BRINGING RIGHTS HOME: MAPPING AN AGENDA ON PROMOTING, PROTECTING AND FULFILLING HUMAN RIGHTS IN AUSTRALIA

Emeritus Professor Rosalind Croucher am

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Acknowledgements

Chancellor, Hon Dr Steve Bracks ac and Dr Terry Bracks am; Vice-Chancellor, Professor Adam Shoemaker; Professor Lidia Xynas, Dean – College of Law & Justice; Hon Michael Kirby ac cmg, distinguished guests, colleagues, students and friends.

Thank you, Professor Xynas, for your warm introduction. I am speaking from the traditional lands of the Gadigal people of the Eora nation, in Sydney. I pay my respects to elders past, present and especially the ones emerging. I also acknowledge the Boonwurrung, Wadawurrung and Wurundjeri people of the Kulin nation who are the traditional custodians of the lands on which I was hoping to speak this evening, in Melbourne. I am deeply honoured to be joined on this special occasion by Michael Kirby.

Bringing Rights Home

I have framed this lecture as 'bringing rights home', to prompt questions: why are rights not 'home'? What does 'bringing them home' mean in the context of human rights in Australia today? What does the map for promoting, protecting and fulfilling human rights look like? It is a theme that is central to my work as President of the Australian Human Rights Commission ('ahrc') – Australia's national human rights institution ('nhri').

I will begin by telling a story about the eldest of my five grandchildren. A few years ago, he proclaimed to me, 'Grandma, you have the *Magna Carta* on your wall!'. I did indeed, on the wall of my study. It was a facsimile copy produced by the Rule of Law Institute in 2015, to mark the 800th year of the sealing of the *Magna Carta*

by King John. My grandson was about seven years old at the time. How did he know about the *Magna Carta* – the foundation document for the rights and freedoms in our laws? Through *Horrible Histories* on television.[1] It was a story of King John being nasty. While television shows are comprehensible, the *Magna Carta* is not what you might describe as a highly accessible document. It is written in the medieval Latin of the early 13th century. It is iconic, perhaps 'the vibe' of our understanding of rights, but over breakfast with your grandchildren?

On access to justice, how about this:

> *Nulli vendemus, nulli negabimus, aut differemus rectum aut justiciam*
> To no one will we sell, to no one will we refuse or delay, right or justice

This is quite a different scenario from the late 1940s when the United Nations General Assembly, with Australia's own 'Doc Evatt'[2] in the chair as President, adopted the *Universal Declaration of Human Rights* ('*UDHR*'). This landmark document, born out of the horrors of the Second World War and the holocaust, was adopted by the General Assembly on 10 December 1948.[3] It was one of the first decisions of the United Nations. We now celebrate 10 December as International Human Rights Day.

It was a moment that was also embraced and marked across Australia. I remember Michael Kirby recollecting the *UDHR* being given to every schoolchild in Australia, on that flimsy aerogramme paper that some of you may remember. Its language, as its title suggests, is universal. How about this:

> Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

No medieval Latin, there. The significance and symbolism of the *Magna Carta* as the embodiment of rights was drawn upon by Eleanor Roosevelt, the Chairman of the Commission on Human Rights speaking to the General Assembly on 9 December 1948 in Paris: '[t]his *Universal Declaration of Human Rights* may well become the international *Magna Carta* for all men everywhere'.[4]

Australia was a founding supporter of the *UDHR* and the Charter of the United Nations itself. Australia has since signed and ratified each of the other major first human rights instruments, for example, the *International Covenant on Civil and Political*

1 'Crooked King John and Magna Carta', *Horrible Histories* (Lion Television, 2015).

2 Rt Hon Dr Herbert Evatt QC, Former Justice of the High Court of Australia (1930–1940), Attorney-General for Australia and Minister for External Affairs (1941–1949), Leader of the Opposition (1951–1960) and Chief Justice of New South Wales (1960–1962).

