

**"Equality, Proportionality and Dignity: The Guiding Principles
for a Just Legal System"**

The Sir Ninian Stephen Lecture

29 April 2016

It is an honour to be invited to deliver the Annual Sir Ninian Stephen Lecture. Sir Ninian Stephen is among our most distinguished jurists. He served on the High Court of Australia for a decade commencing in 1972 and in that time he authored many fine judgments.

Professor Charlesworth, who served as one of Sir Ninian's Associates, compiled his biographical entry for the *Oxford Companion to the High Court*. She observed¹:

"While he was personally a liberal and progressive thinker, these views are not consistently reflected in his judgments, which reveal a cautious attitude to judicial review and no particular social or political agenda or judicial philosophy."

This is no small compliment. It is not the job of a judge to bring a social or political agenda to the determination of the cases that come before him or her. Sir Ninian made the point powerfully in

¹ Blackshield, Coper & Williams, *The Oxford Companion to the High Court* (2001) at 643.

a lecture that he delivered in 1981 on the subject of judicial independence². Discussion of that subject commonly centres on the need for separation of the judicial arm of government from the legislative and executive arms. Sir Ninian suggested that there are other dependencies of which judges should be free³:

"[T]o be committed to an ideology or to a particular faith or doctrine to such an extent that one forfeits the ability to do justice with that moderate degree of impartiality of which the merely mortal judge is capable is also to have forfeited true independence."

Sir Ninian's tenure as a Justice of the High Court of Australia proved to be only the starting point of his public career. In 1982, he was appointed Governor-General of the Commonwealth. This was at a time when the controversy surrounding the dismissal of the Whitlam Government was still fresh and Sir Ninian, like his predecessor, Sir Zelman Cowan, played an important role in restoring the confidence of the Australian community in the office of Governor-General⁴.

² Stephens, "Southey Memorial Lecture 1981: Judicial Independence - A Fragile Bastion", (1981-1982) 13 *Melbourne University Law Review* 334.

³ Stephens, "Southey Memorial Lecture 1981: Judicial Independence - A Fragile Bastion", (1981-1982) 13 *Melbourne University Law Review* 334 at 334.

⁴ McCormack and Saunders, *Sir Ninian Stephen: A Tribute*, (2007) at 29.

After an extended term as Governor-General, Sir Ninian embarked on a remarkable international career commencing as Australia's first Ambassador on the Environment. In early December 1991, Sir Ninian was invited to join a Group of Distinguished Observers representing the Commonwealth nations at the Convention for a Democratic South Africa. The group engaged in discussions with Nelson Mandela and President de Klerk. The following year, Sir Ninian chaired the Northern Ireland peace talks. In 1993, he was appointed a foundation judge for the International Criminal Tribunal for the former Yugoslavia ("the ICTY"). He was subsequently elected to the Appeal Division of that Tribunal and of the International Criminal Tribunal for Rwanda.

In 1998, the Secretary General of the United Nations, Kofi Annan, asked Sir Ninian to Chair a commission on the establishment of a tribunal to try former Khmer Rouge leaders in Cambodia. Sir Ninian also led UN missions to Burma to explore the extent of forced labour in the hinterland. And he was appointed by the Commonwealth to facilitate discussions in Bangladesh to avert civil strife.

It is more than fitting that the Menzies Foundation, in collaboration with the Commonwealth Government, has established the Sir Ninian Stephen Menzies Scholarship in International Law. I would hope that among members of this audience there will be candidates for the award of that scholarship in future years.

Perhaps in recognition of Sir Ninian's status as a great internationalist, Professor Anderson suggested that I speak tonight on the topic "Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System". These are informing ideas of international human rights law. In the aftermath of World War II, the General Assembly of the United Nations adopted the Universal Declaration on Human Rights ("the Declaration"). The first Article of the Declaration proclaims that all human beings are born free and equal in dignity and rights. Underlying the Declaration, and the international treaties that have given effect to it, is the recognition that the rights and freedoms for which it provides all derive from the inherent dignity of the human person⁵.

