

**HUMAN RIGHTS IN AUSTRALIA:
A RETREAT FROM TREATIES**

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Those who deny freedom to others deserve it not for themselves; and under a just God, can not long retain it¹

There is no (real) democracy without recognition of basic values and principles such as morality and justice. Above all, democracy cannot exist without the protection of individual human rights – rights so essential that they must be insulated from the power of the majority.²

1. Introduction

The Australian Constitution does not entrench and protect fundamental rights and basic values. Some rights of limited application find expression and, with a degree of judicial activism, protection has been discovered in the Constitution for *implied* rights.³

The High Court has also developed the presumption against abrogation of fundamental rights and freedoms in construing legislation, looking for a clear indication that the legislature, having directed its attention to those rights, has consciously decided on their abrogation or curtailment. The presumption, initially directed to the protection of common law rights, has more recently been extended to the protection of fundamental rights and freedoms.⁴ In *Plaintiff S157/2002 v Commonwealth of Australia*⁵ Gleeson CJ said:

Courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. (Coco v The Queen (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ). As Lord Hoffmann recently pointed out in the United Kingdom (R v Home Secretary; Ex Parte Simms [2002] 2 AC 115 at 131), for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be "subject to the basic rights of the individual" (see also Annetts v McCann (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ).

The human rights and values embodied in treaties ratified by Australia have not, as a rule, been made enforceable as part of Australia's domestic legal system,⁶ unlike the position in countries with which it shares a common legal heritage.⁷

In the absence of entrenched and enforceable protection for human rights, governments at federal and state levels have implemented policies and enacted legislation in breach of Australia's international obligations.

2. Is Australia a "Real" Democracy?

Take human rights out of democracy and democracy loses its soul; it becomes an empty shell.⁸

In a recent paper published in the Harvard Law Review Judge Aharon Barak President of the Supreme Court of Israel reflects on the protection of fundamental human rights and values as an essential feature of a modern democratic state. He addresses the role of an independent judiciary in upholding such rights and values and makes the following points:

- the people through their (democratic) representatives can destroy democracy and human rights;⁹
- human rights are at the core of substantive democracy which is broader than the notion of majority rule;¹⁰
- the protection of individuals and minority groups in a democracy cannot be left to the legislature and the executive or the whims of the majority;¹¹

All attempts to entrench fundamental rights in the Australian Constitution or legislate for a Bill of Rights have failed. These efforts, beginning in 1944, have met with organised and vehement opposition often from unexpected quarters.¹²

In March 2004 the Legislative Assembly of the Australian Capital Territory passed the Human Rights Act which will commence operation on 1 July 2004. The legislation, the first of its kind in Australia, was introduced following a process of community consultation and report of a committee chaired by Professor Hilary Charlesworth.¹³ Section 32 of the Act provides that a declaration of the Supreme Court of the ACT that a territory law is incompatible with a human right as defined in the Act does not affect the validity, operation or enforcement of that law or the rights or obligations of anyone. There is also no right to initiate proceedings to enforce the provisions of the Act in particular cases. As a result the legislation has critical deficiencies as it does not entrench or adequately protect rights.

With the enactment in the United Kingdom of the Human Rights Act 1998 Australia's isolation in the protection of human rights within the advanced industrialised democracies became complete. As Sir Anthony Mason, former Chief Justice of the High Court of Australia has observed:¹⁴

Australia's adoption of a Bill of Rights would bring Australian in from the cold, so to speak, and make directly applicable the human rights jurisprudence, which has developed internationally That is an important consideration in that our isolation from that jurisprudence means that we do not have what is a vital component of other constitutional and legal systems, a component which has a significant impact on culture and thought, and is an important ingredient in the emerging world order that is reducing the effective choices open to the nation.

International human rights instruments and provisions by way of constitutional or legislative bills of rights allow for the limitation or derogation from rights in particular circumstances which include states of emergency, maintenance of public order or general welfare. In Australia, where there are no entrenched provisions protecting civil and political rights the process is easier for an executive intent on taking ever more draconian measures.

It is in times of crisis that we need to be vigilant against unwarranted incursions on the rights and liberties of individuals and minority groups. Society needs to be protected from the acts of evil perpetrated by murdering fanatics and terrorists but the measures taken must not themselves pose a greater threat than that which they are intended to confront. As H L Mencken said of developments in the United States early last century:¹⁵

Holes began to be punched in the Bill of Rights and new laws of strange and then fantastic shape began to slip through them. The hysteria of the late war completed the process. The Espionage Act enlarged the holes to great fissures. Citizens began to be pursued into their houses, arrested without warrants, and goaled without any

form of trial. The ancient writ of habeas corpus was suspended; the Bill of Rights was boldly thrown overboard.

