Keynote Address

Access to Justice and Human Rights Treaties

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Paget-Lewis, a school teacher at Ahmed Osman's school in England, developed a sexual infatuation with his student. Over a period of months he subjected Ahmed and his family to a process of stalking and harassment, all of which was reported to the police. When interviewed by the police, Paget-Lewis admitted that he was in danger of doing something criminally insane. To a school inspector, who reported the matter to police, he made clear threats to murder Ahmed's family. Police officers were instructed to arrest him, but nothing occurred for three months. On 7 March 1988 he followed the Osman family home where he shot and injured Ahmed Osman and killed his father.

Ahmed and his mother instituted proceedings for negligence against the police for failing to prevent the attempted murder of Ahmed and the murder of his father. The statement of claim was struck out. An appeal to the Court of Appeal was unsuccessful. The Court applied the House of Lords decision in the Yorkshire Ripper case, *Hill v Chief Constable of West Yorkshire Police*[1], in which the House of Lords had decided that, for public policy reasons, no action would lie against the police for negligence in the investigation and suppression of crime.

In *Osman v Ferguson*[2] the court rejected the submission that the House of Lords' decision in *Hill* was concerned with police policy decisions, which were immune, but did not extend to police operational decisions. A number of other arguments also designed to distinguish *Hill* were rejected. There were important issues of public policy involved in this line of authority and the British courts had determined where that policy lay. As Lord Templeman said in *Hill*:

> ... If this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he [sic] may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his [sic] duties.[3]

Ahmed Osman and his mother lodged an application with the European Commission of Human Rights asserting that English law, as revealed in this

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1 [1989] AC 53.

2 *Osman v Ferguson* [1993] 4 AllER 344; Tregiljas-Davey 'Osman v Metropolitan Police Commissioner: The Cost of Police Protectionism's (1993) 56 *MLR* 732 at 733–734.

3 Ibid at 64–65.

decision, was in breach of their rights under the European Convention on Human Rights. The case was referred by the Commission to the European Court of Human Rights. The Court unanimously upheld the claim under Article 6 of the Convention which, relevantly, provides:

> In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...

Note the generality of the provision. Nothing is said about any particular civil obligation, let alone the law of private wrongs which encompass matters such as negligence in the common law system. The Article speaks only of what may be described as a right of access to justice.

The European Court of Justice analysed the English case law, specifically *Hill*. The case for the applicants was that the dismissal by the Court of Appeal of their negligence action on the ground of public policy constituted to a restriction of their right of access to a court. The European Court referred to the exclusionary rule laid down in *Hill* and concluded:

> ... In the instant case, the Court of Appeal proceeded on the basis that the rule provided a water-tight defence to the police, and that it was impossible to prise open an immunity which the police enjoy from civil suit in respect of their acts and omissions in the investigation and suppression of crime.
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> The Court would observe that the application of the rule in this manner, without further inquiry into the existence of competing public interest considerations, only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime, and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.
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> In its view, it must be open to a domestic court to have regard to the presence of other public interest considerations which pull in the opposite direction to the application of the rule.[4]

The Court outlined a list of factors including the significant degree of negligence involved and the nature of the harm sustained and concluded:

> For the court, these are considerations which must be examined on the merits and not automatically excluded by the application of a rule which amounts to the grant of an immunity to the police.

And

> The court concludes that the application of the exclusionary rule in the instant case constituted a disproportionate restriction on the applicant's right of access to a court. There has accordingly been a violation of Article 6(1) of the Convention.[5]

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4 *Osman v The United Kingdom* European Court of Human Rights, 28 October 1998, paras 150–151.

5 Id at paras 152 and 154.

The result of these proceedings was that the Applicant's lost the chance of success in the proceedings. The Court would not speculate as to the outcome of the proceedings if the statement of claim had not been struck out. Nevertheless, the loss of the chance was valued in the amount of £10000 together with £30000 costs.

The decision in *Osman* has not passed without criticism. Lord Hoffman said:

> ... this decision fills me with apprehension. Under the cover of an Article which says that everyone is entitled to have his civil rights and obligations determined by a tribunal, the European Court of Human Rights is taking upon itself to decide what the content of those civil rights should be. In so doing, it is challenging the autonomy of the courts and indeed the parliament of the United Kingdom to deal with what are essentially social welfare questions involving budgetary limits and efficient public administration.[6]

As His Lordship concluded:

> It is often said that the tendency of every court is to increase its jurisdiction and the Strasbourg Court is no exception.[7]

I have taken you to this case in order to indicate the way in which treaty obligations may impinge on a private action for damages. Human Rights treaties are not simply concerned with matters of public law and criminal law. Much of the discussion of human rights, whether in the context of international treaties or in the context of a domestic Bill of Rights, focuses exclusively on public law and criminal law issues, to the virtual exclusion of consideration of civil actions.

