Sydney University Law Society Public Forum

Sydney

12 October 2005

"The Need for Agitators - the Risk of Stagnation"

The Hon Justice M H McHugh AC

High Court of Australia

The Need for Agitators - The Risk of Stagnation[1]

Every developed society – whether it is a democratic society like Australia or one of the many authoritarian regimes that inhabit the globe – needs agitators. The Macquarie Dictionary defines an agitator as "one who stirs up others, with a view to strengthening his own cause or that of his party etc". But that is not the sense in which I use the term. I use it in the sense described by Oscar Wilde in *The Soul of Man under Socialism* in a passage cited by Murphy J in *Neal v The Queen*[2]. Oscar Wilde said:

> "Agitators are a set of interfering, meddling people, who come down to some perfectly contented class of the community and sow the seeds of discontent amongst them. That is the reason why agitators are so absolutely necessary. Without them, in our incomplete state, there would be no advance towards civilisation."

Like Oscar Wilde, I believe that developed societies need agitators for the reason he gives. Without agitators, societies stagnate and, as the communist dictatorships of Eastern Europe demonstrated, implode. Societies need "interfering, meddling people" that question the rules and practices that most of the community accepts without question.

---

[1] I am indebted to my Associate, Kateena O'Gorman, and Lorraine van der Ende of the Reference and Research Service of the High Court of Australia Library for the assistance they have given me in preparing this speech.

[2] (1982) 149 CLR 305.

As Oscar Wilde pointed out, those rules and practices are most often accepted by a community that is "perfectly contented", but self-absorbed. In her novella, *The Acolyte*, Thea Astley describes[3] the shortcomings of a brilliant but self-absorbed musician:

> "I am baffled as to how a man attuned to the subtlest of intervals could fail to register the implications of deliberate dissonance."

This bafflement also describes the "incomplete state" of a "perfectly contented class of the community" that fails to register the implications of its status quo for other classes of its community. The role of the agitator is to resolve the puzzle. The agitator is the perceptive listener who is not only aware of, and attuned to, the subtlest of accepted practices, but also registers the dissonance between those practices and what is fair, just and good. The agitator notes when the entire ensemble – while in tune with itself – is playing in the wrong key.

It should occasion no surprise, then, that musicians have often figured among the ranks of agitators. Mozart's *The Marriage of Figaro*, for example, was based on a play that had been banned as an attack on the mores of the time. When Salvador Allende was elected as President of Chile, he stood beneath a banner that read: "[t]here is no revolution without songs". A strong source of support for Allende's

---

[3] (1972) at 29.

election had been the "New Song" movement, through which Chilean folk musicians gave voice to the country's poor farm workers and sung of the dissonance caused by the struggle for workers' rights. One of the movement's leaders was Victor Jara.

When President Allende was killed, in what is now widely accepted as a US-backed coup, on September 11, 1973, Victor Jara was detained with thousands of others in the Stadium of Chile, tortured and killed by machine-gun fire four days later. On the 25th anniversary of his death, and nearly six years before Chile's highest court ruled that General Pinochet was not immune from prosecution for the detention and the torture of Victor and his comrades, Victor Jara's widow, Joan, remarked that[4] "[t]hey could kill him, but they couldn't kill his songs". The songs of the New Song movement – like other folk tunes – were, to use a statement of one of the folk heroes of both my, and my associates', generation – Bob Dylan[5] – "the stuff that could make you question what you'd always accepted, could litter the landscape with broken hearts, had power of spirit."

To question "what you'd always accepted", one has to have "power of spirit", as Dylan claimed. In the words of the Australian poet, Peter Steele SJ[6], one has to have an "upheaval rising beneath a disciplined surface". It is the "unruly thoughts" summonsed by that

---

4 http://news.bbc.co.uk/1/hi/world/americas/165363.stm

5 *Chronicles, Volume One*, (2004) at 14.

