Legislating for a Bill of Rights Now*

George Williams

Introduction

What are the rights and responsibilities of Australian citizenship? Do we possess a right to a jury trial? Does compulsory voting infringe upon our right to opt out of the political process, or is it part of our civic duty? Is there an entitlement to basic services for communities in the bush?

Our system of government does not provide answers to these questions. In 1901, the framers of our Constitution avoided such issues. For nearly 100 years, we have continued to do the same. Our democracy is the poorer for this failure.

This is one symptom of other serious problems within the political system. The 1999 republic referendum exposed Australians' lack of knowledge about the current system, as well as their high level of alienation from the political process and their elected representatives. It says much that the two most effective arguments in the debate were 'Don't Know—Vote No' and 'Vote No to the Politicians' Republic'.

We have not set out the role of the people within the political process. Certainly, the Constitution does not do the job. It is no wonder that many Australians are disconnected from the fact that it is they, the people, that are ultimately sovereign.

Some have increasingly searched outside our borders for answers, turning to international treaties and conventions. This has its place, but it cannot make up for the fact that there is no Australian frame of reference on basic questions of human rights.

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Hence, when mandatory sentencing arose as a political issue, attention immediately turned to the United Nations Convention on the Rights of the Child. Article 40 requires that children be 'dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence'. Mandatory sentencing is obviously inconsistent with such a requirement.

International law has an important and meaningful role in such debates. Unfortunately, it has also obscured our lack of basic standards on such issues. The Convention has superseded the question of whether the Northern Territory law is inconsistent with our own respect for the right to a fair trial and, if convicted, a just sentence. It should be clear without the need for international assistance that mandatory sentencing is unjust and wrong. The punishment should fit the crime, and judges should be able to exercise appropriate discretion in setting the sentence.

It is a sign of our political immaturity that we do not determine such issues according to publicly acknowledged domestic standards. Political debate in Australia is impoverished by the lack of an Australian Bill of Rights.

A not so 'magnificent' human rights record

Ironically, the very lack of human rights protection in Australia has enabled the myth to emerge that our record on these issues is a good one. The lack of structured protection means that such issues are often ignored and do not attract media attention.

Some Australians, perhaps influenced by United States television programs, believe that we have a Bill of Rights. Of course, this is not true.

Most of us are secure in the belief that our human rights are well protected under the law. In fact, we are fortunate that the rule of law is firmly entrenched in our political culture, and that we have an independent High Court where such issues can be aired. However, our legal system does not protect many of our basic rights. Individual liberty has little protection under our law. Even the right to vote, and freedom from discrimination on the basis or race or sex, exist only so long as Parliament continues to respect them. In the past, this respect has had its limits.

On 18 February 2000, Prime Minister John Howard, in discussing mandatory sentencing on the ABC's AM Program, stated that 'Australia's human rights reputation compared with the rest of the world is quite magnificent.' Here, he expressed the commonly held view. However, this view is not consistent with a careful and considered examination of the historical record.

As the Prime Minister recognised, 'We've had our blemishes and we've made our errors.' The reality is far worse and reveals a longstanding and continuing weakness in our democratic structure. Australia is out of step with other comparable nations such as Canada, New Zealand and the United Kingdom in the protection of human rights. Rather than having a 'magnificent', or even 'sound', approach to these issues, domestically, we are far from the forefront of the protection of human rights. We have lagged behind.

The protection of human rights in Australia

The roots of our current problem lie many decades ago in the drafting of the Australian Constitution. The Constitution was drafted at two conventions held in the 1890s. The framers did not seek to establish the Constitution as a catalyst for the protection of civil liberties. Instead, they infused the instrument with responsible government in a way that would enable some fundamental rights to be undermined by a sovereign parliament even where they might have been recognised by the common law.

This is clearly demonstrated by the drafting of certain provisions. For example, the Constitution that came into force in 1901 said little about indigenous peoples, but what it did say was entirely negative. Section 51(xxvi), the races power, enabled the federal parliament to make laws with respect to 'The people of any race, other than the aboriginal race in any state, for whom it is deemed necessary to make special laws', while under section 127 'aboriginal natives shall not be counted' in taking the census.

