

**Institutional and Remedial Issues –
The Means and Methods of Protecting Human Rights**

**Human Rights Symposium held at University of SA,
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1. Introduction

I wish to begin by paying tribute to the outstanding constitutional scholarship of my close friend and colleague, Professor George Winterton who died recently. It is fitting that today I should draw on some of his pioneering work published nearly 30 years ago.

The status of the basic rights and freedoms which are recognized at common law and by statute, is well known

So far as the common law is concerned they are based on the traditional British concept of liberty:

- Essentially a person is free to do what s/he wishes, subject to any legal restriction to the contrary

✚ this includes the exercise of such rights as the freedoms of speech and assembly and the right to protest.

- The law of torts provides remedies for interferences with the liberty and property of individuals which are not authorized by law eg trespass and conversion

- The rights are *residual* character

✚ ₁ *ie* they are what is left over after *subtracting* the restrictions of those rights

For present purposes, the most crucial feature of the status of the rights I have mentioned, both at common law and by statute, is their vulnerability in the face of overriding inconsistent legislation

- Especially in a country which follows the notions of British parliamentary sovereignty to the extent, of course, that this concept operates in a federal country with a written constitution.

¹ See to the same effect *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at p 564. (“Everybody is free to do anything, subject only to the provisions of the law.”) See also *Malone v Metropolitan Police Commissioner* (No 2) [1979] Ch 344 at p 357 (“England it may be said ... is a country where everything is permitted except what is expressly forbidden”).

- By that sovereignty I mean that a parliament is unable to bind its successors:
 - regarding the legislation that can be repealed and amended; or
 - on the manner and form in which such legislation is enacted.

In this talk I intend to discuss:

- (a) the various options for providing rights with greater protection; and
- (b) some other issues that typically arise when those options are adopted.

2. *Option 1: A statutory bill of rights as an interpretative instrument*

- (i) Under this option parliament enacts such an instrument as an aid to the interpretation of past and future legislation

Such an instrument would be similar to an *Acts Interpretation Act* and the presumptions which exist at common law

Its aim would be to ensure that either in the case of ambiguity, or where otherwise possible, any legislation is read so to be consistent with the scheduled rights

- (ii) It may even be possible to do the same in *State* legislation regarding the interpretation of the *common law* (unwritten or decisional)
 - such law is of course subordinate, and subject, to statutory alteration

But following the same course of action may prove more complicated,

- in *federal* legislation,
- which may require careful drafting in order to avoid breaching s 71 of the Constitution²

That said, courts already take account of *international law* especially in relation to human rights when determining unresolved issues at common law³

² So as to avoid the Parliament exercising or interfering with the exercise of the judicial power of the Commonwealth under that section of the Constitution: see *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 484-5, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 36-7. The relevant statutory provisions may have to *alter* or *modify* the content of the common law rather than purport to *direct* the courts as to how they interpret that body of law.

³ *Dietrich v. The Queen* (1992) 177 CLR 292 at 321, *Mabo v QLD* (No 2) (1992) 175 CLR 1 (“international law is a legitimate and important influence on the development of the common law”) at 42 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288.

- (iii) The interpretative instrument would operate subject to the expression by the parliament of any contrary intention

That intention is to be understood *objectively* if it is not made clear by the parliament itself

Traditional assumption is of course that normally the parliament may repeal or amend any legislation which it may enact⁴ and

- This may be done *expressly* or by *implication* according to the principle of implied repeal
- Under which *later* Acts are usually taken to impliedly repeal *earlier* inconsistent Acts⁵

- (iv) The Commonwealth, State and the Territory Parliaments would normally be responsible for enacting their own statutory bills of rights if they operate in this way

As they are for their own Acts Interpretation Acts, since such instruments operate as only a guide, even if only notionally, to ascertaining the intention of a Parliament

I very much doubt whether *Commonwealth* provisions can validly express the intentions of a *State* parliament:

- for reasons that include the implied limitations derived from the federal nature of the Australian Constitution⁶
- despite attempts made in some versions of such instruments in the past⁷

3. Option 2: A statutory bill of rights as a statutory instrument

- (i) Under this option legislation would go further and create and give the force of law, to rights enumerated in the legislation.

⁴ *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 generally and at [13] n 101. There may be exceptions eg legislation passed in the exercise of Const s 51(xxxviii).

⁵ Usually but not always: see eg the other well known principle of statutory interpretation which provides that general provisions should not prevail over special provisions.

