

# Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons

Chief Justice RS French AC

Anglo-Australasian Lawyers Society  
and  
Constitutional and Administrative Law Bar Association  
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## Introduction

Australia is exceptional among Western democracies in not having a Bill of Rights in its Constitution, nor a national statutory Charter of Rights. A recent academic article in the *European Human Rights Law Review*<sup>1</sup> used as a subheading the well-known Australian saying, 'she'll be right mate', intending to convey what the authors described as 'Australia's lukewarm attitude towards human-rights specific legislation.'<sup>2</sup> There have been frequent criticisms of Australia's perceived exceptionalism in this respect and laments about its relegation to a backwater, while the great broad river of international human rights jurisprudence sweeps by. It is not my purpose to answer those criticisms, but rather to say something about how the Australian Constitution, statutes and the common law are applied to the protection of rights. In so doing, I will make some comparisons with the United Kingdom.

The topic is timely. On 30 September 2009, the Australian National Human Rights Consultation Committee delivered a report to the Attorney-General of the Commonwealth following an extensive national consultation process addressing three questions:

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<sup>1</sup> D Kinley and C Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights' (2012) 1 *European Human Rights Law Review* 58-70.

<sup>2</sup> Kinley and Ernst, fn 1, 59.

- which human rights (including corresponding responsibilities) should be protected and promoted?
- are those human rights currently sufficiently protected and promoted?
- how could Australia better protect and promote human rights?

Conscious, no doubt, of the content of the debate that took place during the consultation process, the Committee first recommended that '... education be the highest priority for improving and promoting human rights in Australia'. It also proposed an audit of all federal legislation for compliance with Australia's international human rights obligations.<sup>3</sup> The Committee sought an amendment to the *Administrative Decisions (Judicial Review) Act 1975* (Cth) to make Australia's international human rights obligations a relevant consideration in government decision-making.<sup>4</sup> Absent a Federal Human Rights Act, the Committee proposed that the *Acts Interpretation Act 1901* (Cth) be amended to require that, as far as it is possible to do so consistently with the legislation's purpose, all federal legislation be interpreted consistently with a definitive list of Australia's human rights obligations.<sup>5</sup> The Committee also recommended that Australia adopt a Commonwealth Human Rights Act<sup>6</sup> to be based on the 'dialogue' model<sup>7</sup> reflected in the *Human Rights Act 1998* (UK) and in human rights legislation in the Australian Capital Territory and the State of Victoria.

The Government responded on 21 April 2010 by announcing what it called 'Australia's Human Rights Framework'. It did not include a Human Rights Act or Charter. The Attorney-General said:

The Government believes that the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community.

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<sup>3</sup> Recommendation 4.

<sup>4</sup> Recommendation 11.

<sup>5</sup> Recommendation 12.

<sup>6</sup> Recommendation 18.

<sup>7</sup> Recommendation 19.

Key features of the national human rights framework were enhanced government support for human rights education across the community, including in primary and secondary schools, the development of a new national action plan on human rights in conjunction with the States and Territories and non-government organisations, the introduction of legislation to establish a Parliamentary Joint Committee on human rights to provide greater scrutiny of legislation and the review of legislation policies and practices for compliance with the seven core United Nations human rights treaties to which Australia is a party.

The Commonwealth Parliament has now enacted the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The Act established a Parliamentary Joint Committee on Human Rights<sup>8</sup> with the following functions:

- (a) to examine Bills for Acts and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;<sup>9</sup>
- (b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;<sup>10</sup>
- (c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General and to report to both Houses of the Parliament on that matter.<sup>11</sup>

That Act also requires that any Bill introduced to the Parliament be accompanied by a Statement of Compatibility, which must include 'an assessment of whether the Bill is compatible with human rights'.<sup>12</sup> The Act defines human rights as

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<sup>8</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 4.

<sup>9</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 7(a).

<sup>10</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 7(b).

<sup>11</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 7(c).

<sup>12</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 8.

the rights and freedoms recognised or declared by the seven core United Nations human rights treaties as they apply to Australia. They are by reference to acronyms: the ICCPR, the ICESOC, CERD, CEDW, CAT, the CORC and the CORPD. As Professor Kinley and Christine Ernst observe in their recent paper:

The significance of this definition cannot be overstated. Its practical effect is to require lawmakers to assess human rights compatibility by reference not to a closed list of rights, but to the well over 100 rights and freedoms contained in the seven treaties listed.<sup>13</sup>

On 22 September 2011, the Attorney-General and the Minister for Finance and Deregulation launched a public discussion paper which foreshadowed the consolidation of Commonwealth anti-discrimination laws into a single Act covering discrimination on the grounds of race, sex, marital status, pregnancy, sexual orientation, age and disability.

It is important to observe that Australia already has in place a number of statutes at Commonwealth and State level prohibiting discrimination on grounds of race, sex, age and disability; the Commonwealth statutes by operation of s 109 of the Constitution would render inoperative any inconsistent State law. These statutes include:

- the *Racial Discrimination Act 1975* (Cth);
- the *Sex Discrimination Act 1984* (Cth).

Most States and Territories protect against discrimination on the basis of gender identity. Victoria<sup>14</sup> and the Australian Capital Territory<sup>15</sup> have statutory Human Rights Charters which apply interpretive rules to their statutes and provide for declarations of incompatibility.

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<sup>13</sup> Kinley and Ernst, fn 1, 61.

<sup>14</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>15</sup> *Human Rights Act 2004* (ACT).