Section 51(xxvi) was inserted into the Constitution to allow the Commonwealth to take away the liberty and rights of sections of the community on account of their race. By today's standards, the reasoning behind the provision was clearly racist. Even Edmund Barton, later Australia's first Prime Minister and one of the first members of the High Court, stated at the 1898 Convention in Melbourne that the races power was necessary to enable the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth.' In summarising the effect of section 51(xxvi), John Quick and Robert Garran, writing in 1901, stated:

> It enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localise them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.

One framer, Andrew Inglis Clark, the Tasmanian Attorney-General, supported a provision taken from the United States Constitution requiring the 'equal protection of the laws'. This clause might have prevented the federal and state parliaments from discriminating on the basis of race. The framers were concerned that Clark's clause would override Western Australian laws under which 'no Asiatic or African alien can get a miner's right or go mining on a gold-field'. Sir John Forrest, Premier of Western Australia, summed up the mood of the 1897–98 Convention when he stated:

> It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.

Clark's provision was rejected by the framers, who instead inserted section 117 of the Constitution, which merely prevents discrimination on the basis of state residence. In

formulating the words of section 117, Henry Higgins, one of the early members of the High Court, argued that it 'would allow Sir John Forrest … to have his law with regard to Asiatics not being able to obtain miners' rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based upon colour and race.'

The drafting of the Constitution laid the foundations for many subsequent human rights violations. What is of particular contemporary concern is how this history continues to play a role to the present day.

In 1998 the High Court heard the Hindmarsh Island case. The federal government sought to persuade the Court that the Commonwealth has the power to pass laws that discriminate against Australians on the basis of their race. This position was supported by the governments of the Northern Territory, South Australia and Western Australia. The question before the High Court was whether the drafting intentions behind the races power still determined the meaning of the power, or whether the scope of the races power had been transformed by the 1967 referendum that had extended it to Aboriginal people.

The Commonwealth argued that there are no limits to the races power so long as the law affixes a consequence based upon race. In other words, it was not for the High Court to examine the positive or negative impact of the law. On the afternoon of the first day of the hearing, the Commonwealth Solicitor-General, Gavan Griffith QC, suggested that the races power 'is infected, the power is infused with a power of adverse operation.' He also acknowledged 'the direct racist content of this provision' in the sense of 'a capacity for adverse operation'. The following exchange then occurred between the Solicitor-General and the High Court Bench:

> **Justice Kirby:** Can I just get clear in my mind, is the Commonwealth's submission that it is entirely and exclusively for the Parliament to determine the matter upon which special laws are deemed necessary or whatever the words say or is there a point at which there is a justiciable question for the Court? I mean, it seems unthinkable that a law such as the Nazi race laws could be enacted under the race power and that this Court could do nothing about it.
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> **Mr Griffith:** Your Honour, if there was a reason why the Court could do something about it, a Nazi law, it would, in our submission, be for a reason external to the races power. It would be for some wider over-arching reason.

Of course, without a Bill of Rights or an entrenched Racial Discrimination Act, there was no such over-arching reason. When the High Court handed down its decision on 1 April 1998, it was divided. The Court split on whether the races power could be used to discriminate against indigenous peoples. This fundamental question remains unresolved.

This could hardly be said to be a solid foundation from which to advance reconciliation. It is not surprising that reconciliation requires a re-examination of our Constitution and in the short term the entrenchment of the Racial Discrimination Act.

How can we close the gap between indigenous and non-indigenous Australians when we have yet to address the racist underpinnings of our Constitution?

The Hindmarsh Island case demonstrated very clearly that our fundamental freedoms are often solely dependent on the wisdom and good sense of our legislators. This can be too easily taken for granted, as was shown by the long-standing government policy of forcibly removing indigenous children from their families and communities. This also was challenged in the High Court, but it was held in the Stolen Generation case in 1997 that there was nothing in the Constitution that prohibited such conduct.

Without a Bill of Rights, many of our basic freedoms, possibly even including the right to vote of some sections of the community, can be taken away by federal, state and territory parliaments. Any student of Australian history will be aware of the danger that parliaments can pose to civil liberties. After all, one of the first pieces of legislation passed by the new Commonwealth Parliament was the *Immigration Restriction Act 1901*, which implemented the White Australia policy.

