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AUSTRALIAN COUNCIL FOR OVERSEAS AID
TASMANIAN SUMMER SCHOOL, 23 JANUARY 1978

ACTION FOR HUMAN RIGHTS IN AUSTRALIA

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Hon. Mr. Justice M. D. Kirby
Chairman of the Australian Law Reform Commission

INTRODUCTION

"Human Rights" are in the news. The United Nations General Assembly has condemned the deprivation of human rights by Chile, South Africa and Israel. The United States has lately transformed an underlying humanitarian concern with human rights into an attribute of national policy. President Ford established a Co-ordinator for Human Rights and Humanitarian Affairs in the Office of the Secretary of State. President Carter has taken the movement forward. It is now a major element in the President's foreign policy. President Carter asserts the right to "speak out openly when we have a concern about human rights wherever abuses occur". In Britain calls are made by Members of the House of Lords for the introduction of a Bill of Rights to assert and protect human rights in a new way. In Canada, New Zealand and in Australia steps have been taken or are being taken to establish Human Rights Commissions to scrutinise the compliance of local laws with the international standard of human rights. Other specific legislation has been introduced and major reforms of the law are under scrutiny. In some of the Australian developments, the national law reform commission has been assigned a specific part. The purpose of this paper is to review Australia's action for the protection of human rights, to identify some of the controversies that must be faced and to suggest criteria by which action for human rights can be distinguished from windy rhetoric.

It is not for me to talk of human rights developments beyond Australia. But the lessons we are learning here and the debate in which we are engaged may have some relevance for people in our region. It is not my purpose to ignore the economic and political issues which are inevitably bound up in any realistic discussion of human rights in action. It is just not possible, as I recognise, to ignore economic considerations or political organisation of society in a meaningful discussion of human rights in action. But in the nature of things, I cannot dwell on such matters. I merely recognise that to some extent the human rights debate in Australia depends upon our relative prosperity. We enjoy a social and economic climate that permits at least some tolerance of mutual rights and privileges. If we were not so affluent or if times changed, the tolerance of others' rights might diminish. On the other hand, as the economic and social problem of neighbouring countries are successfully tackled, as we must hope, the concern for human rights, as we perceive them, will doubtless increase. The demand for human rights, enforceable by effective machinery, is likely to rise in all countries as standards of universal education increase and minimum standards of economic and social wellbeing are established.

If this tale of our Australian experience seems parochial and if our triumphs and disputes appear on occasions to be minor ones it should always be remembered that for all the faults of our society and certain deprivations of quite sizeable minorities in it, the ordinary citizen can enjoy in Australia a generally quiet and relatively contented life. In such a climate, the debate about human rights often assumes a low priority as attention is given to the more pressing concerns of government. It would be wrong to say that the Australian search for human rights is in the forefront of the national consciousness. But it would be equally wrong to ignore the moves that are afoot to right specific wrongs in our society, including by reference to the notions of human rights.

1. H. Storey "Protection of Human Rights - Alternatives and Options" in *A Human Rights Commission for Australia*, 14 May 1977, *mimeo* 21.

CONSTITUTIONAL GUARANTEES

It would not be true to say that the Australian Constitution is silent on the issue of human rights. But it speaks with a muted voice. Two apparently important guarantees have been so interpreted by the High Court of Australia as to have a most circumscribed application. For example, the provisions of s.116 of the Constitution forbidding the Commonwealth from making any law for establishing any religion or for imposing any religious observance or for prohibiting the free exercise of any religion proved a puny weapon during the last War when the pressures of wartime saw a conflict between perceived necessities and the desires of a small and unpopular religious sect.[2] Likewise, the guarantee in s.80 that the trial on indictment of any offence against the law of the Commonwealth "shall be by jury" has been quite simply circumscribed by the Commonwealth limiting the number of offences which are triable on indictment. The High Court upheld the contention that, despite its language, s.80 carries no implication that any offences must be made indictable.[3]

Indeed, the only provision in the nature of a "fundamental guarantee" in our Constitution to have been given significant effect is that found in s.92 which guarantees the absolute freedom of trade, commerce and intercourse among the States. The provision in s.41 that no adult person shall be prevented from voting at elections for either House of the Parliament of the Commonwealth is limited to guaranteeing such persons only such a right as he has or acquires in State elections. Attempts to flesh out the voting provisions to accord rights to young people[4] or to ensure roughly equal electoral boundaries[5] met with little support in the High Court of Australia. The Australian

2. *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth* (1943) 67 *C.L.R.* 116.
3. *R v. Archdall* (1928) 41 *C.L.R.* 125, 139.
4. *King v. Jones* (1972) 46 *A.L.J.R.* 524.
5. *Attorney-General for Australia (ex rel. McKinlay v. Commonwealth)* (1976) 50 *A.L.J.R.* 279.

