug' in *The Sydney Morning Herald*. 27 July 2004. URL: <http://www.smh.com.au/articles/2004/07/26/1090693902143.html?oneclick=true#> (Accessed 27 July 2004).

Greenfield, C. & Williams, P. (2003) 'Limiting Politics: Howardism, Media Rhetoric and National Cultural Commemorations' in *Australian Journal of Political Science*. Vol 28 No. 2 July 2003, pp. 279-97.

Herman, S. & Chomsky, N. (1994) *Manufacturing Consent: The Political Economy of the Mass Media*. London: Vintage.

Hocking, J. (2004) *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy*. Sydney: UNSW Press.

Howard, J. (1997) 'Address at the An-Nahir Newspaper Official Cocktail Reception'. Bankstown, Sydney, 16 December 1997.

Howard, J. (2001a) 'Question and Answer, National Press Club Address'. National Press Club, Canberra, 25 January 2001.

Howard, J. (2001b) 'Radio Interview with Jeremy Cordeaux, 5DN, 29 November 2001.

Howard, J. (2003) 'Address at Ceremonial Sitting to Mark the Centenary of the High Court of Australia'. Supreme Court of Victoria, Melbourne, 6 October 2003. URL: <http://www.pm.gov.au/news/speeches/speech514.html> (Accessed 28 May 2004).

Howard, J. (2004) 'RBA man warns of oil threat' in *Australian Financial Review*, 31 May 2004.

Justice and Community Safety (2004) *ACT Bill of Rights Consultative Committee: Arguments for and against a Bill of Rights*. Canberra: ACT Government. URL: <http://www.jcs.act.gov.au/prd/rights/arguments.html> (Accessed 21 June 2004).

Kingston, M. (2004) *Not Happy, John: Defending Our Democracy*. Penguin: Camberwell.

Kirby, M. (2000) *International Law: Down in the Engineroom*. Address to the Opening Session of the Australian and New Zealand Society of International Law and the American Society of International Law Joint Meeting held in Sydney, 26 June 2000.

Lees, M. (2003) 'The Progressive Alliance will fill the political vacuum in Australia's centre' in *On Line Opinion*. 1 May 2003. URL: <http://www.onlineopinion.com.au/view.asp?article=312> (Accessed 6 June 2003).

Lindell, G. (ed) (1994) *Future Directions in Australian Constitutional Law*. Sydney: The Federation Press.

Liverani, M.R. (1995) 'A Bill of Rights Now, Proponents Urge' in the *Law Society Journal*, (1995) 33 (3) LSJ 42.

Lyons, J. (2004) 'Defence Scandal' in *The Bulletin*. 20 April 2004.

Merquior, J.G. (1991) *Foucault*. London: Fontana Press.

Moor, K. (2003) 'PM accuses Labor MP of anarchy link' in *Melbourne Herald Sun*. 6 December 2003. URL: <http://melbimc.nomasters.org/news/2003/12/58623.php> (Accessed 25 June 2004).

Moor, K. & Miranda, C. (2003a) 'Government accuses DEMG of having anarchist agenda' in *Melbourne Herald Sun*. 5 December 2003. URL: <http://melbimc.nomasters.org/news/2003/12/58623.php> (Accessed 25 June 2004).

Moor, K. & Miranda, C. (2003b) 'Health activists on file' in *Melbourne Herald Sun*. 6 December 2003. URL: <http://melbimc.nomasters.org/news/2003/12/58623.php> (Accessed 25 June 2004).

Sackville, R. (2003) 'The 2003 Term: The Inaccessible Constitution'. Paper presented to the 2004 Constitutional Law Conference, University of New South Wales, Sydney, 20 February 2003.

Saunders, C. & Le Roy, K. (eds) (2003) *The Rule of Law*. Sydney: The Federation Press.

United Nations (1976) *International Covenant on Civil and Political Rights*. URL: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (Accessed 25 June 2004).

Warhurst, J. & Simms, M. (eds) (2002) *2001: The Centenary Election*. Brisbane: University of Queensland Press.

Williams, D. (2002) 'Against Constitutional Cringe: The Protection of Human Rights in Australia'. Speech at the Australian Conference on Bill of Rights, NSW Parliament Theatre, Macquarie Street, Sydney, 21 June 2002.

Williams, G. (1999) *The Federal Parliament and the Protection of Human Rights*. Research Paper 20 1998-99 dated 11 May 1999. URL: <http://www.aph.gov.au/library/pubs/rp/1998-99/99rp20.htm> (Accessed 24 June 2004).

Williams, G. (2000) *A Bill of Rights for Australia*. Sydney: UNSW Press. Summary from URL: <http://www.gtcentre.unsw.edu.au/bills-of-rights-resources-arguments-for-and-against.asp> (Accessed 26 June 2004).

Williams, G. (2001) 'Legislating For a Bill of Rights Now' in *Parliament and the Public Interest*. Lectures in the Senate Occasional Lecture Series, 2000 (June 2001).

Williams (2003) 'The Senate: Beware Senate reform that seeks to only block the block' in *The Sydney Morning Herald*. 9 October 2003. URL: http://www.smh.com.au/articles/2003/10/08/1065601908961.html?from=storyrhs&one_click=true (Accessed 26 June 2004).