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PROTECTING HUMAN RIGHTS AND CIVIL LIBERTIES IN QUEENSLAND WITHIN THE EXISTING LEGAL FRAMEWORK[∇] [⊕]

For tens of thousands of years before European contact, the Turrbal people, and on the other side of the Brisbane River, the Jagera people, prospered on this land, often meeting over shared food to discuss important issues. I honour their Elders, past and present, as we continue that ancient tradition this morning.

Thank you for leaving the comfort of your cosy beds so early to be part of JATL's discourse on civil liberties and human rights, an issue of universal concern, especially to clever, compassionate, aspiring lawyers like you. Protecting clients' rights and, where necessary, enforcing them under the rule of law in independent courts is a lawyer's key business.

I need not remind this audience that Australia remains the only democratic nation in the world without a statutory charter of rights. And at a State level, unlike Victoria[1] and the ACT[2], Queensland does not have a Human Rights Act. Personally, I support an Australian charter of rights, generally of the kind recommended in the National Human Rights Consultation Report.[3] I have stated my reasons in the past[4] and will not repeat them today. The reality is that presently there is little appetite on either side of mainstream politics for a federal or Queensland statutory bill of rights. I am comforted, however, that such things can change quickly. Today I will speak to you, the future leaders of the legal profession and wider community, about how human rights can be protected within our existing legal framework. Indeed, the very effectiveness of this framework has been the most powerful argument against the introduction of a charter. After all, at least since the second

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∇ The Honourable Justice Margaret McMurdo AC, President, Court of Appeal, Supreme Court of Queensland.

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1 *The Charter of Human Rights and Responsibilities Act* 2006 (Vic).

2 *Human Rights Act* 2004 (ACT).

3 National Human Rights Consultation Report (September 2009).

4 See *An Australian Human Rights Act; Quixotic Impossible Dream or Inevitable natural Progression*; Southern Cross University, Michael Kirby Human Rights Lecture 2010, 3 September 2010; (2009-10) 13 *Southern Cross University Law Review* 37-55.

half of the 20th century, Australia without a bill of rights has done better in protecting civil liberties than most of the world's nations with bills of rights.

Not bad considering our unpromising beginnings as a nation and State: a prison colony at Port Jackson in 1788 and another at Moreton Bay in 1825, where there was little concern for the civil liberties of prisoners, let alone for those of the Cadigal, Turrbal and Jagera peoples whose lands we took with neither treaty nor fair compensation and too often with shameful brutality, applying the now discredited concept of *Terra Nullius*.

I will speak first this morning of common law rights. I will then discuss the rights provided by the Commonwealth Constitution and then briefly discuss rights created by statute.

Common law rights

Blackstone[5] identified three primary common law rights: personal security, personal liberty and private property. Auxiliary common law rights include access to the courts; legal professional privilege; privilege against self-incrimination; immunity from the extension by a court of the scope of a penal statute; freedom from extension by a court of governmental immunity; immunity from interference with vested property rights; access to legal counsel when accused of a serious crime; not to be unlawfully deprived of liberty; procedural fairness when affected by the exercise of public power; and freedom of speech and movement.[6]

Lady Hale, the sole woman member of the UK Supreme Court, recently observed that many of the notable successful rights challenges in recent years in the UK have been founded in the common law, including the rejection of the admission of evidence obtained by torture.[7] In *A (No 2)*[8] Lord Bingham observed that the English common law had regarded torture and its fruits with abhorrence for over 500 years. And, Lady Hale explained, it was the common law which enabled the media in the

5 William Blackstone, *Commentaries on the Law of England* (1765-1769) Vol 1, "Of the Absolute Rights of Individuals".

6 French CJ, *Protecting Human Rights Without a Bill of Rights*, John Marshall Law School, Chicago, 26 January 2010, 26-27.

7 Keynote Address to the Constitutional and Administrative Law Bar Association Conference 2014, *UK Constitutionalism on the March?* 12 July 2014.

8 *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221.

