I was most grateful for the kind invitation to deliver the Blackburn lecture for 2008. It is now more 20 years since Sir Richard Blackburn’s death and some of you will not have the pleasure of knowing him. His portrait hangs in courtroom 1 and his achievements have been amply expounded in various accounts of his distinguished career, but it is his personality and character that many of us remember so fondly. He impressed me as a gentleman of the old school, reserved but without pretension, urbane, erudite, unfailingly courteous and anxious to follow wherever the path of duty might lead. I appeared in a number of difficult cases before him, including one in which a highly intelligent but emotionally disturbed boy of 15 pleaded guilty to the murder of his younger sister. Sir Richard was always patient and compassionate, seeking to look beyond the events, however horrific or tragic, to the underlying human dramas that had caused them and to the ultimate rehabilitation of the offender. Fortunately for me, he also had a good sense of humour. On one occasion he caught me staggering up the steps of the court with about 2 dozen law books and I was obliged to tell him that I was attempting to sneak them back into the library before I was caught and castigated. Well, perhaps I should castigate you now”, he proposed with a smile, but laughed as I embarked upon a plea in mitigation, pointing to the frank confession and obvious attempt at restitution.

I once heard Sir Richard describe the jury system as a “bulwark of liberty”. It was a splendidly evocative phrase and, whilst I do not wish to dwell upon the role of juries today, I do wish to discuss the values that underlie the rule of law in modern democratic societies and to the adequacy of our bulwarks of liberty.

The concept was forcibly brought home to one of the judges of Supreme Court of the United States who joined in a majority judgment upholding the right of American towns to compulsorily acquire property and pass it on to developers if the development would be for the benefit of the town and its people. Justice Souter had a home outside a small town in New Hampshire and he had obviously overlooked the official state motto: “Live free or die”. Furious protestors responded to the judgment by promptly proposing that his house be compulsorily acquired by the town and turned into a hotel. The hotel would be called the “Lost Freedoms” and its restaurant “The Just Desserts”. The law permitted the proponents to put the proposal to a ballot and, since even the senior citizens association supported it, his position seemed perilous.¹

The common law was not initially based on any concept of human rights or liberty but upon the need to maintain order and suppress or punish bad behaviour. St Paul had invested secular authorities with the role of being God's agents of punishment and the Church fathers, notably St Augustine of Hippo and St Thomas Aquinas, had a significant impact on naturalist legal theory stressing that temporal law, or 'lex humana' as Aquinas described it, was subordinate to the eternal law of God. The earliest English lawyers were also churchmen and the early writings on the common law all had a strong religious flavour.

Blackstone, in his famed commentaries, also conceded the supremacy of 'divine law' and Lord Eldon later proclaimed that Christianity was part of the law of England. There are many people who still think that this should be so. They assume that the purpose of the law is to ensure that their moral beliefs are imposed upon everyone else.

There are, of course, many objections to such an approach.

First, there may be vehement disagreement about the dictates of Christian morality or that of other religions. Indeed, anyone who sits in on a synod debate about some controversial issue like the ordination of homosexual clergy or almost anything else concerning sex or gender is likely to be reminded of the old protest song of the sixties: you don’t count the dead when God’s on your side. Furthermore, it is inescapable that actions taken by those purporting to enforce Christian standards have often not been very Christian.

Second, in a multicultural and pluralistic society, the beliefs of those who adhere to one religion may be challenged by those who adhere to others or who have no religion. There are many ethical systems and all are passionately defended. Most are essentially deontological, that is based upon the acceptance of certain duties, or teleological, that is based upon the pursuit of certain objectives or consequences, though others are based on character or motive. There has even been disagreement about whether there can be an absolute standard by which the ethics of human behaviour must be measured, with some, like Plato, maintaining that there can and others, like Aristotle, contending that ethical systems should evolve from practical experience. The significance of differing ethical systems should not be exaggerated because there is often considerable agreement as to

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2 Romans 13: 1-6.
3 There were significant theological differences between the Augustinian and Thomist conceptions of law: McCoubrey, H., The Development of Natural Legal Theory, Croom Helm in ass. with Methuen, New York, 1987, at 39-60.
6 In re Masters & C. of the Bedford Charity (1818) 2 Swans 470 at 527.
7 For a serious discussion of such issues see Cahill, L.S., Sex, Gender & Christian Ethics, CUP, 1996.
10 Ibid.
ultimate moral judgements even if reached by different theoretical routes. Nonetheless, it is important to recognise that no group has an unrivalled claim to the moral high ground.