⁶ As an interference with the State Parliamentary processes on the analogy provided by the inability of the Commonwealth Parliament to *repeal* State laws: *South Australia v The Commonwealth (1st Uniform Tax Case)* (1942) 65 CLR 373 at p 416 per Latham CJ ; and to prevent State Parliaments *enacting* laws : *Gerhardy v Brown* (1985) 159 CLR 70 at 81, and 121, *Mabo v Queensland (No 1)* (1988) 166 CLR 186, at 197, 203, 216, 242, 243 – 4 , *Native Title Act Case* (1995) 183 CLR 373 at 464 - 5. That inability extends to State laws that are invalid for inconsistency with valid federal legislation under Const s 109.

⁷ Draft Australian *Bill of Rights* 1984 cl 10 circulated by the then Attorney-General, Sen Gareth Evans but never introduced into the Commonwealth Parliament.

The rights would have a free standing operation in the general law
They would obviously fill any gap in the common law and existing legislation by recognizing any basic human rights felt worthy of protection

- (ii) Instruments of this kind could be expected to include provisions which purport to render *inoperative* any *past* legislation that is inconsistent with the rights enumerated in the bill of rights

Such legislation would be rendered inoperative by reason, if nothing else, of the implied repeal principle under which, as indicated before, *later* statutes are usually taken as impliedly repealing *earlier* inconsistent statutes

- (iii) This kind of instrument would have the effect of modifying the common law

But note importance of distinguishing between:

- (a) *construing* existing common law rules and legislation so that, wherever possible, both do not infringe the rights enumerated in the statutory bill of rights, and
- (b) *creating* those rights where none existed before, whether at common law or under existing legislation

The creation of new rights raises questions of remedies (to be discussed later)

- (iv) The more complicated question relates to the impact of such a statutory bill of rights on *future* inconsistent legislation

The basic problem here is that, as indicated before, Parliaments which possess plenary powers within their allotted fields of legislative power:

- are unable to bind their successors regarding legislation that can be repealed and amended; or on the manner and form of enacting such legislation; and
- we also need to appreciate that the implied repeal principle is seen as part of the British concept of parliamentary sovereignty, at least as that concept is traditionally understood.

This understanding has prevailed and operated in Australia.⁸

- Although it does not have to be,

⁸ See the authorities cited in G Lindell, "The statutory protection of rights and parliamentary sovereignty: Guidance from the United Kingdom?" (2006) 17 *Public Law Review* 188 at p 201 n 44

- it may continue to represent the views of a majority on the High Court today so as to limit the effectiveness of the option under discussion

The understanding pre-dates and fails to take account of modern developments in the home of parliamentary sovereignty which deserve more attention than they have so far received in Australia.

- The British developments have not involved the *Human Rights Act* but rather the *European Communities Act* passed in 1972 to facilitate British membership of the European Community (then known as the Common Market)
- The House of Lords has since the middle of the 1990s sanctioned without explaining the notion of *disapplying* inconsistent Acts passed *after* 1972
- This appears to fly in the face of the rule about implied repeal explained earlier
 - ✚ but without taking away from the British Parliament its ability to repeal the 1972 Act by *express* provisions
 - ✚ should the UK ever decide to discontinue its membership of the European Union
- It will be noted that the *disapplied* inconsistent legislation is rendered *inoperative* and not *invalid* since it remains open to the British Parliament to pass *express* legislation to repeal the 1972 Act

While *disapplication* is now accepted the explanation for it has yet to be made judicially clear

- I cannot reproduce my analysis of this issue here ⁹ except to mention briefly following possible explanations
 - I *Future provisions are not applied because this represents on a continuing basis what the Parliament intends given the importance it attaches to adhering to the earlier Act*

The difficulty with this explanation: one can never be entirely sure that parliament has not changed its mind, even by implication

⁹ Article above n 8 at 189 - 204.