3 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

4 '180th, 181st Plenary Meetings of General Assembly: 3rd Session' (UN Audiovisual Library, 9 December 1948) 0:02:55–0:03:05 <https://www.unmultimedia.org/avlibrary/asset/2057/2057242/>.

Rights ('*ICCPR*') and the *International Covenant on Economic, Social and Cultural Rights*. Overall, we have ratified seven major treaties and a number of associated protocols.[5]

The *UDHR* was an aspirational document, without conferring rights as such, but the other treaties do create obligations for governments to implement the treaties in their domestic law and to be accountable to other governments that are also parties to the treaty. Not enough has been done, however, to enact the rights and freedoms protected by these instruments into Australian law – despite the aspirations perhaps encouraged in the schoolchildren of Michael Kirby's young years.

It does not mean that we do not have a strong tradition of rights and freedoms – we do, and they go back directly to the *Magna Carta* – but it does mean that the rights and freedoms enshrined in these international human rights instruments are not directly enforceable in Australia. They can be conveniently 'distanced' where the moment or politics pushes it.

The passage of the *UDHR* and other human rights treaties has been of profound and enduring impact on Michael Kirby, as a champion of human rights and the international law that gave birth to and nurtures it, long urging the utility of human rights law in the interpretation of the *Constitution*.[6]

Tonight, I ask, what do we need to do to bring these rights home? How do we create an Australian grammar of human rights, consistent with our promises to the world? When I say 'our', I refer to Australia's federal governments over the years. I note in this respect that if you look at the treaties Australia has committed to and their ratification, it is an equal split of left- and right-wing support. It is neither a Labor nor a Coalition project.[7] The Australian conversation about human rights should, therefore, be above politics.

5 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976 ('ICESCR'); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('CERD'); *Convention of the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW'); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC'); *Convention of the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

6 For example, Kirby J's powerful dissent in *Al-Kateb v Godwin* (2004) 219 CLR 562.

7 Apart from the Second Optional Protocol to the *ICCPR* on the abolition of the death penalty which I am sure would have been supported by both sides of politics, it is an equal split for the remaining 20 signing and ratification moments.

Over the last two and half years, I have been leading conversations about the protection of rights and freedoms in Australia.[8] We are framing our work in terms of our view, as the NHRI, of what the reform agenda needs to be to respect, protect and fulfil human rights in Australia into the future.

Our experience with COVID-19 responses has provided in many ways the national test case and setting for looking at answers. Government measures in the interests of protecting the health of the entire community have provided a range of conversations about our rights. I think this has been a really good thing, speaking to a heightened 'rights consciousness' or 'rights-mindedness' in the face of COVID-19 restrictions.

For the most part, governments have openly justified their decisions. The Premiers and First Ministers have maintained a regimen of press conferences, often on a daily basis, that have assisted in the acceptance of the limits to rights and freedoms that have been part of the emergency response.[9]

Even so, there are new expectations from the community generally about human rights, and justifications for limitations – what is the least restrictive approach; and a broad consensus about the need to advance and protect the rights of the community as a major focus of what government does. This creates the momentum for a 'new normal' in the post-COVID world. From the perspective of the AHRC, that involves a greater embedding of human rights in decision-making and accountability for those decisions.

The Australian Human Rights Commission and a Federal Human Rights Act

The Human Rights Commission was established in 1981, by a Coalition government,[10] after Australia had ratified the *ICCPR* the previous August. Dame Roma Mitchell AC DBE CVO QC was appointed to lead it.

In his Second Reading Speech for the Human Rights Commission Bill 1981 (Cth), the then Attorney-General, Senator the Hon Peter Durack, said that the establishment of the Commission would 'help Australia to discharge the obligations

8 We held a conference in October 2019, with Her Excellency Dr Michelle Bachelet, the UN High Commissioner for Human Rights, as our keynote speaker. We released an Issues Paper and two Discussion Papers, dividing our work around three key areas of focus: reforming discrimination laws, the positive framing of rights and freedoms, and accountability measures. We plan to put all three pieces together as a final report for consideration by Government.

