

HOW HUMAN RIGHTS ARE PROTECTED IN AUSTRALIA

Human Rights in Australia and Beyond

Politics and Law Teacher Professional Learning Day: 4 December 2015

Session title: The Ways Human Rights are Protected in Australia, including in the Constitution, Common Law, Statutory Rights and Charter of Rights such as the Charter of Human Rights and Responsibilities Act 2006 (Victoria) and the Human Rights Act 2004 (Australian Capital Territory)

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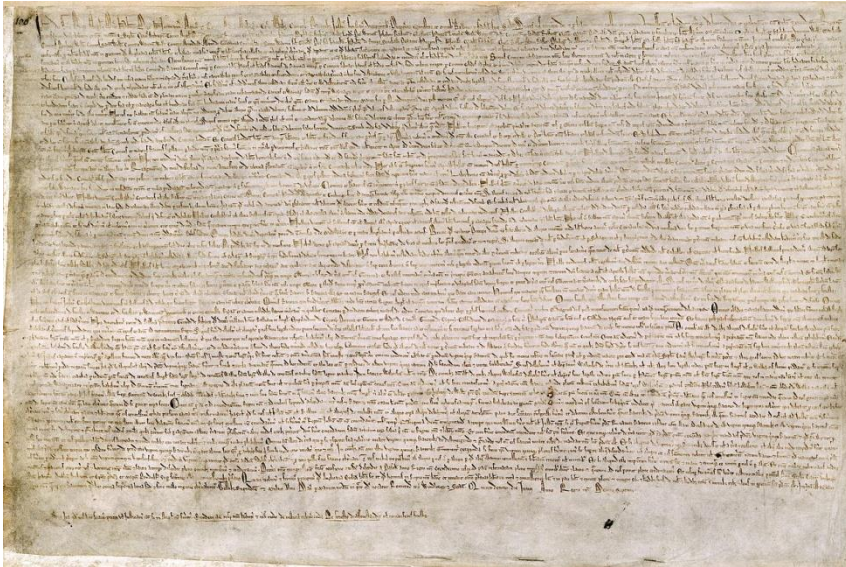
Rule of Law

- Magna Carta 1215 (45 confirmations) Ch 29
 - Every freeperson has an inherent individual right to his life, liberty, property and citizenship
 - Individual rights must always yield to the necessities of the general welfare at the will of the state
 - The law of the land is the only mode by which the State can declare its will

Supremacy of law over arbitrary power

Equality before the law – without exemption

The Great Charter



- MAGNA CARTA 1215
- XXIX. No Freeman shall be taken or imprisoned or disseised of his freehold, liberties or free customs or outlawed or exiled or in any way ruined...., except by the lawful judgement of his peers or by the law of the land. To no one will we sell, to no one will we deny or delay right or justice.

English Bill of Rights 1689

- Limits power of monarch
(William & Mary)
- Regular Parliaments
- Free elections
- Freedom of speech in Parliament
- Prohibition on cruel and inhuman punishment
- Liberty of Protestants to have arms for defence within the Rule of Law



Separation of Powers

- Ch I – Parliament
 - Power to make law not subject *Magna Carta*, English Bill of Rights or international law
- Ch II – Executive
 - Delegated legislation
 - Subject to Supply
 - Police
- Ch III - Judiciary
 - Conclusive decision on a controversy re rights, liberty or property

Commonwealth Constitutional Rights

- **Right to vote, s 41** – ‘adult’ (21) – *Commonwealth Franchise Act 1902*
- **Acquisition of property on just terms, s 51(xxxi)** – Wartime – Tasmanian Dams – NT intervention
- **Trial by jury, s 80** – if by indictment – not contempt – not service tribunals
- **Freedom of interstate trade commerce and intercourse, 92** – discriminatory & protectionist not incidental to appropriate proportionate legitimate State objective
- **Freedom of religion, s 116** – no Commonwealth laws – establishing – imposing – prohibiting – or qualification for office – JW’s: not exempt from ordinary law – *Lebanese Moslem Assoc v MIEA*
- **No discrimination between residents of States, s 117** – *Street v Qld Bar Assoc* – intent to practice in Qld – 12 m residency; *Goryl v Greyhound* - residents more generous MV cpo
- **Implied freedom of political communication** — law not reasonably appropriate and adapted to legitimate end of representative government – defamation defence

Common Law rights

- Property rights : *Mabo*
- Presumption against retrospectivity
- Fair trial: *Dietrich*
- Burden of proof – presumption of innocence
- Privilege against self-incrimination – Cp Parliament and Royal Commissions
- Legal professional privilege
- Appeal rights
- Procedural fairness - right to a hearing & apprehended bias
- Presumption against delegation
- Defamation
- Executive immunity - *Koowarta*

Charter of Human Rights and Responsibilities Act 2006 (Vic)