II *At common law (a) ordinary statutes can be repealed by express or implied provisions; whereas (b) constitutional or fundamental statutes can only be repealed by express provisions*

III *Parliamentary sovereignty as understood by some modern scholars only requires, parliament to be able to repeal or amend any law it wishes however fundamental that law may be*

- *But it can be restricted in the way it carries out that repeal or amendment at least as regards the need for express provisions.*

The difficulty with the last two explanations is that: they may prove unattractive to a majority of the present H Ct

- because of their tendency to adhere to Br notions of constitutional law current as at 1900 even though analytical means are available to the H Ct to follow the modern developments ¹⁰

But if *disapplication* is legally effective as a means of controlling the operation of future statutes in Australia:

- it is based on the rationale that although the Parliament should remain free to pass any law that it wishes
- it should be forced to take political responsibility for its actions by making its intentions very clear

(vi) The Parliament which would enact this kind of statutory bill of rights would be the:

Commonwealth - as regards rights infringed by the *Commonwealth and Territory Governments and their public officials and authorities*

- although this does not preclude the Commonwealth allowing the legislatures of the self-governing Territories to enact their own bills of rights

States – as regards rights infringed by their *Governments and public officials and authorities*

Whether the Commonwealth could enact such an instrument to cover the infringement of rights by *State Governments and their public officials and authorities* raises difficult questions

- even if, as is likely, the external affairs power is available to give effect to the *ICCPR*

¹⁰ Article cited above n 8 at pp 202-3.

- the instrument would give rise to real doubts based on the implied limitations which are derived from the federal nature of Australia's Constitution (intergovernmental immunity)

But if it was valid despite these doubts, note the differential impact on the States because of Const s 109 so as to entrench the rights against the *States* but *not* the *Commonwealth*

4. **Option 3: A bill of rights as a constitutional instrument**

(i) Meaning

Would provide the strongest legal protection to the rights sought to be protected and beyond the reach of ordinary legislation

Normally associated with judicial interpretation and enforcement

Various forms: Alterations would require approval of special majorities and or approval of electors at a referendum

Can be absolute or qualified

(ii) **Absolute entrenchment**

(a) *Australian Constitution*

The entrenchment of rights in that Constitution represents the cleanest and most comprehensive legal way of entrenching rights at all levels of government

It would be available in my view to amend the *State Constitutions* despite arguments raised in the past that s 128 is directed to the alteration of the Australian Constitution (see s 106)

But its disadvantage is obvious and well known given the political difficulty of invoking its successful use as is illustrated by the paucity of successful amendments carried in the past

(b) *State and Territory Constitutions*

Although States do have the power to fix the manner and form of amending their constitutions, this is confined to amendments which deal with "the constitution, powers or procedures" of their Parliaments ¹¹

¹¹ *Australia Act 1986* (Cth) and (UK) s 6 which in effect reproduces the *Colonial Laws Validity Act 1865* (Imp) s 5.

- It may be that this power exhausts the powers of State Parliaments to entrench any laws even if more modern alternative views of British Parliamentary supremacy may recognize such powers even for the UK Parliament ¹²
- There is real doubt whether the existing power over manner and form extends to the entrenchment of a bill of rights because of the qualification I have mentioned ¹³

Uniquely, the ACT Legislative Assembly is free of these difficulties and has been given express powers by the Commonwealth Parliament to fix the manner and form in which certain laws are made ¹⁴

- provided that the laws **fixing such manner and form** are themselves required to satisfy the same requirements before they have to be satisfied in the future
- this provides an important safeguard to resolve traditional tension between
 - The ability to put certain matters beyond the reach of ordinary majorities; and
 - The undesirability of one generation being able to tie the hands of succeeding generations. ¹⁵

NT L A seems to lack powers to fix the manner and form in which certain legislation can be passed unless the plenary powers of legislation are read as accommodating the alternative notions of parliamentary supremacy. ¹⁶

(iii) Qualified entrenchment

Any entrenchment can be made subject to the powers of a parliament to derogate, opt out or override all or any provisions of a constitutionally entrenched bill of rights

- This is illustrated by the Canadian Charter of Rights and Freedoms ¹⁷
- although it was rejected by a majority of the Australian Constitutional Commission ¹⁸

¹² *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at [80].

¹³ See eg R D Lumb, *The Constitutions of the Australian States* (5th ed, University of Queensland Press: St Lucia QLD, 1991) at pp 119 – 120.

¹⁴ *Australian Capital Territory (Self-Government) Act* 1988 (Cth) s 26.

¹⁵ See generally G Lindell, “Arrangements for Self-government for the ACT: A Partial Road to Republicanism in the Seat of Government?” (1992) 3 *Public Law Review* 5 at 15-6.

¹⁶ See *Northern Territory (Self-Government) Act* 1978 (Cth) ss 6 – 9.

