

Edith Cowan University Vice-Chancellor's Oration

The Constitution and the Protection of Human Rights

Chief Justice Robert French

20 November 2009, Perth

Introduction

The protection of human rights is the subject of current debate in Australia. It is not the object of this talk to take a position in that debate. If a national Human Rights Act does come to pass, it may be that its interpretation and even its validity will be argued before the High Court. The object of this talk is to say something about the present position in relation to the protection of human rights in Australia by reference to the Australian Constitution and the common law of Australia. Whether greater protections are necessary and how they should be provided if they are needed, are policy questions to be worked out in the course of that debate and, ultimately, in the national parliament.

Let us begin by looking back to the debate about the inclusion of rights guarantees when the Constitution was being drafted at the end of the nineteenth century by the representatives of the six Australian colonies that became the States.

Human rights and the drafting of the Australian Constitution

A leading intellectual force among the colonial delegates to the Conventions that drafted the national Constitution was Andrew Inglis Clark and it was he who was the principal proponent for the inclusion of rights guarantees in that Constitution. He was

Attorney-General for Tasmania. He was very familiar with the Constitution of the United States and with key decisions of the Supreme Court of that country relevant to it. He was well aware of the Bill of Rights which comprised the first ten and fourteenth amendments to the United States Constitution. He believed in the natural or rational rights of man as a counter to what he called "the tyranny of the majority, whose unrestricted rule is so often and so erroneously regarded as the essence and distinctive principle of democracy."¹ Clark was a great admirer of American democracy.

After the 1890 Federation Convention in Melbourne, Clark prepared a preliminary draft of an Australian Constitution which drew extensively from that of the United States.² It formed the basis for much of what was to appear in the Constitution as finally adopted. In his draft Clark included four particular rights based on 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.

Clark sought to expand the equal protection guarantee at the 1898 Convention.³ He proposed that a State not be able to "... deprive any person of life, liberty or property

¹ Clark I A, *Studies in Australian Constitutional Law* (Legal Books, first published 1901, 1997 ed) 386.

² A copy of Clark's draft is available in Williams J M, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 63-112.

³ Clark did not attend the 1897-1898 Adelaide Convention and he sent written amendments to the 1898 Melbourne Convention. See La Nauze JA, *The Making of the Australian Constitution* (1972) 67; Reynolds H, "Clark, Andrew Inglis (1848-1907)" *Australian Dictionary of Biography: Online Edition* <<http://adbonline.anu.edu.au/biogs/A030378b.htm>>

without due process of law, or deny to any person within its jurisdiction the equal protection of its laws".⁴ He justified the prohibition by quoting the words of a leading American jurist, Justice Cooley of Michigan:⁵

A popular form of government does not necessarily assure to the people an exemption from tyrannical legislation. On the contrary, the more popular the form, if there be no checks or guards, the greater perhaps may be the danger that excitement and passion will sway the public councils, and arbitrary and unreasonable laws be enacted.

A great part of the debate in relation to Clark's rights provisions took place at the 1898 Convention in Melbourne. There was opposition to rights guarantees which would affect the legislative powers of the States. This was particularly directed to the equal protection and due process guarantees. The authors of a recent text on Bills of Rights in Australian history have observed:⁶

These proposals were attacked both on the basis that such guarantees were unnecessary for the protection of rights of the citizens in a polity based on representative and responsible government, and because they were seen as having the potential to restrict colonial laws that limited the employment of Asian workers.

⁴ *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 Williams J M, "With Eyes Open: Andrew Inglis Clark and Our Republican Tradition" (1995) 23(2) *Federal Law Review* 149.

⁵ Proposed amendments to the draft of a Bill to constitute the Commonwealth of Australia, Australian Archives Mitchell, Series R216 Item 310 at 4-5. See also Williams J, "With Eyes Open: Andrew Inglis Clark and Our Republican Tradition" (1995) 23(2) *Federal Law Review* 149 at 177.