An important point of difference between the United Kingdom and Australia relevant to this area generally is the existence in Australia of a written Constitution. That Constitution does not contain a Bill of Rights, but it is an important source of rights protection. Against that background, it is desirable to look to the larger context provided by the Constitution and the common law in connection with human rights protection in Australia. That larger context cannot be disentangled from Australia's history and its evolution as a nation.

## **Australia today**

Australia is home to many histories. That of its Aboriginal and Torres Strait Islander people stretches back 40 millennia. The formal history of British colonisation commenced on 26 January 1788 when Arthur Phillip annexed the eastern half of Australia in the name of the British Crown. It was marked by successive annexations of the rest of the continent by the United Kingdom, the evolution of the colonies into self-governing polities, and their union in a Federal Commonwealth in 1901. Beginning about halfway through the twentieth century there followed a wave of new histories, those of the many people of non-British origin who migrated to Australia from all parts of the world. They brought with them rich and diverse cultural heritages. On the latest census, more than one quarter of the people living in Australia today were born in other countries. More than 43 per cent of Australians were either born overseas or have at least one parent who was born overseas. In recent years migrants to Australia have come from over 180 different countries.<sup>16</sup> Taken together, these histories define the nation. It is to the constitutional history relevant to the protection of the people's rights and freedoms, that I now turn.

## **Human Rights in the drafting of the Australian Constitution**

A Constitution Bill was drafted by a convention of delegates from the Australian colonies in 1890 and 1891. Initially it failed to gain popular acceptance. Further Conventions were held in 1897 and 1898, and a revised Constitution Bill was agreed. It was substantially based upon the 1891 draft. It was submitted to the

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<sup>16</sup> Australian Immigration Fact Sheet 4 – 'More than Sixty Years of Post War Migration' – Revised December 2011 <[www.migration.gov.au/media/fact-sheets/04fifty.htm](http://www.migration.gov.au/media/fact-sheets/04fifty.htm)>.

electors of each of the colonies. Ultimately, five of the six colonies held referenda which approved the Bill. Western Australia's referendum was delayed until 31 July 1900 when its electors too approved the proposed Constitution. In the meantime, the Constitution Bill had been submitted to the Imperial Parliament together with addresses from the Colonial Legislatures. The Bill was enacted and received the Royal Assent on 9 July 1900. The *Commonwealth of Australia Constitution Act*, an Imperial statute, established the Commonwealth of Australia by proclamation as from 1 January 1901.

A leading figure at the Constitutional Conventions was Andrew Inglis Clark. He was Attorney-General for Tasmania.

Inglis Clark's preliminary draft of the Australian Constitution drew extensively from that of the United States.<sup>17</sup> It formed the basis for much of what was to appear in the Constitution as finally adopted. In that draft Inglis Clark included four rights derived from American influences. They were:

1. The right to trial by jury.
2. The right to the privileges and immunities of State citizenship.
3. The right to equal protection under the law.
4. The right to freedom and non-establishment of religion.

Inglis Clark also proposed that a State not be able to 'deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws'.<sup>18</sup>

Inglis Clark's rights provisions were debated at the 1898 Convention in Melbourne. There was opposition to the proposed guarantees particularly those

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<sup>17</sup> A copy of Inglis Clark's draft is available in J M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 80-93.

<sup>18</sup> *Mercury*, 19 August 1897. The amendment also appears in 'Proposed Amendments to the Draft of a Bill to Constitute the Commonwealth of Australia', Australian Archives Mitchell, Series R216, Item 310 at 4 and cited in J M Williams, 'With Eyes Open: Andrew Inglis Clark and Our Republican Tradition' (1995) 23(2) *Federal Law Review* 149, 176.

relating to equal protection and due process. One concern was that they would affect the legislative powers of the States.<sup>19</sup> In the event, limited rights provisions were adopted based on those proposed by Inglis Clark. They comprised the right to trial by jury in cases of offences against the Commonwealth<sup>20</sup> tried by indictment, a prohibition on the Commonwealth establishing any religion or preventing the free exercise of any religion<sup>21</sup> and the protection of the residents of one State from discrimination by another State on the basis of residence.<sup>22</sup> The anti-discrimination guarantee was the relic of Inglis Clark's equal protection proposal. It is important, however, to acknowledge that these are not the only sources of rights protection in the Australian Constitution.

## **The shape of the Australian Constitution**

Under s 1 of Chapter I of the Australian Constitution the law-making power of the Commonwealth is vested in the Commonwealth Parliament which consists of 'the Queen, a Senate, and a House of Representatives'. There are 39 heads of power in that section. The executive power of the Commonwealth is found in Chapter II of the Constitution and principally in s 61. That chapter locates the effective executive power in the Ministers of the Crown.

Chapter III of the Constitution deals with the federal judicature. By s 71, the judicial power of the Commonwealth is vested in the High Court of Australia, such other federal courts as are created by the Parliament and such other courts (ie courts of the States) as are invested with federal jurisdiction. Each Colony, which became a State in 1901, already had in place a court system including a Supreme Court which continues in existence today. The High Court is the final appellate court for all Australian jurisdictions.<sup>23</sup>

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<sup>19</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 669-670.

<sup>20</sup> Constitution, s 80.

<sup>21</sup> Constitution, s 116.

<sup>22</sup> Constitution, s 117.

<sup>23</sup> Constitution, s 73.

The separation of legislative and executive from judicial powers under the Australian Constitution is sharp. In a leading decision, the *Boilermakers' Case*,<sup>24</sup> the High Court affirmed that separation. On appeal from the High Court, the Privy Council said that:

in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive.<sup>25</sup>

The State Constitutions do not contain entrenched separation of judicial power from the powers of the other branches of government. As will be seen, however, Chapter III of the Australian Constitution has a significant part to play in the entrenchment of their independence and impartiality, their separation from the Executive and their essential characteristics as courts.

