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Dear Mr O’Donohue

Submission to the Scrutiny of Acts and Regulations Committee  
review of the Charter of Rights and Responsibilities Act 2006 (the Act)

Thank-you for the opportunity to make a submission to the review of this Act. In my opinion, the Act is deeply flawed, should never have been enacted and should be repealed in full.

My views on this subject accord with those expressed by Professor James Allan, who has published extensively on this subject. I strongly urge the Committee to take into account Professor Allan’s views. To this end, I have enclosed several articles by Professor Allan on the subject of the Act and adopt them as my submission.

Yours sincerely

Andrew Kelly
No logic to Labor's criticism of process

James Allan
The Australian, 6 May 2011

WHICH of the following two processes strikes you as more even-handed?

The first involves setting up an inquiry, a parliamentary inquiry, and the committee conducting it will have seven members. Four will be from the governing party and three from the opposition.

The chair will be from the governing-party and his views about the subject of the inquiry will be known. Indeed, he has described it as "nebulous, ill-defined and undemocratic".

That's the first process. The second one involves setting up a non-parliamentary committee whose chairman is a life-long proponent of the subject of the inquiry. He wants to bring one in; he has always wanted to bring one in; and he has written books and articles arguing in favour of bringing one in.

Indeed, the government setting up this second process brings this particular chairman in from a different state to chair the process.

Oh, and in choosing the members of this committee, the then government does not select a single member who is known to be opposed to, or even sceptical about, the subject of this inquiry.

That is the composition of the second committee. Everyone is either a known committed proponent or the person's views are unknown.

It seems clear to me most readers would agree that, on the criterion of even handedness, the first process is better than the second. Indeed, it is miles better. It may not be one where both sides of the question are equally represented. Nevertheless, both points of view are represented, and strongly represented.

That is simply not true of the second process, which is just about the most one-sided, get-out-what-you-put-in process imaginable.

And I ask the question I did to start this article because in Victoria the new government has launched an inquiry of its statutory Bill or Charter of Rights, with a view to repealing it.

(To put my cards on the table, I have written extensively about how enervating of democratic decision-making this Charter of Rights is, and would be delighted were it to be repealed.)

But here's the thing. The opposition legal affairs spokesman has had the effrontery to criticise this inquiry on the basis, in effect, of a lack of even-handedness.
And this complaint, recall, is coming from the political party that adopted a process just like the second one above in order to help adopt that Charter of Rights in the first place. It stacked the then committee with proponents and made sure not a single known opponent or sceptic was appointed. Not one.

Now I would have thought that if you were a member of the political party that did that then you might be a tad embarrassed to start throwing around allegations of a lack of even-handedness, especially when the process you're complaining about is several orders of magnitude better than the one your own side of politics adopted only a few years before. But I would have been wrong.

You see, the opposition Labor Party in Victoria is afraid that Attorney-General Robert Clark might just actually have the cojones to repeal this egregious and expensive piece of democracy-enervating legislation.

And so it feels it had better start by trying to undermine the legitimacy of the inquiry process. But anyone remotely versed in what went before will only laugh at the brazenness of this ploy.

Come off it! If the former Labor government and then attorney-general Rob Hulls could set up a so-called consultative committee chaired by one of Australia's best known bill of rights proponents, and then fail to appoint even a single known sceptic or opponent of such instruments to that committee, then surely any complaints about process today -- about the membership and even-handedness of today's process and committee -- simply cannot be taken seriously.

In fact, if the opposition Labor legal affairs spokesman can make this complaint with anything remotely resembling a straight face, then I think he ought to move to Los Angeles and look for acting work.

The clear, undeniable fact is that this current inquiry process is much fairer and more even-handed than the earlier one used to help bring in the Charter of Rights.

And once we get past these initial cries about process, I think the argument on the substantive merits -- on whether this charter has increased the scope for free speech (no), on whether it has increased transaction costs across a range of areas (yes), on whether it has opened the door to the judges to indulge in loosey-goosy, comparatively unconstrained interpretive approaches of other legislation (yes) -- will point in no uncertain terms towards repeal of this charter.

Certainly, my fingers are crossed that that is what eventually happens.
Bill of rights fails to deliver and now is the time to repeal

James Allan
Herald Sun, 6 June 2011

IF you don't count the glorified city jurisdiction of the ACT, the state of Victoria is the only jurisdiction in Australia with a Bill of rights.

You see, back six or seven years ago, the then state Labor government set up a so-called Human Rights Consultation Committee, which was chaired by a lifelong advocate of Bills of rights who was brought in from another state.

On top of that, there wasn't a single known opponent of Bills of rights appointed to this committee. Every appointee was either a known supporter, or his or her views were unknown. How's that for balance?

Anyway, this consultation committee surprised absolutely no one in recommending the enactment of a statutory Bill of rights, a recommendation that was acted upon by the former government in 2006 when it enacted Victoria's statutory charter, or Bill, of rights.

Now here's the thing. Victoria's new Attorney-General has launched an inquiry into this charter of rights, an inquiry much more balanced than the earlier consultation committee, as it happens. And here's my hope. I hope the Victorian charter of rights is repealed. Why? Because this awful piece of trendy legislation has not done anything like what its proponents claimed it would.

