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A HUMAN RIGHTS ACT FOR QUEENSLAND?

The Honourable Justice Margaret McMurdo AC
President, Court of Appeal, Supreme Court of Queensland[*]

At the beginning of the year I was honoured to accept Professor Neil Rees's invitation to present this Inaugural Oration. Lectures like this appear a great idea when you are first asked but the euphoria wears off at a rate directly proportional to the lecture date's approach. When Professor Rees and I settled on the topic *A Human Rights Act for Queensland?* neither appreciated how topical this question would be by the 23rd of September. Queensland Attorney-General, the Honourable Yvette D'Ath MP, announced only last week that she will be referring the issue of whether Queensland should have a human rights charter to a parliamentary committee for an inquiry. The terms of that inquiry have not yet been settled but I understand the question will be referred to Parliament sometime in the coming weeks.

In those circumstances, the conventions surrounding the doctrine of the separation of powers which apply in this State make it unwise for me as a sitting judge to express a concluded view on this topic which will soon be a matter for the elected Parliament of Queensland. What I can and will do this evening is set the background for this debate by discussing the history of human rights at common law and internationally; the 2009 Australian National Human Rights Consultation; the position in the ACT and Victoria where there are human rights acts; and the lead up to the pending Queensland debate; before concluding with some recent insights from international jurists. I emphasise that I am not speaking on behalf of my court or the judiciary. If anyone apprehends I have a view on any issue, I hold it as an ordinary Queenslander.

Human rights at common law

Perhaps, like me, you were fascinated to see the *Magna Carta* which came to Australia from Lincoln Cathedral as part of our bicentennial celebrations and was displayed in the Magna Carta pavilion at Brisbane's Expo 88. It is fitting in Queensland in 2015, the much celebrated

[*] I gratefully acknowledge the assistance of my Associate, Anne Crittall LLB (Hons) for her research and editing assistance.

year of the 800th anniversary of *Magna Carta*, that the debate has been ignited as to whether we should have a Queensland human rights act at all, and, if we should, what model it should take.

Magna Carta, the great charter, signed in a field at Runnymede on the River Thames, not far from Windsor, is seen as the source of common law human rights. This is a tad ironic as the infamous King John's concessions to his Anglo-Norman barons were in one sense offensive to human rights. They were dragged out under duress. The beneficiaries of the charter were not oppressed serfs but the barons who oppressed others and were interested in neither democracy nor the rights of the common people.

The charter was legally valid for only three months, although it was later re-issued. Nevertheless, *Magna Carta* brought hope in harsh times. It limited the power of the King by binding him to the rule of law. It gave the church the right to be free from governmental interference. It allowed free citizens to own and inherit property and provided some protection from excessive taxes; and it gave widows who owned property the right to choose not to remarry. It established principles of due process and equality before the law. It contained provisions forbidding bribery and official misconduct. It began the tradition of respect for the law; the notion that there should be limits on government power; and the concept of a social contract under which the government ruled with the consent of the people.[1] Winston Churchill described it as: "The foundation of principles and systems of government of which neither King John nor his nobles dreamed."[2]

Magna Carta was one of four charters sealed over the next 10 years, giving rights to the King's subjects and limiting the monarch's powers. In 1297 it was entered as a statute of England and Wales. It was the first significant check on royal power, establishing the authority of the law over arbitrary executive action.

Magna Carta was used by parliament in its struggle against the absolute power of the Stuart kings, but the self-proclaimed Lord Protector, Oliver Cromwell, was no fan, referring to it as: "*Magna Farta*." I am uncertain whether this was a clerical slip or Cromwell's attempt to

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1 The Commonwealth Magistrates' and Judges' Association 2015 Conference, Wellington, New Zealand, 13 – 18 September 2015, *Magna Carta to Commonwealth Charter Exhibition to Mark 800th Anniversary of the Great Charter 2015*, Introduction.

2 Above; Winston S. Churchill, *A History of English-Speaking Peoples*, 4 Vols (New York: Dodd, Mead and Company, 1956), Vol 1, 254 and 357.

denigrate the charter. With parallels to the modern day tension between human rights and civil liberties on the one hand, and the need to protect citizens and the state against terrorism on the other, Cromwell said: "*Magna Farta* [sic] cannot control actions taken for the safety of the Commonwealth."[3]

With the English *Bill of Rights* in 1689 and the *Act of Settlement* in 1701, the concept was established of limitations on government, binding monarch and subject alike, with curbs on the power of the Crown, independent parliamentary control of taxation, and judicial independence.

Throughout the 18th century, *Magna Carta* continued to inspire various declarations of human rights, most importantly the United States of America's *Declaration of Independence* in 1776 and its *Bill of Rights* in 1789, which constitutionally entrenched the idea that fundamental rights should be protected by the institutions of government.

