

# The King's School Lecture – A Perspective on Human Rights from a Practising Lawyer

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## INTRODUCTION

1. Having only been a practising barrister in New South Wales for close to four years, what follows should be read with that limitation of context. The purpose of this paper is to reveal, if I can call it that, some lessons I have learnt about the practical application of human rights for a practising lawyer.
2. I am, of course, delighted to join you here today to say a few words about what is, for myself, a very important topic. When one speaks of human rights, one is generally concerned with the rights of an individual. But to speak of a right implies an obligation.
3. Based on my own experience it seems to me that one of the greatest problems facing the modern Australian lawyer in professional practice, is finding the impugned “legal obligation” to promote and protect the human rights of individuals within the jurisdictional limits of Australia.

## COMMONWEALTH CONSTITUTION

4. What better place to start then with the most important document in the Australian legal system today, the Commonwealth Constitution. After all, the Commonwealth Constitution is the ultimate source of Australian law, dictating as it does the metes and bounds of much of the laws in this country.
5. First, it seems clear enough that the Commonwealth Constitution contains little express or implied protections for human rights in Australia. Therein lays a great difficulty for the practising lawyer. In circumstances where the most powerful source of Australian law says little about human rights, the inference can readily be drawn that the practising lawyer will have great difficulty in

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calling upon the Constitution to protect the human rights of his or her client. Or so it may appear.

6. To the extent that the Commonwealth Constitution does contain a number of guarantees related to civil and political rights, they must be largely characterised as protections against encroachment by the federal entity on the rights and liberties of citizens of the federating States. For example, in accordance with section 117 of the Commonwealth Constitution, no discrimination is permitted between residents of different States.
7. In other words, section 117 protects an interstate resident who is an Australian citizen from the operation of a law wherever the effect of a law would be to subject an interstate resident to a disability or discrimination to which that person would not be subject as an intrastate resident.<sup>1</sup>
8. By way of further example, section 80 of the Commonwealth Constitution contains the right for trial by jury as a guarantee for indictable offences. However, the constraints imposed on the Commonwealth Parliament by section 80 do not apply where an offence is made triable other than on indictment.<sup>2</sup>
9. The Commonwealth Parliament may create an offence punishable by 12 months imprisonment and triable summarily without a jury. If there is an indictment, there must be trial by jury, but there is nothing to compel procedure by indictment.<sup>3</sup>
10. Section 80 of the Constitution does not prevent the Commonwealth Parliament from committing to a judge the determination of certain factual issues in a jury trial.<sup>4</sup> Moreover, there is no constitutional requirement that a jury be composed of 12 persons.<sup>5</sup>

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<sup>1</sup> *Street v Queensland Bar Assn* (1989) 168 CLR 461 at 559, per Toohey J.

<sup>2</sup> *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 190, per Barwick CJ, Mason and Aickin JJ.

<sup>3</sup> *R v Archdall; Ex parte Carrigan* (1928) 41 CLR 128 at 139, 140, per Higgins J.

<sup>4</sup> *Kingswell v R* (1985) 159 CLR 264.

<sup>5</sup> *Brownlee v R* (2001) 207 CLR 278.

11. It follows that even where civil rights are reflected in the Commonwealth Constitution, there are great limits on the extent to which those rights apply. For obvious reasons, this is not good news for the practising lawyer who seeks to gain the protection of a civil constitutional right for the client only to be ousted by the courts giving a narrow construction to the right in question.
12. Second, the framers of the Commonwealth Constitution refused to incorporate a comprehensive bill of rights (to protect human rights), preferring instead the protections of the common law and responsible government. Their rejection of a modified or analogous 'due process/equal protection' provision similar to section 1 of the Fourteenth Amendment of the US Constitution appears to have been based on a concern that it might be used to protect ethnic minorities from discriminatory State and federal laws.<sup>6</sup>
13. Historically, then, it also follows that the very foundation of the Commonwealth Constitution was infected by a perspective to protect the lawmaking power of Federal and State Governments at the expense of the protection of human rights in Australia.
14. As the framers of the Constitution intended to place confidence in the protections offered by the common law and responsible government in Australia, the question then becomes whether these mechanisms have adequately discharged the obligation bestowed upon them. More on that question a little later.
15. Thirdly, in addition to the express provisions in the Commonwealth Constitution, constitutional implications have been identified by the High Court of Australia in the area of civil and political rights. As constitutional implications, these areas of civil and political rights are protected from being abrogated by legislation passed by Federal or State governments.
16. For example, in the civil rights area, it has been determined that there are limitations to the legislative power of a State parliament to vest administrative powers in a State court where such a function is incompatible with the Court's