More free speech because of this Bill of rights? No. In fact, the judges in Victoria have issued five or 10 times more gag orders on the media over the past few years than the judges have done in NSW, where they don't have any Bill of rights.

Meanwhile the Victorian Government has had to hire two or three dozen more lawyers just to deal with the formal demands of this statute, to say nothing of more indirect costs. That would be fine, of course, if proponents could point to the clear practical benefits of the thing. But they can't. All they can do is recite the usual refrain of "Just make it stronger and more potent and judges and lawyers will some day improve Victoria's human rights".

Rubbish. The thing about human rights is that they involve highly debatable social policy line-drawing issues over which people simply disagree. And a Bill of rights transfers some decision-making power to the courts.

Take the issue of whether a prisoner ought to get IVF treatment at taxpayer expense. Do you think that's a decision for the courts? Well, under this charter of rights the Victorian Supreme Court did, in fact; the court even said that not to provide that IVF treatment was a breach of one of the charter rights.
And then there's the monitoring of serious sex offenders after release. This is a highly debatable area of social policy line-drawing. In Victoria, the judges' views of when this is allowed or not has been enhanced by the charter of rights, at the expense of Parliament.

Yet on none of those sort of Bill of rights issues do judges (committees of ex-lawyers) have superior moral antennae to the voters who would otherwise decide these matters under a system that is usually known as "democracy".

That's the problem with this charter of rights. It cuts into the scope for democratic decision-making.

Yes, yes, I know that a statutory Bill of rights doesn't allow judges to strike down statutes.

But it does allow unelected judges to bring to the table a brand new approach to interpreting all other statutes. In effect, they are directed to read other statutes in a human-rights-friendly way, which means to read them in the way they, the judges, happen to think is a more human-rights-friendly way (as though the judges had a pipeline to God on what is and is not rights-respecting). Oh, and the Victorian charter also allows judges to issue these things known as declarations of inconsistent interpretation.

But they, too, inflate the scope for judges to second-guess the politicians.

Now this parliamentary inquiry is a wonderful chance for Victoria to repeal this costly, democracy-diminishing Bill of rights, to get rid of it. Leave aside the costs it has imposed and the almost total absence of the wonderful benefits its proponents claimed it would have several years ago.

If the average punter can't know for sure what a law means, however clearly written, until the top judges have decided whether it can be given some new souped-up human rights friendly meaning, that is bad for democracy and bad for the rule of law.

Sure, lots of people who have a stake in the game - human rights commissioners, legal academics who write books and articles about the thing, lawyers and others - will try to tell you repeal would be awful.

So ask them precisely how Victoria is a more rights-respecting state than Queensland or NSW or South Australia because of this statutory charter of rights.

And if you don't think much of the answer, and prefer such decisions to be made through the democratic process, then cross your fingers and hope that the Baillieu Government has the guts to repeal this statutory Bill of rights. Certainly my fingers are crossed.
Four years on, state has little to show for its Charter of Rights

James Allan
The Australian, 17 December 2010

In last week’s Legal Affairs section, we were treated to a defence of Victoria’s statutory charter or bill of rights by Adam McBeth.

McBeth is deputy director of the Castan Centre for Human Rights Law at Monash University, in Melbourne.

Since this Charter of Rights was enacted back in 2006 you might have expected McBeth, a noted supporter of it, to point to example after example of the wonders that have come to pass due to this innovative instrument.

Instead, though, his defence reads more like one-half ad hominem attack on critics of the charter and one-half promise of all the good things yet to come, somewhere over the rainbow, as it were.

Let’s put it no higher than this.

I don’t think people’s interests (call them rights if you will) are better protected and guaranteed in Victoria -- the only state with one of these charter of rights vehicles -- than they are in the rest of Australia.

I don’t think McBeth gave me any reason to change that opinion, and I think that’s because there’s virtually nothing he can point to.

Let me ask you a serious question: do you really believe that the entire administrative machinery in Victoria now works in a new, human-rights-friendly way, meaning that it is more sensitive to the needs of citizens than such machinery is in NSW or Queensland, or the rest of Australia?

Leave aside how insulting that sort of claim is to government workers in all those other jurisdictions, and focus on why it might be that handing judges power to translate political and moral line-drawing disputes into pseudo-legal ones -- which is precisely what a bill or charter of rights does -- would have that effect.

Frankly, I can’t think of any good reason for it.

To buy that, you would have to buy the corollary, that the administrative machinery in Britain, the US and Canada (all with bills of rights) is better than that of Australia -- at least those parts outside Victoria.
Don't give judges more power

James Allan
The Australian, 9 April 2010

AT present there are two statutory bills of rights in existence in Australia. The first, chronologically, was enacted in the ACT. But truth be told its pretty tough to take seriously what amounts to a city council's posturing with one of these instruments in a jurisdiction lacking full state powers and one chock full of civil servants and others overwhelmingly on the government weal.

That leaves the state of Victoria, with its more recently enacted statutory bill of rights described as a Charter of Rights. And just last month the biggest case so far decided on the reach and scope of that Charter of Rights was handed down in R v Momcilovic, a decision of the Victorian Court of Appeal.

