TITLE: "Human Rights: A View from the Bench"

DATE: 26 October 2005

VENUE: Address to the Annual General Meeting of the Administrative law and Human Rights Section of the law Institute of Victoria

AUTHOR: The Honourable Justice Chris Maxwell, President, Court of Appeal

Today, in the Court of Appeal, we heard a human rights case. Actually, it was a case about public interest immunity, that is, about whether medical records held by a hospital relating to a late-term abortion are or are not immune from production to the Medical Practitioners Board, which is conducting an investigation.

There are competing public interests in issue. They are, on the one hand, the public interest in proper regulatory supervision of the medical profession and, on the other hand, the public interest in privacy, in the preservation of confidentiality of communications between patients and doctors.

The right to privacy is a basic human right, but it is not unqualified. For example, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides that:

> *"No-one shall be subjected to arbitrary or unlawful interference with his privacy..."*

The hospital's claim for public interest immunity failed at first instance. When the hospital's application for leave to appeal came on, I informed counsel for both sides that the Court of Appeal would be assisted by submissions dealing with the relevance of international human rights conventions, and the associated jurisprudence, to the question before the Court.

In their written submissions for the appeal, both the hospital and the board dealt extensively with these issues. The hospital, for example, relied not only on the ICCPR but also on the International Covenant on Economic, Social and Cultural Rights and on the Convention on the Elimination of All Forms of Discrimination against Women. The hospital referred to decisions of the European Court of Human Rights and to the General Comments and communications of the UN Human Rights Committee, the body established to receive reports and determine claims under the ICCPR.

This example illustrates several important things:

1. The Court will encourage practitioners to develop human rights-based arguments where relevant to the question before the Court.

2. Practitioners should be alert to the availability of such arguments, and should not be hesitant to advance them where relevant.

3. Since the development of an Australian jurisprudence drawing on international human rights law is in its early stages, further progress will necessarily involve judges and practitioners working together to develop a common expertise.

When is international human rights law relevant?

While I was still President of Liberty Victoria, I addressed a meeting of the human rights group within one of Melbourne's largest law firms. The meeting was attended by 60 or 70 young lawyers, who were evidently keen to balance the experience of working in a large commercial law firm with some involvement in human rights issues. These are the kinds of lawyers who, from a range of firms, give their time voluntarily in the provision of advice at the Homeless Persons Legal Clinic run by Philip Lynch at the Public Interest Law Clearing House (PILCH).

They had asked me to talk about how practitioners can utilise international human rights law in the course of everyday practice. I said that, for those who were working in mergers and acquisitions, there would be rather little scope, as compared with (for example) those working in public law. Obviously enough, not every case has a human rights dimension, though – as the Ansett administration clearly demonstrated – quintessential corporate law issues such as insolvency and the associated sale of assets can throw up human rights issues concerning the fate of employees of the insolvent company.

It is axiomatic that, unless an international convention has been incorporated into Australian municipal law by statute (as has occurred with the Commonwealth's *Racial Discrimination Act* and *Sex Discrimination Act*), the convention cannot operate as a direct source of individual rights and obligations under Australian municipal law. There are, however, three important ways in which such instruments, and the associated learning, can influence the resolution of disputes under domestic law.

First, the provisions of international treaties are relevant to statutory interpretation. In the absence of a clear statement of intention to the contrary, a statute (Commonwealth or State) should be interpreted and applied, as far as its language permits, so that it conforms with Australia's obligations under a relevant treaty.

Secondly, the provisions of an international convention to which Australia is a party – especially one which declares universal fundamental rights – may be used by the courts as a legitimate guide in developing the common law, that is, the law as it develops through decisions of the courts, as distinct from the law enacted by Parliament. The High Court has cautioned that the courts should act with due circumspection in this area, given that the Commonwealth Parliament itself has not seen fit to incorporate the provisions of the relevant convention into domestic law.

Thirdly, the provisions of an international human rights convention to which Australia is a party can also serve as an indication of the value placed by Australia on the rights provided for in the convention and, therefore, as indicative of contemporary values.

The leading case from which these propositions flow is the High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh.*[1] That case involved an application for permanent entry into Australia by a married man with children in Australia. The Convention on the Rights of the Child, to which Australia was a party, had been ratified by Australia but had

[1] (1995) 183 CLR 273.

not been incorporated by statute into Australian domestic law. The High Court, by majority, held that ratification of the Convention gave rise to a legitimate expectation that the Minister would act in conformity with it and treat the best interests of the applicant's children as a primary consideration. The Minister had not done so, and the applicant had been denied procedural fairness in that he had not been afforded the opportunity to present a case against a decision inconsistent with that legitimate expectation.

The decision in *Teoh* has not gone unchallenged. Successive governments, Labor and Coalition, have attempted to override the effect of the decision – first by executive statements,[2] and subsequently by Bills which, in each case, lapsed before they had been voted on. More recently, in *Lam's case,*[3] several judges of the High Court made remarks strongly suggesting that, on the question of legitimate expectation, *Teoh* would be decided differently by the present High Court. But the occasion for that re-examination of *Teoh* has not yet arrived, and the legitimate expectation test continues to be applied in the courts.