6 "Art into Poetry", (2005) 15 *Eureka Street* 30 at 32.

upheaval that enable the agitator to register the dissonance that lies beneath the surface of language or established practices. The agitator succeeds by raising the consciousness of the community concerning the issue that he or she agitates. Raising consciousness about the issue is almost invariably a necessary condition of successful agitation. Resentment and dismissal are ordinarily the initial reactions to the agitator's challenge. People do not like to have their deeply held beliefs – what Justice Holmes called their "can't helps" – challenged. But it is only by raising the issue – usually again and again – that people become conscious of that issue and are forced to address it.

There is a need for agitators, in the sense I have explained, even in legal practice. This is so even though the common law method – of "high technique and strict logic"[7] – requires judges to engage in a method of analysis analogous to the post-modern scholar's and to critique the principles that lie beneath the surface of existing legal precedents. Justice Cardozo famously explained that the judicial function requires every judge to[8]:

> "extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die."

---

[7] Dixon, "Concerning Judicial Method", *Jesting Pilate*, (1965) 152 at 157.

[8] *Selected Writings of Benjamin Nathan Cardozo*, (1947) at 116.

Most often, the court's law-making function is limited to the incremental development of the body of common law principles. The gradual expansion of the categories of case in which the common law imposes a duty of care on a defendant is a classic example. However, the judicial method also requires appellate judges to keep the law abreast with changes in contemporary political and ethical values or social arrangements[9]. This is well-demonstrated by the common law's recognition of native title. In *Mabo v State of Queensland (No 2)*[10], Brennan J said that:

> "[a] common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."

In *Hollis v Vabu Pty Ltd*, a case concerned with vicarious liability, I commented that[11]:

> "the genius of the common law is that the first statement of a common law rule or principle is not its final statement. The contours of rules and principles expand and contract with experience and changes in social conditions. The law in this area has been and should continue to be 'sufficiently flexible to adapt to changing social conditions'."

If the final appellate court of a country fails to register the implications of disharmony between existing legal principle and

---

[9] McHugh, "Democracy and the Law", (5 July 1998).

[10] (1992) 175 CLR 1 at 42.

[11] (2001) 207 CLR 21 at 50 [72].

changed community values, then a problem arises. The court will amass a debt of legal development that a future generation of judges will be called upon to repay. The interest that will accrue on the loan will be that cases will need to be decided with increased judicial activism so as to bring the law back into harmony with changed social values. The Law needs lawyers who will challenge the status quo, who will critique the current rules and principles, who will sow seeds of discontent in relation to those rules and principles when they are out of touch with contemporary society and thus bring about the change that is required.

There is one area of law that provides fertile ground for the legal agitator to sow the seeds of legal discontent. It is the continuing failure of this country to have a Bill of Rights. Without a Bill of Rights or a constitutional Convention on Human Rights, the High Court of Australia is not empowered to be as active as the Supreme Court of the United States or the House of Lords in the defence of the fundamental principles of human rights. That a judge may be called upon to reach legal conclusions that are applied with "tragic"[12] consequences was brought home in the High Court's decision of *Al-Kateb v Godwin*[13]. There, a majority of Justices - who included myself - held that the investing of judicial power in courts exercising federal jurisdiction did not prohibit the Parliament from legislating to require

---

[12] (2004) 78 ALJR 1099 at 1107 [31]; 208 ALR 124 at 133 [31].

[13] (2004) 78 ALJR 1099 at 1110 [47]; 208 ALR 124 at 137 [47].

that "unlawful non-citizens" be detained until they can be deported. *Al-Kateb* highlights that, without a Bill of Rights, the need for the informed and impassioned to agitate the Parliament for legislative reform is heightened. While the power of the judicial arm of government to keep a check on government action that contravenes human rights is limited, the need for those with a legal education, like yourselves, to inform the political debate on issues concerning the legal protection of individual rights is paramount.

Over the past 60 years, Australia has played a central role in supporting human rights and in encouraging the development of an international system to protect human rights. We were a founding member of the United Nations, were one of only eight nations given responsibility in 1948 for the drafting of the Universal Declaration of Human Rights[14], and have subsequently played a leading role in the development and adoption of international human rights treaties under the auspices of the United Nations. Australia has done a lot to advance human rights and freedoms over the years. So much so, that in 2000 the Secretary-General of the United Nations identified Australia as a "model member" of the United Nations.[15]

---

[14] Along with the United States of America, United Kingdom, USSR, China, France, Lebanon and Chile.

