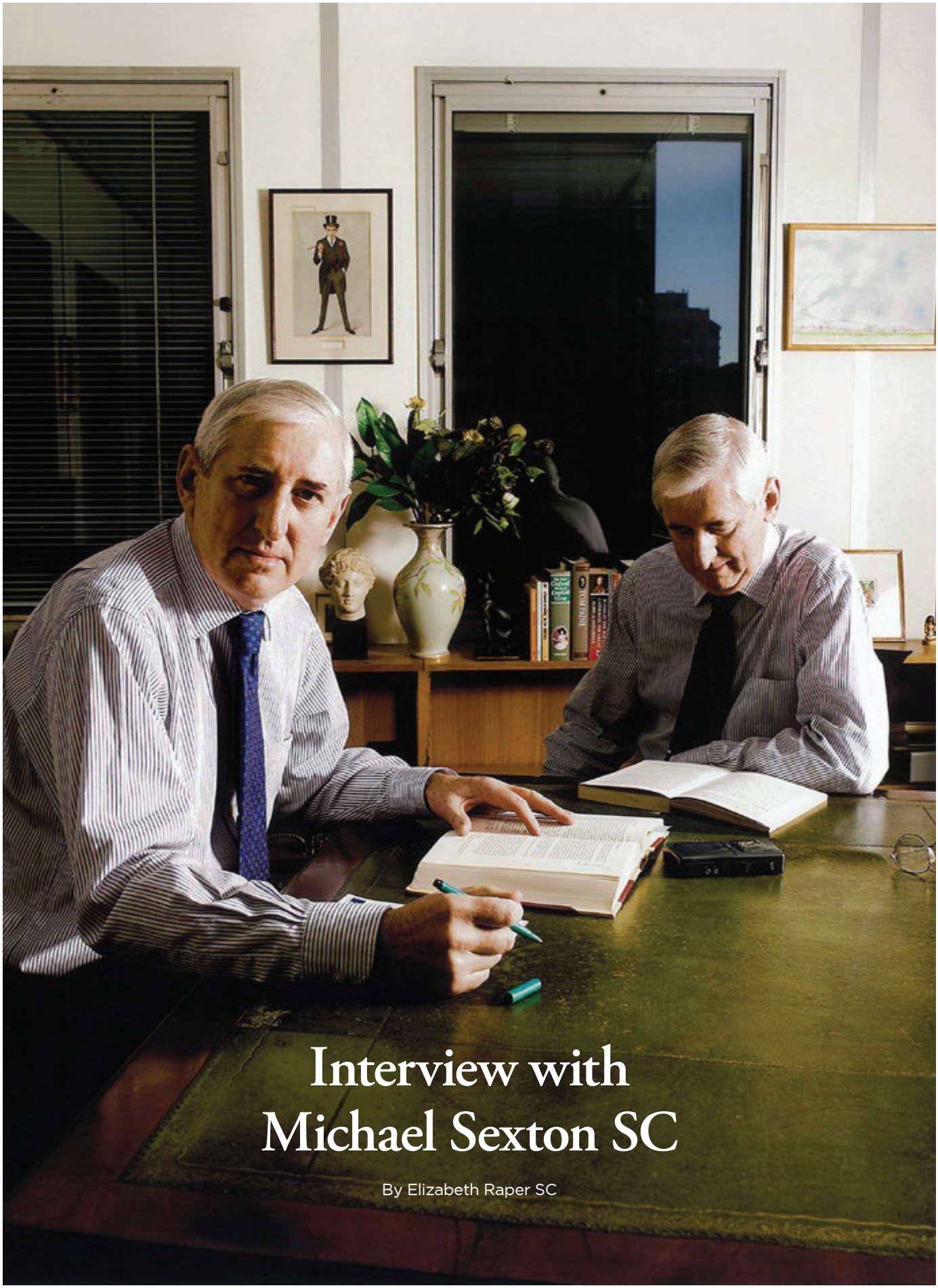


Interview with Michael Sexton SC

By Elizabeth Raper SC

The Solicitor-General's Path and The Capacity for Dissenting Opinions

Michael Sexton SC in conversation with Elizabeth Raper SC

Michael Sexton SC, Solicitor-General of New South Wales since 1998, has recently published a collection of his writings over the decades, entitled Dissenting Opinions, about wide-ranging issues including freedom of speech, political correctness, republicanism, the rule of law, bills of rights, the role (and problems) associated with Royal Commissions, foreign affairs and sport. On 16 September 2020, Elizabeth Raper SC (ER) sat down with Michael Sexton SC (MS) to discuss his very interesting legal and academic career together with the role of lawyers in public debate.

