ATTORNEY-GENERAL

HON ROBERT McCLELLAND MP

REMARKS AT THE

CASTAN CENTRE

HUMAN RIGHTS CONFERENCE 2009

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FRIDAY, 17 JULY 2009

First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their elders, both past and present.

- Professor Sarah Joseph, Director of the Castan Centre;
- Dr Julie Debeljak, Chair;
- Melissa Castan;
- The Hon Justice Chris Maxwell, President, Court of Appeal;
- The Hon Robert Hill, former Australian Ambassador and Permanent Representative to the United Nations;
- Ladies and Gentlemen.

Thank you for your welcome Julie – it's a great pleasure to be here this morning to open your conference which will be looking at developments, at both the domestic and international level, to the changing human rights landscape.

The Castan Centre for Human Rights Law plays a valuable role in bringing together the work of a number of scholars to promote and protect human rights. It is an appropriate testament to the work of Ron Castan AM QC.

Setting the Scene

Your conference, by its title, suggests that human rights is undergoing a change – and I would like to think that part of the change is a result of the Rudd Government's commitment to human rights at both the domestic and international level.

Since coming to Government in November 2007, we have taken a number of steps to create a more inclusive community where people are given a "fair go".

In particular, we have been addressing key areas where people are at risk of social exclusion, including homelessness, mental health and disability, joblessness, children at risk, locational disadvantage and closing the gap for Indigenous Australians.

The Rudd Government recognises that the protection and promotion of rights is an important issue and integral to a social inclusion agenda.

That is why, last December we launched a nationwide consultation on how best to protect and promote human rights and responsibilities in Australia.

The independent Committee, chaired by Father Frank Brennan, has recently concluded its consultation process and is now undertaking the important task of considering the community views expressed in preparing its report to Government.

This will be a significant task – having undertaken 66 community roundtables across Australia and received over 38,000 written submissions. The sheer number of submissions highlights the considerable interest in the community about human rights as well as the success of the committee and its secretariat in engaging the community.

I am pleased that there has been such interest from the community and I look forward to receiving the Committee's report at the end of September.

I have no doubt that the Committee's report will provide a solid platform for constructive debate about how to best protect and promote human rights into the future.

The Importance of Protecting Rights

It may be useful at this stage to partially set the scene for that discussion by noting a few points before focusing on the more controversial role of the courts in the area of protecting fundamental rights.

The first point is that as Australians we insist that our rights and freedoms are upheld. Indeed, before we admit someone as a citizen of our country we require them to swear or affirm their loyalty to Australia and ask that they:

- share our democratic beliefs
- respect our rights and liberties, and
- uphold and obey our laws.

The second is that even those who have argued against the Consultation being conducted in the first place have not argued against the importance of recognising fundamental rights.

The third point is that there are mechanisms already in place that recognise and protect fundamental rights. These include those applied and developed by the judiciary as part of our system of common law, including presumptions used in statutory interpretation.

I would like to explore this third point in more detail.

Protection of Fundamental Rights

The courts play an important role in the protection of fundamental rights. One of the ways they do so is by interpreting legislation consistent with fundamental rights unless Parliament clearly intends to override those rights.

This is just one of a number of legal presumptions that courts use to help them construe legislation.

Indeed, this is not a recent invention. As Chief Justice French recently stated, there is a "well-established and conservative principle of interpretation that statutes are construed, where constructional choices are open, so they do not encroach upon fundamental rights and freedoms at common law."1

In a similar context, the High Court in Pyneboard Pty Ltd v Trade Practices Commission referred to authorities dating to the turn of last century in support of the general presumption "that a statute will not be construed to take away a common-law right unless the legislative intent to do so clearly emerges".2

[1] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471 at 480.
[2] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 and see more generally discussion in *Halsbury's Laws of Australia* vol.24 (at 16 July 2009) 385 Statutes [385-310].

Pearce and Geddes, the authors of one of Australia's pre-eminent works on statutory interpretation in Australia, have described the development of these presumptions as "the court's efforts to provide, in effect, a common-law bill of rights—a protection for the civil liberties of the individual against invasion by the State."3

This approach has also been described as being founded upon a "principle of legality" which provides a working hypothesis that governs both Parliament and the courts.4

On this basis, the relevant questions become:

I. just how strong is this relevant presumption, and
II. what are those "fundamental rights and freedoms" that are presumed to be protected?

In respect to the first question, Justice McHugh described the general presumption against infringing ordinary common law rights as "admittedly weak these days".5 In Harrison v Melham, Chief Justice Spigelman described the presumption as reflecting "an earlier era when judges approached legislation as some kind of foreign intrusion."6

Nevertheless, it must be observed that Chief Justice Spigelman noted that the presumption "still operates with force with respect to legislation which abrogates fundamental rights, immunities and freedoms".7

This would suggest that the answer to the first question is that the presumption is doubtful in respect to common law rights more generally but it is strong at least where the focus is on "fundamental rights and freedoms". But that necessarily takes us back to the second question. Just what are the fundamental rights and freedoms that are so protected by the presumption?