## Human rights and the Australian Constitution today

In holding, in 1992, that there was no basis in the Constitution for implying general guarantees of fundamental rights and freedoms, the then Chief Justice of Australia, Sir Anthony Mason, said:

To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.<sup>26</sup>

There are a number of provisions in the Australian Constitution, including the survivors of the Inglis Clark proposals, which answer to some degree the description of human rights guarantees. Each of them may be summarised briefly:

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<sup>24</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

<sup>25</sup> *Attorney-General of the Commonwealth v The Queen* (1957) 95 CLR 529, 540.

<sup>26</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136.

1. Section 51(xxiiiA) of the Constitution, included in the Constitution in 1946 by referendum, authorises the Commonwealth Parliament to make provision, among other things, for medical and dental services but is subject to the limitation that it does not authorise any form of civil conscription. The preclusion of any form of civil conscription was proposed by Robert Menzies to avoid the power being used to nationalise the medical and dental professions.
  
2. Section 51(xxxi) of the Constitution authorises the Commonwealth Parliament to make laws with respect to:

the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

This has been taken as imposing a just terms requirement in respect of any compulsory acquisition by the Commonwealth of property belonging to the State or to a person. It extends to a very wide range of property interests, described by Sir Owen Dixon in the *Bank Nationalisation Case* as 'innominate and anomalous interests ...'.<sup>27</sup> A law which extinguishes a property right may bear the character of a law with respect to the acquisition of property.<sup>28</sup>

3. Section 75(v) of the Constitution confers on 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.' It entrenches judicial review for jurisdictional error. Former Chief Justice Murray Gleeson described s 75(v) as providing in the Constitution 'a basic guarantee of the rule of law'.<sup>29</sup> The section was inserted in the Constitution at the suggestion of Inglis Clark, to avoid the deficiency in original jurisdiction identified by Marshall CJ in

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<sup>27</sup> *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349.

<sup>28</sup> *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

<sup>29</sup> A M Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 67.

*Marbury v Madison*<sup>30</sup>. Because it is a constitutional provision, the original jurisdiction it confers on the Court cannot be removed by statute. It is proof against privative provisions in statutes to the extent that they purport to exclude the Court's jurisdiction in relation to jurisdictional error.

4. Section 80 of the Constitution provides that:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

The guarantee of trial by jury is contingent upon the offence being tried by indictment. There have been a number of cases in which the scope of this guarantee has been explored. Where it applies it has been held to require a unanimous verdict of the jurors before a conviction can stand.<sup>31</sup> The Court recently rejected a submission that, consistently with s 80, there could be no appeal against a verdict of acquittal directed by the trial judge.<sup>32</sup>

5. Section 92 of the Constitution provides:

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

There are two elements to this guarantee. One is freedom of trade and commerce and the other is freedom of intercourse. That latter freedom was relied upon to strike down national security regulations in 1945 which were found to prohibit interstate movement.<sup>33</sup>

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<sup>30</sup> 5 US (1 Cranch) 137 (1803).

<sup>31</sup> *Cheatle v The Queen* (1993) 177 CLR 541.

<sup>32</sup> *R v LK* (2010) 241 CLR 177.

<sup>33</sup> *Gratwick v Johnson* (1945) 70 CLR 1.

6. Section 116 of the Constitution, which is another of the Inglis Clark rights, provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

This guarantee does not apply to the States but only to the Commonwealth. It has been litigated from time to time. In *Attorney-General (Vic); Ex rel Black v Commonwealth*<sup>34</sup> a challenge was brought to laws providing for grants to the States to be distributed to religious schools. The laws were said to establish a religion contrary to s 116. The challenge was rejected. In 1997 the High Court rejected an action brought by Aboriginal people claiming that policies of the Northern Territory designed to place Aboriginal children in foster care in church and State operated homes, had interfered with their freedom to practice their own religion. The majority held that the *Aboriginal Protection Ordinance 1918* (NT) was not a law which could be characterised as a law 'for prohibiting the free exercise of any religion'.<sup>35</sup> Recently the Court held that arrangements made by the Commonwealth for funding the Scripture Union of Queensland to provide chaplaincy services in State schools did not involve the requirement of a religious test as a qualification for any office under the Commonwealth. That was because the persons to be appointed to provide the services in State schools were not officers of the Commonwealth.<sup>36</sup>

7. Section 117 of the Constitution prohibits discrimination between residents of States. It provides:

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<sup>34</sup> (1981) 146 CLR 559.

<sup>35</sup> *Kruger v Commonwealth* (1997) 190 CLR 1.

<sup>36</sup> *Williams v Commonwealth* [2012] HCA 23.

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

In an important decision in 1989 the Court struck down Queensland laws which required any legal practitioner wishing to practice in Queensland to have his or her principal practice there. Although on the face of it the law, which was a rule made by the Queensland Bar Association, applied to all legal practitioners, it operated to discriminate against out-of-State practitioners.<sup>37</sup>

The specific guarantees to which I have referred may be seen as falling within the categories of civil and legal process rights and economic and equality rights. Australian constitutional law academic, Professor Peter Bailey, has made a persuasive case for their similarity to, if not identity with, a number of human rights and freedoms guaranteed under the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>38</sup>

## **Judicial power and the rule of law**

Chapter III of the Constitution provides for the federal judicial power to be exercised by the High Court, by federal courts created by the Parliament and also by State courts which are invested with federal jurisdiction. The High Court has resisted legislative or executive intrusions upon the judicial power. As one of the Justices of the High Court, Justice Gummow, said in a case decided in 1998:

The legislative powers of the Commonwealth do not extend to the making of a law which authorises or requires a court exercising the judicial power to do so in a manner which is inconsistent with its nature.<sup>39</sup>

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<sup>37</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461.