Nearly 50 years later, the federal parliament passed the *Communist Party Dissolution Act 1950*, which outlawed the Australian Communist Party, an organisation then participating, with some limited success, in elections at every tier of government. The Act was far out of proportion to the dangers posed by the organisation to Australian society and was a draconian attack on civil liberties, including upon the freedoms of speech, belief and association. Section 7 even provided a term of imprisonment of five years for any person who knowingly carried or displayed anything indicating that he or she was in any way associated with the Party, such as a badge with the words 'Communist Party Conference 1948'. In addition, under section 9, the Governor-General could declare a person to be a communist or member of the Communist Party. A sanction could be applied not according to a person's acts but according to his or her beliefs. Once declared, a person could not hold office in the Commonwealth Public Service or in industries declared by the Governor-General to be vital to the security and defence of Australia. Should a person wish to contest a declaration by the Governor-General, he or she could do so, but 'the burden shall be upon him to prove that he is not a person to whom this section applies.'

Even today, political agitators can find themselves faced with jail. In 1996, Albert Langer was imprisoned for ten weeks for distributing leaflets encouraging voters to put the candidates of the Australian Labor Party and the Coalition equal last. He challenged this in the High Court, but failed. After the High Court finding, Amnesty International released a statement describing Langer as 'the first prisoner of conscience in the country for over 20 years'.

Lest it be thought that we have made progress since the jailing of Langer in 1996 or that the other examples are from a bygone era, several contemporary controversies clearly reveal that our human rights record is blemished. For example, our treatment and detention of refugees, themselves escaping persecution, torture or even execution for political or other reasons, is hardly humane or consistent with commonly held views about human dignity. Also relevant are the mandatory sentencing laws under which Indigenous children are being sent to prison for extended periods without a judge being able to take account of the actual circumstances of their crime.

Today, our human rights record is far from 'magnificent'. While middle class Australia has little to fear from oppressive laws, this is not the right indicator. What matters is how we treat the vulnerable and weak in the community, such as the poor with little or no economic power, or people living in rural areas with little political clout and dwindling access to basic services. Examined from this angle, our human rights record is poor. Moreover, we have not put the structures in place to reduce the chances of such events happening again. As Brian Burdekin, a former Australian Human Rights Commissioner, has stated: 'It is beyond question that our current legal system is seriously inadequate in protecting many of the rights of the most vulnerable and disadvantaged groups in our community'.

An inadequate legal structure

It might be argued that we are simply at par with other comparable nations, which continue to have their own human rights concerns. However, Australia differs from these other nations in one crucial respect. We are alone in not having developed a statement setting out our basic rights and freedoms. Other common law nations have already done this: Canada in 1982, New Zealand in 1990 and even the United Kingdom (from which our own system is derived) in 1998. We have been left behind, our legal system quarantined from human rights developments in other nations with which we had shared a common legal framework. While each of these nations, like Australia, had relied upon the common law tradition to protect rights, they have since recognised the need to supplement this with a Bill of Rights.

The lack of action by Australian parliaments has meant that responsibility has been abdicated to the courts. The High Court has found, for example, that certain rights can be implied from the Constitution, such as a freedom to discuss political matters, as well as other rights such as an entitlement to procedural fairness in the trial process. Individual judges have even interpreted the Constitution as embodying many rights, indeed almost an implied Bill of Rights. Australian courts, and not parliaments, have taken the lead.

There are real and important limits to what judges can achieve. A judge required by legislation to sentence a person to jail for one year for stealing a packet of biscuits has no choice but to do so. The Constitution was not drafted to include a Bill of Rights. To interpret it as containing this would compromise the legitimacy of the High Court. The role of that Court is to interpret the Constitution as it has been drafted, and to adapt the document to changing times and shifting national needs. It would exceed its brief if it were to go beyond those rights expressed by or necessarily implied in the text. This would also compromise the role of the federal parliament as the only body able to initiate, and the Australian people as the only body able to sanction, changes to the text of the Constitution.