⁶ Byrnes A, Charlesworth H and McKinnon G, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 25; see also Williams G, *Human Rights under the Australian Constitution* (Oxford University Press, 1999) at 37-42.

A racial basis for opposition to these guarantees was apparent from the remarks of the Premier of Western Australia, John Forrest, who said:⁷

It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.

At the time, and for a long time after federation, Western Australian laws prohibited persons of Asiatic or African descent from obtaining a miner's right and from mining on a goldfield. The colony also had a racially biased Immigration Act.

The equal protection proposal was based on the US Fourteenth Amendment. Isaac Isaacs explained of that amendment that it had been inserted in the American Constitution after the Civil War because the southern states had refused to concede rights of citizenship to persons of African descent. The object of the amendment was to ensure to the black population that they should not be deprived of the suffrage and various rights of citizenship in the southern states. He did not think it necessary to insert such a clause in the Australian Constitution.⁸

In the event, limited rights provisions were adopted based on those proposed by Clark. They comprised the right to trial by jury in cases of indictable offences against the Commonwealth, a prohibition on the Commonwealth establishing any religion or

⁷ *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 1898 at 666 also cited in Williams G, *The Case for an Australian Bill of Rights: freedom in the war on terror* (UNSW Press, 2004) at 21.

⁸ *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne) 1898 at 668.

preventing the free exercise of any religion and the protection of the residents of one State from discrimination by another State on the basis of residence. The anti-discrimination guarantee was the relic of Clark's equal protection proposal. It is important, however, to acknowledge that these are not the only sources of rights protection in the Commonwealth Constitution. It is necessary to look more broadly at its terms.

The shape of the Australian Constitution

Section 3 of the *Commonwealth of Australia Constitution Act 1900* (UK) authorised the Queen to declare by proclamation that the "people" of the Australian colonies:

... shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia.

Section 4 provided that the Commonwealth would be established and the Constitution of the Commonwealth take effect on a day appointed by the proclamation. That day was 1 January 1901. Section 5 provided that the Act and all laws made by the Parliament of the Commonwealth under the Constitution "... shall be binding on the courts, judges and people of every State and of every part of the Commonwealth, ...". The former colonies became and were designated the "Original States of the Commonwealth" (s 6).

Section 9 of the Act sets out the text of the Constitution. It has eight chapters which deal with the following topics:

Chapter I – The Parliament

Chapter II – The Executive Government

Chapter III - The Judicature

Chapter IV – Finance and Trade

Chapter V – The States

Chapter VI – New States

Chapter VII – Miscellaneous

Chapter VIII – Alteration of the 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,". Section 51 of the Constitution sets out the subjects upon which the Parliament of the Commonwealth is authorised to make laws. There are 39 heads of power in that section.

Chapter II of the Constitution deals with the Executive Government. The key provision of that chapter is cl 61 which provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

By convention the Governor-General acts upon the advice of the Australian Ministers of the Crown through the Federal Executive Council which is established under s 62 of the Constitution. The section locates the effective executive power in the Ministers of the Crown.

Chapter III of the Constitution deals with the federal judicature. Each colony which became a State already had in place a court system. Those court systems continued after federation and continue today. 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. The High Court is the final appellate court for all Australian jurisdictions.⁹

The Constitution took effect in a society operating upon certain assumptions about the rule of law and basic freedoms reflected in the common law inherited from England. That common law which has over the years evolved and been modified still provides the setting in which the Commonwealth and State Constitutions, and constitutional institutions, operate and in which statutes are interpreted. It is part of the constitution of Australia and of its States in a small “c” constitutional sense.

Human rights in the Australian Constitution

The absence of a Bill of Rights in the Australian Constitution is in part a function of our history. The movement towards the formation of an Australian federation which began in the last decade of the nineteenth century, came from the colonists. It was driven by their concerns about foreign affairs, immigration, defence, trade and commerce and industrial relations. There was some anxiety about the colonising activities of France and Germany in the region. Such concerns could not be dealt with by a system of six separate colonial governments. The federation movement did not seek to rid Australia of British hegemony. There was no desire to assert against government generally, or the British Government in particular, rights and freedoms for colonists. The rights most intensely debated were those of the individual colonies as proposed states, vis a vis, the proposed federal parliament.

