Chapter Eight
An Australian Bill of Rights by Stealth?

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Giving a dinner address is a rather daunting task. Like the mother-in-law who comes to visit, the trick is not to overstay your welcome – and that can be hard, even for a former lawyer, given that we are, as Kafka pointed out, trained in legal infancy to write a 10,000 word document only to give it the quaint title of a "brief". Donning my other cap as a columnist, I shall try to be brief as I speak tonight about the cunning stealth strategy behind those advocating a Bill of Rights for Australia.

As a child of Danish immigrants who loved nothing more than to make their own sausages, I can provide first hand confirmation that laws are indeed like sausages: it's best not to see them being made. The current push for a Bill of Rights in Australia is an equally unedifying sight – it is a first-class lesson in how to boil frogs.

You recall the theory. If you dump a frog in boiling water, he'll hop out. But put him in cold water and slowly raise the heat and he won't notice he is being cooked. The Bill of Rights strategists are doing the same. We're being dipped into something that has a nice, warm feel to it. But like a colony of frogs marked for execution, the temperature has gone from tepid to warm to hot to boiling. If you haven't noticed it, that's because the advocates pushing a Bill of Rights on us are trying to trick us into quiet submission.

In his book *The Jealous Mistress*, Robert Traver described the law as the difference between a debate and an alley fight. But pick up George William's little book, *A Bill of Rights for Australia*,[1] and you'll find a more under-handed game in play.

Rather conveniently, our high priest of the Bill of Rights movement laid down his stealth strategy in that small book some years ago. The game plan goes like this. Introduce baby Bills of Rights into the States first. But don't call them Bills of Rights because that might scare people away. Call them Charters or Human Rights Acts because that sounds more benign. Then, once people are used to all this new talk about "rights", up the heat and move on to the main game – entrenching a Bill of Rights into the federal Constitution.

And that is precisely how it is panning out. The ACT already has a Bill of Rights – officially called the *Human Rights Act*. Victoria is planning to have a Bill of Rights – called a *Charter of Rights and Responsibilities* – up and running by January next year. WA and Tasmania have also put one on their agendas. Even in NSW, the Attorney-General Bob Debus is pushing for one now that former Premier Bob Carr, who was a long-time critic of a Bill of Rights, is off the scene. In Queensland, too, the Queensland Law Society is putting pressure on Premier Peter Beattie to keep up with other States and begin community consultation with a view to introducing a Bill of Rights.

It's all being done under the guise of listening to the people, as Tasmanian Attorney-General Judy Jackson said a few months back.[2]

But going by the experience in the ACT and Victoria, listening to the people means setting up something called an "independent committee" stacked with the most ardent admirers of a Bill of Rights. The consultative committee in the ACT was headed by Hilary Charlesworth. In Victoria, it was overseen by George Williams, with basket-ball player Andrew Gaze thrown in for good measure. Once that committee was established the result was a *fait accompli*. And, as Williams happily reminded us recently, the Victorian Charter is only the start of incremental change, not the end of it.[3]

It goes without saying that the current process is not so much about listening to the people. You'll notice that a referendum was not called in Victoria – it seems "rights" don't extend as far as voting for radical changes. And these changes are radical. Handing judges a Bill of Rights is like putting them on an extended dose of slow-release judicial steroids: it fundamentally alters the traditional separation of powers by creating a pumped up judiciary and leaving us with a neutered Parliament.

Of course, these matters are never mentioned by those preaching about a Bill of Rights. Instead they talk endlessly about educating the ignorant masses, drowning them in what Williams calls a "rights culture" by way of State-based Bills of Rights before pushing for, and I'm quoting him, "a more robust proposal for a

Bill of Rights in the [federal] Constitution".[4]

And Williams has plenty of support from the big end of town. Former High Court Justice Michael McHugh wants a Bill of Rights. So does former High Court Chief Justice Sir Anthony Mason, who claims that a "Bill of Rights would bring us in from the cold". Notice how a Bill of Rights is being sold to us as a cloak to keep us warm. Similarly, the Chief Justice of the NSW Supreme Court points to "Australia [being] threatened by a degree of intellectual isolationism" because we have not introduced a Bill of Rights. Yesterday we learnt that David Malcolm, the former Chief Justice of Western Australia, is mystified that we don't have a Bill of Rights.

