

THE UNIVERSITY OF NEW SOUTH WALES

INTERNATIONAL COMMISSION OF JURISTS

1980 SEMINAR

LEGISLATING FOR HUMAN RIGHTS

SATURDAY, 16 FEBRUARY 1980

A BILL OF RIGHTS FOR AUSTRALIA?

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

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HUMAN RIGHTS TODAY

It is appropriate that the International Commission of Jurists and the University should consider at this seminar the state of human rights protection in Australia. Both are dedicated to the hope that something better can be done for the protection of peace and of the rights of man, including by respect for the Rule of Law. The rights of man can only flourish with certainty in times of peace and where the Rule of Law is observed. They can be enjoyed only if certain standards of general education and economic prosperity are secured.

It is timely to be involved in this debate because human rights and their practical protections are a matter of current international and local concern. The debate about a Bill of Rights or other human rights protection in Australia is simply a reflection of the debate proceeding on the wider international stage. Before the crisis in Afghanistan, President Carter elevated the long-standing United States focus on human rights, as a part of the United States tradition and Constitution, to be a humanitarian concern as

an attribute of national foreign policy. Indeed, this began even before President Carter took office. President Ford established in the Office of the Secretary of State a Special Co-ordinator for Human Rights and Humanitarian Affairs.

The international debate inevitably turns our attention upon the domestic situation in Australia. This attention inescapably raises the question of whether we, in Australia, should have a Bill of Rights in our Constitution or elsewhere and if not, what steps short of a Bill of Rights, should be adopted so that we are not left behind in the international movement to provide improved, practical accessible protection for the rights of man.

There is a debate in our country about the methodology of protection. On 21 March 1979 Mr. Jim Carlton M.P. asked the Prime Minister whether the government would be prepared to use the external affairs power of the Constitution to introduce a Bill of Rights. In other words, he asked whether the government would contemplate ratifying an international instrument on human rights, thereby seeking to secure a legitimate basis upon which the Commonwealth could enact binding human rights legislation. The question arose out of proposals made in the Labor Party for the use of Section 51(xxix) of the Constitution. This is what Mr. Fraser told the House of Representatives :

"The present Government has set its face against using the external affairs power to expand the Commonwealth's power and influence at the expense of the States. The Government believes that this is a correct course to take because the founders of the Constitution certainly did not mean the external affairs power to be used in that way. We know that during the previous Administration the external affairs power was used for a number of changes in the negotiation of treaties and accession to treaties and international conventions in terms of co-operation with the States, in terms of

of consulting the States and in terms of having their observers present during negotiations and consultations, at the same time seeking where possible to have federal clauses built in which are designed to protect the position of the States. I believe that that is the correct course in a federation.

The proposal of the Leader of the Opposition to use section 51(xxix), the external affairs power, in relation to a Bill of Rights not only raises some serious legal and constitutional problems but also is totally at odds with the philosophy and policy I have outlined, which is designed to work in harmony and co-operation with the States, and also in a way that protects the basic rights of the States to the extent that that is possible. I think it also overlooks the fact that we have already legislated in a number of areas to protect the rights of citizens and will continue to do so where there is a need. The Ombudsman, the Administrative Appeals Tribunal and other provisions are areas where the Commonwealth has shown concern for the rights of individual citizens against, for example, what can sometimes be regarded as a large, powerful and hard to understand bureaucracy. Protection for the rights of individuals in a modern society I think is necessary. We have legislated to put those matters into effect.

We are also quite well advanced at officer and ministerial levels in developing co-operative Commonwealth-State human rights machinery. That co-operation would fly out the window if there was any suggestion that we were suddenly going to use the external affairs power to expand the Commonwealth's role at the expense of the

at the expense of the States, and we have no intention of doing so. I think that this particular instance highlights the difference in philosophy between those on this side of the House who do believe in co-operation between the Commonwealth and the States and the Australian Labor Party which does not believe in the States or in the Senate".

Commonwealth Parliamentary Debates (House of Representatives), 21 March 1979, 944-5.

