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ANNOTATED GUIDE TO THE HUMAN RIGHTS ACT 2019 (QLD)

BY NICKY JONES

FOREWORD

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In February 2019, Queensland became only the third jurisdiction in Australia to adopt a *Human Rights Act*. It followed the adoption of earlier statutes enacted by the legislatures of the Australian Capital Territory and Victoria. I congratulate the author of this text for writing this excellent and practical work to introduce judges, practicing lawyers, civil society and ordinary citizens to the contents of the *Human Rights Act 2019* (Qld). It will help to introduce readers to the large concepts that are explained in these pages.

Australia inherited the English legal tradition. Until recently lawyers trained in Australian law schools emerged from their studies with a general prejudice against broad concepts of universal human rights. Substantially, these were seen as unsuitable to the functions of courts and other bodies, identifying the applicable law in an individual matter. With the exception of the United States of America, in the aftermath of its Revolution, virtually all countries of the old British Empire, until the 20th century, resisted the notion of statements

[*] Deputy President, Australian Conciliation and Arbitration Commission (1975-83); Chairman of the Australian Law Reform Commission (1975-84); President, NSW Court of Appeal (1984-96); Justice of the High Court of Australia (1996-2009); and Honorary Life Member of the International Bar Association 2022.

of fundamental human rights. They considered that these would lack the particularity appropriate to specific law-making. They would divert the judiciary to resolving large questions of policy and principle that were properly the province of legislature. In the modern age, they would break down the dualist tradition by which international treaties expressing universal human rights were only incorporated into domestic law by specific legislation enacted for that purpose.

Moreover, legislation was considered unnecessary, in fact, because the democratic parliament would ensure that, if defects were alleged in the law, they would be promptly corrected by the legislature, if that were truly needed and desired. On the whole, democratic legislatures did amend laws that were seen to be incompatible with basic rights. Moreover, the common law, which formerly played a larger part in the declaration of legal principles, would often introduce notions protective of liberty and sensitive to human dignity, through techniques of interpretation that gave preference to such values. A large helping of self-satisfaction and excessive pride in the corrective elements of ancient institutions led to disparagement of most jurisdictions of the Commonwealth of Nations to human rights statutes.

Yet, one by one the jurisdictions of the old Empire gave way to the adoption of human rights laws, either in independence constitutions of former colonies or in specific legislation designed to promote and encourage respect for the broad principles of human rights that were emerging in the international community of the United Nations.

The notion that the legislature would always "fix up" statutory or common law provisions was increasingly shown to be wrong. In part, this was because the democratic process did not always yield a fair opportunity to minorities to express, and secure respect for, their basic rights and dignity. In Australia, doubts about the adequacy of Parliament as a way of ensuring universal respect for fundamental human rights gave way to the idea that constitutional provisions, specific legislation and developments of the common law itself needed stimulus and fresh techniques.

A prime example of this irksome realisation came in 1992 by the 6:1 decision of the High Court of Australia in *Mabo v Queensland [No.2]* 1992 175 CLR 1. Whereas in earlier generations Australians were unconcerned about, or indifferent to, discrimination on racial grounds against First Nations People in the denial of land rights. By 1992, this was seen to be an unacceptable legal outcome. Yet to this day, Australia is now basically the only advanced legal system in the world that does not provide a "Bill of Rights" or equivalent in its Constitution. Whilst the adoption of such a measure seems so necessary and essential in most countries, this has not been the case in Australia.

It was against this background, and the defeat or failure to adopt federal legislation of broad ambit on this topic, that sub-national jurisdictions began to adopt their own laws. As I have said, Queensland is the third jurisdiction to do this. Because it involves an idea regarded, even recently, as "heretical" or "dangerous" to a good number of Australian citizens, enactment of the *Human Rights Act 2019* (Qld) inescapably challenges many long held concepts about law-making and the best way to ensure that fundamental

rights will be upheld, even where legislatures have rejected or overlooked them.