9 I have considered issues arising in the COVID responses in: Rosalind Croucher, 'Emergency Powers Need Scrutiny: Ensuring Accountability Through COVID-19 Lockdowns and Curfews is a Human Rights Issue' (2021) 95(5) *Law Institute Journal* 19; and Rosalind Croucher, 'Lockdowns, Curfews and Human Rights – Unscrambling Hyperbole', forthcoming in *Australian Journal of Administrative Law*.

10 *Human Rights Commission Act 1981* was proclaimed on 10 December 1981.

it has assumed under the covenant'.[11] In 1986, the Human Rights Commission was put on a permanent footing under the Labor government[12], as the Human Rights and Equal Opportunity Commission. Marcus Einfeld was appointed as the Commission's first President. The enabling legislation, *Human Rights and Equal Opportunity Commission Act 1986* (Cth), was also proclaimed on 10 December – 'International Human Rights Day'.

The Commission was designed in tandem with an accompanying Australian Human Rights Bill 1985 (Cth). This was passed in the House of Representatives but did not survive the Senate.[13] From the perspective of the Commission's jurisdiction, it is still unfinished legal architecture. To continue along the allegorical lines, we are like a doughnut – with a hole in the middle.

Instead of formal implementation of these instruments through a Human Rights Act or Charter, people can bring a complaint on the basis of these rights to us at the Commission. We have had this function since 1981.[14]

One particular example is the growing set of complaints from Australians invoking the right to return to this country and for children to enter or leave Australia for the purpose of family reunification.[15] These are complaints that do not sit under the category of 'unlawful discrimination' in the four anti-discrimination laws, but in what we describe as our 'human rights' jurisdiction that links to the treaties.[16]

This set of 'human rights' complaints have increased 500 per cent with COVID-19: masks, travel caps, travel bans, family reunion, persons with disability and COVID restrictions, and vaccinations. Our overall complaint caseload, including the unlawful discrimination complaints, is increasing towards well over 100 per cent over the past year.

11 Senator the Hon Lionel Murphy, as Attorney-General of the Labor government, had moved a Human Rights Bill in 1973, including the establishment of a Human Rights Commissioner and a Human Rights Council, with a statutory Bill of Rights. There were also Bills of the Coalition government in 1977 and 1979.

12 The initial Human Rights Commission ceased to exist on 9 December 1986 pursuant to a sunset clause in its enabling legislation, which limited its term of operation to a maximum of five years.

13 See, eg, George Williams, *The Federal Parliament and the Protection of Human Rights* (Research Paper No 20, 1998–99, Parliament of Australia), <https://www.aph.gov.au/binaries/library/pubs/rp/1998-99/99rp20.pdf>.

14 Most notably, however, these instruments do not include the *ICESCR*.

15 For individuals alone – art 12 *ICCPR*; for family groups – art 12,17, 23 of *ICCPR*; and family groups with children – all of the above plus arts 3, 8, and 10 of the *CRC*.

16 There are three distinct pathways of complaints: unlawful discrimination under the four federal Discrimination Acts; complaints of 'discrimination in employment', based on the ILO Convention 111, and 'human rights' complaints referable to the international instruments scheduled to the *AHRC Act*: see Rosalind Croucher, '"Seeking Equal Dignity without Discrimination": The Australian Human Rights Commission and the Handling of Complaints' (2019) 93(7) *Australian Law Journal* 571.

This human rights jurisdiction is important, but it is limited and essentially invisible. The process itself, however, may have impacts for individuals through quiet diplomacy. But if the process does not lead to a successful result through conciliation, then there is no access to judicial consideration, nor to any enforceable remedies.

Our *Constitution* expressly speaks about some rights, but the 'rights' questions in the Australian constitutional context are framed through the lens of limitations on legislative power – and largely through arguing about the implications of such limitations. They are not about personal rights.[17]

Compare the 'Bills of Rights' approach in the United States ('US'), with its constitutionally entrenched rights and freedoms.[18] Not driven by wars of independence from other nations, our *Constitution* was designed around the concerns of its time: foreign affairs, immigration, defence, trade and commerce, and industrial relations – as well as about 'colonising activities of France and Germany in the region'. It was built at a time where concerns about race were a major factor – a legacy that continues to be a stain on our Constitutional framework.

