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CHARLES DARWIN UNIVERSITY

DARWIN, 27 AUGUST 2012

AUSTIN ASCHE LECTURE 2012

HUMAN RIGHTS PROTECTION IN
AUSTRALIA – A RIPOSTE TO CHIEF
JUSTICE KEANE

The Hon. Michael Kirby AC CMG

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RIPOSTE TO CHIEF JUSTICE KEANE***

THE HON MICHAEL KIRBY AC CMG**

AUSTIN ASCHE AND HIS LECTURE

It is a privilege to deliver the Austin Asche Lecture, especially in the presence of the Administrator of the Northern Territory (The Hon. Sally Thomas AM), her predecessor (Professor Tom Pauling AO QC) and another predecessor, the honorand of this lecture, the Honourable Austin Asche AC QC. I suppose that the collective noun for Administrators is a bureau.

I am glad that the Vice-Chancellor of Charles Darwin University (Professor Barney Glover) has initiated this series and is also present. I honour the university that bears the famous name of Charles Darwin. That name and the intellectual legacy that goes with it, demands open-mindedness, constant questioning of received wisdom and recognition of the process of change that exists in all living things¹. It is by an inbuilt capacity to change and to embrace gradual variation that living organisms (including institutions) need to survive, adapt and flourish.

* Text on which was based the second Austin Asche Lecture, delivered Darwin, 27 August 2012.

** Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1995-8); Laureate of the UNESCO Prize for Human Rights Education (1998); Gruber Justice Prize (2010).

¹ Charles Darwin, *The Origin of Species*, in William Benton (ed.), *Great Books of the Western World*, Encyclopaedia Britannica Inc, Chicago, Vol. 49, Ch V, 65.

My thesis is that the generic protection of universal human rights is such a catalyst for the evolution of new thinking in the legal discipline. And that it is time for Australia to embrace and welcome this, as so many others have earlier done.

Austin Asche, in his most distinguished legal career, has illustrated a grand capacity to change to change and adapt. He began legal practice at the Queensland Bar in 1951. But then he switched to Melbourne, where he was appointed Queen's Counsel in 1972 and the first Victorian Judge of the new federal Family Court of Australia, when it was created in 1976². He was Acting Chief Justice of that court in 1985-6. But then, in a great leap of faith, he resigned, moved back to Darwin, and became a Judge of the Supreme Court of the Northern Territory in 1986. His appointment as Chief Justice followed in 1987 and as Administrator in 1993. Not for him, a quiet retirement, he thereafter served as Chancellor of the predecessor to this University. He still serves as Chairman of the Territory Law Reform Committee. Talk about a life of adventure and variations on a legal theme called stability and continuity.

His legal skills are honoured in our Commonwealth, as much as are his personal qualities and his choice of an outstanding spouse, Dr Val Asche AM, a microbiologist of distinction. Lawyers should spend more time with scientists. It might help rescue their minds from the ever present danger of formalism and ultra orthodoxy.

It is my privilege to be the second lecturer in this series. The first was a most distinguished lawyer, the Honourable Chief Justice, Patrick Keane of the Federal Court of Australia. His lecture, "Sticks and Stones May Break my Bones, But Names Will Never Hurt Me"³, is an interesting and insightful essay, providing a most worthy

² Pursuant to the *Family Law Act 1975* (Cth). His appointment as one of the original Justices of the Family Court of Australia took effect on 5 January 1976.

³ (2011) 2 *Northern Territory Law Journal* 77.

initiation for the lecture series. Chief Justice Keane was himself an outstanding advocate. As Solicitor-General for Queensland, he appeared before me many times in the High Court of Australia. There he deployed his forensic skills to great advantage. It is therefore not surprising that he chose a legal topic of controversy, upon which he had lectured before, namely the protection of human rights in Australia and whether we should embrace a statutory declaration of rights, enforceable in the courts.

Chief Justice Keane has long been opposed to this notion. His Asche lecture sought to expound the reasons why. My lecture is titled a 'Riposte'. No discourtesy at all is intended. I acknowledge that able and experienced lawyers and citizens in Australia (and some elsewhere) are opposed to the idea. I myself was unconvinced for much of my life. In these remarks, I hope to take others on the same journey of legal development as I have experienced. Certainly, the issue is one worthy of debate and reflection in a university, particularly one that bears the famous name of Darwin.