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<sup>6</sup> Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne 1898, Vol IV at 665.

position, under the Constitution, as a potential repository of federal jurisdiction.<sup>7</sup>

17. The court must not be subjected to direction from the executive as to the content of judicial decisions.<sup>8</sup> Legislation which requires a court exercising federal jurisdiction to depart significantly from standards characterising the exercise of judicial power may be repugnant to Chapter III of the Constitution.<sup>9</sup>
18. In relation to political rights, a freedom of political communication (including non-verbal communication) has been identified and this freedom extends to the States and local government.<sup>10</sup> The High Court has ruled that freedom of political communication is required to adequately exercise the right to vote at the federal level.<sup>11</sup>
19. The suggestion that there is a basic principle of equality underlying the Constitution no longer commands any authority, although there is probably a right of procedural 'due process' (i.e. procedural fairness) arising out of Chapter III of the Commonwealth Constitution.<sup>12</sup>
20. Yet again, as observed, the practising lawyer faces difficulties in rendering the benefit of implied constitutional rights from Australia's ultimate source of law. Not only are the implied rights limited in their scope and application, but for myself, it is difficult to see how something as important as the creation, maintenance and protection of human rights should be left to necessary implication.

## **REFLECTION ON LEGISLATIVE AND JUDICIAL POWER**

21. When a practising lawyer, such as a barrister is approached by a client who claims his or her "human right" has been infringed, a good starting place is to

<sup>7</sup> *Kable v DPP (NSW)* (1996) 189 CLR 51; *Fardon v A-G (Qld)* (2004) 223 CLR 575.

<sup>8</sup> *South Australia v Totani* (2010) 242 CLR 1.

<sup>9</sup> *Thomas v Mowbray* (2007) 233 CLR 307.

<sup>10</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

<sup>11</sup> *McGinty v Western Australia* (1996) 186 CLR 140 at 166, 167 per Brennan CJ, at 287 per Gummow J (with whom Toohey and Gaudron JJ agreed).

<sup>12</sup> *Leeth v Commonwealth* (1992) 174 CLR 455 at 486 per Deane and Toohey JJ (general principle of equality), at 502 per Gaudron J (Ch III precludes Courts acting in a discriminatory way).

determine whether there is any legislative or common law right which protects the proposed right in question.

22. Consequently, a survey will necessarily need to be undertaken of relevant legislation, both at the State and Federal level in Australia, to determine whether any statutory cause of action crystallises for the benefit of the client with respect to the infringement of his or her human right.
23. Like the paradigm of constitutional protection for human rights, statutes passed by Federal and State governments are scattered in their approach to creating statutory rights and otherwise imposing legislative obligations or prohibitions with respect to the maintenance and protection of human rights.
24. The scattered approach to protection of human rights by reference to the exercise of legislative power creates great difficulties for the practising lawyer. For example, given that Australia does not have a comprehensive or collective constitutional or statutory Bill of Rights, it follows that various statutory rights need to be examined closely to determine how they can assist in the bastion of protecting human rights.
25. Let us look for a moment at the legislative response to prohibiting discrimination on various protected grounds at both the Federal and State level. The first important observation to make here is that at the Federal level in Australia, there is no unified statutory piece of legislation which regulates and prohibits unlawful discrimination.
26. Rather, the Federal statutory approach to prohibiting discrimination has been the slow enactment of a series of laws with respect to particular grounds of discrimination. For example, the first Federal law prohibiting discrimination was the *Racial Discrimination Act 1975* (Cth).
27. The fact that it took the Federal Parliament some 74 years to expressly enact a Federal law prohibiting a form of discrimination, this says a lot about the historical view taken by the Commonwealth of Australia on the topic of discrimination for most of the 20th century. Clearly, by implication, the absence of any statutory protections prohibiting discrimination plainly

demonstrates that the Commonwealth government did not take discrimination seriously in this country.

