WORKSHOP SESSION 1B: HUMAN RIGHTS AND PRO BONO LEGAL SERVICES

A SURVEY OF THE SOURCES OF HUMAN RIGHTS IN AUSTRALIAN LAW AND A CONSIDERATION OF HOW EFFECTIVELY HUMAN RIGHTS ARE PROMOTED AND PROTECTED UNDER AUSTRALIAN LAW

Cathy Scalzo, Senior Associate
Allens Arthur Robinson

Abstract: *We may not have a bill of rights in Australia but human rights protection can be found in legislation, the common law, administrative law, our Constitution and international instruments. This paper surveys the sources of human rights law in Australia and gives consideration to how effectively human rights are promoted and protected under Australian law. This paper was presented at the conference in a session focused on how pro bono lawyers can rely on human rights to promote and protect their clients' interests in their dealings with corporations, governments and other agencies.*

1. Introductory Remarks

Protecting and promoting human rights through the rule of law requires that human rights be articulated in legal terms and that mechanisms exist for their enforcement by those directly affected by their breach.[1] In Australia, where there is no bill of rights or other legal document setting out basic human rights, human rights are articulated in and enforced by a somewhat random combination of legislation, the common law, administrative law and the *Australian Constitution*. As a result, the ability of the Australian legal system to promote and protect the full range of human rights articulated under international law is extremely limited.

[1] David Kinley, in Human Rights in Australian Law: Principles, Practice and Potential, David Kinley (ed), The Federation Press, 1998, 18.

2. Drawing on International Human Rights Where a Treaty Has Been Directly Incorporated into Australian Law

Under the *Australian Constitution* the Commonwealth Parliament has no specific head of power to legislate with respect to human rights. This has tended to reinforce Australia's reliance for human rights protection on international human rights covenants. International human rights covenants, like all international law, became part of Australian law by 'legislative incorporation'. The principle of legislative incorporation provides that the provisions of ratified treaties and other international instruments do not become part of the national law unless they have been enacted in legislation.[2] To the extent that international human rights standards are derived from treaties it is the Parliaments of Australia, (both Federal and State) that have primary responsibility for giving effect to international human rights standards.[3] For over a century Australian judges strictly adhered to the principles that 'treaties [including international human rights treaties] do not have the force of law nor do they vest individuals with rights under Australian law unless they are given that effect by statute'.[4]

To the extent that courts are required to determine questions pursuant to international human rights instruments that have been incorporated into legislation it is entirely logical and relatively uncontroversial that courts should draw on international human rights principles and jurisprudence to decide such cases. This occurs regularly in respect of the provisions in *Convention on the Status of Refugees* although there are increasing

---

[2] Other former British colonies, such as New Zealand and Canada, also rely on legislative incorporation.
[3] Justice Michael Kirby, in Kinley (ed), above n 1, vi.
[4] Gibb CJ in *Kioa v West* (1985) 159 CLR 550, 577 and *Simsek v McPhee* (1982) 148 CLR 636, 641.

examples in other fields of law.[5] Where practitioners are acting in matters that involve legislation based on international human rights covenants practitioners can and should draw on international human rights standards and jurisprudence to encourage the courts and administrative bodies to interpret and apply the legislation in the manner that best serves the best interests of their clients.

3. Drawing on International Human Rights Standards Where a Treaty Has Not Been Directly Incorporated into Australian Law

In recent times, some Australian High Court judges have shown themselves willing to acknowledge that the incorporated/ unincorporated dichotomy over-simplifies the way treaty-based (and customary) international human rights standards can be drawn on in judicial decision-making.

> *The concepts and language [of incorporated as opposed to unincorporated international norms] lack the sophistication to capture the more nuanced reality that there are many different ways in which international law may be of relevance to an issue before a domestic court. A norm of international treaty law may not be 'part of' domestic law in the sense that it gives rise to a right or an obligation which is directly enforceable in domestic courts and on which individuals may therefore found their case, but, in so far as judicial recourse to it is permitted by treaty presumption, to assist in interpretation of domestic statute law or its customary or near-customary status provides guidance on the development of domestic common law, it is clearly of legal relevance.*[6]

---

[5] For various examples see Justice Michael Kirby, 'Domestic Implementation of International Human Rights Norms' (1999) 5 *Australian Journal of Human Rights* 27.

[6] M Hunt, 'Using Human Rights in English Courts' as quoted in W.Steiner & P. Alston, *International Human Rights in Context,* Oxford University Press 2000, 1012.

In *Dietrich v The Queen*[7] Mason CJ and McHugh J stated the basic legislative incorporation principle but they did not expressly rule out the possibility that the obligations of the International Covenant on Civil and Political Rights (ICCPR) and, by implication, other treaties which set human rights standards, may have an indirect legal effect on the domestic laws of Australia.

> *Ratification of the ICCPR as an executive act has no directly legal effect on domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions.*

As we will see, increasingly, albeit rather haphazardly, even when not incorporated by enactment, international human rights standards and the treaties and customary international law principles from whence they are drawn, are being given 'informal status' by Australian courts.[8]

A. International Human Rights Standards May Affect Australian Law Indirectly, by Shaping the Development of the Common Law

Mabo v Queensland (Mabo No 2)[9] was the high-water mark in the High Court's willingness to look to international human rights standards to develop the common law, with some of the judges drawing on international norms with spectacular and significant effect. In *Mabo (No 2)* Brennan J (with whom Mason CJ and McHugh J agreed), discussing the basis for recognising the continued existence of traditional native title stated that:

---

[7] (1992) 177 CLR 292.
[8] P Bayne, 'Administrative Law, Human Rights and International Humanitarian Law' (1990) 64 *Australian Law Journal*, 203.
[9] (1992) 175 CLR

The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's succession to the Optional Protocol to The International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[10]

Since *Mabo (No 2)*, the High Court has sporadically continued to acknowledge a role for international law in the construction of the common law but its approach appears to have been more cautious[11] and the application of the principle infrequent. In *Dietrich v The Queen*, Mason CJ and McHugh J expressed the view that the use of international law is only legitimate when the common law is ambiguous or uncertain. On that basis they were not prepared to apply international human rights norms, including rights provided for in the ICCPR, to support the right of an accused person to counsel at public expense as such a rights had hitherto never been recognised in the common law.[12] In *Minister for Immigration & Ethnic Affairs v Teoh*[13] Mason CJ and Deane J said that courts should rely on international law with 'due circumspection when the Parliament itself has not seen fit to incorporate the provisions of convention into our domestic law'.