<sup>38</sup> See P Bailey, *Human Rights: Australia in an International Context* (Butterworths, 1990); P Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis, 2009).

<sup>39</sup> *Nicholas v The Queen* (1998) 193 CLR 173, 232 [146] (citations omitted).

The Court has not gone so far as to import a 'due process' requirement from the text and structure of Chapter III.<sup>40</sup> However the constitutional scheme under which State courts may be invested with federal jurisdiction brings them within the protection of that Chapter. State Parliaments cannot confer upon State courts functions which would so distort their institutional integrity as to make them unfit repositories for federal jurisdiction. It has been said that legislation which requires a court exercising federal jurisdiction to depart to a significant degree from methods and standards which have characterised judicial activities in the past may be repugnant to Chapter III.<sup>41</sup> In November 2009 the Court struck down a provision of a civil assets forfeiture statute in New South Wales which required the Supreme Court in that State to hear and determine, on an *ex parte* basis, an application by the New South Wales Crime Commission for an interim freezing order in relation to assets suspected of being the proceeds of crime.<sup>42</sup> Under the legislation an application to set aside the restraining order could not succeed unless the applicant proved that it was more probable than not that the interest in the property was not 'illegally acquired property'. That in turn required the negating of a very widely drawn range of possibilities of contravention of the criminal law found in the common law and State and Federal statute law. In the joint judgment of Gummow and Bell JJ their Honours characterised the process thus:

The Supreme Court is conscripted for a process which requires in substance the mandatory *ex parte* sequestration of property upon suspicion of wrong doing, for an indeterminate period, with no effective curial enforcement of the duty of full disclosure on *ex parte* applications. In addition the possibility of release from that sequestration is conditioned upon proof of a negative proposition of considerable legal and factual complexity.

Section 10 engages the Supreme Court in activity which is repugnant in a fundamental degree to the judicial processes as understood and conducted throughout Australia.<sup>43</sup>

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<sup>40</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 355 [111] (Gummow and Crennan JJ).

<sup>41</sup> *Ibid.*

<sup>42</sup> *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

<sup>43</sup> *Ibid* 366-367 [97]-[98].

In November 2010, the Court also held invalid a provision of a South Australian law on the same basis.<sup>44</sup> The *Serious and Organised Crime (Control) Act 2008* (SA) provided for the Attorney-General of that State to make a declaration about an organisation where the Attorney-General was satisfied that members of the organisation associated for purposes related to serious criminal activity. The declaration was a purely administrative process. Once a declaration had been made, the Commissioner of Police could apply to the Magistrates Court of South Australia for a control order against any member of the organisation and the Court, if satisfied that the defendant was a member of a declared organisation, was required to make the order sought. The control order provision was held invalid on the basis that it authorised the Executive to enlist the Magistrates Court to implement its decisions in a manner incompatible with that Court's institutional integrity. That was because the exercise of judicial power by the Magistrates Court was so confined and so dependent on the Executive's determination in the declaration that it departed impermissibly from the ordinary judicial processes of an independent and impartial tribunal.

Chapter III of the Constitution was held to have another important consequence for the status of State Supreme Courts in a decision delivered in 2010 concerning, inter alia, a privative or ouster clause limiting review by the Supreme Court of New South Wales of decisions made by the Industrial Court of that State.<sup>45</sup> The High Court held that State legislation which would take from a State Supreme Court power to grant relief for jurisdictional error on the part of inferior courts and tribunals was beyond State legislative power. Chapter III of the Constitution required that there be a body fitting the description of 'the Supreme Court of a State'. Its supervisory jurisdiction enforcing limits on the exercise of State executive and judicial power was a defining characteristic of such a body.

There are other provisions of the Constitution which have potential connections to human rights. These include the electoral and franchise provisions.

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<sup>44</sup> *South Australia v Totani* (2010) 242 CLR 1.

<sup>45</sup> *Kirk v Industrial Relations Commission* (NSW) (2010) 239 CLR 531.

Statutory disqualification of any one serving a term of imprisonment for however short a period and for whatever reason, was held invalid by the Court in *Roach v Electoral Commissioner*.<sup>46</sup> The electoral and franchise provisions were also the subject of an important decision of the High Court published in December 2010.<sup>47</sup> By that decision the Court held invalid an amendment to the *Commonwealth Electoral Act 1918* (Cth) removing a long-standing period of grace for people to register on the electoral roll, or change their enrolments after an election had been called. The provisions of the Constitution in issue were ss 7 and 24. Section 7 requires that the Senators for each State be 'directly chosen by the people of the State'. Section 24 requires that the Members of the House of Representatives be 'directly chosen by the people of the Commonwealth'.

### **The implied constitutional freedom of political communication in Australia**

In two decisions delivered on 30 September 1992, the High Court recognised an implied constitutional freedom of communication on political matters in Australia. The first case, *Nationwide News Pty Ltd v Wills*<sup>48</sup> involved a prosecution of *The Australian* newspaper which had published an article highly critical of the Australian Industrial Relations Commission. The article said, inter alia:

The right to work has been taken away from ordinary Australian workers. Their work is regulated by a mass of official controls, imposed by a vast bureaucracy in the Ministry of Labour and *enforced by a corrupt and compliant 'judiciary' in the official Soviet-style Arbitration Commission*.<sup>49</sup>

The newspaper was prosecuted under s 299 of the *Industrial Relations Act 1988* (Cth) which provided that:

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<sup>46</sup> (2007) 233 CLR 162.