The principle of equality pervades the Declaration. The emphasis in international human rights law on that principle is largely found in the proscription of discrimination whether on the ground of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Equality has more than one dimension to it. It connotes the idea that every person is to be treated in the same way. This is commonly described as "formal equality". It is in this sense that we

⁵ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948); Principle VII, *Human Dimension of the Final Act of the Conference on Security and Cooperation in Europe* (1975) 14 ILM 1292 (the Helsinki Accords).

may speak of the right to "equality before the law". We require courts and tribunals in a just legal system to treat people equally, applying the same procedures and affording the same fair trial protections to all. However, individuals and groups are differently placed in their ability to fully enjoy all of the rights and freedoms that international human rights law recognises, including social and economic rights. A just legal system needs to acknowledge disadvantage and allow special measures to redress it if disadvantaged groups and individuals are to enjoy substantive equality.

Most human rights and freedoms are not absolute and international law recognises that their exercise may be the subject of such restrictions as are necessary in the public interest in a democratic society. Judgments must be made about whether a law that restricts a human right or freedom is justified in the broader public interest. So, too, must judgments be made about whether a measure that accords special treatment to a group or individual is justified because it is conducive to the achievement of substantive equality or whether it offends the principle of non-discrimination.

The principle of proportionality is the means by which a court or tribunal applying international human rights law determines whether a particular restriction on a human right is a justified restriction or whether a special measure is an appropriate means of securing substantive equality for a particular group or individual. The

court or tribunal asks whether the measure has a legitimate object, whether the measure is necessary to achieve that object and whether the public interest pursued by the law outweighs the harm that is done to the individual right or freedom.

Critics of human rights jurisprudence contend that proportionality requires the balancing of things that are not commensurable and they suggest that to ask whether a challenged provision of a law is the least restrictive means of achieving the object of the law is essentially a legislative task⁶.

It is concerns of this kind that explains why a progressive thinking, great internationalist like Sir Ninian has been guarded about the suggestion that Australia should adopt a Bill or Charter of Rights, incorporating in our domestic law the rights that are set out in treaties to which we are a party including the International Covenant on Civil and Political Rights. In his 1981 lecture, Sir Ninian identified as a further stress to judicial independence the idea that judges should be the interpreters of broadly expressed guarantees of human rights⁷.

⁶ See, eg, Heydon, "Are Bills of Rights Necessary in Common Law Systems?", (Lecture Delivered at the Oxford Law School, 23 January 2013) at 22.

⁷ Stephens, "Southey Memorial Lecture 1981: Judicial Independence - A Fragile Bastion", (1981-1982) 13 *Melbourne University Law Review* 334 at 335.

This is not to say that within the common law world there are not other distinguished lawyers who embrace the incorporation of internationally recognised human rights in domestic law. Following his retirement, Lord Bingham spoke very positively of the English experience a decade after the enactment of the *Human Rights Act* 1998 (UK)⁸. My purpose tonight is not to engage in this debate. It is to acknowledge that Australia now stands apart from other liberal democracies with which we share a common law heritage in that we do not have a Bill or Charter of Rights containing explicit guarantees of human rights and freedoms. It is also to acknowledge that we have a legal system that recognises and protects, as common law rights and freedoms, the civil and political rights that are proclaimed in the Declaration.

The jealous protection of fundamental rights by those schooled in the common law may be illustrated by one of Sir Ninian's judgments in the ICTY. I should start by explaining that international human rights treaties recognise the right to a fair trial of a criminal charge, including the right of the accused to examine, or to have examined, the witnesses against him or her⁹. These are rights familiar to common lawyers.

⁸ Lord Bingham, "Dignity, Fairness and Good Government the role of a Human Rights Act", (2009) 34 *Alternative Law Journal* 74.

⁹ See, eg, *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950,

The first trial of a war criminal since Nuremberg and Tokyo was the trial of Dusko Tadic, the former leader of the Bosnian-Serb Social Democratic Party. Sir Ninian was one of the judges. The prosecutor filed a preliminary motion seeking leave to call witnesses in the prosecution case without disclosing the identity of the witness to the accused or to his counsel. The prosecution feared that its witnesses may be subject to reprisals. By majority, the Tribunal acceded to the prosecutor's application. Sir Ninian dissented. In his judgment, to permit the anonymity of witnesses would not only adversely affect the appearance of justice but was likely to actually interfere with the doing of justice¹⁰.