---

[10] Ibid 42.
[11] See also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 499 per Mason CJ and Toohey J in which it was held that Chapter III of the Constitution did not protect the right against self-incrimination.
[12] (1992) 177 CLR 292, 306.
[13] (1995) 183 CLR 273, 288.

B. International Human Rights Standards May Indirectly Affect Australian Law in the Interpretation of Statutes.

There has been increasing judicial recognition in Australia, consistent with section 15AB(2) of the *Acts Interpretation Act 1901* (Cth), that treaties and other international agreements may be referred to for the purpose of construing an Act. In fact, the courts have gone further than the wording of section 15AB(2)[14], developing a presumption of interpretation which provides that in a case of ambiguity, the construction of a Commonwealth statute which accords with Australia's obligations under an international treaty should be favoured.[15] To the extent that international human rights standards are contained within an international treaty, they may therefore be relied on in judicial decision-making which requires the interpretation of a statutory provision.

This use of international human rights law as a canon of construction does not import the terms of the treaty or conventions into the municipal law as a source of individual rights and obligations.[16] Nor does it mean that the rules of international law are capable of overriding statutes. If there is a clear inconsistency between a statute and international law, the statute will prevail so that a person may be bound by a statute even where that statute is in breach of international law.[17] For example, in *Horta v Commonwealth*, the majority rejected a submission that the *Petroleum (Australia-Indonesia Zone of Cooperation) Act,* which gave effect to the Treaty between Australia and the Republic of

---

[14] George Williams, *Human Rights under the Australian Constitution*, Oxford University Press, Australia, 1999, 21, 22.
[15] Brennan, Dean and Dawson JJ said in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38. The approach was expressly endorsed by Gummow and Hayne JJ in *Doreen Kartinyeri v Commonwealth* (1998) 152 ALR 540, 571.
[16] Per Mason CJ and Deane J in *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.
[17] See *Polites v Commonwealth* (1945) 70 CLR 60 and *Horta v Commonwealth* (1994) 181 CLR 183, 195.

Indonesia on the Zone of Cooperation in the area between the Indonesian Province of East Timor and Northern Australia (the "*Treaty*"), was invalid because the Treaty was inconsistent with or in breach of Australia's obligations including international human rights obligations under customary international law, the United National Charter and the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*). Instead, the High Court affirmed that no provision of the *Australian Constitution* confines legislative power with respect to external affairs to the enactment of laws which are consistent with, or which relate to treaties or matters consistent with the requirements of international human rights (or any other international) law.

In *Newcrest Mining (WA) Ltd v The Commonwealth*[18], Gummow and Hayne JJ said the *Hindmarsh Island Bridge Act* 1997 (Cth) could not be invalid by reason of its alleged inconsistency with international anti-discrimination legal principles. Their Honours said that the Act was to be interpreted and applied in conformity, and not in conflict, with any relevant established rule of international law *only in so far as its language permitted*. Its language was unambiguous so the principle of construction that allowed for recourse to international legal principles did not apply.

In *Teoh*, Mason CJ and Deane J agreed with the general rule of construction that permitted reliance on international law, adding that it should be applied 'at least in those cases in which the legislation is enacted after, or in contemplation of entry into, or ratification of the relevant international instruments. This is because Parliament *prima facie* intends to give effect to Australia's obligations under international law.'[19] It remains

---

[18] (1997) 147 ALR, 42.
[19] (1995) 183 CLR 273, 287.

to be seen whether this dicta is applied in subsequent decisions to restrict the application of the rule of construction to only those situations where the legislation is enacted after, or in contemplation of entry into, or ratification of the relevant international instruments.

C. Treaties May Affect Australian Law Indirectly, Through Australia's Treaty Obligations Impacting on Administrative Law

The decision of the majority in *Minister for Immigration and Ethnic Affairs v Teoh*[20] extended the impact of ratifying an international instrument beyond the established classes referred to above and into the arena of administrative decision-making and procedural fairness.

In *Teoh* Mason CJ, Deane and Toohey JJ accepted as correct the majority of the Full Court of the Federal Court's decision that the ratification of the *Convention on the Rights of the Child* could, notwithstanding that it was not implemented by legislation, form the basis for the existence of a legitimate expectation in an applicant for resident status that the Immigration Minister's delegate would take into consideration the requirement in Article 3.1 of the *Convention on the Rights of the Child* that in all actions concerning children the best interests of the child 'shall be a primary consideration' and that a failure to do so amounted to a want of procedural fairness. Mason CJ and Deane J said:

> *Ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this*

[20] (1995) 183 CLR 273.

country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent any statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as a primary consideration.[21]

D. International Human Rights Standards May Indirectly Affect Australian Law by Influencing Constitutional Interpretation.

In the *Engineers case*[22] the High Court said that the *Australian Constitution*, as an Act of the British Parliament, should be interpreted according to the ordinary rules of statutory construction. If international law can play a role in the interpretation of statutes it is at least arguable that it can assist in the interpretation of the *Australian Constitution*.[23] An important part of the application of constitutional rights is the search for appropriate norms to underpin the development of the particular right or to assist with the balancing of a right as against other community interests. The development of human rights standards in international law is a potential source of appropriate norms.[24] International law, and international human rights standards in particular, therefore have 'enormous unrealised potential for the construction of the express and implied rights in the *Australian Constitution*'.[25]

However, the use of international law in constitutional interpretation has yet to gain the

---

[21] Ibid 365.
[22] (1920) 28 CLR 129, Knox CJ, Isaacs, Rich and Starke JJ, 148- 50 and Higgins J, 161-2.
[23] A precedent for this exists in a former British colony. Section 39(1) (b) of the *South African Constitution* provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.
[24] Williams, above n 14, 22.
[25] Justice Michael Kirby, 'The Australian Use of International Human Rights Norms From Bangalore to Balliol - A View from the Antipodes', (1993) 16 *University of New South Wales Law Journal* 363, 390.

same acceptance in Australia as its use in construing the common law and statute law. In *Polites v Commonwealth*[26] the High Court rejected a submission that the Commonwealth legislative power with respect to defence in s 51 (vi) of the *Australian Constitution* should be read as subject to a restriction derived from customary international law that one nation was not allowed to compel the nationals of third countries, without its consent, to fight in a war with a third country. Dixon J said:

> *The contention that 51(vi) of the Australian Constitution should be read as subject to the same implication (as a Commonwealth statue), in my opinion, ought not be countenanced. The purpose of the Part V of Chapter I of the Australian Constitution is to confer upon an autonomous government plenary legislative power over the assigned subjects. Within the matters placed under its authority, the power of the Parliament was intended to be supreme and to construe it down by reference to the presumption is to apply to the establishment of legislative power a rule for the construction of legislation passed in its exercise. It is nothing to the point that the Constitution derives its force from an Imperial enactment. It is nonetheless a Constitution.*[27]

In *Horta v Commonwealth*, the High Court affirmed that no provision of the *Australian Constitution* confines legislative power with respect to external affairs to the enactment of laws which are consistent with, or which relate to treaties or matters consistent with the requirements of international law.[28]

This is consistent with the traditionally conservative approach the courts in Australia have taken in construing the *Australian Constitution* and is partly explained, as Dixon J stated, by the nature of the document reinforced by the fact that fact that the text of the *Australian*

---

[26] (1945) 70 CLR 60, 78.
[27] This statement was cited with approval by Gummow and Hayne JJ in *Doreen Kartinyeri and Anor v The Commonwealth of Australia* (1998) 152 ALR 540, 571.
[28] (1994) 181 CLR 183, 195.

Constitution can only be altered with the authority of the Australian people, qualified to vote and expressed through a referendum.[29]

The only express judicial statements which support a principle which would permit reliance on international law when interpreting the *Australian Constitution* have come from Justice Michael Kirby. In *Newcrest Mining (WA) Ltd v The Commonwealth*[30], expressly adapting what Brennan J said in *Mabo (No 2)* about the international law's influence over the development of the common law Kirby J said:

> *International law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as a basic law of the Australian nation, which is a member of that community.*

In *Newcrest Mining*, Kirby J relied on his formulation of the principle to support his conclusion that section 51(xxxi) of the *Australian Constitution*, which requires that the Commonwealth afford just terms in any acquisition of property, must apply to laws passed by the Commonwealth for the Territories. Kirby J referred to Article 17 (2) of the Universal Declaration of Human Rights (*UDHR*) which states that 'no one shall be arbitrarily deprived of his property' and to other international and foreign domestic jurisprudence which

---

[29] *Australian Constitution*, s 128.
[30] (1997) 147 ALR 42, 148.

supported the existence of such a principle as a fundamental human right and a norm of customary international law. He said:

> *When the forgoing principles, of virtually universal application, are remembered, it becomes even more astonishing to suggest that the Constitution, which in 1901 expressly and exceptionally recognised and gave effect to the applicable universal principle, should be construed today in such a way as to limit the operation of that express requirement in respect of some laws made by its Federal Parliament but not others. Where there is an ambiguity in the meaning of the Constitution, as there is here, it should be resolved in favour of upholding such fundamental and universal rights.*[31]

Kirby J adopted a similar approach in his dissent in *Doreen Kartinyeri and Anor v The Commonwealth of Australia*[32], citing customary international law[33] and the various conventions[34] which prohibit discrimination on the basis of race to support his conclusion that the Commonwealth race power in 51(xxvi), as amended by the *Constitution Alteration (Aboriginals)* 1967 (Cth), did not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race).

Justice Michael Kirby's vision of the *Australian Constitution* as a document that speaks to the international community is a novel concept in Australian constitutional law because "it challenges the traditional insular focus of the Australian Constitution as an instrument concerned only with Australian governance."[35] His willingness to apply international law, especially when it declares the existence of universal and fundamental rights to the

---

[31] (1997) 147 ALR 42, 147.

[32] (1998) 152 ALR 540, 598-9.

[33] Justice Tanaka in *South West Africa Cases (Second Phase)* [1966] ICJR 3, 293.

[34] See *United Nations Charter* 1945, Arts 1(3), 55 (c), 56; UDHR . Art 2; CERD, Arts 1(1), 1(4), 2, 6; ICCPR, Art 2(1) ;ICESCR Art 2(2); *Declaration on Race and Racial Prejudice* 1978. Art 9(1). It is interesting to note that in Kirby's own words at p. 146 in *Newcrest Mining* the Universal Declaration is not a treaty, it is not part of Australian domestic law, still less is it part of the Constitution and although Australia had signed the CERD, ICCPR and ICESCR it had not, at the time of the 1967 referendum, ratified any of those conventions.

[35] Williams, above, n 14, 23.

interpretation of the *Australian Constitution*, has yet to be embraced by other members of the High Court. It cannot be overstated that it may be some time, *if at all*, before his approach becomes conventional wisdom.

4. Is the Full Range of Human Rights Adequately Promoted and Protected in Australia?

This paper is based on the premise that legal enforcement is an essential component of any system that purports to adequately promote and protect human rights. If determining the range of human rights that is promoted and protected in Australia we need to go beyond looking exclusively at the increased reliance by the judiciary on international human rights standards in its decision-making. There are other important strands in the complex web of human rights protection and promotion in Australia.

> *The practical (as opposed to conceptual) mechanics of the legal dimension of human rights operate, in reality, in a continuum of interrelated and overlapping processes, sequences and manifestations of human rights propagation. There are, what is more, a number of institutions both public and private, and sets of sub-systems (Australia's nine jurisdictions and more or less distinct spheres of the legislature, the executive, the bureaucracy and the judiciary in each) that all have an impact on the precise form in which the law deals with human rights.*[36]

A comprehensive review of all of these mechanisms and institutions is beyond the scope of this paper.[37] Instead, this paper considers the adequacy of the protection and promotion of human rights afforded by the judiciary in the context of the principal legal mechanisms that the judiciary interprets and enforces, namely legislation, the common law

[36] Kinley (ed), above n 1.
[37] For such a review see Kinley (ed), above n 1.

and administrative and constitutional law. The review of those mechanisms reveals that for a number of reasons the system for protecting and promoting the full range of human rights in Australia remains inadequate. This paper also briefly considers whether these inadequacies are in any way alleviated by Australia's accession to the *First Optional Protocol* to the ICCPR.

A. Human Rights and Legislation

The human rights legislation that has been implemented at the Commonwealth and state level is unsystematic and falls wildly short of comprehensive protection required by the principal human rights instruments.