The question and answer were followed later in the same Question Time by Mr. Lionel Bowen M.P., Shadow Attorney-General.

He asked the Prime Minister this question :

"Is the Prime Minister aware of a statement made in 1977 by the former Attorney-General, the present Minister for Home Affairs, that human rights should be the same all over the country, and of a further statement which reads : 'We ought to be able to get together on this. If we can't, well then federalism is dead'? In view of those statements and the statement of the Prime Minister today that the Commonwealth would not use the external affairs power under the Constitution to enact a Bill of rights which guarantees the provision of human rights by all States throughout Australia by the end of this year, will the Prime Minister guarantee that such rights will be brought into operation shortly rather than wait a further two years?"

Mr. Fraser responded thus :

"The honourable gentleman could not have heard what I said. I indicated that negotiations were already well advanced at both officer and ministerial level to develop co-operative Commonwealth-State human rights machinery. The difference between members on this side of the House and members of the Opposition is that the Australian

Labor Party does not bother about co-operation with anyone; members of the Labor Party just go marching over a cliff." Commonwealth Parliamentary Debates (House of Representatives) 21 March 1979), 947-8.

The point of these questions and answers can be shortly stated. The issue whether we in Australia should or should not have a Bill of Rights has become complicated by a partisan alignment within the major political groupings of our country for and against the proposition of a Bill of Rights. I have previously pointed to the fact that the alignment in Australia differs entirely from the alignment in Britain. In Britain the chief proponent of a constitutional Bill of Rights is Lord Hailsham, the Conservative Lord Chancellor. When in Opposition, the Conservative Party urged consideration of a Bill of Rights for Britain. The European Convention on Human Rights already provides a form of human rights law for Britain, as recent cases have demonstrated. The Labour Party of Britain, on the other hand, opposes Bills of Rights, suggesting that the sovereign Parliament should not have its powers curbed by unelected, unrepresentative judges. Times may change with the change of government in Britain. At the moment, the political line-ups in Britain and Australia on the issue of a Bill of Rights are precisely the opposite.

Because the issue has become muddled in the waters of political controversy, you will understand that I must not, as a judge, venture further than to outline the issues, leaving the decision to you. I therefore propose to traverse briefly an historical perspective in the United States and Australia. I will summarise some of the arguments for and against a Bill of Rights. I then want to say some things about the Law Reform Commission's role and other initiatives taken for the protection of human rights and freedoms in Australia.

#### THE DEBATE IN THE UNITED STATES

Two hundred years ago this week, in the infant Republic of the United States, a debate was raging. In substance, it has been resolved in that country. It remains for resolution in Australia.

The debate was about the best way to protect human rights in a country boasting a system of government of laws not of men. The original Constitution of the United States contained a few statements of general rights, enforceable in the courts, but no general collection of the "rights of man". In this form, the Constitution had been passed by the representative of ten States. No State dissented.

But when it was sent back for ratification, a debate flared which was not resolved until the fifteenth of December 1791 when, by due majority, the Congress adopted the first ten Amendments to the United States Constitution, known popularly as the Bill of Rights.

This Bill of Rights had been strongly opposed by the American Founding Fathers, many of them brought up in the traditions of the common law of England. Alexander Hamilton questioned the need for a statement of rights, where there was no express power given to take away the citizen's basic privileges. He suggested that fixing a list, any list, would result in a limitation of civic rights. Definition would inevitably produce circumscription. Who would be so bold, asked one patriot, as to list the rights of the people?

The debate, which was a vigorous one, was engaged two centuries ago between those of Hamilton's view and those who called for the inclusion, in the Constitution of the United States, of the fundamental rights that would be above other laws and beyond the power of Congress to amend. It was Mason, the draftsman of the Virginia Bill of Rights, who led the assault. Later it was agreed, as a price of ratification, to include a Bill of Rights and James Madison was assigned the task of drawing it. The Bill of Rights permeates American

legal and social life. It has produced a nation of right-asserting citizens. It had encouraged the litigation of fundamental principles in the courts. It has certainly elevated to great importance the "least dangerous" arm of government : the Supreme Court of the United States. The Bill of Rights includes, as fundamental entitlements, the right of freedom of religion, freedom of the press, peaceful assembly, the right to petition, protection against unreasonable searches, the obligation to pay due compensation for compulsory resumption of property and the assurance of due process of law in legal process.