Several features of the adoption of such sub-national legislation for human rights in Australia have been emphasised in defending the enactment of *Human Rights Acts*:

- An increasing realisation of the inadequacies, imperfections and failures of the past;
- A realisation that such legislation can avoid unintended or unforeseen abuses of basic principle by affording additional scrutiny of the massive flow legislation (not necessarily in the courts) so as to ensure conformity with fundamental human rights; and
- An increasing perception that such new legislation may be used to teach children and other citizens about the fundamental principles governing the way by which we live together in relative harmony.

The passage of the *Human Rights Act 2019* (Qld) and legislation like it has afforded different Australian jurisdictions opportunities to experiment with new procedures and methodologies considered appropriate to testing the law and policy of the jurisdiction against the touchstone of fundamental human rights.

One feature of the Queensland Act that is novel has been (as the Attorney-General said when the Act was adopted by Parliament) “[t]he primary aim of the legislation is to ensure that respect of human rights is embodied in the

culture of the public sector, and that public functions are exercised in a principled way that is compatible with human rights".

Some critics of the failure to do this earlier pointed to serious defects in public administration in Queensland in the 1970s-1980s. The memories of that time and of the failure of legislature to provide redress against conduct viewed widely as fundamentally wrong led to the enactment of the 2019 statute. Moreover, it contributed to the adoption in the Queensland Act of special remedies to address the intersection of Queensland public entities and the communities they serve. This is not a statute that relies only on courts and judicial process to improve the culture of legal exposition and operation. The Queensland Act goes further than the ACT law and the *Victorian Charter of Rights and Responsibilities* by protecting rights to education and health services. Conventionally, these have been seen as lying outside the civil and political rights more commonly to appearing in such legislation. Given the special responsibilities of sub-national governments in Australia to protect rights to education and health services, it is unsurprising that particular efforts were made in Queensland in the 2019 Act to afford protections not hitherto found, in express terms, in any Australian legislation.

The 23 rights enshrined in the Queensland Act are, for the most part, designed to give effect to Australia's obligations following its ratification of the *International Covenant on Civil and Political Rights* (ICCPR). That covenant was adopted by the United Nations General Assembly in December 1966. On the initiative of the Federal Government it was ratified, in August 1980. By additionally ratifying the First Optional Protocol to the ICCPR, Australians were, for the first time, given the entitlement to

communicate with the UN Human Rights Committee. They could complain about any failure they alleged on the part of Australian law to conform to the ICCPR.

This additional remedy was quickly availed of. It gave Australians a right of complaint to a UN body, which they did not enjoy in remedies afforded by their own courts and officials. It was this disharmony of rights for redress under Australian law and under international law that eased the path to the re-expression of the common law, as occurred in *Mabo v Queensland [No.2]* 1992 175 CLR 1 at 42. This, therefore, is a still developing area of the law in Australia. Sometimes it is hotly contested. That is a healthy feature of subjecting earlier Australian law and governmental practice to measurement against international and national standards of fundamental human rights. The task may be controversial and sometimes disputed. However, the enactment of the *Human Rights Act 2019* (Qld) now affords individuals potential remedies to redress features of fundamental human rights where State law is alleged to be defective or silent.

At first, doubtless, the application of the Act will be uncertain and often contested. But the value of this book is that it not only draws on the rich development of human rights jurisprudence in other jurisdictions within Australia; but also in the many courts and institutions around the world that are daily considering applying and enforcing fundamental human rights in ways appropriate to local entitlement.

The record of the commentaries on the developments that have occurred in other jurisdictions, in Australia and beyond, will make this text invaluable to

those who use it. Out there in the wider world, experienced and principled decision-makers are constantly measuring laws and policies against standards commonly expressed in the same or comparable language. It has taken Australia a long time to get to this point. Most parts of our country have still not done so. Universal human rights is a living tree of basic principles. This book will help translate those principles from text on a page to actions and decisions of courts and officials in Queensland. It will enliven concepts in the minds of individuals claiming justice and basic rights to whom the principles of human rights are ultimately addressed.

11 November 2022 Michael Kirby