We saw ourselves as essentially British and, as the Hon Robert French AC remarked, 'the rights most intensely debated were those of the individual colonies as proposed states, vis a vis, the proposed federal parliament'.[19] It was, in essence, a deal among the States.

While the US approach has given strong protections to rights and freedoms, it is an approach that has led to a politicisation of appointments to its Supreme Court – one, if I might say, that should not be emulated in our own constitutional context. I observe in contrast that the model of statutory rights protection in Commonwealth countries is a different one, which retains and emphasises parliamentary supremacy – and the clear separation of powers between the courts and the parliament.

The introduction of a federal Human Rights Act was the principal recommendation of the National Human Rights Conversation led by Fr Frank Brennan SJ, over a decade ago ('Brennan Report').[20] The past President of the Law Council of Australia, Pauline Wright, in her Press Club address,[21] also called for an Australian Bill of Rights,

17 *McCloy v New South Wales* [2015] HCA 34, [30]; See also *Unions NSW v New South Wales* (2013) 252 CLR 530, 554 [36].

18 See, eg, JL Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69(1) *Modern Law Review* 7; S Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49(4) *American Journal of Comparative Law* 707, 710.

19 R French, 'Protecting Human Rights Without a Bill of Rights' (Speech, John Marshall Law School, Chicago, 26 January 2010) 7. <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26jan10.pdf>.

20 *National Human Rights Consultation* (Report, September 2009).

21 Pauline Wright and Stephen Kiem, 'No Time Like the Present to Protect our Human Rights' (Speech, National Press Club, Canberra, 18 November 2020).

joining many voices to do so, amplifying the conversation – to do at the federal level what the Australian Capital Territory, Victoria and Queensland have done in relation to State and Territory decision making and accountability.[22]

The focus of these models is primarily aimed at ensuring that decisions are made with human rights obligations in mind. It is frontloaded, rather than reliant on ex post facto action through complaints or the limited judicial pathways under the *Constitution*. In any consideration of improving human rights protections in Australia, and especially at the federal level, such models are instructive. They are framed as 'dialogue' models, between the government of the day, as well as the parliament, the courts and the community.

Following the Brennan Report, the Parliament of Australia established the Parliamentary Joint Committee on Human Rights ('PJCHR'), but it did not enact a Human Rights Act.

While every other country in the Commonwealth of Nations has moved forward by introducing comprehensive human rights protections in legislation, Australia stands alone for not having introduced such protection. The beauty of a Human Rights Act, and other measures that frontload rights-mindedness, is that they are expressed in the positive: affirming rights and freedoms – not just implying them – and giving a clear anchor for decision making. It frontloads human rights thinking. It is also Australian legislation – parsed in the vernacular.

This is the focus of a major part of the AHRC's national conversation project: advancing the case for a Human Rights Act and other complementary reforms. We need to complete the architecture of the Commission – to fill the hole in the doughnut. For my own part, I have had somewhat of a 'Road to Damascus' conversion to the idea of, and need for, an Australian Human Rights Act and embedding human rights thinking more directly in our laws and decision making.

My Journey Along the Road to Damascus

It was not one specific Damascene moment, but a growing realisation, in three parts.[23] Part one – was a recognition that, while the common law strongly embeds the idea of rights, the common law has its limits. Protection of serious invasions of privacy, for example, has got stuck. The common law needs a great leap forward, as it achieved

22 *Human Rights Act in 2004* (ACT), the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2019* (Qld). There are also the older examples of the UK and New Zealand: *Human Rights Act 1998* (UK); *Human Rights Act 1993* (NZ).

23 My first expression of this was to open Law Week in Perth in 2019. A reduced version was published as: Rosalind Croucher, 'Law, Lawyers and Human Rights' (2019) 46(5) *Brief* 22–27.

in *Donoghue v Stevenson* in relation to negligence, but we have not got there yet. Perhaps the 'age of drones', is the contemporary equivalent of the 'age of railroads' to provide the necessary catalyst for the common law.