Since the *Commonwealth v Tasmania*[38] it has been clear that the Commonwealth's power to legislate with respect to external affairs[39] enables the Commonwealth to pass legislation to implement obligations it has incurred by becoming a party to international instruments. Notwithstanding that the external affairs power is wide enough to enable Federal Parliament to legislate to enact a statutory bill of rights by implementing its obligations under the various human rights conventions Australia has ratified[40], Federal Parliament

[38] *(1983)* 158 CLR 1
[39] *Australian Constitution*, s 51(xxix).
[40] See above n 3.

has not done so, preferring instead to adopt a less systematic approach.[41]

That unsystematic approach has involved the Commonwealth passing some pieces of legislation which draw directly on instruments that set international human rights standards. The most significant international human rights-oriented legislation passed by the Commonwealth (and mirrored to varying degrees by the states and territories) in reliance on the external affairs power has been in the area of anti-discrimination. In particular, the Commonwealth has passed the *Racial Discrimination Act 1975* (Cth) which relies on the International Convention on the Elimination of all Forms of Racial Discrimination (***CERD***), the *Sex Discrimination Act 1984* (Cth) which relies on the Convention on the Elimination of Discrimination Against Women (***CEDAW***), the *Disability Discrimination Act 1992* (Cth) which relies on the *International Labour Organisation Convention 111 – Discrimination (Employment and Occupation) Convention*, the ICCPR, and the ICESCR. Other legislative enactments outside the anti-discrimination field have been more limited. They include legislation protecting the right to engage in sexual conduct in private (*The Human Rights (Sexual Conduct) Act* (Cth)[42], various economic rights, including freedom from unfair dismissal,[43] and the adoption into the *Migration Act 1958* of the *Convention Relating to the Status of Refugees*.[44]

In addition, the Commonwealth has also introduced the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), pursuant to which the Attorney-General has

---

[41] Williams, above n 14, 19.
[42] See the discussion about the *Toonen* Case at p37 below.
[43] Parliament is not bound to meet all of its obligations under a treaty, nor must it meet any particular obligation fully or exactly see *Victoria v Commonwealth (Industrial Relations Act case*)) (1996) 187 CLR 416 at 488 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.
[44] The Convention was completed in Geneva on 28 July 1951 and amended by the *Protocol Relating to Status of Refugees* which was completed in New York on 31 January 1967.

declared that various international instruments relate to human rights and freedoms.[45] However, it is clear that a declaration under the Act does not make a convention part of Australian law.[46] At best, the declarations operate as a political rather than a legal barrier to a government considering a breach of the rights provided for in the Convention. Moreover, the Human Rights and Equal Opportunity Commission is entrusted with monitoring Australia's compliance with the Conventions declared under the Act. Consistently with the Australian legal system's failure to afford adequate protection to economic, social and cultural rights, the ICESCR is a significant omission from the list of conventions declared under the Act to date.

As discussed below, the human rights provided for in the *Australian Constitution* and the common law have tended to be concerned with imposing limitations on governmental action. One of the advantages of domestically legislating international human rights standards and one of the reasons why the absence of comprehensive legislation contributes to the inadequacy of human rights promotion and protection in Australia is that legislation can create human rights obligations between individuals. Collectively, the anti-discrimination statutes in Australia grant private persons rights of action against other private persons, such as employees against employers, customers against goods and service providers.[47] To make human rights protection more effective in Australia the traditional delineation between the public and private spheres will need to be further broken down. This is because:

> *Today, it is the exercise of private rather public power that poses the greatest threat to the basic rights of Australians. The increasing privatisation of government and the*

---

[45] Section 47(1) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).
[46] per Mason CJ in *Teoh*, 363. Compare Nicholson CJ in *Re Marion* (1990) 14 Fam LR 427, 449.
[47] Williams, above n 33, 11

> *corresponding exercise of what had been considered to be public power by large corporations means that it may be appropriate to constitutionally guarantee rights as against non-government action.*[48]

The doctrine of parliamentary sovereignty in Australia is a factor which plays a significant role in diminishing the adequacy of human rights protection in Australia. Parliamentary sovereignty means that Parliament has a right to make or unmake any law whatsoever, including the law of a predecessor Parliament. This means that even the legislation which currently exists to protect and promote human rights can be overturned by the current or future Parliaments. Because there is no strict legal limitation on Parliament's ability to pass legislation which amends or repeals human rights legislation, such legislation at best acts a political obstacle to restricting rights and then only in some circumstances. One example where such legislation has so operated was when the need to amend the *Racial Discrimination Act* acted as a barrier to the extinguishment and modification of the native title rights by the Federal Parliament.

Some commentators have argued that the principles that have been developed in other former British colonies such as Canada and New Zealand demonstrate that the doctrine of parliamentary sovereignty can encompass the notion that legislation can only abrogate a fundamental right that is already recognised by statute where the intent of the Parliament to do so is clear and unambiguous as is the case in respect of fundamental rights recognised by the common law. However, even if the principle were adopted by the judiciary in Australia, fundamental rights could still be overridden by an express parliamentary intention.

The prevailing view amongst law-makers in Australia continues to be that, as the expression of the democratic will, Parliament is the body most suited to the oversighting the preservation and enhancement of human rights in Australia.[49]

However, one of the problems with a system which allows the legislature the final say in the protection and promotion of human rights is that it fails to take account of the fact that many of the individuals or groups in need of human rights protection lack political power.

> *Human rights essentially concern the protection of minority rights from arbitrary erosion or violation by the majority. The legislature, which relies on majority support, cannot be expected routinely to risk political self-destruction by promulgating minority causes; on the other hand, the courts, who do not rely on any constituency, risk nothing in protecting them. What body can better attenuate the impact of majoratorium expectations when they may unfairly circumscribe minority ones, than a body which does not depend for its survival on popularity with the majority?*[50]

The increased frequency with which Australia's indigenous peoples have used judicial processes to promote or protect their human rights is at least partly a reflection of their inability to secure their rights through the legislative or executive action. The human rights of refugees and asylum seekers, who may never exercise a right to vote in Australia, are

---

[48] Ibid 265.

[49] Commonwealth, *Australia's Efforts to Promote and Protect Human Rights*, Joint Committee on Foreign Affairs, Defence and Trade of the Commonwealth Parliament, Australian Government Printer, 1994, pp i-xl.