Stripped to its core, the three Victorian justices did the following: First off, they issued a declaration of inconsistent interpretation as regards the Drugs, Poisons and Controlled Substances Act which imposes a reverse onus on the accused when it comes to drugs offences. They declared that such legislative provisions are inconsistent with people's Charter rights.

Secondly, the three justices in Momcilovic spelt out how s.32(1) of the Charter of Rights, the reading down provision that was put in to tell judges how to read all other statutes, is to be understood.

Let's have a closer look at each of these in reverse order and then consider what this case tells us about the present attempts by the lawyers' wing of the Commonwealth Labor Party to impose one of these instruments on us at the national level.

In the United Kingdom their reading down provision, one that was largely copied by Victoria, has unleashed some truly unappetising results. The UK judges have interpreted the "do everything you possibly can to interpret other statutes as consistent with what you judges think is the rights-respecting outcome" type provision as being a licence to read words in, read words out, ignore parliament's clear intentions, and to do this even where the legislation being interpreted is not in the slightest degree ambiguous.

Bluntly put, it has been taken up there as a licence to legislate and rewrite legislation, to give Alice in Wonderland meanings to provisions, and this despite the obvious rule of law infringing and retrospective aspects of such judicial activities.

So a big question in Victoria was whether they would follow the Brits. And get this. The Victorian attorney-general Rob Hulls argued in court that the Victorian judges should follow the UK precedents on this, most noticeably the case of Ghaidan. He did this despite all his earlier assurances at the second reading of the Charter of Rights Bill that it would not lead to any interpretation on steroids type bizarre UK outcomes.
And yet his position in court was to argue in favour of just those precise outcomes. Amazing!

And boy did the three Victorian justices put him in his place for that. Here's a favourite passage of mine: "In the light of these clear statements to the parliament, it is puzzling that the submission advanced on behalf of the attorney-general in this proceeding should have propelled such a different view of s.32(1).4 [para. 84]

At any rate the court rejected all the UK precedents and opted for a much more restrained understanding of the s.32 reading down provision. This, to my mind, is all to the good. But it's all to the good precisely to the extent it neuters the Charter of Rights.

Do the judges in Momcilovic completely neuter the reading down provision? No. Sure, they reject the earlier adventurism of the Victorian Chief Justice. And they reject the UK jurisprudence. And all that is to be welcomed. But there are still problems.

We're told that other statutes will be interpreted by applying s.32(1) of the Charter of Rights "in conjunction with common law principles" [para. 35].

Having read the case carefully, twice, I don't really know what that means. Will s.32 or won't s.32 alter how judges would otherwise go about their interpreting job? Beats me. In this case it clearly does not. But who really knows in the future what the effect of the euphemism "in conjunction with" will be?

But that's a quibble. For bill of rights opponents like me this part of the case is as good as you could expect to get. And despite my qualms about the Victorian justices following New Zealand's dissenting Chief Justice Sian Elias, who is herself the most expansionary of the Kiwi judges when it comes to the reach and ambit of the New Zealand statutory bill of rights, you have got to like the fact they cite her about how this interpretive reading down process risks being undertaken "according to highly contestable distinctions and values" [para. 108].

So as I said, this is probably as good as things get for bill of rights opponents and the reasoning of the Victorian judges on this point was certainly as good as any going.

But here's the thing. The outcome in this case on how to use the reading down provision is only good to the extent it neuters the Charter of Rights of any effect, which leads one to ask why we want to have one. If statutes will be read just as before - and note that they won't be, because of that little gloss or elision "in conjunction with" - then why have one?

And then there's the question of how stable this relatively hard line ruling by the judges will be. Was it made with one eye on assuring people during the current national debate on whether to have a bill of rights that the Victorian judges could be trusted, and perhaps even would be safe to appoint to the High Court? Who knows.

That brings us to the second thing the justices did in Momcilovic. They issued a declaration of inconsistent interpretation. This is the power given to them by bill of
The thinking would be that handing philosopher king status to a bunch of unelected judges, and allowing individuals to complain about almost every statute and regulation to the courts, would have good long-term consequences, as opposed to hiking costs, making everyone super defensive, reversing a few cases here and there, and politicising the judiciary.

I think McBeth and all the rest of the pro-bill of rights lobby in Victoria are scared to death that newly elected Premier Ted Baillieu and his Attorney-General Robert Clark are going to repeal this Charter of Rights.

Pretty clearly, both men are convinced that the charter is poorly designed, and are debating whether to amend it or repeal it.

It will be no surprise to anyone much that I think this instrument ought to be repealed.

Its underlying premises and foundations are simply too undemocratic, too anchored in a judges-know-best-about-rights world view, to be fixable.

Far better to deal with issues that arise with specific pieces of legislation.

Of course, the McBeths of the world might cry "tomorrow and tomorrow and tomorrow" this Charter of Rights will start to deliver.

But that discounts the reality that smart, nice, reasonable people simply disagree about the rights-respecting course of action.