<sup>47</sup> *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

<sup>48</sup> (1992) 177 CLR 1.

<sup>49</sup> (1992) 177 CLR 1, 96 (McHugh J) (emphasis in original).

A person shall not

...

(d) by writing or speech use words calculated:

...

(ii) to bring a member of the [Industrial Relations] Commission or the Commission into disrepute.

The High Court held the section invalid. A majority of the Court (Brennan, Deane, Toohey and Gaudron JJ) held it was invalid as infringing an implied freedom of political discussion.<sup>50</sup> In their joint judgment, Deane and Toohey JJ discerned in the doctrine of representative government 'an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealth'.<sup>51</sup> The implication operated at the level of communication and discussion between the people of the Commonwealth and their members of Parliament and other Commonwealth authorities. It also operated at the level of communication between the people of the Commonwealth themselves.

The other case in which judgment was delivered on 30 September 1992, *Australian Capital Television Pty Ltd v Commonwealth*,<sup>52</sup> involved a challenge to new Commonwealth legislation proposing to impose a blanket prohibition on political advertisements on radio or television during federal election periods. The majority (Mason CJ, Deane, Toohey and Gaudron JJ) held that the new provisions were invalid because they infringed the constitutionally guaranteed freedom of political discussion.<sup>53</sup> Mason CJ acknowledged the historical fact that the framers of the Constitution had not adopted the United States model of a Bill of Rights. He accepted that it was difficult if not impossible to imply general guarantees of fundamental rights and freedoms in the Australian Constitution. He went on to say, however:

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<sup>50</sup> (1992) 177 CLR 1, 53, 61 (Brennan J), 78-81 (Deane and Toohey JJ), 94-95 (Gaudron J).

<sup>51</sup> (1992) 177 CLR 1, 73.

<sup>52</sup> (1992) 177 CLR 106.

<sup>53</sup> (1992) 177 CLR 106, 145-147 (Mason CJ), 174-176 (Deane and Toohey JJ), 218-221 (Gaudron J).

the existence of that sentiment when the Constitution was adopted and the influence which it had on the shaping of the Constitution are no answer to the case which the plaintiffs now present. Their case is that a guarantee of freedom of expression in relation to public and political affairs must necessarily be implied from the provision which the Constitution makes for a system of representative government. The plaintiffs say that, because such a freedom is an essential concomitant of representative government, it is necessarily implied in the prescription of that system.<sup>54</sup>

It is important to note that the implied freedom of political communication did not confer enforceable rights on individuals. Rather, it operated to limit the law-making power of the parliament to prevent it from encroaching upon that freedom.

The scope of the implied freedom has been considered in a number of cases involving defamation actions brought by politicians against media outlets.<sup>55</sup> As expounded in those cases, the implied constitutional freedom of political communication does not confer rights on individuals. Rather, it invalidates any statutory rule which is inconsistent with that freedom. In the context of defamation law, it also requires that the rules of the common law conform with the Constitution. This affects, inter alia, the scope of the defences of qualified privilege that might be raised by media publishers. It does not extend to invalidate laws which are reasonably appropriated and adapted to serve legitimate public ends particularly relating to criminal conduct.

The freedom does not extend to matters traditionally controlled by the criminal law. Deane and Toohey JJ said in *Nationwide News* that:

a law prohibiting conduct that has traditionally been seen as criminal (eg conspiring to commit, or inciting or procuring the commission of, a serious crime) will readily be seen not to infringe an implication of freedom of

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<sup>54</sup> (1992) 177 CLR 106, 136.

<sup>55</sup> *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Roberts v Bass* (2002) 212 CLR 1.

political discussion notwithstanding that its effect may be to prohibit a class of communications regardless of whether they do or do not relate to political matters.<sup>56</sup>

Subsequent High Court decisions dealing with the implied freedom have held that it is not infringed by restrictions on the advertising of legal services.<sup>57</sup> Nor by orders made under a statute restricting publication of the identity of sex offenders who have served their sentence and are subject to post-custodial restrictions.<sup>58</sup>

The implied freedom of political communication is not limited to citizens or individuals. On the other hand it offers no greater protection to the press or the media than it does for individuals. As one commentator has observed, 'the beneficiaries of the freedom are consistently described as "citizens" or "electors" or "the community", without the media being accorded favourable, or indeed unfavourable, treatment by virtue of any claimed role as watchdog.'<sup>59</sup>

## The common law rights and freedoms

The common law has a constitutional dimension because, amongst other things, as Sir John Latham wrote in 1960:

in the interpretation of the Constitution, as of all statutes, common law rules are applied.<sup>60</sup>

That constitutional dimension is also reflected in the institutional arrangements which the common law brings with it. At its core are public courts which adjudicate between parties and which are the authorised interpreters of the law which they

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<sup>56</sup> (1992) 177 CLR 1, 77.

<sup>57</sup> *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

<sup>58</sup> *Hogan v Hinch* (2011) 243 CLR 506.

<sup>59</sup> M Chesterman, *Freedom of Speech in Australian Law: A delicate plant* (Ashgate, 2000) 44.