Belief in the strength of our common law heritage explains why we did not adopt a bill of rights at federation. The delegates who attended the Australasian Conventions where the terms of the Constitution were debated were all familiar with the Constitution of the United States and with the first ten Amendments known as the Bill of Rights and the Fourteenth Amendment, which guarantees the equal protection of the law for all persons born or naturalised in the United States. Our Constitution is modelled on that of the United

213 UNTS 221 (entered into force 3 September 1953) Art 6(3) (d).

¹⁰ *Prosecutor v Dusko Tadic (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 10 August 1995) (Judge Stephen).

States. The decision not to adopt the Bill of Rights or the Fourteenth Amendment was a deliberate one.

Sir Owen Dixon, perhaps the greatest common lawyer of the last century, sought to explain that decision to an audience of American lawyers at a dinner in Detroit in 1942. He pointed out that the guarantees of life, liberty and property against invasion by government had been seen as indispensable in the aftermath of the American Revolution, whereas our history had not suggested the need to control the legislature itself. To what one suspects may been the bewilderment of his audience, Sir Owen observed that to our Founding Fathers the Bill of Rights and the Fourteenth Amendment were undemocratic because to adopt them was to argue a want of confidence in the will of the people¹¹.

Sir Owen's observation is illustrated by the Convention Debates over a clause which, echoing the Fourteenth Amendment, provided that no State should deny to any person within its jurisdiction the equal protection of the laws. Mr Isaacs pointed out that the Fourteenth Amendment had been enacted following the Civil War when the Southern States had refused to concede the right of citizenship to emancipated slaves. He and other delegates saw no occasion for the adoption of a measure which would prevent

¹¹ Dixon, "Two Constitutions Compared" in Woinarski (ed), *Jesting Pilate and Other Papers and Addresses*, 2nd ed (1965) at 101-102.

distinctions that were common in colonial factory legislation respecting the employment of non-Caucasians¹². The only protection that was thought necessary was against one State discriminating in its law against the residents of another State. This is the guarantee of equality that we find in the Constitution. Section 117 provides that a subject of the Queen resident in any State shall not be subject in other States to any disability or discrimination which would not be equally applicable were he a subject of the Queen resident in that other State.

Section 117 was given a confined operation in *Henry v Boehm*¹³. Mr Henry was a barrister who was admitted to practice in Victoria. His complaint was with the Admission Rules in South Australia, which required an applicant for admission as a barrister to have been continuously resident in South Australia for three months before lodging the application. Mr Henry commenced proceedings in the original jurisdiction of the High Court seeking a declaration that the Admission Rules were invalid to the extent of the residence requirement. The majority rejected Mr Henry's challenge holding

¹² *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne 1898, Vol I at 668-674.

¹³ *Henry v Boehm* (1973) 128 CLR 482.

that the Rules did not subject him to any disability or discrimination because he was a resident of Victoria¹⁴.

Sir Ninian dissented in *Henry*. He rejected the notion that a requirement of universal application is equally applicable to all; if the discriminating factor relates to a personal attribute and not all persons possess that attribute, while the requirement may apply to all, the disadvantage will apply unequally¹⁵. Sixteen years after *Henry* was decided, a similar challenge was brought by a New South Wales barrister who complained of the requirement under the rules for admission in Queensland that an applicant have an intention of practising principally in that jurisdiction¹⁶. Sir Ninian's dissenting reasons in *Henry* were vindicated. Mason CJ favoured a liberal rather than a narrow interpretation of s 117. His Honour observed¹⁷:

"The very object of federation was to bring into existence one nation and one people. This section is one of the comparatively few provisions in the Constitution which was designed to enhance national unity and a real sense of national identity by eliminating disability or discrimination on account of residence in another State."

¹⁴ *Henry v Boehm* (1973) 128 CLR 482 at 490 per Barwick CJ; 490 per McTiernan J; 493 per Menzies J; 497-498 per Gibbs J.

¹⁵ *Henry v Boehm* (1973) 128 CLR 482 at 502.

¹⁶ *Street v Queensland Bar Association* (1989) 168 CLR 461.

¹⁷ *Street v Queensland Bar Association* (1989) 168 CLR 461 at 485.

Brennan J, in much the same vein, described s 117 as a "guarantee of equal treatment under the law" and as one of the "constitutional pillars of the legal and social unity of the Australian people"¹⁸. *Henry* was overruled.