So any future delivery for the McBeths in the Castan Centre for Human Rights Law won't necessarily be a delivery for a huge chunk of other Victorians, who may well prefer to have their elected legislators rather than unelected judges make these calls – on democratic legitimacy grounds if nothing else.

Of course, the new Victorian Premier and Attorney-General have as much mandate to repeal this thing as there was originally to bring it in.

Sure, they could spend a few million dollars setting up another consultation committee like the last one, only this time with not a single known supporter of bills of rights as a member (and I hereby volunteer my services for that mooted committee, especially if it pays what the last one did).

And when that new committee reports back, heck, it might even (surprise, surprise) recommend repeal.

But why spend the money and why wait?

You can't fix this thing by tinkering and amending. Get rid of it and go back to specific legislation for specific problems, not a catch-all directive to the Victorian judges to read all other statutes in a human-rights-friendly way.
The recent Momcilovic case in the Court of Appeal shows us that even they can't really make sense of that directive (and that's not a criticism of the judges but of the catch-all directive they have been forced to interpret).

Bills and charters of rights like Victoria's are instruments that make all criminal trials potentially ones that raise charter of rights issues, so costs and uncertainty go up.

And they change the way judges are asked to interpret -- to give meaning to -- all other enactments. And they do that despite the rule-of-law-sapping effects for citizens trying to know, in advance, what the law demands.

They also force judges to look at unspecified and potentially unlimited overseas precedents, while injecting a potent new reading down power and even a declaration of inconsistent interpretation power.

In fact, read that Momcilovic case carefully and you will notice that the top Victorian judges never really spell out what the effect of the bill of rights will be.

They genuflect in the direction of interpretations that least infringe the charter rights (which is far from obviously always a good idea), and say you don't need ambiguity to trigger the new Charter of Rights way of reading all other statutes.

And all this for what? The "tomorrow and tomorrow and tomorrow" benefits that are so ethereal they can't yet be seen.

This experiment in handing power to judges can, and should, be reversed.

Give Victorians a plebiscite, if nothing else. Heck, forget McBeth. Even Hamlet would know the right answer to the to repeal or not to repeal question.
rights enthusiasts on the basis that it would be jolly nice to set up a little dialogue (their characterisation, not mine) between the elected legislators and the unelected judges.

Now I've never quite understood why a committee of ex-lawyers with no democratic legitimacy at all should be given such an exalted status. Why judges rather than physicists or theologians or social workers or teachers or generals or anyone really?

No one ever answers that question.

So my view on the underlying rationale for this very much mimics that of the Canadian legal academic Grant Huscroft who says that “talk of dialogue is better understood as a rationalisation of enhanced judicial power rather than as a justification for it”.

Hence although the judges in Victoria were just doing what the Charter of Rights empowered them to do, I would never empower judges to do this. I think it's a mistake. And I do wonder why the Victorian justices are happy to concede that asking what's reasonable as regards rights is based on “highly contestable distinctions and values” [para 108] but miss the fact that assessing legislation for rights-compatibility (before issuing one of these awful declarations) is every bit as based on highly contestable distinctions and values.

All that said, I will enjoy seeing what Hulls does in response to this judicial throwing down of the gauntlet. Will he stand up to the judges as he assured us he would back when introducing the Charter or will he roll over? If you enjoy irony and hypocrisy this could be wonderful entertainment.

And what can we take from this decision at the national level? First off, at the national level there will be no easy out when it comes to a reading down provision.

Victoria's justices could adopt a sane approach to interpreting other statutes because they had a power to issue declarations. That power will almost certainly not be there in any mooted Commonwealth version.

So if a Victorian-type approach were adopted as regards how to read other statutes then the statutory bill of rights would do very little indeed, subject to what “in conjunction with” ends up meaning.

If you think that's a likely stable end result, should a Commonwealth statutory bill of rights ever (God help us) make its way on to the statute book, then I know a man named Madoff with whom you might like to invest your life savings.
Desperate charter lobby turns on its opponents

James Allan
The Australian, 12 March 2010

ALL of us have watched a sporting match where one side seems to be losing, and decides at that point to stop playing the ball and start playing the man.

Heck, I've played an awful lot of competitive sports in my time and seen this plenty myself. As I said, generally it's a sign of desperation.

The same goes for the bill of rights debate. Proponents of a statutory bill of rights are clearly less than thrilled by reports that their long-cherished hope for one of these instruments has been shelved by the Labor cabinet.

In response, a number of people are a bit upset.

One of them was last week's Legal Affairs commentator Adam McBeth. He resorted to describing bill of rights opponents like me (and others he hinted at but didn't name, perhaps because it's easier to name a nobody than it is a former state Labor premier like Bob Carr or a current attorney-general like John Hatzistergos) as "sensationalist", spouting "fire and brimstone" predictions and, my personal favourite, "determined that the decisions of a public authority not comply with freedom from torture". That, apparently, is why "Allan and his ilk" oppose the enactment of a statutory bill of rights. And really, if you can't work in a backhanded claim that those who disagree with you are in favour of torture, you really can't enjoy your weekend. I'm only surprised the Holocaust didn't get a quick mention.

