

# CATHERINE BRANSON LECTURE SERIES

## “HUMAN RIGHTS IN MIDDLE AGE”

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When I told my law clerk that I was proposing to speak today of “Human Rights in Middle Age”, he started to object that the Universal Declaration of Human Rights, at 70, was well past middle age. He then caught my eye and subsided.

It is the case that I and the Universal Declaration are close in age. But the International Covenant on Civil and Political Rights was not ratified in New Zealand until 1978 and in Australia until 1980. And the righting of the domestic legal order in our dualist jurisdictions has come later still – within my working career in law.

In 1965, 17 years after adoption of the Universal Declaration and a year before I entered law school, the leading constitutional scholar of the time was clear that the climate of opinion in New Zealand “in parliamentary and legal circles” was “unsympathetic to the proposals for stating basic rights and principles in the form of a constitution or a Bill of Rights”.<sup>1</sup> In a collection of essays published three years later, a young academic recently returned from study in North America poured cold water on the notion that New Zealand might adopt a Bill of Rights on the US model.<sup>2</sup> He said that such a notion was contrary to the New Zealand tradition in which “[p]ragmatism is dearer to us than principle”.<sup>3</sup>

The then young academic grew up to become Minister of Justice and changed his mind. Sir Geoffrey Palmer in the mid-1980s proposed an entrenched Bill of Rights based on the International Covenant on Civil and Political Rights under which the courts would be empowered to strike down incompatible legislation.<sup>4</sup> For a country which prides itself on being the Diceyan dream and has a Parliament less trammelled than the modern Parliament of the United Kingdom, this was a bridge too far. The compromise was a statutory statement of rights in which courts must apply inconsistent legislation but with a strong interpretative presumption of conformity with human

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<sup>1</sup> JF Northey “The New Zealand Constitution” in JF Northey (ed) *The AG Davis Essays in Law* (Butterworths, London, 1965) 149 at 179.

<sup>2</sup> Geoffrey Palmer “A Bill of Rights for New Zealand?” in KJ Keith (ed) *Essays on Human Rights* (Sweet & Maxwell, Wellington, 1968) 106.

<sup>3</sup> At 131.

<sup>4</sup> See Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] I AJHR A6.

rights.<sup>5</sup> It became an early model of the statutory bills of rights subsequently adopted in the United Kingdom and in Australian jurisdictions.<sup>6</sup>

The dynamics of human rights observance were transformed in New Zealand with enactment of the New Zealand Bill of Rights Act 1990. But the critical domestic commitments to the International Covenants had already been made in Australia and in New Zealand through the setting up of Human Rights Commissions to provide a mechanism for resolving claims of unlawful discrimination and to promote the observance of the human rights recognised in the Universal Declaration of Human Rights and in the Covenants. The Declaration and Covenants were not alien notions in our legal orders. And our countries prided themselves on having taken leading roles in the adoption of the international statements.

So how are we doing? As all of you will know, there's some not so good news.

In New Zealand, the Human Rights Commission reports that “[i]n recent years the valuable mechanisms that promote and protect human rights in New Zealand have been shown to be fragile and need to be strengthened”.<sup>7</sup> It says that human rights considerations are “generally not at the heart of public policy decision making”.<sup>8</sup>

The United Nations Human Rights Committee country reports on New Zealand, the peer country reviews carried out under the United Nations Human Rights Council and the New Zealand Human Rights Commission have criticised failure to enact as law the obligations under Conventions other than the ICCPR and the omission of protections for privacy and property in the New Zealand Bill of Rights Act.<sup>9</sup> They point to lack of progress in gender equality, family violence, child poverty, and employment and education outcomes for Maori and for Pacific and other migrant peoples.<sup>10</sup> The extent of Maori imprisonment and economic and social deprivation is said to raise questions about systemic discrimination.<sup>11</sup>

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<sup>5</sup> New Zealand Bill of Rights Act 1990, ss 3, 4, 5 and 6.

<sup>6</sup> Human Rights Act 1998 (UK); Human Rights Act 2004 (ACT); and Charter of Human Rights and Responsibilities Act 2006 (Vic).

<sup>7</sup> New Zealand Human Rights Commission *National Plan of Action 2015–2019 – Full Report* (available at <npa.hrc.co.nz>) at A | 3 and A | 24.

<sup>8</sup> At A | 3 and A | 24.

<sup>9</sup> Human Rights Committee *Concluding Observations on the Sixth Periodic Report of New Zealand* CCPR/C/NZL/CO/6 (2016) at [9]–[10] and [15]–[16]; Committee on Economic, Social and Cultural Rights *Concluding Observations on the Fourth Periodic Report of New Zealand* E/C12/NZL/CO/4 (2018) at [5]–[7]; Human Rights Council *Report of the Working Group on the Universal Periodic Review A/HRC/26/3* (2014) at [128]; Human Rights Commission *Submission of the New Zealand Human Rights Commission to the Human Rights Committee* (February 2016) at [26]–[32].

<sup>10</sup> Human Rights Committee *Concluding Observations on the Sixth Periodic Report of New Zealand* CCPR/C/NZL/CO/6 (2016) at [17]–[18], [21]–[22] and [29]–[32]; Committee on Economic, Social and Cultural Rights *Concluding Observations on the Fourth Periodic Report of New Zealand* E/C12/NZL/CO/4 (2018) at [10]–[13], [21]–[24], [30]–[31] and [37]–[38]; Human Rights Commission *Submission of the New Zealand Human Rights Commission to the Human Rights Committee* (February 2016) at [87]–[101], [124]–[150] and [102]–[123].

<sup>11</sup> Human Rights Committee *Concluding Observations on the Sixth Periodic Report of New Zealand* CCPR/C/NZL/CO/6 (2016) at [23]–[26]; Committee on Economic, Social and Cultural Rights *Concluding Observations on the Fourth Periodic Report of New Zealand* E/C12/NZL/CO/4 (2018) at [10]–[11]; Human Rights Commission *Submission of the New Zealand Human Rights Commission to the Human Rights Committee* (February 2016) at [195]–[208].

The chief architect of the New Zealand Bill of Rights Act, Sir Geoffrey Palmer, has expressed dismay at the timidity and lack of imagination of the courts in applying the Bill of Rights Act.<sup>12</sup> The principal mechanism for parliamentary scrutiny of Bills, the s 7 Attorney-General's report, seems to generate little parliamentary interest and too much legislation is passed despite acknowledgment that it represents limits on rights that are not justifiable in a free and democratic society. There have also been expressions of concern about the resourcing of the Human Rights Commission.<sup>13</sup>

The report card for Australia is if anything more bleak. In part that reflects the migration challenges you have that have no equivalent yet in New Zealand.

The Australian Human Rights Commission in 2015 recommended that Australia's human rights obligations be directly incorporated into Australian law.<sup>14</sup> That call has been repeated on a number of occasions by the United Nations Human Rights Committee, most recently in its report of 1 December 2017.<sup>15</sup> In the same report it commented adversely on conditions of detention in immigration facilities and the significant over-representation of indigenous people in Australian gaols, and expressed concerns about counter-terrorism laws and violence to women.<sup>16</sup> The Committee criticised political attacks on the Human Rights Commission and cuts to its budget.<sup>17</sup> Notwithstanding the establishment of the Parliamentary Joint Committee on Human Rights, the Committee was concerned that parliamentary scrutiny for human rights compliance was inadequate and recommended that it be strengthened.<sup>18</sup>

Human rights are not going to go away. It is time then to acknowledge that protecting them is a whole of community and whole of government effort and responsibility. In my remarks I want to disagree with the view that domestic enactments of rights in a parliamentary model of rights protection entails shifting the constitutional balances towards judicial responsibility for rights. I take the view that the role of Parliament and the executive in rights protection is more important than the role of the courts. So although it may be a little impertinent of a visitor to say so, and although I do not underestimate the strength of Australian constitutionalism or the protection provided

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<sup>12</sup> Geoffrey Palmer "The Bill of Rights after Twenty-One Years: The New Zealand Constitutional Caravan Moves on?" (2013) 11 NZJPIL 257 at 271–273.

