The Council of Australasian Tribunals (NSW Chapter)

The Whitmore Lecture

Acknowledgements

Thank you for the warm welcome.

Before I begin I would like to acknowledge the Gadigal People of the Eora nation. I pay my respects to your elders, past and present.

It is an honor to be here tonight to deliver the Whitmore Lecture in the honor of the late Professor Harry Whitmore, a scholar whose 1966 work on *Freedom in Australia* was the first analysis I read as a young student on how fundamental rights were protected under Australian law.

Prof Whitmore and I have one or two things in common. We were born in the UK migrating to Australia around the same time. Most notably, we have both been Dean of a Law Faculty-an experience that amply prepares us for almost anything that life throws at us thereafter.

Timing is everything. Prof Whitmore's early professional years were interrupted by the Second World War when he left the public service to join the British Army in the Royal Armoured Corps. After the war, he returned to the British Civil Service and migrated to Australia in 1950, graduating with a law degree from Sydney University in 1958, followed by a Masters from Yale.

Prof. Whitmore moved through the academic ranks at the University of Sydney and ANU in 1965 where he was twice Dean in 1966 and again from 1970-72.

He established himself as the leading administrative lawyer through numerous publications and including the *Principles of Australian Administrative Law.*

In 1969 he was appointed to the Administrative Review Committee (the Kerr Committee) and then to following Bland Committee in 1971. He was recognised as the driving force behind the development of modern administrative law in Australia, under which citizens have the right to test the legality and merits of decisions that affect them.

Prof Whitmore's concern for traditional freedoms and civil liberties is reflected in a number of his publications, including a 1963 article in the *Sydney Law Review* titled, 'Obscenity in Literature: Crime of Free Speech.' This paper followed with a book (co-authored with Enid Campbell) published in 1966, *Freedom in Australia.* This was the first major publication in Australia that explores the protection to freedoms, such as limits to police powers and the need for consent to medical treatment.

It has been interesting to reflect on Whitmore's work on civil liberties in the context of our recent and probably unprecedented national debate – termed the **'freedom wars.'**

This debate was prompted by an election promise to amend s18C of the *Racial Discrimination Act,* legislation the AHRC administers through our complaints

process. The key idea was to promote freedom of speech and restrict the current law prohibiting racial abuse.

A couple of weeks ago we learned that the proposed amendments to S1*BC* will not proceed. I welcome and respect the decision by the Prime Minister. It is consistent with the submission of the AHRC to the Government on the Exposure Draft and responds to the overwhelming rejection of the proposed amendments by the Australian community.

The freedoms debate has now been turned on its head and we are faced with a different balancing act with respect to the proposed anti-terrorism legislation. These new laws will be introduced to respond to the terrorist threat that, it is feared, may be posed by Australians returning from fighting in the conflicts in Syria and Iraq. It is now proposed that to advocate the promotion of terrorism will be a new offence, warrant detention metadata for two years will be required, the burden of proof may be shifted to an accused in respect of new offences, the threshold for arrests without a warrant will be lowered and passports may be suspended.

Seemingly overnight there has been a radical reversal of the public debate, from protection of freedom of speech in our multicultural society to introduction of a suite of proposals to limit freedoms in the interests of national security. The freedom includes the provision in the Magna Carta 1215 that no man shall be arbitrarily detained without charge or trial by his peers, right to privacy and the criminal trial laws that place the persuasive burden on proof on the state.

This evening I would like to explore how Australia gives effect to the human rights treaties we have ratified and the vital role played by Administrative law and tribunals. I would like to suggest that the time has come to revisit the value of Human Rights for Australia so that can be guided by benchmarks for fundamental freedoms, rather than present swings of policy apparently without anchor in legal principle.

I had already graduated in law from Melbourne University before the recommendations of the Kerr and Bland Committee were made. I therefore did not have the opportunity to study administrative case law as law students now do. However, as President that I have gained a deeper understanding of Australia's administrative law regime and an appreciation of its critical relevance to the protection of human rights.

For human rights are often protected in this country through the principles of administrative law.