But let's put aside for the moment whether I'm a brimstone-spouting torture lover and take a closer look at statutory bills of rights and how judges interpret other statutes when one of these instruments is enacted. I've been pointing for years now to what has happened in Britain with just such a statutory bill of rights, one on which the Victorian charter was largely modelled. The British version also has a reading-down provision that directs the point-of-application judges to read other statutes in what they, the judges, happen to think is a rights-respecting way, "so far as it is possible to do so".

And in Britain those same judges have decided that they can give statutes a new, different meaning (because of this provision) even where there is no ambiguity at all in the legislation being interpreted.

"Even if, construed according to the ordinary principles of interpretation, the meaning admits of no doubt, (this reading down provision) may nonetheless require the court to depart from the intention of the parliament."

That's a quote from the House of Lords only a few years ago in the Ghaidan case, well known to McBeth, and which has been repeatedly affirmed.
Oh, and the British judges also said they could now read words in, read words out, and pretty much do anything short of the hokey pokey.

When McBeth claims that sort of interpretive approach is in keeping with the existing "common law approach in Australia" I'm afraid there's no polite way to respond. He's full of crap.

And you'll notice that neither he nor anyone else ever addresses the substantive point that what is happening in Britain with their statutory bill of rights is tantamount to having a full-scale US-style or Canadian-style constitutionalised bill of rights.

After all, what's the difference, really, between judges striking down laws they happen to think are not rights-respecting and their rewriting those laws by ignoring parliament's clear intentions and reading words in and out?

It's not just me that says statutory bills of rights are able to transfer huge powers to the judges. The Oxford legal academic Aileen Kavanagh says that too, "that the judges exercise strong form constitutional review when interpreting the UK's statutory bill of rights".

Of course, Kavanagh is a strong supporter of bills of rights.

She very much likes the fact that Britain's statutory bill of rights has transmogrified into a powerful, judicial-power-enhancing vehicle. That makes it a tad difficult for McBeth to call her a fire and brimstone spouting sensationalist, of course. You can't really play the man when he's on your team, not even in the bill of rights debate.

What about Victoria then? Maybe Victoria's charter of rights, even though it directs judges to look at what's happening in Britain, and even though it copies much from there, will prove to be the harmless, orthodoxy-enhancing vehicle that McBeth pretends? Well, it's still a bit early to say, truth be told. The big bill of rights decisions in New Zealand, Canada, and Britain that gave judges more power than they had before the bill of rights came four or five years after it came into force. We are not there yet in Victoria.

Having said that, take a look at a decision by the Victorian Chief Justice late last year. It was about how to interpret a criminal law provision that said "a person is not excused from answering a question . . . on the ground that the answer to the question . . . might tend to incriminate the person".

That is part of section 39 of the Major Crime (Investigative Powers) Act 2004. Here's what the Victorian Chief Justice had to say: "It is apparent that under the ordinary meaning of the Act, the common law privilege is removed entirely, and is replaced only by a limited immunity (given by the Act)". In other words, the Act's ordinary meaning is clear and does not protect against indirect or derivative use of compelled testimony. The statute is not open to doubt. And yet the rest of the Chief Justice's judgment amounts to a justification for over-riding that clear meaning in favour of reading in a qualified indirect protection. And that announcement by the Chief Justice, ex cathedra, is only coherent if she believes the Victorian courts have been granted a Ghaidan-type licence to over-ride the clear intent of parliament.
On what other basis can she ignore the ordinary, unambiguous meaning of a statutory provision?

No doubt that's why the Chief Justice says that "the interpretative obligation in s.32 of the charter creates a new dynamic for the interpretation of legislation".

Now you can like or dislike giving judges this power to ignore parliament and rewrite disfavoured statutes. But what you can't do is claim it is democratic, nor that it is in keeping with long-standing orthodoxy, nor that opponents are completely deranged fearmongers.

Maybe as deputy director of the Castan Centre for Human Rights Law, McBeth never runs into people who disagree with his views about where to draw all the many lines that vague, amorphous moral abstractions such as "right to free speech" or "right to a fair trial" demand, but outside that rarified environment people simply disagree about all these things and more -- even about when some practice amounts to torture and when it doesn't.

So reciting the mantra of "don't you want your rights protected" doesn't much help to answer anything, at least not unless you're as happy as McBeth to have these matters determined by unelected judges, however much guided by the views of far off foreign courts.

We "sensationalist fire and brimstone" types don't find that a very appealing prospect.
In relation to the ambiguity of international rights standards, Allan has written:

McClelland smuggles UN rights standards in the back door

James Allan
The Australian, 18 June 2010

HOW many readers have found themselves unable to sleep on some night and decided to have a read of the 1989 UN Convention on the Rights of the Child?

Implausible, I know, even for lawyers, but it's not the worst strategy for overcoming insomnia. And in your browsing you would come across Article 19 of that convention, or treaty.

It reads, in part: "State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence."

Now think about what you figure that covers and doesn't cover.

And remember that all these multilateral treaties, such as the CRC, have to be worded so as to get on board as many as possible of the world's Sudans, Chinas, Libyas, and worse -- and I say worse because Libya was just overwhelmingly voted on to the UN Human Rights Council, to be there along with a bunch of other countries no sane Australian would take human rights advice from -- but I'll leave that point for another article.

