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Introduction to Special Issue on Human Rights – *Dr S C Churches* 63

ARTICLES

Bills of rights: Chapter III of the Constitution and State charters – *Ronald Sackville AO QC*

The opposition to national human rights legislation largely rests on the contention that the legislation would transfer power from elected legislators to unelected judges. The contention assumes that unelected judges lack extensive powers to override the will of democratically elected parliaments in order to protect fundamental freedoms. It also assumes that a statutory charter would allow unelected judges to frustrate the will of parliaments. Neither assumption is correct. The High Court's Ch III jurisprudence has given the court considerable scope to strike down State and Commonwealth legislation that threatens fundamental rights and freedoms. The court has been quite willing, for example, to hold that legislation is repugnant to the judicial process or invalidly attempts to prevent courts exercising their constitutionally entrenched powers of judicial review of administrative action. By contrast the important recent decision in R v Momcilovich (2010) 265 ALR 751; [2010] VSCA 50, demonstrates considerable restraint in interpreting the powers conferred on courts by the Victorian Charter of Human Rights and Responsibilities. The debate about a national charter of rights has largely missed the point. Judicial interpretation of a statutory charter is more deferential to the will of elected Parliaments than a robust application of the High Court's Ch III jurisprudence to State and Commonwealth legislation. 67

Human rights in the New Zealand courts – *Philip A Joseph* and *Thomas Joseph*

Lord Cooke of Thorndon termed the post-war international human rights movement the "rise of constitutionalism". He presciently predicted that international human rights would transform rights-adjudication in the national courts of the common law jurisdictions. This article records how the New Zealand courts have responded to the challenge. It examines: the effect of New Zealand's parliamentary Bill of Rights on the exercise of public power; the two models the courts have applied in giving effect to New Zealand's international human rights obligations; and the reach of the common law principle of legality in protecting basic rights. Today, the New Zealand courts interpret public powers in accordance with protected rights sourced in the common law, the Bill of Rights and international human rights instruments. The article ends with the evocative suggestion that New Zealand and other comparable common law jurisdictions may be inching closer towards a natural law conception of law. 80

Due process and rule of law as human rights: The High Court and the "offshore" processing of asylum seekers – *Mary Crock* and *Daniel Ghezelbash*

A central message delivered by the High Court in Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth is that Australia's Constitution and common law tradition do provide some guarantees against administrative unfairness and the arbitrary

use of power, even in the absence of a bill of rights. The case is another example of the Australian courts facing down attempts to restrict judicial oversight of immigration decision-making. This time, the focus was on the system for processing asylum claims outside of Australia's "migration zone". In a unanimous judgment, the High Court ruled that two Tamil asylum seekers denied refugee protection on Christmas Island did have a right to have their determinations made in accordance with the rules of procedural fairness and general principles of law. The authors examine the implications of the ruling for both the current regime and plans for the establishment of a regional processing centre in East Timor. 101

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