Set out below is their conversation.

ER: *In the formative years of your legal career, your first legal position was as an associate to McTiernan J, on the High Court and then when he sat as a judge on the Judicial Committee of the Privy Council, what do you remember most vividly of this time working with him? Reflecting on this period, do you see this experience as shaping in any way the way you think about the law or your future place within it?*

MS: During that 'initial time at the High Court' I saw the best advocates in every jurisdiction. It was particularly true at that time as the Court was on circuit for a third of the year. In addition, one observed the judges of course in operation, most particularly your own judge, but the other judges as well. This experience gives you an idea of the best of the law and the sort of standards that you try and aim for in future years. The same was true before the Privy Council.

The experience made a very graphic impression at that time and remained for the future.

ER: *Your memoirs* On the Edges of History – A Memoir of Law, Books and Politics *provide such a delightful, almost playful, recollection of this time when you were so young and embracing the world, in a particularly adventurous way. Given your Bar News readers are confined within Australian borders at the moment, tell us about your Trans-Siberian railway experience between your time with McTiernan J and taking up a scholarship at the University of Virginia?*

MS: The 'Trans-Siberian Railway' *(laughs)* was something of an accident. I'd come back to Hong Kong with the McTiernans and put them on a plane for Sydney. I had wanted to get back to Europe to do some travelling with some people from law school and this seemed like an adventurous way to do it. I'd underestimated the difficulties of travelling in what was then the Soviet Union, because you couldn't arrive somewhere or leave somewhere without someone from the government tourist organisation organising it for you. The trains looked like something out of the Tsarist period from the 19th Century. My chief memory was the vastness of Russia. Day after day the train would rattle on. You would look out the window and the forest would give way to steppes and so on. This was a land mass that swallowed Napoleon's army, swallowed Hitler's army. I very much enjoyed it although I was quite pleased to finally emerge and back into the West.

ER: *You travelled a lot at that time in Europe and working in America, have you continued to juxtapose your writing and work with travel?*

MS: Well, I certainly did a lot of travelling when I was young and my horizons have narrowed as I've got to this period in my life. We have spent quite a bit of time in Paris, and in France. In recent years we have spent some time in Italy, particularly in Verona and at Lake Garda.

ER: *What will your post-pandemic voyage be?*

MS: Well if there is such a thing, it would be back to Verona and to Lake Garda.

ER: *The University of Virginia was an interesting choice at that time when Australians sought out the Oxbridge experience, what drew you to America?*

MS: I was always more interested in the U.S from a legal point of view - Their constitutional law as well as anti trust law and labour law bore more resemblance to ours than the English system. In addition, I have always been particularly interested in American history and American literature and I was keen to live in the U.S.

ER: *Have you found that your legal arguments over the years have been influenced by American jurisprudence?*
MS: To some extent. The notion of public policy considerations developed earlier in American law than they did perhaps in English law and I think that is still something that is a particular interest of mine.

ER: *You have written about Bills of Rights and their efficacy in Australia. Do you see the fact of the existence of a Bill of Rights in America as having any influence on how America is coping with the current pandemic? Do you feel that in some way your own previous writings about this issue have been prophetic in some sense?*
MS: I do not think the Bill of Rights in the U.S. has had a particular impact on the last six months. But in a more general sense, as I have written, it seems to me undesirable to transfer political questions to courts. This has been, in my view (noted to be a minority view in some legal circles), a product of the existence of the Bill of Rights. As a result, the US Supreme Court has become a political institution because people know it decides political questions and its judges are treated as politicians.

Academic experience should broaden the way you solve a legal problem.

ER: *Your career has been one which has embraced successfully the trinity - academia, law and politics more than others. On the academic side, you then worked as an academic at the University of New South Wales and completed a sabbatical at Georgetown University, what influence do think these experiences had on you later practising law?*
MS: Academic experience should broaden the way you solve a legal problem – you consider legal theory as well as the particular facts.