[15] "Transcript of the Prime Minister, The Hon John Howard MP", *Television Interview with Kerry O'Brien, 7:30 Report*, 30 August 2000. Accessed at: <http://www.pm.gov.au/news/interviews/2000/interview428.htm>

Given this record, why then have we recently been called "a wolf in sheep's clothing"[16]? It is undoubtedly the case that Australia's international reputation as a champion of human rights has been somewhat tarnished over recent years. There are, for example, numerous domestic illustrations of our failure to give the protection of human rights the appropriate priority and emphasis in the development and implementation of public policy. Recent decisions by the High Court concerning immigration, race relations, and indefinite detention for habitual criminal offenders provide clear examples of current deficiencies in the protection of human rights within Australia. The former Australian Human Rights Commissioner, Mr Brian Burdekin, commented[17] in 1994 that:

> "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."

Sadly, that comment is just as pertinent now as it was then.

Any debate about the state of human rights within Australia leads inevitably to the question of a national Bill of Rights. The fact that we are the only Western country in the world without a Bill of

---

16 Mungoven, "Better a White Knight than a Trojan Horse", *The Australian*, 27 January 2003.

17 Williams, "Human Rights and the Second Century of the Australian Constitution" (2001) 24 *University of New South Wales Law Journal* 782 at 783.

Rights must certainly raise questions about our true commitment to the human rights standards that we have ostensibly accepted over the years by way of numerous international treaties and conventions. The evident short-comings of Australia's present system of rights protection, many of which have become more apparent in recent years, means that the question of a Bill of Rights is taking on a new urgency. As Dr Sev Ozdowski, the Human Rights Commissioner, recently announced[18]:

> "Unquestionably, the lack of a domestically enacted, actionable 'Bill of Rights' is the single biggest human rights issue facing civil society in Australia today."

Over the years there have been numerous attempts to introduce a Bill of Rights into Australia. Each attempt has proved controversial. None of the Bills introduced by the federal government has been approved by both houses of Parliament. These have included the *Human Rights Bill* introduced by Senator Lionel Murphy in 1973 and the *Australian Human Rights Bill* introduced by Lionel Bowen in 1985. Parliament has also allowed little time to debate the various proposals put forward by minor parties and independents[19].

---

18 Ozdowski, "Human Rights: A Report Card for Australia and Tasmania", (October 2004) at 12.

19 These have included the *Australian Bill of Rights Bill* proposed by Andrew Theophanous MP in 2001, the *Parliamentary Charter of Rights and Freedoms Bill* introduced into Parliament by Senator Meg Lees in the same year, and the *Human Rights Bill* 1982 proposed by Senator Janine Haines.

Attempts to obtain the support of the Australian people for inserting rights guarantees into the Constitution have been similarly unsuccessful. For example, the proposals put to referendum in September 1988, which included certain human rights measures, were comprehensively defeated both at a national level and in every State.

Critics of a Bill of Rights would argue that this reflects a widely held view amongst the Australian people that rights are already adequately protected in this country. Survey results do not support this conclusion. For example, a survey conducted by Brian Galligan and Ian McAllister in 1997 showed that 54% of respondents did not feel that rights were well protected and that 72% supported the introduction of some type of Australian Bill of Rights.[20] The majority of Australians do seem, therefore, to believe in the need to improve the protection of human rights and freedoms within Australia and are sympathetic to the notion of a Bill of Rights.