My point here is that it's not at all clear what Article 19 means. We know that a lot of countries whose standards look pretty awful compared to ours signed up too.

And we know that almost all countries at the time of signing permitted parents to spank or smack their own children, if the degree of force was reasonable.

Now let's say some democratic government, say like ours here in Australia, had a statute that allowed parents to spank their kids. Would you say that that statute breached human rights? And if you did would it be because of Article 19?

And if you thought parental spanking did not breach human rights but some overseas experts thought otherwise -- ones who were wholly undemocratically chosen and included people from countries with all sorts of undemocratic and downright authoritarian regimes -- would you defer to them?

This is not a pointless hypothetical. It matters. You see, our attorney-general, fresh from his bruising loss in cabinet on enacting a statutory bill of rights nationally -- and
we can all get down on our knees and thank whatever gods there be for that -- has just introduced into parliament his back-up plan.

It's called the Human Rights (Parliamentary Scrutiny) Bill. First off it proposes there be a Parliamentary Joint Committee on Human Rights. As things stand we have a Senate-only committee charged with scrutinising bills, including whether a bill trespasses unduly on personal rights and liberties.

Moving from a Senate-only committee to a joint committee is not in the least problematic, but this newly proposed joint committee is not going to be asked to decide if bills trespass unduly on personal rights, exercising their own legislative judgment. No, this new joint committee is going to be asked something very different.

It is going to be asked whether bills and acts are compatible with human rights. But get this: human rights have been defined to mean what has been recognised in seven UN conventions, including the CRC noted above, together with all the other usual suspects, such as the ICCPR.

So what will this proposed new committee say if my above hypothetical came up? Before you answer that you might like to know that these big UN conventions have committees to monitor states’ progress in implementing them.

You might also like to know not just that the membership of these committees is unbelievably undemocratic and weighted towards countries you wouldn't take any moral advice from if your life depended on it, but also that the committee for the CRC has consistently maintained that parental corporal punishment violates the convention -- regardless of the legislative history and intentions of the states that signed it.

So will that be decisive, or not? Do we defer to some Mickey Mouse UN committee or not? Or rather, do our elected MPs on this proposed joint committee defer?

Your crystal ball is as good as mine on this, but I'll tell you this flat-out: the existing demand that legislators use their own judgment on what counts as respect for rights is miles and miles better than this genuflecting before highly undemocratic supranational appointed experts.

Are my concerns exaggerated? Well, consider this. This new McClelland Human Rights (Parliamentary Scrutiny) Bill will also require all other bills to come with a statement of compatibility. The minister will have to say the bill is, or is not, compatible with human rights. Ah, but again that term human rights has been outsourced.

The test isn't what the minister thinks. The test looks like being what the minister thinks the UN thinks, or what the minister thinks lawyers think the committee members for the conventions think, or, well, you get the idea.

This is more of our attorney-general's anti-Midas touch. He takes an uncontentious notion and turns it into the most politically correct, undemocratic pap any law school special interest group favouring a bill of rights could dream up. Everything he touches turns to -- well, you know as well as I do.
Treaties and conventions in Australia’s Westminster system have never, ever required passage through the elected legislature. They are entered into under the prerogative power, under straight-up executive power. We don’t have the democratic checks on entering into treaties and conventions that the US does.

That’s a problem, at least if you’d like your legislators to assess what is and isn’t rights-respecting using their own judgment, not outsourcing it to treaties signed by the executive and monitored by UN appointees from Libya et al.

A worse problem is what has happened in Britain, New Zealand and Canada with these statements of compatibility.

Without exception, in all three of those jurisdictions they have collapsed into a guess about what the top judges and lawyers will think about some bill. You don’t get the minister’s opinion about the bill’s respect for rights.

No, you get what the minister’s in-house lawyers think, based on their reading of case law in the European Court of Human Rights, from UN committees, and the rest.

That has indirectly increased the power of unelected judges, through the statement of compatibility back door as it were, in all three of those countries.

I hope the Coalition blocks this in the Senate. A joint committee? No problem. In fact, it’s a good idea, but tell them to assess things against their own view of whether the statutory language trespasses unduly on rights.

Don’t put down seven UN conventions and outsource our human rights views to international bodies staffed, often, by people from countries whose records are pitiful.
In relation to judicial overreach, Allan has written:

I'll take democracy over a written constitution

James Allan
The Australian, 15 April 2011

WHAT do you think is the point of a written constitution? I mean that as a serious question. Imagine that you were living right now in New Zealand, a jurisdiction with no written constitution and a sovereign parliament. What would someone from here say to you was the point of shifting to a written constitutional set-up like Australia’s?

Now, of course, people might answer in terms of federalism (though our High Court has done just about everything it can to gut federalism as a working system here, leaving us with massive vertical fiscal imbalance and pathetic calls for "co-operative federalism" -- look at the US and Switzerland, far wealthier than we are, and remember that federalism only works when it's competitive, not co-operative).