If we are to learn from the mistakes and excesses of the past, and advance the protection of human rights in Australia, there is only one real option for change. Parliaments must assert their leadership. They, and not the courts, are the appropriate forum from which to develop the rights attaching to Australian citizenship.

A Bill of Rights now

The current lack of protection for fundamental rights in Australia presents a compelling case for reform. We ought to respond to our human rights record with action designed to ensure that community standards are set into the fabric of our legal system. An Australian statement of rights is long overdue.

A Bill of Rights would make a positive contribution to modern Australia. It would enhance Australian democracy by expressing the core rights of the Australian people, such as the right to vote, as well as promoting a sense of community involvement.

Legislative, not constitutional, change

A Bill of Rights presents a considerable challenge. One only has to look at the record of failed referendums. With the results of 1999 added to the list, 44 referendum proposals have been put to the Australian people. Only eight have passed. There has not been a successful referendum for a generation.

The last eight proposals for change in referendums in 1984, 1988 and 1999 were all defeated. To find a successful 'Yes' vote, we need to go back to 1977, when Australians voted, amongst other things, to require High Court judges to retire at the age of 70.

The 1988 referendum is particularly relevant. Four proposals were put to the Australian people. The second proposal sought to guarantee 'one vote, one value' by requiring that the population count in each electorate not deviate by more than 20 per cent from any other electorate. This proposal would also have inserted a right to vote into the Constitution. The fourth proposal also sought to guarantee basic freedoms, but only by extending the operation of existing guarantees. The right to trial by jury, for example, which in section 80 of the Constitution only applies to commonwealth offences, would have been extended to the states and territories.

All four proposals were defeated nationally and in every state—a dismal result for the proponents of change. The highest national 'Yes' vote was 37.10 per cent for the proposal on 'one vote, one value'. The fourth proposal received an astonishingly low vote. Nationally, 30.33 per cent of voters registered a 'Yes' vote, while 68.19 per cent voted 'No'—the lowest 'Yes' vote ever recorded in Australia. In South Australia the 'Yes' vote was only 25.53 per cent, while in Tasmania it was 25.10 per cent.

The defeat of the 1988 referendum shows that any attempt to create an Australian statement of rights should not be in the form of a constitutional amendment. Instead, we should consider an Act of Parliament. This approach is a pragmatic means of protecting a limited range of the fundamental rights of the Australian people, while allowing the oversight of the federal parliament at every step.

How to begin

In New South Wales, the Bill of Rights process has already begun. State and territory parliaments must be involved, and may indeed lead the way. As in Canada and the United States, it would be possible for there to be separate, but complementary, Bills of Rights at the federal and state levels. The Standing Committee of Law and Justice

of the NSW Parliament is currently holding an inquiry into whether NSW should enact a statutory Bill of Rights. If it did, this could provide a model that could be followed in other states and at the federal level.

A first step for the federal parliament might be to convene a joint parliamentary committee, or a special commission consisting of both parliamentary and community members. This body should publicly examine ways in which the federal parliament could work to enhance and entrench the protection afforded to fundamental freedoms in Australia, perhaps with reference to a draft bill developed by the government. The terms of reference of the body should enable it to examine the success and failures of models from nations such as Canada, New Zealand, South Africa, the United Kingdom and the United States. The body should also identify core rights and freedoms, consistent with the values of contemporary Australians, that are the most deserving of protection, and how these rights could be entrenched.

The value of such an approach is confirmed by the Canadian experience. The Canadian Charter of Rights and Freedoms 1982, which has been praised for its 'success in enhancing the "culture of liberty" in Canada', was forged in what has been called a 'democratic crucible'. A draft of the Charter prepared by the Trudeau Government was scrutinised by a joint parliamentary committee, the proceedings of which were nationally televised. The committee received submissions from over 1,000 individuals and 300 groups petitioning for change. After 60 days of hearings, the committee successfully proposed 65 substantial amendments. The Charter came into effect in 1982, and has been the subject of extensive coverage in the written and electronic media. In a large scale opinion survey taken some six years later, it was found that 90 per cent of English Canadians and 70 per cent of French Canadians had heard of the Charter, with a substantive majority agreeing that it 'is a good thing for Canada.'