[50] Madam Justice Rosalie Silberman Abella, *Human Rights and the Judicial Role*, 9th Australian Institute of Judicial Administration Incorporated in Judicial Administration, delivered at the School of Electrical Engineering and Computer Science, University of Melbourne, 23 October 1998, Australian Institute of Judicial Administration Incorporated, 1998, 16.

also particularly vulnerable to the rule of the majority.[51] The same can be said of homeless persons, who confront significant barriers to exercising their civil and political rights under existing electoral laws.

Furthermore, in recent years there have been shifts in the distribution of power amongst the political arms of government which undermine the trust Australians have traditionally placed in the ability of representative democracy to promote and protect human rights. In particular, a number of commentators have observed that Members of Parliament have become less responsible to their electorates and increasingly responsible to their parties[52] and that the Executive appears to exercise increasing dominance over the Parliament.[53] These political trends have been accompanied by largely unchallenged reign of economic rationalist orthodoxy in government policy-making in which human rights priorities have been subjected to economic priorities. As the Executive moves further away from the goal of mainstreaming human rights, that would see human rights become 'the central driving force of all governments',[54] the protection and promotion of economic, social, and to a lesser extent, cultural rights has suffered. This has not gone unnoticed. The recent review by the Human Rights Committee of Australia's compliance with ICESCR highlighted, inter alia, the potential incompatibility of Australia's free market economic policies with the protection and promotion of the rights under the Convention.[55]

---

[51] See the discussion about the *Tampa* below.

[52] Brian Galligan, 'Australia's Political Culture and Institutional Design' in *Towards an Australian Bill of Rights* Philip Alston (ed), National Capital Printing, Canberra, 1994.

[53] Sir Gerrard Brennan in Alston (ed), ibid.

[54] Commonwealth, Senator Dee Margetts, The minority report in *Australia's Efforts to Promote and Protect Human Rights*, Joint Committee on Foreign Affairs, Defence and Trade of the Commonwealth Parliament, Australian Government Printer Service, Canberra, 1994, p xxxix.

[55] Diane Otto and David Wiseman, In Search of Effective Remedies: Applying the International Covenant on Economic, Social and Cultural Rights in Australia, University of Melbourne, Overviews of *Public Law Research Paper, No. 15*.

In addition, Australia's federal system of government conspires together with parliamentary sovereignty to further impede the promotion and protection of the full range of human rights. In 1997 the UN Committee on the Rights of the Child expressed concern about legislation in the Northern Territory which mandated imprisonment for juveniles convicted of property offences. The Committee suggested that the legislation was inconsistent with Article 37(b) of the *Convention on the Right of the Child* which requires that detention of a child should only be used as a measure of last resort. A subsequent CERD Committee, reporting on Australia's compliance with its obligations under the CERD, also expressed concern about the potentially discriminatory aspects of mandatory sentencing regimes in Australia.[56] At the time, the governments in the Northern Territory and at the Commonwealth level were conservative. The Prime Minister's response to the Committee's concerns demonstrates that when political expediency demands it, human rights breaches can be cloaked in the language of sovereignty and federalism.[57]

> *Australia decides what happens in this country through the laws and the parliaments of Australia. I mean in the end we are not told what to do by anybody. …Australia's human rights reputation compared with the rest of the world is quite magnificent. …I'm not saying we're perfect. But I'm not going to cop this country's human rights name being tarnished in the context of a domestic political argument. Now this is a difficult issue. Traditionally, these matters are the prerogative of States. And if you have a Federal government seeking to over turn laws of this kind you really are remaking the rule book.*[58]

---

[56] Commonwealth Attorney-General, the Hon Daryl Williams, *CERD report unbalanced*, Press Release, 26 March 2000.
[57] Compare the reaction of the Federal Government in the *Toonen* case discussed below.
[58] www.pm.gov.au/media/pressrel/2000/AM1802.htm, 18 February 2000.

B. Human Rights and the Common Law

The common law contains within it various rights which are mirrored in the UDHR and the ICCPR. However, the common law is limited in the human rights that it has thus far recognised and can therefore protect. For example in *Victoria Park Racing & Recreation Grounds Co Limited v Taylor*[59], the High Court refused to recognise a common law right to privacy[60]. Also, as discussed elsewhere in this paper in *Dietrich v The Queen*, Mason CJ and McHugh J held that the common law did not recognise the right of an accused person to counsel at public expense.

Parliamentary sovereignty also limits the ability of the common law to foster the protection of human rights because the common law falls away in the face of inconsistent legislation.[61] In *British Railways Board v Pickin*,[62] Lord Reid said that the common law did not contain rights that ran so deep that parliaments lacked the capacity to destroy them. In *Building Construction Employees and Builders' Labourers Federation of New South Wales v The Minister for Industrial Relations*[63] Kirby P, as he then was, agreed with Lord Reid's analysis, stating that such a principal recognised 'years of unbroken constitutional law and tradition in Australia and, beforehand, in the United Kingdom."[64]

As mentioned above, on the positive side of the ledger, common law rules of statutory

---

[59] (1937) 58 CLR 479.
[60] See also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499 per Mason CJ and Toohey J in which it was held that Chapter III of the Constitution did not protect the right against self incrimination.
[61] Compare *Dr Bonham's case* (1610) Co Rep 107a [77 ER 638], 118a where Coke CJ held that a court might declare legislation void for being against common right and reason. The power expressed in that case has not since been applied and has been repeatedly contradicted.
[62] [1974] AC 765 at 782.
[63] (1986) 7 NSWLR 372, 405 per Kirby P.
[64] Williams above n 14, 16.

interpretation do exist which provide that Parliament must be unmistakably clear in its intention to restrict a fundamental freedom.[65] In *Coco v The Queen*[66], Mason CJ, Brennan, Gaudron and McHugh JJ said:

> *The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as the requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested but unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.*

Nevertheless, there seems to be a consensus emerging that:

> *The common law system, supplemented as it is presently by statutes designed to protect particular rights, does not protect fundamental rights as comprehensively as do constitutional guarantees and conventions on human rights …the common law is not as invincible a safeguard against violations of fundamental rights as it was once thought to be.*[67]

C. Human Rights and the Administrative Law

Administrative law contains within it certain principles which afford to persons affected by it, certain human rights, such as procedural fairness and protection from arbitrary and