Third, the belief that all immorality should be unlawful can lead to unhelpful or even inhumane positions. During the 1970s some felt obliged to oppose the decriminalisation of attempted suicide, though they were unable to suggest how throwing a suicidally depressed person into a cell was likely to prove therapeutic or otherwise serve the public interest. In earlier years this type of approach sometimes prevailed despite the apparent absurdity of the consequences. Hence, the survivor of a suicide pact could be convicted of murder and sentenced to death.

More fundamentally, the legal imposition of a moral code involves unjustifiably overriding the rights of the others. It is true, of course, that any law imposes some limitations on human freedom but, as Grotius affirmed, individuals have certain basic rights and should essentially be entitled to determine how they shall live. John Locke went further, holding that some individual rights are inalienable and that there are moral limits to government power. Individual rights have been justified on various grounds, and received early recognition in the 16 century by theologians in the Spanish School of Salamanca who reasoned that, since all humans share the same nature, they also share the same rights, such as equality or liberty, including liberty of thought.

Christianity has, of course, made very positive contributions to the law but the more limited role of the law was stressed even in Lord Atkin’s famous judgement in Donohue v Stevenson when he said that “(t)he rule that you are to love your neighbour becomes in

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12 See for example R v Croft [1944] 1 KB 295.


16 See, for example the discussion by Paolo Carozza in From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights Human Rights Quarterly - Volume 25, Number 2, May 2003, pp. 281-313.

law you must not injure your neighbour.” The division between church and state is rightly part of our liberal tradition as, I suggest, is the distinction between morality and law.

Yet if law is not simply a means of enforcing morality, then how may it be justified and to what extent should it be permitted to interfere with our lives? These are not new questions. Many answers have been suggested and, whilst time will not permit me to do justice to them, I should at least mention some of the more significant.

The first is the concept of natural law. This is said to consist of a series of rules or laws that are universally valid and discoverable by reason. Natural law theory was developed by Aristotle. Cicero also accepted the concept of a natural law of nature as distinct from other laws that might be unjust. Aquinas thought that in adopting natural law people participated in the eternal law of God whilst Grotius maintained that natural law would exist even if God did not. He sought to defend it by reference to secular rational thought. John Locke and others derived a doctrine of natural rights from natural law theory, arguing that all individuals were endowed with inherent rights to life, liberty and property.

There are obvious difficulties with the concept of natural law, including the objection that every proponent is free to include as natural law whatever principles of justice appeal to his or her moral sense, provided only that they seem self-evident and universal.18

Legal positivism, on the other hand, insisted that law and morality should be considered independently of each other. Dworkin explained that the essential difference in theory was between “positivism, which insists that law and morals are made wholly distinct by semantic rules everyone accepts for using as ‘law’, and natural law, which insists that they are united by these semantic rules.”19 Jeremy Bentham famously scoffed that “natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, - nonsense on stilts”.20 He and other legal positivists such as David Hume sought to make law an autonomous field of study in which laws could not be assumed to exist merely because some people thought they should. The insistence by positivists like John Austin and others that laws were simply commands of the sovereign or government has been criticised as morally bankrupt. It has been suggested, for example, that, on this basis, a law authorising the torture of prisoners would be legitimate21. A positivist might well rejoin that there is an obvious difference between legal validity and moral legitimacy but that would not answer the criticism that it would be an enforceable law.