¹⁷ *Canadian Charter of Rights and Freedoms* s 33. It is also illustrated by the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 31.

¹⁸ Australian Constitutional Commission: Final Report (1988) vol 1 pp 492-6 paras 9.210 – 9.234 (‘CC Final Report’).

The derogations etc may require the need to satisfy special parliamentary majorities.

The justification for such a mechanism is based on ensuring that if the majority in a community wishes to override a protected right

- it should be forced to do it explicitly and by satisfying special requirements
- in a way that ensures that this actually represents the wishes of that community

One other provision worth noting is that which may operate to suspend judicial declarations of inconsistency with the Bill of Rights for a certain period of time in order to avoid public inconvenience or hardship by giving the legislature time to take appropriate action to rectify the inconsistency¹⁹

5. Some of the other issues

(i) Other mechanisms

There are other measures that may be adopted which are not mutually exclusive

- Statutory commissions may be created which play an advisory, investigatory and educative role regarding the observance of human rights
- Much can and should be done to pre-clear legislation in the parliaments themselves before it is enacted to ensure that as far as possible it does not trench on basic rights and freedoms

✚ Eg through the use of parliament's own advisers and committees

✚ As was suggested by one of the participants at the Symposium, the British experience with such a process is that it can have the beneficial effect of stimulating political and public debate.²⁰

(ii) Rights to be protected

Apart from the ICCPR, much valuable work has been done regarding rights to be protected including the report of the CC which should not be ignored

Questions arise as to whether corporations as well as ordinary persons should take the benefit of various rights²¹

¹⁹ *Australian Bill of Rights Bill* 1985, cl 14. Although this Bill was introduced and debated in the Commonwealth Parliament it was subsequently abandoned by the then Australian Government because of the opposition it aroused

²⁰ Ms Rowena Daw.

²¹ See the discussion by the CC Final Report at pp 489-490 paras 9.197 – 9.199.

I know of no instrument which guarantees the existence of *absolute* or *unqualified* rights and freedoms

- Any bill of rights will usually either explicitly or implicitly require some balancing
 - ✚ not only as regards the protected rights as between themselves
 - ✚ but also with other public interests which will allow for the regulation of the basic rights and freedoms
- It is difficult for any formula to be devised which is not general in nature and does not vest in the judiciary a large discretion, thus requiring our trust to be placed in the courts
- Although there are others, the formula favoured by the Const Commission was that:

Rights and freedoms guaranteed may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society²²

(iii) Judicial review

It is generally acknowledged that, although technically possible, a non-judicially enforceable bill of rights will, at best, be purely aspirational and it is too much to expect that the organs of the State that are limited by such an instrument are likely to observe its provisions – without judicial review

- There is of course a key difference between *statutory* and *constitutional* instruments.

The role of judicial review and enforcement under a *constitutional* instrument is well known with

- the US being the oldest and most familiar example of such an instrument
- The major consequence of such review is the *invalidation* or *nullification* of legislative and other governmental action
- Something that is an anathema to those who subscribe to traditional notions of British parliamentary sovereignty

²² CC Final Report at p 490 para 9.200

For those countries who continue to observe it in even a qualified form, the challenge with *statutory* instruments is to stay within the bounds of parliamentary sovereignty

- (a) I have already adverted to the possibility of Australian Courts following the modern British phenomenon of *disapplication* sanctioned by the House of Lords

Although not adopted for the protection of *human rights* in the *UK* there is no reason in legal principle why it should *not* apply to the protection of human rights in Australia

- Both as to past and future enactments

- (b) But the course that has been followed in the *UK*, *Victoria* and the *ACT*²³ has been to give the courts a more modest role which does not threaten either the validity or the operation of legislation which is clearly expressed to be incompatible with the rights enumerated in a statutory bill of rights

If legislation cannot be construed as consistent with the protected rights despite the presumptions in favour of adhering to those rights, all a court can do is to provide a *declaration of incompatibility*

- This does not alter or affect the rights and duties of the parties despite the infringement of any of the rights – it is, as it were, a ‘declaration in the air’
- It merely puts the legislature and government on public notice of the infringement in the hope that that they will cooperate to alter the law in the future to bring it into conformity

It is this very impotence which

- while it successfully ensures conformity with the parliamentary supremacy
- gives rise to a major difficulty for courts exercising federal jurisdiction:
 - ✚ it could prevent its use for *federal* as distinct from *State* legislation; and
 - ✚ even as regards *State* legislation it may not allow the hearing of appeals by the High Court in relation to such declarations
- The difficulty is that according to current orthodoxy federal jurisdiction can only be exercised with regard to “matters” within the meaning of that term in Ch III of the Australian Constitution

²³ *Human Rights Act* 1998 (UK) ss 4,10, *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ss 36-7, *Human Rights Act* (ACT) ss 32-3.