---

[65] See also *Nationwide News Pty Ltd v Wills* [1992] 177 CLR 1, 43 per Brennan J and *Re Bolton; ex parte Beane* (987) 162 CLR 514, 523 per Brennan J.
[66] (1994) 179 CLR 427, 437.
[67] Sir Anthony Mason, 'The role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 12.

biased decision-making by government officials. However, administrative law can also play an indirect role in protecting and promoting other substantive human rights. One of the more effective ways in which the principle enunciated in *Teoh* might be used is to further the promotion and protection of economic, social and cultural rights. In Australia the subject matter of economic, social and cultural rights tends to be provided through government programs, policies and initiatives in areas such as housing, welfare, public health care, education, and the environment. These programs are often administered by government officials whose decisions may be subject to administrative review. In the current legal system, the policies, programs and initiatives which aim to achieve economic, social and cultural goals will seldom be enforceable directly. However, since *Teoh* it has become possible to enforce these rights indirectly through the exercise of the procedural rights bestowed upon individuals by administrative law.[68] Teoh provides a means by which economic, social and cultural rights might be better promoted and, in some circumstances, afforded real protection if administrative decisions are to be informed by international human rights standards contained in treaties ratified by Australia.

However, the significance of *Teoh* should not be overstated. The Court was at pains to point out that:

> *The existence of a legitimate expectation that a decision maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. If the decision-maker proposes to make a decision inconsistent with a legitimate expectation procedural fairness requires that persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.*[69]

---

[68] John McMillan and Neil Williams, Administrative Law and Human Rights in Kinley (ed.), above n 1, 63-89.
[69] Mason CJ and Deane J, 366.

Furthermore, a number of important questions remain unresolved by *Teoh,* including whether the legitimate expectation can temper the actions of independent Commonwealth statutory authorities, government corporations and state and territory government agencies[70] all of which may be vested with significant authority in respect of the subject matter of international human rights standards.[71]

The fact that the Teoh principle is, like the common law, vulnerable to parliamentary sovereignty has also been made very clear. There have been repeated legislative attempts to overturn the decision in *Teoh* which, for various reasons, have lapsed. It remains an open question whether the two joint statements made by the then Minister for Foreign Affairs, Senator Gareth Evans, and the then Attorney-General, Michael Lavarch and that made by the Minister for Foreign Affairs, Alexander Downer, and the Attorney-General, Daryl Williams to the effect that no such expectation should arise in respect of ratified unincorporated treaties have blunted the impact of the decision.[72] According to George Williams, 'these statements have provided an executive indication, and foreshadowed a legislative indication, that 'the act of entering into a treaty does not give rise to legitimate expectations in administrative law'. Nevertheless, doubt about the force of the Ministerial statements has been expressed in a number of judicial and tribunal decisions.[73]

---

[70] McMillan and Williams, above n 68, 83.
[71] The South Australian Parliament assumed that it might apply to that state's officials and provided a legislative response in *Administrative Decisions (Effective International Instruments) Act 1995* (SA).
[72] International Treaties and the High Court decision in *Teoh*, *Ministerial Documents Service,* no 179/94-95, 11 May 1995, at 628-30; *The Affect of Treaties in Administrative Decision Making*, *Commonwealth of Australia Gazette*, no S69, 26 February 1997.
[73] see *Department of Immigration and Ethnic Affairs v Ram* (1996) 69 FCR 431, 437-8 per Hill J and *Davey Browne v Minister for Immigration and Multicultural Affairs* [1998] 566 SCA (unreported, 29 May 1998) per Wilcox J.

D. Human Rights and the Australian Constitution

This paper has previously alluded to the fact that Australia does not have a Bill of Rights[74] that is, that Australia lacks a 'national, justiciable, entrenched, constitutional statement of fundamental rights'[75] at either the Commonwealth or the State or Territory level.[76] While the *Australian Constitution* cannot, through judicial construction which purports to shift the ultimate focus away from the text and structure of the document, become the Bill of Rights that it was never intended to be without harming its integrity and sacrificing judicial legitimacy[77] there is clearly some capacity within the instrument to protect and promote some human rights. This capacity is likely to be greater than had been assumed traditionally since the High Court demonstrated its openness, albeit strictly tied to the nature of Australia's system of government, to find implied in the Constitution a right to free speech.[78]

The strength of the express and implied rights so far recognised in the *Australian Constitution* is that they can override a Commonwealth statute. The weakness of the constitutional rights is that they tend to be limited in nature. Where the High Court has interpreted rights, the aim has tended to be to limit the Commonwealth's power rather than recognising personal human rights.[79] Accordingly, the civil and political rights in the

---

[74] While there was some support for the idea of a Bill Rights in the Australian Constitution at the time of the Constitutional Conferences it was ultimately rejected. On several occasions since, proposals for Bills of Rights have been put forward and been defeated. In 1973 Human Rights Bill based on the ICCPR was introduced by the then Labor Government. The Bill was withdrawn after vigorous protest from the States. A further Human Rights Bill was introduced in 1985. This Bill passed through the House of Representatives before lapsing in the Senate due to the length of the debate.

[75] Justice Michael Kirby, in Alston (ed.), above n 53, 267.

[76] The Constitutions of the Australian States and the Self Government Acts of the Territories are largely barren of provisions that are explicitly right-orientated.

[77] *McGinty v Western Australia* (1996) 186 CLR 140, 168.

[78] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[79] See for example *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

Australian Constitution have tended to be interpreted narrowly.[80] This is evident in decisions concerning the right to vote[81] and trial by jury.[82]

In *Dietrich v The Queen*[83] the majority of the High Court found that the power of a court to order a stay where an unfair trial would result may be exercised where an accused is charged with a serious offence and, through no fault of his or her own, is unable to obtain legal representation. While the court was willing to recognise the right of a person to legal representation in some cases, it did not take the next step of constructing an obligation on government to provide representation. Rather, it was constructed as a limitation on the power of the courts to proceed with an unfair trial. As George Williams points out, the distinctions between positive and negative rights is not neat. For example, the right to a fair trial, or more particularly the right to counsel, requires State action and not merely a zone of non-interference in order to be attained.[84]