<sup>13</sup> Judy McGregor, Sylvia Bell and Margaret Wilson *Human Rights in New Zealand: Emerging Faultlines* (Bridget Williams Books, Wellington, 2016) at 197 and 209; Human Rights Committee *Summary Record of the 3244th Meeting* CCPR/C/SR.3244 (2016) at [15]. The Government has stated, however, in response to questions about resourcing of the Human Rights Commission at a meeting of the Human Rights Committee, that "[t]he Commission received sufficient funds for it to perform all of its functions effectively": Human Rights Committee *Summary Record of the 3245th Meeting* CCPR/C/SR.3245 (2016) at [6]–[8]. There have also been expressions of concern about resourcing of the Human Rights Review Tribunal. Its chair has publicly stated that it is in danger of "collapsing" because of the "exponential increase" in cases: Eleanor Ainge Roy "New Zealand's human rights tribunal 'breaching human rights' due to delays" *The Guardian* (online ed, London, 11 April 2018).

<sup>14</sup> Australian Human Rights Commission *Australia's Second Universal Periodic Review – Submission by the Australian Human Rights Commission under the Universal Periodic Review Process* (April 2015) at [2.3].

<sup>15</sup> Human Rights Committee *Concluding Observations on the Sixth Periodic Report of Australia* CCPR/C/AUS/CO/6 (2017) at [5]–[6].

<sup>16</sup> At [35]–[38], at [39]–[40], at [15]–[16] and at [21]–[22] respectively.

<sup>17</sup> At [13]–[14].

<sup>18</sup> At [11]–[12].

by the common law of Australia for fundamental values, I want to identify from our experience some reasons why enacted statements of rights have been found by us and in a number of jurisdictions to be critical for human rights protection. Without such domestic enactment, it seems to me that something's missing.

### **The importance of domestic statements of rights**

Before mentioning the different forms domestic statements of human rights may take, including by reference to those of the Australian Capital Territory and Victoria, it may be helpful to reflect on why domestic statements of human rights matter.

In New Zealand, the Bill of Rights Act was one of a series of legislative initiatives to systematise New Zealand's constitutional arrangements.<sup>19</sup> The cleanout included a new Constitution Act in 1986 to replace the statute of the Imperial Parliament of 1852.<sup>20</sup> Although in tatters, it limped on in part because of complete apathy in New Zealand about constitutional fundamentals. We had declined the opportunity to join the Australian Federation in 1903. And it was not until 1947 that we adopted the Statute of Westminster after having been prevailed upon to see that we were just being a nuisance by clinging to adolescence.<sup>21</sup>

In much the same way, although there are those who continue to mount fierce attacks on the notion of human rights as law, chiefly on grounds of democratic legitimacy and hostility towards judicial overreaching,<sup>22</sup> I think it is time to grow up and acknowledge that the world has moved on. It is necessary to get beyond simplistic positions that statements of rights depend principally for their efficacy on judicial enforcement and are anti-democratic.

Human rights resonate in law because they are rights. But it would be a big mistake to see human rights simply as rules. Statements of rights are points of reference for all society. They provide organising principles of practical help to decision-makers in ensuring equality of treatment and in promoting the values of the rule of law. They are values acted on by men and women in our societies and treated by them as law. They speak to what Cass Sunstein has called "the expressive function of law" which "makes possible certain valuable human connections and relationships" in part *because* the values they express are incommensurable.<sup>23</sup>

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<sup>19</sup> They included the Ombudsmen Act 1975, the Treaty of Waitangi Act 1975, the Official Information Act 1982 and the Electoral Act 1993.

<sup>20</sup> The former statute being the New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72.

<sup>21</sup> Statute of Westminster Adoption Act 1947. See John Beaglehole's comment in "The New Zealand Scholar" (Margaret Condliffe Memorial Lecture, Canterbury University College, 21 April 1954) reprinted in Peter Munz (ed) *The Feel of Truth: Essays in New Zealand and Pacific History* (AH & AW Reed, Wellington, 1969) 235 at 245 that "an adult who insists on going through the forms of being a child is a nuisance to everybody".

<sup>22</sup> See for example Richard Ekins "Human Rights and the Separation of Powers" (2015) 34 UQLJ 217; and James Allan "Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake it All About – Doin' the Sankey Hanky Panky" in Tom Campbell, KD Ewing and Adam Tomkins (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, Oxford, 2011) 108.

<sup>23</sup> Cass Sunstein "Conflicting Values in Law" (1993) 62 Fordham L Rev 1661 at 1667.

The statements in the Universal Declaration and in the Covenants that have followed have had extraordinary power because they are ethical standards which chime with all men and women. They are authentically appealing.<sup>24</sup> That was brought home to me some years ago when I visited three fragile and remote atolls in the Pacific. The women's councils on each atoll asked to spend time with me. And what they wanted to talk about as we sat on the floor of their open-sided meeting house with the palm trees outside blowing in the trade winds was their human rights and how they were affected by the traditional culture in which they lived.

The continued demonstrated belief in human rights confounds sceptics who say that the dreadful human rights violations we see in our world demonstrate their failure.<sup>25</sup> And in the increasingly pluralist societies in which we live today, adherence to values that are shared also seems good policy because we need all the common ground we can find.

So the international statements have been pivotal and their widespread adoption provides moral reinforcement of the international obligations which cannot help but affect any domestic legal order. They are not however readily accessible. They must be identified by domestic bodies – courts, human rights commissions, and public and private actors making decisions – rather than by the body with ultimate law-making responsibility in the state. It is telling that much of the hostility in the United Kingdom to the Human Rights Act is that it is not seen as a domestic statement of rights.<sup>26</sup>

Human rights are safeguarded not chiefly by legal enforcement but, more importantly, by popular support. Ultimately, whether human rights are observed depends on whether they are valued and understood by the wider community.

All elements of government – the legislature, the executive, and the courts – have obligations not only to observe human rights in their work but to demonstrate the application of human rights in context. In the past, this public exposition of reasons may have been primarily the method of courts, but in the climate of openness and justification our societies have come to expect (and to which modern freedom of information statutes respond), public reasoning is no longer the method of courts alone. In the discourse ethics that Jurgen Habermas suggests are the hallmark of the application of human rights today, the demonstration of human rights in operation is undertaken by all institutions of government, by independent agencies such as human rights commissions, by NGOs, and by public participation.

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<sup>24</sup> It is indicative of the appeal of such statements that 95 per cent of the submissions received on the Scrutiny of Acts and Regulations Committee's inquiry into the first four years of the operation of the Victorian Charter of Human Rights and Responsibilities in September 2011 supported its retention or strengthening: see Human Rights Law Centre *Victoria's Charter of Human Rights and Responsibilities in Action – Case Studies from the First Five Years of Operation* (March 2012) at 5.

<sup>25</sup> See for example Eric Posner "The case against human rights" *The Guardian* (London, 2 December 2014) at 12.

<sup>26</sup> See the proposal by the Conservative Party to replace the Human Rights Act 1998 with a "British" Bill of Rights: Conservative Party *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* at 4.