Unlike the constitutional guarantee of s 117, the rights and freedoms sourced in the common law which we enjoy may be restricted or abrogated by the Parliament. However, the courts act upon an assumption that the Parliament does not intend to modify or do away with a common law right unless it makes that intention irresistibly clear. It has become common to refer to this interpretive principle as the "principle of legality".

The rationale for the principle of legality is well explained by Lord Hoffman in *R v Secretary of State for the Home Department; Ex parte Simms*¹⁹:

"Parliamentary sovereignty means that parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... [t]he constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.

¹⁸ *Street v Queensland Bar Association* (1989) 168 CLR 461 at 512.

¹⁹ [2000] 2 AC 115 at 131-2.

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."

There is nothing new about the principle of legality. In 1908 it was applied in *Potter v Minahan* to uphold the decision of a magistrate that Mr Minahan was not a "prohibited immigrant" under the *Immigration Restriction Acts 1901-1905* (Cth). On his arrival in Australia Mr Minahan had failed the dictation test. Mr Minahan had been born in Victoria to a Chinese father and he had been taken to China when he was about five years old. He was an adult at the time of his return. The Magistrate found that Mr Minahan had always had it in mind to return to Australia.

O'Connor J discussed the concept of a man's home in *Potter v Minahan*. In its ordinary meaning, his Honour said, no matter how long a man may be absent from his home, it remains his home if he has it in mind to return to it²⁰. There was no reason to find that "immigrant" had a different meaning in the Immigration Restriction Acts. In a frequently cited passage O'Connor J observed²¹:

"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".

²⁰ *Potter v Minahan* (1908) 7 CLR 277 at 301.

²¹ *Potter v Minahan* (1908) 7 CLR 277 at 304.

The vigour with which the courts protect common law freedoms is illustrated by *Coco v The Queen*²². In that case, a Supreme Court judge in Queensland issued a warrant approving the use of a listening device in premises occupied by Mr Coco. Police officers obtained entry to Mr Coco's premises to install the listening device by pretending that they were investigating a fault in his telephone. Mr Coco was later charged with an offence and the prosecution tendered recordings of conversations which had been obtained with the use of the listening device at the trial. Mr Coco successfully appealed against his conviction on the ground that the listening device evidence was unlawfully obtained and should have been excluded.

Mr Coco's point was that the statute only authorised the *use* of a listening device; it did not authorise entry onto premises in order to install the device. The Court accepted that argument. Mr Coco, like every person in possession of premises, had a common law right to exclude others from those premises²³. The Court rejected the prosecution's argument that the statute impliedly authorised the issue of a warrant permitting entry to install and retrieve a device:

²² (1994) 179 CLR 427.

²³ *Coco v The Queen* (1994) 179 CLR 427 at 435 citing *Entick v Carrington* (1765) 2 Wills 275 at 291 [95 ER 807 at 817]; *Halliday v Nevill* (1984) 155 CLR 1 at 10 per Brennan J; *Plenty v Dillon* (1991) 171 CLR 635 at 639 per Mason CJ, Brennan and Toohey JJ at 647 per Gaudron and McHugh JJ.

statutory authority to engage in conduct that would otherwise be a trespass must be expressed in unmistakable and unambiguous language. Inconvenience in carrying out a statutory object was "not a ground for eroding fundamental common law rights"²⁴.

The principle of legality has been described as an aspect of the rule of law²⁵. More fundamentally the separation of judicial from legislative or executive power, for which the Constitution provides, gives effect to the rule of law²⁶. The object of the separation of judicial power is the protection of the rights of individuals by ensuring that those rights are determined by a judiciary that is independent of the parliament and the executive²⁷. Legislation which purports to require a court to depart in some significant respect from the methods and standards which characterise the exercise of judicial power may be invalidated²⁸. For this reason, the

²⁴ *Coco v The Queen* (1994) 179 CLR 427 at 436 citing *Plenty v Dillon* (1991) 171 CLR 635 at 654.

²⁵ *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 per Gleeson CJ at 329 [21].

²⁶ *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] per Gummow and Crennan JJ; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351-352 [30] per Gleeson CJ and Heydon J.

²⁷ *The Queen v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1 at 11 per Jacobs J; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.

²⁸ *South Australia v Totani* (2010) 242 CLR 1.

requirement that courts accord all who appear before them equality before the law in a procedural sense may be accepted²⁹.