28. After the passing of the *Racial Discrimination Act 1975* (Cth), it took another hard nine years before the second Federal law dealing with discrimination was passed in Australia. So, in 1984, the *Sex Discrimination Act* was passed. Yet again, more battles were fought for the continued development of prohibiting discrimination law in Australia.
29. Moving forward another eight years, the *Disability Discrimination Act 1992* (Cth) was enacted. And finally, fast forwarding to 2004, the *Age Discrimination Act* was passed at the Federal level. A short review of the historical development of the Federal approach to prohibiting discrimination in Australia reveals some interesting propositions at a high-level of generality about the connection between legislation and human rights more broadly.
30. First, it is clear from the discrimination law experience in Australia at the Federal level, that the enactment of legislation to provide protections for human rights is a slow process. The very fact that it took the Federal Parliament of Australia some 74 years to actually enact a piece of legislation dealing squarely with discrimination law speaks for itself.
31. Second, a close examination of the four federal statutes dealing with discrimination law reveals an inconsistency in approach in regulating and prohibiting the impugned protected attributes. For example, by section 10 of the *Racial Discrimination Act 1975* (Cth), a Commonwealth or State law that seeks to limit or abrogate a right of a person by reference to their race, is invalid. However, no provisions of a similar effect can be found in the other three Federal discrimination statutes.
32. Thirdly, by implication, a study of the four discrimination statutes at the Federal level reveals an interesting fact by omission; namely, that there are many protected attributes that are not covered (i.e. religion, political opinion etc). In that context, is it to be suggested by inference that some protected attributes are more important than others, on the basis that they have

attracted legislative protection? Dare I say there is no easy answer to this question, but it certainly can be said that the Commonwealth Parliament has a long way to go before it can be said that discrimination law has been given a proper unified approach at the Federal level in Australia.

33. The position at the state and territory level throughout Australia on the topic of discrimination law is not much better. For example, in New South Wales, the *Anti-Discrimination Act 1977* (NSW) was enacted. Although for the practising lawyer the *Anti-Discrimination Act 1977* (NSW) creates various statutory causes of action for unlawful discrimination in New South Wales, various issues arise as to the scope of the protections afforded.

34. For example, the protected attribute of race has far less statutory exceptions than many of the other protected attributes (i.e. sex, age, disability, homosexuality, transgender status etc). Again, the question might be posed by implication, as to whether some of the protected attributes in a human rights context are viewed as more important than others.

35. Each state and territory in Australia has, at different times, joined the party by enacting its own discrimination statute prohibiting discrimination on various protected grounds. However, a close study of the various legislative regimes at the state and territory level throughout Australia reveal a more disturbing fact; namely, there are striking inconsistencies between the jurisdictions in their approach to dealing with prohibiting discrimination.

36. With the different legislative responses to regulating discrimination in the respective states and territories of Australia, one is faced with a situation where there can be jurisprudential isolation in the development of the common law in Australia.

37. One final word about discrimination law and human rights. For myself, one of the great failures of the common law in this country has been its inability to develop common law protections in the area of discrimination. It is for this reason that discrimination law is squarely a creature of statute, and not an exercise of judicial power in the imposition of creating such rights.

38. The Australian Capital Territory and Victoria are the only jurisdictions to have enacted human rights charters, although these are statutory and not entrenched.<sup>13</sup> All attempts at the Federal level to introduce a Bill of Rights in statutory form have failed.<sup>14</sup>
39. Since ratification of the *International Covenant on Civil and Political Rights*, Australia has been under an obligation in international law 'to take the necessary steps, in accordance with its constitutional processes ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant'.<sup>15</sup>
40. In addition, the *Human Rights Commission Act 1981* (Cth) (repealed) and its successor the *Australian Human Rights Commission Act 1986* (Cth) (the 'Act') provide that the ICCPR is to form the basis of the work of the Australian Human Rights Commission (the 'Commission') that the Act establishes. The Commission must investigate and report upon alleged breaches of the provisions of the ICCPR.
41. However, the annexation of the ICCPR to these Acts has little if any other effect upon domestic law. For example, the High Court of Australia has not recognised any particular declaratory status for the ICCPR, although two justices have considered a Federal Government Minister was entitled, though not obliged, to take the relevant human rights provisions into account.<sup>16</sup>
42. In recent years, Australia has come under criticism from international human rights bodies, notably for the 1998 amendments to the *Native Title Act 1993* (Cth) (which were considered to be racially discriminatory) and for the policy

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<sup>13</sup> *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (VIC).

