ARTICLES

A Matter of Justice: Human Rights in Australian Law

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In this essay, John Toohey, a former Justice of the High Court of Australia, considers the protection afforded to human rights in Australia by the common law and statute and examines the case for enactment of a Bill of Rights.

I have borrowed the title of this address from the title of the first volume of Professor Rowley's trilogy on the destruction of Aboriginal society.[1] Although much has been written on that subject in recent years, the very great contribution Rowley has made to our understanding of Aboriginal people should not be overlooked.

The position of Australia's indigenous people is not directly the subject of my address. For my purposes the significance of the title lies in highlighting that human rights are not, or at any rate should not be, a matter of grace and favour. They are a matter of justice. Unless that is understood, any discussion of human rights seems to me to proceed on a false footing. If it is understood, there is some

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1. CD Rowley *A Matter of Justice* (Canberra: ANU Press, 1978).

prospect that human rights will receive adequate protection. And they will be protected, not because they are fashionable or politically correct, but because justice demands it.

The term 'human rights' came into vogue after World War II. It replaced 'natural rights' because of the association of that expression with natural law, which itself had become a matter of controversy.

I do not think it is possible to offer a satisfactory definition of human rights. It is somewhat easier to compile a catalogue of particular rights, though in the international context there is a continuing debate about what is called 'cultural relativism' and the question is asked: are human rights everywhere the same?

International affirmation of human rights took place when, in the aftermath of World War II, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights. Countries of Western Europe accepted the Convention for the Protection of Human Rights and Fundamental Freedoms which established the European Court of Human Rights. On a wider stage, many countries, including Australia, have ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The earlier emphasis was on civil and political rights which reflected the history and ideology of Western democracies. They proved less controversial than economic, social and cultural rights.

Even within Australia there is plenty of scope for debate as to the content of particular human rights. But the point has been made by Dr Rosalyn Higgins, now a member of the International Court of Justice, that human rights are *human* rights and are not dependent on the fact that countries may behave differently from each other. The desire of individuals for food and shelter, to be able to speak freely, to practise religion or to abstain from religious belief, not to be tortured, not to be detained without being charged and to receive a fair trial is not dependent upon the particular culture or economic development of a country.[2]

Without attempting an exhaustive catalogue, it is enough for present purposes to recall that the Universal Declaration of Human Rights provides:

- Everyone has the right to life, liberty and security of person;
- No one shall be held in slavery or servitude;
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;
- All are equal before the law and are entitled without discrimination to equal protection of the law;

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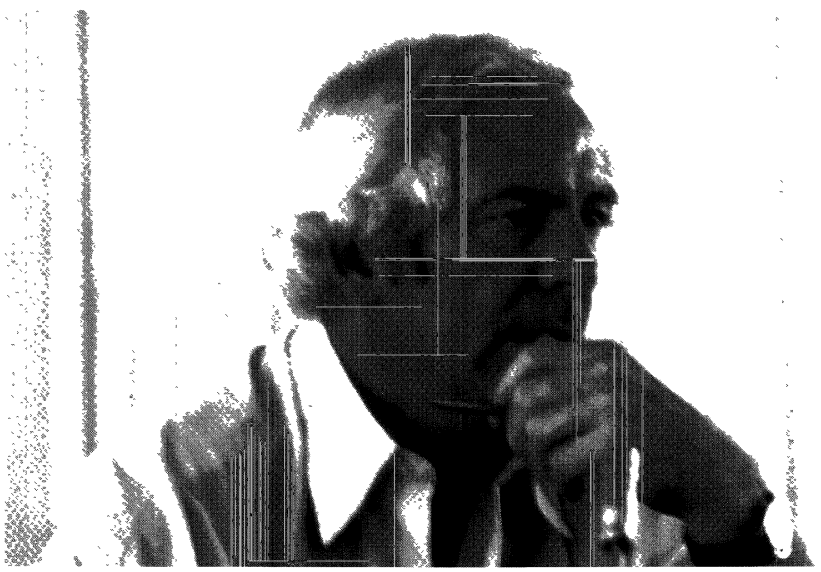
2. R Higgins *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) 96.