<sup>60</sup> J Latham, 'Australia' (1960) 76 *Law Quarterly Review* 54, 57.

administer.<sup>61</sup> As Professor Goodhart said, the most striking feature of the common law is its public law, it being 'primarily a method of administering justice.'<sup>62</sup>

In a lecture delivered in 2008, Chief Justice Spigelman of the Supreme Court of New South Wales recounted the role of 'natural rights' in Blackstone's formulation of the common law. Bentham attacked the idea of such rights as 'nonsense on stilts'.<sup>63</sup> Blackstone's language of natural rights does not have the same force today, but the role of the common law as a repository of rights and freedoms is of considerable significance. A recent, non-exhaustive list of what might be called rights said to exist at common law, include:<sup>64</sup>

- . the right of access to the courts;
- . immunity from deprivation of property without compensation;
- . legal professional privilege;
- . privilege against self-incrimination;
- . immunity from the extension of the scope of a penal statute by a court;
- . freedom from extension of governmental immunity by a court;
- . immunity from interference with vested property rights;
- . immunity from interference with equality of religion; and
- . the right to access legal counsel when accused of a serious crime.

To that list might be added:

- . no deprivation of liberty, except by law;

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<sup>61</sup> F Pollock, *The Expansion of the Common Law* (Stevens and Sons, 1904) 51.

<sup>62</sup> A L Goodhart, 'What is the Common Law' (1960) 76 *Law Quarterly Review* 45, 46.

<sup>63</sup> Chief Justice Spigelman, 'The Common Law Bill of Rights', Speech delivered at the 2008 McPherson Lectures, University of Queensland, Brisbane, 10 March 2008.

<sup>64</sup> J Corrin, 'Australia: Country Report on Human Rights' (2009) 40(1) *Victoria University of Wellington Law Review* 37, 41-42.

- . the right to procedural fairness when affected by the exercise of public power; and
- . freedom of speech and of movement.

These rights are of course of a limited nature and are contingent in the sense that, subject to the Constitution, they can be modified or extinguished by Parliament.

Professor Daryl Lumb wrote, in 1983, of judges in a common law system without a constitutional Bill of Rights:

The creativity of the judges is ... restricted by the ground rules of the system which does not have its source in a fundamental constitutional document which is subject to final review by a constitutional court. As a corollary of this, the doctrine of parliamentary sovereignty enables the rules to be changed and even abrogated. Judicial decisions even of the most basic nature (whatever may be the conventions which restrict the legislative power) are subject to being superseded by legislation which, although open to interpretation, is not open to invalidation by a constitutional court.<sup>65</sup>

He went on to suggest that rights and freedoms at common law might be regarded as 'residual in nature'. In my opinion, however, the word 'residual' is too weak, having regard to the way in which the courts have approached the interpretation of statutes by reference to those rights and freedoms.

### **Common law rights and freedoms and the principle of legality**

Like the United Kingdom, the exercise of legislative power in Australia takes place in the constitutional setting of a 'liberal democracy founded on the principles and traditions of the common law'.<sup>66</sup> The importance of the principles and traditions of the common law in Australia is reflected in the long-established proposition that statute law is to be interpreted consistently with the common law where the words of the statute permit. In a passage still frequently quoted, O'Connor J in the 1908

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<sup>65</sup> R D Lumb, *Australian Constitutionalism* (Butterworths, 1983) 103.

<sup>66</sup> *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587 (Lord Steyn).

decision *Potter v Minahan*<sup>67</sup> said, referring to the 4th edition of Maxwell's *On the Interpretation of Statutes*:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.<sup>68</sup>

That statement was based upon a passage in the judgment of Marshall CJ in *United States v Fisher*.<sup>69</sup>

The principle enunciated in *Potter v Minahan* has evolved into an approach to interpretation which is protective of fundamental rights and freedoms. It has the form of a strong presumption that broadly expressed official discretions are to be subject to rights and freedoms recognised by the common law. The principle is one which we share with the United Kingdom. It has been explained in the House of Lords as requiring that Parliament 'squarely confront what it is doing and accept the political cost'.<sup>70</sup> Parliament cannot override fundamental rights by general or ambiguous words. The underlying rationale is the risk that, absent clear words, the full implications of a proposed statute law may pass unnoticed:

In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.<sup>71</sup>

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<sup>67</sup> (1908) 7 CLR 277, 304 (citations omitted).

<sup>68</sup> J A Theobald, (*Maxwell*) *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) 122 (citations omitted).

<sup>69</sup> 6 US (2 Cranch) 358, 390 (1805).

<sup>70</sup> *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann). See also *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 and D Dyzenhaus, M Hunt and M Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5.

<sup>71</sup> [2000] 2 AC 115, 131 (Lord Hoffmann).

The application of the interpretive rule has not been limited to only those rights and freedoms historically recognised by the common law. Native title was not recognised by the common law of Australia until 1992. It is nevertheless the beneficiary of the rule in its application to interference with property rights. For native title is taken not to have been extinguished by legislation unless the legislation reveals a plain and clear intent to have that effect. This presumption applies to legislation which may have predated the decision in *Mabo (No 2)* by many decades and in some cases by more than 100 years. It is a requirement which was said, in the *Mabo (No 2)* decision, to flow from 'the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land'.<sup>72</sup>

The interpretive rule can be regarded as 'constitutional' in character. It suggests a view that common law freedoms are more than merely residual. As T R S Allan put it:

The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.<sup>73</sup>

By way of example, there has long been a particular recognition at common law that freedom of speech and the press serves the public interest. Blackstone said that freedom of the press is 'essential to the nature of a free State'.<sup>74</sup> Lord Coleridge in 1891 characterised the right of free speech as 'one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done'.<sup>75</sup>

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<sup>72</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 64 (Brennan J).

<sup>73</sup> T R S Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in C Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 146, 148.