This is not the full catalogue of rights of the American citizen. But it is at the core of America's government under the law. Protection of human rights has been a recurring theme in the international policy of the United States. It is hard to learn, uphold and enforce these rights at home, without drawing inferences for the rights of others, elsewhere in the world. The notions undoubtedly played a great part in the development of the United Nations Organisation and in the post-war effort to secure internationally agreed statements of human rights. President Ford appointed a Human Rights Co-Ordinator. President Carter has made the protection of human rights a corner stone of his foreign policy.

#### THE AUSTRALIAN DEBATE

We in Australia do not have a Bill of Rights in our Constitution. The adaptation of the United States Constitution muted the originality of our Founding Fathers. They adopted its written form, its federal structure and the limitation upon the powers of the central government. But they did not copy the United States model in three important particular respects. First, because we had no revolution, the Australian federal union was established as a monarchy under the Crown of the United Kingdom. Secondly, the principle of responsible government was adopted, so that our Ministers sit in the Parliament and are responsible to it. Perhaps most significantly, they did not copy the incorporation



of a catalogue of rights, after the pattern of the United States Bill of Rights.

True it is, the Australian Constitution included certain statements of right. Thus, section 51(xxxi) ensures that if the Commonwealth acquires property it shall do so only "on just terms". Section 80 purported to guarantee trial by jury but only for trials "on indictment". This has proved a puny protection for it was held that the provision does not imply that any offence will necessarily be tried after the formality of an indictment. By reducing indictable offences, trial by jury is reduced.

Section 116 provides certain limitations upon the Commonwealth's legislating in respect of religion. Decisions so far suggest that this is a very circumscribed protection. However, there is currently before the High Court of Australia a challenge by the organisation known as Defence of Government Schools. It contends that the payment of funds to church schools offends section 116 of the Constitution. Time will tell whether there is more life in the section than was previously thought.

These exceptional provisions aside, it must be said that the Australian Constitution contains few general statements of civic rights, especially when contrasted to Constitutions of other lands. At the latest count, 108 national Constitutions of the world provide for a Bill of Rights after the American model. Thirty nine do not. Of course, the provision of a written Bill of Rights is no guarantee that the rights will in fact be protected. Many of the countries with a written list would not be regarded as right-asserting and right-protecting, according to our standards. The point for present purposes is that our Constitution, on paper, is exceptional in its failure to list the rights of the citizen enforceable in the courts. This does not say that our decision is wrong. It is simply exceptional.

The exception did not come by oversight. There was spirited debate in the Constitutional Convention as to whether a Bill of Rights should be incorporated. The debate was put to the test on a proposal to include a guarantee of due process of law in the Constitution. The proposal was supported by Mr. R. O'Connor Q.C. of New South Wales, later to be a High Court Justice. It was opposed by Isaac Isaacs Q.C., the Victorian Attorney-General. The issue was put to the vote and the proposal to include a guarantee of due process was lost by 19 votes to 23. The debate that had engaged Alexander Hamilton, Madison and the American Founding Fathers, was addressed by those who established our Federation. The result was different and it is perhaps for that reason that the debate is still with us today. There are still some who urge that we should establish an Australian list of guaranteed rights. Others would be content with legislation, short of constitutional amendment, guaranteeing certain fundamental rights. Still others oppose this general expression and say that the right way to go about protecting human rights in our country is by the passage of specific laws, possibly supplemented by the creation of a general watchdog, such as the Human Rights Commission.

#### THE DEBATE IN ENGLAND

It should not be thought that the recent revival of interest in the machinery for protecting human rights is a limited local concern. There has been a major debate in England over the past few years.