Nonetheless, the Constitution does not contain a guarantee of substantive equality under the law. The Commonwealth Parliament may if it chooses enact laws which do not operate uniformly throughout the Commonwealth³⁰. The proposition that there is an implied guarantee of equality under law was raised in *Leeth v The Queen*³¹. The case illustrates the difficulty of achieving substantive equality within a federation. The Constitution requires the States to provide for the detention of Commonwealth prisoners in State prisons³². Should Commonwealth prisoners be treated equally throughout Australia with the consequence that their treatment differs from the treatment of State prisoners housed in the same prison? Mr Leeth was convicted of offences against Commonwealth law in the Supreme Court of Queensland. The *Commonwealth Prisoners Act* 1967 (Cth) required a court sentencing a Commonwealth offender to fix the minimum term by reference to

²⁹ *Polyukovich v The Commonwealth* (1991) 172 CLR 501 at 607 per Deane J; *Nicholas The Queen* (1998) 193 CLR 173 at 208 per Gaudron J.

³⁰ *Kruger v The Commonwealth* (1997) 190 CLR 1 44-45 per Brennan CJ; 63 per Dawson J; 142 per McHugh J; 153-155 per Gummow J;

³¹ *Leeth v The Queen* (1992) 174 CLR 455; *Kruger v The Commonwealth* (1997) 190 CLR 1.

³² Constitution, s 120.

the law of the State or Territory in which the offender was sentenced. There were significant differences in the way the minimum term was calculated under the laws of the States and Territories.

Mr Leeth brought proceedings in the High Court contending that the provision of the Commonwealth Prisoners Act was invalid because it required the unequal treatment of Commonwealth offenders. In rejecting Mr Leeth's argument, the majority commented on the likely unrest that would be occasioned if Commonwealth offenders serving sentences were subject to a different regime respecting minimum terms than State offenders housed in the same prison³³.

While we do not have a constitutional guarantee that Commonwealth laws will accord substantive equality, we do have a framework of laws enacted by the State and Commonwealth proscribing various forms of discrimination. Australia was an early signatory to the *Convention on the Elimination of All forms of Racial Discrimination* ("the Convention")³⁴. The *Racial Discrimination Act* 1975 (Cth) ("the RDA") was enacted to give effect to the

³³ *Leeth v The Commonwealth* (1992) 174 CLR 455 at 466 per Mason CJ, Dawson and McHugh JJ.

³⁴ *International Convention on the Eliminating of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)("ICERD").

Convention. States Parties to the Convention commit themselves to prohibiting racial discrimination³⁵ and to taking effective measures to nullify any racially discriminatory laws or regulations³⁶. The Convention also requires States Parties, when the circumstances warrant, to take concrete measures to ensure the adequate development and protection of racial groups and individuals belonging to them for the purpose of guaranteeing them the equal enjoyment of human rights and fundamental freedoms³⁷.

Section 10 of the RDA, is headed "rights to equality before the law". In summary, if a law creates a right that is not universal because it is not conferred on people of a particular race, s 10 operates to confer the right on persons of that race. And if a law prohibits persons of a particular race from enjoying a right or freedom enjoyed by persons of another race, s 10 confers that right on the persons who are the subject of the prohibition³⁸. It is not necessary that the law makes a distinction, in terms, based on race.

³⁵ ICERD, Art 2(1)(d).

³⁶ ICERD, Art 2(1)(c).

³⁷ ICERD, Art 2(2).

³⁸ *Western Australia v Ward* (2002) 213 CLR 1 at 99-100 [106]-[107]; *Gerhardy v Brown* (1985) 159 CLR 70 at 98-99 per Mason J.

Section 10 applies to the discriminatory operation and effect of legislation³⁹.

The prohibition of laws that discriminate on the ground of race is subject to the provision of "special measures"⁴⁰. Special measures are defined in the Convention⁴¹. They are measures taken for the sole purpose of securing adequate advancement of a racial group or individual in order to ensure the equal enjoyment or exercise of human rights and fundamental freedoms. They must not lead to the maintenance of separate rights for different racial groups and they must not be continued after their objective has been achieved. The difficulties arising from the incorporation into our domestic law of the broadly stated criteria of "special measures" are illustrated in *Maloney v The Queen*⁴².