Constitution, a somewhat curious and interesting document, is singularly devoid of the high sounding language normally to be found in a constitutional instrument nowadays. Its terse prose has attracted terse and, frequently, highly literal interpretation. There is nothing here of the self-confident language used by Jefferson when designing the Bill of Rights appended to the American Constitution. Consideration was given to the incorporation of a Bill of Rights in the Australian instrument. But this was rejected by our founding fathers for two main reasons. In the first place, they considered it inappropriate to a system of parliamentary democracy under the Crown. The best guarantee of people's freedoms was to be found in the common law, a responsible Parliament and an independent judiciary.[6] Possibly more immediately relevant was the fear that a Bill of Rights might have prevented discriminatory laws against Chinese and other minority races. It will be remembered that it took one of the few successful amendments of the Constitution in 1967 to omit the pejorative references to persons of the Aboriginal race.[7]

It is unusual, but not unique, for a national Constitition to be devoid of specific reference to civic rights. At the last count of 147 national Constitutions, 108 of them contained provisions equivalent to a Bill of Rights. Thirty nine contained no such provisions. It must be said, however, that of the 108 the great majority are countries in which human rights that we regard as important might be considered precarious or even lacking in general respect. There is no doubt that the written Bill of Rights is no guarantee of the respect of human rights. This much is clearly not in dispute. It is also undoubtedly true that real respect for civil and political rights depends on civic attitudes, traditions and history as much as upon the economic

6. Storey, 21.
7. From ss.51(xxvi) and 127 of the Constitution.

factors already referred to. Despite all this, there is a vocal movement in Australia for the establishment of certain constitutionally guaranteed rights, enforceable at the behest of an individual citizen. The movement takes nourishment from the way in which the United States Bill of Rights and other constitutional guarantees have been enforced by the Supreme Court of that country. One major political party, the Australian Labor Party, has in its platform the introduction into the Australian Constitution of a Bill of Rights. The Government's approach is to establish a special Commission and to introduce specific legislation. It is curious but noteworthy that the political lineup on this issue in Australia appears quite the opposite of that which is developing in the United Kingdom. There, it is the Conservative Opposition which is vocal in the movement for a Bill of Rights. Foremost amongst the proponents is the former Conservative Lord Chancellor, Lord Hailsham. Another Law Lord, Lord Scarman, is a vocal and frequent advocate.[8] The Labour Party appears to oppose the notion, fearing judicial restraint on the radicalism of a sovereign Parliament.

We inherited our legal system and many of our legal attitudes from Britain. It is worth pausing for a moment to recount at least the major themes in the Australian debate for and against a constitutional Bill of Rights. Opinions have ranged from passionate support of the notion to disbelieving opposition to it. It is said that we do not need it. That the enforceable protection of our human rights is to be found in our system of representative and responsible government, our independent judiciary, a free press and our legal tradition.[9] The fear is expressed that the incorporation of vague and necessarily general statements of rights will lead not only to uncertainty but, by their very definition, to

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8. In his Hamlyn Lectures and, more recently in the annual Minority Rights Group Lecture on "Rights and Obligations in a Plural Society". Reported *The Times* 17 November 1977, 1.
9. R.J. Ellicott, "The Commonwealth Government's Proposal" in *A Human Rights Commission for Australia*, 5.

a limitation upon our rights and liberties.[10] What is a minimum will become the maximum. Furthermore, the judiciary will assume an unaccustomed role and be required to flesh out the generalities of the Constitution, thereby assuming the mantle of legislators.[11] The frank politicisation of the judiciary will diminish its authority and respect. Radicals point to the fairly uniform background and training of judges and are inclined to prefer the wisdom of legislators to the often conservative prejudices of the judiciary. The faith in judges to fashion enforceable rights is seen by these critics as touching and naive. Putting it generally, this is the apparent view of the British Labour Party. For those that point to the American Constitution, it is argued that the Americans had their Bill of Rights from the start and over nearly two centuries have grown up with it.[12] Over and over again, it is pointed out that constitutional guarantees are no sure safeguard of rights. The experience in Africa and the Soviet Union are cited.[13] But so is the experience of the United States where, not until recently, was the Constitution used to assert the rights of the coloured minority and then, so it is said, only when the whole community had come round to a ready acceptance of such reforms.[14] Opponents of the Bill of Rights Movement in Australia condemn the moves as pointless, irrelevant and possibly dangerous self-indulgence. What is needed, they say, is not the vague statement of general rights but specific and enforceable legislation that will work. We are told that we can look to responsible and responsive Parliaments to do the job.