3. A Related Issue: Treaties and Customary International Law in Australia¹⁶

Treaties of peace or recognition of a foreign state or government aside, the provisions of an international treaty which Australia has ratified do not form part of Australian law unless validly incorporated into municipal law by statute.¹⁷

This general principle has been eroded by the doctrine of “*legitimate expectation*” which was expressed by Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh*¹⁸:

*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 applied by courts and administrative authorities in dealing with the basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention.*¹⁹

The *Teoh* decision was immediately attacked by the Labor Government. Both it and the subsequent Howard Government introduced legislation to nullify its effect but were unsuccessful.²⁰ The reasoning behind that decision has also been subjected to strong criticism by a number of the present justices of the High Court and, if the opportunity arises, it may well be overruled.²¹

Customary international law is formed, *when there is uniform and consistent state practice across a wide range of states and where there is evidence that this practise is maintained out of a sense of legal obligation*²² and may also impact on Australian law. In *Chow Hung Ching v The King*²³ Dixon J held that “*international law is not a part, but is one of the sources, of English law,*”²⁴ and in *Mabo (No. 2)*²⁵ Brennan J said:

*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.*²⁶

These statements of principle were considered in detail by the High Court in *Dietrich v The Queen*.²⁷ The court was there referred to article 14 (3) (d) of the Covenant on Civil and Political Rights which provides that those facing criminal charges must be provided with legal assistance *where the interests of justice so require*. The court was unanimous in deciding that such a right did not exist in Australia by reference to international law, although that conclusion was articulated in three ways by the court.²⁸

Two principles of statutory construction which invite reference to international legal principles i.e. that the courts should favour a construction that accords with international law, and the presumption against legislative intention to abrogate or curtail fundamental rights or freedoms, are also of relevance.²⁹ The first has not been applied or expressed with a uniformity of approach whilst the second seems to have found greater support.³⁰

In addition, Justice Michael Kirby, the only member of the High Court to routinely refer to international norms, has developed his own distinctive interpretative principle in relation to international law.³¹ In *Newcrest Mining* Kirby J giving expression to the principle said:

[I]nternational law is a legitimate and important influence on the development of the common 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 the basic law of the Australian nation which is a member of that community.³²

Justice Kirby applied the same principle in *Kartinyeri v The Commonwealth*³³ where he (in dissent) expressed the scope and application of the principle as being:

There is no doubt that, if the constitutional provision is clear and if a law is clearly within power, no rule of international law, and no treaty (including one to which Australia is a party) may override the Constitution or any law validly made under it. But that is not the question here... Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity ... In the contemporary context it is appropriate to measure the prohibition by having regard to international law as it expresses universal and basic rights.³⁴

The interpretative principle as expressed by Justice Kirby has attracted strong criticism from other justices of the High Court and is unlikely to command majority support any time soon.³⁵

4. Human Rights Treaty Monitoring System

Following the enactment of the UN Charter on 26 June 1945, the adoption of the Universal Declaration of Human Rights in 1948 brought to fruition the ideal of human rights internationally shared and observed.³⁶ The Declaration set down those fundamental rights and freedoms which were considered inalienable entitlements of every human being.³⁷

Member states pledged themselves to achieving universal respect for and observance of the human rights and fundamental freedoms embodied in the Declaration.³⁸ Australia is a party to the six human rights treaties which have established the covenants and United Nations committee framework to monitor and enforce the rights embodied in the Declaration.³⁹

In a paper published in April 2003 for the Australia Institute, Associate Professor Spencer Zifcak of La Trobe University provides a detailed study of recent UN committee reports which have criticised Australia's performance, the Howard Government's response to them and a critical analysis of government policy.⁴⁰

5. Committee on the Elimination of all Forms of Discrimination Against Women⁴¹

The Committee's report was issued in 1997 and contained "a great deal of positive comment about Australia's endeavours to enhance the status of women in Australian society". Concerns were expressed on:

- cutting of the budget for the Office of the Status of Women;
- cutting of the budget for the Human Rights and Equal Opportunity Commission;

- discontinuance of the Women's Budget Statement;
- discontinuance of the National Register for Women;
- introduction of policies which might slow down progress towards achievement of full gender equality in housing, child care assistance and employment;
- persistence with a reservation to the Convention on the provision of maternity leave and failure to ratify the related ILO Convention concerning maternity benefits.

6. Committee on Rights of the Child⁴²

The report issued in 1997 noted a number of positive developments and leadership in the protection and advancement of children's rights. Concerns expressed by the committee included:

- that the rights and remedies under the Convention had not been entrenched either constitutionally or legislatively;
- that Aboriginal children were significantly over represented in the juvenile justice system;
- the effect of the mandatory minimum sentencing regime in Western Australia and the Northern Territory on the indigenous population and in particular overrepresentation of Aboriginal children in detention;
- the poor standards of health and education of Aboriginal children.

7. Committee on the Elimination of Racial Discrimination.⁴³

In March 2000 the Minister for Immigration and Multicultural Affairs was head of a delegation before the UN Committee on the Elimination of Racial Discrimination. Zifcak refers to that meeting as a "falling out of friends" largely brought about by Australia's failure to comply with its obligations under the Convention.⁴⁴ The Committee report in April was not entirely critical but expressed its serious concerns on Australia's compliance with its international obligations under that Convention. These included:⁴⁵

- the absence of entrenched guarantees in the Australian Constitution to prohibit racial discrimination;
- there had been insufficient consultation with the Aboriginal Community in the process leading to the 1998 amendments to the Native Title legislation;
- the high rate of Aboriginal incarceration;
- the mandatory minimum sentencing regime in Western Australia and the Northern Territory in breach of Australia's obligations due to its racially discriminatory impact on Aboriginal rates of incarceration;
- the refusal to issue an apology and provide monetary compensation to 'the Stolen Generations';

- the discrimination experienced by the indigenous population in enjoyment of their economic, social and cultural rights.