Mrs Maloney, an Aboriginal woman living on Palm Island, was charged with an offence under the *Liquor Act 1992 (Q)*. That Act made it an offence for a person to possess more than a prescribed quantity of liquor in a public place in a restricted area. Palm Island

³⁹ *Gerhardy v Brown* (1985) 159 CLR 70 at 97, 99 per Mason J; *Mabo v Queensland [No 1]* (1988) 166 CLR 186 at 198-199 per Mason CJ; 216-219 per Brennan, Toohey and Gaudron JJ; 231-232 per Deane J; *Western Australia v Ward* (2002) 213 CLR 1 at 103 [115].

⁴⁰ RDA, s 8(1).

⁴¹ ICERD, Art 1(4).

⁴² (2013) 252 CLR 168.

was a restricted area. Mrs Maloney's offence related to her possession of a bottle of bourbon and a bottle of rum in her car in a public place on Palm Island. Needless to say, had Mrs Maloney possessed that quantity of liquor in a public place elsewhere in Queensland she would not have committed an offence.

Mrs Maloney was convicted before the Magistrates Court on Palm Island. She appealed against her conviction, arguing that the restrictions imposed by the Act were inconsistent with s 10 of the RDA⁴³. Queensland contended that the law treated Aboriginal persons and non-Aboriginal persons equally: a non-Aboriginal person on Palm Island would commit an offence if he or she had the proscribed quantity of alcohol in his or her possession in a public place⁴⁴. And, Queensland argued, the possession of alcohol is not a fundamental human right or freedom⁴⁵. In the alternative, Queensland submitted that the restrictions were a special measure.

Although the liquor restrictions did not single out Aboriginal persons, 97 per cent of the residents of Palm Island are Aboriginal. The majority of the Court found that the liquor restrictions would have been inconsistent with s 10 of the RDA and therefore invalid under s 109 of the Constitution, because in their operation they had

⁴³ *Maloney v The Queen* (2013) 252 CLR 168 at 190-191 [36].

⁴⁴ *Maloney v The Queen* (2013) 252 CLR 168 at 190-191 [36].

⁴⁵ *Maloney v The Queen* (2013) 252 CLR 168 at 191 [37].

a discriminatory effect on Mrs Maloney's right to own property⁴⁶. Nonetheless, there was material before the Court to show that the imposition of the restrictions was a response to the findings of the Cape York Justice Study. That study described alcohol abuse and associated violence as being so prevalent and damaging to Indigenous communities in northern Queensland as to threaten their existence⁴⁷.

Mrs Maloney acknowledged that it was appropriate that Palm Island have an alcohol management plan. She contended that the particular restrictions were not a proportionate response to the problem of alcohol abuse on the island. She maintained that there had not been adequate consultation with the local residents and that a less intrusive measure, such as providing better support services for those who drink excessively, might have been adopted⁴⁸.

The broad proportionality inquiry proposed by Mrs Maloney did not command support within the Court. The liquor restrictions were found to be a "special measure". Plainly minds may differ about whether restrictions of this kind in fact promote substantive equality for those who are the subject of them. However, as French CJ

⁴⁶ *Maloney v The Queen* (2013) 252 CLR 168 at 252 [227].

⁴⁷ *Maloney v The Queen* (2013) 252 CLR 168 at 187 [27]; 260 [248].

⁴⁸ *Maloney v The Queen* (2013) 252 CLR 168 at 257 [238].

explained, the Court's task had to be undertaken with appropriate regard to the respective functions of the legislature, the executive and the judiciary under our Constitution⁴⁹. This required the determination of whether the liquor restrictions answered the statutory description of being a measure taken for the sole purpose of "securing adequate advancement" of the Aboriginal community on Palm Island.

In a private law context, the High Court has not received plaudits for its endeavours to ensure substantive equality for married women with respect to what has come to be known as "sexually transmitted debt"⁵⁰: commonly, a wife acting as surety for her husband's business debts. In 1939 in *Yerkey v Jones* the High Court developed a special equity for the benefit of the wife in such a case⁵¹.

Mrs Jones, who was the owner of her own home at the time she married Mr Jones, agreed to a mortgage being taken over the property to secure a loan to enable him to purchase a poultry farm. Mrs Jones had doubts about the wisdom of the venture but she

⁴⁹ *Maloney v The Queen* (2013) 252 CLR 168 at 193 [45].