Such a process could also work in Australia. This committee process would allow popular involvement in the drafting of a statement of basic rights and freedoms. Australians have already enthusiastically embraced the parliamentary committee system as a way of interacting with their representatives. For example, the Legal and Constitutional Legislation Committee's inquiry into the Euthanasia Laws Bill 1996 received 12,577 submissions. There has also been a sustained focus on the committee system during the recent debate over mandatory sentencing.

The model

In my book, *A Bill of Rights for Australia*,[1] I argue for a gradual and incremental approach that would not transfer ultimate sovereignty from parliaments to the courts, but would heighten human rights concerns within the political process itself. My aim is to strengthen and broaden the scope of our democratic system, not to transfer our decision-making powers to the judiciary. Other models have taken this approach. Instead of adopting the United States system whereby their Supreme Court is able to have the last word on important social issues such as euthanasia and abortion, we

[1] UNSW Press, Kensington, NSW, 2000.

should look to a modified version of the models in New Zealand and the United Kingdom.

A Bill of Rights need not establish the judiciary as the final arbiter of important social, economic and political questions. The bill should be entrenched so as to prevail over other inconsistent legislation passed by parliament, and should in this sense be enforceable in the courts. However, parliament ought to be given the option, as found in the Canadian Charter of Rights and Freedoms, to expressly override any of the rights listed in the instrument (or indeed a court's interpretation of those rights).

This override would be raised as a political issue, and would require strong public justification. My view is that a Bill of Rights is primarily important because it offers a means of improving scrutiny and debate on such issues at the political and community levels. Rather than merely creating a legal text, the aim would be to foster a culture of liberty, including a tolerance and respect of difference. Legal texts are meaningless unless they exist within a supportive cultural and political framework. After all, the 1936 USSR Constitution contained a Bill of Rights at the height of the great purges initiated by Joseph Stalin.

The rights listed in the bill should be carefully and narrowly confined in their drafting and selection. It should not include rights where the ambit is unclear or contested, such as a right to life or a general guarantee of equality. The end result should be a statute recognising and protecting core rights, such as the rights to vote and of association and a freedom from racial discrimination. Even these rights should be subject to repeal or amendment (and hence refinement and development) by parliament. The Bill of Rights might also incorporate other basic economic rights and social justice objectives, such as an entitlement to basic services in rural and regional areas. It should reflect contemporary community concerns.

Once it is in place, a Bill of Rights should provide a central role for the federal parliamentary committee system. The Senate's Scrutiny of Bills Committee already examines bills that come before parliament. Under Senate Standing Order 24, the committee is charged with reporting whether bills and acts 'trespass unduly on personal rights and liberties.' This could be adapted and extended. A joint standing committee of the federal parliament, with membership evenly divided between government and non-government members, or standing committees of both the Senate and the House of Representatives, might be created to examine bills and delegated legislation for compliance with a Bill of Rights.

This would serve two purposes. It would allow the vetting of legislation before enactment so as to reduce the likelihood of Commonwealth legislation breaching basic freedoms. It would also build parliamentarians and members of the public into the rights protection process, the latter through their right to make submissions to the committee. This should contribute to a greater understanding of such issues by parliamentarians and the Australian people through media coverage of committee deliberations, submissions and reports.

In the longer term, it may be appropriate to guarantee certain rights in the Australian Constitution. Which rights and in what time frame would depend upon the operation of a statutory Bill of Rights. The success of legislation such as the Racial

Discrimination Act, which has been part of Australian law for a quarter of a century, may mean that it would now be possible to gain popular and political support for inserting a guarantee of freedom from discrimination on the basis of race in the Australian Constitution. This would be particularly appropriate given the inconsistency between the framers' intent on questions of race and the accepted values of the contemporary Australian community.

Mandatory sentencing and a legislative Bill of Rights

I want to take a step back from the events of the day and examine how the current debate on mandatory sentencing might have been different if we had a Bill of Rights. The debate reveals the ad hoc nature of our response and our lack of a structured and considered approach to such issues.