8. Human Rights Committee⁴⁶

Reporting in July 2000 the Committee welcomed Australia's accession to the Optional Protocol to the Covenant permitting individuals to lodge complaints with the Committee in relation for alleged infringement of their human rights. Its concerns included:

- that Australia does not have a Constitutionally entrenched Bill of Rights;
- the mandatory minimum sentencing legislation;
- the 1998 amendments to the Native Title Act (inconsistent with the requirements of Article 27 of the Covenant);
- mandatory detention of asylum seekers;
- failure to inform detainees of their right to seek legal advice and not permitting detainees to be visited by officials from relevant NGOs.

The committee also noted the report on the Stolen Generations and urged the government to afford all those affected a proper remedy for infringement of their rights;

9. Committee Against Torture⁴⁷

The report of the Australian Government to which the committee responded was six years late. The Committee reported in November 2000 and its concerns included:

- the lack of appropriate mechanisms for review of ministerial decisions relevant to Article 3 of the Convention (i.e. that no person should be expelled or returned to another State where there are substantial grounds for believing that they will be in danger or subject to torture);
- the use of instruments of physical restraint in prisons which might cause unnecessary pain or humiliation;
- allegations of excessive use of force by police and prison officers;
- the racially discriminatory effect of the mandatory minimum sentencing legislation.

10. Committee on Economic Social and Cultural Rights⁴⁸

The committee reported in 2000 and noted:

- the failure to afford constitutional or statutory recognition for the terms of the covenant and its provisions, and that the covenant could not be invoked before Australia's courts;
- the indigenous population continued to be at a significant disadvantage in the enjoyment of economic, social and cultural rights;
- the adverse affect on the process of reconciliation had been adversely affected by the 1998 amendments to the Native Title Act;

- an entitlement to paid maternity leave had not been introduced;
- the extended waiting periods for delivery of medical services, in particular surgery, in public hospitals.

11. The Government Responds⁴⁹

The government has usually responded by ignoring or dismissing UN committee reports out of hand but the reaction to the report of the UN Committee on the Elimination of Racial Discrimination was immediate and hostile. The government attacked the report as being unbalanced and as having intruded *unreasonably in Australia's domestic affairs*.⁵⁰

A whole of government review was announced on the operation of the UN treaty system as it affected Australia. An unofficial policy of non-cooperation was introduced including:

- reporting to and representation at treaty committees would in future be based on a more economic and selective approach;
- agreeing to visits by treaty committees only when there was a compelling reason from the government's perspective to do so;
- rejecting unwarranted requests from committees to delay removal of unsuccessful asylum seekers from Australia;
- not to sign or ratify the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women thereby depriving individuals from lodging complaints directly with the UN committee;
- establish a standing inter-departmental committee to advance a program of reform of the UN treaty system.⁵¹

The government promoted the view that the UN committee system and reports were being unfairly critical of Australia which (according to the government) had an excellent human rights record.

Addressing the UN General Assembly in September 2000, the Minister for Foreign Affairs Alexander Downer said:

*Australia is a strong proponent of the universal application of human rights standards, committed to continue its support for international human rights protection ... The committees (The UN Monitoring Committees) need to be more balanced and strategic about targeting key human rights offenders and avoid unfairly focussing their criticism on countries with good human rights records.*⁵²

Other steps taken by the Howard Government have included:

- delaying by more than two years the visit of the UN Working Group on Arbitrary Detention which had wanted to examine the conditions prevailing in immigration detention facilities,⁵³
- delaying the visit of Justice Bhagwati as envoy of Mary Robinson, UN High Commissioner for Human Rights who wished to examine detention facilities.⁵⁴

- failing to ratify the Optional Protocol on the Convention Against Torture which would have permitted UN representatives to visit prisons and detention centres without first requesting permission;⁵⁵
- failing to support the incorporation of a right to self-determination in the new UN Statement on the Rights of Indigenous Peoples in December 2001.⁵⁶

In the same period, the UN had sponsored a detailed investigation on the UN treaty system by Professor Anne Bayefsky. Her report issued in April 2001⁵⁷ provides a comprehensive analysis of the UN treaty system and the work of the monitoring committees. She identified critical defects in the mechanisms for the protection of human rights and suggested how that system could be improved. Expressing concern at the failure of many states to improve the process of implementation of the treaties which they had ratified, she stated:

*If rights are not followed by remedies, and standards have little to do with reality, then the rule of law is at risk. The extent of shortfalls in the implementation of treaties now threatens the integrity of the international legal regime. Many state parties ratified precisely because the international scheme was evidently dysfunctional and the lack of democratic institutions at home made the likelihood of international consequences comfortably remote.*⁵⁸