<sup>14</sup> Attempts to introduce a Bill of Rights for Australia failed with the rejection and rewithdrawal respectively of the *Human Rights Bill 1973* (Cth) and the *Australian Bill of Rights Bill 1985* (Cth). The *Parliamentary Charter of Rights and Freedoms Bill 2001*, introduced by the Democrats in April 2001, did not proceed to a second reading.

<sup>15</sup> *International Covenant on Civil and Political Rights* (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171) (the 'ICCPR') adopted and opened for signature ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966; scheduled in *Australian Human Rights Commission Act 1986* (Cth) Sch 2.

<sup>16</sup> *Kioa v West* (1985) 159 CLR 550 at 570 per Barwick CJ, at 630 per Brennan J.



of mandatory detention of asylum-seekers (which has been found to be in breach of Australia's obligations concerning arbitrary detention).<sup>17</sup>

43. Even though rights and obligations contained in a treaty do not form part of Australian domestic law, treaties are not without significance, including their effect on statutory intention.<sup>18</sup> Underlying all civil and political rights is the concept of the rule of law.<sup>19</sup>

44. In Albert Venn Dicey's classic formulation of the 'rule of law', its essential features consist of the absolute supremacy of regular law as opposed to the influence of arbitrary power and equality before the law – meaning that there is no special law for agents of the State and different laws for individuals conferred by the Constitution.<sup>20</sup>

45. To the extent that the common law confers rights on individuals, the rights are largely derived from the doctrine of the rule of law. The common law has similarly been held to contain principles incorporating elements of the rule of law, including the rule of statutory construction that courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms unless such an intention is clearly manifested by unambiguous language — also known as the 'principle of legality'.<sup>21</sup>

### **SOME CONCLUDING REMARKS**

46. The foregoing is by no means comprehensive in its approach to discussing the interaction between human rights and the Australian legal tradition. It is hoped that this discussion has at least directed the reader to the plain fact that practising lawyers in Australia face great difficulties in applying human rights law for the benefit of their client where proposed rights have been infringed.

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<sup>17</sup> In *A v Australia Communication No 560/1993*, CCPR/C/59/D/560/1993, 3 April (1997) at [9.4], [9.5], the Committee found that the detention of the author was arbitrary within the meaning of article 9(1) of the ICCPR and was also in breach of article 9(4) of the ICCPR for the reasons that the detention authorised by the Act was indefinite, prolonged, not open to review and not proportionate to the end being sought.

<sup>18</sup> *Minogue v Williams* (2000) 60 ALD 366; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-1 per Brennan CJ, at 239-40 per Dawson J, at 251-3 per McHugh J, at 272-3 per Gummow, at 294 per Kirby J.

<sup>19</sup> See Dicey *A V*, *The Law of the Constitution*, Macmillan, 1885 and many later editions and reprints.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Coco v R* (1994) 179 CLR 427.

47. In recent years, in purported exercise of responsible government, successive Federal governments in Australia have continuously undermined the protection of human rights for individuals residing in this country. Rather than move towards the introduction of a constitutional or statutory Bill of Rights, successive Federal governments have either abrogated or severely limited various human rights in Australia. In this manner, Australia is behind in comparison to many Western industrialised countries which have a statutory or constitutional Bill of Rights already in place.

48. Without a direct source of domestic law dealing with human rights, it is difficult for courts exercising judicial power to develop common law protections for human rights in Australia. Absent a *holistic single legal document* that sets out all the human rights which Australia seeks to protect, the wrong message is being sent to members of the Australian community about how serious Australia is in protecting fundamental human rights.

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