And most lawyers also seem to want one. At least that's the impression one gets by reading *Lawyers' Weekly*, which devotes page after page to articles telling us why we simply must have a Bill of Rights. Of course, the motives of lawyers have an altogether different ring to them – the ring of a cash-register. You may recall the story about Clarence Darrow, ranked in 1925 as one of the most famous lawyers in the United States. After Darrow resolved the legal troubles of a female client, she gushed, "How can I ever thank you?". "My dear woman," replied Darrow, "ever since the Phoenicians invented money there has been only one answer to that question". For much the same reason, soon enough we should expect to see law firms setting up "rights" departments sitting alongside their commercial litigation practices.

So if you get the feeling this is an élite agenda driven, at least in some cases, by self-serving motives, you'd be right. And like a general leading his élite band of troops, Williams' manifesto on how to boil a frog helpfully points to the failure of other élite agendas to ensure the same mistakes are not repeated.

He writes:

> "The outcome to the referendum on the republic suggests that Australians are alienated from the political process and that they lack the necessary information about how the system works".

"The debate", says Williams, "has exposed a lack of confidence in Australian democracy".

Notice how a "No" vote on a republic is fobbed off as a sign that the electorate is not smart enough to vote "Yes"? Not wanting to risk a "No" vote when it comes to the main game – entrenching a constitutional Bill of Rights at the federal level – Williams and company are intent on teaching us about this "rights culture".

The "rights" seduction

And so the rights seduction has begun. And that involves peddling this myth that rights are things to be bestowed on people by gracious governments and interpreted (read "expanded") by well-meaning judges. However, that is not the history of rights in Australia. To put it in the vernacular, each of us has the right to do as we damn well please, with this caveat. As part of the social compact, we agree to abide by those restrictions agreed upon by the people as laid down by Parliament. That's the democratic deal.

Alan Anderson sums it up like this.

> "Rather than having to petition government for particular rights, I hold an absolute, unlimited general right. Government must petition me, as an elector, for permission to restrict that general right".[5]

But Bills of Rights activists are intent on re-educating us into believing that without the protection of a Bill of Rights, we live in a "rights-free" nation. They invariably point to administrative stuff-ups as evidence that a new approach to rights is needed – one where judges get to call the shots.

Susan Ryan, the chairwoman of the New Matilda Human Rights Act Campaign, says:

> "Those children detained cruelly behind barbed wire, the imprisoned stateless asylum seeker Al Kateb, Cornelia Rau and Vivien Solon would not have been damaged so badly by Australian authorities if our *Human Rights Act* had been in place".[6]

But episodes of human failing are hardly evidence of complete system failure. They simply point to the fact that no system is perfect. And handing power to judges via a Bill of Rights leads us towards a far more imperfect system. At least it does if you're a democrat. And I hasten to add that's a democrat with a small "d", lest I be confused with being one of those ever decreasing number of capital "D" Democrats, in which case I'd be off singing the praises of a Bill of Rights at a forum to be held at the ANU next month.

Dipping into their bag of tricks, Bills of Rights enthusiasts also argue that a Bill of Rights is needed to ward off the evils of the new laws enacted to confront the scourge of terrorism. The Queensland Law Society – along with just about every other gaggle of lawyers – says a Bill of Rights is needed to stop these new "intrusive" laws, which "trample over" long accepted human rights as part of the war against terrorism.[7]

They appear to have already decided that our new terrorism laws will be abused by government and

that judges must be given the power to stop them. But this argument simply highlights the fact that the Bills of Rights brigade is driving an élite agenda. You'll notice there has been no uproar from mainstream Australia over the new terrorism laws. No demand that judges be allowed to file the edges off these laws. On the contrary, surveys suggest overwhelming support for the new laws.

It seems that the uneducated masses understand that in a democratic society we need to trust that the government is working to protect our interests. Whether you voted for the Howard Government or not, in a liberal democracy there needs to be an underlying level of loyalty to the very idea of a popularly elected government. If politicians get it wrong, we can boot them out of office. Judges, on the other hand, are there to stay.

But here again, the Bills of Rights enthusiasts revert to a familiar stealth strategy. The aim is to make you feel like a philistine – someone who does not believe in human rights – if you are against a Bill of Rights.

What the devotees don't tell us is that a Bill of Rights completely changes the nature of our democracy. They draft up lists of rights that are full of fine sounding sentiments in the abstract. But in practice these lists are first and foremost powerful weapons for judges. Those judges intent on jurisprudential immortality get to mould new laws under the guise of applying a Bill of Rights. Power shifts from our elected representatives to a very small group of unaccountable and unelected judges.