Osman was a negligence case for damages. The action in the European Court, however, had to be directed to the United Kingdom as a nation state for its failure to ensure that the British legal system complied with the treaty obligation on access to justice. The United Kingdom paid compensation on a loss of chance basis for its failure to ensure that its law conformed with its international obligations. This private dimension of human rights treaties is the focus of my remarks today.

Article 6 of the European Convention has its equivalent in a Human Rights treaty to which Australia is a party. This is Article 14 of the International Covenant on Civil and Political Rights (*ICCPR*) which relevantly provides:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

By Australia's accession to the First Optional Protocol of the *ICCPR*, Australian citizens are entitled to approach the United Nations Human Rights Committee in Geneva, for a decision as to the compatibility of Australian law with Australia's obligations as a state party to the Covenant. Although this is not a formal judicial process, and results only in international embarrassment, it can be effective. The

6 Lord Hoffman 'Human Rights and the House of Lords' (1999) 62 *MLR* 159 at 164.

7 Id at 166.

best known example is, of course, the case of *Toonen v Australia* decided by the Human Rights Committee on 4 April 1994 to the effect that the Tasmanian Criminal Code which criminalised male homosexual conduct violated the right of privacy guaranteed by Article 17 of the *ICCPR*. The publicity generated, in part by this decision, led to the Commonwealth overriding the offending state law and the *Human Rights (Sexual Conduct) Act* 1994, the efficacy of which was subsequently affirmed by the High Court.

The United Kingdom as part of its engagement with Europe had in 1966 accepted the two optional clauses of the European Convention being the right of individual petition under Article 25 and the compulsory jurisdiction of the European Court under Article 46. The papers have recently been released under the 30 year rule. It is reasonably clear that no one had any idea as to the scope of the jurisdiction which the European Court could assume.[8]

The exercise of rights to approach the European Court is both costly and lengthy. First, all domestic remedies have to be exhausted. Secondly, until recently, the application had to be made to the European Commission of Human Rights which would in turn refer the matters to the Court. In 1998, the procedures were streamlined so that the Commission no longer intervened and the judicial character of the system was strengthened by the creation of a single full time court.

More significantly, however, for purposes of Australian public debate is the decision by the British Parliament to incorporate the European Convention in its domestic law by the *Human Rights Act* 1998. This legislation is of fundamental significance for the practice of private law in the United Kingdom. It will radically change the process of reasoning in, and the results of, cases in English courts.

The significance of the *Human Rights Act* was manifest in its parliamentary treatment. During the debate in the House of Lords, Lord Campbell of Alloway expressed his bewilderment with what he described as 'these esoteric lectures in law'. He proclaimed that in his entire eighteen years in the Lords he had 'never heard anything like this after dinner'.[9]

In his Keynote Address at the Annual Conference at the Bar on the ninth of this month, the Lord Chancellor, Lord Irvine of Lairg addressed the implication of the *Human Rights Act* as follows:

> The lawyers role in every country goes to the heart of delivering justice. Like the independent judge, the independent lawyer is vital. Lawyers must use their skills fearlessly to express truth; to serve the legal needs of their clients; and to ensure that the court can see the case from their client's perspective. They must be independent of the State and committed to the highest ethical standards. I agree with Sir Sydney Kentridge that,
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> > 'It is the independent bar inseparably from the independent bench which is the protection of the citizen against the State.'

8 See Lord Lester of Herne Hill 'UK Acceptance of the Strasbourg Jurisdiction: What Really Went on in Whitehall in 1965' [1998] *Public Law* 237.

9 Lord Campbell, United Kingdom, House of Lords, *Debates*, 24 November 1997 at col 827–828.

The Lord Chancellor went on to say:

> The role of lawyers will become even more marked on 2 October next year, with the implementation of the *Human Rights Act.* From the perspective of the bar, the incorporation of the European Convention on Human Rights into domestic law is perhaps the most significant element in the government's programme of constitutional reform. It will give birth to a major new jurisprudence, born out of challenges brought by lawyers; and over time, a culture of respect for human rights will permeate the whole of our society.
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> The *Human Rights Act* 1998 offers a modern reconciliation of the tension between the democratic right of the majority to exercise political power, and the democratic need of individuals and minorities to have their human rights secured, whilst at the same time respecting parliamentary sovereignty.