Australia is certainly not alone and far from the worst in its disregard of human rights treaty obligations. It is however, keeping very poor company. Referring to the appointment of Australia to chair the UN Commission on Human Rights from March 2004, Human Rights Watch levelled a barrage of criticism at Australia's human rights record including accusations that Australia:

- has adopted some of the most radical and draconian measures against asylum seekers and refugees of any industrialised country, setting terrible precedents that threaten to undermine the system of refugee protection worldwide. Canberra has aggressively promoted these policies internationally, even questioning the basis of the Refugee Convention.
- is one of a handful of industrialised countries not to have issued an open invitation to the United Nations' human rights experts and investigative bodies. The Australian government faced criticism of its immigration detention regime by the UN Working Group on Arbitrary Detention and an envoy of the UN High Commissioner for Human Rights during their visit to Australia in 2002.
- has joined the ranks of some of the most abusive governments – including China, Cuba, Iran and Sudan – in resisting the adoption of a new treaty establishing an international prison-inspection scheme to prevent torture.⁵⁹

12. Howard's End: Latham's Beginning

Zifcak attributes much of the impetus for the Australian Government's policies and actions on domestic political considerations including:

- an attempt to alienate the socially progressive wing of the Labor Opposition by a form of wedge politics;⁶⁰
- exploiting a pervasive sense of economic and physical insecurity experienced by many Australians;⁶¹

- adopting an anti-international stance thereby exploiting a distrust of economic globalisation and fear of loss of economic sovereignty;
- striking a populist resonance with the electoral core by asserting a form of patriotic sovereignty against the foreign intervention of the UN bodies⁶²

The Howard Government proposes to amend the Crimes Act 1914 to grant authorities the power to detain a suspect for up to 20 hours without charge if judicially authorised. The current maximum period is 12 hours. In addition, time taken to make Inquiries in overseas locations with different time zones would not count for the holding period. There are also proposals to amend the Crimes (Foreign Incursions and Recruitment) Act 1978 which would expand the definition of a “foreign indictable offence” to include an offence triable by a military commission established under a special order of the President of the United States.

These proposals are included in a package of new “anti-terrorism” legislation (The Anti-Terrorism Bill 2004) introduced into parliament on 31 March. The legislation has been referred to the Senate Legal and Constitution Committee for an inquiry to be completed by 11 May. Mark Latham, now safely installed as leader of the Labor Opposition, is likely to support this legislation and at the same time assert his party’s new found credentials on national security issues.

Conclusion

*Australia can be described as ‘Janus-faced’ with respect to particular treaties; the international face smiles and accepts obligations, while the domestic-turned face frowns and refrains from giving them legal force.*⁶³

The Howard Government’s agenda became clear shortly after taking office with a slashing of funds for the Human Rights and Equal Opportunity Commission by forty percent over three years and the refusal to reappoint Sir Ronald Wilson as the Commission’s president. These actions immediately weakened the organisation. They were soon overtaken the government’s actions on the *asylum seeker* front. The politically clever but cynical manipulation of the issue in the lead up to the 2001 election divided the Labor Opposition which then abandoned principle and supported the government in imposing the Pacific Solution. This was and remains an evasion of Australia’s legal obligations under the Refugee Convention.

Spencer Zifcak also deals with the violations by Australia of its UN treaty obligations on complaints by individuals as determined by UN committees prior to April 2003⁶⁴. There have been findings of violations by UN committees in four matters since publication of his paper.⁶⁵ Such violations of human rights treaty obligations are not confined to the federal arena. The States, at present all under Labor Party administration, are following the same line.⁶⁶

Without constitutional or legislative protection fundamental rights, freedoms and values are at serious risk in Australia. Individuals and minority groups who happen, for whatever reason, to be different and who do not behave or think like the majority will suffer the consequences. After September 11 policies such as repressive legislation, extreme cases of government secrecy, denial of free speech and due process have been introduced in the United States.⁶⁷ Australia is following close behind.

This article opened with a quotation from Abraham Lincoln, perhaps the greatest American statesman. In the present climate, it is perhaps fitting to close with the words of Justice Learned Hand, one its great jurists, spoken during the time of the McCarthy witch-hunts:

Risk for risk, for myself I had rather take my chance that some traitors will escape detention than spread abroad a spirit of general suspicion and distrust, which accepts rumour and gossip in place of undismayed and unintimidated inquiry. I believe that community is already in process of dissolution where each man begins to eye his neighbour as a possible enemy, where non-conformity with accepted creed, political as well as religious, is a mark of disaffection; where denunciation, without specification or backing, takes the place of evidence; where orthodoxy chokes freedom of dissent; where faith in the eventual supremacy of reason has become so timid that we dare not enter our convictions in the open lists, to win or lose. Such fears as these are a solvent which can eat out the cement that binds the stones together; they may in the end subject us to a despotism as evil and any that we dread; and they can be allayed only in so far as we refuse to proceed on suspicion, and trust one another until we have tangible ground for misgiving. The mutual confidence on which all else depends can be maintained only by an open mind and brave reliance upon free discussion.⁶⁸

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ENDNOTES

¹ Extract from Abraham Lincoln's letter to Henry Pierce 6 April 1859, two years before the outbreak of the Civil War.