These survey results provide evidence of real concerns amongst the Australian people about Australia's current performance in the area of human rights. Australia does have much to be proud of in terms of our human rights record, both domestically and at the international level. There are, however, numerous recent examples that can be pointed to that raise doubts about our practical commitment to

---

[20] Williams, *The case for an Australian Bill of Rights: Freedom in the War on Terror*, (2004) at 64.

protecting human rights. Devika Hovell, the Director of the International Law Project at the Gilbert and Tobin Centre of Public Law, recently made this point in suggesting that[21]:

> "On paper, Australia is a champion of the international human rights framework. Australia is a party to all the major UN human rights treaties, and has recognised the competence of five of the UN treaty bodies charged with monitoring state compliance with these treaties. Yet while Australia has agreed to the rules and acknowledged the umpire, it consistently refuses to comply with the umpire's decision. While, on paper, Australia contributes significant support to the international human rights framework, in practice, Australia contributes more to the great human rights paradox ... that many prominent countries adopting human rights treaties basically believe that human rights are only relevant for other countries."

Probably the argument most frequently raised against the adoption of an Australian Bill of Rights is that "if it ain't broke, don't fix it." However, an examination of the current system of rights protection within Australia raises serious questions about the validity of this argument. Professor Hilary Charlesworth has noted that: "[a] marked gap in the celebrated features of Australian democracy, however, is a coherent system of protection of human rights."[22]

---

[21] Hovell, "The Sovereignty Stratagem: Australia's response to UN Human Rights Treaty Bodies", (2003) 28 *Alternative Law Journal* 297 at 297.

[22] Charlesworth, "Human Rights in Australian Law", (2002) 13 *Public Law Review* 155 at 155.

Existing legislation within Australia does provide a measure of protection for certain rights and freedoms. Examples include the various anti-discrimination laws, such as the *Racial Discrimination Act* 1975 (Cth), *Sex Discrimination Act* 1984 (Cth), *Disability Discrimination Act* 1992 (Cth) and the *Age Discrimination Act* 2004 (Cth). There is no doubt that legislation of this nature, and the creation of statutory bodies such as the Human Rights and Equal Opportunity Commission, have a positive role to play in ensuring the protection of human rights in this country.

Again, however, there is no doubt that the protection currently provided under ordinary legislation is no substitute for the protection that could be provided by a national Bill of Rights. The most important difference is that, while a constitutional Bill of Rights entrenches the protection of those rights, ordinary legislation can be readily amended or repealed by a government for short-term political gain. Unlike ordinary legislation, a Bill of Rights is expressly designed to place fundamental human rights beyond the reach of day-to-day politics. Furthermore, a Bill of Rights can protect rights where the language of a statute unambiguously interferes with a right but where the legislature probably did not intend to interfere with it. *Al-Kateb* is probably a good example.

There are, furthermore, major gaps in our current framework of domestic human rights legislation which would be addressed under a national Bill of Rights. Numerous submissions that were made to the

NSW Parliamentary Standing Committee on Law and Justice as outlined in their 2001 report entitled "A NSW Bill of Rights" demonstrated the point[23]. Human rights in Australia have been granted statutory protection in a piecemeal and incomplete fashion, and will always be subject to policy changes through amending legislation.

Certainly a Bill of Rights can never provide absolute protection against draconian laws. The discussion paper recently released by the Law Society of NSW noted[24] however that:

> "a comparative analysis of countries which share similar values and systems of government, namely the United States, Canada, the United Kingdom and New Zealand, indicate that protection of rights is better served within the framework of a legislative or constitutionally entrenched Bill of Rights."

This will be the case because a Bill of Rights forces governments to consider the human rights consequences of the legislation they are introducing, allows the judiciary to view legislation through the prism of human rights, and provides the public with a clearer overview of the rights they are being asked to give up in the name of national security. In the area of counter-terrorism, where

---

[23] NSW Parliamentary Standing Committee on Law and Justice, (2001) at [5.16] – [5.22].

[24] Thampapillai, "A Bill of Rights for New South Wales and Australia", *Law Society of New South Wales Discussion Paper* (January 2005) at 3.

legislative changes are often classified as urgent and are being introduced at a rapid pace, scrutiny of this nature is particularly important.

There are then significant limitations inherent within the mechanisms that we rely upon within Australia to protect our fundamental human rights. Would a Bill of Rights make a difference? Certainly, a Bill of Rights in itself does not guarantee respect for human rights. There are many examples of gross abuses of human rights occurring within regimes that ostensibly provide their citizens with the protection of a Bill of Rights.