> "The government is committed to preserving human rights in this country. It does not, however, agree that it is necessary to have a Bill of Rights in order to do so. ... In

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10. Storey, 22.
11. Storey, 23.
12. *Ibid.*
13. *Ibid.*
14. *Loc cit.*

> the government's view there should be a case by case approach to human rights. This approach would deal with areas where human rights in Australia are not basically recognised or which need clarification or codification or would deal with instances where it is demonstrated by the complaints of individuals that existing laws or practices failed to observe basic human rights. The Criminal Investigation Bill is a clear indication of the government's attitude. The privacy reference to the Law Reform Commission is another".[15]

Mr. Ellicott was here mentioning two tasks of the Law Reform Commission. I shall revert to them later.

Against these arguments the campaign for a general and preferably constitutional statement of rights attracts many ardent supporters. Some of them put the opposition down to nothing more than "intellectual paralysis" of the traditionalist legal mind.[16] They point to the vulnerability of Australians to increasing concentrations of arbitrary power, whether in government, business or individuals. The theory that Parliament will step in to protect people's rights is assailed as a myth. It would be all right if it worked, but it does not. It assumes an independent and critical media, an active and informed electorate, politicians who are responsible and responsive to electoral needs, Members of Parliament who are prepared to fight against Party pressures and minorities who are well organised, articul and persuasive. Short of the Millenium, we will not have all of these and accordingly, if we are to give legal protection

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15. R.J. Ellicott, *Commonwealth Parliamentary Debates* (H of R) 1 June 197 2292. Second Reading Speech on the Human Rights Commission Bill.
16. F. Walker, Legislative Foundations of Human Rights - The Problems of Distrust and States' Rights, in *A Human Rights Commission for Austral* 27.

where increasingly it is needed, we must arm the judiciary with new weapons. The judges can be trusted not to exceed proper functions, particularly given our judicial traditions. Essentially what we must do is to afford them general principles to which they can appeal to deal with the truly unacceptable and outrageous cases i.e. those instances where legal injustice has been allowed to perpetuate by Parliamentary indifference, administrative complacency and judicial restraint.[17] The facility of a Bill of Rights could, as Mr. Trudeau has suggested, "withdraw certain subjects from the vicissitudes of political controversy, place them beyond the reach of minorities and officials, and ... establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech and a free press, freedom of worship and assembly and other fundamental rights ... depend on the outcome of no elections".[18]

There the argument rests. There are no moves imminent to entrench a list of fundamental rights in the Australian Constitution. The action is elsewhere.

GENERAL LEGISLATION

As is wellknown, there are means, short of incorporatin a Bill of Rights in the Constitution, by which legal protection can be secured by general legislation. In Canada, which has a federal system and legal tradition similar to our own, the Parliament in 1960 passed an Act for the Recognition and Protection of Human Rights and Fundamental Freedom. The Act declares certain rights and freedoms which are specified and provides that every Act of the Federal Parliament or Regulation made under such an Act shall, unless expressly declared to operate notwithstanding the Bill of Rights, be "so construed and applied" as not to derogate

17. Walker, 28.
18. P.E. Trudeau cited by L.F. Bowen "Will a Commission be Effective?" in *A Human Rights Commission for Australia*, 9 at 13.

from or authorise derogation from the declared rights and freedoms. This legislation was passed during a period of Conservative Administration in Canada. It was a major article of faith of Mr. John Diefenbaker, both in Government and Opposition. It has secured universal political support in Canada. The judicial reaction to it has been patchy but more recent decisions would appear to indicate that the judiciary is learning to live with this new creature.[19]

Meanwhile, the international community has moved quite rapidly in the construction of international statements of enforceable human rights. I say nothing of the moves in Europe[20] or in other regions. Undoubtedly, the worldwide moves for the expression and protection of human rights arose out of the ashes of the Second World War. The United Nations Charter itself speaks in its preamble of "fundamental human rights" of "the dignity and worth of the human person". Article 1 enjoins the Members to promote respect for "human rights and for fundamental freedoms for all without distinction". The Charter was in turn reflected in the Universal Declaration of Human Rights. Later International Covenants were prepared, designed to give teeth to the earlier general statements. The most important of these Covenants is the International Covenant on Civil and Political Rights. Australia, with a delegation led by Attorney-General Nigel Bowen, took an active part in the 1960s in the negotiations which led up to the conclusion of this Covenant. Sufficient numbers of States having ratified the Covenant it has now come into force as part of international law. It was signed by Australia on 18 December 1972 but has not yet been ratified or subscribed to by this country. The intention of successive Australian Governments has been that we should ratify the Covenant and, within our constitutional arrangements, do what is necessary to provide for its enforcement in this country.