If judges are ill at ease with applying the *Australian Constitution* as a source of protection for individual liberty[85] there has been little or no support for using the *Australian Constitution* as a potential source of protection for social, economic or cultural rights. Anglo-Australian law has traditionally derived much from the concept of liberalism, especially liberalism's focus on the individual's freedom from government action. It has not been concerned with placing obligations on others to protect or realise human rights. The law, including Australian constitutional law, has operated to protect individuals whose rights might otherwise be infringed, but it has not placed obligations on government, or

---

[80] Williams, above n 33, 249.
[81] *Australian Constitution*, s41.
[82] Ibid, s80.
[83] (1992) 177 CLR 292.
[84] Williams, above n 14, 8.
[85] Ibid 231.

others, to ensure that certain rights are fulfilled.[86]

According to George Williams, legalism has tended to be adopted by the High Court in its construction of the *Australian Constitution*, allowing the High Court to cloak its own preferences in construction and to hide its preference for economic rights (such as the requirement that any property acquired by the Commonwealth by purchased on just terms) over other kinds of rights.[87] Unless a greater number of a judges begin to construe the *Australian Constitution* like Justice Lionel Murphy as a 'document for a free society' or like Justice Kirby as a document that speaks to the international community there will be little or no scope for judges through the *Australian Constitution* to guarantee rights such as freedom from discrimination or indeed many of the rights listed in the ICCPR and ICSECR.

D. International Mechanisms

In order to properly assess the adequacy of human rights promotion and protection in Australia some consideration needs to be given to the role played by Australia's recognition of the competence of the United Nations Human Rights Committee to receive and consider communications from individuals subject to Australia's jurisdiction, who claim to be victims of violations of rights set out in the ICCPR, where the individual can demonstrate that he or she has exhausted all available domestic remedies.[88]

---

[86] Ibid 6.
[87] Ibid 247.
[88] Article 5(2)(b) of the *First Optional Protocol* which Australia ratified on 25 December 1991.

As Justice Brennan has indicated, accession to the *First Optional Protocol* may have an indirect effect on the promotion and protection of the rights under the ICCPR.

> *The opening up of international remedies to individuals pursuant to Australia's succession to the Optional Protocol to The International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports.*[89]

In Justice Michael Kirby's view, the fundamental principles of the ICCPR will increasingly influence Australian law 'precisely because those disaffected by local decisions can now bring their complaints to the United Nations Human Rights Committee after exhausting all the domestic remedies'.[90]

In a more direct sense, so long as the domestic legal system continues to exclude much of the subject matter of the ICCPR, Australia's ratification of the *First Optional Protocol* will, in some cases, represent the only resort victims of human rights violations will have to enforce the standards provided for in the Convention.

Since the *First Optional Protocol* entered into force, Australians have been not infrequent visitors to the Human Rights Committee, with over two dozen cases in 10 years. The first Australian to take a complaint to the Human Rights Committee was Nicholas Toonen. The Human Rights Committee upheld Toonen's complaint that ss 122 and 123 of the *Criminal Code Act* 1924 (Tas), which effectively made homosexual sexual activity between consenting adult males a crime, were inconsistent with the right to privacy set out in

---

[89] *Mabo (No 2)*, 42.

[90] Justice Michael Kirby, 'The Australian Use of International Human Rights Norms From Bangalore to Balliol - A View from the Antipodes', (1993) 16 (2) *University of New South Wales Law Journal* 363, 387.

Article 17 of the ICCPR.[91] The result was the passage by the Commonwealth of the *Human Rights (Sexual Conduct) Act* 1994 (Cth). The Act referred directly to the ICCPR and was designed to override the Tasmanian legislation pursuant to s 109 of the *Australian Constitution* which provides that in the event of inconsistency the Federal statue will prevail to the extent of the inconsistency. Eventually, the Tasmanians passed legislation effectively conceding that the relevant provisions of the *Criminal Code Act* 1924 (Tas) had been overridden by the Commonwealth Act.

Although it is difficult to assess precisely the extent to which Australia's accession to the *First Optional Protocol* contributes to the promotion and protection of human rights in Australia it is clear that it cannot offset entirely the weaknesses in Australia's domestic system. The lack of local remedies for breach of the ICCPR itself violates the Convention.[92]

Furthermore, the fact that the United Nations Human Rights Committee upholds a complaint is no guarantee that the complainant's rights will be protected in Australia. In *A v Australia*[93], the Human Rights Committee held that the application to the complainant of Australia's policy of non-reviewable, mandatory detention of asylum seekers breached Article 9(1) of the ICCPR which provides a right against arbitrary detention, Article 2(3) which requires States parties to ensure an effective remedy if rights are violated and Article 4 which provides that certain rights, including those set out in Article 9, are non-derogable.

---

[91] Human Rights Committee, Communication no 488/992, UN doc CCPR/C/50/D/488/1992, 8 April 1994.
[92] Kate Eastman and Chris Ronalds in Kinley (ed.), above n 1, 340.
[93] Communication No 560/1993, UN Doc CCPR/C59/560/1993 (30 April 1997)

At the time of the Committee's opinion the Government indicated its intention not to act on the Committee's views and some years hence, there has been no significant change in the policy of mandatory detention. Moreover, the Government's submission to the Human Rights Committee that it did not regard the Committee's opinions as binding on Australia does not instil much confidence in the *First Optional Protocol's* ability, in the absence of Federal government support, to directly promote or protect the human rights standards provided for in the ICCPR. In addition, the Federal Government's recent demonstrations of antipathy to the human rights treaty committees generally does not suggest that the opinions of the international committees that monitor Australia compliance with other international human rights treaties will hold any real sway, at least, over the current Federal Government.[94]

E. The Adequacy of Human Rights Protection and Promotion: The Example of the Tampa Affair

The recognition of the human rights of those who are exiled and persecuted is a clear test case of the utility of human rights law and a measure of the degree of protection afforded to human rights. As Costas Douzinas has argued, 'there is no greater reminder of the demands of ethics than the request of asylum by the persecuted'.[95]

---

[94] Australian Minister for Foreign Affairs, Alexander Downer, Attorney-General, the Hon Daryl Williams, Minister for Immigration and Ethnic Affairs, the Hon Philip Ruddock, *Improving the Effectiveness of United Nations Committees*, press release 29, 2000.

[95] Costas Douzinas, *The End of Human Rights* (Oxford: Hart, 2000), 357-369.