H.L.A. Hart accepted the positivist position that law and morality are independent of each other but rejected the suggestion that laws would be devoid of moral content, arguing that, whilst adopted by a government, they would have been recognised and accepted by the

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18 See “Austin on Jurisprudence” The Edinburgh Review 118 (1863) at 461.
19 Dworkin, R., Law’s Empire, (1986) at 98.
21 Davidson S., Human Rights at 31.
community as a whole.\textsuperscript{22} In response, it has been observed that this theory is only as good as the system of government in power.\textsuperscript{23} In any event, positivism does not require that one wholly abandon morality; only that it be considered separately. Bentham was, of course, a famous utilitarian ethicist and, despite his insistence on the distinction between law and morality, he actively pursued reform of the English law for many years.

Social Contract theory essentially proceeds upon the basis that individuals should be taken to have agreed to relinquish certain rights and subject themselves to regulation in order to form the state and enjoy the society thereby facilitated. This theory also had its origins in antiquity and was also supported by Aquinas. Later philosophers such as Hobbes, Spinoza and Locke acknowledged that there had never been an actual agreement of that kind but the concept remained as a philosophical yardstick for determining whether acts of government were justified by asking whether, in all of the circumstances, the consent of those affected might reasonably be assumed.

The concept is, of course, somewhat artificial and questions have been raised about its implications. It has been suggested that all such theories involve contracts of at least partial self enslavement and hence are incompatible with natural rights theories.\textsuperscript{24} Rousseau even argued that they provided a justification for subjecting offenders to exile or death\textsuperscript{25} and it has been suggested that such a perception actually persuaded Socrates to accept execution, though this has been disputed.\textsuperscript{26} With due respect to Rousseau, I doubt that the general consent of the citizens of Canberra could be assumed for laws providing for such drastic consequences. I cannot image the average person cheerfully initialling a clause reading: “Kindly note that you agree to be killed if you do something really offensive.”

Locke also linked the concept of natural law to social contract theory, suggesting that the social contract enables the people to delegate enforcement of the natural law but that the contract would be broken if the ruler of the state violated the rights of the individual.\textsuperscript{27}

There have been other theories as to what should shape out laws. Bentham sought to create a complete code of law, called a “Pannomion”, based upon the utilitarian philosophy that the right act or policy was that which would cause “the greatest happiness of the greatest number”.\textsuperscript{28}

Marxism went further, maintaining that people could achieve their potential only in a communist society that would make individual rights unnecessary. A number of communist

\begin{itemize}
  \item \textsuperscript{23} Davidson S., \textit{Human Rights} at 31.
  \item \textsuperscript{25} \textit{The Social Contract}, book 2 at 200.
  \item \textsuperscript{26} \textit{The Cambridge History of Greek and Roman Political Thought} (2000) at 182 et seq.
  \item \textsuperscript{27} Locke, J., \textit{Second Treatise of Government}, paras 134 and 149.
  \item \textsuperscript{28} Bentham, J. \textit{The Principles of Morals and Legislation} (1789) Ch I, at 1.
\end{itemize}
regimes have since acted in a manner that suggested they regarded such rights as unnecessary but I doubt that was what Marx had in mind.

Legal realism, which emerged during the first half of the 20th century, also rejected the concept of natural law but was concerned with the function of law and its interaction with policy and legal institutions. Later realists suggested that the demand for human rights was devised from an international sharing of values validated by the “super-value” of human dignity. Whilst acknowledging the limitations of this theory, Scott Davidson has argued that it provides a basis upon which substantial international consensus might be secured.29

During the latter part of the 20th century, a number of other theories were postulated apparently in response to concerns about the “tyranny of the majority” first raised by Alexis de Tocqueville30 and John Stuart Mill.31

Dworkin made the important suggestion that rights should be seen as political or moral ‘trumps’ that should prevail over policies intended to promote general welfare unless there is sufficient reason to override them. Such recognition of rights reflects the principle that all people should be treated with equal respect and concern.32

John Rawls based his theory on the concept of a social contract but postulated a contract formed by people in an original position of equality and within a ‘veil of ignorance’ about their own qualities and attributes. He maintained that in these circumstances the hypothetical contractors would choose to endow everyone with equal basic freedom, respond to social and economic inequalities and otherwise organise things to provide equality of opportunity.33