Unlike in the USA, in Britain and its colonies and dominions the supremacy of parliament was recognised, not through a written *Bill of Rights* but through unwritten constitutional conventions based on the common law tradition of the rule of law, combined with statutes like *Magna Carta* and *Habeas Corpus*. A V Dicey, a leading 19th and early 20th century British constitutional theorist, declared that the common law and the *Habeas Corpus* Acts were: "for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."[4] But Dicey's view of rights was affected by the times in which he lived. He was no visionary, for example, he vehemently opposed both Home Rule for Ireland and universal suffrage insofar as it concerned women or people of colour.

As the British colonies and dominions gained their independence, all adopted charters of human rights; all but for Australia. Indeed, Australia remains the only democracy in the world without a bill of rights.

New Zealand adopted its *Bill of Rights Act* in 1990. The experience seems largely to have been positive. Commentators claim that it has "infused public debate, influenced public attitudes,

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3 J Campbell, *The Lives of the Chief Justices* (London, 1849) Vol 1, 432, 433 quoting Clarendon, *History of the Rebellion*; and A Arlidge and I Judge, *Magna Carta Uncovered* (Oxford, Hart, 2014) 143.

4 A V Dicey, *Introduction to the Study of the Law of the Constitution*, (Macmillan, 1st ed 1885, 10th ed 1959) 221.

shaped legislation, and improved the conduct of state actors."[5] It has ensured that human rights have "been woven into the fabric of New Zealand law and society"[6] and, contrary to the predictions of critics, it has not led to a flood of litigation.

Since 1998, even the United Kingdom has had a *Human Rights Act* incorporating into UK law the rights contained in the *European Convention on Human Rights*.[7] The UK Act makes it unlawful for any public body to act in a way which is incompatible with those rights. If an act of parliament offends a *Convention* right, UK courts cannot strike down the law but they can issue a declaration of incompatibility, thereby preserving the principle of parliamentary sovereignty. The UK *Human Rights Act* creates a free-standing cause of action that allows individuals to bring claims against public authorities that act incompatibly with human rights. There has been no resulting flood of litigation, with the Act being substantively raised in only two per cent of cases determined by appellate courts.[8]

International human rights

Following the horrors of the Second World War, representatives from the world's nations, in an unprecedented spirit of optimism and determination to build a fairer peaceful world, gathered at the United Nations to draft a treaty to prevent future wars and preserve peace and freedom. The result was the 1948 *Universal Declaration of Human Rights* (UDHR). This was the first ever declaration of the fundamental rights and values pertaining to the entire human race. Its principle proponent and drafter, Eleanor Roosevelt, Chair of the UN Human Rights Commission, called it the "*Magna Carta* for all mankind." Australia was closely involved in formulating the UDHR. The Australian Minister for External Affairs, Dr H V Evatt, was then the President of the United Nations Assembly. He enthusiastically proclaimed Australia's adoption of the UDHR as, "a step forward in a great evolutionary process."[9]

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5 National Human Rights Consultation Report, Chapter 11, *Statutory Models of a Human Rights Protection: A Comparison* (2009), 246; E W Thomas, "A Bill of Rights: The New Zealand Experience" (Paper presented at ANU Comparative Perspectives on Bills of Rights Conference, Canberra, 18 December 2002, 30.

6 Above.

7 *Human Rights Act* 1998 (c 42) (UK).

8 National Human Rights Consultation Report, Chapter 11, *Statutory Models of a Human Rights Protection: A Comparison* (2009), 251.

9 Dr H V Evatt, (Australia), Plenary Meetings of the General Assembly, 183rd Plenary Meeting, (10 December 1948), 934; Annemarie Devereaux, 2005 *Australia and the Birth of the International Bill of Human Rights* 1946-1966, Federation Press, 1.

Since then Australia has signed, ratified or endorsed many important international human rights instruments:

- the Convention on the Prevention and Punishment of the Crime of Genocide (signed 1948; ratified 1949);
- the Convention Relating to the Status of Refugees (accession 1954);
- the International Convention on the Elimination of All Forms of Racial Discrimination (signed 1966; ratified 1975);
- the International Covenant on Economic, Social and Cultural Rights (signed 1972; ratified 1975);
- the International Covenant on Civil and Political Rights (signed 1972; ratified 1980);
- the Convention on the Reduction of Statelessness (accession 1973);
- the Convention Relating to the Status of Stateless Persons (accession 1973);
- the Convention on the Political Rights of Women (accession 1974);
- the Convention on the Elimination of All Forms of Discrimination Against Women (signed 1980; ratified 1983);
- the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (signed 1985; ratified 1989);
- the Convention on the Rights of the Child (signed/ratified 1990);
- the Convention on the Rights of Persons with Disabilities (signed 2007; ratified 2008); and
- the Declaration on the Rights of Indigenous peoples (endorsed 2009).