It helps very much that there are shared and accessible frames of reference. That is I think the principal importance of enacted statements of rights. I do not disagree with the view taken by Amartya Sen that public ownership of rights is a reason “to give the general ethical status of human rights its due”.<sup>27</sup> And I accept that may mean there are risks in “locking up the concept prematurely within the narrow box of legislation”.<sup>28</sup> We may indeed see that in our own enacted statements of rights. They have been more comfortable with the traditional common law notions behind the civil and political rights in the ICCPR and, for the moment, hardly acknowledge the economic, social and cultural rights or rights to privacy and equality before the law.

The criticism of locking up rights prematurely should, however, be directly confronted by regular parliamentary review. That is particularly important when there is some considerable unfinished business in incorporation of human rights. But I do not think the need to preserve space for future development detracts from the experience that domestic enactments of rights provide necessary and accessible markers for all. They have domestic legitimacy which provides shelter from the sort of winds that have buffeted the Australian Human Rights Commission and used to belittle the work of the New Zealand Human Rights Commission in anti-discrimination before the enactment of the Bill of Rights Act.

Securing human rights, like securing the rule of law, is inevitably a whole of government responsibility and the work of many hands. A preoccupation with the role of the judiciary seems to me to miss the point. It is necessary to count the ways.

First, the setting of human rights standards in legislation and avoiding their erosion through legislation is inescapably a responsibility of the legislative branch of government. Changes in public administration, the setting up of national human rights commissions, and the development of judicial review of administrative action mean that human rights values infuse our legal order. It seems preferable that they be identified by the institution with democratic legitimacy.

Secondly, the delivery of human rights in practice to individuals is overwhelmingly the responsibility of the executive. If human rights are not embedded in public administration they cannot be properly observed.<sup>29</sup>

In all countries, delivery of human rights is systemised by policies, manuals and other forms of soft law and by modern systems of check within government, many of which provide open processes for review of decisions affecting individuals. Modern administration is supervised not only by the courts but also by officers such as Ombudsmen who inevitably have to address human rights issues, especially but not

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<sup>27</sup> Amartya Sen *The Idea of Justice* (Allen Lane, London, 2009) at 366.

<sup>28</sup> At 366.

<sup>29</sup> This is a point made by scholars such as Carol Harlow and Richard Rawlings in relation to a judicial review-centred conception of public law: it is a partial picture only, and not the most important one. See Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, Cambridge, 2009) at xv–xix.

only in jurisdictions with enacted statements of rights, because non-compliance with human rights will often be bad administration.<sup>30</sup>

In New Zealand, few judicial decisions have been as significant to human rights as a decision of the Ombudsman, upheld by the Court of Appeal in 1988,<sup>31</sup> to require police disclosure of information in criminal prosecutions. The decision predated enactment of the New Zealand Bill of Rights Act and was achieved by a parliamentary officer with a mandate to promote good government, despite long years of acquiescence by the courts in the withholding of information obtained in the course of an investigation. The use of human rights values as standards for good administration was underway before there were domestic enactments of human rights.

Thirdly, no one who is a close observer of human rights in operation doubts the important role played by advocates for change and enforcement, especially the domestic human rights commissions. They have statutory mandates to promote human rights. Their work entails domestic application of human rights standards. Again, it does not seem sensible to withhold from them statutory statements of the rights recognised in domestic law.

The final element in a system for protection of rights is the courts. I have indicated that I do not think courts are the branches of government principally responsible for delivering rights. Their engagement with rights seems however to be inescapable. That is made plain in New Zealand by the requirement that the New Zealand Bill of Rights Act binds the judicial as well as the executive and legislative branches of government,<sup>32</sup> a measure that does not feature in some other statutory bills of rights.<sup>33</sup> But I am not sure that the same position does not follow from the nature of judicial function. There have always been fundamental standards treated as immanent in the common law, although their content may be contestable and judges invoking them are at risk of charges of judicial overreaching. And in judicial review and in development of the common law the work of the courts is intensely contextual and sometimes depends on policy choices. It is not sensible that in such cases courts can be blindfolded to the register provided by human rights values.

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<sup>30</sup> The Commonwealth Ombudsman in 2009 accepted that Ombudsmen in Australia play a “major role in human rights protection”, while expressing some dismay that human rights could swamp the workload: see John McMillan “The Ombudsman’s Role in Human Rights Protection – An Australian Perspective” (paper to the 11th Asian Ombudsman Association Conference, 2–5 November 2009, Bangkok). Rights engagement is clearly a direct responsibility of good administration in Victoria under the Charter because all public authorities are required to act compatibly with human rights. That is reinforced by s 13(2) of the Ombudsman Act 1973 (Vic), which provides that it is a function of the Ombudsman to “enquire into or investigate whether any administrative action that the Ombudsman may enquire into or investigate under [s 13(1)] is incompatible with a human right set out in the Charter of Human Rights and Responsibilities Act 2006”.

<sup>31</sup> *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).

<sup>32</sup> Section 3.

<sup>33</sup> Section 40(2)(b) of the Human Rights Act 2004 (ACT) excludes from the definition of “public authority” a court “except when acting in an administrative capacity”. Similarly, the Charter of Human Rights and Responsibilities Act 2006 (Vic) applies to courts and tribunals only “to the extent that they have functions under Part 2 [human rights] and Division 3 of Part 3 [interpretation of laws]: s 6(2). Compare the differently expressed Human Rights Act 1998 (UK) which provides in s 6 that “[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right”, with a “public authority” defined to include “a court or tribunal”.

In a mature system of domestic human rights protection, the integration of the courts into rights protection is necessary in the same way that “the judge over the shoulder” was a necessary step in building modern administrative law (that is, when the judges emerged from the “deep gloom” described by William Wade<sup>34</sup>). Human rights standards set minimum standards. Below those standards legislation, administration, and judgments lack legitimacy, even though under parliamentary Bills of Rights the courts cannot decline to apply legislation for failure to comply with human rights.

In addition, judicial scrutiny does not serve only to correct breaches of human rights. It provides independent demonstration when behaviour is rights-compliant. That may be seen as a significant contribution of legal process to the rule of law and civil society. It is better in this work that courts and litigants work with enacted standards conferred with democratic legitimacy than they be left to search for them in international obligations or finding them immanent in the common law.

I want to examine further the principal institutional protections for human rights. In our systems, they revolve around parliamentary scrutiny, human rights commission advocacy, education and complaints mechanisms, and the role played by the courts.

### **Parliamentary scrutiny**

Parliamentary responsibility for human rights compliance responds in part to the insight that reconciling collisions between rights or collisions between rights and other pressing public interests (such as security and constitutional fundamentals) may be intensely political. Jeremy Waldron argues that these are matters for the “public square” rather than the courtroom.<sup>35</sup> As I have already indicated, I do not see matters as being as black and white or disconnected. The deliberative processes of the court may illuminate public debate and provide space for second thoughts which are valuable in themselves. But that is not to doubt the importance of parliamentary engagement with human rights.

The setting up of better parliamentary scrutiny in protection of human rights was an aim of the New Zealand Bill of Rights Act. In the White Paper that preceded it, the expectation was expressed that the Bill would be a “set of navigation lights” for legislators and policy-makers.<sup>36</sup> The principal mechanism provided for parliamentary scrutiny under the Bill of Rights Act is the s 7 reports of inconsistency provided by the Attorney-General.

The Australian Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) is a newer generation attempt to set up better engagement by Parliament with human rights. It

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<sup>34</sup> William Wade and Christopher Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 12–13.

<sup>35</sup> See Shawn Rajanayagam “Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act” (2015) 38 UNSW Law Journal 1046 at 1046 discussing Jeremy Waldron *Law and Disagreement* (Oxford University Press, Oxford, 1999); Jeremy Waldron “The Core of the Case against Judicial Review” (2006) 115 Yale LJ 1346; and Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds) *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing, Aldershot, 2006).