<sup>74</sup> W Blackstone, *Commentaries on the Laws of England* (Dawsons of Pall Mall, first published 1769, 1966 ed), bk 4, ch 2, 151.

<sup>75</sup> *Bonnard v Perryman* [1891] 2 Ch 269, 284 and see *R v Commissioner of Police of the Metropolis; Ex parte Blackburn (No 2)* [1968] 2 QB 150, 155 (Lord Denning); *Wheeler v*

Despite its limits and vulnerability to statutory change, the common law gives a high value to freedom of expression, particularly the freedom to criticise public bodies.<sup>76</sup> Courts applying the common law may be expected to proceed on an assumption that freedom of expression is not to be limited save by clear words or necessary implication.

The common law interpretive principle protective of rights and freedoms against statutory incursion retains its vitality, although it has evolved from its origins in a rather anti-democratic, judicial antagonism to change wrought by statute. It has a significant role to play in the protection of rights and freedoms in contemporary society, while operating in a way that is entirely consistent with the principle of parliamentary supremacy. Whether it goes far enough, or whether we need a Human Rights Act to enhance that protection with judicial and/or administrative consideration of statutory consistency with human rights and freedoms, is a matter for ongoing debate.

## **Australian debates about constitutional and statutory protection of human rights**

The national consultation process to which I referred at the beginning of this presentation was not the first initiative relating to national protection of human rights in Australia.

Debate about the desirability of both constitutional and statutory Bills of Rights has been going on in Australia for many years. Attempts to introduce statutory Bills of Rights as Commonwealth law were made in 1973 and 1985. The 1973 Bill was strongly opposed and was not enacted. It lapsed in 1974 when Parliament was prorogued. The 1985 Bill was passed by the House of Representatives, but did not secure a majority in the Senate.

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*Leicester City Council* [1985] AC 1054; *Attorney-General v Observer Ltd* [1990] 1 AC 109, 220 (Bingham LJ).

<sup>76</sup> *Halsbury's Laws of England* (Butterworths, 4th ed reissue, 1996) vol 8(2), 104-105 [107].

In 1985 the Attorney-General, Lionel Bowen, established a Constitutional Commission. That Commission recommended the inclusion in the Constitution of a new Chapter VIA guaranteeing specified rights and freedoms against legislative, executive or judicial action. A proposed new section 124E specified a number of rights.

A constitutional alteration referendum was conducted in September 1988. It did not involve the full suite of rights proposed by the Commission. Rather it would have extended existing rights relating to religious freedom, compensation for the acquisition of property and trial by jury. It also proposed a one vote, one value, principle. It was overwhelmingly defeated. The reasons for its defeat had to do with an associated proposal for four year parliamentary terms and a perception that somehow the changes were going to enhance the powers of the Commonwealth Parliament to the disadvantage of the States. No further attempt has been made to incorporate guaranteed rights and freedoms into the Australian Constitution.

## **The Victorian Charter**

There have been initiatives at State and Territory level in Australia to provide statutory protection for human rights. In 2004, the Australian Capital Territory enacted the *Human Rights Act 2004* (ACT). The Act broadly follows the so-called 'dialogue model' of the *Human Rights Act 1998* (UK). It declares a number of rights. All of the rights declared are said to be 'subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society'.<sup>77</sup> The State of Victoria in 2006 enacted a *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the 'Victorian Charter') along similar lines.

Neither statute can affect the validity of any other law of the Territory or the State of Victoria. Nor of course can they affect Commonwealth laws which apply in the Territory or the State. Each statute requires legislation to be interpreted, so far as possible, consistently with the human rights which it declares. When a law is held by the Supreme Court of the Territory or State to be inconsistent with a human right

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<sup>77</sup> *Human Rights Act 2004* (ACT), s 28(1).

protected by the Act, the Court may make a Declaration of Incompatibility.<sup>78</sup> Such a declaration does not affect the validity, operation or enforcement of the law or the rights or obligations of anyone. However, the relevant Minister must prepare a response to the Declaration and present it to the Parliament.

The High Court of Australia considered the operation of the Victorian Charter in its decision delivered on 8 September 2011 in *Momcilovic v The Queen*.<sup>79</sup> Central to that consideration was the operation of the interpretive provision, s 32 of the Victorian Charter, which provides:

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

The case came to the High Court on appeal from the Court of Appeal of Victoria. It involved the interpretation of a reverse onus provision in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). The section in question provided that a substance on premises occupied by a person is deemed, for the purposes of the Act, to be in possession of that person unless the person satisfied the Court to the contrary. To the extent that that section placed the persuasive burden of proof on a person charged with possession of drugs on their premises, it was said to be inconsistent with the presumption of innocence, one of the human rights set out in the Victorian Charter. The appellant submitted that the section should be interpreted pursuant to s 32 of the Victorian Charter, as imposing upon her only the evidential burden of introducing evidence tending to show that the drugs found on her premises were not in her possession. That contention was rejected on the basis that the interpretive rule in s 32(1) of the Victorian Charter could not be used to rewrite the section, the propounded construction not being open on the language of the section. The appellant nevertheless succeeded on the appeal on the basis that the reverse onus provision did not apply to the trafficking offence with which she was charged so as to lift from the prosecution the burden of proving that she knew of the existence of the drugs she was said to be trafficking.

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<sup>78</sup> *Human Rights Act 2004* (ACT), s 32.

<sup>79</sup> (2011) 85 ALJR 957.