As you know administrative law regulates the decisions of agencies of the executive government-for example, Ministers, departments and the individual officials working for them.[1] In addition to providing a framework for people to question or challenge the decisions of these agencies, the intention is to encourage standards of lawfulness, fairness, rationality and accountability in public administration.

Administrative decision-making plays an important role in the protection of human rights as decisions by government officials can affect virtually every aspect of a person's life. Many of these decisions involve human rights issues. For example, decisions concerning guardianship, immigration, social security and housing.

When examining administrative law and human rights, one finds they are closely

connected in their objectives, and there is overlap between the two bodies of law.

The right to a remedy is one of the core values of the international human rights system.

United Nations human rights bodies have repeatedly emphasised that administrative remedies, not only judicial remedies, are an important means of providing 'effective remedies' to people whose rights are breached because they are accessible, affordable and timely.

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[1] See M Groves & HP Lee (eds), *Australian Administrative Law: fundamentals, principles and*

Of course Administrative law is not a panacea or always consistent with current thinking. We found in our research for tonight's lecture that the House of Lords in *Roberts v Hopwood [1925] AC* 578 considered whether a Council could validly order female employees to be paid the same wages as men. The Lords concluded that the policy was both unreasonable and invalid.

I would like to begin by exploring:

Australia's exceptionalist approach to human rights protection

The modern history of International human rights law begins with the Universal Declaration of Human Rights under Doc Evatt as the President of the UN General assembly, gaining a unanimous vote. Since the adoption of the Declaration the term 'human rights' has been used worldwide to refer to rights and freedoms which function as standards for how people should be treated by their governments, and each other. There is universal agreement about these standards, which has led to a wide range of human rights being recognised in international agreements; ICCPR ICESCR,CROC, Torture, Race, Disability, Sex.

Underpinning all human rights law is the notion of the inherent dignity of all human beings, regardless of their race, sex, age, disability or other attributes.

Human rights are universal, inalienable and indivisible. They are also rarely absolute, and an example of this has occurred within the freedoms debate e.g. trying to find the appropriate balance between freedom of speech and freedom for racial vilification.

There are some absolute rights, such as the right not to be tortured or to be free from slavery. However, in the end most rights are subjected to some reasonable limitation.

Australia is a party to …… all the international agreements that impose obligations on States parties regarding human rights:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Rights of the Child (CRC)
- Convention on the Elimination of all forms of Discrimination against Women (CEDAW)

- Convention on the Rights of Persons with Disabilities (CRPD)
- Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention against Torture (CAT)

Under these agreements, the Australian Government is obliged to avoid taking any action (including developing policy and drafting laws) which may breach human rights. The Australian Government is also obliged to take positive steps to ensure that people are able to enjoy their human rights, and are protected against breaches of human rights by other people, organisations.

International law is not concerned about how human rights are achieved. It is "outcome oriented" which is why one can say that Administrative law achieves many human rights through its processes.

However, and this is critical point, these well-recognised international treaties, do not become part of our domestic law without the passage of appropriate legislation, consistently with the principle of parliamentary sovereignty. Regrettably, most human rights treaties are not legislated as part of Australian law and cannot therefore directly require government officials or courts to comply with their fundamental principles. The role of the AHRC in assessing compliance with the main treaties that provide the definition of human rights for our purposes is thus very limited in practice.

A treaty ratified by Australia is however relevant to the interpretation of legislation even though the treaty may not have been given effect in domestic legislation.[2] Where a statute is ambiguous, the courts will usually favor a construction that accords with Australia's obligations
under a treaty or international convention to which Australia is a party, at

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[2] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 *(Teoh).*

least in those cases in which the legislation is enacted after, or in contemplation of, entry into or ratification of the relevant international agreement.[3] There are strong reasons for rejecting a narrow conception of ambiguity.[4]
Domestic legislation is not, however, required to conform to international agreements entered into by Australia. Where there is no ambiguity of meaning, an Act must be given effect according to its terms even though it is inconsistent with Australia's international obligations.[5]

This brings me to what is Australian "exceptionalism" in respect of human rights

Australia has adopted an exceptional approach to human rights protection when compared to other comparable nations. It is true that historically, Australian "exceptionalism" has been largely effective in ensuring a cultural environment that protects human rights.