First, it would have allowed human rights concerns to be raised when the law was passed by parliament, rather than at some later time. Much damage can go unnoticed and unreported if an issue is only aired years after the law has come into force. The consequences can be devastating. Mandatory sentencing has been in place in the Northern Territory since March 1997. Since then, the imprisonment rates of indigenous women and children have risen alarmingly. The issue has reached the national agenda three years too late. Costly delays are inevitable where there is nothing within the parliamentary process itself to ensure that legislation is examined against human rights standards.

Second, a Bill of Rights would create a more appropriate reference point against which to examine proposed laws. Such laws could be debated in parliament and within the community according to a domestically agreed statement of rights and values. This would deepen our appreciation of such issues and would strengthen the law-making process and, through the parliamentary committee system, community interaction with the political system. We would debate such issues not only according to how they meet external international standards, but also on the basis of our own developing sense of human rights.

Third, a Bill of Rights could provide a means for an independent determination of whether a law breaches an agreed right. The courts ought to be given a role in allowing a person affected by government a last chance. It must not be forgotten that majorities do not always make just law, and that the judicial system can provide an important circuit breaker and final point of appeal.

With a Bill of Rights in place, our approach to and debate on mandatory sentencing would be very different.

Conclusion

A gulf lies between Australians and their government. This stems in part from the longstanding failure to set out the rights and responsibilities of Australians within the political process. The lack of an Australian statement of rights undermines any claim Australia might have to a 'magnificent' human rights record. In any event, the record of human rights abuses, ranging from the Stolen Generation to Albert Langer to our treatment of refugees, shows clearly otherwise.

There is an obvious need for reform. Changes such as improved civics education are important, but we also need to reinvigorate our public life by beginning a process that will involve Australians more directly in the political system. We should draft an Australian statement of rights and freedoms. This should be in the form of a Bill of Rights enacted by parliament that would offer a coherent domestic means of addressing our many contemporary debates on individual liberty. This could start a long overdue dialogue between parliament, the courts and the people. We need to legislate for a Bill of Rights now.

Question — I'd like to ask a question about sedition. I refer to a case which occurred in 1950 or 1951 concerning a man called Mr Lance Sharkey. He was asked by Allan Reid of the Sydney *Daily Telegraph*: 'In the event of Soviet troops entering Australia, what should be the response of ordinary Australians?' Mr Sharkey, quite rightly, said that the suggestion was absurd, but Allan Reid pressed him, and Mr Sharkey said: 'If Soviet troops entered Australia in pursuit of an aggressor, then it would be the duty of ordinary Australians to assist Soviet troops.' For that, Mr Sharkey was sentenced to three years in prison. Now, all he did was express a particular point of view. It's not the first time—in 1949 a man called Burns, who again merely expressed a political viewpoint, received six months hard labour. Could you say something about sedition, and whether something like this should be included in a Bill of Rights, and also the right to demonstrate and the right to free speech?

George Williams — You are absolutely right in mentioning the Burns case and the Sharkey case. A lot of people study those, and it was 50 years ago that these cases were dealt with, when people were put in jail, for simply expressing a political belief. They were charged with sedition under those crimes.

My own perspective on that is that we should think about just how little has changed. Albert Langer was put in jail for ten weeks for arguing similarly stirring views in the media and other areas. They annoyed a lot of people, but should we really be putting people like that in jail? Another thing that shows the weakness of our free speech tradition in this country is the banning of the song dealing with Pauline Hanson, called *Backdoor Man*. That was banned and can no longer be played on radio because it was seen as obscene. The Queensland Supreme Court said that there was no particular reason to protect the playing of that song, because it didn't play a part in the political process. If you ask anyone who listens to Triple J whether songs like that are relevant to their political decisions or not, you will realise just how out of touch our legal

system is with basic conceptions of what it is to be a political actor within the Australian community.

We ought to be recognising the importance of looking at those cases by having a Bill of Rights which would include some freedom of expression. Carefully defined, perhaps, to ensure that it didn't entrench into those areas where people thought there was a legitimate reason to restrict speech. But I would have though that it was clear, at least within in the area of political communication, there should be an extremely wide capacity to criticise politicians and to criticise the very nature of the system itself. Criticising the system and saying that we want an entirely different system of government should not lead to someone being put in jail.