But unless these international instruments are incorporated into domestic law, they do not form part of Australia's federal or state law.

The issue of whether Australians should have a charter of rights and, if so, what form it should take, is not new. It has been debated since before the Commonwealth of Australia was formed. It was a hot topic during the drafting of the Commonwealth Constitution, but ultimately the Constitution contained few human rights protections. In 1973,[10] and again in 1985,[11] human rights legislation was introduced into the Federal Parliament but was never enacted.[12]

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10 *Human Rights Bill* 1973 (Cth).

11 *Australian Bill of Rights Bill* 1985 (Cth).

12 The Honourable Justice Michael Kirby, *A Bill of Rights for Australia – But do we need it*? (Paper presented at The Queensland Chapter - Young Presidents' Association, Brisbane, 14 December 1997).

Things have progressed further, however, at State and Territory levels. The Australian Capital Territory (ACT), in 2004 passed its *Human Rights Act*. Two years later, Victoria followed with its *Charter of Human Rights and Responsibilities Act* 2006 (Vic). Eight hundred years on from *Magna Carta*, is it Queensland's time? The issue is of great importance to legislators, policy makers and all Queenslanders, especially lawyers. After all, rights are central to the study and practice of the law and directly or indirectly impact upon us all.

The National Human Rights Consultation

A great deal of useful work has already been undertaken on the topic. Following the 2008 summit held by Prime Minister Rudd, one of the five big ideas arising from the section on the future of Australian Government was that Australia adopt a federal bill of rights. In response, the Rudd Government set up the National Human Rights Consultation (NHRC) to "initiate a public inquiry about how best to recognise and protect the human rights and freedoms enjoyed by all Australians" and to "establish a process of consultation which will ensure that all Australians will be given the chance to have their say on this important question for our democracy."

The NHRC was chaired by Father Frank Brennan AO, with members, broadcaster, Mary Kostakidis, Indigenous barrister, Tammy Williams, and former Commissioner of the Australian Federal Police, Mick Palmer AO APM. Distinguished Australian diplomat, Philip Flood AO, was an alternate member. Its report, which is available online through the Australian Government Attorney-General's Department website,[13] provides an excellent overview, as at publication in 2009, of Australian human rights, reform options, the competing views in the debate, the various statutory options and future recommendations. I commend it to all who are considering whether Queensland should have a human rights act and, if so, its form.

The NHRC Report established that there was considerable community support for a human rights act. The majority of those attending NHRC community roundtables, which were held throughout Australia including Brisbane, Ipswich, Charleville, Rockhampton, Townsville, Palm Island, Yarrabah, Cairns, Thursday Island and Weipa, favoured a human rights act. Indeed, 87.4 per cent of those who made submissions supported it. The NHRC additionally

[13] The National Human Rights Consultation Report is available at: <https://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>.

commissioned a social research report which consisted of 15 focus groups and a 1200 random person telephone survey. The result was that 57 per cent expressed support for a human rights act, 30 per cent were neutral and only 14 per cent were opposed.[14] It followed that most participants in the roundtable discussions and the majority of those who made written submissions apprehended that more needed to be done to protect and promote human rights.[15]

As to which human rights should be protected, the majority (2641) of those who made submissions to the NHRC expressed support for the protection and promotion of civil and political rights. Many (1252) also supported the protection and promotion of economic, social and cultural rights. Some (593) sought the protection and promotion of all rights contained in the international treaties to which Australia is a party. Others (520) sought support for the protection and promotion of Indigenous rights.[16] The NHRC recommended that the rights listed in the following treaties be protected and promoted:

- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention on the Elimination of All Forms of Discrimination against Women;
- the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment;
- the Convention on the Rights of the Child; and
- the Convention on the Rights of Persons with Disabilities.[17]

The NHRC favoured the introduction of a Human Rights Act of the kind adopted in New Zealand,[18] the United Kingdom,[19] Victoria[20] and the ACT.[21] This "dialogue" model of human rights protection[22] was most favoured by those who made submissions to the NHRC. It is based on the three arms of democratic government, the executive, the parliament and the

14 National Human Rights Consultation Report, 303.
15 Above, 350.
16 Above, 72.
17 Above, Recommendation 17.
18 *Bill of Rights Act* 1990 (NZ).
19 *Human Rights Act* 1998 (c 42) (UK).
20 *Charter of Human Rights and Responsibilities Act* 2006 (Vic).
21 *Human Rights Act* 2004 (ACT).
22 National Human Rights Consultation Report, 303.

judiciary, prompting responses (or dialogues) from each other when a proposed law or policy may be inconsistent with human rights.[23] It works on the understanding that the executive will operate in a manner consistent with human rights by reporting to a democratically elected parliament. Both the executive and parliament will be held accountable by the courts. Parliament, elected by the people, has the final power to pass laws, even laws over-riding human rights. Together with the executive, parliament scrutinises bills for human rights compliance before they become law. The judiciary interprets legislation in the manner consistent with human rights, provides remedies if the executive acts inconsistently with human rights, and has power to declare parliament's laws incompatible with human rights. A central aspect of the dialogue model is that courts do not have power to declare legislation invalid or inoperable. That power remains with parliament which is answerable only to the people. The dialogue model meets the argument that a bill of rights gives unwarranted power to unelected judges.