² Aharon Barak President Supreme Court of Israel: *A Judge on Judging: the Role of the Supreme Court in a Democracy* (2002) 116 Harvard Law Review 16 at 39; see also Lord Woolf, *Droit Public – English Style* (1995) Public Law 57 at 67.

³ See Wendy Lacey: *Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter III of the Constitution* (1994) 5 Public Law Review 82; George Williams: *Civil Liberties and the Constitution – A Question of Interpretation* (1994) 5 82 and 83; Fiona Wheeler: *The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia* (1997) 23 Monash University Law Review 248; *Nationwide News Party Ltd v Wills* (1992) 177 CLR 1 per Brennan J at 48; *Kruger v Commonwealth* (1997) 190 CLR 1 at 112-121; *Levy v Victoria* (1997) 189 CLR 579, *Lang v ABC* (1997) 189 CLR 520; *Stephens v Western Australian Newspapers* (1994) 182 CLR 211; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *ACTP Limited v Commonwealth* (1992) 177 CLR 106.

⁴ See Professor Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams: *Deep Anxieties: Australia and the International Legal Order* (2003) 25 Sydney Law Review 423 at 461 and cases cited at n. 243 from *Potter v Minahan* (1908) 7 CLR 277 at 304, to *Plaintiff S157/2000 v Commonwealth* (2003) 195 ALR 24 (where the High Court held that a decision infected with jurisdictional error is not a valid *privative clause decision* within the meaning of Section 474 of the Migration Act and therefore subject to judicial review by constitutional or prerogative writs); also *WAIJ v MIMIA* [2004] FCAFC 74 (29.3.04).

⁵ (2003) 195 ALR 24 at [30].

⁶ Sir Anthony Mason: *Rights, Values and Legal Intentions: Reshaping Australian Institutions* (1997) 1 Aust ILJ 13; also John Toohey AC: *A Matter of Justice: Human Rights in Australian Law* (1998) 27

WALR 129; M.R. Einfeld: *A Bill of Rights for The Australian People* (4.9.2001) (Address to National Conference of Community Legal Centres); Elizabeth Evatt AC: *How Australia "Supports" the United Nations Human Rights Treaty System* (2001) 12 Public Law Review. 3; Elizabeth Evatt AC: *Meeting Universal Human Rights Standards* (1998) (Presented as a lecture in the Department of Senate Occasional Lecture Series at Parliament 22.5.1998); Charlesworth et al above n.5 at 435-438 and legislation in all Australian jurisdictions to implement a number of obligations under international instruments eg. *Disability Discrimination Act 1992 (Cth)*, *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*, *Human Rights (Sexual Conduct) Act 1994 (Cth)*, *Racial Discrimination Act 1975 (Cth)*, *Sex Discrimination Act 1984 (Cth)*, *Anti Discrimination Act 1997 (NSW)*, *Anti-Discrimination Act 1992 (Northern Territory)*, *Anti-Discrimination Act 1991 (Qld)*, *Equal Opportunity Act 1984 (SA)*, *Sex Discrimination Act 1996 (Tas)*; *Equal Opportunity Act 1984 (Vic)*, *Equal Opportunity Act 1984 (WA)*.

⁷ See eg. New Zealand – *Bill of Rights Acts 1990*; *Human Rights Act 1998 (UK)*; *Canadian Charter of Rights and Freedoms (Canada Act) (UK) 1982 – Schedule to the Constitution Act 1982*; *Constitution Act (South Africa) 1996* Sections 7-39.

⁸ Barak above n2.

⁹ Id at 43-43.

¹⁰ Id at 39.

¹¹ Ibid.

¹² See George Williams: *Human Rights Under the Australian Constitution* (OUP Aust. 1999) George Williams: *A Bill of Rights for Australia* (University of NSW Press 2000); Murray R. Wilcox: *An Australian Charter of Rights?* (Law Book Company 1993); P. Alston (ed) *Promoting Human Rights Through Bills of Rights* (OUP 1999); P. Alston (ed) *Towards an Australian Bill of Rights* (Canberra Centre for International and Public Law 1994); K. Baker (ed): *An Australian Bill of Rights: Pro and Contra* (Melbourne Institute of Public Affairs – 1986); B. Campbell: *The Implementation of Treaties in Australia* (in B Opeskin and D Rothwell (eds) *International Law and Australian Federalism* (1997); Professor Hilary Charlesworth: *Dangerous Liaisons: Globalisation and Australian Public Law* (1998) 20 *Adelaide Law Review* 57 at 67 [at international law entry into a treaty does raise (precisely) the expectation that it will be implemented]; Professor Hilary Charlesworth: *Protecting Human Rights* (1994) 68 *Law Institute Journal (Vic)* 462; R Dunstan: *Delivering on the Promise of Human Rights – Where are We and Where Do We Need to Be* (1997) *Australian Journal of Human Rights* 21; M.R. Einfeld: *A Bill of Rights for The Australian People* (4.9.2001) (Address to National Conference of Community Legal Centres); David Kinley (ed.) *Human Rights in Australian Law: Principles, Practice and Potential* (1998); David Kinley and P Martin: *International Human Rights Law at Home Addressing the Politics of Denial*. A Symposium on Human Rights (2002) 26 *Melbourne University Law Review* 466; Hon Justice Michael Kirby AC: *A Bill of Rights for Australia But Do We Need It?* (address given 4.10.94 to Queensland Chapter of Young Presidents Association); D.A. Smallbone: *Recent Suggestions of an Implied "Bill of Rights" in the Constitution, Considered as Part of a General Trend in Constitutional Interpretation* (1993) 21 *Federal Law Review* 254.