We should also have recognition of the right to protest—peacefully—and the freedom of assembly. I think they're the sorts of rights that Australians would generally recognise ought to be protected and indeed we should not be cutting down on the freedom of protest within the community. So I agree with what you say, and I agree that it suggests the need to entrench certain rights.

Question — I accept that each of the states—most of which are unencumbered by a constitution which has to be altered by referendum—could pass a Bill of Rights. But under what head of power could the Commonwealth pass a Bill of Rights which would be mandatory for observance by people in a state?

George Williams — There are a couple of ways of looking at that. You might only draft a Bill of Rights which applies at the Commonwealth level. That may be a politically pragmatic thing to do and you may tell the states to go away and draft their own Bills of Rights, as this was a bill which simply applied to Commonwealth legislative action. If you did want a Bill of Rights that extended to the states and territories, then I think they should also be subject to this override clause that I've talked about, so that they, like the Canadian provinces, have the ability to re-engage in the process if they find that a High Court decision is not to their liking. But again, with the appropriate scrutiny.

If you're looking at the relevant powers to enable the Commonwealth to enact a Bill of Rights, there are several which might be used. Either you could turn to the external affairs power, and use international conventions, but you don't have to implement those conventions word for word. There is a capacity to pick which of the particular rights we think are important in these countries, and to redraft those rights. So long as the High Court is of the view that this is a proportionate implementation of these things, there is a great degree of flexibility to actually say which of the rights we want, and indeed exactly how they should be protected.

If you didn't want to use the external affairs power, there is still considerable scope to impose a Bill of Rights. You look to other commonwealth legislation in trade practices or a variety of other areas, where they have looked to almost a hotch-potch of powers and pulled them together. The difficulty with doing that is that you would not have complete coverage. The other way, if you wanted complete coverage, and you were not prepared to go to external affairs or a mixture of powers, is to seek a reference of powers from the states. Now, it's politically very unlikely that that would occur.

So there are options. It can be done, but a lot of this will be making sure that the legal underpinnings are right. Having looked at this closely, I am confident that this can be done.

Question — I think that a very good argument has been put forward in theoretical terms for the lack of certain rights in this country, but as soon as you start to go beyond generalities, you have to ask yourself how this is going to be put into effect. Are we going to have a special tribunal? If we are, is it going to be within the powers of the High Court to overturn or review whatever determinations are made? I was in Canada in 1982 when their Bill of Rights was brought in, and I discovered that a large number of people were very willing to come forward and push their particular points of view. There are going to be all sorts of people who will immediately come forward—the whole of the Aboriginal movement will want to establish their point, and you're going to have lawyers who are going to use the Bill of Rights for getting boat people out of detention. Who is going to be the defendant when a judgement is made? Is the commonwealth government going to be the main defendant? Is there going to be somebody else? Will there be cross-actions between individuals? You have to move from aspiration to administration. You just can't say that we are short of a particular level of freedom—you must ask yourself how you're going to carry that into effect. Administration is probably more important than legislation. It is going to be a very difficult thing to do. If we've had trouble recently trying to get ourselves a president, I'd say that that trouble was minor compared to the problems that will be raised in bringing this into effect.

George Williams — You are right about the difficulties. When you consider what happened in 1999, that's why I'm saying we shouldn't have a constitutional change. But I think we need to do something. Are we going to simply continue on this path of dealing with human rights concerns like mandatory sentencing after the event, and recognise the injustice that's happened for several years in the interim?

My suggestion is very different to the Canadian model that you point to, which has led to a lot of debate, because Canada has put a range of very broad rights in its Charter of Rights. It's got a general freedom of equality for example, whereas I'm not advocating that, exactly because it does tend to lead to ambit claims. I think we should be determining the scope of such rights at a much earlier stage.

This is, if you like, a minimalist approach to a Bill of Rights, where I'm seeking to propose an Act of Parliament only—not a constitutional change—and the focus of this particular bill would be within the political process, not legal action. That's a last resort, and if there were legal action, that would be brought by someone against the Commonwealth challenging whether its law matches the particular rights. The aim would not be to create actions between individuals—this is a limitation on government power, not private power. It's about enhancing scrutiny in the political process, not enhancing the rights of one person against another. That can happen in a Bill of Rights, and in other countries it does. But I'm not proposing that because I think we are not ready to go down that path, however we should do something to enhance scrutiny within the process itself and that's how I would limit it—without going into the other legitimate concerns that you have, which I don't think apply to this model.

