

discrimination at work. Mr Tillett said that AIDS-related discrimination was predominantly taking place in the area of employment. He relayed some of the actual incidents that had been brought to the attention of the board:

- a manager transferred a Melanesian employee from the front counter to a storeroom saying that customers might not wish to deal with someone they suspected of having AIDS;
- after his return to work following a minor operation, an employee generally believed to be gay was told he would have to have an AIDS blood test, and make the results available to all the staff so fellow employees could decide whether they would go on working with him;
- employees in a small office refused to answer the telephone or touch documents belonging to a man they knew to be a haemophiliac, saying that there was a risk of AIDS.

(Symposium, Paper)

other discrimination. Other forms of discrimination addressed at the Symposium occur in relation to the provision of goods and services, education, and trade unions.

legislation. The increased occurrence of AIDS-related discrimination raises the issue of the need for existing anti-discrimination laws (at both State and federal levels) to be reviewed in the light of the appearance of AIDS in the community. For example, although the NSW Anti-Discrimination Act makes direct and indirect discrimination on the grounds of physical impairment unlawful it is unclear whether persons with antibody positive conditions are covered by its provisions.

Again, if anti-discrimination laws are to effectively protect homosexuals and persons perceived as such it would appear necessary to enact amendments so as to preclude discrimination on the basis of sexual preference

where such criterion is not included in existing legislation. (The first part of this article appeared in the last issue, [1985] *Reform*, 144.)

bill of rights

Toute loi qui viole les droits imprescriptibles de l'homme, est essentiellement injuste et tyrannique; elle n'est point une loi.

Any law which violates the infeasible rights of man is essentially unjust and tyrannical; it is not a law at all.

Maximilien Robespierre,
Declaration des Droits de l'homme,
24 April 1793, xviii

an australian bill of rights emerges. After a long period of gestation, it appears that Australia may be close to obtaining its own Bill of Rights. The legislation which would make the Bill of Rights part of Australian law was approved by the Federal Cabinet on 30 September 1985, introduced into the House of Representatives by the Attorney-General, Mr Bowen, on 9 October 1985 and passed by the House on 15 November 1985. The Bill implements the Australian Labor Party's policy providing for a Bill of Rights and reflects Australia's role as a State Party to the International Covenant on Civil and Political Rights. The Covenant was adopted by the General Assembly of the United Nations on 16 December 1966. Australia became a party to the Covenant in December 1972 under the Whitlam Government and ratified the Covenant in 1980 under the Fraser Government. An Australian Bill of Rights was first proposed by the then Federal Attorney-General, Senator Lionel Murphy, but the draft legislation was not enacted. In 1984, draft legislation was prepared under the supervision of the previous Attorney-General Senator Gareth Evans and became one of the issues at the general election held on 1 December 1984. After the election, the present Attorney-General Mr Bowen decided not to proceed with Senator Evans' bill.

criticisms of the bill of rights concept. There has been no shortage of people who assert

that Australia has no need for a Bill of Rights. Some of the criticisms are:

- A Bill of Rights is neither necessary nor sufficient to guarantee the preservation of rights. Proponents of this viewpoint cite the words of the Chief Justice of the Australian High Court, Sir Harry Gibbs:

'If society is tolerant and rational, it does not need a bill of rights. If it is not, no bill of rights will preserve it.'

- The concept is undemocratic in that it is an attempt by the present generation to limit the power of the next. In making this point, Professor Lachlan Chipman, Professor of Philosophy at Wollongong University, has said:

'It is worth contemplating whether, if our founders had annexed a bill of rights to our Constitution, it would have guaranteed racial and sexual equality, or whether it would have formally entrenched the opposite.' (*Age*, 20 May 1985).

- A Bill of Rights would produce endless litigation. The South Australian Shadow Attorney-General, Mr Griffin, has said that it would open challenges to long established laws and in particular would disrupt the criminal justice system by giving accused persons greater opportunity to challenge charges, delay trials and create added expense to taxpayers. (*Advertiser*, 12 July 1985).
- The common law provides sufficient protection for human rights.
- A Bill of Rights is of necessity a vague and ambiguous document.
- As a consequence of this vagueness, judges would be required to make value judgments in interpreting the Bill of Rights. There are at least two aspects to this particular criticism:
 - Judges are not answerable to the electorate for their interpretations of the Bill of Rights. This then is

seen as another way in which the operation of a Bill of Rights would be undemocratic.