¹³ Section 32 (3) (a) and (b) *Human Rights Act 2004 (ACT)* (accessible at www.legislation.act.gov.au).

¹⁴ Sir Anthony Mason: *Rights, Values and Legal Intentions, Reshaping Australian Institutions*, above at n5 see also G Sturges and P Chubb, *Judging the World; Law and Politics in the World's Leading Courts* (1988) cite Sir Anthony Mason as having said: "The majority of countries in the western world do subscribe to a Bill of Rights on the basis that individual and minority rights often need protection, and the only effective protection is by a Bill of Rights. If we don't adopt a Bill of Rights I am inclined to think that we will stand outside the mainstream of legal developments in the western world." (at page 70) and Justice John Toohey: *A Government of Laws, and Not of Men?* (1993) 4 *Public Law Review*

158 at 163 “It cannot be said that individual liberties are as well protected in Australia as in those jurisdictions which have expressed Constitutional guarantees of such liberties which preclude legislative or executive infringement”; cf Sir Harry Gibb: *The Constitutional Protection of Human Rights* (1982) 9 Monash ULR 1 at page 5 “The fact that the United Kingdom adheres to the European Convention may provide a reason why that country should adopt a Bill of Rights founded on that Convention. As an Australian I cannot comment on that aspect of the matter. However, no such consideration applies to Australia.” and G Sawyer: *Protection of Human Rights in Australia* (1946) Yearbook on Human Rights at 31 “There is probably no country in the world in which human rights, whether of individuals or groups, are more extensive or better protected than they are in Australia.”

¹⁵ cited by Gore Vidal in the foreword to Marion E Rodgers: *The Impossible HL Mencken* (1991); see also package of “Anti-Terrorism” legislation introduced in Australia, UK, which has had such legislation in place since the 1970s, the USA Patriot Act which includes detention for certain periods without charge and seriously abrogates civil rights. US policies in the wake of September 11, 2001 see Joanne Bauer: *The Challenges to International Human Rights* – Carnegie Council on Ethics and International Affairs 2004; at www.carnegiecouncil.org; despite the express prohibition of article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War (6 U.S.T. 3316, U.N.T.S 135, ratified by the US-see Lord Steyn: *Guantanamo Bay: The Legal Black Hole*, Address at the 27th F.A. Mann Lecture, 25 Nov. 2003; ICRC public criticism of the U.S. failure to institute due legal process for detainees on 6 Nov. 2003) the 5th amendment (Due Process Clause) and the 13th Amendment to the US Constitution which provides “neither slavery nor involuntary servitude, except as a punishment for a crime whereof the parties shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction”, hundreds of enemy combatants remain in legal limbo-land in US military custody at Guantanamo Bay without charge and without any semblance of human rights; see also Joan Fitzpatrick: *Speaking Law to Power: The War Against Terrorism and Human Rights* (2003) 14 EJIL 241 cited in Hilary Charlesworth: *Is the War on Terror Compatible with Human Rights? An International Law Perspective*. Paper presented on 4.12.2003 at the Castan Centre for Human Rights Law Conference accessible at www.law.monash.edu.au/castancentre; Costas Douzinas *The End (s) of Human Rights* (2002) Melbourne ULR 23.

¹⁶ This section is largely based on the paper by Hilary Charlesworth et al above n4.

¹⁷ Id at 446-450 and cases cited at 447 n 153.

¹⁸ (1995) 183 CLR 273.

¹⁹ Id at 316.

²⁰ South Australia is the only jurisdiction where *Teoh* has been reversed, see *Administrative Decisions (Effect of International Instruments) Act 1996 (SA)*.

²¹ See discussion in Charlesworth et al above n 4 at 450; also Wendy Lacey: *A Prelude to the Demise of Teoh: The High Court Decision in Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2004) 26 Sydney Law Review 131.

²² Id at 451- *Trendtex Trading Corporation v The Central Bank of Nigeria* (1977) 1QB 529 at 553-554.

²³ (1948) 77 CLR 449.

²⁴ Id at 477. Article 8 of *The Vienna Convention on the Law of Treaties* (U.N. Doc.A/Conf 39/27) to which Australia is party provides that state parties are bound not to take any action that undermines the “intent” of their treaty obligations and the *Declaration of Tehran, Final Act of the International Conference on Human Rights*, noted the status of the Universal Declaration of Human Rights as having the force of customary international law.

²⁵ (1992) 175 CLR 1.

²⁶ *Id* at 42.

²⁷ (1992) 177 CLR 292.

²⁸ See Charlesworth et al above n 4 at 453-455.