In November 1978, a report of the Select Committee of the House of Lords on a Bill of Rights was debated in the House of Lords. The initial resolution was that the report be noted. Proponents of a constitutional Bill of British rights proposed that the government "introduce the Bill of Rights to incorporate the European Convention of Human Rights into the domestic law of the United Kingdom". Lord Gordon-Walker and Lord Lloyd of Hampstead suggested that to do this would be to import "a new and formidable element of uncertainty into our law". Lord Scarman, on the other hand, criticised the inability of the general common law to handle

the complicated problems of today :

"The common law, marvellous as it has been in developing safeguards for human rights in certain fields, never succeeded in tackling the problem of the alien; never succeeded in tackling the problem of the woman and never succeeded in tackling the problem of religious minorities and it has in our day had to be supplemented by detailed legislation to ensure a measure of justice to racial groups".

House of Lords, Record of Debate, 29 November 1978, col. 1346.

Lord Hailsham pointed to the flood of legislation coming out of Parliament. He stood "unreservedly and solidly" behind Lord Scarman. By a majority of 56 to 30 the Lords adopted the resolution urging the government to introduce formal guarantees into the hitherto unwritten British Constitution. It will be interesting to observe whether an election campaign in the United Kingdom produces commitment, one way or the other, to a Bill of Rights in that country.

Quite apart from domestic debates of this kind in Britain, New Zealand and Australia (countries which have until now spurned the notion of a written list of rights) there have been great movements on the international stage. The European Commission on Human Rights in Strasbourg receives complaints against European Governments from individuals and other Governments. A recent "Stocktaking" on the success of the European Convention on Human Rights issued by the Council of Europe shows that the registration rate of individual applications has been rising steadily since 1967. It now numbers about 460 individual complaints a year. These cases are dealt with in the first instance by the European Commission on Human Rights. If sufficiently important, they are referred to the European Court of Human Rights. Countries bind themselves to bring their law into line with the obligations of the European Convention. As a result of decisions of this international court, domestic law and even the constitutions of European countries have been amended to

accord with rulings on fundamental protections for the rights of European man. Important cases have established the right to interpreters in criminal proceedings, have limited the length of detention on remand, and have laid down the principle of equality between prosecution and defence : a notion imported into European law from the English legal system.

In addition to this European Convention on Human Rights, the Council of Europe has produced more than 100 Conventions on such diverse subjects as extradition, the legal status of migrant workers, transplantation laws and the suppression of terrorism. For all their great differences of history, culture and language, the countries of Europe seem to be doing rather better at uniform law in appropriate areas than we are managing in the Australian federation.

On the international scene, there is the International Covenant on Civil and Political Rights. Australia, in a delegation led by Attorney-General Nigel Bowen, took a key part in the design of that International Covenant. We have signed it in December 1972. We have not yet ratified it. But ratification is the common aim of the present government and its predecessor. The Attorney-General has announced that Australia hopes to ratify the Covenant as soon as possible. Before doing so, it is discussing with the States, as the Prime Minister pointed out, the establishment of machinery that will translate the International Covenant from a fine statement of principles into something more effective. Senator Durack has persuaded all of the State Attorneys-General (and the Attorney-General for the Northern Territory) to take part in Ministerial meetings to discuss human rights issues. These meetings will provide a forum for Commonwealth and State Ministers to consider and discuss broad human rights issues. Some Ministers expressed reservations but Senator Durack indicated that he is confident that the meetings can do valuable work, particularly where there is an issue where uniform action may be needed on an Australia-wide basis. (1979) 4 Commonwealth Record, 109-110.

THE CONTROVERSY SUMMARISED

This, then, is the background for the controversy on human rights in Australia. Most of us would generally agree about the broad content of the "rights" of Australian citizens. The dispute in our country is not about whether there should be human rights or whether they should be protected but precisely what the rights are and whether they should be enforceable by a general charter or in some other way.