The colonists saw themselves as essentially British. It has been argued persuasively that a consciousness of white nationalism was central to federation. The invocation of that consciousness has been described as related to a "cultural strategy in

⁹ Constitution, s 71.

the processes of nation-building".¹⁰ It informed the inclusion in the Constitution of a power for the Commonwealth Parliament to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws".¹¹ The purpose of that provision, according to the constitutional commentators, Quick and Garran writing in 1901, was to authorise the Commonwealth Parliament to localise the "people of any alien race"¹² within defined areas, to confine them to certain occupations and to restrict their immigration. It also extended to giving such people special protection and securing their return to their country of origin.¹³

The principal proponent of the power was Sir Samuel Griffith who also maintained that it should be exclusive to the Commonwealth. The main debate was not whether there should be such a power, but whether it should be exclusive to the Commonwealth or shared with the States.

In this context it is notable that there was virtually no reference to the Aboriginal people of Australia during the Convention Debates on the race power. Indeed, they were expressly excluded from the coverage of that power so that the States could retain legislative power with respect to them. It was not until 1967 that the Constitution was amended to remove that exclusion so that the Commonwealth Parliament would have the power to make laws for Aboriginal people, as well as the people of any other race. The oddity is that a beneficial amendment was grafted on, in 1967, to a provision originally conceived as supporting adversely discriminatory laws.

¹⁰ Irving H, *To Constitute a Nation: A Cultural history of Australia's Constitution* (Cambridge University Press, 1999) at 100

¹¹ Constitution, s 51(xxvi).

¹² Quick J and Garran R R, *The Annotated Constitution of the Australian Commonwealth* (Sydney, Angus & Robinson, 1901) 622.

¹³ Quick J and Garran R R, *The Annotated Constitution of the Australian Commonwealth* (Sydney, Angus & Robinson, 1901) 622.

It is not surprising, having regard to the history of the federation movement, that the Constitution has little to say about the relationship between government and governed. Professor George Williams has suggested that many of the drafters of the Constitution were influenced by the 19th century English constitutional commentators, Bryce and Dicey.¹⁴ Neither of those writers saw a need to expressly guarantee rights in written constitutions. Professor Helen Irving has referred to colonial liberals and conservatives among the drafters of the Constitution. The conservatives for the most part were primarily concerned with States' rights. The liberals represented liberal utilitarianism associated with the ideas of John Stuart Mill. Irving wrote:¹⁵

In the area of human rights, the majority, including most conservatives, took the Millsian approach, seeking the restriction of belief and action only in so far as their free expression harmed others.

The tendency, as she described it, was to respect rights and freedoms, to protect them negatively from interference but not to declare them positively.

Sir Owen Dixon, in comparing the United States and Australian Constitutions, attributed the omission of a Bill of Rights to a readiness on the part of the framers of the Constitution to leave the protection of rights to the legislature and the processes of responsible government. He said:¹⁶

The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except in so far as it might be necessary for

¹⁴ See Williams G, *Human Rights under the Australian Constitution* (Oxford University Press, 1999) at 39. See also Bryce J, *The American Commonwealth* (3rd ed Macmillan, 1912); Dicey A V, *Introduction to the Study of the Law of the Constitution* (10th ed Macmillan, 1959).

¹⁵ Irving H, *To Constitute a Nation: A Cultural history of Australia's Constitution* (Cambridge University Press, 1999) 168.

¹⁶ Dixon O, "Two Constitutions Compared" reprinted in *Jesting Pilate* (Melbourne: Law Book, 1965) 102 cited in Lee H P, "The Implied Freedom of Political Communication" in Lee H P and Winterton G (eds) *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 386.

the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself.