<sup>36</sup> Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] 1 AJHR A6 at 6.

builds in part on the experience of the United Kingdom Joint Parliamentary Committee. Since there is significant support in New Zealand for the adoption of a similar single committee to take responsibility for checking legislative compliance with human rights, the Federal Parliamentary Joint Committee on Human Rights is of considerable interest to us.

The Commonwealth Parliamentary Scrutiny Act is based on two strategies. First, those introducing bills must provide a statement of compatibility with human rights.<sup>37</sup> The statement must consider compatibility with all the human rights treaties to which Australia is a party<sup>38</sup> (whereas in New Zealand the s 7 reporting function is confined to consistency with the rights contained in the Bill of Rights Act, based entirely on the ICCPR). Secondly, evaluation of these statements and the rights-consistency of legislation is the responsibility under the Parliamentary Scrutiny Act of a joint committee of both Houses of Parliament. Early studies give reason for optimism in cross-party cooperation and report that the Committee has contributed to informed debate about difficult choices.<sup>39</sup>

In New Zealand it is a Cabinet requirement that government bills are certified for compliance with the New Zealand Bill of Rights Act.<sup>40</sup> The Commonwealth legislation brings such certificates into the parliamentary process.<sup>41</sup> But it is difficult to know whether the certification of bills for compliance is as effective in bringing human rights into policy development as it may be under the New Zealand, UK, Victorian and ACT legislation with their check-lists of enacted rights.<sup>42</sup> It is possible that such focus will develop under the Committee's guidelines.<sup>43</sup> Until that happens, however, the "navigation lights" hoped for in New Zealand for policy makers and provided in Victoria and the ACT may not be as obvious for those promoting Bills in the Commonwealth Parliament.

Some commentators and the United Nations Human Rights Committee have queried the practical ability of the Joint Parliamentary Committee to influence changes to a Bill

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<sup>37</sup> Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), s 8.

<sup>38</sup> As is made clear by the definition of "human rights" in s 3(1).

<sup>39</sup> Tom Campbell and Stephen Morris "Human Rights for Democracies: A Provisional Assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011" (2015) 34 UQLJ 7. See also Shawn Rajanayagam "Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act" (2015) 38 UNSW Law Journal 1046.

<sup>40</sup> Cabinet Office *Cabinet Manual 2017* at [7.65]–[7.67].

<sup>41</sup> Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), s 8.

<sup>42</sup> In respect of New Zealand, see (in addition to the requirements in the *Cabinet Manual 2017*) the Legislation Advisory Committee's *Guidelines on Process and Content of Legislation* (October 2014) at 21–23. In the ACT, departmental staff must "integrate [Human Rights Act] thinking into the policy development and drafting process": Department of Justice and Community Safety Bill of Rights Unit *Guide to ACT Departments on Pre-introduction Scrutiny: The Attorney General's Compatibility Statement under the Human Rights Act 2004* (October 2004) at 3. In Victoria, assessment of rights compliance is required at every stage in the development of legislation by the Department of Justice's Human Rights Unit's *Guidelines for Legislation and Policy Officers* (July 2008).

<sup>43</sup> The Parliamentary Joint Committee on Human Rights has published a *Guide to Human Rights* (June 2015) in which it seeks to "provide an introduction to the 25 key human rights protected by the seven human rights treaties which form part of the committee's mandate". It also includes a "Short Guide to Human Rights" as an appendix to its scrutiny reports.

because of the late stage at which it becomes involved.<sup>44</sup> In some cases its reports have been tabled following enactment of measures, a matter that the Joint Parliamentary Committee itself has expressed concern about.<sup>45</sup>

One commentator has noted that the statements of consistency indicate reluctance to cite foreign and international legal sources,<sup>46</sup> which is not perhaps readily squared with the international – and very wide – definition of rights. Williams and Reynolds have raised concern about the quality of the analysis carried out by the Committee and have questioned whether it has succeeded in raising public awareness.<sup>47</sup> Perhaps such criticism indicates the need for a comprehensive plan in protection of human rights in which courts, human rights commissions, the soft law of departmental manuals, as well as parliamentary committees can operate. Whether that is feasible without the skeleton provided by a domestic statement of rights is not clear to me. In New Zealand everything hangs off the enactment of rights and I suspect the same is true of human rights compliance in the Australian jurisdictions that have enacted statements. As importantly, in the absence of such a domestic statement of rights it may be difficult for the public to engage with the work of the Committee, potentially obscuring human rights implications.

I would not want to give the impression that I think the model of parliamentary scrutiny we have in New Zealand is better. It has been the subject of some convincing criticism. Although a 2014 amendment to Standing Orders of the House of Representatives now ensures that all s 7 reports are referred to the relevant Select Committee for the subject-matter of the Bill,<sup>48</sup> there is still no Human Rights Committee of the House to keep overview of human rights in the legislative process.<sup>49</sup>

There has been concern in New Zealand at lack of parliamentary engagement with limits on rights, even when the Attorney-General has reported that a proposed measure is a limit on rights that cannot be justified in a free and democratic society.<sup>50</sup> A leading

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<sup>44</sup> George Williams and Daniel Reynolds “The Operation and Impact of Australia’s Parliamentary Scrutiny Regime for Human Rights” (2015) 41 Mon LR 469 at 477–478; and Human Rights Committee *Concluding Observations on the Sixth Periodic Report of Australia* CCPR/C/AUS/CO/6 (2017) at [11]–[12].

<sup>45</sup> Parliamentary Joint Committee on Human Rights *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 14–16 May 2013 (Seventh Report of 2013)* (June 2013) at 10–11 and 18.

<sup>46</sup> Rajanayagam at 1065.

<sup>47</sup> George Williams and Daniel Reynolds “The Operation and Impact of Australia’s Parliamentary Scrutiny Regime for Human Rights” (2015) 41 Mon LR 469.

<sup>48</sup> Standing Orders of the House of Representatives 2014, SO 265(5).

<sup>49</sup> In its responses to suggestions by the United Nations Human Rights Committee that such a committee should be established, New Zealand has taken the view that Bill of Rights consideration is the responsibility of all subject select committees: *Sixth Report of the New Zealand Government Submitted under Article 40 of the International Covenant on Civil and Political Rights* CCPR/C/NZL/6 (2015) at [63].

<sup>50</sup> See for example Janet McLean “The New Zealand Bill of Rights Act 1990 and Constitutional Propriety” (2013) 11 NZJPI 19; and Claire Charters “Finding the Rights Balance: A Methodology to Balance Indigenous Peoples’ Rights and Human Rights in Decision-making” [2017] NZ L Rev 553 at 568–570 (discussing the process followed in New Zealand following the Supreme Court’s decision in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1).

constitutional academic, Janet McLean, notes that as at December 2011 there had been 58 negative s 7 reports, of which 28 related to Government Bills.<sup>51</sup> She says:<sup>52</sup>

We need to pause to reflect on the constitutional propriety that is represented in these figures. In 28 cases, the government was prepared to proceed with a Bill which it openly acknowledged as limiting protected rights unreasonably in a way that could not be justified.

This apparent institutional indifference to infringement of rights treated as “fundamental” in the Bill of Rights Act leads McLean to observe that there seems little acceptance that “it is a serious thing indeed for a government to proceed with a Bill that the government admits it cannot justify in rights terms”.<sup>53</sup> She suggests that if such habit is established, it will be “corrosive”. She has wondered whether we are in danger of having the worst of all worlds: “a kind of s 4 Bill of Rights anti-constitutionalism” that “Parliament can do whatever it wants” that was never our constitutional tradition.<sup>54</sup>

It is noteworthy also that, in line with recent case-law, legislation that trenches on rights is not treated as triggering a s 7 report unless the Attorney-General is of the opinion that it is a limitation that is unjustified.<sup>55</sup> The effect is that what is a justified limitation in a free and democratic society is not referred for consideration by Parliament, the body perhaps uniquely qualified to make that assessment, but is instead withheld from special reference to Parliament on a legal opinion acted on by the Attorney-General, which may be contestable.

