

THE UNITED NATIONS ASSOCIATION OF AUSTRALIA

SUMMARY: UNITING ON HUMAN RIGHTS

The Hon. Mr. Justice M.D. Kirby

May 1978

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THE HON. MR. JUSTICE M.D. KIRBY, Chairman, Law Reform Commission

On Saturday, 13 May 1978, a Seminar was held in Sydney. During the session "Australia and Human Rights" the seminar was addressed by the Attorney-General of the Commonwealth, Senator Peter Durack, Q.C. and by Mr. Gareth Evans, Senator elect for Victoria. The Chairman of the session was The Hon. Mr. Justice Kirby, Chairman of the Australian Law Reform Commission. At the close of the session, Mr. Justice Kirby delivered a summary as follows:

Attorney-General's speech

I am sure that you would want me to start by thanking the Attorney-General, Senator Durack, for delivering his thoughtful address and also to thank Senator-elect Gareth Evans. We are fortunate to have in the Parliament men with such a concern for human rights and their advancement and practical protection in Australia. As I shall show, the points of difference between the Attorney-General and Mr. Evans are less important than the points upon which they have agreed.

Senator Durack has made a number of things clear. In the first place it is the firm commitment of the Commonwealth Government to establish a Human Rights Commission. Although the government desires to do this in consultation with the States, and, if at all possible, with the co-operation and participation of the States, the Attorney has made it clear that the Commonwealth will proceed to establish an Australian Human Rights Commission

in any event. The effort to involve the States is an inevitable consequence of our Federal Constitution. That Constitution leaves with the States of Australia substantial responsibility for the protection of human rights, including in many of the areas mentioned in the *International Covenant on Civil and Political Rights*. It is an indication of the importance which the Commonwealth attaches to the establishment of the Commission and to the co-operative participation of the States in it, that the Deputy-Secretary of the Department of the Prime Minister and Cabinet, Mr. Peter Bailey, has been seconded to conduct the discussions in the States, directed towards the establishment of the Human Rights Commission.

Secondly, Senator Durack has made it clear that it is the desire of the Commonwealth Government to subscribe to the *International Covenant on Civil and Political Rights*. This has been the declared intention of successive Commonwealth governments, since the International Covenant was negotiated by delegations, including one from Australia led by the then Foreign Minister Nigel Bowen. However, the Commonwealth is equally committed to securing the enforcement of human rights in Australia in accordance with Australia's own constitutional framework. This happens to be a Federal framework and the *Covenant* contemplates that countries will comply with its terms, in accordance with their constitutional arrangements. The present Commonwealth government has made it quite plain that it does not consider a Bill of Rights, enforceable in the courts, as an appropriate means of securing the enforcement of human rights in this country. Furthermore, it considers it important to keep in mind the fact that Australian law already provides substantial protection for human rights. These include laws of the Commonwealth and the States, the independent position of the judiciary, some constitution guarantee and the principles of the inherited Common Law. Yet additionally, the free press, parliamentary government and relative prosperity and harmony in the Australian community provide practical protections which no paper Bill of Rights will necessarily secure.

Thirdly, the Attorney-General stressed the emphasis in Australia's foreign policy, upon the international recognition of human rights and respect for their enforcement. This emphasis was

signalled by the election of Australia, for the first time in 30 years, to membership of the United Nations Human Rights Commission. The 10th December 1978 will be the 30th anniversary of the signature of the *Universal Declaration of Human Rights*. The government will be taking steps to ensure the suitable commemoration of this anniversary throughout Australia and the enlivening of the national consciousness of the importance of the *Universal Declaration* for the world as well as for this country.

Mr. Evans' speech

Senator-elect Evans made a number of points which can be summarised thus. In the first place, he suggested that there was no excuse to delay ratification of the *International Covenant on Civil and Political Rights*. He said that consultation with the States might be infinitely protracted and that we ran the risk, in Australia, of so much consultation that we would still be talking about ratification of the *covenant* when the Diamond Jubilee of its conclusion came round. Secondly, Mr. Evans said that it was not difficult for the Commonwealth to proceed immediately to ratification. The *covenant* contemplated, inevitably, the particular problems of the constitutions of Member States. It provided a number of exemptions. It was in the most general language. It did not call for the immediate implementation of all of the provisions contained in its terms. It would have no immediate, overnight impact on the domestic law of Australia. Therefore, all time consuming negotiations with the States, in the hope of securing total agreement on the *Covenant*, was both pointless and unnecessary.