The UK experience

While Bills of Rights advocates argue that such claims are the ravings of the paranoid, you only have to scan the British newspapers to learn that the British are only now waking up to the way such Bills transfer power from Parliament to the courts – and what it means for their ability to govern themselves.

Tony Blair's Labour government proudly enacted the *Human Rights Act* with the aim to "bring rights home" – as if somehow, up until then, Britain had been devoid of human rights. Equally nonsensical was Blair's promise that the sovereignty of Parliament would be preserved under the new Act.

Blair is now singing a different tune. The man who brought human rights home to Britain has, since the London bombings, threatened to send them packing. He has canvassed the possibility of amending the *Human Rights Act* and is threatening judges with, and I quote, "lots of battles in the months ahead". Blair said, "Let's be quite clear – because of the way that the law has been interpreted over a long period of time, ...I am prepared for those battles in the months ahead".

The battle is one between the British Parliament and the British courts. As columnist Melanie Phillips said in Melbourne last year:

> "It was the judicial rulings under human rights law, both in Britain and in the European Court of Human Rights in Strasbourg, which had made Britain a soft touch for radicals seeking a hospitable berth".
>
> Phillips said:
>
> "These judges had effectively torn up British border controls by making it impossible to police asylum claimants through an elaborate system of hearings and appeals; thwarting government attempts to limit welfare benefits to immigrants to deter widespread abuse of the system; and, above all, preventing the deportation of those thought to be a danger to the state if they were to be returned to countries where they might be ill-treated – and then preventing those foreign terror suspects who ... could not be deported from being locked up either".
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> "Radical imams such as Abu Qatada, Omar Bakri Mohammed, Abu Hamza and Mohammed Al-Massari were allowed to use London to preach incitement to violence, raise money and recruit members for the jihad. UK-based terrorists have carried out operations in Pakistan, Afghanistan, Kenya, Tanzania, Saudi Arabia, Iraq, Israel, Morocco, Russia, Spain and the United States. And because of the chaos over asylum and immigration, which meant that the authorities had no idea who was in the country and who was out, the job of the intelligence service in tracking terrorist recruiters and recruits from abroad was made almost impossible".

It's worth pointing out that, when it comes to a Bill of Rights, operating in the shadow of judicial creativity is as problematic as confronting the real thing. In other words, the threat of what judges might do, given half the chance, is having real consequences. London's *Daily Telegraph*[8] recently reported that detectives in the United Kingdom are refusing to issue "wanted" posters for missing criminals because to do so may infringe the right to privacy under the UK *Human Rights Act*.

An over-zealous application of the *Human Rights Act* is seeping into every aspect of life. Twelve year-old

Ben Syms and his mother threatened to sue his school for trying to prevent him from attending school with his hair dyed red, claiming that the ban on hair dye would infringe his right to free expression. Needless to say, the school backed down.

Returning to more serious matters, the Association of Chief Police Officers has stopped the practice of secretly taking suspects' boot prints, which might have proved useful in future investigations. Prior to the *Human Rights Act*, police asked suspects to remove their boots before entering a cell, giving them an opportunity to record the boot prints. Once the new laws were in place, lawyers advised police that the practice could infringe the prisoners' right to privacy. So police were told they must first ask a suspect's permission to take the boot prints. As one newspaper points out, this kind of defeats the purpose, since the suspects would simply slip on a different pair of boots next time they went out to commit a crime.

It's getting so bad in the UK that a few weeks ago the Lord Chancellor admitted to genuine public fears that there was a problem with Labour's attempt to bring human rights home. Lord Falconer said:

> "I think there is real concern about the way the Act is operating. The deployment of human rights is, often wrongly, leading to wrong conclusions about issues of public safety. There needs to be political clarity that the *Human Rights Act* should have no effect on public safety issues – public safety comes first".[9]

The tricks of the Bill of Rights trade

But we don't hear about these concerns from those pushing a Bill of Rights. Instead, they try to placate the critics – who are written off as legal nitwits – by pointing to clever clauses that apparently ensure that power is not shifting to judges.

They point to Canada's so-called "notwithstanding" clause. Section 33 of the Canadian *Charter of Rights and Freedoms* allows Parliament to declare that legislation "shall operate notwithstanding" certain provisions in the Charter. The Victorian Bill has a similar provision in section 31, where Parliament may issue an override declaration in "exceptional circumstances".

As the room is filled with great constitutional minds, let me flag this issue. It strikes me that such a clause raises very real constitutional questions. The normal rule is that one Parliament cannot fetter the discretion of a later Parliament; when a later law is inconsistent with an earlier law, the later law automatically repeals the former, without the need for formal action of any kind.