There are four features of the *Human Rights Act* which will impinge significantly on English case law and the utility of that case law for Australian purposes.

First, by section 3 of the Act the courts are obliged to interpret both statutes and delegated legislation 'so far as it is possible to do so ... in a way which is compatible with the Convention rights'. In determining a question which has arisen in relation to a Convention right, English courts must 'take into account' judgments and decisions of the European Court of Human Rights.

The second feature of the Act is that it constitutes an innovative model for the incorporation of a Bill of Rights in domestic law. Different levels of entrenchment are possible. The highest is a constitutional Bill of Rights, as in the United States. A level of entrenchment somewhat below that is the Canadian Charter of Rights and Freedoms, which permits the legislature to exempt a particular enactment from the Charter. The least entrenched is ordinary legislation capable of amendment by the Parliament without special requirements.

The British approach is in between. The *Human Rights Act* authorises a court, at the instance of a private litigant, to make a declaration of incompatibility between a Convention right and a statute. Where such a declaration of incompatibility has been made, a Minister of the Crown may take steps to make amendments to an Act of Parliament, which the Minister 'considers necessary to remove compatibility'. Such orders require approval by resolution by each House of Parliament. It is by this means that the judicial acknowledgment of the Convention right is reconciled with the doctrine of parliamentary sovereignty. A declaration of incompatibility by the court will have an affect by way of embarrassment. However, the final determination as to whether or not a statute should no longer have effect is not a decision of a court, it is a decision of the parliament.

Whether or not an individual litigant receives the benefit of a declaration of incompatibility, will depend on the relevant minister exercising his or her power to make a remedial order which has affect retrospectively. This has not been considered in the literature to which I have made reference, although some articles assume that the litigant will receive no advantage. The power to amend legislation retrospectively, seems to me to create the possibility that the litigant may avoid the

effect of the originally incompatible statute. A court which makes a declaration of incompatibility, can stand the case over to await the outcome of the process of amendment, if any, before finally disposing of the case.

The third matter to which I wish to refer is section 6 of the Act which states: that '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right.'

Where a public authority is found to have breached this provision, a court is able to make such orders, or grant such relief or remedies as it considers just and appropriate. This will extend to damages.

By force of section 6, public bodies will be open to challenge, other than pursuant to an effective incompatible statute, for breaching such Convention rights as the rights to personal liberty and security (Article 5); the right to a fair trial (Article 6); the right to respect for private and family life, home and correspondence (Article 8); the right to freedom of expression and assembly (Articles 10 and 11); the right to peaceful enjoyment of property (Article 1 of the First Protocol): the right to education (Article 2 of the First Protocol); and the right to enjoy these Convention rights and freedoms without discrimination on the grounds of, inter alia, sex, race, religion, political or other opinion (Article 14).

The range of new causes of action against public bodies is, potentially, very wide.

Furthermore, 'public authority' is defined to include 'any person certain of whose functions are functions of a public nature'. The public conduct of private organisations will be encompassed within section 6 of the *Human Rights Act*.

There is considerable English jurisprudence on the distinction between 'private' and 'public' in administrative law. In that context 'public' bodies have included the Law Society, the Bar Council, the Advertising Standards Authority, the Panel on Takeovers and Mergers, a product accreditation committee in the pharmaceutical industry, and a service-provider regulatory committee of telecommunication companies. All of these have been found to be public for administrative law purposes, and are likely to be held liable for acting in a manner incompatible with Convention rights.

The rights under the Convention that I have referred to, will now likely impinge to a significant extent on what has hitherto been regarded to as private arrangements. For all of these public authorities, including public authorities in the narrower more traditional sense, new flexible remedies are available. These are likely to sweep aside the remaining technical grounds for judicial review in administrative law. They will also impact on a wide range of activities not hitherto subject to such review.

The fourth matter I wish to refer to is, prospectively, the most significant, from the point of view of private rights of action. The legislature has not made clear the extent it intends the courts to change the law with respect to cases not involving a public authority, as broadly defined. If the legislation is brought into effect in its present terms, it will be one of the most significant early decisions the courts will make on the construction of the *Human Rights Act*.

The words 'public authority' are specifically defined to include a 'court or tribunal'. Accordingly, a court is prohibited by section 6 from 'act[ing] in a way which is incompatible with a Convention right.' What does this mean?