In holding that there was no basis in the Constitution for implying general guarantees of fundamental rights and freedoms, Sir Anthony Mason said in 1992:¹⁷

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.

It is sufficient to say that there was probably a variety of reasons behind the absence in Australia's Constitution of a Bill of Rights, some related to the desire to maintain the capacity to discriminate against particular racial groups and others reflecting a loftier vision of the nascent Australian constitutionalism. Hypotheses, however plausible, more than 100 years after the event, are unlikely to yield a single reliable explanation.

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

1. Section 51(xxiiiA) of the Constitution 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 section was introduced into the Constitution in 1946 after the High Court had struck down a law providing for the supply of pharmaceutical benefits paid for by

¹⁷ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 136.

the Commonwealth. The limitation on the constitutional power which would exclude 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. There is complicated case law which attaches to this provision. 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 ..."¹⁸. A law which extinguishes a property right may bear the character of a law with respect to the acquisition of property.¹⁹ In February this year, the Court held by majority that the just terms guarantee extended beyond the States into the Territories and, in particular, the Northern Territory of Australia. In so doing it overturned the 1969 decision *Teori Tau v The Commonwealth*.²⁰ As a result, the just terms guarantee applied to the acquisition of property rights conferred upon indigenous people under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). This was a finding of some significance although public reporting of

¹⁸ *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349.

¹⁹ *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

²⁰ (1969) 119 CLR 564.

the decision focussed upon the Court's rejection of a challenge to the validity of statutes supporting the Northern Territory intervention.²¹

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. Under that provision the High Court can prevent a public official, including a Minister of the Crown, from exceeding his or her lawful power and may require a Minister or official to discharge a duty imposed upon him or her by law. The Court can also quash a decision which is made in excess of power. Chief Justice Gleeson described s 75(v) as providing in the Constitution "... a basic guarantee of the rule of law".²² The section was inserted in the Constitution at the suggestion of Inglis Clark. Because it is a constitutional provision, the jurisdiction conferred on the Court cannot be removed by statute.

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 tried by indictment. It was for that reason that Barwick CJ said, in 1965, that "what might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural provision".²³ There have been a number of cases in which the scope

²¹ *Wurridjal v The Commonwealth* (2009) 237 CLR 309.

²² Gleeson A M, *The Rule of Law and the Constitution*, (ABC Books, Sydney, 2000) 67.

²³ *Spratt v Hermes* (1965) 114 CLR 226.

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.²⁴

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 has been relied upon to strike down national security regulations in 1945 which were found to prohibit interstate movement. This aspect of s 92 has been said to be related to the freedom of movement guaranteed in Art 12 of the International Covenant on Civil and Political Rights (ICCPR).

6. Section 116 of the Constitution, which is another of the 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 The Commonwealth*²⁵ 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

²⁴ *Cheatle v R* (1993) 177 CLR 541.

²⁵ (1981) 146 CLR 559.

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 prevented 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".²⁶

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

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 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 practitioners, it operated to discriminate against out of State practitioners.²⁷

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. 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 ICCPR, the Universal

²⁶ *Kruger v The Commonwealth* (1997) 190 CLR 1.

²⁷ *Street v Queensland Bar Association* (1989) 168 CLR 461.

Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁸

In addition there are other provisions in which it may be arguable that there are potential connections to human rights. These include the electoral and franchise provisions of the Constitution and other provisions relating to non-discrimination in taxing laws and in trade, commerce or revenue. It is sufficient to say that these linkages with the relevant international human rights provisions are more difficult to make, but certainly worthy of consideration.

In addition to the particular guarantees to which reference has been made, the High Court has also held that there exists an implied freedom of political communication, which will be discussed next.

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*²⁹ 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:³⁰

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.*

²⁸ See Bailey P, *Human Rights: Australia in an International Context* (Butterworths, 1990); Bailey P, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis, 2009).

²⁹ (1992) 177 CLR 1.

³⁰ (1992) 177 CLR 1 at 96.