As to other possible models, the NHRC noted that former High Court Justice, the Honourable Michael McHugh, suggested a model similar to the Canadian *Charter of Rights and Freedoms* whereby all legislation would be read subject to the human rights set out in the federal *Human Rights Act*. Any inconsistent legislation would be inoperative, although parliament could provide that the legislation operate, notwithstanding. State laws would be inoperative to the extent of the inconsistency by way of s 109 of the *Commonwealth Constitution*. This model would have a stronger enforcement framework than the dialogue model, with the onus on the government and parliament to respond to a judicial decision if they wanted the law to continue in operation; and individuals bringing claims would have judicially enforceable rights and remedies.[24]

Others proposed what was called "the democratic model," which would involve a statutory human rights act, the use of human rights compatibility statements, stronger human rights oversight mechanisms through an ombudsman and a human rights commission, and improved parliamentary scrutiny.[25]

Professor Anne Twomey discussed a model which would require the insertion of a new chapter in the *Australia Act* 1986 (Cth) setting out an agreed set of rights and applying those rights equally at federal and state levels. This would allow changes to be made through the co-

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23 Above, 242.
24 Above, 300 – 301.
25 Above, 302.

operative enactment of federal and state legislation without constitutional entrenchment. Federal and state parliaments would retain the power to enact provisions that expressly exempt particular laws from the application of those rights.[26]

The public response to the NHRC report recorded in the media was polarised. The merits of a human rights act were recognised and promoted by human rights and peak lawyer groups, some of whom thought the proposed dialogue model did not go far enough.[27] The powerful voices in opposition were vociferous with the charge led by *The Australian* newspaper. I wondered whether the opposition from some sectors of the media was because, unlike the common law, a human rights act would provide a right to privacy, directly impacting on the behaviour of the media. But that may be an unfairly cynical observation. Certainly opposition to the concept of a human rights act was not split along party political lines. It included then Shadow Federal Attorney-General, Liberal Senator George Brandis SC; former New South Wales Labor Premier and later Federal Foreign Minister, Bob Carr; and then New South Wales Labor Attorney-General, John Hatzistigos.[28] The media reaction had its impact. There was no federal human rights act.

State human rights legislation

But what about at state and territory levels? It is not widely known that the first attempt at a state human rights act was right here in Queensland. The Nicklin Country-Liberal Party Government in their policy speech for the 1957 general election promised to "embody in the Constitution provisions which follow those laid down in the Declaration of Human Rights of the General Assembly of the United Nations", and to "enact that such provisions can only be repealed or altered by the sanction of a majority of the people determined at a referendum."[29] The Nicklin Government introduced the Constitution (Declaration of Rights) Bill in 1959. It was not enthusiastically endorsed and, after the Government's re-election in 1960, the Bill

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26 Above, 302 – 303.

27 See, for example, Andrew Byrnes, "Second Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation" (2010) 33(1) *University of New South Wales Law Journal* 19.3.

28 See Michael Pelly, "Battle looming on human rights as committee backs new Act, role for courts" *The Australian* (online), 9 October 2009 <http://www.theaustralian.com.au/business/legal-affairs/battle-looming-on-human-rights-as-committee-backs-new-act-role-for-courts/storye6frg97x-1225784569794>

29 Queensland, *Parliamentary Debates*, Legislative Assembly, 9 December 1959, (The Hon George F R Nicklin, Premier).

quietly lapsed.[30] Queensland has since recognised some freedoms, but on an ad-hoc basis, for example, the protection for the right of peaceful assembly in the *Peaceful Assembly Act* 1992 (Qld).[31]

The Human Rights Act 2004 (ACT)

