‘Bringing rights home—mapping an agenda on promoting, protecting and fulfilling human rights in Australia’

Michael Kirby Justice Oration 2021

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The annual Kirby orations pay tribute to Michael Kirby’s commitment to social justice and human rights and his relationship as friend, colleague and mentor to Victoria University’s College of Law & Justice.

Acknowledgments

Chancellor, the Hon Dr Steve Bracks AC and Dr Terry Bracks AM, Vice Chancellor, Professor Adam Shoemaker, the Hon Michael Kirby AC CMG, Dean Lydia Xynas, other distinguished guests, colleagues, students and friends.

Thank you Dean Lydia Xynas for your acknowledgment of country and warm introduction.

I am speaking from the traditional lands of the Gadigal people of the Eora nation, in the city of Sydney, and 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 the Hon Michael Kirby AC CMG. (I will be the warm-up act for him, or he, my encore.)

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—Australia’s national human rights institution.

I will begin by telling a story about my grandson, Alessandro Montuori. He is the eldest of my five grandchildren and turns 10 years old today.

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 (note, *not* 'signing') of the Magna Carta by King John. Alessandro 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. It was a story of King John being nasty. But the Magna Carta is not what you might describe as a highly accessible document, in the medieval Latin of the early thirteenth 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)

(I can see this as a really inspiring conversation with my grandchildren. It has a kind of Star Wars resonance, but as to filling their imagination on access to justice, I doubt it.)

This is quite a different scenario from the late 1940s when the UN General Assembly, with Australia's own 'Doc' Evatt in the Chair as President, adopted the Universal Declaration of Human Rights (UDHR). This landmark document, born out of the horrors of World War Two and the holocaust, was adopted by the UN General Assembly on 10 December 1948.[1] 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 clearly the UDHR being given to every schoolchild in Australia, on that flimsy aerogramme paper that some of you may remember.

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[1] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

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 Mrs Eleanor Roosevelt, the Chair of the Drafting Committee in speaking to the UN General Assembly on 9 December 1948: '[t]his Universal Declaration of Human Rights may well become the international Magna Carta for all men everywhere'.[2]

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—the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,. Overall, we have ratified seven major treaties and a number of associated protocols.[3]

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. However, not enough has been done 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

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2 <https://www.youtube.com/watch?v=F-WktGCFLA0>.

3 The International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

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.[4]

And so 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?

And when I say 'our', I refer to our 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 Coalition and Labor support. It is neither a 'Labor' nor a 'Coalition' project.[5]

The Australian conversation about human rights *should*, therefore, be above politics.

Over the last two and half years I have been leading conversations about the protection of rights and freedoms in Australia.[6] We are framing our work in terms of our view, as the National Human Rights Institution, 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.

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

5 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.

6 We held a l 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.

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.[7]

But 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.

And from the perspective of the Australian Human Rights Commission 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 first Commission was established in 1981 by a conservative Government (under Malcolm Fraser as Prime Minister), after Australia had ratified the ICCPR the previous August. Dame Roma Mitchell was appointed to lead it. In his Second Reading Speech for the Human Rights Commission Bill 1981, the then Attorney General, Senator the Hon Peter Durack, said that the establishment of the Commission would 'help Australia to discharge the obligations it has assumed under the covenant'.[8]

In 1986, the Commission was put on a permanent footing under the Hawke Labor government, as the Human Rights and Equal Opportunity Commission, or 'HREOC' as it was known. The Act commenced on 10 December 1986 — International Human Rights Day.

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7 I have considered issues arising in the COVID responses in: 'Emergency Powers Need Scrutiny: Ensuring Accountability Through COVID-19 Lockdowns and Curfews is a Human Rights Issue' (May, 2021) *Law Institute Journal* 19; and 'Lockdowns, curfews and human rights—unscrambling hyperbole', upcoming in *Australian Journal of Administrative Law*.

8 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 conservative government in 1977 and 1979.

The Commission was designed in tandem with an accompanying Australian Bill of Rights Act. This was passed in the House of Representatives, but did not survive the Senate.

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 a 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.[9]

So, for example, we have a particular and growing set of complaints invoking the right to return to the country and for children to enter or leave Australia for the purpose of family reunification.[10] 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.

Complaints under our Act have increased 500% with COVID-19—masks, travel caps, travel bans, family reunion, people with disability and COVID restrictions, and vaccinations. Our overall complaint caseload is increasing towards well over 100% over this year.

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.[11]

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

10 For individuals alone—Art 12 ICCPR; for family groups—Art 12,17 and 23 of ICCPR; and family groups with children—all of the above plus Arts 3, 8, and 10 of the CRC.

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

Compare the 'Bills of Rights' approach in the US, with its constitutionally entrenched rights and freedoms.[12] 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'. And 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', as the Hon Robert French AC remarked, and the rights 'most intensely debated' were those 'of the individual colonies as proposed states, vis a vis, the proposed federal parliament'.[13] 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 the US 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).[14] The past President of the Law Council of Australia, Pauline Wright, in her Press Club address, also called for an Australian Bill of Rights, joining many voices to do so, amplifying the conversation—to do at the federal level what the ACT, Victoria and Queensland have done in relation to State and Territory decision making and accountability.[15]

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

13 R French, 'Protecting Human Rights Without a Bill of Rights', John Marshall Law School, Chicago, 26 January 2010, 7. The speech can be found at http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-frenchac.

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

15 *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).

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 we got the Parliamentary Joint Committee on Human Rights, but we did not get 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 our 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.[16]

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 in *Donoghue v Stevenson*

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

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 *can't* 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.[17]

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.[18]

The problem of 'foreignness'

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

And for the Australian Human Rights Commission we 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) includes, for example, powers to examine laws and proposed laws, in terms of being consistent/inconsistent 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 our

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17 See my article on this topic, '"Seeking equal dignity without discrimination": The Australian Human Rights Commission and the handling of complaints', (2019) 93 *Australian Law Journal* 571.