Guardian News case to access court documents placed before a judge in open court proceedings.[9]

Common law rights, unlike a constitutionally entrenched bill of rights, can be modified or extinguished by parliament but only where parliament expressly and unequivocally states that intention.[10] This means that parliament must publicly confront the electorate over any ensuing political controversy.[11] These principles were applied for the benefit of the falsely accused terrorist, Dr Haneef.[12] The Federal Court took a strict view of the statutory provisions allowing the Minister to cancel a visa on character grounds and held that merely being a relative or friend of a person involved in criminal conduct was insufficient to demonstrate bad character.

The common law is organic so that common law rights are not a closed category as the seminal case in the relationship between and reconciliation of Indigenous Australians and non-Indigenous Australians, *Mabo (No 2)*,[13] demonstrates. For the first time, Indigenous native title was recognised as part of the common law of Australia with the rejection of the concept of *Terra Nullius*.

Rights under the Constitution

I turn now to rights under our Commonwealth Constitution. Regrettably, one reason why many of the human rights guaranteed in the US Constitution were not included in ours was because in 1901 most colonies were concerned not to restrict their ability to make laws limiting the employment of Asian workers.[14]

Unsurprisingly then that human rights protection for non-white Australians in the early days of federation was unimpressive as demonstrated by *Muramats* case in 1923.[15] Japanese-born Jiro Muramats became a naturalised Australian in Victoria before moving to Western Australia where he sought to enrol to vote federally. The High Court

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9 *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420; [2013] QB 618.

10 *Potter v Minahan* (1908) 7 CLR 277; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 (Gleeson CJ), citing *Coco v The Queen* (1994) 179 CLR 427.

11 *R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115, 131.

12 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.

13 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

14 Byrnes A, Charlesworth H and McKinnon G, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009), 25; Williams G, *Human Rights Under the Australian Constitution* (Oxford University Press, 1999), 37-42; French CJ, *Protecting Human Rights Without a Bill of Rights*, John Marshall Law School, Chicago, 26 January 2010, 3-4.

15 *Muramats v Commonwealth Electoral Officer (WA)* (1923) 32 CLR 500.

found that his Japanese origin made him an "Aboriginal native of … Asia … or the islands of the Pacific" so that he was statutorily prohibited from voting in Western Australia and therefore ineligible to vote federally.

By contrast these days, the High Court is reluctant to disenfranchise citizens. It held that the constitutional right to vote protected under sections 7 and 24 of the Constitution could not be subverted by Commonwealth legislation disenfranchising prisoners where there was no distinction between short and long term prisoners and their relative culpability. A substantial reason was required before disqualifying an eligible person from voting. The disenfranchising of prisoners serving sentences of three years or more, however, had proper regard to the seriousness of their offending, their culpability and their temporary unfitness to participate in the electoral process.

After the horrors of World War Two, an optimistic spirit of internationalism emerged with the 1948 United Nations Universal Declaration of Human Rights in which Australian, Dr H V Evatt, played a pivotal role. From that point in time, Australia's infamous White Australia Policy was gradually dismantled. Today's Australians identify with 300 ancestries and languages and are united in pride for their cultural diversity, recognising it as a source of social and economic wealth.

Also in 1948, the High Court in the *Bank Nationalisation* case[16] rejected as unconstitutional the Commonwealth's legislative attempt to nationalise banking. It was outside the Commonwealth's power to make laws with respect to the acquisition of property on just terms.[17] This case is now authority for imposing a just terms requirement whenever the Commonwealth compulsorily acquires property belonging to the State or to a person.[18] In 2009, the High Court applied this just terms requirement to Commonwealth laws[19] providing for the Northern Territory's acquisition of property rights conferred on Indigenous people under land rights legislation.[20]

In 1951 in the *Australian Communist Party* case,[21] the High Court held invalid Commonwealth legislation declaring the Communist Party an

