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CONTEMPORARY PERSPECTIVES
ON HUMAN RIGHTS LAW IN
AUSTRALIA

FOREWORD

THE HON. MICHAEL KIRBY AC CMG

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SOURCES OF HOSTILITY

The ambivalence about the recognition and protection of universal human rights in Australia is sometimes puzzling to many Australians in the generations that grew up in a world profoundly influenced by the *Universal Declaration of Human Rights*, and the United Nations treaties and talk of human rights. But to people of my generation, born in Australia before or just after the Second World War, the ambivalence, and hostility, is well understood:¹

I can recount the arguments against a bill, or charter or statute of human rights off by heart; because once I myself accepted them:

1. Human rights were commonly perceived as vague, uncertain generalities, beloved of Europeans with their civil law traditions,

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but alien to the pragmatic problem-solving inclinations of the common lawyers of England and its Empire.

2. Human rights were perceived as having their intellectual roots in the natural law theories of the Roman Catholic Church of the Continent, grounded in supposedly divine notions of the dignity of Man, whereas English Protestants preferred to put their faith, so far as rights and duties were concerned, in their elected parliament, independent judges of high status, trained at the Bar and uncorrupted officials, eventually chosen by competitive examinations;
3. Human rights were the intellectual play things of academic lawyers, of theologians and philosophers, not hard-headed citizens, politicians and lawyers in English speaking countries who were suspicious of broad generalities and only comfortable with specific duties and clear obligations;
4. English-speaking peoples enjoyed the right to do anything they wanted to do unless their elected parliaments, exercising sovereign power, had lawfully forbidden it, which they would supposedly rarely do for fear of electoral disapproval;
5. Human rights declarations were long on assertion and proclamation but often short on delivery. Everyone knew that citizens in English speaking parliamentary democracies, such as Australia, enjoyed greater respect for their rights than was typical in the tyrannies of Europe and the authoritarian regimes that derived their laws from the civilian tradition;
6. Even if Parliament sometimes failed to protect human rights, it was preferable to work on the improvement on the parliamentary system and its accountability to the people at regular elections and referendums than to enhance the powers of the necessarily

unrepresentative and unelected judiciary. To rely on judges this would politicise the judiciary, lower its respect amongst the citizens and actually threaten the basic rights of individuals in society;

7. Human rights charters often gave rise to disputable claims (such as gun freedom in the United States) and to contestable outcomes (such as gay marriage in Canada and South Africa, Massachusetts and Iowa) which it was better to leave to elections and parliaments to sort out and get right than to be imposed on people by the judges; and
8. Human rights were all very well as international instruments adopted to placate less fortunate lands, accustomed to hypocritical overstatements by their leaders and theoreticians. But English speaking democracies knew that such generalities were basically addressed to oppressed people who lacked the blessings of real parliamentary sovereignty. Some of the worst oppressors in history, such as the Soviet Union, had glorious human rights charters in their constitutions. A mature parliamentary democracy, such as Australia, did not really need this foreign nonsense. And international declarations were not binding on us in Australia unless our sovereign parliaments gave them effect at home: which they rarely did.

I know these attitudes only too well. They were taught to me at Law School in the 1950s and 60s. Those instructed in the law in the 1950s to the 1980s learned well these lessons. Many still adhere to these beliefs. Many citizens of Australia genuinely believe such verities. They are endlessly preached to them by the media, fearful that new remedies for abuses of human rights might intrude into their largely unaccountable

powers. Studies show that on the whole, Australians think that human rights are well protected and adequately safeguarded in the law. On the whole, (by the debased standards of the world) Australians are generally correct in these beliefs. But still, increasingly, those in the know are challenging the complacency and the feeling that nothing is needed to reinforce and uphold human rights in Australia. So the question is – should we belatedly embrace this idea? Or should we stand alone and resist it?

CHANGES ARE COMING

It is the *how* and the *why* Australian lawyers and many citizens have come to change their attitudes to universal human rights, to the extent they have, that this Austin Asche Lecture seeks to describe the changes that are coming about:

1. For a moment in history the President of the United Nations General Assembly at the time that Eleanor Roosevelt's *Universal Declaration* was adopted in December 1948 was Dr H.V. Evatt, past Justice of the High Court of Australia. He was a strong proponent of the idea of universal human rights. Indeed, he went further [ch.5]. He and the Australian delegation in 1945-8 urged the establishment of an International Court of Human Rights. Although this has not been achieved as yet, something similar is coming about interestingly through surrogates: the regional human rights courts and commissions in Europe, the Americas and Africa and domestic decisions by national courts in most communities, including Australia.