Opponents of the Bill of Rights (whether in a Constitution or in general legislation) repeat the arguments of Hamilton. People have their rights, unless Parliament specifically takes them away. We can trust the common law and the independent judiciary to protect us from the loss of rights. The free press and general prosperity are also guardians of our rights. Lists of rights tend to define and circumscribe. They can also get out of date as the United States right "to bear arms" illustrates. It is wrong in principle, say the opponents, to commit protection of such important matters to unelected and unaccountable judges. It is all very well if they define the rights correctly. But judges can err and it is more likely that Parliament will be sensitive to the changing needs of society than the remote judiciary, which is unaccountable for its work.

Supporters of the notion of a Bill of Rights say that Parliaments and Governments tend to steer clear of sensitive questions. They point out that such difficult issues as racial integration, police powers and abortion reform have only been dealt with in the United States because of the Supreme Court's ability to grasp the nettle where Congress has failed. They say that judges under our system are more likely to be cautious and that excessive fears of "judicial imperialism" are misplaced. They say that there is a moral and educative advantage in listing the agreed bases upon which we live together in our form of society so that these are put above politics and reinforce the "fragile consensus" necessary for the maintenance of democracy.

According to the supporters of the Bill of Rights, the real threat to liberties is not in a frontal assault but in the erosion of rights by overproductive Parliaments, enacting an ever-increasing flood of legislation which chips away at the freedom of the citizen. A Bill of Rights would at least put some matters, so it is said, beyond dispute.

This is not an easy debate to resolve. It is not for me to resolve it. The arguments both ways are forceful. Each side has merit.

#### ARE OUR RIGHTS AT RISK?

It is sometimes said that the debate about protecting human rights is a theoretical one in Australia because rights are not really at risk. But the view that the common law and the independent judiciary will be sufficient to protect and uphold important rights is sometimes open to doubt.

Take the protection of privacy. This is so important a right that it is contained in the constitutional guarantees of several countries. It takes on a new importance and urgency in the age of computing science. Our High Court, in 1937, was urged to assert and define a common law right to privacy. The Chief Justice of the time said that "however desirable some limitations upon invasions of privacy might be, no authority was cited which shows that any general right of privacy exists". Victoria Park Racing and Recreation Grounds Co. Limited v. Taylor (1937) 58 C.L.R. 479, 496. The Law Reform Commission has now been asked to develop, in detail, the principles for legislative protection of privacy, where the common law failed to provide the remedy.

More recently, we have seen further evidence of failure on the part of the common law. In Dugan v. Mirror Newspapers Limited (1978) 22 A.L.R. 439, the High Court, by a majority, held that Dugan could not maintain an action for civil wrongs in the courts of New South Wales. Dugan was a convicted prisoner. Many years ago he had been sentenced to death for the felony of wounding with intent to murder. The death sentence was commuted. He was later released on licence.

During his freedom he committed another felony. He was sentenced to 14 years' imprisonment. While serving this latter sentence, he commenced proceedings for defamation against a newspaper. The newspaper contended that a prisoner convicted of a felony and sentenced to death could not maintain an action for a civil wrong in the courts of New South Wales. It was alleged that this was the law of England inherited on the establishment of the Colony in Sydney. The defence was upheld. A person convicted and sentenced for a capital felony was declared precluded from bringing an action in defamation.

Of course, I say nothing of the legal principles which led to this conclusion. The fact remains that the decision stands in stark contrast to internationally declared rights and, I would venture to suggest, the opinion of most Australians concerning the proper limit of punishment and the deprivation of civil liberties. The Universal Declaration of Human Rights, for example, asserts that :

"everyone has a right to recognition  
everywhere as a person before the law".

(Article 6).

In the European Court of Human Rights the issue of a prisoner's entitlement to access to the courts was raised in Golder v. United Kingdom. In that case the court said :

"In civil matters one can scarcely conceive  
of the rule of law without there being a  
possibility of having access to the courts  
... The principle whereby a civil claim  
must be capable of being submitted to a judge  
ranks as one of the universally "recognised"  
fundamental principles of law".