A CRITIQUE OF FIRST AMENDMENT CASES

Much of Chief Justice Keane's lecture was devoted (as its title suggests) to perceived errors in the United States Bill of Rights, as the most famous example of a national declaration of legally enforceable rights and duties. Specifically, most of the lecture is addressed to criticisms of that part of the First Amendment to the United States Constitution which has been interpreted to protect free speech and a free media⁴. As Chief Justice Keane points out, the actual language of the constitutional prohibition in that country upon any abridgement of freedom of speech is expressed as limited to the making of laws by the United States Congress⁵. This notwithstanding, the words have been pushed much further, so as to extend to prohibitions on limitations in the judge-made common law⁶. That extension appears

⁴ The First Amendment to the US Constitution provides: "Congress shall make no law... abridging the freedom of speech".

⁵ P.A. Keane, "Sticks and Stones May Break My Bones, But Names Will Never Hurt Me" (2011) 2 NTLJ 77.

⁶ (2011) 2 NTLJ 77 at 87.

to a lawyer to depart from the textual foundation for the ensuing jurisprudence. Yet Americans, including lawyers, tend to accept the result as gospel.

Skilful advocate that he still is, Chief Justice Keane also begins with an ample quotation from the honorand, Austin Asche⁷. In this he accurately describes the Australian rejection of the idea of a constitutional bill of rights and justifies that conclusion on the basis of the pragmatic preference by Australians for specific legislation rather than an “esoteric nephelococcugia of a constitutional guarantee”.

If I had been delivering this lecture in 1981, when Austin Asche gave his address, from which this quotation was taken, I would probably have used much the same explanation to an audience, particularly one that included American lawyers. However, in the 30 years since 1981, my mind has opened. New information has caused me to change my opinion. I do not know; but I would be unsurprised if the same has not happened to Austin Asche. Yet Chief Justice Keane remains loyal to his old beliefs.

Much of his lecture is addressed to borderline cases involving First Amendment free speech decisions in the United States. To virtually all of this criticism, and the conclusions proffered by Chief Justice Keane, I would offer no dissent. Of course, appellate judges realise that an important function is to draw lines, as required by constitutional and statutory texts and common law rulings. Upon many such lines, strongly held and differing views can easily exist. This is demonstrated, in Chief Justice Keane’s lecture, by his citation of several dissenting opinions in the Supreme Court of the United States about what the First Amendment required⁸. Respectfully, it does not really tackle the need for a charter of rights in Australia to point out, that in another country, with a very old text, differing opinions have emerged some of which

⁷ A. Asche, “The Rights of the Child” (first Vernon Collins Memorial Lecture), Melbourne, 14 October 1981, 9.

⁸ For example, the dissent of Alito J. in *Snyder v Phelps* 131 SCt 1207 (2011). See also Alito J’s dissent in another First Amendment speech concerning the legitimate restriction on animal cruelty videos, where I have previously praised his minority view.

appear to Australians eyes to be odd. This is just a reason why we might choose a different text for rights in this country. And develop it in the hands of a judiciary differently appointed, trained and inclined.

As it happens, I agree with virtually all of the criticisms of the cases mentioned in Chief Justice Keane's lecture. At least, I do so approaching the matter from an Australian perception of the legitimate policy enlivened by the topics covered.

To demonstrate that this is not simply a strategic intellectual manoeuvre by me, embraced in 2012 to deliver my riposte, I would point out, that in the High Court of Australia, in *Dow Jones & Co. Inc. v Gutnick*⁹, I expressed like views a decade ago. The case was one in which an American publisher was seeking, by its arguments, to have the Australian courts embrace at least some features of First Amendment jurisprudence in relation to the new technological phenomenon of the internet. Our courts rejected that attempt. I agreed in that outcome. In answer to the comparative absolutism of the American rule, I said:¹⁰

“Any suggestion that there can be no effective remedy for the tort of defamation... committed by the use of the Internet (or that such wrongs must simply be tolerated as the price paid for the advantage of the medium) is self-evidently unacceptable. Instruments of international human rights law recognise the rights of “[e]veryone... to hold opinions without interference” and to enjoy “the right to freedom of expression... [including] freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers... through any... media of his choice”¹¹. However, such instruments also recognise that those rights carry “duties and responsibilities”. They may therefore “be subject to certain restrictions, but these shall only be such as are provided by law and are necessary... [f]or respect of the rights or reputations of others.”

⁹ (2002) 210 CLR 575.

¹⁰ (2002) 210 CLR 575 at 626 [115] – [116].