16 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1.
17 *Constitution*, s 51(xxxi).
18 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, Dixon J, 349.
19 *Wurridjal v The Commonwealth* (2009) 237 CLR 309.
20 *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).
21 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

unlawful organisation.[22] Importantly, Dixon J emphasised that the Constitution was framed in accordance with many traditional conceptions, to some of which, including the separation of powers, it specifically gave effect. Others, including the rule of law, were properly assumed. The impugned legislation offended both concepts.[23] Michael Kirby AC has referred to Dixon J's wise words as worth remembering at times like the present when "unrestrained voices are raised urging us to cast aside our traditional liberties in response to the perceived threat of terrorism".[24]

The High Court took the notion of assumed rights under the Constitution to new levels on 30 September 1992 when it handed down two ground breaking decisions. In *Australian Capital Television*[25] a Commonwealth law imposing a blanket prohibition on political advertisements on radio or television during federal election periods was held invalid as infringing the implied constitutionally guaranteed freedom of political discussion. While this right does not confer individual rights, it invalidates legislation inconsistent with it.

Nationwide News[26] concerned the statutory prosecution under a Commonwealth Act of *The Australian* newspaper for contempt after it published strident criticism of the Australian Industrial Relations Commission. The High Court held the provision was invalid as infringing the implied freedom of political discussion.

Two years later in *Theophanous*,[27] the High Court extended this implied freedom to provide the defence of qualified privilege to a defamation where the subject matter was political.

And in 1997 in *Lange v ABC*,[28] the High Court qualified *Theophanous*. Whilst confirming that the Constitution implied a right of freedom of communication in relation to government and political issues, the court explained that there was a two step process in determining whether a law infringed that right. The first was whether the law burdened political communication. The second was whether it was appropriate and adapted to an end consistent with the system of representative and responsible

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22 *The Communist Party Dissolution Act* 1950 (Cth).

23 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193.

24 Michael Kirby AC, "Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty"(2006) *Melbourne University Law Review* 3, 576-593, 579.

25 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

26 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

27 *Theophanous v Herald and Weekly Times Limited* (1994) 182 CLR 104.

28 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

government established by the Constitution. The *Lange* principles have been applied in many subsequent cases.[29]

Perhaps surprisingly, section 75(v) *Constitution* has proved a rich source of rights-based jurisprudence. It gives the High Court jurisdiction in any matter "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". This has allowed the High Court to prevent public officials, including Ministers of the Crown, from exceeding their lawful power. The High Court may require Ministers or officials to discharge a duty imposed upon them by law. The Court can also quash a decision made in excess of power. The entrenchment of this provision in the Constitution means that this original High Court jurisdiction cannot be removed by statute.[30]

An important example of a human rights case brought under this provision is the *Malaysian solution* case.[31] The High Court held that the *Migration Act*[32] did not provide a power to remove from Australia to Malaysia those seeking refugee status (off-shore entry persons).[33] The Minister's declaration that Malaysia was a country to which such people could be taken was invalid.[34] As Malaysia was not obliged either under international or domestic law to provide access to the procedures and protections contained in the *Migration Act*, a valid declaration could not be made.[35] Further, an unaccompanied asylum seeker under 18 could not lawfully be taken from Australia without the Minister's written consent.[36] The Court declared the Minister's declaration invalid and granted an injunction restraining the Minister from removing the 16 year old plaintiff.

Some provisions in the Constitution provide specific human rights. These include the right to trial by jury for Commonwealth indictable offences[37] which, the High Court has held,[38] requires unanimous verdicts in such trials.

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29 *Unions New South Wales v New South Wales* (2013) 304 ALR 266; Attorney-*General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; *Wotton v State of Queensland* (2012) 246 CLR 1; *Hogan v Hinch* (2011) 243 CLR 506; *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Coleman v Power* (2004) 220 CLR 1; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181; *Roberts v Bass* (2002) 212 CLR 1; and *Levy v State of Victoria* (1997) 189 CLR 579.

30 French CJ, *Protecting Human Rights Without a Bill of Rights*, John Marshall Law School, Chicago, 26 January 2010, 12.