[Emphasis in original]

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

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. The minority (Mason CJ, Dawson and McHugh JJ) held it invalid on the basis it was not within the scope of a relevant head of power in the Constitution. Deane and Toohey JJ in their joint judgment, based the implication upon the system of representative government for which the Constitution provides. They said:³¹

The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person. The actual discharge of the very function of voting in an election or referendum involves communication.

They 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".³² The implication operated at the level of

³¹ (1992) 177 CLR 1 at 72.

³² (1992) 177 CLR 1 at 73.

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 The Commonwealth*,³³ 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. 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:³⁴

... 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.

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.

³³ (1992) 177 CLR 106.

³⁴ (1992) 177 CLR 106 at 136.

The scope of the implied freedom has been considered in a number of cases involving defamation actions brought by politicians against media outlets.³⁵ 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.

There is a question about the range of "political matters" which fall within the implied freedom of communication. In *Australian Capital Television* they were referred to as "a wide range of matters that may call for, or are relevant to, political action or decision".³⁶ In the *Theophanous* decision they were said, by Mason CJ, Toohey and Gaudron JJ, to extend to "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about".³⁷

The freedom does not extend to matters traditionally controlled by the criminal law. Deane and Toohey JJ said in *Nationwide News* that:³⁸

... 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 political discussion notwithstanding that its effect may be to prohibit a class of communications regardless of whether they do or do not

³⁵ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers* (1994) 182 CLR 211; *Lange v The Australian Broadcasting Corporation* (1997) 189 CLR 520; *Roberts v Bass* (2002) 212 CLR 1.

³⁶ *Australian Capital Television* (1992) 177 CLR 106 at 138.

³⁷ *Theophanous* (1994) 182 CLR 104 at 124.

³⁸ *Nationwide News* (1992) 177 CLR 1 at 77.

relate to political matters.

The most recent High Court decision to consider the implied freedom of political communication is *APLA Ltd v Legal Services Commissioner (NSW)*.³⁹ There it was held by majority that the implied freedom did not interfere with regulations restricting the advertisement of legal services. The communication prohibited was not political.

Some general observations may be made about the implied freedom of political communication. It 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 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."⁴⁰ There is ongoing uncertainty about the scope of the "political communication" protected by the freedom.⁴¹

In areas relating to sedition, anti-terrorism and anti-vilification laws, censorship and obscene publications questions may be raised in future cases about the interaction of restrictions imposed by such laws with the implied freedom of political communication. Their resolution may depend in part upon the scope of the concept of "political communication" and which restrictions are reasonably appropriate and adapted to serve legitimate ends compatible with the system of government provided by the Constitution.

³⁹ (2005) 224 CLR 322.

⁴⁰ Chesterman M, *Freedom of Speech in Australian Law: a delicate plant* (Dartmouth, 2000) 44.

⁴¹ Stone A, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication" (1999) 23 *Melbourne University Law Review* 668 and Stone A, "The Limits of Constitutional Text and Structure Revisited" (2005) 28 (3) *University of New South Wales Law Journal* 842.

Australian debates about constitutional and statutory protection of human rights

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.

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.

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 was broadly modelled on similar legislation in the United Kingdom. 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".⁴²

The Australian Capital Territory legislation cannot affect the validity of any subsequent, inconsistent laws of the Territory. Nor can it affect Commonwealth laws which apply in the Territory. When a law of the Territory is held by the Supreme Court of the Territory to be inconsistent with a human right protected by the Act, the Court may make a Declaration of Incompatibility.⁴³ Such a declaration does not affect the validity, operation or enforcement of the law or the right or obligations of anyone. When such a declaration is made the Attorney-General must put a copy of it to the Legislative Assembly of the Territory within six sitting days after the Attorney-General receives the copy. The Attorney-General must also prepare a written response to the Declaration of Incompatibility and present it to the Legislative Assembly not later than six months after the day the copy of the Declaration was presented.