¹¹ *International Covenant on Civil and Political Rights* (ICCPR), Arts 19.1, 19.2

The [ICCPR] also provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”¹². And that “[e]veryone has the right of protection of the law against such interference or attacks”¹³. Accordingly, any development of the common law of Australia, consistent with such principles¹⁴, should provide effective legal protection for the honour, reputation and personal privacy of individuals. To the extent that our law does not do so, Australia, like other nations so obliged, is rendered accountable to the relevant treaty body for such default.¹⁵

This passage from *Gutnick* demonstrates, I suggest, that the real objection of Chief Justice Keane, revealed by the American First Amendment cases, is not that they are unacceptably faithful to the human rights ideal; but that they are insufficiently attentive to other expressed human rights and to the balancing of competing rights which the process properly requires. To this extent, with respect, the leap from a detailed criticism of the American cases on the First Amendment to a conclusion that Australia should reject the very idea of human rights declarations and stick with specific legislation, drafted with the assistance of law reform bodies, is neither a necessary nor a logical one. Any human rights charter that Australians might adopt would inevitably reflect the values of this country, informed by the international treaties that we have ratified. It would also contain the means of resolving clashes between competing rights and values. And such clashes would occur in our own distinctive constitutional, statutory common law *milieu*.

In *ABC v Lenah Game Meats Pty Ltd*¹⁶, in 2001 I drew attention in the High Court to the different way in which free speech rights had developed in the United States of

¹² Arts 19.3. and see *Chakravarti v Adelaide Newspapers Ltd* (1998) 193 CLR 519 at 575.

¹³ ICCPR, Arts 17.1 and 17.2.

¹⁴ Cf *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 42.

¹⁵ Pursuant to the First Optional Protocol to the ICCPR.

¹⁶ (2001) 208 CLR 199.

America and in other countries, including Australia. In the course of my reasons, I remarked:¹⁷

“Only in the United States is the rule in favour of free speech as stringent as the appellant appeared to urge¹⁸. But that rule, which is particularly wide with reference to discussion about public figures, is itself based on an interpretation of an express prohibition in the constitution of that country¹⁹. It is an express prohibition that has no counterpart in the Australian Constitution. Analogous principles have been rejected by this court²⁰ and by courts in the United Kingdom, Canada, South Africa, and by legal bodies²¹”.

Other countries in the Commonwealth of Nations have successfully adopted charters of rights. Recently, the people of Canada celebrated the 30th anniversary of the inclusion of the *Charter of Rights and Freedoms* in the Canadian Constitution. According to a Canadian commentary about that anniversary:²²

...[P]oll after poll shows that Canadians love their Charter... It is true that imbedding these rights and freedoms in our constitutional framework augmented the role of the judiciary in Canadian politics. It has given the court a powerful new instrument to interpret the legitimacy of parliamentary statutes and review the affairs of government... Under this arrangement, the courts are expected to rely on the Charter to review and remedy possible abuses of legislative or executive authority in order to guarantee the individual rights of Canadians. There is no doubt that the Charter has led to greater scrutiny of legislation and activities of government. Most critics and

¹⁷ (2001) 208 CLR 199 at 283 [202].

¹⁸ *New York Times v Sullivan* 376 US 254 (1964). See also *Rajogopal (alia Gopal) v Tamil Nadu* (1995) 82 AIR (SC) 264. Cf A.Stone and G. Williams, “Freedom of Speech for Defamation: Developments in the Common Law World” (2000) *Monash Uni Law Review* 362 at 364.

¹⁹ U.S. Constitution, First Amendment.

²⁰ *Theophanos v Herald and Weekly Times Ltd* (1994) 182 CLR 102 at 134.

²¹ Australian Law Reform Commission, *Unfair Publication, Defamation and Privacy*, Report number 11 (1979) at 77-78 [146], appendix F.

²² Phillipe Lagassé, in *Ottawa Citizen* 14 April 2012.

champions of the Charter can agree on this point. Yet it must also be acknowledged that the courts have often exhibited restraint in applying the Charter. Judicial reviews of crown prerogatives are a notable example, one that merits more attention.

Having isolated the areas of agreement and disagreement with the views expressed in Chief Justice Keane's lecture in this series, I will now embark on my own endeavour to examine the issue of human rights protection in Australia. First, I will identify, beyond the arguments collected in Chief Justice Keane's lecture, the principal grounds typically advanced for opposing the suggestion that Australia should go down the path, further than it has, of adopting a legally accessible charter or statute of universal rights. Then I will endeavour to explain why, despite these grounds of opposition, progress is being made towards adopting some such instrument, including at the federal level. And then I will offer a few practical instances to show the kinds of problems which we have to tackle in Australia without the benefit of a general bill or charter of rights:

THE SOURCES OF AUSTRALIAN HOSTILITY

The ambivalence about the recognition and protection of universal human rights in Australia is puzzling to some Australians, especially those in the generations that grew up in a world 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 perfectly well understood:²³

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

²³ P. Gerber and M. Castan (Eds), *Contemporary Perspectives on Human Rights Law in Australia*. (Forthcoming).