But provisions like section 31 in the Victorian Bill appear to set up a completely new regime that moves the goalposts. Now, unless you issue an override declaration, later laws do not repeal earlier inconsistent laws. On the contrary, earlier laws override the later laws unless you issue such a declaration. I wonder whether that is constitutional?

But quite apart from that constitutional issue, going by the Canadian experience, the real problem with the "override" provisions is that they are useless. In Canada, the "notwithstanding" clause has never been used – not once since the Charter was introduced more than twenty years ago. This clause was the clincher when a Charter was being proposed to Canadians. It was meant to ensure that Parliament was not neutered by a galloping judiciary, because it suggested that the elected legislature had the power to override the Charter in certain circumstances. But it has been politically untouchable for a government to draft legislation which apparently infringes the "rights" of Canadians as set down in the Charter.

Bills of Rights enthusiasts also point to section 4 in the UK *Human Rights Act* which, they say, allows a court to do no more than issue a declaration of incompatibility. Parliament is free to ignore that declaration or act upon it. And that is true. Since its introduction, British courts have used section 4 to issue a number of declarations of incompatibility. Rather like Margo Kingston's book, *Not Happy, John*, these "Not Happy, Tony" judicial sledges, packaged up as judgments, have often been ignored by the British Parliament.

Back in Australia, Bills of Rights crusaders promise that we, too, will have no more than a "modest" little charter because courts will be able to do no more than issue declarations of inconsistency. When the ACT *Human Rights Act* was introduced, Hilary Charlesworth assured listeners to ABC radio that the new law will be "an ordinary, common, garden [variety] piece of legislation", just like the UK Act.[10]

But there is nothing ordinary or garden variety about these laws. The real power handed to judges is found in the interpretation clauses. Section 3 of the UK *Human Rights Act* says that:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given

effect in a way which is compatible with the Convention rights".

It goes without saying that anything is possible. Judges, like painters, can easily change white into black. And judges are using their new-found power to re-shape society to suit their own vision of what is fair and just.

For example in *Ghaidan v. Godin-Mendoza*, the House of Lords extended the meaning of "spouse" in the 1977 *Rent Act* to include homosexual spouse, despite very clear language in the Act that defined "spouse" to mean a person "living with the original tenant as his or her wife or husband".

That was no barrier for the testosterone-fuelled House of Lords. They described the interpretation obligation set down in section 3 as "unusual and far-reaching in character".[11] As one judge noted, if Parliament's intent was to bring rights home, then section 3 is the linch-pin of that objective as the "prime remedial measure".[12] And as this case illustrates, armed with such a provision courts can, when interpreting domestic laws, read words in, read words down, up, inside out, in fact, any which way they please.

As Lord Steyn notes, while the drafters of the UK *Human Rights Act* had before them the NZ Act which requires that the interpretation must be "reasonable", the British Parliament specifically rejected any requirement for a reasonable interpretation when applying the *Human Rights Act* to domestic legislation. Similarly, the Victorian Charter and the ACT *Human Rights Act* have no requirement for reasonableness in their interpretation clauses.

Various members of the House of Lords talk in abstract terms about "a Rubicon which courts may not cross". They point to a distinction between "judicial interpretation" and "judicial vandalism". But as the *Ghaidan* decision reveals, when crunch time comes, the court indulges in the equivalent of judicial graffiti by leaving their own distinctive mark on even the clearest of Parliament's expressed intentions. With impressive legal sophistry, they classify their decision as a case of "robust interpretation" rather than legislative amendment.

The ability to socially engineer their preferred outcomes has proven to be, as the dissenting judge in *Ghaidan* pointed out, "dangerously seductive".[13]

In 2004, the UK Court of Appeal ruled that gypsy families who had set up home on land they bought in Chichester, West Sussex in contravention of planning laws should be allowed to stay because human rights law gave them "the right to family life".

As one commentator noted at the time:[14]

> "The ruling effectively gave the green light for illegal gypsy camps the length and breadth of the land to become legally untouchable, in flagrant breach of the planning laws. It thus legitimised widespread law-breaking".
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> "How can unlawful behaviour suddenly be deemed lawful, even though the law that prohibits it is still on the statute book? The answer is that the *Human Rights Act* has become the law that subverts the rule of law itself".

