Checks and balances:

THE IMPORTANCE OF A BILL OF RIGHTS

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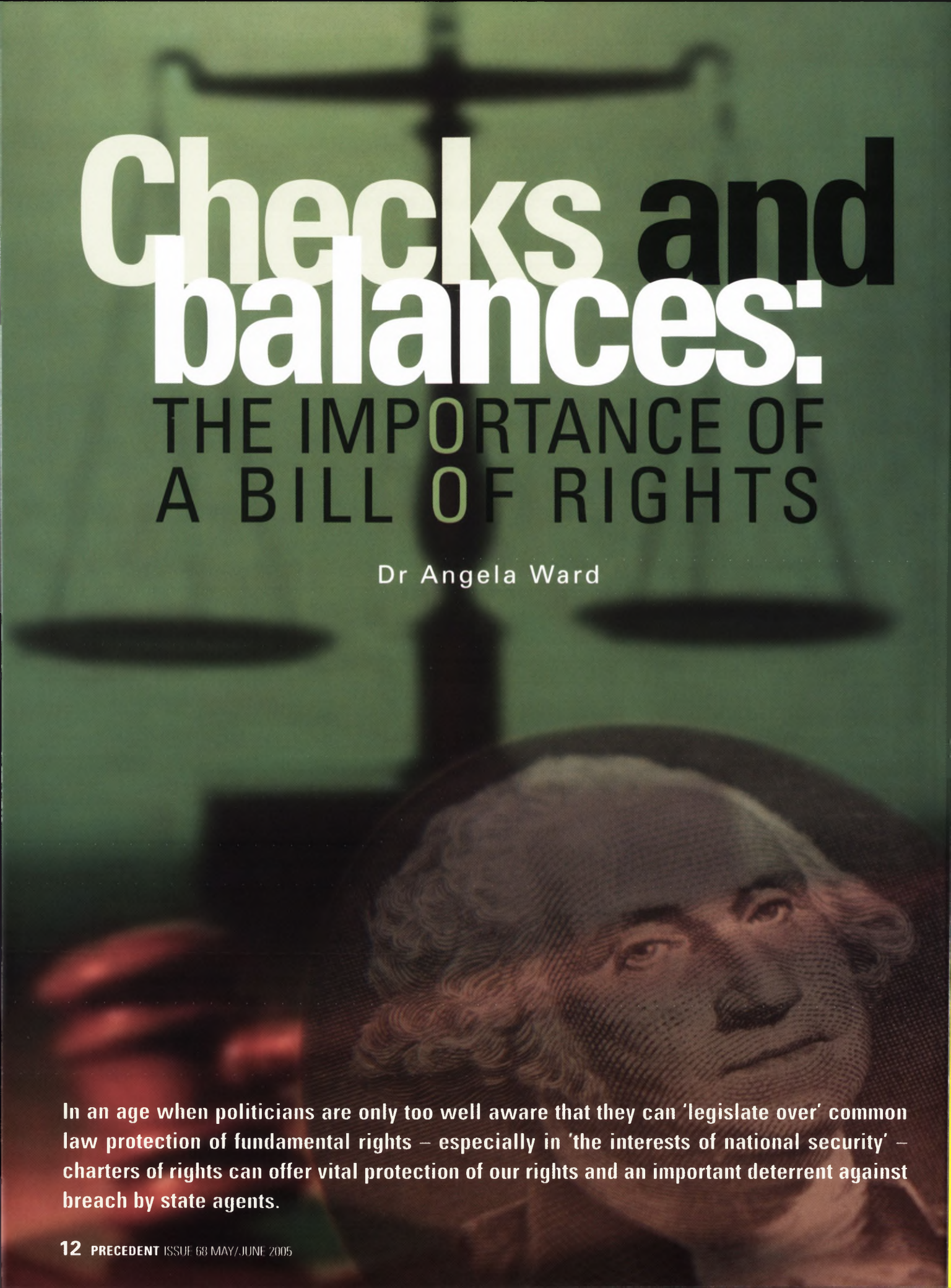

In an age when politicians are only too well aware that they can 'legislate over' common law protection of fundamental rights – especially in 'the interests of national security' – charters of rights can offer vital protection of our rights and an important deterrent against breach by state agents.