The State of Victoria in 2006 enacted a Charter of Human Rights and Responsibilities. The Charter is similar in its impact on legislation to the *Human Rights Act 2004* (ACT). The rights which it protects apply only to "persons".⁴⁴

The topic of constitutional and statutory protection of human rights in Australia has frequently been a matter of controversy. A prominent element of the arguments advanced against the introduction of such rights protection in Australia is that it shifts power on 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

⁴² *Human Rights Act 2004* (ACT), s 28.

⁴³ *Human Rights Act 2004* (ACT), s 32.

⁴⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 6.

by reference to public interest considerations necessarily requires normative judgments which may be seen to have a legislative character.

The phenomenon of judges interpreting broad legal language and making normative decisions in that interpretation 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.

Australia is a party to the ICCPR and the ICESCR and many other treaties and conventions which are designed to protect and advance fundamental human rights and freedoms. The Commonwealth Parliament, by virtue of its power to make laws with respect to "external affairs"⁴⁵, has legislated to give domestic legal effect to certain human rights treaties but not the ICCPR or the ICESCR. Laws giving effect to such conventions, being laws passed by the Commonwealth, would override inconsistent State

⁴⁵ Constitution, s 51(xxix).

laws and thus could be seen as providing a quasi-constitutional guarantee of human rights and freedoms against State laws impinging on them. However, at the Commonwealth level, human rights statutes would not affect the validity of a subsequent inconsistent Commonwealth law.

Consideration of the Constitution and statutes made under it does not cover the whole field of discourse relevant to protection of rights and freedoms in Australia. The common law of Australia, inherited from England and developed by our own courts, has a constitutional dimension and an impact on the protection of those freedoms. It is useful to consider aspects of that common law heritage.

The common law – a constitutional legacy

The phrase "common law" refers to a body of principles or rules of law worked out on a case-by-case basis by courts in England and latterly in this country. That judicial law-making process is incremental. It has been described as being like "the sluggish movement of the glacier rather than the catastrophic charge of the avalanche".⁴⁶

The common law has a constitutional dimension because, amongst other things, as Sir John Latham wrote in 1960:⁴⁷

... in the interpretation of the Constitution, as of all statutes, common law rules are applied.

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

⁴⁶ Rogers W V H, *Winfield and Jolowicz on Tort* (14th ed, Sweet & Maxwell, 1994) 17.

⁴⁷ Latham J, "Australia" (1960) 76 *Law Quarterly Review* 54 at 57.

parties and which are the authorised interpreters of the law which they administer⁴⁸. As Professor Goodhart said, the most striking feature of the common law is its public law, it being "... primarily a method of administering justice".⁴⁹

In the first of his McPherson Lectures last year, Chief Justice Spigelman 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".⁵⁰ 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, include⁵¹:

- . 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:

⁴⁸ Pollock F, *The Expansion of the Common Law* (London Stevens, 1904) 51.

⁴⁹ Goodhart A L, "What is the Common Law" (1960) 76 *Law Quarterly Review* 45 at 46.

⁵⁰ Spigelman C J, "The Common Law Bill of Rights", 10 March 2008, University of Queensland, Brisbane.

⁵¹ Corrin J, "Australia: Country Report on Human Rights" (2009) 40(1) *Victoria University of Wellington Law Review* 37 at 41-42.

- . no deprivation of liberty, except by law;
- . 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.

It is also important to recognise, as Peter Bailey points out in his recent book on human rights in Australia, that common law "rights" have varied meanings. In their application to interpersonal relationships, expressed in the law of tort or contract or in respect of property rights, they are justiciable and may be said to have "a binding effect". But "rights", to movement, assembly or religion, for example, are more in the nature of "freedoms". They cannot be enforced, save to the extent that their infringement may constitute an actionable wrong such as an interference with property rights or a tort.⁵²

The common law method, in contrast with that involved in the implementation of a Bill of Rights, is a case-by-case approach which develops the relevant principles incrementally. Professor Daryl Lumb, wrote in 1983, of judges in a common law system without a constitutional Bill of Rights:⁵³

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

⁵² See Bailey P, *the Human Rights Enterprise in Australia and Internationally* (LexisNexis, 2009).