But in a society such as Australia's, a Bill of Rights would not be operating in isolation. It would be supported by democratic government, an independent judiciary, an independent press and a culture that values respect for human rights. In such an environment a national Bill of Rights would reinforce our national commitment to respecting human rights, would provide an increased level of entrenched protection for human rights and would offer individuals a mechanism through which they could defend those rights against government intrusion.

Those in favour of adopting an Australian Bill of Rights argue that it would directly improve rights protection by providing a legal framework against which the abrogation of individual rights by government could be measured and challenged. The examples outlined above reveal a need for improved human rights protection within Australia. A Bill of Rights provides a guarantee of fundamental rights to all individuals, including those from minority or disadvantaged

groups, and a means of seeking justice against government infringement of those rights.

By expressly outlining the minimum human rights standards that government is required to meet in its dealings with individuals, a Bill of Rights also assists in improving both government policy making and administrative decision making. It requires the government to view all decisions through a human rights framework, and provides a clear standard against which the government can evaluate both proposed legislation and administrative actions. In this way, a Bill of Rights can act as[25]:

> "… a set of navigation lights to the executive and legislature when they prepare legislation."

In a more general sense, a Bill of Rights would enhance Australian democracy by promoting a stronger culture of respect for human rights, and being an important educational tool. The importance of this educational aspect was emphasised by Francesca Klug in a recent paper presented about the United Kingdom's experience with a Bill of Rights[26]:

---

[25] Keith, "The New Zealand Bill of Rights Experience: Lessons for Australia", (21 June 2002) at 6-7.

[26] Klug, "The United Kingdom Experience", National Museum of Australia (18 December 2002) at 8-9.

> "… every society needs a basic statement of its fundamental values that not only sets the boundaries between state and citizens but acts as an ethical code for how individuals should behave toward one another. Those in favour of the bill argued, and continue to argue, that in diverse, democratic societies where there is no single dominant religion or moral code, it is the values of human rights, inspired by all the great religions and philosophies of east and west, that have a unique capacity to unite and heal."

There is also an international dimension to be considered in the decision to adopt a Bill of Rights. Australia is very much the odd man out amongst other Western liberal democracies. The adoption of the *Human Rights Act* 1998 (UK) has left Australia as the only major country with British heritage that does not have some form of a Bill of Rights.

A Bill of Rights would also reflect the international obligations that Australia has already assumed voluntarily through our signing of human rights treaties such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

Indeed, by failing to adopt a Bill of Rights Australia is arguably failing to meet its obligations under international law. For example, under Article 2 of the *International Covenant of Civil and Political Rights*, Australia has agreed to ensure that individuals have access to

“effective and enforceable remedies” if their rights are violated. The United Nations Human Rights Committee observed in 2000 that[27]:

> "… in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the *Covenant*, there remain areas in which the [Australian] domestic legal system does not provide an effective remedy to persons whose rights under the *Covenant* have been violated."

Of course, critics of a national Bill of Rights all criticise and counter these advantages. They argue that the current Australian political system provides the best guarantee for human rights, through traditions such as responsible parliamentary government, separation of powers, free and regular elections, federalism and an independent judiciary. Indeed, they suggest that the adoption of a Bill of Rights is itself inconsistent with the principle of parliamentary sovereignty, by transferring power from elected parliamentarians to unelected judges, and giving an unrepresentative judiciary the ability to invalidate legislation adopted by the people’s own parliamentary representatives. Providing judges with this type of power over central social issues would politicise the courts and diminish respect for the judiciary by allowing so-called "activist" judges to flourish.

Other arguments frequently espoused against a Bill of Rights include the question of whether it would make any practical difference to the actual protection of rights; that it could actually restrict rights by

---

[27] Evatt, "Bill of Rights and International Standards", (21 June 2002) at 2.

"freezing" them and leaving them unable over time to adapt to reflect changing community standards; that it would frustrate government business and the ability of government to respond to pressing problems; and that it would encourage an increasingly litigious environment.