Recently the two houses of the UK Parliament were locked in what was described by the London *Independent* as 'the longest game of parliamentary ping-pong in living memory'.[1] And it may come as a surprise to hear that the epic 30-hour battle, in which a bill ricocheted seemingly interminably between the House of Lords, and the House of Commons, had nothing to do with interest rates, nothing to do with tax rates, and indeed had nothing to do with the economy at all.

The great issue of the day was liberty; and the specific question under such intense debate was the extent to which the UK Government should be entitled to incarcerate, for reasons of national security, those suspected of terrorism without criminal trial.

Liberty, it is often said, is the greatest of all British values, and it is certainly one of the pillars of all democracies; for without fetters on the powers of the state to imprison those it perceives as being contrary to its interests, the fundamental elements of free democratic thought, expression and participation become vulnerable to attenuation. The prohibition on arbitrary detention is also a manifestation of the principle of proportionality on which all democracies are based. In liberal societies, or under the conditions of 'freedom' as President Bush might put it, the state is mandated to take only that action which is necessary to achieve its legitimate aims, and no more.

INCOMPATIBILITY WITH THE *HUMAN RIGHTS ACT* 1998

But perhaps of more significance is the process that led the two houses of the British Parliament to reach such loggerheads. On 16 December 2004 the House of Lords declared that the *Anti-Terrorism, Crime and Security Act* 2001 was incompatible with the 1998 *Human Rights Act*, which incorporates into UK law its obligations under the European Convention of Human Rights (ECHR). The House of Lords, by a majority of 8:1, decided that the UK Government had exceeded the limits of what was 'necessary' in a democratic society by promulgating a law that entitled the Home Secretary to detain indefinitely without criminal trial foreign nationals suspected of involvement in terrorism.

Lord Bingham, in rejecting submissions of the UK Government that the power to detain was for the exclusive judgment of the executive, recalled the traditional function of courts everywhere. He said that "the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself".

Of all the Law Lords, Lord Hoffman's criticism was perhaps the most robust. He wrote that 'the real threat to the life of the nation, in the sense of a people living in accordance with its tradition laws and political values, comes not from terrorism but from laws such as these'.

The power of the UK courts to declare an Act of Parliament incompatible with the rights enshrined in the *Human Rights Act* 1998 does not render the Act in question unenforceable, or otherwise ameliorate its legal effects. But the Act is sent back to the Parliament, which is then bound to reconsider it. The bill that was so vigorously debated in the in the Lords and the Commons on 12 March 2005 was the Government's response to the 16 December declaration of incompatibility of the Judicial Committee of the House of Lords.

What was impressive about the reporting of this matter in the British press was the amplitude and richness of the debate over the re-cast powers of the state to detain individuals suspected of involvement in terrorism.

There were those who charged the UK Government of building, without sufficient reason, a 'climate of fear' in a country which has stood its ground against serious terrorist threats from organisations like the IRA. Suspension of trial by jury was described by Lord Kingsland, the Shadow Lord Chancellor, as 'the first great victory of terrorism over society'. On the other hand, others argued that the 'time has come to respect the supremacy of the Commons...and join together on the terrorist threat we revile'; while the Prime Minister himself argued that 'We need these powers. We are talking about an issue where the advice is clear.'[2] And a battery of learned commentaries have, as a result of the parliamentary debate, thoroughly excavated, and from every angle imaginable, the conundrum of finding the proper balance between individual liberty and the legitimate role of the state in protecting national security.

THE ROLE OF THE COURTS IN DEFENDING HUMAN RIGHTS

But despite the fact that the 1998 *Human Rights Act* is >>

relatively new, there is nothing new about this interplay between politicians and judges on the role of courts in protecting fundamental rights. Indeed, it was pointed out in the 16 December judgment that the prohibition on arbitrary detention enshrined within the ECHR was a mere reflection of a common law right over which UK courts had long been a guardian.