Australia has been a good international citizen for the most part and has been a leading nation in negotiating the body of international human rights treaties

developed over the last 50 years. Most notably, through the work of Doc Evatt who was a key driver of the Universal Declaration of Human Rights and was President of the UN Generally Assembly at the time of adoption.

But fractures are now appearing in the protection of basic rights including protections for Aboriginal and Torres Strait Islanders, asylum seekers and refugees, journalists and their sources, those alleged to be terrorists or members of criminal or bikie gangs.

For relative to comparable common and civil legal systems we have very few constitutional or legislative protections for fundamental freedoms. We have no Commonwealth Bill of Rights or Charter of Rights unlike all other common law countries such as the UK, NZ, Canada, Europe and South Africa. We have no regional court like the European Court of

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[3] *Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 (Gummow and Hayne JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 (McHugh and Gummow JJ).

[4] *Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J).

[5] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).

Human Rights or similar courts in Latin America, Africa and the Middle East and we are isolated from the evolving jurisprudence or the legal systems with which we have most in common.

In the absence of many of the fundamental freedoms protected by legislation and judicial procedures it can be hard to find the legal hook on which to hang an argument before a court to challenge laws on the ground that they violate human rights.

In light of the failure to make human rights directly part of Australian law, how is it that in practice we tend to meet a high standard of human rights compliance and, indeed, has a well-deserved reputation as good international citizen?
The answer lies in a combination of several features of the Australian legal system:

- Culture that is both built upon and demands fundamental freedoms -the insistence on a fair go, tolerance and equality of opportunity.
- Constitutional provisions and implications such as the right to vote, to freedom of religion and an implied right to freedom of political communication.
- Legislation such as the Racial Discrimination Act, Sex Discrimination Act and other anti-discrimination legislation administered by the AHRC; and also charters of rights at the state and territory level e.g. in Victoria and the ACT.
- Judicially developed common law principles of legality and statutory interpretation. [CJ Spigelman and the statutory Bill of Rights]
- Joint Parliamentary Committee on Human Rights that scrutinizes Bills for human rights compliance and compatibility.
- Monitoring, advocacy and complaints functions of the AHRC and similar

Commissions at the state and territory levels.

- Principles of Administrative Law such as the rights to due process and natural justice.

This mixed regime has been effective in creating an environment in which Australians will assert the right to freedom of expression, freedom of association and the right to a fair trial, without being able to point to any specific constitutional or legislative provision.

Problem: trumping of all approaches to human rights by clear and unambiguous legislation.

The practical reality is that, wherever legislation is clear and unambiguous, the statute will trump any common law or international human rights principles. Let us look at some examples:

- ***Ahmed Al-Kateb,*** was a young Palestinian seeking asylum in Australia who was born in Kuwait, but legally stateless and no country would accept him. The Australian government held him in detention indefinitely. When his lawyers challenged his detention in the High Court, a majority of judges decided that the *Migration Act* gave the Immigration Minister the power to detain an "unlawful non-citizen" until he or she is removed from Australia". This discretionary power the Court found, meant that, as Al-Katab could not be removed, he could be held indefinitely. The Court would not therefore order his release. As the words of the *Migration Act* were clear and unambiguous in the view of the majority, the common law presumption that a man cannot be detained without charge or trial did not apply.
- By contrast the minority judges took a different approach to interpretation. Justice Gummow said that if removal was not possible, the power should be read down as a matter of statutory interpretation. Justice Kirby argued more broadly that the presumption in favor of liberty should prevail. Had there been a bill of rights, Justice Callinan argued, the result would have been different.
  A notable example of the power of parliamentary sovereignty apparently unrestrained by fundamental principles of human rights is the
- **Malaysia Solution**
  In May 2011, the Australian Government announced the Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement, whereby up to 800 asylum seekers who arrived in Australia by boat would be removed to Malaysia for processing

of their claims for protection. Under the arrangement, the Australian Government agreed to accept 4000 recognised refugees from Malaysia for resettlement in Australia. The validity of this arrangement was challenged by two asylum seekers in *Plaintiff M10/2011 v Minister for Immigration & Citizenship; Plaintiff M106/2011 v Minister for Immigration & Citizenship* [2011] HCA 32.