1. Human rights were commonly perceived as vague, uncertain generalities, beloved of Europeans with their civil law traditions, but alien to the pragmatic problem-solving inclinations of the common lawyers of England and its Empire. That was the way Austin Asche explained his doubts about human rights charters in 1981 – quoted by Chief Justice Keane in his first lecture in this series.
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 Parliaments, 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. They were suspicious of broad generalities and only comfortable with specific duties and 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. And they would supposedly do this rarely, 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 in practice than was typical in the tyrannies of Europe and in 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 rather than to enhance the powers of the necessarily unrepresentative and unelected judiciary. To rely on judges would politicise the judiciary. It would lower

respect for the courts 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). It was better to leave such questions to elections and parliaments to sort out and get right, rather 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 in Australia unless our sovereign parliaments gave them effect at home. Which they rarely did.

I know these arguments 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, as Chief Justice Keane does and as I once did. Many citizens of Australia genuinely believe such arguments. 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 their law. On the whole, (by the debased standards of the world) Australians are generally correct in these beliefs. Nevertheless, increasingly, those in the know are challenging the complacency and the feeling that nothing is needed to reinforce and uphold human rights in Australia. Chief Justice Keane is resistant. But the chair and members of the national inquiry into whether Australia should have a national charter of human rights (Rev. Professor Frank

Brennan) were converted to supporting the nation. 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 other citizens, have come to change their attitudes to universal human rights, to the extent they have, that this Austin Asche Lecture seeks to describe:

1. In December 1948, the the President of the United Nations General Assembly, at the time that Eleanor Roosevelt's *Universal Declaration of Human Rights* was adopted, 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. He and the Australian delegation to the United Nations in 1945-8 urged the establishment of an International Court of Human Rights. Although this has not yet been achieved, something similar is coming about, interestingly enough, through surrogates: the regional human rights courts and commissions in Europe, the Americas and Africa and domestic decisions by national courts in most countries, including Australia;
2. When in the 1940s Evatt proclaimed his 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 on immigration; and for the suggested 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 raised again in recent times by our treatment of the so-called boat people. And by the bipartisan support in the elected Federal Parliament for sending refugee applicants, seeking asylum in Australia, to other countries rather than processing them ourselves as the *Refugees Convention* and Protocol appears to require;

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 Australian eyes to reveal a feminist perspective of injustice in long settled laws. Movements towards women's rights and gender equality helped to show that parliaments were often extremely *slow*, and sometimes wholly *ineffective* even *hostile*, when addressing gender inequality. Especially so when approaching women's reproductive rights. These movements would coincide with new attention to the parallel rights of the child. Further, anti-discrimination laws were enacted but, in Australia federal, State and Territory legislation have often been ineffective. Sometimes such enactments have faced serious obstruction, even in the courts, because the courts were unused to such notions and of the procedures and remedies that the legislation provided;
4. The early inutility of particular laws, in at least some respects, gave rise to proposals for further law reform. Activism on behalf of minorities challenged long neglected parliamentary law, transfixed as the political parties in Parliament often were by the search for periodic 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 nor the needs of minorities. Unpopular minorities, in particular, have been ignored repeatedly—such as prisoners, refugees, homosexuals, sex workers and drug users;
5. It must be assumed that the Rudd Government in Australia did not really expect Professor Frank Brennan and his colleagues, in the national enquiry into a charter of rights, to conclude that the imperfections in Australia's institutional arrangements for human rights demanded a statutory charter of rights. Following their report, for the time being, this idea has been shelved by the Rudd and Gillard Governments, in favour of a so called "Human Rights Framework". This has included parliamentary machinery to revamp the legislative scrutiny of statutes. Whilst welcoming these measures, so far as

they go, most knowledgeable commentators were extremely disappointed by 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? Some argued that it was like putting the poacher in charge of the game park to leave it to parliament alone to evaluate proposed or enacted laws for human rights compliance. For those who felt that Australia needed a bill or charter or statute of rights, 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. Hovering over, and included in, these concerns, has been the force of international law, international institutions and global human rights guardians to whom, by treaty, 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 international obligations 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 a number of cases in the first decade of this century;
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 identified minorities, defined by reference to their sexual orientation or gender identity. Repeated public opinion polls in Australia appear to 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 involving Australia's sexual minorities. One side of