One can abhor the crimes for which Dugan was convicted. One can accept that such crimes warrant punishment. But to deny access to the courts to a person on the ground that he is a prisoner convicted of certain offences is, I believe, unacceptable. Yet that is our law in New South Wales. There were no higher principles to which the Justices of the High Court could appeal. They felt their duty to be to enforce the law of 19th century England. In England this rule has

abrogated, as it has in several States by statute. In New South Wales, it is the law of the land and will be enforced in the courts. The Law Reform Commission in its work on the review of sentencing of Commonwealth offenders is examining this anachronistic rule so that federal offenders will be ensured a right of access to the Queen's courts. Lord Hailsham has said that the Banner of the West is the Rule of Law. There cannot be a Rule of Law without unfettered access to the courts of law. The loss of civil rights, in the sense of the deprivation of certain classes from access to the law, must be a matter of concern for all thinking people.

#### THE LAW REFORM COMMISSION'S ROLE

In the specific protection of human rights, the Australian Law Reform Commission has a particular role that is relevant to the present debate. There is a general provision in section 7 of the Law Reform Commission Act requiring the Commission, in preparing its reports, to ensure that its recommendations are consistent with the International Covenant on Civil and Political Rights. This is a novel provision in an Australian statute and it is one which the Commission takes seriously. The section was inserted on the resolution of the late Senator Greenwood. It is specially relevant because a number of tasks assigned to the Law Reform Commission by succeeding Attorneys-General have been of vital concern to the practical protection of human rights in our country.

The first task we had related to the implementation of a system of independently handled complaints against federal police. Our recommendations included the recommendation that the Commonwealth Ombudsman should be empowered to receive complaints, to investigate certain of them and to act as a guardian to ensure that complaints were vigorously investigated and fairly handled. It was also suggested that a special branch of police should be established and that an independent judicial tribunal should be created for the truly serious cases, short of the criminal. It was recently announced in Canberra that the basic scheme suggested by the Law Reform



Commission would be adopted for application to the Federal Police of Australia. It has already been accepted by legislation in New South Wales. Some parts of the scheme have been adopted in Victoria, South Australia and Queensland.

Our second report on Criminal Investigation required us to review the procedures of federal police in the investigation of crime. There can be no more critical time for the rights of the subject and for taking those rights seriously, than when a person is under suspicion and interrogation for a criminal offence. A common theme of our report was the adoption of new means of science and technology to set at rest some of the disputes that presently plague criminal trials. The adoption of the tape recorder at police stations will, it is believed, settle many of the disputes concerning alleged confessions to police. The adoption of videotaping and photography of identification parades will dispose of some complaints about identification evidence. Judicial superintendence of arrest and search warrants by telephone is a novel suggestion that has now been adopted in the Northern Territory, where distance, as in Western Australia, is a relevant factor. Special protections were proposed for disadvantaged groups. Parents should be present when children are interrogated. Interpreters should be present where the interrogation is of people who are not fluent in English. Aborigines who are disadvantaged should have a "prisoner's friend" present. All of these proposals were accepted by government. An important Bill was introduced by Attorney-General Ellicott. It was the Criminal Investigation Bill 1977. Attorney-General Durack has said that he hopes to reintroduce the Bill, with some amendments, this year. It is a "major measure of reform". It commits the balance between protecting the community and protecting individual rights to the judiciary who are empowered to exclude evidence wrongfully obtained contrary to the new code.

Already, in advance of federal legislation, some of the proposals have been adopted in New South Wales and the Northern Territory. I believe we will see a new code for the

federal police which will modernise police practice and make it available to all persons in our country. Such rules should not be hidden away in police instructions or English casebooks. It is appropriate for me to pay tribute here to my former colleague, now Senator, Gareth Evans. As a Commissioner of the Law Reform Commission, before his election to the Senate, he took a major part in the work which led to the report on Criminal Investigation, the basis of the Criminal Investigation Bill.

There are many other tasks which the Law Reform Commission is examining relevant to the protection of human rights. Our task on debt recovery, for example, addresses itself to the fact that in some parts of Australia persons are still imprisoned for civil debts. This practice runs counter to the principles of the International Covenant on Civil and Political Rights. If people are guilty of criminal conduct and are deliberately avoiding their debts, that is one thing. It is quite another (and most would think counter-productive) to threaten and actually carry out imprisonment of persons for failing to meet their debts. In the Credit Society, and especially in a time of unemployment, debt default can occur without intent. The law should recognise the realities of today's credit community.