- [9](#). Right to life
- [10](#). Protection from torture and cruel, inhuman or degrading treatment
- [11](#). Freedom from forced work
- [12](#). Freedom of movement
- [13](#). Privacy and reputation
- [14](#). Freedom of thought, conscience, religion and belief
- [15](#). Freedom of expression
- [16](#). Peaceful assembly and freedom of association
- [17](#). Protection of families and [children](#)
- [18](#). Taking part in public life
- [19](#). Cultural rights
- [20](#). Property rights
- [21](#). Right to liberty and security of [person](#)
- [22](#). Humane treatment when deprived of liberty
- [23](#). [Children](#) in the criminal process
- [24](#). Fair hearing
- [25](#). Rights in criminal proceedings
- [26](#). Right not to be tried or punished more than once
- [27](#). Retrospective criminal laws

Human Rights Act 2004 (ACT)

- **PART 3--CIVIL AND POLITICAL RIGHTS**
- [8.](#) Recognition and equality before the law
- [9.](#) Right to life
- [10.](#) Protection from torture and cruel, inhuman or degrading treatment etc
- [11.](#) Protection of the family and children
- [12.](#) Privacy and reputation
- [13.](#) Freedom of movement
- [14.](#) Freedom of thought, conscience, religion and belief
- [15.](#) Peaceful assembly and freedom of association
- [16.](#) Freedom of expression
- [17.](#) Taking part in public life
- [18.](#) Right to liberty and security of person
- [19.](#) Humane treatment when deprived of liberty
- [20.](#) Children in the criminal process
- [21.](#) Fair trial
- [22.](#) Rights in criminal proceedings
- [23.](#) Compensation for wrongful conviction
- [24.](#) Right not to be tried or punished more than once
- [25.](#) Retrospective criminal laws
- [26.](#) Freedom from forced work
- [27.](#) Rights of minorities
- **PART 3A--ECONOMIC, SOCIAL AND CULTURAL RIGHTS**
- [27A.](#) Right to education

Human Rights Act mechanisms (Victoria and ACT)

- Applies to public authorities acting administratively – not judicial or parliamentary functions – exemptions Parole Board
- Statement of Compatibility - how & why law limits rights
- Over-ride Declaration by Parliament
- Ombudsman investigation
- Commission - education, reporting, reviewing, and intervening in Court
- Only subsidiary legal argument in Court
- Preferred interpretation where ambiguous
- Supreme Court Declaration of Inconsistent Interpretation – Minister to re-visit

Australian Human Rights Commission Act 1986

- [International Covenant on Civil and Political Rights \(ICCPR\)](#)
- [Convention Concerning Discrimination in Respect of Employment and Occupation \(ILO 111\)](#)
- [Convention on the Rights of Persons with Disabilities](#)
- [Convention on the Rights of the Child](#)
- [Declaration of the Rights of the Child](#)
- [Declaration on the Rights of Disabled Persons](#)
- [Declaration on the Rights of Mentally Retarded Persons](#), and
- [Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief](#)
- *Native Title Act, 1993* - monitor the human rights of Indigenous people.
- [Age Discrimination Act 2004](#)
- [Disability Discrimination Act 1992](#)
- [Racial Discrimination Act 1975](#)
- [Sex Discrimination Act 1984](#)

Commonwealth processes

- Education
- Investigation & Reports to Minister eg Children in Detention
- Intervention in Court proceedings eg *Clark v Nationwide News*; *Bropho v WA*
- Complaint
- Conciliation & Certificate of termination
- Federal Court
 - Interim injunction
 - Determination of breach

Fair Work Act 2009

- Discrimination:
 - race, colour,
 - sex, sexual orientation,
 - age,
 - physical or mental disability,
 - marital status, family or carer responsibilities, pregnancy,
 - religion, political opinion,
 - national extraction, and social origin.
- Discrimination , in employment :
 - Dismissal
 - pay or leave
 - Changing job
 - Treating differently
 - not hiring
 - different (and unfair) terms and conditions

State & Territory Discrimination legislation

- Australian Capital Territory – *Discrimination Act 1991*
- New South Wales – *Anti-Discrimination Act 1977*
- Northern Territory – *Anti-Discrimination Act 1996*
- Queensland – *Anti-Discrimination Act 1991*
- South Australia – *Equal Opportunity Act 1984*
- Tasmania – *Anti-Discrimination Act 1998*
- Victoria – *Equal Opportunity Act 2010*
- Western Australia – *Equal Opportunity Act 1984.*

Equal Opportunity Act 1984 (WA)

Grounds of Discrimination

- sex, sexual orientation (including by association)
- marital status, pregnancy, breastfeeding
- race
- religious or political conviction
- age (including by association)
- impairment (including by association)
- family responsibility or family status
- gender history
- publication of relevant details on Fines Enforcement Registrar's website

Areas covered

- Employment
- Applicants
- commission agents
- contract workers
- Partnerships
- professional or trade organisations
- qualifying bodies
- employment agencies
- application forms
- Advertisements
- Education
- access to places and vehicles
- provision of goods, services and facilities
- accommodation, clubs, and land