ER: *After returning from the University of Virginia, you worked with the Attorney-General Kep Enderby, during one of the most interesting periods in Australian political history - the Whitlam years. You have worked with many politicians and governments since, including in your current role as Solicitor-General of New South Wales. What insight into politics and a politician's approach to the law and lawyers do we need to understand that barristers perhaps do not understand?*
MS: Politicians need to be always conscious of the electoral impact of the things that they do: of their comments on legislation, for example; on the results of litigation; and thus they are operating to some extent in a different way from someone whose looking at the issue from a legal perspective only.

ER: *You have written much about 'the Dismissal' and the role of various parties. Your writings were published before the publication of Sir John Kerr's letters to the Queen (being perhaps the last pieces of puzzle). Do you have any observations to make about the exchange?*
MS: As to 'the Palace letters', there is nothing particularly new in the Palace letters. It is important that they were published and the fact that it took so long for them to be published is pretty unsatisfactory. But they do underline the irony - there were people in London who knew what the Governor General was proposing to do and yet no-one in the Australian government was aware of this. We knew that in a sense, but it underlines that this was conducted in

great secrecy. I do not under-estimate, in terms of things I have written, the problems of the Whitlam government or the fact that Sir John Kerr might have ultimately faced a very difficult decision. But I do not think that he went about coming to that decision in the right way. I would say he had to confront the Prime Minister at some stage with what he was proposing. It would not have been a particularly pleasant exercise but I think that is what he had to do. And if he had done that he would have, in my view, emerged from all this very, very differently. The truth is that he paid a very high price in a sense for the way in which he conducted all this - he was driven out of the country in many ways, and spent the rest of his life in some form or exile.

ER: *For many years barristers entering politics was not an unusual thing and indeed people like Tom Hughes QC regarded it almost as an obligation to offer oneself public service without expecting any post-career political reward. With some notable exceptions (eg the State Attorney-General) it seems that fewer barristers are choosing to stand for public office than perhaps was the case in the past, do you agree ? And if so, given the 'career' nature of politics, is it, in truth, still possible for barristers to stand for office, if they have not been a political advisor, union official or party official?*
MS: I think it is still possible because the current New South Wales Attorney General shows that it is. But it is very difficult now for two reasons. One is that people need to start so young now in the political arena in one of those sorts of jobs that you have described in your question. That is not something that someone is going to do who is probably bent on a career of the Bar.

And secondly, there is also just the fact that you need to spend so much time to organise a seat in the parliament, particularly in some areas, The organisation of the branches is inconsistent with life at the Bar.

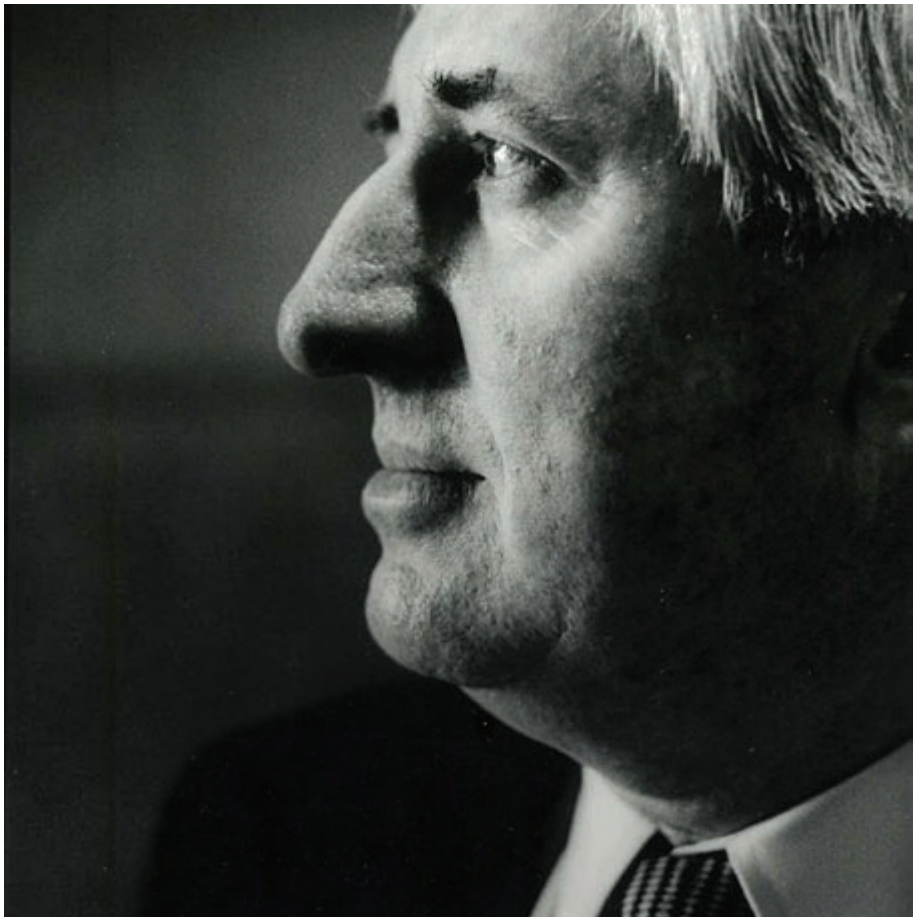
ER: *What are your most memorable experiences of life at the private Bar?*
MS: I was very lucky to represent the ABC, but particularly Four Corners and people like Chris Masters and Paul Barry who were at the forefront of investigative journalism at that time. There was also the entertainment work which meant I was able to work on books, on films and on radio programs. I found inquests particularly interesting and having the role of counsel assisting. I spent 18 months – not every day, but in the Chelmsford Royal Commission - a rather harrowing exercise in many ways for the people involved.