Vital to the High Court's decision in this challenge was the Minister for Immigration's declaration under section 198A(3) of the *Migration Act* 1958 (Cth) that Malaysia was, essentially, a safe country to send refugees. Section 198A(3) provides that the Minister may declare in writing that a specified country:

- provides access to effective procedures for assessing refugee claims
- provides protection for people seeking refugee status
- provides protection to people who have been granted refugee status, and
- meets relevant human rights standards in providing that protection.

The declaration that Malaysia met the criteria in s198 as a country where refugees could be resettled was found by the High Court to be beyond power because Malaysia was not a signatory to the Refugee Convention or its Protocol.

Six members of the Court found that these four elements of S 198A were "jurisdictional facts". Five judges found that the facts must actually exist before the power to issue a declaration was enlivened. the High Court found that the four elements of S 198 were jurisdictional facts that had to be established. As they had not been established as facts the Minister's declaration was beyond power.

- In light of the High Court's unequivocal views that the Malaysia solution would be contrary to legislation, the protection offered by S.198A was promptly removed by Parliament. The result is that if a similar proposal were to come to the court again, it could be valid under the Act. The power of Parliament to remove the human rights protection raises the almost taboo notion that democracy can deliver unacceptable results and the

courts need the power to strike down legislation that conflicts with fundamental human rights.

- The case was a low point in the history of human rights law in Australia, and it demonstrated that the courts are powerless if Parliament passes legislation that in clear language violates fundamental freedoms. [I should in fairness point out that the Minister subsequently exercised his discretion to release Ahmed and he now lives, I am told, happily in Australian on a humanitarian visa. But the power of parliament to pass laws that breach basic human rights remains unchanged.]

- Courts do sometimes struggle to find the line between conflicting rights. In the *Manis* case a prosecution was brought under a law, similar to S 18C, that prohibited the use of the postal services in a way that is "harassing or offensive". Mr Monis wrote letters to the families of Australian soldiers killed in Afghanistan- letters the Court found were 'denigrating and derogatory'. In the High Court challenge to his conviction under the Postal laws, lawyers for Monis argued that he merely expressed political opposition to the war in Afghanistan, and should be protected by freedom of speech. The High Court agreed that the postal law would be valid if it was a proportionate law in response to a legitimate aim. But in applying this principle to the facts the judges split 3:3. The result was that the conviction of the lower court was upheld.

Administrative law and human rights law in Australia

It is with this understanding of the human rights regime Australia that I now turn to the ways in which Administrative law provides real protection against an abuse of power.

Role of the state

Both administrative law and human rights law are concerned with the relationship between the state and the individual. Administrative law is premised upon the protection of individuals against the unlawful or arbitrary exercise of state power; and human rights impose obligations on the state to respect and protect the rights and freedoms of individuals.

Rule of law and Natural justice

Through history we have learnt that transparent, responsible, accountable and participatory governance is a prerequisite to enduring respect for human dignity and the protection of human rights.

Both human rights principles and administrative law are concerned that justice is delivered in fair, reasonable and transparent manner. These are values that not only underpin administrative law in Australia, but our legal system as a whole.

Administrative law has its foundation in some of the most fundamental principles of the rule of law. As (then) Justice French stated:

> The dominant requirement of the rule of law in Australia is that the exercise of official power, whether legislative, executive or judicial, be supported by constitutional authority or a law made under such authority.[6]

In *Church of Scientology v Woodward* [1982] HCA 78, Brennan J said:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

Natural justice is of course a common law doctrine that provides important procedural rights and standards in administrative decision- making.7 Broadly speaking, procedural fairness requires that the decision maker be, and appear to be, free from bias and/or that the person receives a fair hearing. These principles of equality before the law and procedural guarantees are enshrined in article 14 of the ICCPR.

Decision making and human rights

There is no general power to review government action for its compliance with human rights. Courts can, however, consider human

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[6] French R, "Administrative Law in Australia: Themes and values" in Groves and Lee (eds) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, Melbourne, 2007), 15.