- ✚ *ie* proceedings which relate to some immediate right, duty or liability to be established by some determination of a court
- ✚ I have argued that there are ways around this difficulty²⁴ but my solution has not met with universal approval and the current High Court may not be attracted to it / or be prepared to otherwise depart from the current orthodoxy

(iv) Remedies

The Australian and State constitutions do not provide for special remedies to deal with unconstitutional action or, for that matter, governmental action that exceeds ordinary statutory authority

- Cf US where the breach of some, but not all, constitutional rights can give rise to an *implied* right to receive damages

In Australia these matters are left to the *common law* and *administrative law* eg

- Actions for declarations and injunctions and availability of prerogative writs
- There are circumstances when unconstitutional action can give rise to civil actions for damages or restitution of money or property
 - ✚ Eg torts of trespass and conversion
 - ✚ the sole effect of breaching a *constitutional* provision or exceeding a *statutory* authority is to deprive governmental officials from being able to rely on the law to justify what is otherwise a wrongful interference with the liberty or property of an individual

I think the *Constitutional Commission* was right when it recommended that the courts should be given a discretion to grant such remedies as they think appropriate which may draw on existing remedies but without being confined to them²⁵

- Reason given was that there may be gaps and limits on suing the Crown founded on common law immunity and protection of officials from personal liability
- But unlike the Senate Standing Ctee on Const and Legal Affairs in 1985, it saw no need to specifically deal with the inadmissibility of evidence obtained in breach of guaranteed rights and freedoms²⁶

✚ but I concede this is a difficult issue.

²⁴ Article cited above n 8 at 204-8.

²⁵ CC Final Report at p 497 para 9.235. The recommendation was said to be based on the Canadian Charter of Rights and Freedoms s 24(1) and the draft NZ *Bill of Rights* 1985: at p 497 para 9.236.

²⁶ CC Final Report at pp 501-2 para 9.259.

(v) Third party rights –infringement of rights by non-State actors

Usually bills of rights are meant to operate in favour of individuals against the State and public authorities ²⁷

ie guaranteed rights and freedoms operate only as *constraints on the exercise of governmental powers* ²⁸

For that reason the CC recommended limiting guarantee of rights and freedoms against acts done:

- (a) by legislative, executive or judicial arms of Cth States or Territories; or
- (b) in performance of any public function, power or duty conferred or imposed on any person or body by law ²⁹
 - The Commission had regard to Canada, NZ and US ³⁰
 - Same assumption evident with statutory Bills of Rights *eg Human Rights Act 1998 (UK) s 6*

The English experience however indicates that, even with statutory bills of rights, broad guarantees such as the right to life and privacy do not exclude the relevance of such instruments to *third party* conduct

- *ie* the conduct of *private* individuals and companies
- *Eg* it has been held by English courts (following the jurisprudence of the E Ct of HR)
 - ✚ that such widely worded guarantees place *positive obligations* on the State *to enact legislation*
 - ✚ to protect individuals from interferences with the relevant freedom committed by persons not acting on behalf of the State ³¹

²⁷ CC Final Report at pp 483 – 9 paras 9.167 – 9.196

²⁸ CC Final Report at p 483 para 9.168.

²⁹ CC Final Report at p 483 para 9.167.

³⁰ CC Final Report at p 483 para 9.169..

³¹ *X v Y* [2004] EWCA Civ 662 (28 May 2004), *X and Y v The Netherlands* (1985) 8 EHRR 235, 239 – 240 para 23

6. Closing reflection

To conclude, one of the main purposes of any bill of rights is to act as a check on the will of the majority of *elected representatives*.

But the reality of majority rule by the *electors* is illustrated by the recent adoption of *Proposition 8* in California which reversed the ruling of the Californian Supreme Court in favour of recognizing same sex marriages

- even though that may not be the last word on the matter

All one can do is to ensure in varying degrees that the will of the majority of the elected *representatives* and that of the *electors* is clearly and deliberately expressed

- if it is intended to override the basic rights and freedoms which all individuals should enjoy.

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