politics in the Federal Parliament has not permitted its members a conscience vote, normal on such questions. The other side has permitted a conscience vote. But leadership is lacking. Several Members of Parliament (whilst protesting, of course, that they have no personal objection) indicate that they will vote against a change, because some of their constituents are opposed and religious organisations have lobbied furiously on the issue. 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 for others. In most other advanced Western countries, citizens, appealing to universal principles, can ultimately invoke legal responses to their concerns founded in basic doctrine expounded by the judges. However, in Australia, the rights of a minority can just be overridden by a majority, which itself enjoys those rights and effectively leaves those denied the rights nowhere 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 Australia's, 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 by parliament. Thus Canada (1982), New Zealand (1991), South Africa (1996), and United Kingdom (1998), in their differing ways, have all adopted charters of rights. They have done so although their people originally opposed this idea. 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. This grants courts a power to remind Parliament about basic rights; but with no power to actually force a change that Parliament does not want to embrace. The remaining Australian jurisdictions, beyond Victoria and the ACT, including the federal jurisdiction and its other Territories, now stand in opposition, virtually alone in the whole civilized world. Certainly, Australia may be the only nation marching in step. But our stance as a matter of modern governance is exceptional. It restricts, and on one view it denies, the

people rights of access to enforceable liberty and equality amongst all persons; and

9. Coinciding with these developments is a new realism, on the part of many observers, about the parliamentary system itself, 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 to force 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 not anticipated when the Australian Constitution was adopted. Little wonder that these who presently enjoy political 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 the courts might grant. Little wonder that citizen movements are growing up in Australia and elsewhere to fill the political vacuum. These include such bodies as *GetUp!*: an online organisation claiming 600,000 members and enjoying increasing influence in the matter of rights;

BUT IS THERE A PRACTICAL NEED?

The notion that we should leave human rights to be expressed in statutes that are prepared after thorough review and consultation by law reform bodies constitutes a platonic ideal. But as someone who spent 10 years heading the Australian Law Reform Commission, I can only suggest that it represents a romantic approach to the way legislation is actually developed and enacted in Australia.²⁴

The problem that is encountered by law reform bodies in Australia, as elsewhere, lies in securing an appropriate budget; sufficient appointments; adequate staff; suitable resources; and necessary follow up to reports, once delivered. To all of these well known problems, endemic for institutional law reform in Australia, must now be added the scaling down or abolition of the law reform agencies that already exist. Thus, the Australian Law Reform Commission has been severely cut back in

²⁴ The description “romantic” is borrowed from Sir Anthony Mason. See M.D. Kirby, “Law Reform, Human Rights and Modern Governments: Australia’s debt to Lord Scarman” (2005) 80 ALJ 299 at

the number of full-time commissioners, in its resources and premises. Even the well-known quarterly publication created in my day, *Reform*, has been abolished as a print run, for want of funds. It has been replaced by an online publication which cannot reach, in the same way, the most influential decision-makers on matters of law reform. I do not decry the fine work that is still performed by the ALRC. Still, the reduction in government support is at once notable and disappointing.

Unless a law reform agency, such as the ALRC, receives a reference from the Attorney-General, it cannot initiate a project. Generally speaking, in recent years, the references to the ALRC have shied away from fundamental matters of human rights. Putting it bluntly, there has been a reduction of interest in independent enquiry and consultation. There has been a move towards strong control by departmental officials over potential sources of political controversy and embarrassment. This is precisely what law reform projects tend to involve.

The notion that Australia has no need for a charter of rights, because all of its problems are adequately addressed through well designed, specific legislation²⁵, is simply not borne out by experience. A glaring instance of this was the failure of the elected Parliaments, in any jurisdiction of Australia, to repeal and replace the discriminatory holding of the common law, denying legal recognition to indigenous native title. Australia is one of the most mature parliamentary democracies in the world. It has created elected legislatures in most of its jurisdictions since the 1850s. Yet it was not until 1992, in the *Mabo* case²⁶, that the High Court of Australia felt obliged, and authorised, to act.

It is significant, I believe, that the key that was identified by Justice F.G. Brennan, in *Mabo*, to warrant establishment of a new and different principle for native title, was essentially a human rights principle. It was the declaration by the majority of the

²⁵ Keane, above n.5 (2011) 2 NTLJ 77 at 90.