It was not until July 1, 2004 that Australia's first bill of rights, the ACT *Human Rights Act*, came into force. Most of the rights it protects are sourced from the International Convention on Civil and Political Rights (ICCPR). They include the right to life (with life beginning at birth);[32] the freedoms of movement,[33] expression[34] and thought, conscience, religion and belief;[35] the right to a fair trial;[36] the right not to be tried or punished more than once;[37] and the right not to be subject to retrospective criminal laws.[38] Unlike the Victorian Charter, the ACT statute provides for compensation in the event of wrongful conviction and punishment.[39] The ACT Supreme Court may make a declaration of incompatibility when an ACT law is inconsistent with one of the protected rights but this does not affect the law's validity, its operation or enforcement, or anyone's rights or obligations.[40] The Attorney-General, however, must prepare a written response to the declaration of incompatibility and present it to the ACT legislature.[41] This statement must address whether the statute is consistent with human rights and, if not, explain how it is inconsistent.[42] A standing committee must report to the legislature about human rights issues raised by bills presented to the legislature.[43] Failure to comply will not affect the validity, operation or enforcement of the law. The Act operates together with the *Human Rights Commission Act* 2005 (ACT) which establishes the Office of the Human Rights Commissioner.[44] The Commissioner receives complaints about alleged human rights infringements and can intervene in proceedings with the court's permission.[45]

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30 John Wanna and Tracey Arklay, *The Ayes Have it: The History of Queensland Parliament, 1957-1989* (ANU EPress, 2010), 130; and George Williams, *A Charter of Rights for Australia* (University of New South Wales Press Ltd, 2007), 70.
31 George Williams, *A Charter of Rights for Australia* (University of New South Wales Press Ltd, 2007), 70.
32 *Human Rights Act* 2004 (ACT), s 9.
33 Above, s 13.
34 Above, s 16.
35 Above, s 14.
36 Above, s 21.
37 Above, s 24.
38 Above, s 25.
39 Above, s 23.
40 Above, s 32.
41 Above, s 33.
42 Above, s 37.
43 Above, s 38.
44 *Human Rights Commission Act* 2005 (ACT), s 11.
45 *Human Rights Act* 2004 (ACT), s 36.

The ACT *Human Rights Act* was amended in 2008 to provide a direct right of action to the ACT Supreme Court for a breach of obligations under the Act.[46] Individuals can commence proceedings against a public authority (in other words, the executive) when they claim they are a victim of the public authority's contravention of the Act.[47] A public authority contravenes the Act when it does something which is incompatible with a protected human right, or if, in making a decision, it fails to give proper consideration to a relevant human right.[48] The Supreme Court may grant appropriate relief other than damages, for example, an injunction declaratory relief, mandamus or certiorari.

The ACT Government submitted to the NHRC that the Act was an overwhelming success, leading to better policy processes and legislative outcomes. It had improved the quality of law making by ensuring that human rights concerns are given due consideration in the framing of new legislation and policy. The fear that it would transfer power from the democratically elected legislature to unelected judges proved unfounded. The ACT Supreme Court had never issued a declaration of incompatibility and ACT courts had not been flooded with human rights cases.[49] Most cases raising the statute, (about 60%) involved criminal law. The Act has been applied conservatively and has tended to reinforce important common law principles rather than to significantly expand them.[50]

In its first 10 years of operation, the ACT *Human Rights Act* has been mentioned in about 50 tribunal cases (6.6 per cent of published decisions); in 164 cases in the ACT Supreme Court (9.2 per cent of published decisions); and in 29 cases in the ACT Court of Appeal (7.6 per cent of published decisions). After a peak in 2009, there has been a decline in the number of cases in which it has been raised in the Supreme Court. ACT Chief Justice Helen Murrell considers that the Act has had little direct impact on the outcome of cases but its enactment has been a powerful symbolic statement.[51] In this respect it resembles the *Magna Carta*.

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46 Above, s 40C.

47 Above, s 40C.

48 Above, s 40B.

49 National Human Rights Consultation Report, 255 – 256.

50 Helen Watchirs and Gabrielle McKinnon, "Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia" (2010) *University of New South Wales Law Journal*, 33(1): 136 – 170, 146.

51 Chief Justice Helen Murrell, "The Judiciary and Human Rights" (Paper presented at the Ten Years of the ACT Human Rights Act: Continuing the Dialogue Conference, Australian National University, 1 July 2014); ACT Human Rights and Discrimination Commissioner, *Look who's talking: a snapshot of ten years of dialogue under the Human Rights Act 2004 by the Act Human Rights and Discrimination Commissioner*, 2014.

Charter of Human Rights and Responsibilities Act 2006 (Vic)

The Victorian *Charter of Human Rights and Responsibilities Act* came into force on January 1, 2007. It, too, protects rights largely based on those contained in the ICCPR. The 20 protected rights are more extensive than in the ACT statute and include freedom of expression; privacy; equality before the law; the right to vote; rights in criminal proceedings through the right to protection from torture and cruel, inhuman or degrading treatment;[52] cultural and property rights;[53] and the right to liberty and security of the person.[54]

It is broader than the ACT statute in that it protects the rights of all persons with a particular cultural, religious, racial or linguistic background, specifically Indigenous peoples. It also includes a protection from the deprivation of property other than in accordance with the law. Responsibilities are mentioned, not only in the Charter's title but also in the preamble and in the provision relating to freedom of expression. Like the ACT statute, the charter provides that other rights or freedoms are not abrogated or limited simply because they are not listed in the legislation.