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[3] See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6th Edition, 2006) at 165 citing Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v R* (1994) 179 CLR 427 at 437.
[4] *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 209 ALR 116.
[5] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 284
[6] [2008] NSWCA 67 at [3].
[7] [2008] NSWCA 67 at [7].

Writing extra-judicially in 1976 Lord Devlin expressed the opinion that in the 19th century the courts applied a "Victorian Bill of Rights favouring …. the liberty of the individual, the freedom of contract and the sacredness of property, and which was highly suspicious of taxation. If the Act interfered with these notions, the judges tended to either assume that it could not mean what it said or to minimise the inference by giving the intrusive words the narrowest possible construction, even to the point of pedantry."8

This approach seems to fit with the criticism of the broader application of principles of construction as having been developed through the "mutual understandings and values of lawyers".9 The criticism is that there may have been a degree of self interest in the past of lawyers developing those broader presumptions to advantage the more privileged.

On this point, it appears that the courts may well have moved on from that earlier era where the common laws protection focused on the economic rights of the more privileged. That still leaves the task of identifying those fundamental rights to which the weight of authority suggests the rebuttable presumption applies.

In that context, in a significant paper delivered last year, Chief Justice Spigelman has made a thoughtful and very useful attempt to identify those fundamental rights recognised at common law through presumptions applied by the courts in construing legislation.

To list just a few, they include the presumptions that Parliament, without express language, did not intend to:

- retrospectively change rights and obligations
- infringe personal liberty
- interfere with freedom of movement
- interfere with freedom of speech
- restrict access to the courts, or

[8] Devlin, "Judges and lawmakers" (1976) 39 *Modern Law Review* 1 at 13-14. Gleeson M, *The meaning of legislation: context, purpose and respect for fundamental rights* Victoria Law Foundation Oration given at Melbourne on 31 July at 24.

[9] See discussion in DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6th Edition, 2006) at 168; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 328.

- interfere with equality of religion.10

While very useful his Honour made it clear that this list was not exhaustive. His Honour also recognised that there is some overlap between this list and human rights specified in international human rights instruments.11 And the presumption has been applied in a number of cases to include the protection of fundamental human rights.12

There obviously remains a live issue as to the extent to which international human rights principles should be considered when construing legislation.13

It is quite clear that where legislation has been enacted for the purpose of giving effect to Australia's international treaty obligations that the Courts will have regard to the text of the international instrument (and possibly preparatory material) in construing ambiguous or vague language.14

However, even early High Court authority indicates the principle is broader than that. In 1908 in Jumbunna Coal Mine NL v Victorian Coal Miners Association it was held that so far as the language permits a statute should be construed consistently with "the community of Nations, established rules of International law or international instruments."15

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[10] Other presumptions include that Parliament did not intend to permit an appeal from an acquittal; interfere with the course of justice; abrogate legal professional privilege; exclude the right to claim self-incrimination; extend the scope of a penal statute; deny procedural fairness to persons affected by the exercise of public power; give executive immunities a wide application; interfere with vested property rights; authorise the commission of a tort; alienate property without compensation; or disregard for the common law protection of personal reputation - JJ Spigelman AC, *The Common Law Bill of Rights : First Lecture in the 2008 McPherson Lectures: Statutory Interpretation and Human Rights*, Speech given at University of Queensland, Brisbane on 10 March 2008 at 23-4

[11] JJ Spigelman AC, op cit, 24.

[12] *Kruger v. Commonwealth* (1997) 190 CLR 1 at 105 per Gaudron J (genocide), *Kartinyeri v. Commonwealth of Australia* (1988) 195 CLR 337 at 417-419 per Kirby J (racial discrimination), *Plaintiff S157/2002 v the Commonwealth* (2003) 211 CLR 476 at [34-5] per Gleeson CJ (access to courts) and *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Masri* (2003) 197 ALR 241 at 260-3 per Black CJ and Sundberg and Weinberg JJ (right to personal liberty).

[13] R McClelland, *The Magna Carta* given at the 2009 Constitutional Law Conference, NSW Parliament, Sydney on 20 February 2009; reprinted in *The Journal of the NSW Bar Association*, *Bar News*, Winter 2009 7 at 8.

[14] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 per Gummow and Hayne JJ; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492.

[15] (1908) 6 CLR 309 at 363 per O'Connor J

Thus, for instance, in Lim's Case, Justices Brennan, Deane and Dawson favoured a construction of the Migration Act 1958 that was consistent with Australia's international treaty obligations.16

Similarly in Brown v Classification Review Board, the Federal Court of Australia held the classification code established under the Classification (Publications, Films and Computer Games) Act 1995 should be construed consistently with the right of freedom of expression contained in the International Covenant on Civil and Political Rights.17

The reliance on international human rights instruments nevertheless ventures into admittedly controversial terrain.