Part two – was a realisation that the statutory expression of rights is played out in the negative, reliant on individual disputes; and what coverage there is, is patchy. They are framed in terms of what you cannot do and, like the common law, they rely on a dispute before offering a solution. This is not to say that our discrimination laws are not important. They directly reflect international commitments, being domestic implementations of them, and they can achieve many positive systemic outcomes through the conciliation process that is the heart and soul of the complaints-handling processes, and the principal vehicle of operation of discrimination laws.[24]

Part three – was the realisation of the effectiveness of the complaint-handling jurisdiction of the Commission, when it is dealing with claims of unlawfulness under Australian law.[25]

The Problem of 'Foreignness'

Australia's human rights framing is still 'foreign'. Like the Latin of the *Magna Carta*, human rights are often seen as somehow not 'ours'.

We at the AHRC have to administer that 'foreign law' – our entire functions are framed through the lens of international law.

Section 11(1) of *Australian Human Rights Commission Act 1986* (Cth) ('*AHRC Act*') includes, for example, powers to examine laws and proposed laws, in terms of being consistent with, or contrary to, any human right. 'Human rights' in this context are directly referable to the international treaties. We can also seek to intervene, with the leave of the court, in proceedings that involve human rights issues.

The central challenge of our human rights complaints handling jurisdiction is that it is a jurisdiction based on international treaties that are scheduled to the *AHRC Act*. It is not about direct obligations under Australian law. A similar challenge affects the operation of the PJCHR. In both cases, this challenge stifles the effectiveness of the processes.

Under our statutory mandate, we are to hold the government to account against the standards articulated in the international instruments. For the complaints that reference the international treaties, a challenge is also that the respondent is

24 See Croucher (n 16).

25 This is a jurisdiction the Commission has had since the very first days under the *Racial Discrimination Act 1975*, in the first incarnation of domestic implementation of international treaties, with the Commissioner for Community Relations, Al Grassby.

principally the Commonwealth, because the 'acts or practices' that we can consider are those 'by or behalf of the Commonwealth or an authority of the Commonwealth', which at many times places us in an oppositional position to the government.

Moreover, the acts or practices may well be lawful under domestic law, but contrary to international human rights obligations. Therefore, the Commonwealth has a clear answer to the complaints in domestic law. In international law, however, that is no defence. Let me illustrate by reference to arbitrary detention.

'Arbitrary Detention'

In *Al-Kateb v Godwin*[26] there was a challenge to the legality of administrative detention by the Commonwealth under the provisions of the *Migration Act 1958* (Cth) ('*Migration Act*'). Although there is much discussion about the implications of the case and those that have followed,[27] the essential principle is that indefinite detention is lawful under Australian law. In the context of our international obligations, however, art 9 of the *ICCPR* provides that:

> No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 9 has been the subject of a large amount of Commission work, particularly – but not only – in the context of immigration detention.[28]

Since 1992, Australia has had a system of mandatory detention. Any non-citizen who is in Australia without a valid visa must be detained according to the *Migration Act*. These people may only be released from closed immigration detention if they are granted a visa or are removed from Australia.

Following *Al-Kateb*, a number of amendments were made to the *Migration Act* in an attempt to overcome some of its undesirable consequences. In particular, the Minister was given the power to grant a visa to a person in immigration detention,

26 (2004) 219 CLR 562

27 For example: Rainer Thwaites, *The Liberty of Non-Citizens: Indefinite Detention in Commonwealth Countries* (Hart Publishing, 2014), especially chs 3, 4; Juliet Curtin, '"Never Say Never": *Al-Kateb v Godwin*' (2005) 27(2) *Sydney Law Review* 355; Matthew Zagor, 'Uncertainty and Exclusion: Detention of Aliens and the High Court' 34(1) *Federal Law Review* 127; Joyce Chia, 'Back to the *Constitution*: the Implications of *Plaintiff S4/2014* for Immigration Detention' (2015) 38(2) *University of New South Wales Law Journal* 628; Peter Billings, 'Whither Indefinite Immigration Detention in Australia? Rethinking Legal Constraints of the Detention of Non-Citizens' (2015) 38(4) *University of New South Wales Law Journal* 1386; David Burke, 'Preventing Indefinite Detention: Applying the Principle of Legality to the Migration Act' (2015) 37(2) *Sydney Law Review* 159.