²⁶ (1992) 175 CLR 1.

High Court in *Mabo* that the preceding common law principle had later come to be perceived as untenable. This was so because it breached a principle expounded in the international statements of universal human rights²⁷. Whilst, in that common law decision, it proved possible for the High Court to reach outside the Australian legal system to the international principles (which were thereby imported and made part of the common law of Australia) most such problems arise in Australia today in a statutory context. It is then extremely difficult, or even impossible, for the courts to invoke international human rights law. Towards such laws, within the judiciary, there is quite often the same scepticism and lack of sympathy about conceptual thinking as appears in parts of Chief Justice Keane's first lecture.

It follows that, to tackle the difficult challenges to human rights in Australia (especially of minorities and particularly of unpopular minorities), a different legal framework is required. That framework will not succeed unless it is expressed in a charter or statute of human rights. The softest option, least offensive to the traditionalists, is that adopted in the New Zealand statute; substantially copied in the United Kingdom statute; given effect in the Australian Capital Territory and Victorian laws; and recommended for federal enactment by the Brennan Committee.

But still the question lingers: is there any real injustice in our country that needs this new and hitherto unusual remedy? I could give many instances to demonstrate that there is. Recent cases including child refugees²⁸; terrorism suspects²⁹; and Aboriginal Australians having discriminatory federal laws imposed upon them by reference to their race³⁰. These instances illustrate, in my view, the need for a much more effective human rights law. At the very least, there is a need for a law modelled on the New Zealand declaratory provisions that would allow individuals, who had failed in any political endeavours to seek change, to approach the courts,

²⁷ (1992) 175 CLR 1 at 42 per Brennan J.

²⁸ *Minister for Immigration v B* (2004) 219 CR 365.

²⁹ *Thomas v Mowbray* (2007) 233 CLR 307. Contrast *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

³⁰ *Wurridjal v The Commonwealth* (2009) 233 CLR 422.

on a matter of principle, to secure a declaratory order. In such cases, the legislature would continue to enjoy the last say. But at least the individual would then secure the attention of independent judges. Their declarations might sometime enliven parliamentary and administrative action. They might attract attention and overcome the kind of neglect of basic principles that was drawn to notice in the *Mabo* case. They might uphold the principle that all official action is truly subject to the law – and not only in a formal sense³¹.

AN INSTANCE OF IRREMEDEABLE WRONG

There are many instances, I believe, where this form of relief might help our representative democracy to work more effectively. However, a vivid recent case in point serves to illustrate my thesis. The case concerns a prisoner in South Australia, Mr James Watson³².

The facts of Mr Watson's case were simple. In 1985, a 14 year old school girl was murdered. Mr Watson was arrested in September of that year. He was charged with murder. At his trial, he was convicted and on 6 May 1986, he was sentenced to life imprisonment. On 28 August 1986, the sentencing judge fixed a non-parole period of 24 years, commencing from the day of his arrest. In 1994, under truth in sentencing legislation, this non-parole period was recalculated. It permitted an application for parole after Mr Watson had served 16 years and 5 months imprisonment. At about the same time as this recalculation occurred, Mr Watson suffered a stroke in prison. He experienced difficulties in walking. He faced many health and medical problems. He could only get about with a walking frame.

In accordance with his recalculated sentence, on 9 October 2001 Mr Watson applied to the Parole Board of South Australia for parole. In the event that this request was

³¹ *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 507-8, per Kirby and Callinan JJ. See also Robert French, "Administrative Law in Australia: Themes and Values" in M. Groves and H.P. Lee (Eds), *Australian Administrative Law: Fundamentals, Principles and Doctrine* (Cambridge, 2007), 18.

³² *Watson v South Australia* (2010) 208 ACrimR 1; [2010] SASFC 69. *Correctional Services Act*, 1982 (SA), s67(9).

rejected, the Parole Board was obliged to give reasons for its decision³³. In the event that the Board concluded that parole should be recommended, it was required to proffer its recommendation to the Governor of the State, indicating the proposed date of release and the period of parole to be served, for not more than three years nor more than ten years.

By the operation of the *Acts Interpretation Act 1915* (SA)³⁴, the reference to the Governor in the foregoing statute was a reference to the Governor acting with the advice and consent of the Executive Council, i.e. members of the elected government of the State. There is no provision in the legislation obliging the Governor to give reasons for the decision made on such a recommendation if the decision was to refuse release on parole. The Governor rejected the application. He gave and was advised to give, no reasons for his decision.