It provides that a human right may be lawfully subject to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors,[55] including elements of the internationally recognised test of proportionality. In other words, there are no absolute rights: restrictions on human rights are permissible so long as the extent of the limitation is proportionate to the permissible objective sought to be achieved.

Like the ACT statute, the Victorian Charter applies only to natural persons. It binds each of the three branches of government, the legislature, the judiciary and the executive, to the protection and promotion of human rights.[56] It requires the government, public servants, local councils, police and other public authorities to act compatibly with these specified human rights and to consider them when developing policies, drafting legislation and delivering services. As in the ACT, the legislature must receive a statement of compatibility from the member of

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52 *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s 10.
53 Above, ss 19 – 20.
54 Above, s 21.
55 Above, s 7.
56 Above, s 6.

parliament introducing a new bill[57] but failure to do so does not affect its validity and enforcement.[58] A committee must also review any proposed bill and report on whether it is compatible with human rights.[59]

Courts and tribunals are required to interpret statutory provisions in a way that is compatible with human rights and may consider foreign and international jurisprudence.[60] If the Victorian Supreme Court cannot interpret a legislative provision consistently with a protected human right, as in the ACT, it may make a declaration of inconsistent interpretation.[61] Once such a declaration is made, the Attorney-General and the relevant Minister must be notified and must prepare a written response for parliament within six months.[62] A declaration of inconsistent interpretation does not affect the validity, operation or enforcement of the statutory provision nor create any legal right or give rise to any civil cause of action.[63]

Unlike the ACT statute, the Charter allows parliament to expressly declare that a legislative provision applies, despite incompatibility with the Charter, in exceptional circumstances including threats to national security or a state of emergency. These "override" declarations expire after five years but can be reinstated.[64]

The only case where a declaration of incompatibility has been made is *Momcilovic*.[65] The declaration did not stand for long. Importantly, the High Court held that the provision of the Charter allowing declarations of incompatibility to be made was constitutional. The *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) s 5 reversed the onus of proof for a person found in possession of a drug of dependence. The Charter s 25(1) protected the presumption of innocence in criminal cases. The High Court held that the Court of Appeal was wrong to conclude the two provisions were incompatible.

Under the Charter, the executive (the public authority) is required to act and make decisions in a way that is compatible with human rights.[66] Unlike in the ACT, breach of the Victorian

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57 Above, s 28.
58 Above, s 29.
59 Above, s 30.
60 Above, s 32.
61 Above, s 36.
62 Above, s 37.
63 Above, s 36.
64 Above, s 31(7).
65 (2011) 245 CLR 1; *R v Momcilovic* (2010) 25 VR 436.
66 *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s 38.

Charter does not enable an individual to obtain direct relief from the public authority, but could lead to the exclusion of evidence obtained by the public authority in breach of a human right or lead to a court construing an otherwise lawful act as unlawful. The Charter gives the Victorian Equal Opportunity and Human Rights Commission a range of functions to monitor and report on the implementation and operation of the Charter.

The Victorian Government submitted to the NHRC that the Charter had resulted in more transparent and accountable government actions and improved scrutiny of government decision-making, with human rights an increasingly important factor in delivering services and developing public policy.

Last year the Victorian Equal Opportunity and Human Rights Commission reported on the Charter's operation. After eight years it had become part of the everyday business of public authorities and had driven important human rights initiatives. The Victorian Police, for example, were addressing discriminatory policing and racial profiling by developing human rights-based policies, standards and strategies, particularly in Aboriginal communities.[67] That is because Aboriginal Victorians are 13 times more likely to be in prison than other people; Aboriginal women are the fastest growing prison population in Victoria; half of all Aboriginal prisoners who are released return to prison within two years; and a high proportion of Aboriginal women held in custody on remand (that is without bail pending the hearing and determination of their charges) are subsequently not given a custodial sentence.[68]

Another significant human rights issue was abuse in the disability sector. In 2013-2014, the Disability Services Commissioner reviewed 309 incident reports relating to allegations of staff assaults and unexplained injuries in disability services.[69]

The Commission was also concerned about the number of high profile family violence related deaths during the first half of 2014. That is because over 60,000 family violence incidents were reported to Victorian police during the year, with family violence accounting for 41.7 per cent of all crime against the person offences, and 22,213 women seeking help from homelessness due to

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67 Victorian Equal Opportunity and Human Rights Commission, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities*, 2015, 1.

68 Above, 17.

69 Above, 36.

family violence. Governments have human rights obligations to prevent and respond to family violence and to protect the human rights of women and their children. The Charter provides that protection through the right to equality before the law; the right to life; the protection of families and children; the right to liberty and security of the person; and the protection from cruel, inhuman or degrading treatment. The Commission noted that local councils had initiated a number of policies to prevent family violence, informed by the Charter's human rights perspective.