28 A recent example is *Immigration Detention following Visa Refusal or Cancellation under Section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, a grouped report involving a number of complainants raising similar issues. Because the complaints pre-dated the 2017 amendments, the Attorney-General was obliged to table the report.

regardless of whether the person met the requirements for that visa. The Minister was also given the power to place a person into 'community detention' as an alternative to closed detention. While each of these options offered the potential for avoiding arbitrariness, the powers relied on the discretion of the Minister and the Minister had no duty to consider exercising them.

In a continuing series of reports in relation to human rights complaints, invoking art 9 of the *ICCPR*, and others, the Commission has sought to point out that the approach to mandatory detention in practice, and particularly closed detention, generally examines the problem in the wrong way.

The question appears not to be asked whether it is necessary for a person to be detained, including whether any risks they may pose to the community can they be appropriately mitigated through conditions. Instead, the approach has been rather to take closed detention as the default position for broad categories of people, and to consider whether there are any exceptional circumstances that would justify their release.

To put this into perspective: the average length of detention has continued to increase, exceeding 600 days for the first time on public record by November 2020. It reached 673 days in June 2021 – the highest ever recorded, and the number of persons in long-term detention (over two years) comprised over 30% of the detention population (479 individuals). In March 2021, 130 persons had been detained longer than five years, and of those, 14 had been detained for nine years – far higher than any comparable jurisdiction.

It is also well established that prolonged detention is a risk factor for mental ill-health – the negative impacts of immigration detention on mental health worsen as the length of detention increases.[29] This is of particular concern in the current context, given the consistently high average length of detention in recent years, and the large number of people being held in closed facilities for prolonged periods.

I should note, however, that the AHRC has established constructive and regular forms of engagement with the Australian Border Force ('ABF') and with the Department of Home Affairs as part of seeking to address these broader policy issues, within the current policy settings of government – acknowledging the Commission's role to challenge policy when it is out of kilter with our treaty commitments; and the ABF's role in implementing domestic policy. That conversation is ongoing.

When it comes to our function to consider human rights complaints, however, domestic law and international expectations are at loggerheads.

29 See, eg, Australian Human Rights Commission, *Inspections of Australia's Immigration Detention Facilities 2019* (Report, December 2020) 134.

Some detainees have been in this limbo for very long periods – even over 10 years. I recently pressed the case for seven individuals who have complaints before the Commission, one of whom has been in detention for nearly 12 years. In 2005, after *Al-Kateb*, a process of review by the Commonwealth Ombudsman of persons who had been held in immigration detention for two years or longer was introduced. This oversight mechanism was aimed at providing better transparency with respect to long-term detainees. What does this mean for those persons who have between in detention for four times this period – and more? Each of the persons, I wrote about had been assessed by the Ombudsman as appropriate for release into the community.

Not a Foreign Language

In a paper I presented to the University of Adelaide in 2018, I asserted that 'human rights are not a foreign language'.[30]

Some persons may regard human rights standards and principles as somehow 'outside' impositions – by an amorphous and foreign 'United Nations', at odds with state sovereignty. This is a theme that comes up regularly in conversations with NHRIs around the world, through our regional and international networks. To which I would respond, is compassion foreign? Is decency foreign? Is respect foreign? Is dignity foreign? Is the aspiration for everyone to be given a fair go a stranger to our values? Additionally, aren't the values that underpin human rights principles already central to our sense of values in this country? As Australians. How do we help people to realise that they are already talking in human rights language?