31 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144; (2011) 85 ALJR 891.

32 *Migration Act* 1958 (Cth).

33 [2011] HCA 32, [54], [55], [95], [237].

34 Above, [68], [136], [255].

35 Above, [109], [116], [118], [125], [126], [130].

36 *Immigration (Guardianship of Children) Act* 1946 (Cth).

37 *Constitution*, s 80.

Another is the guarantee of freedom of trade, commerce and intercourse among the States under section 92 of the Constitution.[39] From all the cases concerning section 92, I was taken with Dulcie Johnson's story. In 1945 she was refused a war-time permit to travel from South Australia to Western Australia to visit her fiancé as a bureaucrat deemed her reason for travel was inadequate. The High Court, always a softie for true love, struck down the national security regulation which provided for travel between States only with a permit.

The Constitution prohibits the Commonwealth from establishing any religion, from imposing any religious observance, from prohibiting the free exercise of any religion or from requiring a religious test for any Commonwealth office or public trust.[40]

Discrimination between residents of States is prohibited under section 117 Constitution.[41] In 1989, the High Court relied on section 117 to strike down rules relating to the admission of barristers of the Supreme Court of Queensland which required those seeking admission to be Queensland residents or to intend to practise principally in Queensland.[42]

Chapter III of the Constitution deals with the judicature and, since *Kable's* case[43] in 1996, has become a significant source of rights-based law. The New South Wales parliament passed an Act authorising the continued detention of Kable in prison for a specified period after the completion of his sentence if the Supreme Court was satisfied he was more likely than not to commit a serious act of violence. The High Court held the Act was unconstitutional as incompatible with the integrity, independence and impartiality of the Supreme Court as a court in which federal jurisdiction had been invested under Chapter III.

More recently in *Totani*[44] the High Court, applying *Kable*, struck down an Act requiring a Magistrates Court, in specified circumstances, to make a control order against a member of a declared organisation. The plurality[45] considered the Act was invalid as it authorised the executive to enlist the Magistrates Court to implement executive decisions in a manner

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38 *Cheatle v R* (1993) 177 CLR 541.
39 *Constitution*, s 92.
40 *Constitution*, s 116.
41 *Constitution*, s 117.
42 *Street v Queensland Bar Association* [1989] HCA 53; (1989) 168 CLR 461.
43 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
44 *South Australia v Totani* (2010) 242 CLR 1.
45 French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

incompatible with the proper discharge of the Magistrates Court's federal judicial responsibilities and with its institutional integrity.

These Chapter III questions are likely to feature when the High Court hands down its decision, presently reserved, concerning the constitutionality of the *Vicious Lawless Association Disestablishment Act* 2013 (Qld) in *Kuczborski v The State of Queensland*.[46]

Rights created by statute

There are a multitude of statutes which create rights. The most prominent at a federal level are the *Racial Discrimination Act* 1975 (Cth) which has had critical provisions controversially suspended during the Northern Territory intervention and as a result of welfare legislation;[47] *Sex Discrimination Act* 1984 (Cth); *Australian Human Rights Commission Act* 1986 (Cth); *Disability Discrimination Act* 1992 (Cth) and *Age Discrimination Act* 2004 (Cth). Queensland legislation most obviously includes the *Anti-Discrimination Act* 1991 (Qld).

Australia is a signatory to most international conventions concerning human rights, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights; the Declaration on the Rights of Indigenous Peoples; the Convention on the Prevention and Punishment of the Crime of Genocide; Convention on the Political Rights of Women; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; the Convention on the Rights of the Child; the Convention on the Reduction of Statelessness; the Convention Relating to the Status of Stateless Persons; Convention Relating to the Status of Refugees; Slavery Convention of 1926; Supplementary Convention on Slavery; and Convention on the Rights of Persons with Disabilities. While these international conventions are not part of Australian domestic law, they may be considered in construing domestic statutes and ascertaining legislative intent. In the absence of a clear contrary intent, courts can conclude that legislatures intend to pass laws consistent with them.[48]

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46 [2014] HCA TRANS 187 (2 September 2014).