The extent of that controversy is minimal where there is a convenient overlap between fundamental common law rights and international human rights principles. Thus, for example, in Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri it was held that "there can be no question that the right to personal liberty is among the most fundamental of all common law rights …. It is also among the most fundamental of the universally recognised human rights."18

Another example is in the area of property law where it has been held that the presumption against arbitrary deprivation of property is consistent with common law principle dating back to Magna Carta as well as article 17 of the Universal Declaration of Human Rights.19

Nevertheless, concerns have also been expressed about the wisdom of construing legislation consistently with the totality of Australia's international obligations.

For instance, in Teoh's Case, Justice McHugh expressed the view that, given the sheer volume of international treaties and instruments to which Australia is a party, he doubted

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[16] *Chu Kheng Lim v Minister for Immigration , Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38. See *Halsbury's Laws of Australia* vol.24 (at 14 July 2009) 385 Statutes [385-305].
[17] *Brown v. Classification Review Board* (1998) 82 FCR 225 at 236 per French J.
[18] (2003) 197 ALR 241 at 260-3 per Black CJ and Sundberg and Weinberg JJ
[19] *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 658-659

the legitimacy of imputing to Parliament the intention of considering each of our international obligations before passing legislation.20

In Colemen v Power, former Chief Justice Gleeson held that there was no presumption that a 1931 Queensland statute should be construed consistently with the provisions of the International Covenant on Civil and Political Rights because the statute predated the international instrument.21

It is, after all, a presumption about parliamentary intention.

It remains to be seen how the courts will resolve the tension between cases such as Lim, Brown, Newcrest Mining on the one hand and the views of Justice McHugh in Teoh and Chief Justice Gleeson in Colemen v Power, on the other.

One approach that may be adopted by the courts would be to restrict the presumption to those international instruments which set out fundamental rights and freedoms.

If that approach is taken it would be broadly consistent with the direction that the presumption in respect to common law rights seems to be heading. But are the two concepts merging?

The answer to that question is that in Australia it is far from clear. It is simply not possible to identify the extent to which the development of common law presumptions in construing legislation will be informed by fundamental principles of international human rights law.

There is arguably a need for greater clarity.

Where To From Here?

[20] *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 316. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 per McHugh J at 590.

[21] *Coleman v Power* (2004) 220 CLR 1 at 27-29.

As a legislator and as Attorney-General, I strive to introduce legislation that is as clear and concise as possible yet sufficiently broad so as to cover potential circumstances not necessarily foreseen by the Parliament at the time of passage.

In so doing I rely heavily on the work of extremely talented public servants to develop and draft legislation. But it is impossible to foresee each and every circumstance that may arise under the legislation and which may give rise to litigation.

For this reason the courts have played and will continue to play a vitally important part in interpreting and applying legislation to the particular facts in individual cases before them.

At times there will be controversy about particular interpretations, but in undertaking that important task they will no doubt endeavour to apply what former Chief Justice Gleeson described as the principle of "imputed decency."22

The extent to which the development of that principle should be informed by current community values as to the fundamental rights that Australians hold dear is an important matter that is being considered by the Consultation Committee.

These matters are important and not without complexity. However, at their core, they are about nothing more and nothing less than ensuring that Australians have a fair go. A fair go in terms of having their interests considered before legislation is passed that affects them, a fair go when dealing with the bureaucracy and a fair go when coming before the courts to protect their rights.

Conclusion

Ladies and Gentleman. I began today by briefly referring to a number of positive changes that the Rudd Government has taken to create a more inclusive community where people are given a fair go.

[22] M Gleeson AC, *The meaning of legislation: context, purpose and respect for fundamental rights,* Victoria Law Foundation Oration given at Melbourne on 31 July 2008 at 22-23.

I expect that the Consultation Committee, in providing its report to Government, will address a range of issues that contribute to providing a fair go.

The Committee has been asked to assess community support for options it puts forward to protect and promote human rights in Australia. It may report that the community strongly supports new human rights legislation for Australia. It may suggest support for legislative action to confirm that statutes should, where possible, be given an interpretation by courts which is consistent with international human rights law. And the Committee may suggest possible improvements to the parliamentary and executive scrutiny processes, the role of human rights education and the adequacy of federal anti-discrimination laws.

It is an exciting time in the area of human rights. And I look forward to receiving the Committee's report in a few months time. I am sure it will help guide us as we seek to ensure the ongoing protection and promotion of human rights.

Thank you again for the invitation to attend your conference. Centres such as the Castan Centre play an important role in the discussion and engagement on important issues, such as human rights.

Your work can also help inform public debate on critical issues that impact on our democracy. And today, I am pleased to advise that the Centre will receive funding from the Government to undertake a workshop into options to improve criminal justice responses to people trafficking.

This is an issue which affects our region of the world as much as anywhere.
And is just one example of the Centre's capacity to engage on broader policy issues which intersect with the protection and promotion of human rights.

Thank you.