Nozick took a very different course, postulating a minimal state, the functions of which would be akin to those of a ‘night-watchman’. Citizens would have rights not to be killed, assaulted, or robbed, rights to deal with property and enter into contracts and the right to otherwise act as they pleased provided their actions did not violate the rights of others. The role of the state would be limited to enforcing these rights.34 The most obvious objection to this theory is, of course, that it would not permit inequities to be addressed and that has long been regarded as one of the law’s greatest failures. As Anatole France once said. “In its majestic equality the law forbids rich and poor alike to sleep under bridges, beg in the streets or steal loaves of bread”.35

29  Supra at 37.
30  Alexis de Tocqueville , Democracy in America (1835).
My own view is that we should accept, as a prima facie position, that each person has equal rights and, conversely, equal obligations to respect the rights of others. Individual rights must give way to some extent in order to permit social government and legal regulation but the nature of our democratic government and the extent of legal regulation should nonetheless reflect due respect for equality and freedom. The role of law is to not to impose a particular moral or political agenda but to maintain order, facilitate government and protect human rights. Hence, we do not stone people for adultery but we do imprison people for rape. The system of justice should be fair and penal sanctions accepted as a form of corporate self defence but subject to the same constraint; namely, that responses should not exceed those reasonably necessary to protect the community. Some measures, like torture and execution, should be rejected on the basis that they infringe rights too fundamental to be overridden even with majority support. Unlike Nozick, I do not believe that governments should be restrained from assisting those who are poor or otherwise vulnerable. On the contrary, I think that the exponents of social contract theory were right in suggesting that government actions would generally be justified if the consent of those affected might reasonably be assumed and I think that we are a sufficiently compassionate and responsible people for that assumption to be made.

Sadly, political reality often fails to live up to the aspirations of legal philosophy and one must ask whether the checks and balances of our democratic society sufficiently protect our basic rights?

The conventional answer is that we have a system of responsible government ultimately answerable to the people. Even if one adopts the cynical view that not every politician has the qualities that Plato might have expected of a philosopher-king, can we not assume that self interest in re-election should ensure that our laws reflect public values and hence ensure our freedom?

Public values are, of course of vital importance because, as so many countries have tragically demonstrated, recognition of human rights is also a matter of politics. As the Inter-American Court has said, “The concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it”36.

What then are the social values that have emerged during our relatively short history? The first colonists included emigrants fleeing from poverty and former convicts who had been transported to our antipodean prison colonies. They found not a land of green fields and gentle streams but a wild and untamed place with droughts and floods. Settlers could be granted properties of a size unimaginable in mother England and some derived great wealth. Yet most struggled to eke out a living. The hardship and uncertainty of life inevitably influenced the character of the men and women who strove to raise children on farms and in outback towns. They clung together, supported each other in times of trouble

36 Habeas Corpus in Emergency Situations, par 26, cited by Davidson S., Human Rights, at 29.
and consoled each other in times of tragedy. It was perhaps inevitable that they would come to prize courage, stoicism and mateship. Succeeding generations had little respect for class or privilege but a tolerance, even an amused affection, for larrikins. Everyone was entitled to a “fair go”.

There were substantial blind spots, most notably in the treatment of aboriginal people, who until the great social watershed of the 1960s had no right to vote or even be counted in a census, though others, like the Chinese who had flocked to the goldfields in earlier years, had also been treated unfairly and discrimination on the basis of gender, sexual preference, and sectarianism remained largely unquestioned. Yet there was much to applaud in the values reflected, however, imperfectly, in the lives of these early settlers.

These values were enhanced rather than diminished by the two world wars in the first half of the twentieth century. Courage in the face of danger, stoicism in adversity and a fierce and unwavering loyalty to their “mates” made Australians outstanding soldiers and they returned to a proud nation. Post war Australia opened her doors to an influx of migrants. To a people long accustomed to standing shoulder to shoulder in times of adversity and offering hospitality to those in need, it seemed the only decent thing to do and in the years that followed Australia began to champion the cause of human rights internationally.

There was a pervasive social conservatism and censorship was rigorously enforced. I recall one book being banned because of a single expletive spoken by a parrot and pamphlets issued by an art gallery being seized because they contained photographs of Michelangelo’s famous statue of David and that naughty Italian had sculpted him without pants. Yet the 1960’s brought a renewed emphasis upon human rights and in the years that followed there were increased efforts to combat the evils of sexism, racism and homophobia. Despite some of the more recent stances taken Commonwealth and state governments, I believe that the ideals of courage, fairness and mateship have had a positive influence on our laws.