It is worth remembering also that the prohibition on slavery was a court-based initiative, with the 18th century English courts ruling that the common law right to property, in disputes concerning ownership of slaves, was trumped by the common law right to individual liberty. Parliament eventually followed, some one hundred years later, with legislative initiatives leading to its outright prohibition. From this perspective, and given that we live in an age in which most laws are based on statute rather than the common law, instruments like the *Human Rights Act* are merely a contemporary tool that allows the courts to perform an ancient function.

Bills of rights play a key role in securing transparency in government, and are an indispensable catalyst to vigorous debate when an elected majority contemplates wholesale attenuation of the fundamentals elements of democracy.

THE AUSTRALIAN CONTEXT

The Australian legislative package introduced to address post-9/11 terrorism has also been questioned for its compliance with Australia's obligations under international human rights law.[3] However, if it were ever challenged before the High Court, the case would have an architecture very different from the UK litigation; for Australia, unlike the UK, has not domesticated into its own law the fundamental rights contained in the UK *Human Rights Act* 1998. This Act reflects the terms of the ECHR, to which Australia is not a party; but the provisions of the European Convention largely mirror the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party. Incorporation of the ICCPR would be required before the High Court could directly consider the issues that the Judicial Committee of the House of Lords was called on to review when the *Anti-Terrorism, Crime and Security* was challenged by detainees.

Thus, any challenge to the Australian Security Legislation Amendment (Terrorism) Bill (2002) brought to the High Court would be confined to examining whether the Federal Government had acted within the rubric of authority vested in it by the Australian Constitution, along with the tiny cluster of fundamental rights that have been held to be a feature of the Constitution by implication. The High Court would have no authority to direct the Parliament to reconsider its security legislation for compliance with Australia's obligations under the ICCPR.

Given that the Australian and UK legal systems spring from common roots, it may appear odd that they differ so radically, in 2005, with respect to strategies for securing judicial protection against infraction of fundamental rights. A key reason for this divergence lies in the fact that the UK legal system has been subject to external pressure to which Australia has not.

Because Australia is outside any regional system for the protection of human rights, there has been little 'external' pressure for national law to be recast in order to comply with international obligations. In the UK, momentum for incorporating the ECHR into national law gathered because of the number of cases emanating from the European Court of Human Rights in Strasbourg in which the court had held the UK to be in breach of its Convention obligations. By the time the *Human Rights Act* was passed in 1998, UK law had been found wanting on around 50 occasions. This situation arose partly because UK courts did not have the authority to correct breaches of the Convention 'at home'. The Australian legal system has not been subject to the same pressures, due to the lack of a regional court with a power of review over domestic human rights shortcomings.

Further, Australia is now somewhat isolated by the absence of an instrument specifically empowering the courts to correct human rights violations. After the second world war, the UK Government, as part of the decolonisation process, encouraged newly independent states, including states in Asia, to 'write in' terms similar to the ECHR in their new national constitutions. Indeed, there was a proposal from the colonial office at one point for a pan-Asian system. This, coupled with the fact that New Zealand and Canada have adopted their own human rights instruments, has meant that Australia is now very much isolated in choosing to rely exclusively on ad hoc legislative instruments, such as the *Race Discrimination Act*, and the common law, in protecting fundamental rights.

AUSTRALIAN RESISTANCE TO A BILL OF RIGHTS

There are also cultural reasons underpinning what one eminent Australia professor has termed the 'Australian reluctance about rights', which considers bills of rights to be relevant only to social issues that can neatly be hived off from economic matters (which are of greater concern). This view generally holds that there are greater calls on resources than a constitutional bill of rights, which in any event will assist only a marginalised few.

But human rights law impacts on all types of governmental power. The distinction between social concerns and economic matters is not as neat as this current orthodoxy suggests. The UK *Human Rights Act* has influenced areas as diverse as tax law, fair trading rules, local government and planning, insolvency procedures, and any other field of enterprise affected by state regulation. Indeed, business should be concerned, particularly from the perspective of foreign investment, if a perception develops that the powers of Australian courts to review exercise of government authority are limited in comparison with those of courts in other democracies.