[7] Administrative Review Council, *The Scope of Judicial Review* Report No. 47 (2006) 13.

rights if the legislation under consideration includes 'human rights' as a relevant consideration.

It is no exaggeration to say that in 1995 something of a bomb shell exploded on the terrain between international law and domestic law with the High Court's decision in *Teoh.*[8] The High Court held that when Australia has ratified an international treaty this creates a:

'legitimate expectation', in the absence of statutory or executive indications to the contrary, that administrative decision makers will act in conformity with the treaty.[9] In practice, this principle does not prevent decision makers from departing from that expectation: it merely means that if they propose to depart from it they must give the person affected an opportunity to make submissions against the proposed course of action.

As a public international lawyer I was encouraged by the High Court's decision in *Teoh* as it strengthened the role of international law in Australia. The CJ Mason and Justice Deane stated that:

Ratification of a *convention is* a *positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention. That positive statement is an adequate foundation for* a *legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention.*

The importance of the decision lies in the obligation of government officials to take into account or have regard to treaties to which Australia is a party, even where parliament has yet to provide a legislative means of applying these principles in domestic law.

Not only was the decision unprecedented in Australian law but also the political response was unprecedented and globally unique. The Ministers of Foreign Affairs and Attorneys-General of successive governments have issued statements that the mere fact that the government has entered into a treaty is 'not a reason for raising any

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8 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

9 (1995) 183 CLR 273, 291-2 (Mason CJ and Deane J).

expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic law". No such statement has been successfully passed by parliament.[10] Although the *Teoh* decision still stands, subsequent case law suggests that the High Court might not follow it in the future.[11]

In *Lam* (2003), the High Court's response to the earlier decision in Teoh was cool to icy. The idea of a legitimate expectation was distilled to the simple and pre-existing question "What does fairness require in all the circumstances of the case". As Justice Callinan pointed out, "that the interest of children matters, is something any civilized person would hold expectations about". A significant concern was that *Teoh* elevates the executive above Parliament" ... this is fatal flaw in the Teoh position to the extent that it created a substantive right rather than a procedural one taking international treaties into account in decision-making.

Perhaps the last word should go to CJ Barwick who damning by faint praise said of a idea of a 'legitimate expectation' that he appreciated the "literary quality of the expression better than he perceived the precise meaning and perimeter of its application" .

It seems that *Teoh* has lost much of its .significance, because the duty to afford procedural fairness arises irrespective of any 'legitimate expectation' arising from the ratification of a treaty.[12] The majority of the High Court has since held in 2012 in Plaintiff 810/2011 that the phrase 'legitimate expectation' should be discarded.[13]

Human rights: A tool for statutory interpretation

Statutory interpretation is a core function of courts and tribunals, and human rights can be used in this process. Legislation is to be interpreted

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[10] See, generally, N O'Neill, S Rice and R Douglas, *Retreat from Injustice: human rights law in Australia* (2004) 187. See also Mallesons Stephen Jaques Human Rights Law Group, Submission.

[11] For example, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1. See also H Charlesworth, M Chiam, D Hovell and G Williams, *No Country is an Island: Australia and international law (2006) 30.*

[12] G. Williams & D. Hume, 'Human Rights under the Australian Constitution', (2nd ed, 2013), 32.

[13] *Plaintiff S1012011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636. See further G. Williams & D. Hume, 'Human Rights under the

Australian Constitution', (2nd ed, 2013),32-33.

and applied as far as its language admits so as not to be inconsistent with the established rules of international law.[14]

There is also scope to use human rights to inform the exercise of discretion. For example, the Ministerial Direction under the *Migration Act 1958* for decisions about whether to cancel or refuse a visa under s 501 of the Migration Act on character grounds states that, in exercising their discretion whether to refuse or cancel a visa, decision-makers must consider relevant international obligations under treaties including, the *CRC,* the *ICCPR* and the *CAT.*

Other instances of discretionary decision-making in this sense include all decisions that require consideration of what is 'fair' or 'just' or 'reasonable' in the circumstances. Indeed, since no administrative decision should be made capriciously, it may be that all decisions which call for an element of judgment and where the factors to be taken into account are not exhaustively specified are decisions to which consideration of human rights are potentially legitimate.