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19. W.N. Tarnopolosky, "The Supreme Court and Civil Liberty" (1976) 14 *Alb. L.Rev.* 58; N. Lyon, The Central Fallacy of Canadian Constitutional Law (1976) 22 *McGill L.J.* 40.
20. *Cf.* G. Triggs "Prisoner's Rights to Legal Advice and Access to the Co The Golder Decision by the European Court of Human Rights" (1976) 50 *A.L.J.* 229.

During the Labor Government, the Human Rights Bill 1973 was introduced by Attorney-General Murphy.[21] The Bill, by clause 6, provided for approval to be given to ratification by Australia of the International Covenant on Civil and Political Rights (as well as the Convention on the Political Rights of Women). The Bill purported to bind Australia "and each State".[22] It set out in its clauses substantially, but not exactly, the provisions of the International Covenant. It then established certain machinery for the enforcement of the rights stated in general terms. This machinery included a Human Rights Commissioner with powers of conciliation and, ultimately, access to the federal courts for enforcement. It also provided for an Australian Human Rights Council and various other machinery provisions. The Bill lapsed with the dissolution of the Parliament in mid 1974. It was never reintroduced. It engendered much heat and passion during its short life. It was attacked by churchmen, the *Australian Medical Journal*, Sir Robert Menzies and the Chief Justice of Victoria who, before retiring to take up the position of Governor, wrote a letter to the State Attorney criticising its terms and purpose.[23] Needless to say, it had its supporters.[24] The arguments need not be recounted as most of them have already been listed above. The question of the Commonwealth's power under our Constitution to pass legislation in such general terms, even under the external affairs power, was hotly contested by certain of the States.

Following the change of government at the end of 1975, the incoming Administration showed itself equally keen to ratify the International Covenant but more prepared to do so after consultation with the States. It was hoped that this consultation would secure a broad national agreement on human

21. *Commonwealth Parliamentary Debates (Senate)*, 21 November 1973, 1971.
22. Clause 5(1).
23. As reported in *The Age*, 1 February 1974, 3.
24. G. Evans "An Australian Bill of Rights?" (1973) 45 *The Australian Quarterly* 4. Dealing with the general arguments for Bill of Rights.

rights and participation in general national machinery for their enforcement.[25] The result was the Human Rights Commission Bill-1977. This followed a Canadian and New Zealand decision to establish a Human Rights Commission. The major purpose of the Bill was to "ensure that Commonwealth and Territory laws, acts and practices conform with the International Covenant on Civil and Political Rights".[26] The Bill establishes a Human Rights Commission comprising between six and ten members. The functions of the Commission include the examination of enactments (or when requested to do so by the Minister, proposed enactments) -

> "for the purpose of ascertaining whether the enactments or proposed enactments are or would be inconsistent with or contrary to the rights and freedoms recognised in the [International Covenant on Civil and Political Rights]." (Clause 8(d)).

The Commission may also inquire into acts and practices and suggest action that should be taken to comply with the provisions of the Covenant. Furthermore, it has general research and educational functions. Clause 9(3) empowered the Commission to inquire into and report upon a complaint made in writing by a particular individual. The limitations of the Commission are clear and are acknowledged. It is limited to Commonwealth laws. Its functions are limited, upon complaint, to inquiry and report. It has no means of providing specific relief. It is in short a Commonwealth monitor or "watchdog".

The hopes for participation of the States of Australia appears to have come to nothing. Mr. Ellicott, introducing the Bill, explained why :

> "Consistently with the notion that the Commission should be established as a joint

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25. Ellicott, *C.P.D.*, 2292.
26. Ellicott, 2291.