However, amending the Australian Constitution is notoriously difficult, given that it requires a majority to be secured across Australia, and a majority in a majority of states. For this reason, a legislative approach has been preferred by those who have attempted to promulgate fundamental rights protection. Three attempts to introduce federal human rights instruments have occurred, in 1973,

1984, and 1985: all were by Labor Governments, and all failed. Given the constraints of the Australian Constitution, another alternative would be to implement the ICCPR into state legislation, and indeed the ACT Legislative Assembly has already taken this step in what is widely regarded as a highly successful initiative.

Another objection cited by detractors of bills of rights is costs. Cynics claim that bills of rights represent, above all, an opportunity for lawyers to make money. This argument reflects a serious misunderstanding of legal processes, and the work that lawyers do. The work of lawyers shifts with all changes in the law. For example, when a new law emerges on trade practices, the focus of legal advice moves to that new development; the same applies to new laws on tax, company law, and any other field of legal regulation. A shift in emphasis, in the work of lawyers, toward advising on the workings of a new bill of rights might be expected, especially at the initial stages of its operation. But to say that this shift, and it would probably be a temporary shift, is an argument against its promulgation, is disingenuous. It could be applied to any change in the law. Following this logic, no updates in any kind of law would be feasible, given the increase in the work of lawyers that any change entails.

But, more importantly, a charter of rights could potentially protect the fundamental elements of democracy more efficiently than does the approach currently favoured in Australia – instituting ad hoc inquiries whenever serious human rights violations are suspected. So, for example, if an individual dies in policy custody then, under the ECHR Article 2 (right to family life), the family can bring the matter directly to the courts for inquiry if there are suggestions that the death occurred in suspicious circumstances. The court can then decide whether the state and its servants have in any way violated the Article 2 (right to life), and award compensation or other appropriate sanction. Thus, charters of rights provide a 'permanent forum' for the protection of human rights, and an influential deterrent against breach by state agents. It is also, in all likelihood, more cost-efficient than establishing ad-hoc inquiries.

Far from undermining democracy by transferring authority from elected politicians to the courts, bills of rights enhance democracy, by ensuring that politicians are not shielded from view when they attempt to promulgate laws that offend the fundamental principles of democratic governance. Further, the fear of a 'government of judges' may be less pervasive in Australian society than some might think. On 14 March the Brisbane *Courier Mail* published an article putting the case for a national bill, pointing out that in a 2004 Morgan Gallop poll, High Court judges were ranked as having very high standards of ethics and honesty by 63% of those polled. The figure for Federal politicians was 20%.

CONCLUSION

In the 21st century, and in an age in which politicians are only too well aware that they can 'legislate over' common law protection of fundamental rights, it is perilous to leave the question of what is 'necessary' in a democratic society in the exclusive hands of the political arms of governance.

Charters of rights, in many ways, simply restore and reinforce the traditional role of the courts in protecting against the erosion of fundamental democratic values under the pressure of a parliamentary majority of the day. They ensure that legal rules are enacted through transparent and accountable processes, and that participation in such processes reflects the plurality of interests at play in a modern democracy; and charters of rights guard against unwarranted breach of the timeless rule that the exercise of authority should not exceed that which is necessary to achieve its aim. ■

This article is an edited version of a presentation delivered by Dr Ward to the LAWASIA conference held at the Gold Coast in March 2005.

Notes: **1** Nigel Morris, Colin Brown, and Ben Russell 'After a sleepless 30 hours, Commons and Lords agree on the bouncing bill', 12 March 2005. **2** All reproduced in 'What they said: Prevention of Terrorism Bill', 15 March 2005, *Times Online*. **3** C Michaelsen, 'International Human Rights on Trial — The UK's and Australia's Legal Response to 9/11', [2003] *Sydney Law Review* 13.

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