Victoria has recently reviewed the Charter to ensure it remains robust and effective, embedding, through public education, the societal values of freedom, respect, equality and dignity. The report was delivered to the Victorian Government on 1 September 2015 and tabled in Parliament on 17 September 2015. It is available online[70] and id likely to be of interest to Queensland's parliamentary committee. Its recommendations include amending the Charter in the terms of the 2008 amendment to the ACT statute so that aggrieved individuals can bring claims against public authorities, including judicial review, and receive any remedy other than damages. The report acknowledges the need for a further review in four years to consider how the Charter could be improved, including its possible application to economic, social and cultural rights, and to ensure the remedies it provides are appropriate.

The debate in Queensland

Last year the Honourable Peter Wellington, Independent Member for Nicklin and current Speaker of the Queensland Parliament, spoke about the need for a bill of rights to protect Queenslanders:

> "Queensland has no upper house or house of review, and the current committee system is not able to properly provide the necessary checks and balances on the excesses of … government … I believe it is time for an act of parliament that enshrines the rights and liberties we value".

Following the Queensland election in January and letters of exchange between Premier Palaszczuk and Mr Wellington, the Premier undertook, during the current parliamentary term, to seek advice from the Department of Justice and Attorney-General regarding issues relating to a possible Bill of Rights in Queensland.

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[70] The 2015 Review of the Charter of Human Rights is available at: <https://myviews.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights>.

In support of that course, a number of organisations and individuals wrote to the Premier stating that, in light of the positive ACT and Victorian experience, there should be a comprehensive community consultation process to give Queenslanders the opportunity to provide their views about how their rights should be protected.

Former Victorian Attorney-General, Rob Hulls, who was instrumental in the enactment of the Victorian Charter and who is now the Director of the Centre for Innovative Justice at RMIT University, in May this year spoke about the steps he thought Queensland should take towards enacting human rights legislation. He argued, "that human rights are about everyone; about our everyday hopes for ourselves and for our families; about how we expect to be treated when interacting with the world … about the innate humanity in us all….human rights are a formal manifestation of the fair go, that quintessentially Australian characteristic about which we so readily soliloquise…it is a very Australian thing to want our rights articulated."[71] He considered the real impact of Victoria's Charter had been to change the culture of government and public life so that human rights are at the core of government, not on the periphery; it is actions and decisions of policymakers and service providers, informed by a human rights perspective, which make a difference to individual lives. The Victorian Charter meant better accessibility on public transport; older same sex couples able to access superannuation benefits; a more flexible approach to tax collection for disadvantaged families; improved enforcement of the right to a fair hearing; rate payers having better access to interaction with local councils; the prevention of eviction from their homes for disadvantaged Victorians including single mothers, elderly people and people with disabilities; a man with a disability gaining access to his own mail; and a woman in residential care having better protection to privacy through the simple provision of a shower curtain when showering.

These were small things but they meant a great deal to the individuals affected. They also changed the way that others will be treated in the future. Hulls argues that Queensland needs a charter of rights[72] so that every Queenslander experiences justice as a reality and so the ghosts of the past do not reappear.

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71 Rob Hulls, 'A New Magna Carta? Six steps towards a Queensland Human Rights Act' (Speech delivered for the Queensland Council of Civil Liberties, Brisbane, 13 May 2015), 10-11.

72 Above, 14.

Also in May this year, the Australian Lawyers for Human Rights group called on the Premier to initiate a state-wide public discussion on the introduction of a Queensland human rights act. They considered this was vital for democracy in Queensland and crucial to protect the rights and liberties of all Queenslanders against abuses of government power. A bill of rights, they contended, would be a bulwark against corruption in a state which had no upper house to review legislation. The Queensland Council of Civil Liberties has also supported the concept of a Queensland human rights act based on a dialogue model.[73]

As noted at the beginning of this address, the Queensland Attorney-General has stated a parliamentary committee will shortly be established to consider whether Queensland should have a human rights act, and, if so, its form.