On the other hand, the s 7 reports are available for public comment. They are published on the Ministry of Justice website and the Attorney-General has waived legal professional privilege in making available the advice behind them. In cases of public controversy, the Attorney-General also publishes the advice which has led to a conclusion that a s 7 report is not warranted (either because no right is engaged or, more frequently, because the legislation is a limitation justifiable in a free and democratic society).

Whether parliamentary oversight can be improved depends on changes to Parliament’s procedures, perhaps building on the recent change to Standing Orders in 2014. But unless measures that impact on enacted rights are determined by Parliament to be limitations acceptable in a free and democratic society, there may

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<sup>51</sup> McLean “The New Zealand Bill of Rights Act 1990 and Constitutional Propriety” at 33.

<sup>52</sup> At 33. Of the 12 Government Bills introduced between 2011 and 2017 for which a s 7 report was published (see Ministry of Justice “Constitutional Issues & Human Rights – Section 7 Reports” (23 March 2018) <[www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/section-7-reports](http://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/section-7-reports)>), eight have been enacted (though in the case of the Land Transport Amendment Bill (No 2) 2016 (173), after amendments with the aim of addressing the inconsistency with the Bill of Rights Act: see the Select Committee report at 7–8).

<sup>53</sup> At 34.

<sup>54</sup> At 37.

<sup>55</sup> Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [8.7.1]–[8.7.4]; and Tessa Bromwich “Parliamentary rights-vetting under the NZBORA” [2009] NZLJ 189 at 192.

remain a democratic deficit in the protection of rights through the parliamentary process.

## Human Rights Commissions

The public criticism directed at the Australian Human Rights Commission has received widespread comment domestically and internationally and need not be traversed here.<sup>56</sup> There has been nothing comparable in New Zealand, although in the early years of the Commission it was subject to some ridicule and disparagement before spreading consciousness of human rights (itself fostered by the role of the Commission) and enactment of the New Zealand Bill of Rights Act saw a change in culture.<sup>57</sup>

The New Zealand Human Rights Commission did venture into a very New Zealand public controversy when it reported to the Prime Minister in June 1981 with the recommendation that the government should prevent the then-pending Springbok tour of New Zealand. The Prime Minister, Mr Muldoon, was characteristically dismissive. In 1983 its report on the treatment of children and young persons in state care was also rejected. The Commission was regarded as largely toothless, fuelling calls for incorporation of the ICCPR into New Zealand law which eventually led to the New Zealand Bill of Rights Act.

The New Zealand Human Rights Commission was established by legislation in 1977,<sup>58</sup> initially with special responsibilities for addressing discrimination through public education and through conciliation of complaints. Under the major reforms of 1993, and as is the case in Australia, the Commission was given a direct reporting function.<sup>59</sup> Further legislation in 2001 gave the Commission greater scope in advocacy, including in the courts,<sup>60</sup> a role also fulfilled by the Australian Commission.<sup>61</sup> It also renamed the Complaints Review Tribunal the Human Rights Review Tribunal and conferred on it jurisdiction to grant declarations that legislation is incompatible with the New Zealand Bill of Rights Act.

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<sup>56</sup> See for example Michael Gordon "Lauded and Vilified: Gillian Triggs, Australian Human Rights Commission President" *The Sydney Morning Herald* (online ed, Sydney, 16 June 2017); Michael Slezak "Gillian Triggs: Australian government 'ideologically opposed to human rights'" *The Guardian* (online ed, London, 26 July 2017); and Meg Brodie "Uncomfortable Truths: Protecting the Independence of National Human Rights Institutions to Inquire" (2015) 38 UNSWLJ 1215.

<sup>57</sup> The Commission was criticised for being pragmatic and tentative in its decision to focus on "promoting attitudinal change through education and publicity": Margaret Wilson "The Human Rights Commission – Educator or Enforcer" [1979] NZLJ 467 at 469; see also JB Elkind "The Human Rights Commission as a Law Determining Agency" [1984] NZLJ 198; and Priscilla Pitts "The Human Rights Commission – The Public Watchdog with Little Bark and Less Bite" *Broadsheet* (Auckland, March 1980) at 22.

<sup>58</sup> Human Rights Commission Act 1977.

<sup>59</sup> See Human Rights Act 1993, s 75 (as enacted). The Commission also has wide powers to inquire into any matter "including any enactment or law, or any practice, or any procedure, whether governmental or non-governmental, if it appears to the Commission that the matter involves, or may involve, the infringement of human rights": s 5(2)(h).

<sup>60</sup> Human Rights Act 1993, s 5(2)(j), inserted by s 5 of the Human Rights Amendment Act 2001.

<sup>61</sup> Australian Human Rights Commission Act 1986 (Cth), s 11(1)(o).

In general the reports of the New Zealand Human Rights Commission have steered away from the major controversies of the day. There is, for example, as yet no Human Rights Commission report into whether the overrepresentation of Maori in the justice system (one of the more significant contemporary human rights issues) is a result of systemic discrimination. The New Zealand Commission has not to date tackled inquiries of the scale or political sensitivity of the Australian Human Rights Commission's *Forgotten Children* report of 2014, touching as it does the flashpoints of migrant detention and security. As a result, the New Zealand reports have not engendered comparable controversy to those of the Australian Human Rights Commission, and are not perhaps where its greatest efforts have been.<sup>62</sup> Instead, the reports of the New Zealand Human Rights Commission have concentrated on matters of practical importance in the lives of disadvantaged groups, which may have low visibility with the public. The reports of the Commission have raised the public profile of these issues and led to practical advancements.

In something of a departure from the usual practice, the Commission used its reporting function to report to the Prime Minister human rights concerns about the Government Communications Security Bureau and legislation which gave it powers of surveillance and information sharing.<sup>63</sup> The report led to an independent review of intelligence and security services in New Zealand and amendment of the legislation in Parliament to impose periodic reviews of the intelligence and securities agencies and the legislation under which they operate.<sup>64</sup>

The Australian Human Rights Commission was established in its present form nine years after the New Zealand Commission and, it seems, with less popular support than its New Zealand counterpart.<sup>65</sup> It seems to have always lived with political controversy, much of it conspicuously unfair. Its complaints jurisdiction, principally carried out by mediated settlement, was initially described as constituting it a modern day "Star

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<sup>62</sup> Reports have included *The Accessible Journey* (October 2005), concerning accessible public land transport for persons with disabilities; *To Be Who I Am/Kia noho au ki toku ano ao* (January 2008) discussing the discrimination experienced by transgender people; *Caring Counts/Tautiaki tika* (May 2012) looking at employment in the aged care sector; and *A New Era in the Right to Sign/He Houhanga Rongo te Tika Ki Te Reo Turi* (September 2013) concerning use of sign language. But see John Belgrave and Mel Smith *Ombudsmen's Investigation of the Department of Corrections in Relation to the Detention and Treatment of Prisoners* (December 2005) and Waitangi Tribunal *Tu Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017), both tackling issues of some political sensitivity.

<sup>63</sup> Human Rights Commission *Report to the Prime Minister – Government Communications Security Bureau and Related Legislation Amendment Bill; Telecommunications (Interception Capability and Security) Bill, and Associated Wider Issues Relating to Surveillance and the Human Rights of People in New Zealand* (9 July 2013).