> Commonwealth-State venture, I proposed that the Commission should be subject to the direction of a body called the Human Rights Council, in relation to that part of its work that related to the examination of State and Commonwealth laws and practices. I proposed that the Council should be empowered to lay down criteria to be taken into account in determining whether laws or practices fell within the scope of the International Covenant and that membership of both the Commission and the Council should consist of State as well as Commonwealth members. ... Accordingly there have been discussions with the States on this matter and I anticipate that further discussions will be held shortly. However, most of the States have indicated that at this stage they would not propose to join in a scheme that involved functions relating to State legislation and State practices being vested in a Commonwealth Commission. Having regard to these discussions the functions in the Commonwealth's Commission as set out in this Bill will be limited to Commonwealth and Territory laws and practices."[27]

It seems that discussions with the States are continuing.[28] The Bill, like its predecessor, lapsed with the dissolution of the Parliament. It has been promised for reintroduction and there is some suggestion that it will be reintroduced in a different and more vigorous form. Time will tell. It seems unlikely, in view of the comments of some State law officers, that the States will agree to participate. The

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27. Ellicott, 2292-3.
28. Ellicott, 2292-3.

Victorian Attorney-General put it thus :

> "Objections to such a proposal in the context of a federation such as Australia might be that it creates one body answerable to one government with the responsibility of overseeing the activities of seven parliaments and governments. This could be seen as an intrusion upon democratic processes of the governments who do not participate in the formation of the Commission".[29]

Nevertheless, he did concede :

> "In the Australian context it would be best for the Commonwealth and the States to act together in a spirit of co-operation to achieve for the Australian citizen protection of their civil and political rights but ultimately those rights can only be protected if the community is determined to see that they will be protected".[30]

Critics of the Bill in the Labor Party have condemned it as "almost totally ineffective",[31] and "window-dressing".[32] Nevertheless, they have generally welcomed it whilst promising to do more. It is there that this debate rests and we will have to wait for the next session of Parliament to see the final form of the proposed Human Rights Commission. It should be said that the Canadian legislation has now been passed and the Canadian Human Rights Commission establish

The only successful incorporation of the International Covenant in an Australian statute is to be found in s.7 of the *Law Reform Commission Act* 1973. When that Act was under consideration by the Senate, Senator Greenwood proposed the incorporation of a new clause. His proposal was agreed to

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29. Storey, 23.
30. Storey, 25.
31. Bowen, 9.
32. Bowen, 12.

by the Government and it became section 7 :

> "In the performance of its functions, the Commission shall review laws to which this Act applies, and consider proposals, with a view to ensuring -
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> (a) that such laws and proposals do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and
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> (b) that, as far as practicable, such laws and proposals are consistent with the Articles of the International Covenant on Civil and Political Rights".

This provision has not been regarded by the Law Reform Commission as a pious utterance. On the contrary, it is a touchstone frequently used by it in formulating its recommendations.[33] It is a specific statutory duty. It could be expanded to a more general obligation to review legislation, if no alternative machinery were established.[34] Clearly it is desirable that law reform in Australia should have a clear focus on the international movement for the protection of human rights in the law. But a specific clause such as this is no substitute for particular efforts directed towards the enforceable protection of human rights. It is to those efforts past and current that I direct the balance of this paper.

PARTICULAR LEGISLATION

The Australian Parliament under successive governments with different political outlooks has enacted a number of laws that deserve attention in the context of human rights protection. Furthermore, a number of Bills have been

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33. The Law Reform Commission, *Alcohol, Drugs & Driving*, 1976, A.L.R.C.4, 1, 110
34. This was suggested by the author in "Human Rights : The Challenge for Law Reform". The Turner Memorial Lecture, 1976 (1976) 5 *Uni.Tas.L.Rev.* 103, 117f

introduced or are promised and several important and relevant references given to the Law Reform Commission. The catalogue is a lengthy one but the following should be specifically mentioned:

* The *Family Law Act* was passed in 1975 - significantly to modify and reform family law in Australia and hopefully to simplify its procedures and remove some, at least, of the bitter battles that so often beset this area of litigation.
* A Family Law Council has now been appointed to review the operations of this Act. As well, steps are in hand to secure the establishment of an Institute of Family Studies, promised by the Act, in order to ensure that the real operation of the law in practice can be observed, to promote improvement.
* The *Administrative Appeals Tribunal Act* was passed during the Labor Government and the Tribunal has been established during the present Administration. It has begun its operation and provides an effective and impartial review of decisions of the bureaucracy, including Ministerial decisions.
* An Administrative Review Council has been established under that Act and its Members appointed. This Council has begun the vital work of reviewing and reforming the administrative laws and procedures of the Commonwealth Public Service and of Commonwealth instrumentalities to ensure that they are fair.
* In 1977 the *Administrative Decisions (Judicial Review) Act* was assented to, although its commencing date has not yet been proclaimed. The Act was itself submitted to the scrutiny of the Administrative Review Council. It provides for wider grounds for the review by judges of administrative decisions. It

simplifies procedures that are available here and casts upon the bureaucracy the obligation to state reasons and to supply them so that they can be submitted to judicial scrutiny.