⁵⁰ Australian Law Reform Commission, *Equality Before the Law: Womens Equality*, Report 69 (1994), Ch 13.

⁵¹ (1939) 63 CLR 649.

agreed nonetheless. Dixon J, as he then was, enunciated the principle in this way⁵²:

"[I]f a married woman's consent to become a surety for her husband's debt is procured by the husband and, without understanding its effect in essential respects, she executes an instrument of suretyship which the creditor accepts without dealing with her personally, she has a prima facie right to have it set aside."

By the end of the last century the decision in *Yerkey v Jones* had come to be seen as somewhat outmoded. In 1994, the House of Lords rejected a special principle applying to married women in favour of a principle, expressed in gender neutral terms, to set aside a guarantee given by one cohabitee to secure the debts of another cohabitee unless the creditor has taken reasonable steps to satisfy itself that the surety entered the transaction with knowledge of the true facts⁵³. The Court of Appeal of New South Wales subsequently rejected a wife's claim to have a mortgage that she had executed to secure her husband's business debts declared to be of no force or effect in the case of *National Australia Bank v Garcia*⁵⁴. The Court of Appeal was critical of the principle in *Yerkey v Jones* because it

⁵² *Yerkey v Jones* (1939) 63 CLR 649 at 683.

⁵³ *Barclays Bank plc v O'Brien* [1994] 1 AC 180.

⁵⁴ *National Australia Bank Ltd v Garcia* (1995) 39 NSWLR 577.

was based on general assumptions about the capacity of married women and it declined to follow it⁵⁵.

The wife obtained special leave to appeal to the High Court. The joint reasons in her case acknowledged that Australian society had changed in the decades since *Yerkey v Jones* had been decided and particularly so with respect to the role of women. Nonetheless, their Honours observed that it remains that a significant number of women are in relationships marked by disparities of economic and other power. They identified the rationale for the *Yerkey v Jones* principle as not residing in the subservience or inferior economic position of women but rather in the trust and confidence that exists between marriage partners. And their Honours contemplated the application of the principle to other relationships that are more common now than in 1939. They instanced long-term, publically declared, relationships between members of the same sex or the opposite sex⁵⁶.

This shift in the rationale for the *Yerkey v Jones* principle has attracted criticism on feminist grounds. Apart from characterising the decision as "the clearest example of an antiquated approach to

⁵⁵ *National Australia Bank Ltd v Garcia* (1995) 39 NSWLR 577 at 598.

⁵⁶ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 404 [22].

the status of women 'as wife'⁵⁷, the complaint is not with the retention of the principle but with the Court's failure to source it in gendered structural inequality⁵⁸. The critique assumes that the Court was well placed to undertake a sophisticated evidence-based analysis of structural inequality in late twentieth century Australian society in determining the respective rights of the parties. For my part, recognition of the continued utility of the principle sits comfortably with re-stating its rationale in terms that allow of its wider application to other publically declared relationships of trust and confidence.

I started this lecture noting the concerns expressed by some common lawyers about the desirability of courts becoming the interpreters of broadly expressed human rights. Of course, Australian courts must determine the validity of laws that are said to infringe on the explicit and implicit guarantees under our Constitution. In making these determinations the courts apply proportionality analysis. It is to be observed that these guarantees operate as limits on the exercise of legislative power. They do not confer personal rights on individuals. In this respect, the implied freedom of political communication arising from our Constitution is to be distinguished from the First Amendment's guarantee of

⁵⁷ Blackshield, Coper and Williams, *The Oxford Companion to the High Court*, (2001) at 721.

⁵⁸ Dunn, "Yakking Giants": Equality Discourse in the High Court" (2000) 24 *Melbourne University Law Review* 427.

freedom of speech, which is conceived as a personal right. This difference in the way the freedom is conceptualised is evident in the differing approaches that courts in Australia and the United States have taken to legislative restrictions on election funding.

Provisions of the *Election Funding, Expenditure and Disclosures Act* 1981 (NSW) ("the Funding Act") were challenged in *McCloy v New South Wales*⁵⁹. The Funding Act imposes a cap on the amount of political donations. Self-evidently, this limits the amount of money that is available for candidates for election purposes. The restriction is ameliorated to some extent by the Funding Act's provision for the public funding of State election campaigns. The Funding Act also contains prohibitions on the making or acceptance of political donations by prohibited donors. Among the categories of prohibited donors are property developers.