- No one shall be subjected to arbitrary arrest, detention or exile;
- Everyone charged has the right to be presumed innocent until proven guilty according to law in a public trial;
- No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence or to attacks upon his honour or reputation;
- Men and women, of full age, have the right to marry and to found a family;
- Everyone has the right to own property;
- Everyone has the right to freedom of thought, conscience and religion;
- Everyone has the right to freedom of expression and opinion;
- Everyone has the right to freedom of peaceful assembly and association;
- Everyone has the right to work and to rest and leisure;
- Everyone has the right to education.

These rights may be found in a different, usually an expanded, form in other international instruments. In whatever form they are cast, they inevitably possess two features. The first is that they speak in general terms. The second is that they are not always in harmony. Hence the scope for debate. Is the right to life inconsistent with the imposition of the death penalty for serious offences? How do we reconcile the right not to be subjected to arbitrary interference with privacy and the right to freedom of expression and opinion? How far may that freedom intrude into the affairs of individuals?



John Leslie Toohey: A Justice of the High Court of Australia 1987-1998

My theme is a consideration of the ways in which human rights have or have not been implemented in Australian law. Inevitably one begins with the proposition that Australia does not have a Bill or Charter of Rights. You have heard the argument, 'If society is tolerant and rational, it does not need a Bill of Rights. If it is not, no Bill of Rights will preserve it'. I have never been impressed with that approach. On the one hand, it takes too sanguine a view of our own history and of the common law which we inherited from England. Minorities have not always received the protection justice demands. On the other hand, it fails to give sufficient weight to the part that a Bill of Rights may play in a country, even when it is largely ignored. I have attended conferences overseas and heard politicians and, I might add, some judges refer with pride to the rights written into the constitution of their country. But I have known that those provisions have received very little respect. At the same time the existence of enshrined rights in those countries does provide some measure of protection, particularly if there is a degree of independence in the judiciary. And with some constitutional provision to point to, it is often easier to place that country in the international spotlight by drawing the world's attention to breaches of human rights. I will say something more about a Bill of Rights later; for the moment let me focus more directly on Australia.

The first step is to look at the Australian Constitution. While it does not contain a Bill or Charter of Rights, it does contain a number of guarantees. It is true that some are aimed at protecting the States against discriminatory treatment by the Commonwealth in relation to trade, commerce and revenue.[3] Others contain a guarantee against discrimination between persons in different parts of the country in relation to customs and excise duties, and other Commonwealth taxes and bounties.[4]

More to the point, there is a requirement that acquisition of property by the Commonwealth be on just terms;[5] a right to trial by jury on indictment for an offence against any law of the Commonwealth;[6] a guarantee of direct suffrage in federal elections;[7] a guarantee that the Commonwealth will not make any law for imposing any religious observance or for prohibiting the free exercise of any religion.[8] There is a prohibition against the discriminatory treatment of a resident of another State.[9] Some aspects of this prohibition were explored by the High

3. S 99.
4. Ss 86, 88, 90, 51(iii).
5. S 51(xxxi).
6. S 80.
7. Ss 7, 24.
8. S 116.
9. S 117.

Court in *Street v Queensland Bar Association*,[10] when it struck down rules requiring that persons admitted to the Queensland bar practise principally in Queensland.

From the nature of federation and from particular provisions of the Constitution it is possible to discern certain implications protective of human rights, such as a freedom of communication on matters relevant to political discussion that is implied in the system of representative government for which the Constitution provides.[11] But the High Court has stopped well short of inferring any general guarantee of fundamental rights and freedoms from the Constitution.

Australia is a common law country and, notwithstanding the volume of legislation over the years, much of our law is still to be found in the judgments of the courts. So we must look both to the legislatures and the courts to see the extent to which human rights are part of our domestic law.