* The *Ombudsman Bill* introduced during the Labor Government was carried forward, improved and finally passed during the present government. The first Commonwealth Ombudsman, Professor Jack Richardson, has now commenced his duties. He has already received hundreds of complaints about bureaucratic action and inaction.

* Draft legislation has been promised on the reform, modernisation and standardisation of the procedures of Commonwealth administrative tribunals. This promise will conclude a series of enactments which are designed to change fundamentally the citizen's relationship with government and with the working of the machinery of government. There is no doubt that among the relevant, modern challenges to human rights is the growth in power of the government sector. The catalogue of legislation just mentioned is an attempt to ensure the supervision of government decisions by trained and hopefully enlightened judicial minds. The aim of the exercise is the improvement of administrative procedures at the counter by force of the supervision available on a citizen's complaint.

There have been many other Acts that are relevant at a Commonwealth level. Most notable of these is the *Racial Discrimination Act* 1975 and the legislation on Aboriginal land rights. Also, at a State level, Acts have been passed to strike down discrimination, to promote equal opportunities and to advance the cause of minorities. Tolerance of minorities' rights is an obvious feature of the human rights

movement. Respect for the integrity of the individual human being is at the heart of this movement.

Among the legislation which has been introduced or promised is the Freedom of Information law, first promised in the early days of the Labor Government and now included in the election commitment of Mr. Fraser. This Bill will follow United States precedents in permitting an individual citizen to have access to certain government information relevant to the working of the machinery of democracy. The language of the Bill, and particularly of the exceptions to access and the machinery provided will be critical. The early introduction of this legislation has been promised.

The government has also given important references to the Law Reform Commission requiring it to investigate and report upon a number of matters that are specifically relevant to the protection and advancement of human rights in Australia. Amongst these matters, currently under active study, are the following:

* The provision of legal protections for privacy. The courts in Australia have held that there is no general right to privacy enforceable by the law.[35] This decision is intolerable in an age of big government, big business, the passion for personal information and scientific developments, including the computer, that can feed that passion. The Law Reform Commission has been asked to suggest new laws that will protect people's privacy in the modern age.
* A new, uniform Defamation Act. The protection of people from arbitrary or unlawful attacks on their honour or reputation is specifically included in article 17 of the Covenant. Australia's defamation laws and practices are in

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35. *Victoria Park Racing & Recreation Grounds Co. Limited v. Taylor* (1937) 58 *C.L.R.* 479.

a mess. The Law Reform Commission has already made tentative proposals to simplify and unify the laws here.[36] Clearly they are critical to striking the right balance between freedom of expression and a free and vigorous press, on the one hand, and respect for reputation, on the other.

* New laws on access to the courts. To supplement the steps that have already been taken to provide legal assistance throughout Australia, the Law Reform Commission has been asked to suggest new rules that should govern the "standing" of citizens to test the legality of conduct in courts of law. Already the Law Reform Commission has tentatively put forward proposals that will, if adopted, remove technical and meritless impediments which stand in the way of a citizen or a taxpayer invoking the laws of the land, including the Constitution, without having to prove some special financial or like interest in the matters at stake.[37]
* New laws for Aboriginal Australians. An important reference requires the Commission to consider whether some form of recognition should not be given to Aboriginal Customary Laws in our society. From the outset of colonisation, we have rejected legal pluralism. The question now before the Commission is whether it should recommend the recognition of Aboriginal laws either by the courts or by some other means of legitimate authority.

There are many other matters before the Law Reform Commission, as before its State counterparts, relevant to the advancement

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36. The Law Reform Commission, discussion paper No. 3., *Defamation & Publication Privacy - a Draft Uniform Bill*, 1977.
37. The Law Reform Commission, discussion paper No. 4., *Access to the Cour - I, Standing : Public Interest Suits*, 1977.

of human rights. Section 7 of our Act ensures that in all of our recommendations we must test proposals against the criterion of the Covenant. Making the law simpler, more straightforward, more accessible and more just is the task of the Law Reform Commission. It seeks to give practical focus to the general desire to improve the human rights of all Australians.

THE CRIMINAL INVESTIGATION BILL : THE LITMUS

Far the most important, for human rights, of the projects studied by the Law Reform Commission, and one already reported upon, relates to *criminal investigation*. The Commission's report was delivered in 1975 and was subsequently adopted, in substance, by the present government. It became the Criminal Investigation Bill 1977 which lapsed with the dissolution of the 30th Australian Parliament. When he introduced the Human Rights Commission Bill, Mr. Ellicott instanced the Criminal Investigation Bill as "a clear indication of the government's attitude" to the protection of human rights. It is in truth a piece of legislation which addresses itself specifically and in every clause to the rights and duties of citizens and police in the criminal investigation process.