When I was involved in a panel that was looking at the protection of religious freedom in Australia over the summer of 2017–18, I was struck by the fact that both broadsides of the argument saw an answer in having a Human Rights Act as part of the Commonwealth protections of rights and freedoms. This was even from those who had been ardent opponents in previous times.

The purpose of such an Act needs to be about changing the culture of decision-making and embedding transparent, human rights-based decisions as part of public culture. For me, the outcome needs to be that decisions are made through a human rights lens. It is the upstream aspect that is so crucial to change.

30 Rosalind Croucher, 'Human Rights Are Not a Foreign Language: Reflections on the 70th Anniversary of the Universal Declaration of Human Rights' (Seminar, Public Law and Policy Research Unit, Adelaide Law School, 4 September 2018) <https://humanrights.gov.au/about/news/speeches/human-rights-are-not-foreign-language-reflections-70th-anniversary-universal>.

The Difference This Could Make for Al-Kateb

The majority judges in *Al-Kateb* acknowledged the consequences of their decision. Justice McHugh considered the result 'tragic'.[31] Ten years after the decision, Justice Dyson Heydon described his judgement as 'what you may call the inhumane approach'.[32] A small compensation perhaps is that, after the case, Mr Al-Kateb was granted a bridging visa and, in late 2007, he was granted permanent residency.[33] In that case, Justice Kirby was in dissent, with Gummow J and the Chief Justice, Gleeson CJ.

The principle of legality, which has been championed as the common law's protection of rights and freedoms,[34] did not save Mr Al-Kateb.[35] The principle of constitutionalism did not constrain the *Migration Act*.[36]

Justice Kirby urged the use of international human rights law as a legitimate and valuable part of the interpretive context. Justice McHugh fervently rejected this approach, notwithstanding the tragedy of the case. In 2019, the Hon Michael McHugh AC QC said that he would have decided *Al-Kateb* differently if Australia had a Human Rights Act.[37]

Compare the situation in the United Kingdom ('UK'), which has had a Human Rights Act since 1998, in operation from 2000. Section 4 enables the court to make a declaration of incompatibility of a law with the *European Convention on Human Rights*. I will use one illustration: the 2004 case of *A and others v Secretary of State for the Home Department.*[38]

A detention regime was introduced in the aftermath of the attacks in the US in 2001. The regime targeted for indefinite incarceration only suspected international terrorists (not national terrorists). The particular detainees, the subjects of the litigation, were suspected international terrorists who lived in the UK, but who could not be sent to their home countries because of a risk that they would be tortured or killed – the non-refoulement principle. The detainees, however, could not be tried in court following criminal law rules because of a lack of evidence. Hence, they were

31 (2004) 219 CLR 562, 581 [31].

32 As cited in Burke (n 27) 159.

33 Thwaites (n 27) 98.

34 J Spigelman, 'The Common Law Bill of Rights' (2008) 3 *Statutory Interpretation and Human Rights: McPherson Lecture Series* 9; Robert French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 2.

35 David Burke has argued powerfully that the principle of legality was misapplied by the majority, to the extent that overturning the decision is justified: Burke (n 27).

36 Thwaites (n 27) ch 3.

37 UNSW, '2019 Mason Conversation – Gilbert + Tobin Centre of Public Law' (YouTube, 16 August 2019) 44:13–45:45 <https://www.youtube.com/watch?v=XhAveYy68IM>.

38 [2004] UKHL 56.

detained in Belmarsh prison indefinitely. The case was taken before the House of Lords on the grounds of the right to liberty and non-discrimination. Her Majesty's Government ('HMG') argued that this was a necessary measure to protect the nation during a public emergency. The House of Lords held that the provisions under which detainees were being held at Belmarsh prison were incompatible with the right to liberty and made a declaration to this effect.

Following this case, HMG acted on the incompatibility declaration, and the regime was replaced with a new 'control order' scheme that did not make a distinction on the basis of nationality. This new regime also attracted judicial scrutiny and it was made (somewhat) more human rights compliant over time.