At a practical level, however, it is clear from a brief examination of Australia's recent record in areas such as immigration, race relations and counter-terrorism policy that the existing mechanisms for protecting human rights within Australia are inadequate in many respects. In the Belmarsh case[28], the House of Lords – armoured with the European Convention on Human Rights – held that "[t]here is... no warrant for the long-term or indefinite detention of a non-UK national whom the Home Secretary wishes to remove. Such a person may be detained only during the process of deportation. Otherwise, the Convention is breached and the Convention rights of the detainee are violated." Thus, while the House of Lords could find that the executive's indefinite detention of a suspected terrorist was unauthorised, the High Court of Australia was not – in the *Al-Kateb* case – equally empowered to find that the executive's indefinite detention of an asylum seeker was a similar breach of human rights. This example clearly evidences a need to place a greater focus on human rights and freedoms within Australia, and supports the argument for the introduction of a Bill of Rights.

---

[28] *A & Ors v Secretary of State for the Home Department* [2005] 2 AC 68 at 92 [8].

A further question to be considered is precisely what rights should be specifically protected within an Australian Bill of Rights? The natural starting point for any Bill of Rights would seem to be the rights recognised under the *International Covenant on Civil and Political Rights.* More controversial is the question of whether an Australian Bill of Rights should extend beyond civil and political rights to include economic, social and cultural rights.

Australia has already recognised the importance of such rights through its acceptance of the *International Covenant on Economic, Social and Cultural Rights*, and there are international examples, such as the *South African Bill of Rights*, which expressly guarantees certain economic, social and cultural rights. At the same time, however, legislating in favour of such rights is seen as being more complicated than legislating for basic civil and political rights due to the difficult questions of resource allocation that invariably accompany such rights.

The question was specifically considered by the ACT Bill of Rights Consultative Committee during its investigations into the adoption of an ACT Bill of Rights. The Committee ultimately concluded that economic, social and cultural rights should be included in the *Human Rights Act*[29]. The ACT Government did not adopt this suggestion, instead adopting a compromise position of initially

---

[29] *Towards an ACT* Human Rights Act*: Report of the ACT Bill of Rights Consultative Committee* (May 2003), at 109.

including only political and civil rights in the *Human Rights Act* 2004 (ACT) but providing for the inclusion of further rights to be considered in a review to be conducted within the next five years.

There are numerous other issues to be considered once we move beyond the initial question of whether or not Australia needs a national Bill of Rights. For example, should a Bill of Rights provide individuals with a right of action and legal remedies against government agencies who breach their human rights? Should a Bill of Rights entrench mechanisms providing for all proposed legislation to be formally considered in light of its human rights implications and compliance with the Bill of Rights before it can be passed by Parliament? In a federal system such as Australia another question will be the effect of any Bill of Rights on the actions of State governments.

While Bills of Rights across the world are founded on the same fundamental belief in the importance of protecting human rights and share many common features, they come in many different varieties. There is not a single "Bill of Rights" model that has been uniformly adopted world-wide. Rather, they come in different forms; all based upon the same concern for human rights but adapted to the particular needs and circumstances of each individual nation.

There is clearly a need within Australia for an increased focus on human rights. Recent High Court decisions have highlighted gaps in our existing system of rights protection. They have also highlighted the inability of Australian judges to prevent unjust human rights

outcomes in the face of federal legislation that is unambiguous in its intent and that falls within a constitutional head of power.

A national Bill of Rights would change this. As I noted in *Al-Kateb*[30]:

> "Eminent lawyers who have studied the question firmly believe that the *Australian Constitution* should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments. It is an enduring – and many would say a just – criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights."

The debate about an Australian Bill of Rights can no longer be considered simply an academic or abstract debate in a country that already boasts an exemplary human rights record. In light of current deficiencies it is, instead, increasingly becoming a debate that holds great practical significance for all Australians.

In your legal studies and your future practices as lawyers or in other disciplines, I invite you to join the ranks of Victor Jara and Bob Dylan - to join the ranks of the creative thinkers that critique the rules of civility so that the rest of us may "advance towards civilisation".

---

[30] *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1115 [73]; (2004) 208 ALR 124at 144 [73].