The most striking case in one sense was the Mr Bubbles case. I acted for the Derens. They sued the Police ultimately in defamation, not in malicious prosecution. It was an example of how people can be – people who are entirely innocent - destroyed by the criminal justice system. It does not happen terribly often in our society but it can happen, it happened to the Derens.

As to public debate, I would say, and that if barristers want to get involved, that would be a good thing. Barristers normally have the ability to set out issues in a clear and concise way which is obviously an advantage in contributing to public debate.

ER: *You are, and have been the Solicitor-General for New South Wales, since 1998, what do you like most about this position?*
MS: You deal with the most interesting cases, whether in terms of litigation or advice, particularly in the public law area, including all the major constitutional cases in the High Court. In New South Wales there are a lot of delegations and functions from the Attorney General. It is just a very attractive form of public administration. I cannot speak too highly of the post really.
ER: *You thought about politics, you went for the pre-selection for Phillip. I understand that you thought as well about the Senate. Is being Solicitor-General the closest marriage of the two - law and politics?*
MS: Well I think because I have always been interested chiefly in public administration, that is why I find it particularly attractive. And I suppose politics is another form, a slightly different form of public administration. I never made any secret in the memoir that I was interested in politics. Politics is a very demanding sort of an exercise.

ER: *You have written extensively about politics, over the last two decades, and have engaged in political debates by writing articles in Australian newspapers about some of the most polemical issues facing Australia including freedom of speech and immigration policy. Do you see barristers as having a role in political debates and if so, what role should that be?*
MS: As to public debate, I would say, and that if barristers want to get involved, that would be a good thing. Barristers normally have the ability to set out issues in a clear and concise way which is obviously an advantage in contributing to public debate but it depends on whether people have an interest in doing that or not.



In the High Court with James Renwick SC and Lloyd Babb SC

ER: *Your most recent work Dissenting Opinions, collates, according to subject matter, your writings (including articles and book reviews) over the last two decades about wide-ranging issues including freedom of speech, political correctness, republicanism, the rule of law, bills of rights, the role (and problems) associated with Royal Commissions, foreign affairs and sport.*

In the preface to the book, you write:

The term "dissenting opinions" is normally used in the law to describe the judgments of those members of appellate courts who take a different view in a particular case from their colleagues who form the majority and effectively decide the question before the court. I have used it, however, in relation to this collection of articles and book reviews published over several decades because they proposed in the main a departure from what might be characterised as the conventional wisdom, that is, the views and values of those who preside over most public and private intuitions in Australia, including much of the media.

I do not suggest for a moment that there has been any disadvantage to myself as a result of these publications but I have suggested in some of the pieces concerning the relatively recent phenomenon of political correctness that this climate of conformity has had a chilling effect on public debate. And that young people embarking on their careers now have to be wary of expressing unconventional opinions.

This is even – and perhaps particularly – so in universities which historically were places where established ideas were always open to challenge.

Although some of these pieces are from earlier periods, most concern questions that are still controversial and can be taken as a contribution to those on-going discussions. Most importantly, however, they represent the hope that there will be much greater scope in the immediate future for the full-blooded public debate of social, economic and political issues in Australia.