Administrative law: a tool for challenging immigration decisions

Australia's treatment of asylum seekers and its system of mandatory detention has been much criticized both domestically and internationally, and one of the most noticeable ways in which administrative law has been used to enforce human rights in Australia in recent years is in challenging refugee decisions.

The article, 'the use of administrative law to enforce human rights' by J. Boughey argues that the courts have used the flexible language of the Act to protect human rights by expanding the scope of Australia's protection obligations beyond the government's preferred definition.[15] For example, in *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1, the High Court found that persecution under the Refugees Convention could be by both State and non-state or private actors if the state condones, tolerates or refuses to protect the individual from it. That case involved a woman who was the victim of domestic

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14 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 (O'Connor
JJ.

1 J Boughey, the use of administrative law to enforce human rights' (2009) 17 AJ Admin 25, 26.

violence. Ms Khawar argued that police not only failed to protect her from the violence but that it was tolerated and condoned by them.

In *Kioa v West,* the High Court held that the validity of a deportation decision would depend on whether natural justice had properly been afforded to an applicant. The ambiguity of what natural justice requires in each case leaves scope for decisions to be challenged and overturned on natural justice grounds. This case was concerned with a decision made by a delegate of the Minister of Immigration and Ethnic Affairs to deport the appellants (Mr and Mrs Kioa), citizens of Tonga. In arriving at that decision, the delegate took into account a departmental submission that, inter alia, submitted that Mr Kioa had been actively involved with people who were seeking to circumvent Australia's immigration laws. By majority, the High Court held that this remark in the letter - described by different Judges as 'extremely prejudicial', 'clearly prejudicial', and 'credible, relevant and damaging' - gave rise to the breach of natural justice. CJ Mason:

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.[16]

Tendency of the Federal and High Courts to read down legislation or regulations to ensure they do not infringe human rights. In e vans 2008 the Federal Court found that regulations to allow police to take action against those causing 'annoyance or inconvenience' during Pope Benedict's visit to Sydney were invalid as they infringed freedoms of expression and movement.

In Minister for Immigration and Citizenship v *Haneef* in 2007, the Full Federal Court construed the word "association" in the s 501(6) (b*)Migration Act* narrowly so that the Minister's cancellation of Mr Haneef's visa on character grounds was invalid. In short, the notion of association should have some bearing on a person's character; his

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16 (1985) 159 CLR *550* at 584.

relationship with his two second cousins who had been arrested for terrorist acts.

However, it may not always be the case that decisions of the executive can be challenged or subjected to judicial scrutiny.

An issue of serious concern for the Commission is for those people who have been found to be refugees, but who have received adverse security assessments from the Australian Security and Intelligence Organisation (ASIO). These asylum seekers have limited opportunities to seek review of an adverse security assessment.

As of May 2013 there were 56 people, who have been formally assessed by Australia as refugees, in immigration detention facilities on the ground that they are considered by ASIO to be a security risk. [While this number was accurate in May, it may be that they are a little lower since that time]. A number of these individuals have spent more than five years in closed detention. The human cost for these refugees has been significant with two thirds needing counselling or medication for depression, at least 11 have been reported to have attempted or threatened suicide, with even higher rates of self-harm.

While the Security Appeals Division of the Administrative Appeals Tribunal (AAT) has the power to review adverse security assessments, as you know, access to the AAT is denied to people who are not Australian citizens or holders of a permanent visa or a special purpose visa.[17] Accordingly, refugees with adverse security assessments cannot access merits review in the AAT.

Further, although the High Court of Australia has held that ASIO decisions are subject to judicial review, the ability of ASIO to withhold from an applicant and the Court the information on which ASIO has relied, renders a challenge to that information virtually impossible.

The Commission is concerned that refugees have limited avenues to seek review of an adverse security assessment. Refugees who receive an adverse security assessment face indefinite detention, potential removal from Australia, and separation from family members.

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[17] ASIO Act s 36.