The ACT *Human Rights Act* and the Victorian *Charter of Rights and Responsibilities Act* have similar clauses, so we can expect the same kind of judicial law-making. Here, the Bills of Rights brigade will no doubt say we should just trust judges to do the right thing. That might be a safe bet when you know that activist judges tend to have the same world view as yourself.

American columnist Charles Krauthammer has noted that, in a few short years, the US Supreme Court had cemented into constitutional law abortion on demand, racial preferences, and most recently gay rights. It was, said Krauthammer, the "liberal trifecta" – "just about their entire social agenda save shutting down the Fox News Channel".[15] Another American commentator has remarked: "If the American courts started interpreting the Second Amendment the way they interpret the First, we'd have a right to bear nuclear arms by now".[16]

But when judicial activism goes the wrong way, just wait for the outcry. A few weeks ago Philip Adams sniffed at the George W Bush versus Al Gore contest as a reminder that "the outcome [was] left to the voters on the Supreme Court".[17]

That, of course, is the problem in a nutshell. If we are to count votes when it comes to implementing major social change, let's count the votes of the people rather than those of a few judges.

Where to now?

Having traversed the tricks of the Bills of Rights trade, the next question is, where to now?

Winning the intellectual argument is one thing. The real battle is winning the political one. Williams would have us believe that the public is uneducated and disconnected on these issues. I'm not so sure. The general public may not be able to cite sections of the Australian Constitution but their understanding of the judicial role is impressive.

When I first started writing opinion columns, judicial activism was one of the first topics I covered. Some friends working in the law suggested that this was a narrow topic for the legal in-crowd. They were wrong. I received mountains of mail – and still do – from laymen concerned about the transfer of power to unelected judges.

Like Williams, I'm all in favour of educating the public, but if we are to have an informed decision on a Bill of Rights for Australia, then let's ask some meaningful questions. Not just, "Do you want Australia to have a Bill of Rights?", but also a question that asks, "Do you understand that a Bill of Rights transfers power from Parliament to the Judiciary?".

If we are to have a Bill of Rights to bed down the social compact that Williams and Co are so keen to educate the public about, then let's talk not just about rights, but also about responsibilities. It's a neat trick to draft up, as Victoria has, a *Charter of Rights and Responsibilities* but then make no mention of responsibilities in the Act.

So let's talk about what we might have on the other side of the ledger – on the obligations side. We might want to draft those obligations in the same ethereal language of rights to ensure that if rights are to breed freely, then obligations will too.

Let's be truly avant-garde and give conservatives on the bench something to work with so they too can engineer a better world. This might flush out the not-so-true-believers. Will supporters of a Bill of Rights be quite so supportive of conservative activist judges who play policymaker with a long shopping list of fine-sounding obligations?

So let me finish by suggesting that we should *not* respond to the heat with our own stealth strategy. Instead, we need to work towards a more honest and open debate about a Bill of Rights. The trade of lawyers is, as Thomas Jefferson once said, to question everything, yield nothing and to talk by the hour. I hope I have fulfilled only the first two of those three criteria.

Endnotes:

1. George Williams, *A Bill of Rights for Australia*, UNSW Press, 2000.

2. *Tasmania, WA join push for bill of rights*, *Australian Financial Review*, 13 January, 2006.

3. *A clear right of way for people who cherish their freedoms*, George Williams, *The Sydney Morning Herald*, 21 December, 2005.

4. *A Bill of Rights for Australia, op. cit.*, at p. 54.

5. *The Rule of Lawyers*, Alan Anderson, *Policy*, Volume 21, No 4, p. 36.

6. *Safe rights: why not?*, Susan Ryan, letter to *The Australian Financial Review*, 5 December, 2005.

7. *Queensland calls for human rights charter*, *Lawyers Weekly*, 12 May, 2006 at 6.

8. *Human rights fears mean police refuse to issue wanted posters for foreign criminals*, London's *The Daily Telegraph*, 14 May, 2006.

9. *Ibid.*.

10. *The Law Report*, Radio National, 9 December, 2003.

11. *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 at para 30.

12. *Ibid.*, Lord Steyn at para 44.

13. *Ibid.*, Lord Millett at para 61.

14. *A caravan and horses through the rule of law*, Melanie Phillips, *Daily Mail*, 1 October, 2004.

15. *Courting a crisis of legitimacy*, Charles Krauthammer, *The Washington Post*, 4 July, 2003.

16. *Annie's Got Her Gun*, Ann Coulter, *George Magazine,* December, 2004.

17. *Polls fail to detect apathy*, Philip Adams, *The Australian*, 28 March, 2006.