Yet, perhaps paradoxically, public opinion concerning some aspects of our law sometimes seems to have been strangely discordant. There may be a number of reasons for this.

First, whilst democratic societies seek to ensure equal rights, they can never ensure equal knowledge. The public is largely dependent upon the media and, if I may say so with due respect to the fourth estate, that does not always permit the full picture to be accurately conveyed. False impressions about criminal law and practice are now widespread and firmly entrenched. The shock jocks are only the brash tips of misinformation icebergs. Television, radio and newsprint media alike produce a steady flow of stories that may be wholly or partially true but which nonetheless have some capacity to mislead.

Most obviously, the facts can simply be misreported. I fondly remember one journalist, who was cross-examined about an article she had written concerning her interview with Lindy Chamberlain. She acknowledged that certain statements had been attributed to Mrs
Chamberlain and garnished with quotation marks but readily agreed that she had not said some of the things attributed to her. “Well, why did you write them”, she was asked. She explained that she hadn’t; they had been added by a sub-editor. When asked whether he had spoken to Mrs Chamberlain she said cheerfully, “Oh, I wouldn’t think so, that’s not his job.” This caused some incredulity. “You mean he made it up? It was a work of fiction?” I was enchanted by her answer. “Oh Sir!”, she said reprovingly, “We like to think of ourselves as factionalising rather than fictionalising.”

It would be quite wrong to damn an entire profession by extrapolation and I should acknowledge that, mercifully, such attitudes are comparatively rare. Most journalists conscientiously attempt to report the truth and many go to considerable lengths to ascertain it. More commonly, the problem is one of confusion or oversimplification. I once heard the late Justice Glass complain that even court transcripts regularly transliterated his classic prose into vulgar outbursts. Yet journalists must not merely transcribe but condense, explain and try to lend some interest to the case. The complexity of the issues may also defy reduction to the column space or time slot available. Furthermore, only a minority of readers who flick through a newspaper may read the whole article. Many will pick up the main theme from the headline and perhaps the introductory paragraph before losing interest and moving on.

A further problem is that reports of a few cases may be seen as normative. Of all of the thousands of cases that are heard and decided each year, only a handful are reported in the media. Those few are chosen because they are “newsworthy”, often because of their potential to cause shock or outrage. If one only reads of sentences that seem inexplicably lenient, then one may readily assume that this is a common if not universal problem. Similar problems arise in relation to other issues such as the prevalence of crime. The discrepancy between ‘objective’ measures of the risk of criminal victimisation and ‘subjective’ measures of individuals’ fear has already led to an extensive ‘fear of crime’ literature.37

The danger is that misconceptions as to the law and the social problems it seeks to address may be reflected in opinion polls and hence influence legal policy. Hence, legislation may be enacted in response to non-existent or substantially misunderstood problems.

In some cases politicians could provide an accurate and balanced account of the real issues but choose not to, preferring instead to use the opportunity to portray themselves as champions of the people, men and women with the courage to take strong action to address public concern. Indeed, the public may be actively misled by politicians seeking support for their policies. For example, the Mabo and Wik decisions were followed by tirades of abuse from leading political figures in the Commonwealth and at least some states. The judges of the High Court were vilified as incompetent, unthinking and irresponsible. Whilst the High Court had unanimously held that native title was

extinguished by the grant of a fee simple or even a lease conveying the right to exclusive possession, politicians repeatedly suggested that everyone’s homes were in jeopardy.

Even if not misled, the public will rarely have an adequate appreciation of what has been learned from decades of legal, philosophical, sociological, psychological and criminological scholarship. Nor will the public have the opportunity of giving detailed consideration to the enormous volume of legislative measures proposed each year. Yet these limitations are rarely acknowledged. There is a striking difference between public attitudes to medicine and law. The public generally accept that when medical issues are raised, some allowance must be made for specialised knowledge and expertise. No one suggests that government should determine minimum dosages of penicillin and there are no newspaper polls as to the best means of controlling infection. Yet legal issues are regularly discussed without any regard for relevant research or scholarship.