Following the first failed application, Mr Watson kept applying to the Parole Board. On five occasions, the Board recommended release. However, on each occasion, the Governor refused. This was despite the detailed and apparently persuasive recommendation in the Board's report. That report referred to the prisoner's remorse and insight into his crime; his general good behaviour whilst in prison; his serious health conditions; his immobility, which would make any repetition of his offence extremely unlikely; the strictness of the proposed supervision that was recommended; and the fact that the mother (although not the father) of the victim was reported not to oppose the release of the prisoner to parole.

The only clue as to a reason for the Governor's decision, was a reported statement of the then Premier of the State (the Hon. Mike Rann). He said:³⁵

“It is not the role of governments to be the rubber stamp... It is the role of Government to make a decision, and we made a decision. That decision, as far as I am concerned, is final.”³⁶

³³ *Ibid*, s67(6).

³⁴ Section 23.

³⁵ M. Rann quoted *The Advertiser* 24 April 2002: reproduced (2010) 208 ACrimR1 at 9.

³⁶ *Ibid* at 26-27.

Despite specific requests by Mr Watson, addressed to the Governor, for reasons for the repeated refusals to accept the decision of the Parole Board, no such reasons have ever been provided. The difficulty in which this placed Mr Watson was well described by Chief Justice Doyle in his reasons, when Mr Watson brought an application for judicial review to the Supreme Court of South Australia:³⁷

“Reasons for the Governor’s decision might assist Mr Watson to improve his prospects of release by identifying aspects of his circumstances or behaviour that was seen as an obstacle to release. As things stand, Mr Watson has no idea why the Governor has refused to release him on parole, and he is left contemplating a blank wall. The decision made by the Governor is a decision on his particular case. It has an impact on his hopes of regaining his liberty. Even if there be a rational link between... broad considerations of Mr Watson’s particular circumstances. So considerations of utility and justice... support a conclusion that in the particular circumstances of this case, reasons for decision are required.”

Notwithstanding these observations, the Full Court of the Supreme Court unanimously refused to provide relief. Whilst upholding the power of the court to examine the exercise by the Governor of his powers in accordance with law³⁸, the judges concluded, on the basis of their understanding of Australian law, that there was no duty to provide reasons; that the failure to provide such reasons was the result of the governing legislation; and that nothing in what had occurred amounted to a denial of natural justice or procedural fairness, authorising the intervention of the law.

At about the time Mr Watson had been convicted in 1986, an important decision was delivered by the High Court of Australia in *Public Service Board of New South Wales v Osmond*³⁹. That decision, in turn, reversed an earlier one reached by the Court of Appeal of New South Wales⁴⁰. In that case, Justice Priestley and I (with Justice

³⁷ Applying *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342 and *South Australia v O’Shea* (1987) 163 CLR 378.

³⁸ (1986) 159 CLR 606.

³⁹ *Osmond v Public Service Board of NSW* [1984] 3 NSW LR 477 (CA).

⁴⁰ *Osmond* (1986) 159 CLR 606 at 670.

Glass dissenting) held that the common law in Australia had advanced so as to impose upon officials, making administrative decisions seriously affecting the rights of individuals, to provide reasons for those decisions as a obligation to be implied into the power of decision-making afforded to officials by a democratic Australian legislature.

The High Court of Australia, led by Chief Justice Gibbs⁴¹, rejected this conclusion. However, Chief Justice Gibbs, and even more clearly, Justice Deane (in concurring reasons) conceded that, in particular circumstances, specially or exceptionally, an administrative decision-maker might be required to give reasons for the decision. No such “special” or “exceptional” circumstances were found in Mr Watson’s case.

In the theory over the control of the power of a government to take from an individual, indefinitely, or “finally”, *any* hope of liberty at *any* time in the future, those in the government who make such a decision are rendered answerable to elected representatives in Parliament. But those representatives, in turn, are most unlikely to raise, or pursue, such a matter. Certainly, this would be unlikely if the parliamentarians were not made privy to the reasons that had led to such a drastic decision. It would appear to be more drastic because made in the face of a sixfold recommendation by the specialist, multi-member body, ordinarily entrusted by legislation to making recommendations that will normally be acted upon.

As Chief Justice Doyle recognised, the lack of reasons in Mr Watson’s case undermined not only the prisoner’s capacity to mend his or her ways should that be necessary. It also undermines the capacity of rendering the political decision-makers accountable to the people for their decisions. By their silence, they effectively immured themselves from political accountability. And in any case, with or without reasons, it seems most unlikely that the fate of a prisoner such as Mr Watson would ever truly enliven the wrath of the electorate or present a genuine issue of political disquiet.

