HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

NATIONAL HUMAN RIGHTS CONGRESS

SYDNEY, AUSTRALIA

26 SEPTEMBER 1987

EQUALITY BEFORE THE LAW

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The Hon Justice Michael Kirby CMG*
President of the Court of Appeal

NEED FOR A BILL OF RIGHTS

When I was invited to address this congress, I chose as my theme "The Education of (not so) Young Michael". My upbringing and education was, I suppose, typical of the Australian lawyer of my generation. I was brought up in the days of Empire. Empire Day medals were given out at school. The Governor General or the Governor visited flag waving children. He was always most welcome because of the half-day holidays which inevitably followed. Empire Day addresses (including one I gave myself) waxed lyrical about our links with Britain. The common law running back to Magna Carta was the defence of the liberties of our citizens. We were all part of a world wide brotherhood of men. In those days, there was no mention of a sisterhood. Indeed, there was precious little mention of women and we rarely saw them in our single sex high schools.

When I entered the Sydney Law School, I had my prejudices against a Bill of Rights strongly reinforced. Constitutional Bills of Rights were things which foreigners had; because they needed them. Like the devil quoting scripture, the vivid

language of James Madison, founding father of the American republic was cited. "Who will be so bold as to declare the rights of the people?", Madison had asked. We all nodded gravely. It was impossible to sum up the rights of the people. It was undesirable that we should try. Our rights were protected by the common law administered by independent judges. Those laws were renewed by Parliaments of democratically elected legislators. They were administered by faithful Crown servants operating in the dutiful Executive Government.

What a battering those notions have taken in the past twenty years. The judiciary still struggles to adapt and renew the common law. Cases do come before the Courts which demonstrate the flexibility of that mighty instrument of liberty. Important decisions are regularly handed down by the courts, which demonstrate the way in which common law rules can be adapted to meet new and even unexpected circumstances. Sometimes the absence of a Constitutional Bill of Rights does not seem to be such a burden. For example in recent times in my own court important decisions have been made, defensive of rights:

* Relief has been given against criminal prosecutions and other such proceedings, where the prosecutor has been so slow in prosecuting the case that to allow it to proceed would amount to an abuse of process[1].
* A number of magistrates who, alone of all the magistrates constituting the former Court of Petty Sessions were not "reappointed" to the new Local Court were held to have been denied natural

justice. They had a legitimate expectation, so it was held, to be heard concerning secret complaints about them, before their reappointments were refused[2].

* Even within the last week an order refusing an appeal by a person committed involuntarily to a mental hospital was reversed. Observations were made upon the importance of the open administration of justice as it affects the mentally ill. Specific reference was made in my judgment which, I am sure, Dr Andrei Sakharov would have approved had he been here, to the potential of misuse of psychiatric detention[3].

* Also this week the Court of Appeal dismissed an appeal in the so called Spycatcher case. In competition in that case were the interests of free speech in a democratic society (on the one hand) and the duties of confidentiality and the protection of national security (on the other). The Court had to find the solution, but without the guiding star of a national Bill of Rights[4].

Although these cases may demonstrate that we can get by in Australia, in the Courts, without a Bill of Rights, a glance at the judgments will show that the reasoning is often based on complex and detailed legal rules. Frequently there can be little analysis of the great issues of public importance which are in competition when rights are most at stake. The outcomes are therefore rather chancey.

Furthermore, a number of cases in recent years, including in our highest court (the High Court of Australia) demonstrate

that the pathway of the common law does not always lead to a result which will strike the citizen as just, and in tune with modern times. I refer, for example, to the decision in the Dugan case[5], where it was held that a convicted felon was deprived of civil rights and disentitled from suing for an alleged civil wrong in our courts. This principle was founded on an ancient rule of the common law which could be traced to the time when convicted felons were invariably hanged, and were thus not in particular, practical need of civil rights. But this change of circumstances was held to be irrelevant to the application of the law. The offence to notions of fairness in a modern and democratic society had to be ignored.

Likewise, the McInnes case[6]. Mr McInnes was abandoned by his lawyers shortly before the commencement of a trial for rape in Perth. He asked for an adjournment of the trial. This was refused. He was forced, at relatively short notice, to defend himself in a complex criminal trial. He was convicted. He appealed. But it was pointed out that the "right" to legal assistance was not a legal right. It was a mere privilege that could be lawfully refused. The appellant's conviction was affirmed.