For those who assert that the proper way to protect human rights is to do so specifically, by legislation passed through the Parliament, the Criminal Investigation Bill provides a litmus. The Bill has attracted much praise and support. One international scholar has put it thus :

> "About the details of the proposals ... people will inevitably dispute. About the need to take duties and liberties seriously, however, there can be no dispute. Few people can be expected to welcome increased formalities and procedures with enthusiasm, especially those who have to operate them. Yet if this is the price for the reintroduction of the rule of law into criminal investigation, then it ought to be paid".[38]

38. A.J. Ashworth, "Some Blueprints for Criminal Investigation" [1976]

The Prime Minister, Mr. Fraser, speaking of the Bill at the Australian Legal Convention in 1977, aptly described its purposes :

> "The basic purpose of this Bill ... is to codify and clarify the rights and duties of citizens and the Commonwealth Police when involved in the process of criminal investigation. This is an area in which there has been much dissatisfaction, considerable writing, many proposals for reform but not much legislative action".[39]

Here, then, is positive and specific action for the definition, protection and enforcement of specific rights. Gone are the vague generalities and the broad brush. Here, clause by clause, is the specific and enforceable list of rights and duties of citizens and police at a time most critical for human rights, if we take them seriously.

When he introduced the Bill, Mr. Ellicott rightly said :

> "This Bill is a major measure of reform. ... Although a large number of reports have been produced and many reforms proposed, I think it is fair to say that this Bill represents the most significant legislative initiative in this field to be taken in the Commonwealth of Nations at least since the last war and probably since the establishment of modern police forces. It comes to grips with a whole variety of difficult issues upon which there has been much writing, widespread dissatisfction, but little legislative action. ... [I]t represents an attempt by the law to catch up with the developments of

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39. J.M. Fraser, Speech to the Australian Legal Convention, (1977) 2 *Cwth. Record*, 863.

science and technology and to call them in aid, both of the police and of the accused in the process of criminal investigation. But above all, it proposes that these advances which are now available should be brought to the assistance of the administration of justice itself".

The Bill translates the general language of the International Covenant into specific provisions. It does so with "a full knowledge of the tradition of our criminal justice system". Mr. Ellicott described his intention this way :

> "[The Bill] exemplifies the approach which this government takes in this field. Basic human rights should not be left in vague general terms. To be effective, they should be translated into specific, clear and simple obligations and privileges. The Bill endeavours to do that".

Among the important provisions of the Bill are many which are critical for human rights in action. They include :

* A person held in custody is to be given a specific right to be assisted by a lawyer.
* Strict criteria are to be laid down for arrests without warrant and the taking of fingerprints will only be permitted for identification purposes.
* Restrictions are to be imposed on the use of force, including firearms, for the purpose of arrests.
* Safeguarding provisions are to be introduced as to the identification of suspects by identification parades and other procedures to ensure that injustices are not thereby committed.
* To ensure that in the interrogation of persons suspected of committing an offence, the rights of the suspect are not infringed and to reduce to the minimum disputes as to the accuracy of records of such interviews, provision is to be made requiring that such interviews be tape recorded or be conducted in the presence of an independent third party and

reduced to writing or, if neither of these courses is practicable in the particular circumstances, a written record of the interview be verified by an independent third party as soon as possible after it is made.

* Restrictions are to be placed on the questioning of Aboriginals except in the presence of a "prisoner's friend" and on the questioning of persons not fluent in English except in the presence of an interpreter.
* Substantial alterations are made to the system of police bail, including the spelling out of criteria to be applied by the police in making decisions as to the grant or refusal of bail; provision is also to be made entitling a person refused bail by the police to appeal immediately to a magistrate, if necessary by telephone.
* The police are to be given the power to require persons to identify themselves where they may be able to assist police in inquiries in relation to an offence and a reciprocal power is also to be given to citizens in those circumstances to require the police to identify themselves.
* General search warrants are to be abolished and specific provision is to be made for the granting of search warrants, detailing the situations in which searches may be conducted without warrant and providing for obtaining a warrant over the telephone.
* In a prosecution for an offence, the onus is to be on the prosecution to justify the admission of evidence obtained in contravention of any of the procedures or requirements laid down in the legislation.