As it happens, we tend to look more in the direction of legislation when we think of human rights. At the Commonwealth level we think of the Racial Discrimination Act 1975, the Sex Discrimination Act 1984, the Human Rights and Equal Opportunity Commission Act 1986, the Affirmative Action (Equal Employment Opportunity for Women) Act 1986 and the Disability Discrimination Act 1992. In Western Australia reference can be made to the Equal Opportunity Act 1984.

This emphasis on statute law as a means of enforcing human rights and protecting the interests of minority groups prompts the question: why have these rights and interests not been given adequate protection by the common law? Why the need for so much legislation, particularly in the area of discrimination?

Views as to the vitality of the common law range from the enthusiasm of Blackstone who, in his *Commentaries on the Laws of England*, described it as 'the best birthright and noblest inheritance of mankind'[12] to those who see the common law as traditionally upholding freedom of contract and rights of property, with discrimination the price inevitably to be paid. Geoffrey Robertson QC puts the matter very strongly when he says: 'The common law failed abjectly to counter inequality'.[13]

I do not take such a jaundiced view of the common law, partly because there is a sense in which, to adapt GK Chesterton's aphorism in a quite different context, the common law may not so much have failed in this respect as not been adequately tried.

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10. (1989) 168 CLR 461.
11. *Nationwide New Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Cth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corp* (1997) 145 ALR 96.
12. W Blackstone *Commentaries on the Laws of England* 18th edn (Chicago: UCP, 1979).
13. G Robertson *Freedom, the Individual and the Law* 6th edn (London: Penguin, 1993) 462.

In one area the common law has a long and, I suggest, proud record and that is in securing the liberty and security of the person against the excessive use of power by the state. It is reflected in protection against arbitrary arrest and detention, and in the rule that a person may not be arrested or detained against their will for questioning. The High Court has asserted the right to personal liberty under the law as 'the most elementary and important of all common law rights'.[14] Ancillary to this principle is the right to be informed of a charge and to be brought before a court so that the legality of arrest or detention may be challenged. The right to a fair trial, ingrained in which is the presumption of innocence and the privilege against self-incrimination, has been emphasised by the courts time and time again.

In *R v Dietrich*[15] the High Court held that while the common law did not recognise the right of an accused to be provided with counsel at the public expense, the courts have power to stay criminal proceedings that will result in an unfair trial and that lack of representation for a person charged with a serious offence is likely to result in an unfair trial.

The picture in other areas of human rights, especially in the dealings of individuals with each other, has not always been so heartening. No doubt a number of factors have contributed to this picture. There are limits on the development of the common law by the courts, imposed by the constitutional distribution of powers among the three branches of government.[16] In the past there was greater reluctance on the part of the judges to acknowledge the role of the courts in developing the common law. Also, there are limits inherent in the very technique by which the courts do develop the common law. They deal with the particular problems presented to them and the common law has been built up case by case over many years, precedent playing its part.

Nevertheless, it is a matter for profound regret that the common law did not develop over time principles which were at odds with the discriminatory treatment of persons by reason of their race or sex. Some writers have suggested that this failure was due to the importance the law attached to freedom of contract. I think that the story is not as simple as this.

What of freedom to contract and its important corollary, freedom not to contract? It is freedom not to contract that has often been the source of discrimination, for freedom not to contract implies freedom to exclude. While the

14. *R v Foster* (1993) 113 ALR 1, 8 quoting Fullager J in *Trobridge v Hardy* (1955) 94 CLR 147, 152.
15. (1992) 177 CLR 292.
16. Ibid, 318-320.

courts have placed some constraints on that freedom, for instance where one of the parties is at a disadvantage by reason of age, health or unfamiliarity with the English language, opportunities may have been missed to argue on a wider basis against discriminatory treatment.

There has been, since the fifteenth century, recognition of a duty to serve on the part of those engaged in a 'public calling'. They must serve the general public without discrimination and may only refuse to serve on reasonable grounds. Different theories have been advanced for the origin of this duty to serve. Some say that it was a response to the monopoly power of those engaged in public callings, that is, that it was a protection against abuse of the power. Others argue that the obligation arose because of the nature of the undertaking, to serve the public generally.