<sup>64</sup> Intelligence and Security Act 2017, ss 235–241.

<sup>65</sup> The early history of the four attempts to enact legislation to provide for a Commission is described by Peter Bailey, then its Deputy Chairman, in March 1986: "The Human Rights Commission – Tame Cat or Wild Cat?" (1986) 60 ALJ 123. The Commission was preceded by a different body in operation since 1981. The Commission's website notes that "[t]he first Commission was a distinct statutory body from the current Commission" and that "[i]t should not be assumed that the present Commission necessarily endorses views expressed by or on behalf of the first Commission in every respect": see Australian Human Rights Commission "1981–86 Human Rights Commission: Reports" <[www.humanrights.gov.au](http://www.humanrights.gov.au)>.

Chamber”.<sup>66</sup> It was also established in a legal order in which the courts were reluctant to take international instruments such as the ICCPR and the Declaration of the Rights of the Child into consideration.<sup>67</sup> This may have caused difficulties in the complaints function. The Commission’s Deputy Chairman, Peter Bailey, pointed out in 1986 that it was hardly practical for a complaint based on failure to take human rights into consideration to operate in the absence of a legal obligation to take human rights into account.<sup>68</sup> It “would be preferable”, he thought, for decision-makers to be required to take into account “statutorily approved human rights” and for the courts to hold as a matter of law “that human rights must be taken into account by decision-makers in the absence of contrary statutory direction”.<sup>69</sup>

The Human Rights Commissions of both jurisdictions have used their powers to intervene in a wide range of court cases concerning minimum standards of criminal justice, discrimination in employment, refugee cases and many others.<sup>70</sup> Both engage in outreach programmes to promote human rights awareness such as the “It Stops With Me” programme in Australia and the “Give Nothing to Racism” campaign in New Zealand to encourage challenges to racism in everyday life. Both Commissions have developed guides for human rights for businesses.<sup>71</sup>

The Australian Commission has developed programmes in cultural education and to address responses to historic abuse and sexual harassment, and resources for schoolteachers to support teaching about human rights and fundamental freedoms.<sup>72</sup> The New Zealand Commission has conducted similar programmes (including adopting a guide to help women identify abuse in relationships and connect them to support services) and provided information about the vulnerability exposed in the Christchurch earthquake aftermath to guide conduct in future disasters.<sup>73</sup>

Both Commissions also make submissions to Select Committees on human rights implications of bills. These programmes, which are of practical assistance in enhancing human rights observance, are in addition to the substantial complaints

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<sup>66</sup> A suggestion effectively countered by Annemarie Devereux “Human rights by agreement? A case study of the human rights and equal opportunity commission’s use of conciliation” (1996) 7 ADRJ 280 at 283. She refers (at 298) to the “minimal interventionist policies” adopted by the Commission in producing outcomes directed at continuing and future relationships, rather than punishment.

<sup>67</sup> *Kioa v West* (1985) 159 CLR 550 at 570–571 per Dixon CJ, at 603–604 per Wilson J and at 630 per Brennan J.

<sup>68</sup> Peter Bailey “The Human Rights Commission – Tame Cat or Wild Cat?” (1986) 60 ALJ 123.

<sup>69</sup> At 126. These issues were also discussed by the Commission in *The Human Rights of Australian-Born Children: A Report on the Complaint of Mr and Mrs R C Au Yeung* (January 1985) at [23]–[25].

<sup>70</sup> In New Zealand see for example *Spencer v Ministry of Health* [2016] NZHC 1650, [2016] 3 NZLR 513; *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245; and *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24. In respect of Australia, see for example *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562; and *Magaming v The Queen* [2013] HCA 40, (2013) 252 CLR 381.

<sup>71</sup> New Zealand Human Rights Commission *The Business of Human Rights A Guide for Good Corporate Citizens* (March 2016); Australian Human Rights Commission and Deloitte Australia *Missing Out: The Business Case for Customer Diversity* (February 2017); and Australian Human Rights Commission and Ernst & Young Australia *Human Rights in Investment* (April 2017).

<sup>72</sup> Discussed in the Australian Human Rights Commission’s *Annual Report 2016/2017* (September 2017).

<sup>73</sup> New Zealand Human Rights Commission *Annual Report 2015/16* (November 2016) at 9 and 24.

mechanisms operated by the Commissions.<sup>74</sup> In conducting the complaints jurisdiction based on unlawful discrimination both Commissions have emphasised conciliation and education. They have high resolution rates often entailing agreement to change processes to bring about real systemic change.<sup>75</sup>

In addition to national reports, complaints, and public education, the Commissions take the pulse of human rights protection in each jurisdiction and are critically important to the oversight and reviews conducted by the United Nations Human Rights Committee and in the Universal Periodic Reviews. These reviews are important markers for human rights. They indicate the range of initiatives underway which can then be monitored for progress, and tie the initiatives back to human rights. The discipline of these checks itself serves an educational purpose in promoting human rights and discourages complacency and the spin sometimes encountered in country reports.<sup>76</sup>

In considering the successes of Human Rights Commissions in Australia and New Zealand, it is easy to overlook the low base from which they started and the progress that has been made. It is worth remembering too that, although not of the same degree as the controversy around the *Forgotten Children* report, the earlier reports of the Australian Commission such as the *Our Homeless Children* inquiry of 1989, the *National Inquiry into the Human Rights of People with Mental Illness* in 1993, the *Bringing Them Home* inquiry of 1997, and the *Same-Sex: Same Entitlements* national inquiry of 2007 all generated considerable heat. Yet, over time, these reports have brought about transformation in public attitudes to human rights, surely the best mark of success for a Human Rights Commission. As the *Bringing Them Home* inquiry shows, the success of the work of the Commission may take many years before it can be properly assessed. The apology made by the Prime Minister was 10 years after the report.

It would be wrong therefore to be despondent about recent controversy. The reports of the Commission speak to the wider community and they are markers for the future. The New Zealand Bill of Rights Act was enacted in part because the Human Rights Commission was thought to be toothless. By contrast, if human rights come to be enacted in Australian domestic law, it will be because the Australian Human Rights Commission was not, and has been effective in raising public consciousness of human rights.

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<sup>74</sup> The New Zealand Commission in the 2015/16 year received 5,336 inquiries and complaints, of which 1,274 were complaints of unlawful discrimination under the Human Rights Act (see the Commission's *Annual Report 2015/16* at 19–22).

<sup>75</sup> In its *Annual Report 2015/16* the New Zealand Commission says (at 21): “A total of 84 percent of enquiries and complaints dealt with by the disputes resolution team were resolved, partly resolved or assistance provided that enabled the complainant to progress the matter. Ten percent were not resolved and were referred to the Human Rights Review Tribunal.” The report goes on to say that “there were 69 outcomes involving systemic change”. The changes reported included a school adopting an inclusive practice tool from the New Zealand Council for Educational Research to better accommodate students with a disability, a recruitment firm agreeing to no longer advertise with “English as a first language” as a requirement, a retail outlet changing procedures to recognise transgender customers, an employer developing a performance management system to ensure fairness where there is a disability, and a booking agency removing the premium it charged for people in a wheelchair.

<sup>76</sup> See McGregor, Bell and Wilson *Human Rights in New Zealand: Emerging Faultlines* at ch 11.