In its approach to the interpretive provision, the majority of the Court took the view that s 32(1) operated as a valid rule of statutory interpretation. It did not confer on the courts a function of a law-making character, repugnant to the exercise of judicial power by a State court. There was nothing to suggest that the interpretation process required by s 32(1) involved any new approach to the Court's role in construing legislation. A majority of the Court rejected the proposition that s 32(1) should be applied in the same way as the equivalent provision of the *Human Rights Act 1998* (UK), as explained in *Ghaidan*.<sup>80</sup> A majority also held that the power conferred upon the Supreme Court to make a declaration of incompatibility was valid.

There are important differences between the constitutional framework within which the Victorian Charter was considered and the setting of the *Human Rights Act 1998* (UK). The UK Act also has a particular history defined by the relationship between the United Kingdom courts and the European Court of Human Rights that did not inform the Victorian Charter. The strong interpretive approach undertaken by the House of Lords in *Ghaidan* might be seen in the Australian context as altering the constitutional relationship between the court interpreting a statute and the parliament which enacted it. There is an apparent difference in the interpretive approach adopted in *Ghaidan* and that adopted in the later decision of the House of Lords in *R (Wilkinson) v Inland Revenue Commissioners*<sup>81</sup>, which does not seem to have held sway. In that case Lord Hoffman drew an analogy between s 3 of the *Human Rights Act 1998* (UK) and the principle of legality. The other Law Lords agreed with Lord Hoffman. Nevertheless, Lord Phillips said later in *Ahmed v Her Majesty's Treasury*:

I believe that the House of Lords has extended the reach of s 3 of the HRA beyond that of the principle of legality.<sup>82</sup>

A prominent element of the arguments advanced against the introduction of constitutional and statutory charters in Australia is that they would shift power on

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<sup>80</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

<sup>81</sup> [2005] 1 WLR 1718.

<sup>82</sup> [2010] 2 AC 534, 646 [112].

important matters of social policy from elected politicians to unelected judges. There is no doubt that human rights and freedoms guaranteed in constitutions and statutes around the world are broadly expressed. The definition of their limits in particular cases by reference to public interest considerations necessarily requires normative judgments which may be seen to have a legislative character.

The phenomenon of judges interpreting and applying broad legal language and making normative decisions in that interpretation and application is not new. Such concepts as 'reasonableness', 'good faith' and 'unconscionable conduct' found in the common law and in many statutes involve that kind of decision-making. The particular sensitivity of judgments about the scope of human rights guarantees is their impact on legislation. If a right is constitutionally guaranteed, then legislation held by a court to be incompatible may be invalid. If the human right is guaranteed by a statute, then a subsequent inconsistent statute will not thereby be invalid. But the Declaration of Incompatibility mechanism for which the Australian Capital Territory and Victorian legislation provides is intended to impact on the parliamentary process by requiring the Attorney-General to present the Declaration to the parliament and respond to it.

Significant controversy or lack of bipartisan political support will generally defeat any attempt to change the Constitution in Australia. For the foreseeable future there are unlikely to be any express provisions introduced into the Australian Constitution which protect or guarantee fundamental rights and freedoms of the kind set out in the ICCPR or the economic and social rights set out in the ICESCR. The introduction of a national statutory Charter of Rights would not require an amendment to the Constitution, but would be politically contentious, not least because of its potential impact upon the laws and legislative powers of the States.

As mentioned earlier in this paper, the Commonwealth Parliament, by virtue of its power to make laws with respect to 'external affairs',<sup>83</sup> has legislated to give domestic legal effect to certain human rights treaties but not the ICCPR or the

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<sup>83</sup> Constitution, s 51(xxix).

ICESCR. Laws giving effect to those conventions, being laws passed by the Commonwealth, would override inconsistent State laws and thus could be seen as providing a quasi-constitutional guarantee of human rights and freedoms against State laws impinging on them. At the Commonwealth level, human rights statutes would not affect the validity of a subsequent inconsistent Commonwealth law.

## **Conclusion**

The role of constitutions and constitutional law can be of great significance in the protection of fundamental human rights and freedoms. So too can statutory provisions and the common law. Ultimately however, these things will only have the importance attached to them by the people who are served by the Constitution and the laws made under it and those who exercise power under that Constitution and those laws. It is useful to finish with two cautionary observations. One was made by a great American judge and the other by the drafters of the Indian Constitution.

In a short but celebrated speech entitled 'The Spirit of Liberty' delivered in 1944, Judge Learned Hand of the United States said:

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court, can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.<sup>84</sup>

I do not adopt that in its full generality but it underlines the importance of a culture of respect for human rights and freedoms within society. The debate is to what extent such a culture may be supported, nurtured and protected by law.

The other remark which I think is worth quoting was made by Dr BK Ambedkar who was Chairman of the Drafting Committee of the Constituent Assembly, which drafted the Constitution of India. On 25 November 1949, the day before that Constitution was enacted, he said:

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<sup>84</sup> Judge Learned Hand, 'The Spirit of Liberty' (Speech given at an 'I Am An American' celebration, New York, 21 May 1944). This speech was later turned into a book of the same name: see I Dillard (ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (Alfred A Knopf, 1952) 144.

I feel however good a Constitution may be, it is sure to turn out bad [if] those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.<sup>85</sup>

Both of these observations should be treated as worthy of continuing consideration. They may help place existing debates about human rights and freedoms in a larger perspective.

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<sup>85</sup> Prime Minister of India, Shri Atal Bihari Vajpayee (Speech given on the Occasion of the 50th Anniversary of the Republic of India, Parliament of India, 27 January 2000) citing Dr B K Ambedkar participating in the Constituent Assembly Debates: <<http://parliamentofindia.nic.in/jpi/MARCH2000/CHAP1.htm>>.