I wouldn't set up any special tribunals, because we should be setting up a process where court action is a last resort and should be dealt with in an appropriate court, and not in a special tribunal of any kind. It should go to our independent judges, not to persons appointed without tenure by the executive and bodies like the Administrative Appeals Tribunal. So leave it to the courts, but set up a system where court action is not the norm under this model, but political action is.

Question — There are numerous matters that would need to be addressed in a Bill of Rights if it were left exclusively to the politicians. An example concerns the right to vote, which you gave primacy in your list of things that ought to be enshrined in a Bill of Rights. Many have considered in the past, and some still do, that the practice of electoral compulsion in Australia is inconsistent with Article 25 of the International Covenant on Civil and Political Rights. Our politicians, however, become very touchy when they perceive possible threats to Australia's quaint system of electoral compulsion.

George Williams — What you are raising is a very legitimate problem within the system—are our politicians acting in our own interests? There are instances where that clearly has not been the case. You can certainly argue as a result of the referendum last year that there was a fairly cosy arrangement about what sort of system we would end up with. But looking at a Bill of Rights, you can't abandon the politicians—indeed, the politicians must be built squarely into the process, because they need to be educated at least as much as the community about these issues.

Question — Do you think the right *not* to vote should be excluded?

George Williams — I support compulsory voting very strongly. When you think about rights you should also think about where our civic responsibilities lie within that process. The right to be free, for example, should not exempt someone from jury service. We should have a balance between our entitlements and our duties within the system. It is also important to remember that we don't actually have *compulsory* voting within this system anyway—it's compulsory to turn up at the ballot box, but there is no compulsion to fill out the form. That's a very appropriate balance between the right to do something, to at least turn up, but then you can't be compelled to cast a preference.

Question — What are your thoughts on how a Bill of Rights would deal with homosexual and religious vilification?

George Williams — We should be debating those in the context of a Bill of Rights, and obviously, in looking at a Bill of Rights, we should be looking particularly at those sections of the community which are particularly vulnerable in certain ways, and religious minorities are a good example of that. We have a freedom of religion in the Constitution, but that is so narrow and has almost been interpreted out of existence by the High Court, and we should recast that in some way within a Bill of Rights itself.

On the sexuality point, I'm in favour of having a freedom from discrimination on the basis of sexuality. That's something that we ought to debate in the context of a Bill of Rights and the community should be heard on how it sees that particular right as

fitting in such a bill. That's a classic example of a particular minority where there is an instance of historic oppression in certain ways.

In the context of anti-vilification laws, we should make up our minds within the Bill of Rights by balancing it against other types of laws. For example, I don't think laws which restrict hate-speech should breach a Bill of Rights, and I think it should be drafted appropriately to respect that. But if you are dealing with anti-vilification, whether it is hate, sexuality, religion or whatever, those types of anti-vilification laws should only be allowed in the narrowest circumstances, and it should be clear that they should be limited to things such as inciting violence against someone. That would be the extent of it, but I think the community would recognise that there should be some scope to allow such laws.

Question — You're proposing a system whereby the Bill of Rights can be altered by the parliament. What is to prevent the parliament from first altering the Bill of Rights and then legislating against a minority?

George Williams — Absolutely nothing, except for the political imperative. Think of the debate over the Native Title Amendment Bill. There was no doubt at that point that if the government had simply repealed the Racial Discrimination Act, then that would not have stood in its way of just extinguishing native title, subject to appropriate compensation. Or, indeed, another context—why not just repeal the Sex Discrimination Act and let the government do what it wants? The fact is, it's not politically feasible, because once the community has an appreciation for a certain right, the political imperative is that politically we are subject to that particular right in a way that means it has a very strong resonance in the community. I think that's actually a far more valuable impediment on parliament than law ever is, because it's something that flows from the community's respect for a right, rather than simply being something on the text of a legal page.