⁵³ Lumb R D, *Australian Constitutionalism*, (Butterworths, 1983) 102.

constitutional court.

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 interpretation of statutes

The common law has been referred to in the High Court as "... the ultimate constitutional foundation in Australia".⁵⁴ It has a pervasive influence upon constitutional and statutory interpretation. As McHugh J said in *Theophanous*:⁵⁵

The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture.

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".⁵⁶ 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 decision *Potter v Minahan*⁵⁷ said, referring to the 4th edition of Maxwell on *The Interpretation of Statutes*:⁵⁸

⁵⁴ *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182.

⁵⁵ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 196.

⁵⁶ *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587.

⁵⁷ (1908) 7 CLR 277 at 304.

⁵⁸ Maxwell P B, (*Maxwell*) *On the interpretation of Statutes* (4th ed, Sweet and Maxwell, 1905) 122.

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. [Footnote omitted]

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. It has been explained in the House of Lords as requiring that Parliament "squarely confront what it is doing and accept the political cost".⁵⁹ 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.⁶⁰

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.

Although Commonwealth statutes in Australia are made under a written constitution, the Constitution does not in terms guarantee common law rights and freedoms against legislative incursion. Nevertheless, the interpretive rule can be regarded as "constitutional" in character even if the rights and freedoms which it protects are not. There have been many applications of the general rule which, in Australia, had its origin in *Potter v Minahan*. It has been expressed in quite emphatic terms. Common law rights

⁵⁹ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131. See also *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 and Dyzenhaus D, Hunt M and Taggart M, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 *Oxford University Commonwealth Law Journal* 5.

⁶⁰ [2000] 2 AC 115 at 131.

and freedoms are not to be invaded except by "plain words"⁶¹ or necessary implication.⁶²

The presumption, however, 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 general presumption against 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* decision, to flow from "the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interest in land".⁶³

Two high profile cases involving the application of the presumption in the Federal Court in the last few years were the judgments of the Full Court of the Federal Court in *Minister for Immigration and Citizenship v Haneef*⁶⁴ and *Evans v New South Wales*.⁶⁵ In *Haneef* the Full Court construed s 501 of the *Migration Act 1958* (Cth) narrowly. That section defined the circumstances in which a person would not pass the "character test" and so be liable for refusal or cancellation of a visa on character grounds. A person would fail the character test if:⁶⁶

the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct;

⁶¹ *Re Cuno* (1889) 43 Ch D 12 at 17 per Bowen LJ.

⁶² *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206 per Higgins J.

⁶³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 64.

⁶⁴ (2007) 163 FCR 414.

⁶⁵ (2008) 168 FCR 576.

⁶⁶ *Migration Act 1958* (Cth), s 501(6)(b) cited in (2007) 163 FCR 414 at 422.

The Court had to interpret the kind of "association" which would bring a person within the criterion. Was it good enough to be a relative or a friend of a person involved in criminal conduct. The Court said:⁶⁷

Having regard to its ordinary meaning, the context in which it appears and the legislative purpose, we conclude that the association to which [the section] refers is an association involving some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation. The association must be such as to have *some* bearing upon the person's character. [Emphasis in original]

In *Evans* the Court was concerned with the validity of a regulation made under the *World Youth Day Act 2006* (NSW). Under the regulation a person could be directed not to engage in conduct causing annoyance to participants in a World Youth Day event. The Full Court referred to cases about the presumption and to what Chief Justice Gleeson said in *Electrolux Home Products Pty Ltd v Australian Workers' Union*.⁶⁸ He had said:⁶⁹

The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.

In the *Evan's* case, the regulation making power conferred by the Act, was interpreted according to the common law principle and found not to authorise a broadly stated regulation directed to conduct causing "annoyance ... to participants in a World Youth

⁶⁷ (2007) 163 FCR 414 at 447 [130].

⁶⁸ (2004) 221 CLR 309.