- Mr Richard Tracey, a Senior Lecturer in Law at Melbourne University, has warned that the consequence of judges bringing their own values and perceptions to bear on their interpretation of the law would be the spread of the American legal method of 'jurometrics' whereby judges are rated on a political scale of conservative to liberal on the basis of their decisions (*Age*, 21 October 1985).

Reservations were expressed about this possible new role for judges at the 23rd Australian Legal Convention in Melbourne (*Sydney Morning Herald*, 7 August 1985). Justice Brennan of the Australian High Court said:

If a Bill of Rights were to work a redistribution of powers between the courts and the political branches of Government in this nation, it would be necessary to encourage our judges to give consideration to issues which they have been trained largely to ignore.

His Honour said that judgments on policy issues had traditionally been made by the political branches of Government which were seen as 'more sensitive to public sentiment than the unelected judiciary'. In response to a paper delivered by Justice Sandra Day O'Connor of the Supreme Court of the United States of America in which her Honour described the United States Bill of Rights as 'one of the most remarkable and enduring achievements of American democracy', Justice Michael McHugh of the New South Wales Supreme Court pointed out that while there were similarities in the Constitutions of Australia and the United States and the foundations of their legal systems, there were vast differences in their judicial traditions and reasoning.

the advantages of a bill of rights. Supporters of a Bill of Rights cite the following advantages:

- The Bill would have an educative function, inspiring respect for rights by setting them out in a positive declaratory form. The Bill could act not only to elevate general community standards but to guide legislatures, administrators and judges.
- Despite protestations of the sufficiency of the common law, it does not in fact offer clear or wide-ranging statements of rights. The Attorney-General, Mr Bowen, has made the following points:
 - at best the common law offers remedies in a haphazard and incidental way;
 - it provides no guarantees of such rights as freedom of expression, movement or peaceful assembly or the right to a speedy trial or legal aid;
 - it has been specifically held that the common law contains no fundamental guarantee of the right of religious freedom and expression (*Advertiser*, 17 October 1985).
- Professor Tony Blackshield of La Trobe University has pointed out that a Bill of Rights would enable judges to recognise rights which even the best judges have been unable to do at common law (*Age*, 26 July 1985).
- The United Kingdom itself, in which the common law originated, has since 1966 allowed individuals to petition the European Court of Human Rights under the European Convention on Human Rights. Judgments of the European Court of Human Rights have resulted in the following legal developments in the United Kingdom:
 - amendments to the Prison Rules;
 - a change in the Scottish Education Department's policy on corporal punishment;
 - proposed legislation to enable parents to exempt a child from corporal punishment;
 - enactment of the Contempt of Court Act 1981;
 - enactment of the Employment Act 1980 to protect the right of freedom of association;
 - enactment of the Mental Health (Amendment) Act 1982;
 - changes to legislation regulating homosexual conduct; and
 - enactment of the Interception of Communications Act 1985 (A Bill of Rights for Australia? Report of the Senate Standing Committee on Constitutional and Legal Affairs (1985), para6.5–6).
- Even assuming that the rules of the common law provide the legal framework for a civil libertarian's Utopia, Parliament can legislate to withdraw common law rights. The enactment of the Communist Party Dissolution Act 1950 is a case in point. The Menzies Government passed the Act in reliance on the defence power but the High Court held that this power did not support the legislation which was therefore invalid. It should be emphasised that the legislation was invalid because of a lack of a relevant head of power rather than any constitutional guarantee of freedom of thought and expression. An attempt to amend the Constitution so as to permit the legislation failed to attract the required majorities.
- Community attitudes fluctuate. It is therefore valuable to protect minorities by establishing certain fundamental rights to guard against a possible future erosion of those rights.
- Even assuming the best intentions of the Parliament, legislation can frequently have anti-libertarian consequences which are not intended by the legislature. A Bill of Rights would protect individuals against such unintended incursions on civil liberties.
- A Bill of Rights would be a clear and definite move to fulfil Australia's international obligations under the International Covenant on Civil and Political Rights.

features of the bill of rights legislation. The 32 Articles of the Bill of Rights are set out in clause 8 of the Australian Bill of Rights Bill 1985. The Bill of Rights provides for the following rights:

- a right of every person to the equal protection of the law (however, laws discriminating in favour of a particular group in order to redress disabilities or counter discrimination are specifically preserved);
- rights for ethnic, religious or linguistic cultural minorities to enjoy their own culture;
- the right to vote and be elected at genuine periodic elections which are to be by universal and equal suffrage and by secret ballot;
- freedom of expression;
- freedom of thought and conscience;
- freedom of religion or belief;
- right of peaceful assembly;
- freedom of association;
- rights of privacy and family rights including:
 - protection from unlawful attacks on honour and reputation;
 - protection from unlawful search or seizure;
 - the right to marry and found a family;
- freedom of movement within Australia and rights to enter and leave Australia;
- the right to life;
- rights of liberty and due process including:
 - outlawing of slavery;
 - a right to be informed of reasons for arrest and of charges;
 - rights of a person detained in custody to remain silent and consult with a lawyer;
 - rights of a person on a criminal charge to a fair hearing, a lawyer, legal assistance if the interests of justice require and the person lacks sufficient means and to an interpreter;

- new criminal offences not to be made retrospective;
- a right of a convicted person to seek review by a higher tribunal;
- right of a person deprived of liberty to be treated with humanity.