The question of legitimate expectation and the requirements of procedural fairness represent only one part of what was said in *Teoh.* The other propositions to which I have referred – about the utilisation of international human rights law – also continue to be applied.[4]

Over the past two decades, Australian courts have been prepared to consider the use of international human rights conventions in:

(a) exercising a sentencing discretion;[5]
(b) considering whether special circumstances existed which justified the grant of bail under the *Extradition Act* 1988 (Cth);[6]
(c) considering whether a restraint of trade was reasonable;[7]
(d) exercising a discretion to exclude confessional evidence.[8]

In *John Fairfax Publications Pty Ltd v Doe,*[9] Gleeson CJ (as Chief Justice of New South Wales), in considering whether the means of protecting privacy of communication under Part VII of the *Telecommunications (Interceptions) Act* 1979 (Cth) lacked proportionality, referred to the international recognition of the need for stringent controls in the interests of privacy.

As I said earlier, we – that is, practitioners and judges – have to educate ourselves so that we can more readily identify those instances in which international human rights law can be

---

2 Joint statement by the Minister for Foreign Affairs and the Attorney-General, *International Treaties and the High Court Decision in Teoh* (10 May 1995), Joint Statement by the Minister for Foreign Affairs and the Attorney-General and Minister for Justice, *The Effect of Treaties in Administrative Decision-Making* (25 February 1997).

3 (2003) 195 ALR 502.

4 See, for example, *AMS v AIF* (1999) 199 CLR 160 at 180 [50]; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 626 [116].

5 *R v Togias* (2001) 127 A Crim R 23 at 37[85] per Grove J; at 43[123] per Einfield AJ; *R v Hollingshed* (1993) 112 FLR 109 at 115, contra *Smith v R* (1998) 98 A Crim R 442 at 448.

6 *Schoenmakers v Director of Public Prosecutions* at 75.

7 *Wickham v Canberra District Rugby League Football Club Ltd* [1998] ACTSC 95 at [64]-[70]; *McKellar v Smith* [1982] 2 NSWLR 950 at 962F.

8 *McKellar v Smith* [1982] 2 NSWLR 950 at 962F.

9 (1995) 37 NSWLR 81 at 89D-F, 90B-C.

of assistance. Take statutory interpretation for example. At law school, I learned – and have never forgotten – the Latin maxims *noscitur a sociis* and *ejusdem generis*. There are other, equally familiar, rules of statutory construction, such as that Parliament is presumed not to alter the common law, or to take away established rights, unless words are used which convey a clear intention to do so.
These are basic tools of statutory interpretation. In the same way, human rights law should become a standard point of reference for statutory interpretation. Where the relevant provision of the statute affects individual rights and interests, the question should always be asked: "Are there provisions of the human rights treaties which bear relevantly on the construction of this section?"

In recent years, most law schools have included "human rights law" as a subject in the curriculum. That in itself is most welcome. But human rights should not be seen as a special subject. Rather, it should be seen as informing almost everything which lawyers, and courts, do. What the courts do, every day, is to make decisions which affect human rights. This is true not only of the substantive rights which fall for decision but also of procedural rights, typified by the presumption of innocence and the right to a fair trial which are distinctive of our criminal justice system.

Human rights and the administration of justice

In his recent article on the topic, Phil Lynch from the PILCH Homeless Persons Legal Clinic discusses the three-step approach to human rights lawyering proposed by Deena Hurwitz.

These steps are:

1. describing the client's issues in human rights terms;

2. securing remedies and redress using human rights, having regard to international obligations; and

3. developing strategies and delivering services in the context of key features of human rights advocacy – in particular accountability, transparency, non-discrimination, involvement of the person affected, self-determination and respect for human dignity.

Lynch emphasises this third step – developing strategies and delivering services consistent with human rights principles. He points to research which shows that being treated with respect and dignity by lawyers and the courts is often more important to a person's perception of justice than the legal outcome of a case.

We have already started to change the way in which the Supreme Court responds to litigants in person. In my first weeks at the Court, I sat in four appeals involving self-represented litigants. The Court does its best, but there is no consistent strategy for dealing with self-represented litigants. At the request of the Chief Justice, I am now chairing the Court's Self-represented Litigants Committee. Next year we hope to have a full-time Coordinator, who will be the point of contact for all self-represented litigants, to guide them through the court process. The Coordinator will also develop and implement a long-term strategy.

We are also looking at introducing a court-based pro bono scheme, based on the Federal Court Order 80 Scheme and a similar scheme that is in place in the Supreme Court of NSW.

I have already had consultations with PILCH and the Equal Opportunity Commission of Victoria about how the Court can do more to ensure that the administration of justice is in accordance with human rights principles. I am meeting with Victoria Legal Aid in the near future. If you have ideas about how the Court can do a better job of respecting and addressing human rights, please do not hesitate to contact me.