⁴¹ (1986) 159 CLR 606 at 675.

Cases such as *Watson* tend to show the dead-end that is reached in Australia in pursuit of constitutional accountability, at least where unpopular individuals and minorities are concerned. It is precisely for such cases that most countries have now adopted bills or charters or statutes of rights. They have done so in order to defend minorities against the possibilities of injustice or indifference on the part of the majority to the basic principles of justice and the rule of law applicable to such a case.

A further factor operating in *Watson* was not mentioned in the reasons of the South Australian court. Yet it is unlikely to have escaped the notice of the judges. In previous times, the High Court of Australia had recognised the entitlement of intermediate courts, such as the Full Court of the Supreme Court of South Australia, to repair defects in the law or to extend principles in the common law or equity left open by any earlier reasoning of the High Court⁴². In recent years, however, the High Court Justices have strongly castigated the judges of the intermediate courts where they sought to elaborate principles in the face of contrary indications from the apex court.⁴³ Although this approach has been questioned in law journals,⁴⁴ it is the possibility of a sharp rebuke, for failing to conform to the reasoning in *Osmond*, that might have restrained intermediate judges from exploring the potential of exceptions to the *Osmond* rule, presented by “special” or “exceptional” cases.

It is this expansion of reasoning that has seen progress being made in England, so far as the right to reasons for administrative decisions of serious consequences. In that country, such “exceptional” cases, obliging the giving of reasons, have extended to the failure to give reasons “for the length of the penal element period of [a] sentence, such as life imprisonment.”⁴⁵ In one such case, as Justice Peek noted in the South Australian full Court, Lord Mustill concluded that it was particularly unfair that a prisoner, facing life imprisonment, should be left in the dark.⁴⁶

⁴² *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [17]; contrast at 418 [59], See also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2001) 230 CLR 89 at 149 [131].

⁴³ Peter Young “Authority of the High Court of Australia” (2012) 83 *Australian Law Journal* 7.

⁴⁴ *R. v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531.

⁴⁵ *Ibid* [1994] 1 AC 531 at 565 per Lord Mustill (Lords Keith of Kinkel, Lane, Templeman and Browne-Wilkinson concurring) see also *Watson* (2010) 208 ACrimR1 at 31 per Peek J.

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“Contrast this with the position of the prisoner sentenced for murder. He never sees the Home Secretary; he has no dialogue with him; he cannot fathom how his mind is working. There is no true tariff, or at least no tariff exposed to public view which might give the prisoner an idea of what to expect. The announcement of his first review date arrives out of thin air, wholly, without explanation. The distant oracle has spoken, and that is that ... I therefore simply ask, is it fair that the mandatory life prisoner should be wholly deprived of the information which all other prisoners receive as a matter of course. I am clearly of the opinion that it not.”

The *Watson* case is, I believe, exactly the type of case that a bill or charter of rights might address. It is the type of case that tests both the theory and practice of Australian law and its commitment to constitutionalism. Unaccountable power is antithetical to our system of government. Unreasoned decisions feed and sustain unaccountable power. No lawyer, no judge and no citizen should feel comfortable about such an outcome. The courts have declared that it is the law. But we can reform and improve the law. It is one that should be taught in law schools, written in our books, practiced in our courts and upheld in our decisions.

THE LINE IN THE SAND

Some observers will be unmoved by Mr Watson’s plight or by the legal outcome in his case. Or by his complaints about unfairness. They may say that all such problems should be solved by Parliaments, although they know that, in a practical world, which is a pipe dream. They may say that any such injustices will be solved by law reform agencies; although they know that this will all happen because such bodies are pale shadows of their former state. In any case, those bodies usually depend on the government for a reference and resources. And neither is forthcoming.

Some may say the media will speak up against such injustice. But the problem with media is that it is a flighty and fickle champion. Indeed, it is often part of the problem, as the tabloid law and order campaigns against prisoners illustrate.

We can do better. Most nations try to do better. Many regions of the world do better. Our record in Australia is not so perfect that we can leave things as they are.

In the end one's reaction to such questions depends on assessments and expectations of our institutions of governance and on our empathy for those on the receiving end of apparent injustice and oppression. I like to think that Austin Asche's lifetime engagement with the substance of law and with often vulnerable victims of the law will have brought him, as it has brought me, to a belief that Australians need to renew their instruments of justice. And, relevantly, this means the adoption of a national Charter of Rights – just as the Brennan Committee proposed.