

## **A Reply to Professor Allan**

[response , in *The Australian*, 24 April 2009 to item by James Allan arguing against human rights charters and similar legislation, in same paper, 17 April 2009 – which item accessible at :  
<http://www.theaustralian.news.com.au/business/story/0,,25344402-17044,00.html>]

I apologise if I offended Professor Allan in my review of Geoffrey Robertson's book, *The Statute of Liberty*, but he misrepresents me when he asserts that I called opponents of the Bill of Rights, "crazy".

I pointed out that, although Professor Allan, an expatriate Canadian, is very critical of his country's *Charter of Rights and Freedoms*, this is not a view reflected in the political processes of his native Canada. The Canadian people had twenty-one years experience with a statutory Bill of Rights before they chose, in 1982, to show their approval by entrenching the *Charter of Rights and Freedoms* in the Canadian Constitution. This argument was put forward by Mr. Robertson in the book that was being reviewed.

The rhetorical flourish, which seems to have given rise to such offence, was, however, all mine. I pointed that, since the Canadian people, on the one hand, and Professor Allan, on the other, appeared to be so much at odds, one or other of them might be considered "crazy". I hope this did not indicate a lack of respect for Professor Allan or his arguments; though it is interesting that he chose to take offence at my immoderate language rather than rebut the argument I put forward.

Professor Allan's own argument against a Bill of Rights begins by giving a place of primacy in the liberal democracy model, that we share with Canada, the United Kingdom and New Zealand, to the elected representatives of the people gathered in Parliament. The politicians, who make up our parliaments, are described as rational and wise representatives of we, the people. I share this position.

I begin to part ways with Professor Allan when he makes the argument that, in interpreting a Bill of Rights, the courts make unwise, irrational, unwarranted decisions which do not reflect the opinions of the Parliament or the majority of the voting public. I do not agree with this, although I accept that courts, like all our other democratic institutions, are fallible.

I strongly disagree with the next step in Professor Allan's argument. He argues that a Bill of Rights takes too much power from parliament and gives it to the courts. This is despite the fact that, under the constitutionally entrenched *Charter of Rights and Freedoms* in Canada, their Parliament has the power to overrule any decision of the Court. Proposals being considered for an Australian Human Rights Act also leave the Australian Parliament's powers to legislate wholly unaffected.

His article begins by extolling the wisdom and rationality of the elected representatives of the people, the parliamentarians. Then, to counter the fact that Canadian Parliaments have seldom sought to overturn their court's interpretation of the Bill of Rights, he

characterises the same parliamentarians as timid, intimidated by the courts and unrepresentative of those who elected them.

You cannot have it both ways. Canada's parliamentarians have the power to overrule the courts. If they choose not to do so, then the much more logical explanation (and the one that strikes at the heart of Professor Allan's whole position) is that these parliamentarians are still acting as wise and rational representatives of the will of the people. Simply, the elected representatives, in general, approve of the way in which the courts apply the contents of a Bill of Rights to often difficult situations.

While Professor Allen asserts that playing the man, not the ball, has never been central to his opposition to a Bill of Rights, as far as lawyers are concerned, his article contains very little other than criticism of lawyers in general and judges in particular. It is important to remember who judges are. They are experienced lawyers who have been chosen by our politicians (those elected by the people to form a government) because of their ability and integrity. For those who believe that Parliament is our key democratic institution (and Professor Allan and I agree on that), judges should stand high in our estimation.

It is also true that we elect our politicians, but we do not trust them completely. We want the courts to carry out their watch-dog role. Those who don't think this way, like the Fijian President, Josefa Iloilo, would seek to sack all the judges.

Professor Allan's claim that a Bill of Rights is anti-democratic should be closely examined. A Bill of Rights is just another Act of Parliament. We should remember that, like any other Act of Parliament, it is a decision by Parliament instructing the courts as to what the law is and the situations in which it should be applied. Put more broadly, if we, the people, decide that we want to have a Bill of Rights as part of our structure of governance, then, how can it be said that such a decision is undemocratic?

So Professor Allan and I agree on some things and disagree on others. I am reliably informed that we are to share a platform in front of a group of talented young people in a few weeks time. I look forward to continuing our discussion in person.

**Stephen Keim**  
**Chambers**  
**20 April 2009**