Although this last group of rights has been referred to compendiously as 'rights of liberty and due process', it should be noted that a right of due process as such has not been included in the Bill of Rights, presumably in order to avoid the wide-ranging limitations on executive and legislative power which the courts in the United States of America have imposed on the basis of the right of due process contained in the Fourteenth Amendment to the United States Constitution. It is interesting to note a provision in Article 21 of the Indian Constitution similar to Article 19(3) of the proposed Australian Bill of Rights. Article 19(3) provides that '[n]o person shall be deprived of liberty except on such grounds, and in accordance with such procedures, as are established by law'. The Indian Article has been interpreted by the Indian Supreme Court as conferring a right of due process, but it seems unlikely that our courts would place the same interpretation on Article 19(3).

Article 3 of the Bill of Rights stipulates that the rights and freedoms are subject to 'such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society'. This blanket qualification is placed in one article in order to preserve the simplicity of the text and enhance the inspirational quality of the Bill of Rights by obviating the need for all rights to contain this qualification as is done in the International Covenant on Civil and Political Rights. The Canadian Charter of Rights and Freedoms and the proposed New Zealand Bill of Rights contain the qualification in a single article, as is proposed for the Australian Bill of Rights. It should be noted that the authorisation for justifiable *limitations* on rights will not permit a total *denial* of any of the rights.

operation of the bill of rights. The impact of the Bill of Rights on other laws will be as follows:

- It will only apply to the law (both statute law and common law) of the Commonwealth and Territories (other than the Northern Territory).
- At its lowest level of operation, it will act as a rule of interpretation so that a construction of relevant laws which results in no conflict with the Bill of Rights or which furthers the objects of the Australian Bill of Rights Act is to be preferred to any other construction.
- Prior inconsistent Acts and instruments are deemed to be repealed five years after the day on which the Bill of Rights Act comes into force.
- Later inconsistent Acts and instruments do not have any operation to the extent that they are inconsistent with the Bill of Rights unless they expressly override the provisions of the Bill. It should be noted that doubts have been expressed as to the validity of an attempt by the Parliament to forbid implied repeal. Existing High Court authority suggests that it is not possible. However a decision of the Canadian Supreme Court based on the Canadian Bill of Rights 1960 which preceded the Canadian Charter of Rights and Freedoms and which operated as an ordinary statute, as the Australian Bill of Rights is intended to do, held that it was possible for Parliament to require an express declaration to override the Bill of Rights.
- Where a court finds that legislation is inconsistent with the Bill of Rights, it may make a declaration deeming the inconsistent legislation to have been in force prior to the date of the declaration or up to a maximum of three months after the declaration is made if the court is satisfied that 'grave public inconvenience or hardship' would otherwise be caused. A 'fruits of victory' exception ensures that the declar-

ation does not apply to the proceedings in which it was made.

- Where rights relating to search and seizure and due process have been infringed, a court:
 - must refuse to admit evidence obtained in breach of those rights unless satisfied that admission of the evidence would substantially benefit the public interest in the administration of criminal justice and that benefit would outweigh any prejudice to the rights and freedoms of any person (in this regard, it should be noted that the Australian Law Reform Commission has developed similar proposals relating to the admissibility of illegally obtained evidence which are discussed in its Interim Report on Evidence);
 - may make other orders to preserve the reputation of the administration of justice in the face of the infringement.
- The Bill of Rights does not confer any right of action or make any person criminally liable. It is 'a shield and not a sword'.

The legislation also establishes a Human Rights and Equal Opportunity Commission (see below).

specific criticisms. The criticisms of the Bill of Rights legislation range from the contention that it is too weak to assertions that it is too wide-ranging. Those who say that it is too weak point to its failure to cover State law, its exclusion of past Commonwealth laws for the first five years of its operation and its lack of a positive right to challenge laws or initiate action to protect a right. The lack of a right to own private property and a right to refuse to join a trade union remains a point of criticism (see the comments of the former Shadow Attorney-General, Mr Brown, reported in the July issue of *Reform*). Amendments proposed by Mr Bruce Goodluck but rejected by

the Government would have provided for these rights as well as

- a right for parents to choose private schools for their children's education; and
- rights in respect of scientific research and creative activity.