Others, wary of appealing to federalist justifications, might point to the benefits of locking-in certain things related to the legislature, executive and judiciary. Change to these fundamentals would require constitutional amendment. As the well-known American legal academic Larry Alexander puts it, written constitutionalism "sides with risking rigidity rather than risking security". The idea is that having a legally unlimited legislature, as in New Zealand, might be too risky, so bring in a written constitution that locks a few things in.

Now, whether you find either the Alexander or federalist arguments persuasive, they are at least plausible grounds for shifting to a written constitution. But here's one approach no one would use to try to get a New Zealander to shift to a written constitution.

No one would say: "Look, shift to a written constitution because in a few years it won't matter what the words actually say or what the people who wrote them intended or what the citizens who voted on them thought they meant.

"The unelected judges will be free to give them new meanings, to treat the whole document as some sort of living tree or malleable vehicle that latter-day judges can stuff full of their favoured political outcomes."

If you had a choice between a legally unlimited, democratically elected legislature or judges who were basically unconstrained by the originally intended meanings or understandings of a written constitution, which would you choose? I'd take democracy any day.
I ask because there is a terribly worrying trend in our High Court in the last few years. They seem to have launched themselves on a quiet but implicit rewriting of our written Constitution, or rather a bare majority of them have done this. And the core reality is that we’re being presented with an outcome (as regards how it is interpreted) that virtually no one would ever have signed up to back at federation or, for that matter, would do so today.

Here’s how it has worked. First we had the implied rights cases of the 1990s. The basic logic of those cases came in the ACTV case in Chief Justice Mason’s reasoning. Hold your breath because here is how audacious it was: 1) the Constitution mentions our MPs being "directly chosen by the people"; 2) hence they are representatives of the people; 3) hence accountable to the people; 4) thus they have a responsibility to take account of the views of the people; 5) therefore, we judges must be able to assert there’s an implied freedom of political communication.

Oh, and that implied freedom: read into a constitution that explicitly and deliberately left out any US-style bill of rights protections, one that clearly trusted the elected parliament, can now be used to invalidate a statute putting limits on election broadcasting spending.

It is more audaciously divorced from original intentions and meanings of the written text reasoning than you will anywhere.

Still, the dissenting judges never quite managed to overturn these cases and they became settled and then everything went quiet. Until recently.

Back in 2007, in Roach, the prisoner voting case, four of six of our High Court judges built on this implied rights jurisprudence to read into our Constitution a limit on the elected parliament passing laws as regards which prisoners can vote. They came up with an Animal Farm-type rule of "two years bad, four years good" as regards which prisoners could be disenfranchised.

The key point here is that the legislation the High Court struck down would clearly have been valid at the time of federation, since such laws actually existed then. Indeed, they existed right up to 1983. The majority judges in Roach seemed to be saying that what was constitutionally valid back in 1983 no longer is today. Or worse, if the law had stayed as it was in 1983 it would still be valid, but since parliament back then opted to be more generous to convicted prisoners (as to when they could vote) no later parliament could reverse itself and go back to more restrictions.

Now, on what known-to-mankind principle of interpreting a written text, as opposed to reading in one’s own personal political preferences, is that even remotely plausible?

Let’s be clear. Our top judges are there to interpret texts that people at the time of federation thought were locking-in outcomes, not handing blank cheques to future judges to tell us about their perceptions of shifting social values.

But it gets worse. Last year, in Rowe, a four-to-three decision of our High Court, the majority goes even further. They invalidate a law related to when the electoral rolls
can close. The law they invalidate is much the same as what existed at federation and for a long time thereafter. Again, they seem to say that once any legislature has liberalised things, no future one can go back.

Oh, and in both Roach and Rowe they build in a reasonableness or proportionality-like test. And wouldn't you know it, they, the judges who made up this test, will be the ones who get to operate it and say what laws are reasonable. And all of this is built on what is in the actual Constitution? On the simple phrase “directly chosen by the people”. Just add in the premise that meanings can change over time to keep pace with changing social values (as intuited by the judges). Throw in an unwillingness on the part of dissenting judges to press for overturning past decisions. Toss in a solicitor-general who seems to accept in his arguments whatever the latest ratcheting-up case stood for. And, presto, you have a jurisprudence built on sand and divorced from original understandings and meanings.

Don't get me wrong. In neither Roach nor Rowe do I object to the actual substantive outcome. But I object massively to the fact the majority judges in our High Court are treating our Constitution as a fluid, evolving instrument that they, and they alone, can fill with content — the need for constitutional amendments be damned.

Now, given that, who wants to vote "yes" to any mooted new preamble as regards our indigenous people? The fact is that it doesn't matter how clear the words, how obvious the intentions, and how straightforward the public's understandings. Future judges, mimicking our present ones, can give them new substantive meanings. No one can know how they will be interpreted when original understandings and intended meanings count for next to nothing.

I wouldn't sign up for that reality in New Zealand today. I wouldn't have done so back at federation (and I very much doubt many others would have either). And I think the dissenting judges need to become a lot more aggressive and vocal in pointing out the core level democratic illegitimacy involved.