It is one thing for a court to decide that an act alters the rights and obligations between a public body and an individual, which is referred to in the English literature as the 'vertical effect' of the act. However, what is it that the court is obliged to do to obey the statutory injunction imposed on itself as a 'public authority' when deciding a case between two private litigants? This is referred to in the English literature as the 'horizontal effect' of the act. There is now a considerable amount of literature on the horizontal effect of the *Human Rights Act.*[10]

An expansive view of the 'horizontal effect' has been drawn from some general observations by the Lord Chancellor during the course of debate on the Bill, about the Convention affecting how courts develop the common law. Reference is also made to observations by the Home Secretary that the object was to give a remedy 'at home' to someone who could get a remedy in Strasbourg.

The consensus view amongst human rights lawyers appears to be that the Act will have significant 'horizontal effects', but will not go so far as to create new causes of action. It is by no means clear to me that these predictions are supportable. Numerous difficult decisions will have to be made by the courts.

Issues of access to justice, such as that considered in *Osman's* case, may now be determined as matters of domestic law, enforceable in the civil courts of England.

In many ways the *Human Rights Act* is a logical development in view of the fact that citizens of the United Kingdom are entitled to seek redress in the European Court against the nation for the failure of statutes or the common law to protect their Convention rights. Whilst *Osman* involved a public authority, this would not always be the case.

The European Court has developed a jurisprudence which obliges state parties to change their law, to be compatible with Convention rights. A good example of this is the case of *X and Y v The Netherlands.*[11] In that case the prosecutor decided not to proceed with a case against a person who sexually assaulted a mentally defective girl. The European Court held that the failure of the Netherlands Criminal Code to protect the victim was a violation of her right to privacy under Article 8. In its decision, the Court said:

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10 See eg, Wade W *'Human Rights and the Judiciary'* Judicial Studies Board Annual Lecture at 4–6; Hunt M 'The 'Horizontal Effect' of the Human Rights Act' (1998) *Public Law* 423; Feldman D 'Remedies for Violitions of Convention Rights Under the Human Rights Act' (1998) 6 *EHRLR* 691 at 702–703; Hooper A, 'Current Topic: The Impact of the Human Rights Act on Judicial Decision-Making' (1998) 6 *EHRLR* 676 at 684–685; Greer S 'A Guide to the Human Rights Act' (1998) 24 *EL Rev* 3 at 7–8; Klug F 'The Human Rights Act 1998' (1999) *Public Law* 246 at 257–259; Ewing KD 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *MLR* 79 at 89–90; Lester Lord and Pannick D (eds), *Human Rights Law and Practice* (1999) at 31–33.

11 (1985) 8 EHRR 235.

> The Court recalls that though the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of individuals between themselves.[12]

English lawyers are well aware of the dramatic impact this new approach will have on their common law inheritance. It is confidently expected that many areas of criminal justice will be radically transformed and certain other areas, such as family law, will also result in significant new litigation activity. Indeed, there are few areas of the law which will not be impacted upon in some way or another.

The construction of Article 6 as part of the domestic law of England will impinge on access to justice issues as they arise between litigants, as well as between litigants and government agencies. For example, one issue that will arise is whether or not the right to a hearing 'within a reasonable time' is breached by the listing practices of the court and delays in a case being heard. At present, a litigant who is prepared to face the further delays of proceedings in the European Court, may be entitled to compensation from the United Kingdom. The *Human Rights Act* may create such a right of compensation as a matter of domestic law.

Similarly, issues will arise as to whether or not a denial of a right of access to legal assistance by reason of legal aid rules is in accordance with Convention rights; whether the rules of standing applicable in a particular area of the law are compatible with those rights; whether a statute of limitations is compatible; whether rules requiring leave for the admission of evidence are compatible; whether leave requirements for instituting proceedings are compatible; also, time limits imposed by court rules or directions may be subject to challenge; declarations that someone is a vexatious litigant may be challengeable; contractual agreements for compulsory arbitration may be subject to review in circumstances where they do not constitute a true exercise of free choice and where the procedures do not guarantee against abuse.

Access to Legal Aid and the burden of excessive legal costs may also give rise to issues of access to justice. Indeed, when the High Court established the principle in *Dietrich* that a stay of criminal proceedings could be ordered when an accused was unable to obtain legal representation, the Court drew on international treaties, including the European Convention and its jurisprudence.[13] There are numerous access to justice issues which, in England, may now be determined in accordance with these human rights obligations.[14] These are technical points, but often with dramatic consequences.