⁶⁹ (2004) 221 CLR 309 at 329 [21].

Day event".⁷⁰ It was interpreted, inter alia, in such a way as to minimise interference with freedom of speech.

In the quotation from Professor Lumb's text on Australian constitutionalism mentioned earlier, the suggestion was made that common law rights and freedoms could be regarded as "residual". And indeed the common law has always adhered to the proposition that "... everybody is free to do anything, subject only to the provisions of the law".⁷¹ That may suggest that freedom is what is left over when the law is exhausted. But the interpretive principle in Australia and its equivalent in England, suggest that it is more than that. TRS Allan put it thus:⁷²

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.

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".⁷³ 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

⁷⁰ (2008) 168 FCR 576 at 598-599.

⁷¹ *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283 (Lord Gough); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564.

⁷² Allan T R S, "The Common Law of the Constitution: Fundamental Rights and First Principles" in Saunders C (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 148.

⁷³ William Blackstone, *Commentaries on the Laws of England* (first published 1769), Vol 4, 151-152.

long as no wrongful act is done".⁷⁴

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.⁷⁵ 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 application of the principle in support of freedom of expression was seen at the level of constitutional characterisation of powers in the decision of the High Court in *Davis v Commonwealth*.⁷⁶ 1988 was the bicentenary of European settlement of Australia. A company was established called the Australian Bicentennial Authority to plan and implement celebrations of the bicentenary. The *Australian Bicentennial Authority Act 1980* (Cth) was enacted to, inter alia, to reserve to the Authority the right to use or licence the use of words such as "bicentenary", "bicentennial", "200 years", "Australia", "Sydney", "Melbourne", "Founding", "First Settlement" and others in conjunction with the figures 1788, 1988 or 88. Articles or goods bearing any of these combinations without the consent of the Authority would be forfeited to the Commonwealth. In their joint judgment striking down some aspects of these protections, Mason CJ, Deane and Gaudron JJ (Wilson, Dawson and Toohey JJ agreeing) said:⁷⁷

Here the framework of regulation ... reaches far beyond the legitimate objects sought to be achieved and impinges on freedom of expression by enabling the Authority to regulate the use of common expressions and by making unauthorized use a criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions

⁷⁴ *Bonnard v Perryman* [1891] 2 Ch 269 at 284 and see *R v Police of the Metropolis; Ex parte Blackburn (No 2)* [1968] 2 QB 150 at 155; *Wheeler v Leicester City Council* [1995] AC 1054; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 220.

⁷⁵ *Halsbury's Laws of England* (4th ed, 1989) Vol 8(2) par 107.

⁷⁶ (1988) 166 CLR 79.

⁷⁷ (1988) 166 CLR 79 at 100; see at 116 per Brennan J.

in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.

The common law can of course only go so far. It does not provide the support for freedom of expression that would accord it the status of a "right". It cannot withstand plainly inconsistent statute law.

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.

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 that people who are served by the Constitution and the laws and those who exercise power under the Constitution and the laws attach to those freedoms. 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:⁷⁸

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.

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 Indian Constitution. On 25 November 1949, the day before that Constitution was accepted, he said:⁷⁹

I feel however good a Constitution may be, it is sure to turn out bad because 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.

Both of these observations, like most observations in these areas, should be treated as provisional, perhaps working hypotheses, but worthy of continuing consideration. They may help place our existing debate in a larger perspective.

⁷⁸ Speech given at an "I Am An American" celebration in Central Park, New York on 21 May 1944 entitled "The Spirit of Liberty" which he later turned into a book of the same name. See Dillard I (ed) *The Spirit of Liberty: Papers and Addresses of Learned Hand* (1952) 144.

⁷⁹ Address by the Prime Minister Of India, Shri Atal Bihari Vajpayee on the occasion of the 50th anniversary of the Republic of India (27 January 2000) citing Dr BK Ambedkar participating in the Constituent Assembly Debates: <<http://parliamentofindia.nic.in/jpi/MARCH2000/CHAP1.htm>>.