Just imagine what these judges might do if anyone actually ever gave them a bill of rights, statutory or constitution.
In relation to the nature of rights, statutory bills of rights, and parliamentary processes for rights protection Allan has written:

**All’s well that ends well**

James Allan  
The Australian, 23 April 2010  

ALL’S well that ends well. Maybe that’s what Mr. Shakespeare might have said after the final act who are we kidding, the final act for now in this awful charter or bill of rights drama.

On Wednesday the Attorney General made public the worst kept secret ever, that the Labor Party would not be proceeding with a statutory charter of rights. It also rejected what you can think of as the back-door model, the one where some other statute is enacted that has a reading down provision put into it that commands the judges to do everything they can to read all other statutes in some newfangled ‘consistent with human rights’ way.

As Will would say, ‘Frailty, thy name is Robert McClelland’. And thank God for that. A national charter of rights would have been an awful innovation, one that would have enervated parliament and increased the power of our judiciary. The fact Labor backed away from this is a good day for Australia and a good day for Australian democracy. And we should all congratulate them for this, and perhaps give special praise to Bob Carr whom I think played a pivotal role in blocking this.

Of course this latter day renouncing of any sort of bill of rights does not change the fact that the Attorney General set up a Consultation Committee that was incredibly one-sided in its composition with a chairman who had previously gone on the record as favouring just such a statutory bill of rights and not one single known skeptic or opponent of these instruments as a member.

And it doesn’t change the fact that this committee, at great cost to the taxpayer and after hearing from well under 0.2 per cent of the population, ended up writing precisely the pro-bill of rights report all of us knew they would write as soon as the members were announced. In fact I predicted as much in print at the time. So in future perhaps Mr. McClelland could just send me a small cheque and I’ll write him the report he wants rather than going through this sort of incredibly lop-sided spin exercise.

In a way I think the obvious lack of balance partly led to Mr. McClelland being hoist with his own petard.

More importantly, I think we can now all say that these sort of commissions on whether to enact one of these instruments are worthless, or worse. The old maxim of ‘Tell me the answer you want and I can appoint a committee of smart, well-meaning, sincere people to give you precisely that answer’ applies. And we all know it.
So any future government, nationally or at the State level, that wants to bring in a statutory bill of rights needs explicitly to make it a main election issue or it needs to hold a plebiscite on the point. Let’s face it, if you can hold a plebiscite on the national anthem, you can hold one on the crucial and fundamental to the institutional balance of power question of a bill of rights.

The days of the State of Victoria-style setting up of a one-sided commission to report on whether to have a bill of rights and then giving you the answer everyone knew they would in advance must surely be dead. No one can take them seriously and even the insipid and often incompetent state opposition parties in this country should be able to paint any such attempt in future as illegitimate and bogus.

The fact is that everyone knows that if this were put to the Australian people, or the people of any state, the proposal for a bill of rights – be it statutory or anything else – would lose and it would lose badly as it has at least twice in the past. That, at the end of the day, is why Labor is backing down on this issue. When Mr. McClelland says otherwise, he doth protest too much.

Of course having run this expensive spin exercise it is not easy to back down. You need some face saving stuff to allow for the graceful climb down. The Attorney General can hardly be expected to say that the days back when he tried to initiate this thing were his salad days, when he was green in judgement, cold in blood.

So we have the face saving provisions. And personally let me say if this is the price we have to pay to keep ourselves free of a bill of rights, I’d be the first one to pay that price. Of course that doesn’t mean this face saving stuff is meritorious.

Here’s what we’re now being told this Labor government will do. First off, they’re going to spend a dozen or so million dollars on human rights education. You might well be asking yourself what this means. I know I am.

You see the thing about rights is that people simply disagree on what the rights-respecting outcomes are. They differ on what the scope and reach of rights are, on how they inter-relate, on what limits are reasonable. Even the judges disagree, as even a casual glance at any top court overseas would tell you.

And of course no one has a pipeline to God on these issues. So what will an education campaign do or be? Will it tell us the politically correct ABC radio view of what is rights-respecting? Or maybe the view of the European Court of Human Rights, or at least the majority view there? Does Mr. McClelland really think rights are uncontroversial? Does he think his government’s policies as regards those claiming to be refugees are, or are not, rights-respecting?

This whole education campaign has a sort of holier-than-thou sound to it. Maybe he could just get out a guitar and sing us a chorus of Kumbaya and be done with it?

The other face saver that he announced was that there would be a joint parliamentary committee on human rights that would have to make statements of compatibility as to any future Bill’s effects on international human rights obligations.
Of course we already have a Senate standing committee whose remit is to examine whether a Bill has trespassed unduly on personal rights and liberties. Changing that to a joint parliamentary committee is not at all objectionable. But asking it to look at international human rights obligations is flawed because it risks turning the exercise into a ‘guess what the judges here or overseas think’ exercise. It has been clearly documented that that has happened in Canada and New Zealand with similar pre-passage statements of compatibility.

I’m no fan of this in other words. But let me repeat. This is infinitely better than what Mr. McClelland wanted, which was a statutory bill of rights. Let’s all then just be thankful one didn’t come to pass. Mr. Shakespeare, as always, may have put it best.

‘That what we have we prize not to the worth
While we enjoy it, but being lack’d and lost,
Why, then we rack the value, then we find
The virtue that possession would not show us
While it was ours.’