The inadequacy of the protection and promotion of human rights currently provided in Australia was starkly demonstrated in the case brought on behalf of asylum seekers concerning the Australian government's attempt to prevent the *Tampa,* a Norwegian-registered container ship whose crew had rescued approximately 430 asylum seekers from a sinking Indonesian-registered vessel, from entering Australian territorial waters. The incident raised a plethora of international legal issues[96], including the alleged breach by the Australian Government of the principle of non-refoulement[97], and an uncharacteristically public example of the Federal Government's now well-established practice of holding asylum seekers incommunicado or in isolation, including from access to legal advice.[98] Nevertheless, international legal principles and international human rights standards did not form a substantive part of the arguments presented to or the judicial decision- making at either first instance or on appeal[99] with Parliament's sovereignty, instead, reigning supreme.

In the aftermath of the incident, no less than seven Acts were rushed through the Federal Parliament over a two day period. A number of the provisions that were introduced which were intended to erode the human rights refugees and asylum seekers are entitled to under the *Convention on the Status of Refugees*. For example, in a blatant attempt to avoid the application of the international human rights obligations provided for in the Convention (and in breach of international law)[100] amendments to the *Migration Act* 1958

---

[96] Jean-Pierre L Fonteyne, 'All Adrift in a Sea of Illegitimacy: An International Law Perspective on the Tampa Affair', (2001) 12 *Public Law Review*, 249-253.
[97] Art 33 of the *Convention Relating to the Status of Refugees* 1951.
[98] Nick Poynder,' The Incommunicado Detention of Boat People: A Recent Development in Australia's Refugee Policy', (1997) 3 *Australian Journal of Human Rights* 2.
[99] *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 182 ALR 617: *Victorian Council for civil Liberties Inc v Minister for Immigration and Multicultural Affairs* [2001] FCA 1329.
[100] Such action in itself constitutes a breach of international law pursuant to Art 27 1969 *Vienna Convention on the Law of Treaties.*

(Cth) were passed which purported to exclude from the Migration Zone those parts of Australia's territory on which most asylum seekers arriving by boat were landing.[101] This means that asylum seekers arriving on various islands excluded from the Migration Zone are denied the human rights guaranteed to them in the Convention.

5. Other Former British Colonies and Britain Itself

In almost all other British colonies, human rights values have been incorporated into domestic law more systematically and comprehensively than has been the case in Australia. Such incorporation has been effected with varying degrees of legal force, through the adoption of an assortment of different models. It is notable that the incorporation of rights in countries such as New Zealand and Britain has not diminished the importance of statute law in those jurisdictions. Human rights legislation continues to play a separate, complimentary role, for example governing the relationship between individuals rather than between the state and its citizens.

The situation in Australia could not be more different.

> *Ultimately, [the systems that are in place in Australia] do not effectively protect fundamental freedoms from being abrogated by Australian parliaments. Australians remain subject to the dominion of their parliaments because, at any time, their representatives could choose to arbitrarily interfere with individual liberty.*[102]

[101] *Migration Amendment (Excision from the Migration Zone) Act* 2001 (Cth).
[102] Williams, above n 14, 24.

6. Conclusion

Although 'it cannot be said that the enjoyment of rights in general in Australia is appreciably inferior to that in comparable countries in which such rights are recognised in more explicit legal terms and where rights discourse is more surely rooted in the legal heritage',[103] the protection and promotion afforded to the full range of human rights by Australia's legal system is inadequate. The loose and sometimes overlapping web of protection that exists in Australia offers support for some civil liberties but rarely provides any legally enforceable social, economic and cultural rights. Although the web of protection may impact as an important political barrier to a government wishing to breach fundamental rights, the protection offered is ad hoc, and limited in scope. Moreover, the rights of those most often in need of protection, such as refugees and the indigenous population, appear to be at the disposal of political expediency masquerading as federalism and/or parliamentary sovereignty.[104]

The absence of coherence and consistency George Williams identifies in relation to the High Court's interpretation of constitutional rights is also evident in the promotion and protection of human rights afforded by the legislature and the courts in their interpretation of legislation and development of the common and administrative law. One is left with the feeling that the protection and promotion of human rights will remain forever vulnerable to the changing composition of the High Court and/or the whims of the political arms of government.

---

[103] David Kinley in Kinley (ed), above n 1, ix.
[104] Williams, above n 14, 23.

The scheme of protection currently afforded human rights is also unsatisfactory because it is largely unknown. Australians possess a disturbing lack of knowledge about their system of government and have little or no knowledge of their legal rights. Human rights are not a prominent part of the Australian legal tradition: still less are they endemic to our legal culture.[105] Because human rights protection is not readily apparent or accessible it fails to serve the promotional, educative and symbolic function that should underlie the operation of human rights.[106] To ensure the adequate protection of human rights in Australia needs to develop its culture of liberty.[107] Lawyers can contribute to this culture of liberty by increasing their reliance on human rights principles in litigious as well as non-litigious matters.

According to Justice Abella, human rights are marginalised because 'unlike civil liberties, which rearranges no social relationships and only protects our political ones, human rights is a direct assault on the status quo. It is inherently about change – in how we treat each other, not just in how government treats us.' In the absence of effective international enforcement mechanisms that cover the full range of rights and a comprehensive incorporation of international human rights treaties into our domestic law, the promotion and protection of international human rights standards has fallen increasingly to the national judiciary. Given the revolutionary nature of the challenge posed by human rights and the legal context which constrains judicial decision-making in Australia, increased reliance by the judiciary on international human rights standards cannot, in isolation, provide an adequate system of protection and promotion for the full range of human rights

---

[105] David Kinley in Kinley (ed.) above n 1, ix.
[106] Ibid 23-24.
[107] For a statement about the importance of human rights culture even where rights are constitutionally guaranteed. See I Mahomed, 'Constitutional Court of South Africa', in C Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia* ,Federation Press 1996, 173.

in Australia. Until human rights are main streamed by the legislature, through their incorporation into domestic law,[108] the current legal system will remain seriously inadequate in its ability to protect and promote many of the human rights of the most vulnerable and disadvantaged groups in our community.[109]

[108] It is beyond the scope of this paper to advocate for one or other model of incorporation and the arguments for and against the introduction of a Bill of Rights has been thoroughly canvassed elsewhere. See for example P Alston (ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law, Australian National University, Canberra, 1994.

[109] Brian Burdekin, forward, in P Alston (ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law, Australian National University, Canberra, 1994, page v.