The Commission has welcomed the Australian Government's appointment of an Independent Reviewer for Adverse Security Assessments in October 2012. The appointment is an important acknowledgment of the need for greater transparency and accountability in the application of ASIO security assessments to asylum seekers and refugees. Under this review process it seems as many as 10 refugees have been released. However, a non-statutory review mechanism with non-binding recommendations does not adequately reflect the gravity of the consequences of an adverse security assessment.

The lack of transparency of the ASIO security assessment process is also an issue of concern. Under the Independent Reviewer process refugees are provided with an unclassified written summary of reasons for the decision to issue an adverse security assessment. However, there is limited information available about the content of the summaries of reasons. In particular, it is unclear whether they will set out any details about the information that ASIO relied upon to make the adverse assessment.

At the Commission we have also been concerned that a failure to provide sufficient details about the information relied upon by ASIO could amount to a lack of procedural fairness and could prevent a blatant error, such as an error of identification, being identified. Furthermore, it may lead to a breach of article 9(2) of the *ICCPR,* which requires a person who is arrested to be provided with reasons for their arrest.[18]

Limits of Administrative Law

Other limitations include, that a merits review by tribunals is available only when the legislation under which the particular decision was made provides for such review. There is no general right to have a decision reviewed by a tribunal.

Judicial review is also limited by the absence of a general legal obligation on decision makers to consider the human rights implications of a

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[18] Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Migration and Security Legislation Amendment (Review of Security Assessments) Bill 2012,* April 2012, p vii, at http://www.aph.gov.au/Parliamentary Business/Committees/Senate Committees?url=legcon ctte/co mpleted inquiries/2010-13/security assessments/report/index.htm (viewed 6 May 2013).

decision.[19] Further, the remedies available under judicial review generally apply to the 'procedural aspects, rather than the substantive aspects, of public decision-making: such remedies often cannot right the relevant wrongs'.[20] The remedy is usually a declaration that the decision was unlawful and the matter can be sent back to the original decision maker for determination.

Administrative law allows individuals to challenge government decisions and encourages standards of lawfulness, fairness, rationality and accountability. The remedies it offers are, however, limited, and there is no general onus on government to take human rights into account when making decisions. For these reasons, the National Human Rights Consultation Committee recommended that the *Administrative Decisions (Judicial Review) Act 1977* be amended in such a way as to make the definitive list of Australia's international human rights obligations a relevant consideration in government decision-making.

Concluding remarks

Australia implements human rights in a multifaceted way, using the institutions of modern democracy -parliament, the courts, administrative law and the Human Rights Commissions to ensure a normative culture in which human rights are, for the most, part respected.

However, this ad-hoc approach to human rights protection is not sufficient as many fundamental freedoms and rights do not have formal recognition under the law.

Similar to the need identified in the 1970s for a more cohesive approach to administrative law, I believe a more comprehensive approach is needed for the protection of human rights:
The need for a legislative Bill or Charter of Rights is now a national imperative to protect against the growing encroachment of executive discretion that is frequently not subject to judicial scrutiny.

It is therefore time to reopen the public debate about a legislated form of human rights charter to ensure that all freedoms and rights are better

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[19] For example, Australian Human Rights Commission, Submission; Law Council of Australia, Submission; Castan Centre for Human Rights Law, Submission.

[20] Castan Centre for Human Rights Law, Submission.

protected and that, where a freedom is limited, our courts can be guided by principles to determine if the limitation is fair, proportionate and reasonable. A human rights charter would not only link Australia's domestic laws with our international obligations but provide a clear legal obligation to administrative officers and decision makers to give proper consideration to human rights when making a decision.

I am of course well aware that the national consultation conducted by Father Frank Brennan, failed to attract the necessary political will to support his recommendation for a Charter of Rights. But let us not give up on the need for effective human rights mechanisms.

For those that are hesitant, I would like to remind you that at time the Kerr Committee delivered its recommendations there was initially some trepidation, now Australia's administrative system is considered a vital part of our robust

democratic society and a model for other countries.

As a nation however we to strengthen our protections of fundamental freedoms .. we need to do much better to protect and respect all human rights and freedoms in our multicultural society to promote social cohesion and inclusion of us all.