## The courts

In the area of court enforcement of rights our jurisdictions diverge substantially. That is likely to continue while judicial review is not accepted in Australia to be available for human rights breach (as it is in New Zealand and the United Kingdom) and until the constitutional objections in Australia to rights-compliant interpretation can be overcome, perhaps by building on the long-standing interpretative principle of the common law more recently repackaged as the principle of legality.<sup>77</sup>

Sir Robin Cooke's view that the New Zealand Bill of Rights Act was intended to be woven into the fabric of New Zealand law<sup>78</sup> is not yet realised, despite early authorities which showed some promise. But there is powerful recent authority in the United Kingdom supportive of the view that human rights do not stand apart.<sup>79</sup> If they are properly to be seen as part of the general law, there is scope for the enacted statements of human rights to galvanise the common law in the manner of the Ancient Charters. In the UK, the approach taken by a unanimous Supreme Court in *Osborn* leaves open the possibility that statutes and charters of rights may become less important as separate legal instruments as their underlying effect become embedded in the common law. On this approach, the interpretative obligation to adopt meanings consistent with rights may be treated as consistent with common law principles of interpretation which presume consistency with fundamental values.

I think it is rash to think that our legal orders can never converge under new insights,<sup>80</sup> although I accept that the present climate does not seem propitious. But the preservation of the single common law of Australia seems to leave little space for human rights under the Charters of Victoria or ACT to be brought into the mainstream without an enacted Commonwealth Bill of Rights.

The constitutional context in Australia has meant that the Charters in Victoria and ACT are very different from the New Zealand and UK models and contain provisions of considerable difficulty, especially in matters of remedy.<sup>81</sup> In New Zealand we have had no difficulty in treating breach of rights as justifying judicial review and we are not pushed to find jurisdictional error.<sup>82</sup> It is sufficient to justify judicial review that non-observance is an error of law. As a result, despite the similarities between the New Zealand Bill of Rights Act and the Victorian and ACT Charters, the law and the way in which the courts will respond to human rights breach is different. If Sir Anthony Mason is right in the view that the protection of rights is unlikely to be treated in

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<sup>77</sup> As suggested by French CJ in *Momcilovic v The Queen* [2011] HCA 34, (2011) 245 CLR 1 at [51].

<sup>78</sup> *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156.

<sup>79</sup> *Regina (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, particularly at [54]–[63] per Lord Reed (with whom Lord Neuberger, Baroness Hale, Lord Kerr and Lord Clarke agreed).

<sup>80</sup> Some lines of thought worth exploring may be seen in judgments of Tate JA in the Victorian Court of Appeal, particularly *Bare v Independent Broad-Based Anti-Corruption Commission* [2015] VSCA 197, (2015) 48 VR 129.

<sup>81</sup> See Mark Moshinsky "Charter Remedies" in Matthew Groves and Colin Campbell (eds) *Australian Charters of Rights A Decade On* (The Federation Press, Sydney, 2017) 69.

<sup>82</sup> Compare the majority decision in *Bare v Independent Broad-Based Anti-Corruption Commission* [2015] VSCA 197, (2015) 48 VR 129, deciding, with Tate JA reserving, that breach of the Charter did not amount to jurisdictional error: see at [139]–[153] per Warren CJ, at [617]–[626] per Santamaria JA and at [378]–[397] per Tate JA.

Australia as a purpose of judicial review,<sup>83</sup> then the protection of human rights in the courts Australia and New Zealand will go separate ways.

There are already signs of divergence in outcome. 25 years after enactment of the Canadian Charter, an experienced appellate judge said that the Charter was most visible in criminal law.<sup>84</sup> I would say the same after more than 25 years of experience with the New Zealand Bill of Rights Act. As was said of the Canadian experience, the enactment of rights:<sup>85</sup>

... has changed the way crime is investigated in this country. It has changed the way offences are prosecuted. It has changed the way that criminal law is practised. And, it has changed the way that due process is valued in society.

By contrast, the verdict of Jeremy Gans is that, in Victoria, the Charter has played little part in appeals against criminal convictions and sentences.<sup>86</sup> He reports that at the time he wrote (in 2017) no criminal appeal had been allowed by the Court of Appeal on Charter grounds.<sup>87</sup>

I do not suggest that the results in the cases in which the Charter was not relied on reached results inconsistent with human rights. I think it is right to acknowledge that the big changes to criminal justice in jurisdictions like mine following enactment of the Bill of Rights Act may well have been because we had not kept pace with the reformation of criminal justice accomplished by the High Court of Australia in the last two decades of the 20th century. But without domestication of human rights at the Commonwealth level, it is not surprising that invocation of the enacted statements in Victoria and ACT seems to be lagging even in criminal justice, where they have had transformative effect elsewhere. The transformation may not simply be in result. It may impact on how law is seen. The Canadian appellate judge I have already cited reported that the Charter had changed the way crime is processed and criminal law is practised. But the most important change he mentioned was “the way that due process is valued in society”.

In New Zealand, as in the United Kingdom, judicial review is a principal means of addressing non-compliance with rights. Although in New Zealand the Bill of Rights Act is silent on remedies (and in that is to be contrasted with the Human Rights Act 1998 (UK)), we have taken the view that the full remedial measures available to the High Court can be resorted to, including exclusion of evidence and damages. There is some indication that in appropriate cases it may be open to the court to grant a declaration

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<sup>83</sup> Anthony Mason “Procedural fairness: Its development and continuing role of legitimate expectation” (2005) 12 AJ Admin L 103 at 109.

<sup>84</sup> Marc Rosenberg “Twenty-Five Years Later: The Impact of the *Canadian Charter of Rights and Freedoms* on the Criminal Law” (2009) 45 SCLR (2d) 233 at 233.

<sup>85</sup> At 233.

<sup>86</sup> Jeremy Gans “The Charter of Law and Order” in Matthew Groves and Colin Campbell (eds) *Australian Charters of Rights A Decade On* (The Federation Press, Sydney, 2017) 169.

<sup>87</sup> At 181.

of inconsistency where legislation breaches rights,<sup>88</sup> but to date there has been only one such declaration (and it is the subject of appeal on which the Supreme Court has reserved its decision).<sup>89</sup>

Although damages have been awarded for breaches of rights,<sup>90</sup> the remedy is treated as a residual one, where no other response is available.<sup>91</sup> And awards have been modest, with no attempt to treat awards in tort as guides.<sup>92</sup> In this New Zealand has followed the lead of the United Kingdom, itself following the approach taken in Strasbourg.<sup>93</sup> Whether that position may change if the Bill of Rights Act is absorbed into the common law is for the future. In addition, a decision of the Supreme Court of New Zealand has held that damages may not be awarded for breach of rights attributable to judicial error,<sup>94</sup> in a move that cuts down the remedial responses available for the criminal procedure rights.

I hope I do not sound as though I am a proselytiser for the way we do things in New Zealand. There is more than one way to protect human rights. And I am conscious that we operate in very different constitutional settings and that they must dictate the paths to be taken. Indeed I have some serious reservations about directions in New Zealand in some of the cases on human rights. And I have already referred to Sir Geoffrey Palmer's view that the courts have not taken the step up that had been hoped for.

### **Unfinished business?**

There remains in New Zealand and Australia unfinished business in the incorporation into domestic law of international commitments other than those derived from the ICCPR. They include not only the ICESCR but also Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of All Forms of Discrimination Against Women and the United Nations Declaration on the Rights of Indigenous Peoples.

When the Universal Declaration was under discussion, the New Zealand delegation argued for the inclusion of economic, social and cultural rights as indispensable for personal freedom in which the individual can "reach his full stature".<sup>95</sup> Despite the

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<sup>88</sup> *Temese v Police* (1992) 9 CRNZ 425 (CA) at 427 per Cooke P; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at [19]–[20] per Tipping J for the Court (but see *Boscawen v Attorney-General* [2009] NZCA 12, [2009] 2 NZLR 229 at [50]–[56]); and *R v Poumako* [2000] 2 NZLR 695 (CA) at [86]–[107] per Thomas J dissenting.