The new Attorney-General, Senator Durack, has also discussed the Bill in an address to the North Queensland Legal Convention.[40] He has pointed out that :

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40. P. Durack, "Recent Developments in Law Reform", An Address delivered to the North Queensland Legal Convention, Townsville, 8 October 1977, *mimeo*, (66a/77).

> "The Bill is seen as a practical way of implementing those provisions of the International Covenant on Civil and Political Rights which protect the individual in his contacts with the criminal justice system. This Covenant is of enormous importance for the people of Australia. It is of enormous importance for Australia to be a party to that International Covenant. The whole movement towards the protection of human rights has been a major matter of international concern since the Second World War. The International Covenant has been the high point of those debates".[41]

The Attorney-General has happily said that he will not shirk from tackling difficult projects and sensitive matters such as this Bill. "There is no sense" he said "in having law reform commissions unless the government takes active and prompt steps to consider the reports and to implement the reports so far as they are consistent with the government's policies and the practical exigencies that may apply". The Criminal Investigation Bill is an endeavour to do what the opponents of Bills of Rights have urged. It is unthinkable that the human rights of Australian citizens in such a vital matter as the criminal investigation process, should be hidden away in rules made by English judges in the early part of this century or in the instructions of Commissioners of Police to their officers - instructions which are not generally available. If we take our human rights seriously, we should list civic rights and duties such as these in an Australian statute which is available, as an educative measure, to all of us.

I am sure that many who see the human rights issue as a serious and practical matter will be looking for the

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41. *Ibid*, 10.

reintroduction of the Criminal Investigation Bill and an informed parliamentary debate upon its measures. If Parliament acts where, as the Prime Minister has said, there has been only talk up till now, it will give proof to the proposition that responsible government, even in sensitive and difficult areas, can protect the human rights of its citizens in specific and effective ways. That is why I have described the Criminal Investigation Bill as the litmus.

CONCLUSION

There is no time here to deal with many other themes that warrant our consideration. I have mentioned, in passing, the "duties of citizens". The Criminal Investigation Bill contains certain duties. The laws of the land impose many duties. In the area of human rights, the new debate, from which we can learn much from our Region, relates to civic duties and responsibilities as well as privileges and rights. Furthermore, we should all be conscious of the perils of benign discrimination and the need to ensure that, in protecting minorities, we do so in a way that is sensitive to the rights of the majority community. This very issue stands presently reserved before the Supreme Court of the United States in the case of *Regents of the University of California v. Bakke*. Allan Bakke, an engineer, still wishes to attend the California University's medical school. A number of positions have been preserved by the school for "individuals from disadvantaged educational cultural and socio-economic backgrounds". By all standard criteria, Bakke's record was better than that of many of the minority students who gained enrolment. He has challenged his exclusion. How we protect majority rights in a pluralist society will now be explained by the United States Supreme Court. Lord Scarman has recently proposed that laws loaded in favour of disadvantaged minority groups, such as the *Race Relations Act* should remain on the statute book only for a limited period. In the longer term, he suggests, individual rights must predominate.[42] We in Australia will,

42. Scarman, *Minority Rights ina Plural Society, op cit, mimeo,* 11.

in solving our human rights issues, have to address ourselves to these problems. Laws that afford particular and additional rights and privileges to Aboriginals and members of the ethnic communities must be framed according to principle. But what should that principle be?

In all of this, I have said nothing about the innumerable acts of official and voluntary groups to help the underprivileged, to relieve poverty, to provide education and succour. My purpose has been a limited one. In concentrating on the action for human rights in the law and in legal machinery, I am not ignorant of the practical work being done at other levels. That tale must be told by others. The burden of what I have said is simply this. Our legal system is not devoid of notions of civic rights and privileges. A legal tradition that traces its ancestry through the Bill of Rights to Magna Carta can scarcely be said to be one devoid of such notions. Australia is feeling the impact of the international movement for the declaration and protection of human rights. This Movement turns the spotlight on to the actual legal machinery that exists in a country by which human rights can be asserted and defended. In our country there are complications. They include our legal tradition, our federal constitutional structure, the absence of constitutional guarantees and the vigorous debate that has been waged concerning the way in which we should take part in the worldwide movement for human rights. Although differences of opinion have arisen and although the debate has been partly enmeshed in the toils of political warfare, there is no doubt that action is being taken to define and protect human rights in this country. I am of the view that we will see more action and a deepening commitment of all political leaders to the practical assertion by our legal system of the accepted values of our society, and the provision of real machinery to enforce values that we not only talk about but are prepared to take seriously.