A further criticism of the legislation is that the Bill of Rights will not be constitutionally entrenched and so will be subject to change by ordinary Act of Parliament. Apart from the difficulty of obtaining the agreement of a majority of electors in a majority of States in order to amend the Constitution to include a Bill of Rights, the Report of the Senate Constitutional and Legal Affairs Committee has said that there should at least be a trial period in which the Bill of Rights operates as an ordinary statute before the question of constitutional entrenchment is considered (para 3.5). However, the Committee considers that the Bill should not, in any case, be entrenched for the following reasons:

- the rights thus entrenched may not be relevant to future generations, but would be difficult to alter (for example, the right to bear arms contained in the Constitution of the United States of America);
- judges would have the 'final word' on important social issues;
- such a transfer of responsibility to the judiciary could cause Parliaments to abdicate their responsibilities and could engender judicial activism (para 3.6–12).

On the other hand, a Bill of Rights which did not give a constitutional guarantee of rights would be worthless in the face of a determined Government with control of both Houses of Parliament. A period in which the Bill operates as an ordinary statute could be used to educate the electorate as to the value of a Bill of Rights and could be followed by a referendum to entrench the Bill in the Constitution.

reverse discrimination. The Law Council of Australia has expressed concern that the Bill of Rights permits reverse discrimination in favour of disadvantaged groups (*Australian Financial Review*, 26 November 1985). The Law Council contends that there is no support for such a provision in the International Covenant on Civil and Political Rights. However, the explanatory memorandum to the legislation shows that the Government regards the provision in Article 26 of the International Covenant for 'effective protection against discrimination' as an implicit permission for 'benign discrimination'.

abortion. Although Article 18 of the Bill of Rights states that '[e]very human being has the inherent right to life and no person shall be arbitrarily deprived of life', the Australian Episcopal Conference expressed the concern of the Catholic Bishops that the Bill may nevertheless fail to protect unborn children due to the provision in clause 9(3) that the rights and freedoms of the Bill of Rights apply only for the benefit of 'natural persons', an expression likely to be construed so as to exclude the unborn (*Age*, 31 October 1985). In order to allay these fears and make clear that the Bill provided no right to abortion, the Government subsequently amended the relevant sub-clause to read '[t]he rights and freedoms set out in the Bill of Rights do not apply for the benefit of bodies politic or corporate' which the Government has stated reflects the intention of the original clause (*Age*, 13 November 1985). Mr Bruce Goodluck proposed further amendments to the legislation so as to make it clear that human life exists from the moment of fertilisation but the amendments were rejected by the Government. The President of the Australian Episcopal Conference, Archbishop Francis Rush, has indicated that the Government's amendment to the legislation falls short of allaying all of the bishops' concerns which include a concern that the right to privacy may be interpreted to confer a right to abortion as has happened in the United States of America (*Australian*, 13 November, 1985).

human rights and equal opportunity commission. The powers given by the legislation to this Commission have produced the greatest concerns about the Bill of Rights package. The functions of the Commission are:

- to inquire into possible infringements of rights and effect a settlement or report to the Minister;
- to promote an understanding of rights in Australia;
- to promote the protection of rights and freedoms;
- to undertake research and educational programmes;
- to examine enactments for conflict with the Bill of Rights and report to the Minister; and
- to recommend enactments to the Minister to promote rights.

The powers of inquiry proposed for the Commission which have caused concern include the following:

- a power to compel attendance at a compulsory conference for settlement of a dispute;
- a power to require information to be furnished, questions to be answered and documents to be produced, the penalty for non-compliance being a fine not exceeding \$1000 or three months prison in the case of a natural person or a fine not exceeding \$5000 in the case of a body corporate;
- a power to conduct conferences, which are to be held in private, 'in such manner as the person presiding at the conference thinks fit'.

In addition a person who insults or obstructs a person conducting a Commission inquiry can be fined \$1000 in the case of a natural person or \$5000 in the case of a body corporate.

The Federal Opposition is strongly opposed to the powers of the Commission as it is to the Bill of Rights legislation as a whole. It ap-

pears that the Australian Democrats are also concerned that the powers and penalties are excessive (*Bulletin*, 3 December 1985).