In the third place, Mr. Evans stressed the positive values of ratifying the *Covenant*. First it would constitute a bench mark by which we could test our laws in Australia against an agreed international standard. Secondly, it would constitute a means of putting pressure on governments, including governments in the States, to bring their laws and practices into line with an agreed international statement of proper principles. There was, he declared, a need for such a facility in Australia. The sooner it could be achieved, the better.

Finally, Mr. Evans articulated the options that were open to government. These included:

- \* to do nothing
- \* to establish a Human Rights Commission as a kind of "watch dog", but lacking its own powers of enforcement
- \* piecemeal legislation to deal with particular challenges to human rights.
- \* enactment of a statement of rights or a Bill of Rights either by way of ordinary Commonwealth legislation or by an amendment of the Commonwealth Constitution
- \* various combinations of or a total combination of all of these options, except the option of doing nothing: Mr. Evans left us in no doubt that he would favour a Bill of Rights, perhaps in combination with specific legislation and the establishment of an appropriately set up national Human Rights Commission.

#### The Law Reform Commission and Human Rights

The only mention in Australian legislation of the *International Covenant on Civil and Political Rights* is to be found in the *Law Reform Commission Act 1973*. Section 7 of that Act requires the Australian Law Reform Commission in performing its functions and in making recommendations for reform, modernisation and simplification of our laws, to ensure, so far as practicable, that its proposals and recommendations are consistent with the *International Covenant*. The provision is an unusual one in an Australian statute. When the Bill was proceeding through the Senate, it was proposed by the late Senator Greenwood, whose concern for human rights in Australia is not always fully appreciated. The then Attorney-General, Senator Murphy, adopted the proposal and it became part of the statutory duty of the Law Reform Commission. It is not simply a pious utterance. It provides the law reform Commissioners of the Commonwealth with a specific statutory obligation to test all of the proposals against the criteria laid down in the *International Covenant*. In a number of the tasks before the Commission, notably its review of motor traffic laws to deal with drinking driving and

with the laws governing human tissue transplantation, reference to the *International Covenant* has provided specific guidance to the Commission, which has been acknowledged in its reports to the Parliament.

The Attorney-General has indicated the importance which the government attaches to specific legislation of a practical protection of human rights: translating vague general language into particular and individually enforceable legal rights and privileges. This has been a concern of successive governments at a Commonwealth level in Australia and is reflected in the references that have been given to the Law Reform Commission. A catalogue of these references indicates that this is so. They include:

- \* how complaints against the Commonwealth's police should be fairly and independently handled.
- \* whether random breath tests be introduced in the hope of diminishing the road toll.
- \* how debt laws should be reformed to remove the possibility of imprisonment for debt, a matter specifically referred to in the *International Covenant*.
- \* what laws should govern the transplantation of organs and tissues from one human person to another, consistent with the rights of the donor and the predicament of the recipient.
- \* what new laws are required to protect individual privacy in Australia in the computing age and in the age of mass information.
- \* what modern laws and procedures are required to prevent defamation and to protect the honour and reputation of Australians, also a matter specifically addressed in the *International Covenant*.

- \* what laws should govern the right of individuals to sue and their access to the courts in Federal jurisdiction in this country i.e. what standing should be required of litigants, before courts will hear their complaint.
- \* what recognition, if any, should be given to the customary laws of the indigenous Aboriginal people of this country.
- \* what practices and entitlements should be observed when the Commonwealth compulsorily acquires property for Commonwealth purposes, to ensure that the constitutional guarantee of "just terms" is spelt out in law and practice.