Some recent discussions

In July this year I attended the 2015 Cambridge Lectures conducted by the Canadian Institute for Advanced Legal Studies at Queen's College, Cambridge. Albie Sachs, a retired judge of the South African Constitutional Court where he sat for 15 years, presented a lecture entitled "Judging Social and Economic Rights: The South African Experience." The following evening I watched, and heard him discuss, a film depicting his courageous life: "*The Soft Vengeance of a Freedom Fighter*." As a young lawyer he played a prominent part in the struggle for justice in Apartheid South Africa. The authorities detained him in solitary confinement and tortured him through sleep deprivation. He was exiled to Mozambique where he was later blown up by a car bomb on the instructions of the South African Apartheid Government. He lost his right arm and the sight of an eye but miraculously survived. On his return to his homeland, he met his would-be assassin, a white South African police officer, through South Africa's truth and reconciliation process. Sachs assisted in drafting his nation's post-apartheid constitution which entrenched social and political as well as cultural and economic rights. As you might expect, he was a strong supporter of South Africa's entrenched constitutional model. He was proud of his judicial role in cases such as the *Treatment Action Campaign Case*[74] where the South African Constitutional Court ensured that pregnant women living with HIV were able to receive the drug Nevirapine which substantially cut the likelihood of the transmission of HIV to their unborn babies.

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73 Amy Remeikis, "Queensland needs Human Rights Bill: Civil Libertarians" *Brisbane Times* (online), 6 January 2015 < http://www.brisbanetimes.com.au/queensland/queensland-needs-human-rights-bill-civil-libertatians-20150105-12icmd.html>.

74 *Minister of Health v Treatment Action Campaign* (TAC) (2002) 5 SA 721 (CC).

I told him that Queensland may adopt a human rights act and asked his views about the argument that it would empower unelected judges to make law and undermine the sovereignty of parliament. He responded, as he did in his book, *The Strange Alchemy of Life and Law*,[75] that judges understand human dignity, oppression and the things that reduce a human being to a state below that which a democratic society can regard as tolerable. In determining human rights issues, it is a benefit, not a burden, that judges are unelected, for it is in this area that their "vision, institutionally tunnelled in the direction of respect for human dignity, comes into its own." The principled balancing undertaken by courts in determining human rights issues, Sachs argued, "is quite different from the compromises worked out in political life.[76]

Last week I, together with hundreds of other judicial officers from around the world, attended the Commonwealth Magistrates and Judges Association 17th Triennial Conference in Wellington, New Zealand. The Right Honourable the Baroness Brenda Hale of Richmond, the first and still sole woman to be appointed to the UK Supreme Court, and now its Deputy-President, spoke on "Applying Concepts of International Human Rights in the national or domestic courts." During the discussion which followed, I told her about the proposed parliamentary inquiry as to whether Queensland should have a human rights charter, and, if so, its form. She considered that human rights legislation in the UK had resulted in better governance with a vibrant human rights focus. She suggested that it was essential to adopt a model which had repercussions for the executive if found in breach of the protected human rights. Otherwise, there was no incentive for people to bring cases before the courts and it would not be possible to develop an effective human rights jurisprudence which would permeate through the culture of governance and into the fabric of Queensland society.

Support for a human rights act, however, is not universal. Critics point out that Australia has done better at protecting human rights without a charter than most countries with charters. Allowing unelected judges to make policy decisions, the critics contend, undermines the role of the elected parliament. A human rights act, they argue, would benefit only lawyers and would instil a litigation-based culture for which taxpayers will ultimately foot the bill. I also spoke at last week's conference with John Hatzistigos who, as I explained earlier was an opponent of a federal bill of rights when he was the New South Wales Attorney-General. He is now a New South Wales District Court judge. We discussed the Queensland position and

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75 Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press, 2009).

76 Above, 167 – 171.

I asked whether he still opposed a human rights charter now that he had crossed over from elected politician to unelected judge. For the reasons I have just set out, he remained firmly opposed to a charter at any level of government.

Some critics fear that a human rights charter might stultify and discourage business. But that does not seem to have been the outcome in the UK, New Zealand, the ACT or Victoria. And, with the high ethical expectations of modern investors and shareholders, it is arguable that conducting business in a jurisdiction which respects and upholds human rights through a charter will be a business incentive, not a disincentive. Tertiary education, by way of a topical example for this audience, is one of Queensland's biggest businesses. Australia's increasing isolation from its common law cousins in its failure to develop an internationally recognised and respected vibrant human rights jurisprudence may make Australian universities, especially in the field of law, less attractive and less competitive.

Conclusion

In conclusion, I encourage each of you, as part of your personal celebration of 800 years of *Magna Carta*, to carefully follow and contribute to the parliamentary inquiry into whether Queensland should have a human rights act. In formulating your views, consider the NHRC Report available on the Federal Attorney-General's Department website. And to those legislators and others who may be concerned at the notion of unelected judges determining whether laws passed by the elected legislature are unlawful, the words of the late, great Nelson Rolihlahla Mandela may be apposite:

> "Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government and authorities are subject to the scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order …
>
> It was, to me, never reason for irritation but rather a source of comfort when these bodies were asked to adjudicate on actions of my Government and my Office and judged against."[77]

[77] Edwin Cameron in *Justice: A Personal Account* (Tafelberg, 2014) quoting President Nelson Mandela's speech at the International Ombudsman Conference in Durbin in 2001.