²⁹ *Id* 457-461.

³⁰ Above n 3. In the US the latter canon of statutory interpretation dates from the decision in *Murray v The Charming Betsy* (1804) U.S. (2 Cranch 64, 118) of Marshall CJ that: “An act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains”.

³¹ Charlesworth et al above n 4 at 461-463; and see *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 657-658.

³² (1997) 190 CLR 513 at 657-658.

³³ (1998) 195 CLR 337.

³⁴ *Id* at 418.

³⁵ See eg. *Callinan J in Western Australia v Ward* (2002) 191 ALR 1 at 275; Gleeson CJ, McHugh and Gummow JJ in *AMS v AIF* (1999) 199 CLR 160 at 180.

³⁶ Lord Steyn: *Human Rights: The Legacy of Mrs Roosevelt* (2002) Public Law 473.

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³⁷ *Id* at 9-10; 1. *Personal rights* (i.e life, liberty, freedom from torture etc). 2. *Civil and political rights* (e.g. freedom of thought, expression, assembly, conscience and the right to vote) 3. *The rights of individuals in groups* (e.g. the right to privacy, asylum in case of persecution, property, freedom of movement and freedom to choose a religion) 4. *Economic and Social Rights* (e.g the right to work, education and social security).

³⁸ The Preamble to the UDHR.

³⁹ Covenant on Civil and Political Rights (CCPR) together with the first and second Optional Protocols under it; Covenant on Economic, Social and Cultural Rights (CESCR); Covenant on the Elimination of All Forms of Racial Discrimination (CERD); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention Against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment (CAT); Convention on the Rights of the Child (CRC). Australia is also a party to the Convention and Protocol Relating to the Status of Refugees (CRSR); The supervisory committees monitoring compliance comprised the Human Rights Committee (HRC); The Committee on Economic, Social and Cultural Rights (CESCR), The Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), The Committee Against Torture (CAT), the Committee on the Rights of the Child (CRC). The international instruments, the reports of the committees, records, complaints and decisions on violations are accessible at www.bayefsky.com the instruments, research and reading/reference materials are accessible at www.austlii.edu.au/dfat/;

⁴⁰ Assoc. Prof. Spencer Zifcak (La Trobe University) *The New Anti-Internationalism: Australia and the United Nations Human Rights Treaty System*: Discussion Paper 54 (The Australia Institute – April 2003).

⁴¹ *Id* at 20.

⁴² *Id* at 21.

⁴³ Id at 15-16.

⁴⁴ Id at 1-7.

⁴⁵ Id at 7.

⁴⁶ Id at 17-19.

⁴⁷ Id at 19.

⁴⁸ Id at 22.

⁴⁹ Id at 24-35.

⁵⁰ Id at 7.

⁵¹ Id at 25.

⁵² Ibid.

⁵³ Id at (iv).

⁵⁴ Ibid: Prime Minister Howard responded by saying: "*Well, I'm not immediately bowled over by every request that comes from Mrs Robinson.*" Zifcak above n40 at 29 citing ABC's PM program – 20.1.2002.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Professor Anne Bayefsky "*The UN Human Rights Treaty System: Universality at the Crossroads*" (250 page report) Accessible at www.bayefsky.com

⁵⁸ Zifcak above n40 at 36-37.

⁵⁹ a series of critical reports have been issued by Amnesty International from February 1996 on the issues raised by the committees. The AI reports are accessible at www.amnesty.org; Human Rights Watch (at www.hrw.org) has issued numerous reports condemning Australia's failures.

⁶⁰ Zifcak above n40 at (v). A Labor Government introduced mandatory detention for asylum seekers; the Labor Opposition supported the Government's "Pacific Solution" following the Tampa incident. Mark Latham as the newly elected leader of the Labor Opposition suggested that legislation retrospectively criminalising specified conduct to allow for the Australians in US military custody at Guantanamo Bay to be returned and tried in Australia. This is prohibited by Article 9 of the Universal Declaration of Human Rights ("*No one shall be subjected to arbitrary arrest, detention or exile*") and contrary to Article 11 of the UDHR which provides that no-one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time when it was committed.

⁶¹ Id at (v). eg the debate surrounding the Tampa and the border protection legislation demonstrated during the 2001 election, see also Professor Robert Manne: *The Barren Years -John Howard and Australian Political Culture* referring to the rise of the Howard Government coinciding with the progressive destruction and disappearance of the social democratic political agenda from the Australian political landscape cited at Zifcak at page 58.

⁶² Ibid.

⁶³ Charlesworth et al above n 4 at 436, citing Charlesworth: *Australia's Split Personality: Implementation of Human Rights Treaty Obligations in Australia* (in Alston & Chiam [eds]: *Treaty-Making and Australia* [1995]); Professor Lowitja O'Donoghue: *Grass Roots Human Rights: Beyond Symbolism* (Third Annual Human Rights Oration: Equal Opportunity Commission Victoria 10.12.2003); Prof Larissa Behrendt: *From the Periphery to the Centre: The New Role for Indigenous People* (2003) Law and Justice Address of the Law Foundation of NSW.