A further problem is that public opinion may be swayed by fear, anger, suspicion or other emotions, especially after some horrific event has been graphically portrayed. Erich Fromm has persuasively argued that the rise of Nazism in what had been a western democracy could not be adequately explained by economic or political considerations but that it was also attributable to strong psychological factors which made millions “as eager to surrender their freedom as their fathers had been to fight for it”. Whilst analysing such obvious factors as resentment against the Treaty of Versailles, poverty, patriotism and emotional manipulation, he argues that these resentments took root in the fertile soil provided by feelings of personal insignificance and powerless which, he maintained, could be found in all democracies. He cited Hitler’s own rationale for conducting mass meetings: people who felt alone and small in other contexts would be surrounded by many with the same convictions and thus “succumb to the magic influence of what we call mass suggestion.” It may be argued that in the decades that have elapsed since this statement the mass media has taken over from mass meetings but that the psychological factors that influence human behaviour remain.

In most cases, of course, the consequences are far less grave than they were in Nazi Germany but it does appear that vague suggestions of hidden agendas or unseen risks may sometimes prevail over rational debate. In 1988 there was a referendum on proposals to extend the right to trial by jury, ensure freedom of religion, and prevent the states from acquiring property save on just terms. The proposal was rejected by 67.09% of electors. Yet, in the 20 years that have elapsed since, I have never met anyone who wanted their state government to be free to take their property without paying for it or to limit religious freedom. No rational reasons for the negative vote emerged in the campaign. Fear of an unknown hidden agenda apparently prevailed.

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Important and profoundly difficult questions may also be raised about the extent to which public opinion should determine legal responses. To even raise such questions may give rise to concerns about patriarchal or elitist approaches to government. Democracy may not be a perfect system but most of us would agree that it is the best yet formulated and ‘government of the people by the people for the people’ is surely a noble aspiration. Yet, I suggest, serious questions remain. Is democracy merely majority rule as sometimes suggested? Should the wishes of the majority prevail regardless of their implications for the rights of others?

In some of the western films that I watched on Saturday afternoons as a boy, there were scenes of the brave sheriff holding back a lynch mob and insisting on a fair trial. Was he wrong to do so? Should he have just taken a vote. “Right, hands up all those in favour of hanging him? Any against? OK, I declare the motion carried. You can kill him”.

Mill, and others were rightly concerned about the possibly tyranny of the majority. The problem appears to have been particularly acute in Africa where tribal minorities have sometimes been brutally oppressed. The obvious responses to such problems are curbs upon government power by devices such as bills of rights, but one may ask whether a government can truly be democratic if the will of the majority may be overridden?

At least part of the answer may lie in the difference between the application of real social values and short term populist responses. One does not need to impliedly impugn the overall sovereignty of the people to suggest that the sober judgement that men and women may make about law and government, if given full knowledge and the opportunity for calm reflection, may not coincide with their immediate emotional response to particular incidents. Many people readily accept that if human rights are to be adequately maintained then some further check may need to be imposed on the power of government, even if democratically elected. A bill of rights may thus be seen as reflecting a mature decision by the people to ensure that government policy respects the underlying values that they have determined should be so respected. Another may be that some rights are simply too fundamental to be denied by the actions of others.

There are, of course, other checks and balances. Why then should we have a bill of rights?

First, because it may articulate the rights that we say are fundamental to our society and that reflect the ideals we accept and the kind of people we claim to be. Whilst I have long been sceptical of Lord Devlin’s views concerning the educative value of the law, it does

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42 For example, there has been a plethora of legislation preventing discrimination on grounds of gender, marital status, sexual preference, religious conviction, political affiliation, age or physical and/or intellectual disability. Further legislation has provided a wide range of remedies to protect unwary consumers and legal aid schemes have proliferated. Australia also has a Human Rights Commission.
seem to me that the American Bill of Rights and the French Declaration of the Rights of Man had some real influence on the self perceptions of generations of people.