The reservations concerning the sort of proceedings which the Commission can conduct were summed up by an editorial in the *Advertiser* (11 July 1985):

Such proceedings, smacking of a star chamber, could as easily inhibit individual liberty as promote it. They also would seem to run against the grain of what the Bill is supposed to represent.

The editorial expresses the view that the remedy for violation of rights should be sought in the courts as it is in the United States.

Some limited criticisms of the powers of the Commission have been made by the Senate Standing Committee for the Scrutiny of Bills in its Seventeenth Report of 1985. The Committee recommends that the time within which a person may be required to furnish information or the time or place at which a person may be required to attend should be reasonable (p 11-3). The Committee has also drawn attention to the removal of the privilege against self-incrimination as a possible undue trespass on personal rights and liberties (p13-4).

effect of the bill of rights on the states. As has been mentioned, one of the criticisms of the proposed Bill of Rights legislation is that it does not override State laws. The Report of the Senate Standing Committee on Constitutional and Legal Affairs recommended that any Bill of Rights should apply to future State laws with a provision allowing State Legislatures to displace certain operations of the Bill of Rights by express declaration, any such declaration to lapse after a maximum of two years subject to express renewal by the relevant Parliament (para4.40-1). The Committee recommended however that the displacement mechanism not be permitted to override electoral rights provisions of the Bill of Rights which would overcome gerrymanders (para 4.46-9).

The legislation passed by the House of Representatives takes a different approach. The Commission may, with the consent of the Minister, examine State enactments and report to the Minister as to any conflict between the enactments and the Bill of Rights. When introducing the legislation, the Attorney-General, Mr Bowen, pointed out that the Government had chosen to limit the extent of application of the Bill of Rights to the States 'in order to achieve if possible a co-operative approach to human rights protection' (*Canberra Times*, 10 October 1985). However Mr Bowen reserved the Commonwealth's right to enact specific overriding Commonwealth legislation if the States fail to repeal legislation which offended the Bill of Rights or failed to enact their own Bills of Rights. Such legislation would be enacted in reliance on the external affairs power of the Australian Parliament as interpreted by the High Court in the *Tasmanian Dams Case*. A majority of judges in that case held that the external affairs power enabled the Parliament to enact legislation implementing Australia's international treaty obligations. Valid legislation would override inconsistent State laws.

In response to moves by the Australian Democrats to make specific provisions to ensure democratic elections in all States, Mr Bowen has made it clear that when the Bill of Rights has been passed he is anxious to have the Commission report on proposals for redistributions of the Western Australian Upper House and the Queensland Legislative Assembly (*West Australian*, 27 November 1985). Mr Bowen pointed out to Parliament in response to a question from the Labor Member for Canning, Mr Gear, that there was an 11 to 1 disparity in the voting power of electors for the Western Australian Legislative Council with 8500 electors in the Lower North province and 95000 electors in the North-East Metropolitan province.

aborigines. Unlike the Canadian Charter of Rights and Freedoms and the proposed New Zealand Bill of Rights the proposed Australian Bill of Rights does not have any

autochthonous elements. The Canadian Charter for instance has provisions protecting the rights of English or French linguistic minorities in individual provinces as well as a provision recognising and affirming existing aboriginal and treaty rights of the aboriginal peoples of Canada who include the Indian, Inuit and Metis peoples. Similarly the New Zealand Bill recognises the rights of the Maori people under the Treaty of Waitangi which is annexed to the Bill of Rights in both the English and Maori languages as a schedule. However the Senate Constitutional and Legal Affairs Committee in its report considered that problems of Aboriginal rights were best addressed through specific legislation and pointed out that Australian Aborigines would benefit generally from the introduction of an Australian Bill of Rights (para 3.60-2). Article 4 of the proposed Bill of Rights guaranteeing equal protection of the law and Article 5 protecting the rights of minority groups are particularly relevant in this context.

the future of the legislation. The Bill of Rights legislation must now be considered by the Senate. Some delay in that Chamber is likely due to the anxiety of the Australian Democrats to secure a strengthening of the Bill's provisions with respect to the States. The Democrats' spokesman, Senator Michael Macklin, has said that if the legislation is not strengthened or at the very least referred to the Senate Constitutional and Legal Affairs Committee, the Democrats would have to reject it (*Age*, 26 November, 1985).

expungement of criminal records

Stone walls do not a prison make
Nor iron bars a cage.

Richard Lovelace, 1640

endless punishment for past mistakes. The Australian Law Reform Commission has issued a discussion paper on what can be done to enable people to 'live down' criminal records. The paper invites submissions and comments. The final report is expected in 1986. Thousands of people are convicted of