These and many other cases have led lawyers in many common law countries to the belief that the courts cannot always provide protection for fundamental rights. One solution to this deficiency, lately emphasised by Sir Robin Cooke in New Zealand is to find in the common law rights which "run so deep" that they cannnot be removed even by an Act of Parliament. Consistent with our jurisprudence, that notion was recently rejected by the New South Wales Court of Appeal[7]. However, we

may not have heard the last of it. In default of a constitutional or statutory Bill of Rights, it is left to the judges to determine the scope of the fundamental principles of the common law.

The other response has been the development of constitutional and statutory Bills of Rights and widespread support for them in the legal profession. In Canada, a statutory Bill of Rights has recently been replaced by the Canadian Charter of Fundamental Rights and Freedoms. Canada is a democracy sensitive to personal freedom. Indeed, it is the country with the closest similarities to our own federal and common law legal arrangements. In New Zealand too it is proposed that a referendum will be conducted on the introduction of a Bill of Rights. Many distinguished lawyers nowadays support the notion of Bills of Rights. They include Lord Hailsham and Lord Scarman in England. In this country the supporters have been fewer and less vocal.

The basic reason why I now support the notion of a Bill of Rights is that the alternative, reliance upon Parliament, is manifestly breaking down. One has only to look to the unattended reports of the Law Reform Commission, to realise that politicians (in the midst of their heady debates) cannot always find the time, in Australia, for many of the pressing issues affecting human rights. They get caught up in their political wrangles. Those wrangles are so distracting and much more exciting than the sensitive and delicate problems of balancing and declaring rights. The challenge to human rights in Australia is not so much a vicious assult by an authoritarian government. It is rather the rush of legislation

which may contain provisions inimical to human rights. A thousand acts of Parliament are passed every year in Australia. This says nothing of the subordinate legislation. In this mass of law making provisions may be enacted which are damaging to human rights but whose significance is not noted. We run the risk of losing our rights by oversight, rather than by direct assault. I feel sure that much of the anxiety which has been expressed in Australia concerning the proposed Australia Card would not have existed, had there been an effective Bill of Rights. Many citizens are concerned that such an identification facility, without countervailing and powerful (constitutionally entrenched) protections for privacy would, or could, damage individual privacy.

Furthermore, a Bill of Rights, endorsed in Parliament (or even more so if approved by the people at referendum) would provide the legitimacy which is needed for judicial development of the law and the protection of human rights. At the moment, that legitimacy depends on nothing more that the judicial office and the tradition of the common law. Inevitably, the exercise of that office and the perception of that tradition varies from judge to judge. A statement of the basic rules by which society lives together, incorporated in the constitution, putting those rules above the party conflict would, in my view be timely. In addition to the danger of too much legislation, and inadequate legislation for the protection of rights, there is another danger. It lies in technology. The future debates about human rights cannot ignore the impact of technology. Thus, to talk today about freedom of speech and freedom of the press, without reference to the electronic media, the ownership

of the media and the spread of information around the world, is self deceptive. To talk of privacy without reference to the computer, the satellite, laser technology and informatics, is to live in the past. To talk about respect for human life without reference to the miracles of bio-technology is to ignore one of the greatest problems presented to the modern perception of human rights in a puzzled world. To talk of human rights generally without reference to nuclear weapons and the modern means of mass destruction, appears somewhat unrealistic[8].

Judges do their best. But they need legitimate and modern instruments by which to protect the rights of citizens. Politicians do their best. But by oversight and distraction, they may overlook the protection of vital human rights. Bureaucrats do their best. But they can be insensitive to freedom in their pursuit of efficiency or other urgent goals. Freedom can be very inefficient. It is no less important for that reason.

HUMAN RIGHTS AND ABORIGINES

This year is the twentieth anniversary of the constitutional amendment which excised two scars from the Australian Constitution. The most important of these was the provision by which people of the "Aboriginal race in any state" had been omitted from the class of person for whom the Australian Parliament might make "special laws"[9]. Next year is the tenth anniversary of the decision of Justice Mason, now Chief Justice of Australia, dismissing a statement of claim filed in the High Court of Australia seeking declarations and relief on behalf of the Aboriginal people of Australia in

respect of the "occupation settlement and continuing dealing in the lands comprising the Australian continent"[10]. The appeal from that decision resulted in a holding by a statutory majority of the High Court, that Australia became a British possession by settlement and not by conquest, the continent being terra nullius before the arrival of the First Fleet[11]. That other event is the anniversary which looms on the horizon, like the sails of the extraordinary band of ships with their doubtful human cargo which approached Botany Bay 200 years ago.