⁶⁴ See *Toonen* 488/1992; *A* 560/1993; *C* (832/1998); *Winata et al* (930/2000); *Love et al* (983/2001); *Rogerson* (802/1998).

⁶⁵ See *Young* 941/2000 decision 6.8.2003; *Baban et al* 1014/2001 decision 6.8.2003; *Cabal and Bertram* 1020/2001 decision 7.8.2003; *Bakhtiyari et al* 1069/2002 decision 29.10.2003.

⁶⁶ eg. In South Australia under Labor Party Premier Mike Rann (who has from the outset tried to emulate his "mentor" the late Don Dunstan whose government achieved so much in advancing the rights of indigenous Australians), there have been reversals of decisions of the Parole Board. Under the Human Rights Act 1998 UK which adopts the European Convention on Human Rights all sentences must be imposed by "*an independent and impartial tribunal*". If that had been the position in SA, Premier Rann could not interfere with the decisions of the Parole Board (see *R v Secretary of State for the Home Department Ex p. Anderson* (2003) 1AC 837; also Morris Amos: *R v Secretary of State for the Home Department Ex p. Anderson: Ending the Home Secretary's Sentencing Role* (2004) 67 Modern Law Review 108 at 109). The interference by the SA Government and in particular the Attorney General and Premier Rann with the independence of the Director of Public Prosecutions by directing action to be taken in a particular case rather than by way of general guidelines has made the DPP a cipher in the control of the Rann Government (see *Nemer v Holloway and ors* (2003) SASC 372); Mike Rann now asserts that he will direct the DPP to prosecute in particular cases whenever his government decides its in *the public interest* (because he is of course the best judge of that). In this environment the criminal justice system in South Australia could be compared to a *dying animal* (with apologies to Phillip Roth; *The Dying Animal*: 2001 Jonathon Cape). The State Government announced on 15 March 2004 that it would appoint an administrator to the Anangu Pitjantjatjara Lands which are self-managed and their status protected by legislation (Pitjantjatjara Land Rights Act 1981). The decision taken by executive decree and announced by Treasurer Kevin Foley, as Premier Rann was strangely invisible at the time, was contrary to the Racial Discrimination Act (Cth) and Australia's treaty obligations. That ill advised step exposed the government to serious internal division and was quickly reversed. The government has now appointed a *coordinator* (whatever that means). Not long after the initial Rann Government decree, Mark Latham announced that, if the Labor Party won government, he would do away with ATSIC (the peak body elected by indigenous people). Prime Minister Howard exploited the situation, announcing on 15 April 2004 that the Government would abolish ATSIC and put an end to the "failed experiment" of self management. Howard would not have taken such a step without the apparent support coming from so-called progressive forces supposedly sensitive and protective of the interests of Aboriginal people. The Rann Government continues to push its *tough* law and order policies, ridicules and marginalises anyone and everyone getting in the way of its populist agenda; eg. Mr Rann's response, to lawyers offering constructive criticism on the Labor Government's policies, was *C'mon, make my day!* – So much for reasoned debate within a free and democratic society. It is as if we had strayed onto the set of a Dirty Harry movie or Monty Python sketch. As the government's *get tough on crime* agenda gains momentum (and, to the delight of the radio shockjocks, Mr Rann assures us that SA will be the toughest jurisdiction in Australia) the prison system is in crisis; the public health system, particularly in the delivery of mental health services, is in a deplorable state and getting worse by the day; services for families and particularly vulnerable Aboriginal children are so bad they might as well not exist. These are all areas where one or more of the human rights treaties to which Australia is a party apply. Meanwhile the Rann Government hoards money, ignores its obligations, and pleads fiscal responsibility. Mike Rann just happened however to *find* the money available to throw at his grand vision, an *Adelaide Film Festival*, which will one day be the wonder of the world. Similar sideshows are going on in every other State with Premier Carr in New South Wales leading the way as the pied piper. He has even gone to the extreme of passing retrospective legislation to ensure that a prisoner who had been sentenced to life as a juvenile but had served his non-parole term of 15 years will

never be released. That action breaches the UDHR and 2 or 3 of the human rights treaties but then who cares as long as it is in the public interest!

⁶⁷ See above n15; *Report of the Lawyers Committee for Human Rights - Imbalance of Powers: How Changes to US Law and Policy Since 9/11 Erode Human Rights and Civil Liberties*, cited in Mary Robinson: *Shaping Globalisation: The Role of Human Rights* [5th Annual Grotius Lecture – ASIL 2.4.2003] US *Civil Liberties in September 11's Wake: A Roundtable Discussion and In Defence of Freedom* (Statement of 162 US Organisations at www.carnegiecouncil.org).

⁶⁸ Learned Hand [American Jurist 1872-1961; a judge of the US District Court: (New York's Southern District), and of the Federal Second Circuit Court of Appeals. He was often referred to as the "tenth justice of the Supreme Court":] extract from "*A Plea for the Open Mind and Free Discussion*" Address to University of the State of New York: 24.10.1952 delivered at the height of the McCarthy period; see also his collected papers/lectures: *A Spirit of Liberty* (1952) and "*The Bill of Rights*" (1958).