2. When in the 1940s Evatt proclaimed these notions about human rights, he was immediately confronted by China and other states concerning Australia's dismal record on human rights for the Aboriginal people; for its White Australia policy of immigration; and for the racist features of its governance in Papua New Guinea. Australians came to realise that, on *race* at least, we were far from perfect. This is a point elaborated in recent times by our treatment of the so-called boat people. And by the bipartisan support in our elected Federal Parliament for sending refugee applicants, seeking asylum in Australia, to other countries rather than processing them ourselves as the Refugees Convention requires. See Mick Gooda [ch.13], Tania Penovic [ch.14]; Samina Yasmeen [ch.20] and Kevin Dunn [ch.21];
3. Coinciding with the constitutional and statutory movements towards change on the particular subject of race in the 1960s-90s came great debates that lifted the scales of many eyes to reveal the feminist perspective of injustice in long settled laws. Women's rights and gender equality helped to show that parliaments were often extremely *slow* and sometimes wholly *ineffective*, even *hostile*, over addressing gender inequality, and especially women's reproductive rights. These movements coincided with new attention to the parallel rights of the child,. Anti-discrimination laws were enacted but, in Australia federal, State and Territory legislation have often been ineffective. Sometimes such enactments came up against serious obstruction, even in the courts because the courts were unused to their notions, procedures and remedies;
4. The early inutility of the law, in at least some respects, gave rise to proposals for law reform. Other activism on behalf of minorities

challenged long neglected parliamentary law, (transfixed as the political parties in Parliament often were by the periodic search for electoral majorities. Some of these endeavours led to litigation appealing to express and implied rights in the Constitution itself, in statutes and in the common law. Mixed responses to these demands have been evident in the decisions of the High Court of Australia. The stumbling attempts of successive federal Governments and Parliaments have not addressed all of the demands and needs of minorities. Unpopular minorities, in particular, have been ignored repeatedly and consistently – such as prisoners, refugees and gays, sex workers and drug users.

5. It must be assumed that the Rudd Government did not really expect Professor Frank Brennan and his colleagues, in the national enquiry, to conclude that (the imperfections in Australia's institutional arrangements for human rights) demanded a statutory charter of rights. For the time being, this idea has been shelved by the Rudd-Gillard government, in favour of a so called "Human Rights Framework", including parliamentary machinery to revamp the legislative scrutiny of statutes. Whilst welcoming these measures, so far as they go, most knowledgeable commentators were extremely disappointed over the government's response to the Brennan Report. They asked how there could be effective action without human rights protection in Australia and accountability without independent decision makers [ch.2]. Some said that it was like putting the poacher in charge of the game park to leave it to parliament itself to evaluate proposed laws for human rights compliance. But for those who felt that Australia needed a bill or charter or statute of rights [ch.3], the Rudd Government

postponed further debate until 2014 – ironically to the eve of the centenary of ANZAC.

6. Against this background, most attention to human rights needs in Australia has concerned the effectiveness of the presently available models in all of the Australian jurisdictions, established to respond appropriately to the human rights concerns of vulnerable minorities: 1. Children; 2. Indigenous people; 3. Boat people and refugee claimants; 4. People with mental disabilities; 5. Prisoners; 6. Terrorism suspects; 7. Polluters and those alleged to endanger the environment; 9. Various aspects of religion and the right of Australians to enjoy it and to be free of it. Hovering over, and included in, these concerns, has been the force of international law, international institutions and global human rights guardians to whom Australia has rendered itself accountable in various ways. The courts, the bureaucracy and Parliaments themselves have had to struggle with a paradox. The Australian nation regularly signs onto an obligation expressing universal human rights. But it does not then legislate to bring those rights (and duties) into force domestically. Can such international laws still influence Australian decision making? If not, what is the point of ratifying human rights treaties but then rejecting the recognition of the duties so embraced? This was a debate we had in the High Court of Australia in *Al Kateb v Godwin* and *Minister for Immigration v B*.
7. A particular instance of the apparent failure of the democratic response to an issue, claimed as one of basic human rights, is that of marriage equality. Conceptually, this is but one special aspect of the legal rights of minorities, defined by reference to their sexual orientation or gender identity. Repeated public opinion polls in

Australia indicate that the majority of the persons polled, (particularly amongst the young), support amendment of the federal *Marriage Act*, to permit marriage equality and to remove the prohibition on marriage discriminating against Australia's sexual minorities. One side of politics in the Federal Parliament will not permit its members a conscience vote, normal on such questions. The other side permits a conscience vote. But the leadership is lacking. Several Members of Parliament (whilst protesting, of course, that they have no objection themselves) indicate that they will vote against a change because some of their constituents are opposed and religious organisations are lobbying furiously. Under current institutional arrangements, it appears that civic equality on marriage will be denied to the minority that wants it. And is in decline (certainly religious marriage) amongst the majority with the power to change its definition. In most other advanced Western countries, citizens, appealing to universal principles, can ultimately invoke legal responses of basic doctrine from the judges. In Australia, the rights of a minority can just be overridden by a majority, which itself enjoys those rights and leaves those denied the rights nowhere else to go for legal redress;