<sup>89</sup> *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791; *aff'd Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24.

<sup>90</sup> *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*].

<sup>91</sup> *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [258] per Blanchard J (with whom Tipping, McGrath and Henry JJ expressed agreement in general terms at [299], [373] and [385]).

<sup>92</sup> At [265] per Blanchard J.

<sup>93</sup> See *Regina (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673.

<sup>94</sup> *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

<sup>95</sup> Colin Aikman, quoted in McGregor, Bell and Wilson *Human Rights in New Zealand: Emerging Faultlines* at 51.

early support, domestic enactment of the ICESCR rights remains a prospect only. That seems largely because of resourcing issues and a preference for progressive implementation through specific legislation rather than through enactment of an overarching statement of principles. There is also scepticism about the imprecision in expression of the rights and the lack of an established tradition of their judicial exposition (compared with judicial familiarity with the rights contained in the ICCPR).

Despite the lack of recognition, economic, social and cultural rights are increasingly resorted to in cases concerning discrimination on grounds involving social or economic disadvantage and in cases concerning environmental issues.<sup>96</sup> A major seat of contest for economic, social and cultural rights has grown up in discrimination claims to the Human Rights Review Tribunal. The issues are emerging in cases coming into the courts by way of appeal or judicial review.

Since 2001 the Tribunal has had statutory jurisdiction to make a declaration that legislation or policies are inconsistent with the New Zealand Bill of Rights Act's proscription of discrimination on one of the prohibited grounds in the Human Rights Act 1993.<sup>97</sup> The Court of Appeal upheld such a declaration of inconsistency in the case of discrimination on the basis of family status when families providing care to family members with disabilities were denied state financial support available to other carers.<sup>98</sup> The case was not appealed by the Crown to the Supreme Court. Instead, legislation was enacted to limit the Crown's liability and to prevent further such challenges.<sup>99</sup> It was enacted despite an Attorney-General's s 7 report that it breached the non-discrimination right and appeared to limit the right to judicial review.

The New Zealand Human Rights Commission has supported claimants and appeared in support of a number of judicial review applications involving discrimination which touches on rights under the ICESCR. Amendment in 2001 increased the powers of the Commission to participate in such litigation.<sup>100</sup> The economic, social, and cultural rights are also a major focus of the Human Rights Commission in its educational and advocacy functions more generally. Except in relation to discrimination these are matters in which the didactic function of the courts (which has been so successful in raising awareness of civil and political rights) is circumscribed. It is therefore largely the efforts of the Human Rights Commission that are raising public awareness of economic, social and cultural rights and in promoting rights under the other Conventions.

Better awareness may also be fostered by recourse to the provisions of these Conventions in New Zealand law. We have had a less suspicious view, I think, than Australia in the persuasive use that can be made of unincorporated standards of the

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<sup>96</sup> See for example the Court of Appeal's disagreement with the wider approach to educational rights taken in the High Court in *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA) at [80]–[83]. Deprivation of choice to attend special educational facilities was not justiciable. The Court of Appeal drew a distinction between individual rights and general rights read into the Education Act 1989 by the High Court.

<sup>97</sup> Human Rights Act 1993, s 92J, inserted in 2002 by s 9 of the Human Rights Amendment Act 2001.

<sup>98</sup> *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

<sup>99</sup> New Zealand Public Health and Disability Amendment Act 2013.

<sup>100</sup> Human Rights Act 1993, s 5(2)(j).

international legal order.<sup>101</sup> The lack of domestic recognition of some of the other Conventions has not prevented recourse to their provisions by courts and other decision-makers when issues arise touching on them. In New Zealand the CRC has been invoked in many cases concerning custody of children and the interests of children in immigration matters. The late adoption in New Zealand of UNDRIP, based on reluctances in part shared with Australia and Canada (other jurisdictions with significant indigenous populations), has not inhibited reference to the Declaration and the principles it adopts in New Zealand cases concerning Maori interests and claims.<sup>102</sup>

Although the CPRD has been referred to in a number of court decisions, there are suggestions that its promise has not yet been matched by the reality of its implementation.<sup>103</sup> A convention that has been largely invisible has been CEDAW.<sup>104</sup> That is surprising, given the unprecedented public involvement in New Zealand in the processes around its adoption and ratification, including by well-organised NGOs. Since 2001 an Equal Opportunities Commissioner has been appointed to the Human Rights Commission with responsibility to promote equal pay and equal employment opportunities, areas of New Zealand's performance which have been the subject of criticism by the United Nations Human Rights Committee. There are signs that such inequalities are emerging as significant grounds in discrimination cases.<sup>105</sup>

## Conclusion

Nearly 50 years ago, when I first practised in the courts of New Zealand, human rights were something invoked in other jurisdictions. We did not think to invoke in argument international instruments respectful of family relationships or human dignity or political speech. Indeed, when the United Nations Declaration of Human Rights was cited in the Court of Appeal in 1967, the Judges were indignant. One Judge said “[i]t needed no Charter of the United Nations” to remind us in New Zealand about the importance of freedom of speech.<sup>106</sup>

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<sup>101</sup> Compare *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 as subsequently considered in *Re Minister for Immigration and Multicultural and Indigenous Affairs, ex parte Lam* [2003] HCA 6, (2003) 214 CLR 1 with *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104; and *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298.

<sup>102</sup> See Sian Elias “First Peoples and Human Rights, a South Seas Perspective” (2009) 39 N M L Rev 299 at 307–308. The Declaration has been referred to by the Supreme Court of New Zealand in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [12] per Elias CJ; *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [91]–[92]; *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [158] and [164] per Elias CJ and at [317] per Glazebrook J; and *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [491] per Elias CJ and at [657] per Glazebrook J.

<sup>103</sup> McGregor, Bell and Wilson *Human Rights in New Zealand: Emerging Faultlines* at 141.

<sup>104</sup> It is striking that a survey of Members of Parliament a few years ago showed little awareness of CEDAW: see McGregor, Bell and Wilson *Human Rights in New Zealand: Emerging Faultlines* at 193.

<sup>105</sup> See for example *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437.

<sup>106</sup> *Melser v Police* [1967] NZLR 437 (CA) at 445 per McCarthy J.

Kenneth Keith, one of the architects of the New Zealand Bill of Rights Act, believed it came to be recognised that a bill of rights does not entail a choice between Parliament and the courts. Rather he thought it is directed “at the lawmaking process as a whole”.<sup>107</sup> He said it has wider public and educational value. It is a “beginning point for public debate” – it is a “marker”. And, he said, “the enterprise of protecting rights should generally be seen as a cooperative rather than a divisive one”.<sup>108</sup>

The repositioning in thinking by enactment of such “markers” is evident. As Stephen Sedley has remarked: “Courts and public administrators are still getting accustomed to this reorientation, and it does not make headlines; but it affects hundreds of thousands of people every year, and to them it matters a great deal.”<sup>109</sup>

Eleanor Roosevelt was right to say that human rights starts in small places, close to home.<sup>110</sup> But it is equally true that human rights must be a culture shared by legislators, administrators and judges. It has been a pleasure to offer these reflections in a lecture in honour of someone who has done so much to create that culture in our region.

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<sup>107</sup> KJ Keith “The New Zealand Bill of Rights Experience: Lessons for Australia” (2002) 9 AJHR 119 at 122.

<sup>108</sup> At 129.

<sup>109</sup> Stephen Sedley “Colonels in Horsehair” *The London Review of Books* (19 September 2002) at 17.

<sup>110</sup> In remarks delivered at the United Nations in New York on 27 March 1958, quoted in McGregor, Bell and Wilson *Human Rights in New Zealand: Emerging Faultlines* at 8.