All of these tasks, given to the Australian Law Reform Commission represent the commitment of the government to its philosophy of specific, particular and practical protection for individual rights at a Commonwealth level in Australia. Each of these references is important. But no reference is more significant for the practical protection of human rights than the one given to the Law Reform Commission by the Labor Government and acted upon by the present Liberal/National Party Government in the *Criminal Investigation Bill* 1977. In 1975 the Law Reform Commission produced its report *Criminal Investigation*. That report proposed the enactment of Commonwealth legislation which would collect in an Australian statute for the first time, the rights and duties of suspect and police at that time most critical for the human rights of a person: when he is involved in the criminal investigation process. The Law Reform Commission's report annexed a draft Bill. With some modifications, the government has proceeded to introduce legislation based upon that Bill. The Prime Minister, Mr. Fraser, rightly declared to the Australian Legal Convention that:

"The basic purpose of this Bill...is to codify and clarify the rights and duties of citizens and 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."

Until now many of suspect's critical rights, during the course of criminal investigation by police, have been hidden away in Rules made by judges in England in the early part of this century, or in Commissioners' instructions to police officers, many of which are not available upon request and are purely internal documents. This is obviously an unsatisfactory position from the point of view of the practical protection of human rights, if we are serious about them. For the first time, an attempt has been made to collect them in an Australian statute, that will be available to all Australians so that they can learn, at the one time, their rights and duties and ensure compliance with them. The same Bill, the *Criminal Investigation Bill* includes a number of important measures designed to afford practical protection for human rights:

- \* strict criteria are proposed to govern arrests without warrant.
- \* the right of access to a lawyer is guaranteed.
- \* provision is made for taperecording or other verification to ensure the reliability of confessions to police.
- \* intrusive personal searches are to be conducted only by medical practitioners.
- \* persons not fluent in the English language are not to be questioned in custody except with the help of an interpreter.
- \* children are not to be questioned except in the presence of a parent, guardian, or other like person.
- \* Aboriginal Australians are not to be questioned in serious cases except in the presence of a "prisoner's friend" or other like person.
- \* provision is made for the judicial enforcement of the new code, requiring the judges to weigh the rights and freedoms of the accused against the public interest.

The *Criminal Investigation Bill* 1977 lapsed with the dissolution of the last Parliament. It has not yet been introduced. However, the Attorney-General is giving careful thought to the matter.

submissions and suggestions that have been received since it was first tabled. It is, as the Prime Minister has described it, a "major measure of reform". It gives positive expression to the human rights of Australians and reposes their protection in a traditional quarter: namely the judges who have the duty to uphold the law, enforce individual rights, and protect the community against crime.

#### Points of Agreement and Disagreement

A scrutiny of what the Attorney-General has said and what Senator-elect Evans has said will show that the points that unite us concerning human rights are, happily, greater in number and importance than the points upon which we are divided. This is not surprising, but it is significant and should be remembered. The Attorney-General and Mr. Evans agree upon three important matters. They were:

- (1) The need for Australia to subscribe to the *International Covenant on Civil and Political Rights*;
- (2) The need for new machinery in Australia to protect human rights and to ensure their practical enforcement and protection; and
- (3) The utility of a Human Rights Commission as part of the new machinery. Mr. Evans expressed some caveats about the effectiveness of the proposed Commission. However, the precise form of the Commission and its proposed functions are now under review. The need for a "watchdog" testing Australian legislation by the benchmark of the *International Covenant on Civil and Political Rights* was agreed to by both speakers.

The points of difference are perhaps less significant. Lord Hailsham in his Robert Menzies Memorial Oration stressed the importance, in a democracy, of fostering different points of view. But he also stressed the need for promoting certain matters beyond the party political debate. It was important to ensure avoidance of any form of dictatorship by the "transient majority". The test for a society is the way in which it respects the rights of individuals, including unpopular, minority atypical individuals. I believe there is much wisdom in this assertion. It has relevance for human rights in Australia. Whilst our leaders, including

Senator Durack and Mr. Evans disagree about details, their talks today illustrate that they are in broad agreement upon the most important fundamentals. I have previously suggested that this represents the precise position of human rights in Australia. While we may disagree about detail, most of us, in the Australian community, are united in our understanding of fundamental human rights and of the need to uphold them and protect them.

I conclude these remarks as I began them. On behalf of the United Nations Association of Australia and this audience, I express appreciation to the Attorney-General and Mr. Evans for the time they have given to this seminar. We will be fortunate in this country if our leaders continue to address themselves sensitively and constructively to the protection of human rights, as Senator Durack and Mr. Evans have done today.