ER: *What is your advice to young barristers embarking on their legal careers about whether to and the way in which they express their opinions in the public domain?*

MS: I think if you were a young person now and you wanted to get involved in public issues, there are a lot of difficulties in doing this, particularly if you are working for a large public or private sector organisation. I have written a lot about political correctness and it seems to me to be a very strong strain at the moment in some areas of Australian life. As a result, I think there is a real disincentive for young people, if they want to avoid damaging their careers.

ER: *Lastly, with the benefit of the experience you have now have as the result of a remarkably interesting career, what advice, if you had been able, would you have given your younger self, when you first commenced at the Bar?*

MS: I think I would have said, 'I shouldn't have so many opinions and publish them'. But I do not say that seriously. I could not really give myself any different advice as it is very hard to know when you start at the Bar where it will take you. BN

The following is an article written by Michael Sexton SC, published in The Australian, *on Monday, March 28, 2016, now forming part of his collected writings in his recent book entitled* Dissenting Opinions *(Connor Court Publishing 2020).*

US Provides a Salutary Lesson on Politicising Judges through a Bill of Rights

Elected representatives are more suited to reaching outcomes of contentious questions

Many Australians would be puzzled to observe that a recent vacancy on the US Supreme court has set off a firestorm in American politics. The vacancy was caused by the death of Justice Antonin Scalia and will provoke a major confrontation between President Obama, who makes the nomination to fill the vacancy, and the Senate which has to approve the nomination under the US Constitution.

The Republicans have 54 of the 100 members of the Senate and so can block any nomination by the President if they vote together. It is true that in Australia the federal parliament does not need to approve appointments to the High Court which are made by the executive government. But it is also true that such appointments in this country are seldom matters of political controversy. Why is this different in the US?

The answer lies in the bill of rights that is part of the US Constitution. It has resulted in highly contentious political questions, such as capital punishment, abortion, gun control and funding of election campaigns, being decided not by the elected politicians in the Congress but by the Supreme Court. Naturally many members of the community have strong views on these kinds of issues and bitterly resent decisions of the court that find against their beliefs. These feelings are accentuated because they know that they have no say in the selection of the judges of the court in the same way that they do for members of the Congress.

The political nature of many of the court's decisions are reflected in the fact that over recent years the nine members of the court have often divided five votes to four on these kinds of questions. Four of the current judges are supposedly liberal and four supposedly conservative with one oscillating between the two groups. Justice Scalia was a member of the conservative group but it would normally be expected that President Obama would nominate a liberal lawyer to replace him. This would significantly alter the balance of power on the court and so has raised the stakes considerably for this nomination.

There have, of course, been frequent calls for a bill of rights at either the state or federal level – or both – in Australia. Both Victoria and the Australian Capital Territory already have a statutory bill of rights. The problem is, as the American experience demonstrates, that handing over political questions to courts does not turn them into legal questions. All it means is that political issues are determined by judges and not by elected parliamentarians. So what happens is the politicisation of the judiciary or, put another way, the judicialisation of politics.

There is, therefore, something fundamentally anti-democratic about a bill of rights but this has never been considered a valid objection by the academics, activists, and legal professional bodies who constantly call for this exercise. They think judges are better qualified than politicians to decide on social and economic policies for our society. So they positively welcome a transfer of power from the parliaments to the courts. It would be easy to be cynical and say that it is hardly surprising that many legal groups are in favour of legislation that is likely to generate substantial litigation and so serve the financial interests of the legal profession. But it is important to realise that the proponents of a bill of rights are in fact ideologically motivated and want political issues to be decided in the courts.

A bill of rights is in any event a self-defeating exercise because none of the so-called rights in the Victorian and ACT statutes are absolute. To take the example of freedom of speech, there have always been legitimate restrictions including the law of defamation, contempt of court and protection of national security. So a general reference to freedom of speech only invites argument about what the exceptions will be and this then becomes under a bill of rights a subjective exercise for the courts rather than the parliament.

The question that comes out of the conflict in Washington between the President and the Senate is whether we would want to see judges of the High Court politicised in the same way as judges of the US Supreme Court. If we don't, it will be necessary to resist the calls for a bill of rights in this country. If we are going to have arbiters of our society, better to elect them than to appoint them from the ranks of the legal profession. BN