Second and most obviously, few of us really share the belief of Bob Carr and others that politicians can always be trusted to act fairly and in a manner calculated to protect human rights. There is ample evidence to the contrary. One could point to obvious examples relating to the treatment of our aboriginal people. Only last year another NSW politician, Linda Burney, who is the state’s first Aboriginal minister, spoke of the days when she was classified as wildlife. She said “It still staggered me that for the first 10 years of my life, I existed under the Flora and Fauna Act of NSW.” More recently, governments of Western Australian and Northern Territory have maintained mandatory sentencing laws despite the injustice they inevitably cause and the absence of any proven link between such laws and reductions in criminal behaviour. We have also seen the former Commonwealth Government maintain that was acceptable for an Australian citizen to be held in a foreign concentration camp without trial and without charge for six years. I never imagined that an Australian government would accept that our liberty should be terminated if an American soldier thought we must have done something wrong, even if unable to articulate what it might have been.

It is true that neither a bill of rights nor any other human rights laws can ensure that governments will act fairly and reasonably or that they foresee every unintended consequence. However, in jurisdictions in which such rights are entrenched they can limit the power of governments to infringe them and, even in jurisdictions like the ACT where the government can enact laws that are incompatible with human rights, they can still offer significant safeguards. In this jurisdiction, of course, they authorise the Supreme Court to issue a declaration of incompatibility, require of any incompatibility so identified to be reconsidered by the legislature and provide a bias towards statutory interpretation favouring the preservation of such rights.

What are the arguments against a bill of rights?

The most fanciful has perhaps been that expressed by a journalist who apparently feared that it might facilitate a coup by enabling a “galloping Imperial judiciary” to “usurp the power of the people’s elected representatives”. It made me wonder what I had overlooked during my term of office. Others have also expressed concern that a bill of rights could confer further powers on courts. As another writer put it recently, they would

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44  Morgan, S, Mandatory Sentencing in Australia: Where have we been and where are we going?, a paper presented at the colloquium of Judicial Conference of Australia at Uluru in April, 2001. See also www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/hra_mandsent/submissions/sub57.doc
“transfer the power to define what counts as, say, a reasonable limit on free speech over to committees of ex-lawyers”. He went on to complain that rights would be described in “disagreement-disguising moral abstractions and generalities”.47

Such concerns are at best overstated and at worst misconceived. The most fundamental misconception is that powers would be “usurped”. In parliamentary democracies those elected to parliaments do not govern by divine right but rather as representatives of the people. If the people choose to limit the power their representatives wield by, for example, amending the Constitution, then there will not have been a coup but a corporate exercise of a fundamental democratic right. In fact, limitations on legislative power are not novel in Australia. The Constitution confers limited power on the Commonwealth Parliament and the ACT Self Government Act confers limited powers on the Legislative Assembly. On the other hand, if a bill of rights is enacted by the legislature, as has occurred in the ACT, then it is obviously an expression of the legislature’s power rather than a derogation from or usurpation of it.

Those opposing the introduction of any human rights legislation also seem to forget that some rights are already entrenched in Australia. Most notably, the power conferred upon the Commonwealth Parliament to make laws for the acquisition of property was from its inception limited by the requirement that any such acquisition be on just terms.48 More than a century has since elapsed without any evidence that the implied rights thereby conferred have frustrated good government or undermined democracy in Australia. Can it seriously be suggested that the states need the power denied the Commonwealth to take private property without paying for it?

Issues of interpretation commonly arise in relation to statute law generally. It may be suggested that the interpretation of terms in other legislation does not enlarge the powers of courts, but that is not correct. In fact power is constantly being conferred upon courts as statutes are enacted or amended and that is sometimes expressed in very broad terms. For example, the ACT Supreme Court has “all original and appellate jurisdiction that is necessary to administer justice in the Territory”.49 Similarly, courts already interpret the constitutional provisions that define and limit the powers of our democratically elected governments.