The plaintiffs in *McCloy* argued that the ability to pay money to secure access to a politician is itself an aspect of the freedom of communication guaranteed under the Constitution⁶⁰. They contended that donors are entitled to "build and assert political power"⁶¹. The argument drew on the decision of the Supreme Court

⁵⁹ (2015) 89 ALJR 857.

⁶⁰ *McCloy v New South Wales* (2015) 89 ALJR 857 at 866 [20] per French CJ, Kiefel, Bell and Keane JJ.

⁶¹ *McCloy v New South Wales* (2015) 89 ALJR 857 at 866-867 [25].

of the United States in *Citizens United v Federal Election Commission* with respect to the scope of the First Amendment right⁶².

In rejecting the plaintiffs' challenge, the joint reasons in *McCloy* spoke of the desirability of there being a level playing field in the public debate of matters touching on government and politics⁶³: a goal not achieved if political parties are in a position to buy unlimited opportunities to advertise in the most effective media. The joint reasons considered to guarantee the ability of a few to make large political donations to secure access to those in power to be the antithesis of the principles on which the Constitution is premised.

One of the plaintiffs' arguments in *McCloy* was that alternative measures could have been adopted by the Parliament that would be less restrictive of the freedom. Proportionality analysis in our constitutional setting confines consideration of alternative means to those that are "obvious and compelling". It is not open to the court to substitute its own essentially legislative judgment for that of the Parliament⁶⁴. Relevant to the analysis in *McCloy* is that the

⁶² *Citizens United v Federal Election Commission* 558 US 310 (2010).

⁶³ *McCloy v New South Wales* (2015) 89 ALJR 857 at 869 [39] citing *R (On the application of Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] 1 AC 1312 at [28].

⁶⁴ *McCloy v New South Wales* (2015) 89 ALJR 857 at 872 [58].

impugned provisions of the Funding Act do not affect the ability of any person in New South Wales to communicate with another about matters of politics and government, nor to seek access to or to influence politicians in ways other than involving the payment of substantial sums of money to them. The effect on the freedom of communication is thus indirect and the public interest in removing the risk and perception of corruption evident. The Funding Act was described in the joint reasons as supporting enhanced equality of access to government, which the freedom of communication seeks to protect. By contrast, in *Citizens United*, a decision that has attracted considerable controversy⁶⁵, any attempt to level the playing field to ensure that all voices are heard was found to be inconsistent with the First Amendment right⁶⁶.

The Australian Capital Territory⁶⁷ and Victoria⁶⁸ are, to date, the only Australian jurisdictions that have enacted charters of human rights and freedoms. Each adopts the "dialogue model" by which the court does not invalidate legislation but may issue a declaration that legislation is inconsistent with a Charter right or freedom. Were

⁶⁵ Kang, *After Citizens United* (2010-2011) 44 *Indiana Law Review* 243; Stevens, *Beyond Citizens United* (2012) 13 *Journal of Appellate Practice and Process* 1.

⁶⁶ *Citizens United v Federal Election Commission* 558 US 310 at 365, 469 (2010).

⁶⁷ *The Human Rights Act* 2004 (ACT).

⁶⁸ *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

the Commonwealth Parliament minded to enact a bill or charter of rights, a constitutional impediment to adoption of the dialogue model may be discerned from the discussion of the Victorian Charter in *Momcilovic v The Queen*⁶⁹.

Of course it is not the sole responsibility of the courts in a liberal democracy to promote equality and respect for human rights. The Commonwealth Government recently commissioned a stocktake on the status of our traditional rights. The Attorney-General gave a reference to the Australian Law Reform Commission requiring it to undertake a review of the whole body of Commonwealth laws to assess their consistency with traditional rights, freedoms and privileges. At the end of last year the Commission published its final report⁷⁰. It is a comprehensive survey of Australians' traditional rights, freedoms and privileges. Each is examined against any Commonwealth law which bears on it and, using the yardstick of proportionality analysis, the Commission identifies laws which may unjustifiably restrict a right and proposes their further consideration or review. The Report provides a sound basis for the discussion of the protection of rights in a democratic society and I encourage you as our future generation of common lawyers to read it.

⁶⁹ (2011) 245 CLR 1.

⁷⁰ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Government Laws*, Final Report, No 129, December 2015.