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

Act. It is not about direct obligations under Australian law. A similar challenge affects the operation of the Parliamentary Joint Committee on Human Rights. In both cases this challenge stifles the effectiveness of the processes.

Under our statutory mandate we are to hold 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 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 government.

Moreover, the acts or practices may well be lawful under domestic law, but contrary to international human rights obligations. So the Commonwealth has a clear answer to the complaints in domestic law. But in international law, that is no defence.

Let me illustrate by reference to arbitrary detention.

'Arbitrary detention'

In *Al-Kateb v Godwin* (2004) 219 CLR 562 there was a challenge to the legality of administrative detention by the Commonwealth under the provisions of the *Migration Act 1958* (Cth). Although there is much discussion about the implications of the case and those that have followed,[19] the essential principle is that indefinite detention is lawful under Australian law.

In the context of our international obligations, however, article 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.'

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[19] For example: Rainer Thwaites, *The Liberty of Non-Citizens: Indefinite Detention in Commonwealth Countries* (Hart Publishing, 2014), especially chapters 3 and 4; Juliet Curtin, '"Never Say Never": *Al-Kateb v Godwin* (2005) 27 *Sydney Law Review* 355; Matthew Zagor, 'Uncertainty and Exclusion: Detention of Aliens and the High Court' 34 *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 *Sydney Law Review* 159.

Article 9 has been the subject of a large amount of Commission work, particularly—but not only—in the context of immigration detention.[20]

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 a power to grant a visa to a person in immigration detention, 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 people in long-term detention (over two years) comprised over 30% of the detention population (479 individuals). In March 2021, 130 people had

[20] 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.

been detained longer than five years, and of those, 14 people 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.[21] 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 we have established constructive and regular forms of engagement with the Australian Border Force 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.

We are still continuing that conversation.

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

And people have been in this limbo for very long periods of time—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 people 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 people who have between in detention for four times this period—and more? The people I wrote about had each been assessed by the Ombudsman as appropriate for release into the community.

Not a foreign language

In a previous paper I did for Adelaide university in 2018, I made the assertion that 'Human Rights are not a foreign language'.

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[21] See, eg, Australian Human Rights Commission, *Inspections of Australia's Immigration Detention Facilities 2019 Report*, 134.

Some people 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?

And, in our country, aren't the values that underpin human rights principles already central to our *own* sense of values in this country? As Australians.

So 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 of the broad sides 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.

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'.[22] Ten years after the decision, Justice Dyson Heydon described his judgement as 'what you may call the inhumane approach'.[23]

A small compensation perhaps is that, after the case, Mr Al-Kateb was granted a bridging visa and, in late 2007, he was granted leave to remain in Australia indefinitely.[24]

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22 (2004) 219 CLR 562, [31].

23 As cited in Burke, 'Preventing Indefinite Detention', 159.

24 Thwaites, 98.

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,[25] did not save Al-Kateb.[26]

The principle of constitutionalism did not constrain the Migration Act.[27]

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, in the Mason Conversation of the Gilbert and Tobin Centre of Public Law of the University of New South Wales, former Justice McHugh said that he would have decided Al-Kateb differently if we had a Human Rights Act.[28]

Compare the situation in the UK, which has had a Human Rights Act since 1998, in operation from 2000. One provision enables the court to make a declaration of incompatibility of a law with the Human Rights Act. I will use one illustration: the 2004 case of *A and others v Secretary of State for the Home Department*.[29]

A detention regime was introduced in the aftermath of the '9/11' attacks in the United States. The regime targeted for indefinite incarceration only suspected *international* terrorists (not national terrorists). The particular detainees the subject of the litigation were suspected international terrorists who lived in Britain 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. But they could not be tried in court following criminal law rules because of a lack of evidence. So they were 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. The Government argued that this was a necessary measure to protect the nation during public emergency.

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25 J Spigelman, "The Common Law Bill of Rights" (2008) 3 *Statutory Interpretation and Human Rights: McPherson Lecture Series*, 9. See also French, "The Common Law and the Protection of Human Rights", 2.

26 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, 'Preventing Indefinite Detention'.

27 Thwaites, ch 3.

28 https://www.youtube.com/watch?v=XhAveYy68IM.

29 [2004] UKHL 56.

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, the UK Government 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.

UK academic Conor Gearty 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.[30]

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 which have 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[31] and understanding how far judicial power stretches.

But 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 compatibility of proposed laws within the requirements of Australian law.

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30 *Fantasy Island* (Oxford University Press, 2016) 76.

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

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 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.[32]

Human rights had meaning for Cooper and he demonstrated it. The holocaust was a primary catalyst for the Universal Declaration, but it also had a deep impact on Cooper. Horrified at the lack of international condemnation of Kristallnacht on 9 November 1938 and its aftermath in the attacks on Jews in Germany, Cooper led his own protest. On 6 December 1938, he 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'. 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 own 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 Australian Human Rights Commission 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,[33] 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'.[34] The clock cannot be stopped, nor even slowed, but the Australian Human Rights Commission can

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32 Diane Barwick, 'Cooper, William (1861–1941)', *Australian Dictionary of Biography* http://adb.anu.edu.au/biography/cooper-william-5773 (accessed 10 September 2018).

33 TS Eliot, 'The Love Song of J Alfred Prufrock', 1920.

34 Michael Kirby, *Michael Kirby—a private life* (Allen & Unwin, 2011), 192.

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 forty years.