Professor Conor Gearty of the London School of Economics commented that this case was 'an early and great test' of the Human Rights Act:

> Parliamentarians, cabinet Ministers, and civil servants proved themselves inclined to take human rights seriously even when the human rights law itself did not require that they should, and even when they had to pretend they were not doing so. The result is surely a better form of human rights protection, precisely because it is democratically entrenched. It is not imposed from the judicial clouds but grows from below in response to a prompt, not an instruction.[39]

While the case is also an illustration of the Court using its power to make a declaration of incompatibility, this is not the only way that a Human Rights Act would make a difference.

In the Australian context, there are additional questions about the constitutionality of such a provision that has to be navigated in any discussion of having such a power in a federal Human Rights Act. Most notably, the High Court's *Momcilovic* decision[40] and understanding how far judicial power stretches. Nevertheless, the power of an approach to the positive framing of rights, with the foundation of a Human Rights Act, is its impact upstream – on decision making, and, through the PJCHR, before the laws are made.

Moreover, the Commission's complaint handling pathway involving the international treaties would take a very different complexion if those complaints were framed through Australian law. The PJCHR would also be analysing the compatibility of proposed laws within the requirements of Australian law.

We do have a strong sense of rights and freedoms in Australia, but we do not have a commonly understood, let alone embedded, framework to help us grapple with the challenges that confront us. The language of rights has been on many people's lips

39 Conor Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (Oxford University Press, 2016) 76.

40 *Momcilovic v The Queen* (2011) 245 CLR 1.

over this past year. It is also a language that inherently has existed in our national character over time and in our common law history and institutions. It is a language that is seen in our early recognition of the importance of suffrage for women, and in the story of William Cooper.[41]

Human rights had meaning for Cooper, and he demonstrated it. The holocaust was a primary catalyst for the *UDHR*, but it also had a deep impact on Cooper. Horrified at the lack of international condemnation of *Kristallnacht*[42] on 9 November 1938 and its aftermath in the attacks on Jews in Germany, Cooper led his own protest.

On 6 December 1938, Cooper led a delegation to the German Consulate in Melbourne to deliver a petition which condemned the 'cruel persecution of the Jewish people by the Nazi Government of Germany'.[43] It was the only private protest against such action. Cooper was 77, a Yorta Yorta man, and the delegation was of Aboriginal people. Cooper was a leading activist with respect to the treatment of his people and a founding member of the Australian Aborigines League. Had Eleanor Roosevelt known of Cooper's actions, she would have been proud of him.

Our system for protecting human rights has not changed significantly for a long time. There is value in continuing our reflections on whether we need to do more to protect human rights in our own Australian way – a federal Constitutional way – and in which the role of the AHRC is central.

Final Thoughts

At the end of his autobiography, *Michael Kirby – A Private Life,* Mr Kirby ends with a somewhat J Alfred Prufrock lamentation,[44] in a series of observations prefaced with, 'if only …' I mention one: 'If only the inexorable ticking of the clock could be stopped and the beauty of the present could be kept forever'.[45] The clock cannot be stopped, nor even slowed, but the AHRC can fill its seconds with a very busy present tense, conversation after conversation, inquiry after inquiry, report after report, honouring and doing justice to Michael Kirby's vision, and to our statutory mandate, entrusted to us by governments across the parliamentary divide, for almost 40 years.

41 Diane Barwick, 'Cooper, William (1861–1941)', *Australian Dictionary of Biography* (Web Page, 1981) <http://adb.anu.edu.au/biography/cooper-william-5773>.

42 Translated into English as the 'Night of Broken Glass'.

43 The language of the petition is noted in an article from the time, eg, in 'Deputation Not Admitted', *The Argus* (Melbourne, 7 December 1938) 3. A recreation of the resolution is held by the Honorary Consul General of the Federal Republic of Germany in Melbourne.

44 TS Eliot, 'The Love Song of J Alfred Prufrock' (1915) 6(3) *Poetry* 130.

45 Michael Kirby, *Michael Kirby – A Private Life* (Allen & Unwin, 2011), 192.