Particular concern has been expressed about proposals such as that contained in s 24 of the ACT Human Rights Act requiring judges to interpret the law, “so far as is possible consistent with its purpose in a way that is compatible with human rights”. It has been suggested that, since the application of such provisions is not dependent upon ambiguity in the statutory provision to be interpreted, “this is Alice in Wonderland stuff” which gives the judge the power to rewrite statutes with which he or she disagrees.50 Again, however, such provisions

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48 Par 52 (xxxi) of the Constitution.
49 Pursuant to s22 of the Supreme Court Act 1933.
50 Allan, J., “John Howard and the Constitution”, Quadrant, April 2008 6 at 12.
are not novel. In this jurisdiction the Legislation Act 2001 contains provisions intended to assist in “working out” the meaning of laws contained in territory legislation generally. They do not apply only when there is ambiguity\(^{51}\) and they require a purposive interpretation.\(^ {52}\) The Acts Interpretation Act 1901 also requires that a purposive approach be taken to the interpretation of Commonwealth legislation.\(^ {53}\) Even in the absence of such provisions, courts have long tended to read down statutory provisions on various grounds, including the need to prevent absurdity or manifest injustice\(^ {54}\) or prevent someone from taking advantage of his or her own wrong.\(^ {55}\) It is difficult to see why a statutory requirement to prefer interpretations that would avoid incompatibility with prescribed human rights should be seen as any more potentially seditious. It is, of course, the duty of courts to interpret rather than rewrite legislation but they do not breach that duty by taking into account factors that the legislature has itself prescribed.

Human rights legislation may bring new challenges and litigation may lead to some further human rights jurisprudence, though the feared floodgates have certainly not opened in this jurisdiction. This may frighten those who believe that any decision not directly mandated by statute is a treasonable act of “judicial activism” but, again, this is not a new phenomenon. I am told that Sir Gerard Brennan once felt moved to ask counsel where he thought the common law had come from. He was not the first to suffer such bemusement. Oliver Wendell Holmes had earlier felt obliged to point out that “the common law is not a brooding omnipresence in the sky”. There is, I suggest, little real reason to fear further legal development and, in the absence of constitutional change, the legislature would in any event be able to overturn any decisions it did not like.

Finally, it is said that it would be wrong to entrench particular human rights because future generations may see things differently. I must say that I find it difficult to imagine a future Australian society in which people favoured torture, imprisonment without trial and unjust seizure of property but if such a society were to emerge then the people would be free to amend the law and restore their right to subjection.

Sadly, the history of even the world’s great democracies are littered with cases in which people have suffered greatly because their rights and freedoms have not been protected. Australia is now one of only a few countries, like Afghanistan, Burma, Bhutan and Libya, that still do not have bills of rights. We are in very shabby company.

In a modern, democratic society people may assume that only terrorists or criminals need fear incursions into their rights, though Dr Haneef might wish to debate such an assumption. They may be surprised to learn that in some circumstances people may be detained to

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\(^{51}\) See s 138.

\(^{52}\) See s 139.

\(^{53}\) See s 15AA.

\(^{54}\) See, for example, Ingham v Hie Lee (1912) 15 CLR 267.

\(^{55}\) See, for example, Holden v Nuttall [1945] VLR 171.
preserve evidence. They may also be surprised to learn of some disclosure offences. Suppose, for example, that a mother is informed that her sixteen year old daughter is being so detained. She is permitted to tell the father only that the child is safe but unable to be contacted for the time being. The father explodes, “What? You mean she has been kidnapped?” In response, she reveals the truth without first consulting an AFP officer and giving him the chance to forbid such disclosure. In that event she has committed an offence punishable by 5 years imprisonment.

It should not be forgotten that the law applies equally to everyone. When rights are taken away in an attempt to target some person or group, our rights are equally removed and so are those of our children. It may be necessary to respond to new challenges like the threat of terrorism but, as earlier generations have understood, it is also necessary to defend our rights and freedoms and to insist that even safety is not bought at too high a price. It is, I suggest, time to look to the future and to ask ourselves what legacy we wish to leave to our children.

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56 Section 105.4 of the Criminal Code Act 1995 (Cth) provides that a preventative detention order may be applied for if the applicant is satisfied that a terrorist act has occurred within the last 28 days, it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act and detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

57 Section 105.41 (4A) and (4B) of the Criminal Code Act.