Whatever its true origin, the duty to serve exists though it has not been invoked frequently. A turning point might have been the decision in *Constantine v Imperial Hotels Ltd.*[17] In 1943, Learie Constantine, the famous West Indian cricketer, was refused admission to the Imperial Hotel in London and suffered, in the words of the trial judge, 'much unjustifiable humiliation and distress'.[18] It was held that an action for breach of a duty to receive and lodge him was maintainable without proof of special damage. In the circumstances, Constantine was awarded nominal damages only. Here, one might have thought, was a cause of action that could be built upon so that a refusal to provide a service to someone, by reason of that person's colour, could in appropriate circumstances give rise to an award of substantial damages.

In a number of decisions given in the last 20 years or so, the United States courts have rejected the distinction between innkeepers and common carriers, on the one hand, and other places of public accommodation such as restaurants. They have recognised and enforced a common law obligation to serve in regard to restaurants, gasoline stations, hospitals and home builders. Many of these decisions have concerned discrimination against blacks and the economically disadvantaged.

The common law has been found wanting in its protection against discrimination in employment. There is no decision in the common law world, so far as I am aware, that has recognised a tort of discrimination, other than a Canadian case in which the decision was overturned on appeal. *Bhadauria v Board of Governors of Seneca College*[19] concerned a highly educated East Indian woman,

17. [1944] KB 693.
18. Ibid,708.
19. (1979) 105 DLR (3rd) 707 (Ontario Ct of App).

holding several degrees and with substantial teaching experience. Between 1974 and 1978 she applied for 10 openings on the teaching staff of the defendant college, all of which openings were advertised in the Toronto press. She was not granted an interview for any of them although she had the requisite qualifications. She alleged that this was because of her ethnic origin.

The plaintiff alleged that the respondent was in breach of its common law duty not to discriminate against her. The Ontario Court of Appeal concluded that, if the plaintiff could prove her allegations, they gave rise to a cause of action at common law. The Court accepted that no authority cited to it had recognised a tort of discrimination but, equally, none had repudiated such a tort. The Court referred to the preamble to the Ontario Human Rights Code, not as itself giving rise to a cause of action but as evidencing the public policy of the Province respecting fundamental human rights. In the view of the Court, those rights being accepted, it was appropriate that they receive the full protection of the common law. In putting the matter in this way, the Court leant heavily on *Ashby v White*, where Holt CJ said:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.[20]

However, an appeal to the Supreme Court of Canada was successful: *Board of Governors of Seneca College v Bhadauria*.[21] The judgment of the Court was delivered by Laskin CJ who said:

> The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the Code.[22]

In other words, the Court was of the view that the Ontario Human Rights Code constituted a comprehensive statement of the rights and remedies available in the area of discrimination, leaving no room for the operation of the common law.

The notion of public policy, adverted to in *Bhadauria,* may offer some scope for the operation of the common law in the area of discrimination. A refusal to

20. (1703) 2 Ld Raym 938, 953.
21. (1981) 124 DLR (3rd) 193.
22. Ibid, 203.

employ, or a decision to dismiss a person because of that person's colour or sex, gives rise to notions of public policy. In the well known case of *Nagle v Feilden,*[23] the Court of Appeal in England refused to strike out a statement of claim in an action brought by a woman trainer against the stewards of the Jockey Club and ordered that the matter should proceed to trial. The plaintiff had trained racehorses for many years and had frequently applied for and been refused a trainer's licence, it being the practice of the stewards to refuse to grant a trainer's licence to a woman under any circumstances. The Court of Appeal sustained the statement of claim on the ground that, although there was no contractual relationship between the parties, the plaintiff had an arguable case for claiming the relief sought, on the ground that the stewards' practice might be void as contrary to public policy. Lord Denning MR put the matter quite bluntly when he said:

> The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it.[24]

Clearly a judge cannot determine public policy by reference to his or her own idiosyncratic views. But in the area of anti-discrimination and human rights, there has been much in community standards on which to build. Again, perhaps, a failure to explore sufficiently the parameters of the common law. In the end discrimination has been outlawed through the actions of the legislatures rather than the courts.