Australian law is developing slowly in the same general direction as the *Human Rights Act* will now take English law.

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12 Id at para 23.

13 *Dietrich v The Queen* (1992) 177 CLR 292 at 300, 306, 334 and 351.

14 See McBride J, 'Access to Justice and Human Rights Treaties' (1998) 17 *CJQ* 235.

Section 3 of the British Act which requires the court to construe legislation in a manner which is compatible with Convention rights – the New Zealand *Bill of Rights Act* 1990 contains a similar provision – may already be reflected in the Australian law of statutory interpretation. The English material asserts that the new section goes further than the common law, which is confined to construing an ambiguous provision on the basis that Parliament was presumed to intend to legislate in accordance with its international obligations.[15] However, not without an element of irony, the word 'ambiguity' is itself not without its own difficulties.

Generally 'ambiguity' is understood in the sense that a word or phrase may have more than one meaning. However, the word 'ambiguity' is also sometimes used in a more general sense: that it applies to any situation in which the intention of Parliament with respect to the scope of a particular statutory provision is, for whatever reason, doubtful.[16]

It is this broader approach to the concept of ambiguity which has found favour in Australia with respect to application of international human rights instruments. As three members of the High Court put it:

> We accept the proposition that the court should in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty.[17]

However the word 'ambiguity' in this context bears the broader meaning, namely it applies to any case of doubt as to the proper construction of a word or phrase. As Mason CJ and Deane J, with whom Gaudron J agreed on this subject, said in *Minister for Immigration & Ethnic Affairs v Teoh*:

> In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations to which it imposes on Australia, then that construction should prevail. So expressed the principle is no more than a canon of construction and does not import the terms of the treaty or Convention into our municipal law as a source of individual rights or obligations.[18]

There is no reason why this principle of statutory construction would not now be reflected in Interpretation Acts, whether at Commonwealth or state level. In the light of the broader concept of 'ambiguity' developed in Australia, it is likely that the jurisprudence in England and New Zealand, under their statutory provisions,

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15 *R v Home Secretary, Ex parte Brind* [1991] 1 AC 696 at 747–748 (Lord Bridge of Harwich); *Bringing Rights Home* Command Paper 3782 (1997) par 2.7.

16 See Bell J & Engle Sir G, *Cross on Statutory Interpretation* (3rd ed, 1995) at 83–84; *Bowtell v Goldsborough Mort & Co Limited* (1996) 3 CLR 444 at 456–457; and my Sir Ninian Stephen Lecture 'Statutory Interpretation: Identifying the Linguistic Register' delivered at the University of Newcastle, 23 March 1999: <http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/sp_240399>.

17 *Chu Kheng Lim v The Minister for Immigration and Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).

18 *Minister for Immigration & Ethnic Affairs v Teoh* (1994–95) 183 CLR 273 at 287–288.

will also guide the application of the common law of statutory interpretation in Australia.

The position with respect to the development of the common law will not, however, coincide. As Sir Gerard Brennan said in *Mabo (No 2)*:

> The opening up of international remedies to individuals pursuant to Australia's accession to the [First] Optional Protocol to the ICCPR brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform within international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[19]

The incorporation by the *Human Rights Act* 1998 of the European Convention into English law gives rise to a radically different approach to the influence of international human rights instruments on the development of the common law. It is in this respect, more than any other, that Australian common law and that of England will progressively diverge.

This will be seen in a substantial way in the new rights of action against public authorities, including private organisations exercising public functions. To the extent that the courts accept a 'horizontal effect', this will be even more dramatic.

Last year, in an address to a conference organised by the Human Rights and Equal Opportunity Commission, I stressed the significance for Australian lawyers of these developments in England.[20] I noted that one of the great strengths of Australian common law is that it has been able to draw on a vast body of experience from other common law jurisdictions. Now both Canada and England, and to a lesser extent New Zealand, will progressively be removed as sources of influence and inspiration.

This is a transition of great significance for Australian lawyers. At the present time, for the vast majority of us, American Bill of Rights jurisprudence is virtually incomprehensible. Within a decade it is quite likely that in substantial areas of the law, British and Canadian cases will be equally incomprehensible to Australian lawyers. The Australian common law tradition is threatened with a degree of intellectual isolation that many would find disturbing.

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19 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42.

20 The Honourable Mr Justice Spigelman 'Rule of Law – Human Rights Protection' (1999) 18 *Aust Bar Rev* 29.