8. A further consideration that has converted some thinking Australians to the need for a judicial role in protecting and advancing human rights, is the fact that several countries, with legal traditions relevantly identical to ours, have, in recent decades, embraced a reserve role for the courts, to permit them to act as a stimulus and a reminder where minority rights are said to have been denied. Thus Canada (1982), New Zealand (1991), South Africa (1996), and United Kingdom (1998), in their differing

ways, have adopted charters of rights. They have done so although they originally opposed this idea. And even in Australia, the Australian Capital Territory (2004) and the State of Victoria (affirmed in 2006), reaffirmed (in 2012), have adopted charters of rights, based essentially on the New Zealand model: with a power to remind Parliament about basic rights but with no power to force a change that Parliament does not want to embrace. The remaining Australian jurisdictions, including the federal and its Territories, now stand in opposition, virtually alone in the whole civilized world. Certainly, we may be the only nation marching in step. But our stance as matter of modern governance, is exceptional, restricting and on one view, a denial to the people of rights of access to liberty and equality amongst all persons.

9. Coinciding with these developments is a new realism, on the part of many observers, about the parliamentary system as it actually works today. Political power in Australia is increasingly haemorrhaging to the head of government, to political parties and even to party factions - sometimes external to Parliament. Remarkably few citizens now participate in Australia's political parties. Yet, this very small number effectively controls our institutions in a way unthinkable when the Australian Constitution was adopted. Little wonder that more who presently enjoy the power do not wish to surrender that power, even to an attenuated scrutiny by courts limited, as the Brennan Committee proposed, in the remedies that they might grant. Little wonder that citizen movements are growing up in Australia to fill the political vacuum, such as *GetUp!*: an online organisation claiming 600,000 members and enjoying increasing influence in the matter of rights concerns;

10. Even talk of parliamentary “sovereignty” is now distinctly old fashioned. It is redolent with 19th century British thinking about its Parliament and Westminster at the height of its Empire. No parliament today is truly completely “sovereign”, possessed of total and unlimited powers. Least of all in a federal constitutional system, such as Australia’s. Every national and sub-national parliament today operates in the wider context of global and regional organisations and law. Such organisations and laws include those that proclaim and uphold universal human rights. Australia’s misfortune is that, not only is it deprived of a *national* charter of rights. It operates in the last geographical region of the world (Asia/Pacific) that does not have a *regional* charter of human rights nor an effective court or commission to declare and protect basic human rights, especially of minorities, where they are abused and unrepaired by domestic law; and
11. Informed observers increasingly realise that, amongst the greatest advantages of such charters is the use to which they can be put in educating succeeding generations about the common values of society. And in preventing infractions upon universal rights by encouraging internalised procedures to be observed by officials with relevant powers. This is a point repeatedly made by Paula Gerber over many years: contrasting, for example, the knowledge amongst Victorian pupils at schools with the knowledge of basic core rights and duties amongst the students at schools in Massachusetts. There the students study and learn about their society’s values. Here they do not.

- * The rights, dignity and needs of people living with HIV, of commercial sex workers, of drug users and other groups extremely vulnerable to infection need to be tackled, as they have been in recent international reports with which I have been associated²;
- * Issues concerning the distinctive rights of the aged will be increasingly important, as that cohort of the population expands in Australia, as also in most developed countries;
- * The topic of the fundamental rights of citizens in Australia to life saving health care; at present these decisions are left to officials and politicians. But are such issues of life and death appropriate to such decision-makers.
- * The topics of end of life decisions, palliative care and euthanasia will need new attention in a rights context;
- * In global terms, even beyond human rights, issues of bioethics and human rights will demand attention³. The global affront of endemic poverty will increasingly be seen as a human rights issue, akin to slavery; and
- * Human rights in the future will be viewed in a wider context that includes protection of the entire biosphere of our earth, the protection of Outer Space and the protection on the Earth of all sentient creatures, beyond human beings. This last topic, as animal welfare law, is now being taught in a quarter of Australia's law schools. It is a concerning issue – involving the appreciation of the sights of other sentient creatures. So the ambit of universal rights law is even expanding.

² United Nations Development Programme, Global Commission on HIV and the *Law, Risks, Rights & Health* (UNDP, New York, July 2012), 29-54; Commonwealth of Nations, Eminent Persons Group, report: *A Commonwealth of the People – Time for Urgent Reform* (Perth, October 2011) 98-102.

³ UNESCO, *Universal Declaration on Bioethics and Human Rights*, adopted by the General Conference, 1997, Paris.

The mind of humanity continues to expand and rights-talk will expand too. This book will be a good companion for the journey.

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