Another area in which both the legislatures and the courts in this country have not developed a cohesive set of principles is in relation to privacy. Indeed, in 1937 the High Court declared in effect that there was no common law right to privacy.[25] The courts have protected privacy where it is incidental to other legal rights, as in protecting the reasonable use and enjoyment of land. But that falls far short of recognising an entitlement to privacy.[26]

Legislatures in this country have intervened to prohibit the unauthorised use of listening devices in relation to private conversations. The Commonwealth Privacy Act 1988 safeguards privacy in the Commonwealth public sector, but

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23. [1966] 2 QB 633.
24. Ibid, 644-645.
25. *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.
26. D Yarrow 'Developments in the Law of Privacy – Law and Policy' (1996) 17 QL 60, 60-61.

there is no general privacy scheme covering data held by non-government bodies. Nor is there any general protection of privacy against publication by the media, save where the material published is defamatory.

The concern, outrage in some instances, evoked particularly by the television coverage of persons at times of stress or grief, and the publicity surrounding the life and death of the Princess of Wales, has brought into sharp focus the need for a better balance between the rights of the individual and those of the media. At present the scales come down heavily against those who wish to maintain their privacy. One has to acknowledge the apparent obsession of many to tell all on television shows, particularly in the United States. Nevertheless, there is a strong case for laws that, to borrow the language of Geoffrey Robertson QC in a recent newspaper article, 'generally deny entry to the cradle, the school and the toilet, to the bedroom, to the hospital and the grave'.

That brings me to the question I raised earlier: should Australia have a Bill of Rights? The arguments on both sides are well known. Against are arguments based on tradition, a reluctance to involve the courts in decisions which have political implications and a view that specific laws are preferable to a general statement. There is much force in these and supporting arguments. The arguments for a Bill of Rights stress that while we are a democracy, the rights of minorities have often been overlooked; that there are limits to what the courts can do in this regard without the existence of general protective provisions; that it is a means of empowering those without power; and that a Bill of Rights would play a valuable role in educating the citizens of this country to the importance of human rights. As one English writer has put it, 'The case for a Bill of Rights rests rather on the belief that it would make a distinct and valuable contribution to the better protection of human rights'.[27]

There is too a wider impact. As the former Chief Justice of Australia, Sir Anthony Mason, has observed:

> Australia's adoption of a Bill of Rights would bring Australia in from the cold, so to speak, and make directly applicable the human rights jurisprudence which has developed internationally and elsewhere. That is an important consideration in that our isolation from that jurisprudence means that we do not have what is a vital component of other constitutional and legal systems, a component which has a significant impact on culture and thought, and is an important ingredient in the emerging world order that is reducing the effective choices open to the nation state.[28]

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27. M Zander *A Bill of Rights?* 3rd edn (London: Sweet & Maxwell, 1985) 90-91.
28. A Mason 'Rights, Values and Legal Intentions: Reshaping Australian Institutions' [1997] 1 Aust ILJ 13.

We are in a sense isolated in this regard, even among the countries with which we share a common heritage. Those arguments seem to me more persuasive.

I turn to wider considerations. Australia has ratified the major international human rights treaties. Ratification does not make an international instrument part of Australia's domestic law. As recently as 1995 in the *Teoh* case[29] it was said:

> It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute.[30]

Nevertheless international law may have a bearing on domestic law. Any doubt or ambiguity in the construction of a statute may be resolved in accordance with a construction that itself accords with the rules of international law including the terms of any relevant international instrument. But more than that, Australian courts have turned increasingly to international law as 'a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.[31]

Teoh's case itself is an illustration of how an international instrument ratified by Australia, namely, the United Nations Convention on the Rights of the Child, while not part of domestic law, may give rise to a legitimate expectation that those making administrative decisions will act in conformity with the instrument.

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29. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
30. Ibid, 361.
31. *Mabo v Qld (No 2)* (1992) 175 CLR 1, Brennan J 42. Referred to with approval by Mason CJ and Toohey J in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499.