47 See Australian Human Rights Commission, *The Suspension and Reinstatement of the RDA Rights and Special Measures*.

48 *Yeo v Attorney-General for the State of Queensland* [2011] QCA 170, [52]-[61] citing *Attorney-General v Fardon* [2003] QSC 331, [19]-[24]; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575*; Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Attorney-General v Sybenga* [2009] QCA 382; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, Brennan, Deane and Dawson JJ, 38; Mason CJ

The importance of developing a strong community-based human rights and civil liberties culture and the fact that human rights can be protected by unlikely statutes is illustrated by a recent positive Queensland development. Following a complaint early this year (without which, I emphasise, none of this would have happened), the Queensland Ombudsman investigated the practice of strip searching up to twice a day women prisoners receiving certain prescribed medications in the Townsville Women's Correctional Centre. The practice ceased once the Ombudsman's Office began enquiries, but the Ombudsman nevertheless reported its conclusions to parliament. These were that the practice was unlawful, unreasonable, disproportionate and contrary to the purpose of the *Corrective Services Act* 2006 (Qld), section 3, which refers to "the humane containment, supervision and rehabilitation of offenders" and "recognises that every member of society has certain basic human entitlements, and that, for this reason, an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded" and "the need to respect an offender's dignity" and the special needs of some offenders by taking into account "age, sex or cultural background; and … any disability". It is pleasing that the Ombudsman's recommendations were accepted unconditionally by the executive. The report also underlines the limited means prisoners have to advocate about breaches of rights.[49]

Conclusion

I hope this review demonstrates that, even without an Australian charter of rights, the common law, our Constitution, statutory law and the international conventions to which Australia is a party, play a pivotal role in protecting human rights and civil liberties. As future lawyers, you can best protect human rights by raising community awareness so that people expect the legislature, executive and judiciary to protect not only their rights but also those of the most vulnerable. When human rights become entrenched in the hearts and minds of citizens, government will listen. We may even get that Australian charter of rights.

Some of you may work as lawyers in academia or in policy. You may be able to educate the community through oral and written public advocacy. Joining organisations like JATL is a good start. When you leave UQ you

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agreeing, 10.

[49] Report of the Queensland Ombudsman, "The Strip Searching of Female Prisoners Report: An investigation into the strip search practices at Townsville Women's Correctional Centre", September 2014.

may consider Amnesty's LINK, the Council for Civil Liberties or become active in human rights committees in your professional organisations.

Some of you may become advocates in the courts where you may be able to raise human rights arguments. Your generation of lawyers is much better educated in human rights jurisprudence than mine. You think in a rights-based way. While recognising the spectre of unfavourable costs orders, I urge you to be courageous and think laterally in putting forward legitimate rights-based contentions. If you do not, who will? Remember it is almost impossible for courts to develop rights-based jurisprudence if no-one raises the argument. Do not be discouraged if initially unsuccessful. Consider whether an appeal is advisable. If not, learn from the experience and refine and improve your rights-based arguments for the next opportunity.

Issues which require your immediate advocacy include:

- ensuring the Constitution is amended appropriately to recognise the unique and seminal role of Aboriginal and Torres Strait Islander Australians in the history of our nation;
- remembering that every person has basic human entitlements and protecting the rights of asylum seekers in Australia in accordance with our international obligations. This is particularly difficult when the legislature and executive do not permit citizens to know the circumstances of the arrival or the conditions of detention of asylum seekers, including children, whilst their applications are processed; and
- in an age of understandable rising fear of terrorism from those with no respect for human rights, ensuring that the community remains vigilant to minimise any necessary, temporary incursions into civil liberties for security reasons.

Well, after all that I think you deserve a CPD point! I hope my infringement of your human right to sleep in on a cloudy Thursday morning has been as short as possible or, at least, can be justified as a special measure.