If the celebration of the Bicentenary of European settlement on the Australian continent in January 1788 is to have any meaning, it must be to focus the attention of the present inhabitants of Australia upon the extraordinary meeting which then took place between two quite different civilisations. I stated this rather obvious opinion in an essay invited by the Australian Bicentennial Authority in 1986. The Authority subsequently declined to print my opinion[12]. What a distorted view this showed of the conception of the Bicentenary, I must leave it to others to judge. Fortunately, one of the better features of the civilisation developed in Australia since 1788 is a media which (for all its other faults) is vigilant in its criticism of government and its agencies. As a result of the Authority's rejection of my views, they were published widely in the media in Australia and beyond. Indeed, they were printed in full in the major dailies of several capital cities. They reached out to an audience which they might otherwise not have touched. Such are the curious ways of this country when Aboriginal issues are concerned.

For some Aboriginals, their friends and supporters, the Bicentenary is an occasion for lamentation not celebration. Distinguished Australians have indicated that they will boycott the celebrations because of the offence it does to the Aboriginal people. It should never be forgotten that the first words recorded in the dialogue between Governor Phillip and his party reconnoitering Botany Bay, and a group of Aboriginals seeing the colonists for the first time were "Warra Warra!". This means "go away!"[13]. But away they did not go. It is neither feasible, nor just, now, that the 16 million successors to that reconnoitering band of redcoats should go away, leaving the Great South Land again exclusively to the descendants of the shouting, hostile party with their rude but unheeded instruction. I know of no Aboriginals who seriously expect the non-Aboriginal majority to pick up their goods and chattels and move off. We must come to terms with each other, living together in a multicultural society of increasing diversity.

On the other hand, the majority must come to understand the despoilation which has been wrought upon a unique cultural inheritance, and the injustices which are still daily done to the descendants of the indigenous people of this continent. They lived together in general harmony with each other and with their environment for thousands of years before January 1788. Reflecting on the special positions of the Aboriginals as a "People of the Land" (to use the phrase adopted in New Zealand in respect of the Maoris) would be a worthy objective for the Bicentenary. Understanding the perspective of the descendants of this quite different civilisation will not be any easier for the majority in the future than apparently it has proved in the

past. But gateways to understanding, there are. They can be found amongst the small but courageous band of intellectuals and helpers who ceaselessly speak out, with the object of advancing the interests of Aboriginal people. They can be found amongst the increasingly vocal leaders of the Aboriginal community itself. They are few in number. But their efforts gnaw away at the moral conscience of the people and their representives in Parliament, as well as those who serve in the courts and the bureaucracy.

In Parliament some progress has been made, although accompanied by many disappointments. In the bureaucracy of the Executive Government, the achievements are patchy. There have been many lost opportunities. There has been inefficiency and many ill targetted programs.

In the courts there have been some important achievements. They include R v Anunga[14], where the Chief Justice of the Northern Territory laid down a number of sensitive rules for the admission into evidence of confessions allegedly made by Aboriginal accused. They probably also include Onus and Frankland v Alcoa of Australia Limited[15]. In that case the High Court of Australia held that members of the Gournditch-Jmara Aboriginal community in Victoria who claimed to be custodians, according to the laws and customs of their community, of its ancestral relics had sufficient interest to institute proceedings to enforce the Archeological and Aboriginal Relics Preservation Act 1972 (Vic) when certain of the relics were found on the land at Portland belonging to Alcoa. The same sensitivity can be found in a later judgment of that Court in Re Toohey & Anor; ex parte Meneling Station

Pty Limited & Ors[16]. There the Court upheld as correct the decision of Justice Toohey, then Aboriginal Land Commissioner, that land in the Northern Territory which was the subject of grazing licences was "unalienated Crown land". The grazier had only personal rights and not rights of a proprietory nature. It was in that case that Justice Brennan drew a stark contrast between the attitutes to land ownership taken by Anglo-Australian law and the attitutes of traditional Aboriginals to land. Drawing on Professor W E H Stanner's Boyer Lectures "After the Dreaming", reproduced in his book of essays White Man Got No Dreaming, Justice Brennan summed it up:

> "[T]he connection of the group with the land does not consist in the communal holdings of rights with respect to the land, but in the group's spiritual affiliations to a site on the land and the group's spiritual responsibility for the site and for the land. Aboriginal ownershiop is primiarily a spiritual affair rather than a bundle of rights. ...To ascertain the existence and identity of "traditional Aboriginal owners" of land it is necessary to enquire into the spiritual affiliation with sites and spiritual responsibility for sites and land, a daunting task for one whose tradition, if unexpanded by experience or research, would leave him "tongueless and earless" towards this other world of meaning and significance.[17]

CONCLUSION

There is nothing in our Constitution which comes close to the sterling and simple principles of the Treaty of Waitangi in New Zealand. Calls are now being made in that country that the Treaty should be made the paramount law, or part of the paramount law of New Zealand[18].

I now bring together my two themes. The Bicentenary is the celebration of a meeting of two very different civilisations. The power and force of one almost completely

swamped and overwhelmed the other, until just before it was too late. Fortunately, at the very last moment, the tide turned. It will be for future generations of Australians - Aboriginal and non-Aboriginal - to address the many wrongs which have occurred. From the constitutional disparagement of 1900 and the Colonial Coloured Races Restriction and Regulation Act 1896, through the Invalid and Old Age Pensions Act 1908 (which disentitled "Aboriginal natives" of Australia from the pension), the cases of discrimination which came to the courts and the cases of injustice which were never heard and wrongs unrequited, reform is needed. That reform may come from a Compact. It may come from a Treaty. But that it should come is plain. That it should come, stimulated by the Bicentenary is plainer still. That it should find its path into our basic law (the Constitution) is plainest of all. Equality before the law shuld not be a pious boast of wordy politicians or judges. It should be a daily activity of our society protected by our fundamental law, upheld when necessary in the courts.

I congratulate the Human Rights and Equal Opportunity Commission for convening this congress. I hope that it will examine both the machinery and the substance of all human rights protection - particulary for the indigenous people of this continent. The watershed of the Bicentenary should focus the national mind in Australia on the protection of human rights for all our citizens. But especially the protection of the human rights of the descendants of those who were here first.

FOOTNOTES

* The views stated are personal views.

1. Herron v McGregor & Anor (1986) 6 NSWLR 246.
2. McCrae & Ors v The Attorney General unreported CA 24 June 1987 (1987) NSWJB 133.
3. B v The Medical Superintendant, Macquarie Hospital, unreported, CA 21 September 1987.
4. The Attorney General for the United Kingdom v Heineman Publishers Australia Pty Ltd & Wright, unreported, CA 24 September 1987.
5. Dugan v Mirror Newspapers Limited (1978) 142 CLR 583.
6. McInnes v The Queen (1979) 143 CLR 575.
7. Australian Building Construction Employees & Builder's Labourer's Federation v Minister for Industrial Relations unreported, CA 31 October 1986 (1986) NSWJB 231.
8. M D Kirby, "Human Rights and the Challenge of the New Technology" (1986) 60 ALJ 170.
9. Australian Constitution, s 51 (xxvi). See also s 127. the Constitutional amendments were effected by the Constitution Alteration (Aboriginal) 1967, No. 55 of 1967.
10. Coe v The Commonwealth of Australia & Anor (1978) 52 ALJR 334; 19 ALR 592.
11. See eg Gibbs CJ in Coe, above, at (1979) 53 ALJR 403, 408.
12. M D Kirby, Aboriginal Bicentenary? mimeo, 1986.

13. Glenelg-Bourke, 30 November 1855, H.R.A. 18; 208 cited R J King "Terra Australis: Terra Nullis Aut Terra Aboriginum?" (1986) 72 JRA Hist. Soc. 75. The words said to have been uttered on 21 January 1788.

14. (1976) 11 ALR 412.

15. (1981) 149 CLR 27; 36 ALR 425.

16. (1982) 44 ALR 63.

17. See ibid, 87-88.

18. J Tamihere, "The Treaty of Waitangi and the Bill of Rights - A Plea for Recognition" [1987] NZLJ 151.