



LAW WEEK 2003

Address at the Law Week Service

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St George's Cathedral
Perth
Western Australia



The theme chosen by the Law Society for Law Week 2003 is *Human Rights and the Law*. This is a very significant theme for us to ponder as once again we gather together to celebrate Law Week at this ecumenical service in this beautiful cathedral.

In this context, it is significant that of the nations that previously relied upon the common law to defend human rights, Australia stands out as the only one that continues to put faith in this method of protection. Canada, South Africa, Hong Kong, India, Pakistan and New Zealand have all adopted a Bill of Rights, whether in statutory form or constitutionally entrenched. Even more significantly, in recognition of its accession to the *European Convention on Human Rights*, the United Kingdom enacted a Bill of Rights in 1998 as part of its domestic law. This latter development is of great significance to Australia, because it is from the English common law that we have drawn in the protection of human rights. There can be no doubt that this step was necessary because the protection offered by the common and statute law of the United Kingdom was not sufficient to comply with the obligations imposed by the *European Convention*. Given that the United Kingdom has recognised that its common and statute law provides insufficient protection for fundamental human rights by pan-European standards, it is necessary to ask on what basis can Australia justify a lesser legal standard of protection than all of Europe, Bangladesh, Canada, Hong Kong, India, New Zealand, Pakistan and the United States?



The fact that Australia is "behind the times" in this regard, is both a blessing and a bane. It is a bane because Australian citizens must currently rely upon the limited powers of the courts to protect their rights and freedoms. While s 92 of the *Commonwealth Constitution* provides that "trade, commerce and intercourse among the states ... shall be absolutely free" and guarantees freedom of movement by citizens around Australia, there are few other guarantees. The provision in s 80 for trial by jury can be nullified by the creation of offences triable summarily. Section 116 of the *Constitution*, however, contains a constitutional guarantee of freedom of religion that goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion¹. However, we have no other positive freedoms "as of right" without judicial decree. In one way, this is a blessing because we are in a position to learn from the mistakes and misfortunes of others. For instance, the criticism of the 1982 *Canadian Charter of Rights and Freedoms* is that "except in criminal cases, the major beneficiaries of Charter rights are corporations, professionals and other privileged interests"².

As Ms Cherie Booth QC has pointed out in her recent addresses, the experience of the United Kingdom since the enactment of the *Human Rights Act 1998* in a series of cases has given rise to a new key area of jurisprudence and a cultural shift in the law and the legal profession. This has already had a significant impact upon the practice of private law in

¹ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 per Latham CJ at 124.

² A Petter, *Canada's Charter Flight: Soaring Backwards into the Future* (1989) 16 *Journal of Law and Society* 151 at 152.



the United Kingdom as well as upon judicial reasoning and methods of interpretation³.

The incorporation of the *European Convention on Human Rights* into domestic law by the *Human Rights Act* was heralded as a great step forward for that country. Many commentators expected that the development of a new culture of respect for human rights would result from the act and eventually permeate British society⁴. Currently, Australia's obligations under the *International Convention on Civil and Political Rights*, which follow this country's accession to the *First Optional Protocol*, can only be tested by application to the United Nations Human Rights Committee in Geneva. This is not a formal or binding judicial process and its effectiveness is questionable. The best outcome an aggrieved Australian can hope for is a short-lived international embarrassment for the Government. In the absence of action by Parliament to incorporate Australia's human rights' treaty obligations into domestic law, the High Court has in the past taken into account the international obligations which Australia has undertaken in the interpretation and application of domestic law. For example, Australia is a party to the United Nation's *Convention on the Rights of the Child* under which the best interests of the child are declared to be a "primary consideration" in all relevant actions concerning children. In *Minister for Immigration v Teoh*⁵, it was held that the provisions of the *Convention* were relevant to a decision to deport the father of children.

³ J Spigelman, *Access to Justice in Human Rights Treaties* (2000) 22 Sydney Law Review 141 at 144; G. Phillipson, *The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?* (1999) 62 *Modern Law Review* 824 at 825

⁴ Lord Chancellor, Lord Irvine of Lairg, Keynote Address to the Annual Conference of the Bar, UK, 9 October 1999

⁵ (1995) 69 ALJR 424



While such provisions were not incorporated into domestic law, accession to the *Convention* resulted in a legitimate expectation that those making administrative decisions in actions concerning children, would take into account as a primary consideration the best interests of the children, who were themselves Australian citizens. Their father was not, although he had applied for resident status. Mason CJ and Deane J⁶ said that the provisions of an international convention to which Australia was a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law. It was acknowledged, however, that courts should act in this fashion with due circumspection, when the Parliament itself has not seen fit to incorporate the provisions of the *Convention* into domestic law. However, a departmental instruction which, in effect, ignored the interests of the children was held to render the proceedings invalid for want of procedural fairness. Whether the Australian Government will seek to revisit the issue of domestic recognition of international human rights' obligations, in the light of the experience in the United Kingdom, is yet to be seen. Currently, there is no reason to be optimistic. In the meantime, it seems to me to be vital that informed public discussion on the subject should continue. In 1999, in an address to the National Conference of the Australian Plaintiff Lawyers' Association, Chief Justice Spigelman of New South Wales warned that a failure to keep up with other common law countries in respect of the development of human rights could result in significant intellectual isolation for Australia⁷. In this country, we still draw significantly upon the judicial experience in England and increasingly in Canada for our interpretation, application and the

⁶ Ibid at 430-431

⁷ J Spigelman, *op cit*, at 150



development of the common law. The effect of the developing human rights' jurisprudence on the common law in Canada is already limiting our comparable base. The same may follow in the case of New Zealand, although the human rights' legislation adopted there is not the "full bill" as in the case of Canada and the United Kingdom. The enactment of the *Human Rights Act* and its impact upon the development of the common law in that country could cause the common law in each of our respective countries to seriously diverge. The consequence will be that not only shall Australia be geographically isolated, but also legally isolated. In these times of growing globalisation, Australia can ill afford to fall behind the rest of the developed world.