The Commission's task on privacy protection will seek to establish rules that defend the claim of the individual to a zone of privacy. The task we have on class actions and standing address the question: What is the proper role of the courts? Is it appropriate that we should limit access to the courts to persons with a particular, pecuniary interest of their own in litigation? Should it be enough to be a citizen to be able to challenge legislation in the High Court of Australia? At present, it is not enough. Some particular personal involvement must be shown to move the court. It is not so in other countries, where it is considered that being a taxpayer is sufficient "interest". The reference on standing and the task on class actions require the Law Reform Commission to define the proper future role of courts and judges.

Two of the most recently received references from Senator Durack fix a deadline for report and in each case a report must be delivered in 1980. The first relates to the reform of sentencing of Commonwealth and A.C.T. offenders. Is it appropriate that judges should receive training before they tackle the task of sentencing? Should offenders in all parts of the country receive roughly the same punishment for a Commonwealth offence and if so how should greater uniformity be brought into the criminal justice system? What is the true purpose of punishment : is it to deter others? to vindicate society and secure retribution? or is it to rehabilitate the offender? Does it have all of these purposes and if so are they consistent?

These questions also arise in our recent assignment on child welfare laws. In today's society it seems inapt that a child should be charged with being a neglected child, yet in some jurisdictions, notably the A.C.T., that legal fiction persists. Important steps have been taken in South Australia and Western Australia to diminish the intimidation of the child welfare laws and procedures. These are under close scrutiny by us for their application in the Capital Territory.

#### OTHER INITIATIVES ON HUMAN RIGHTS

The Law Reform Commission is not the only vehicle for promoting laws for the practical protection of human rights by specifics, not generality. A number of initiatives have been taken by successive Commonwealth Parliaments to deal with the special problem of human rights as against the bureaucracy. More damage may be done, in quantum, to human rights over the bureaucratic counter than in police stations and gaols. With the growth of government and of the services and facilities it is expected to provide, more checks are needed to uphold the position of the individual. In his statement in Parliament on 21 March when referring to the establishment of the Ombudsman, the Administrative Appeals Tribunal and other provisions, Mr. Fraser could have mentioned the Administrative Decisions (Judicial Review) Act 1978. This Act, which has passed through Parliament (but which is not

yet proclaimed) establishes important rights to judicial review in the Federal Court. It submits bureaucratic decision-making to the test of lawfulness and correctness. It also requires that Commonwealth officers give persons affected by decisions the reasons for decisions that are adverse to them.

The Freedom of Information Bill is another important initiative, being the first effort by a Westminster Parliament to grapple with the problem of the individual's right to break down the secrecy that has hitherto permeated government in this country. Other initiatives are planned. They include, as has been stated, the establishment of a Human Rights Commission. This will be a federal watchdog, which will scrutinise laws of the Commonwealth to ensure that they do not offend against the internationally declared standards set out in the Covenant on Civil and Political Rights :

"Under the legislation individuals or groups who consider their rights to have been violated will be able to take their complaints to the Commission to seek redress. The Commission will have the power to report on laws and practices which may be inconsistent with the International Covenant, on laws that should be passed and any other action that should be taken by the Commonwealth in relation to human rights".

Senator Durack, (1979) 4 Commonwealth Record, 109.  
All of these are important initiatives and I believe they have not been sufficiently drawn to attention. It is reassuring that although differences exist as to the means of protecting human rights, there is a broad consensus amongst all the Parties in the Australian political system, at least at the Commonwealth level, that new machinery is needed and that this machinery should take as its guiding star international statements of civil rights, including the International Covenant.

HUMAN RIGHTS IN AUSTRALIA & THE INTERNATIONAL COVENANT

We tend to assume that we in Australia have an impeccable system of legal protection for human rights which is second to none in the world. In short, we are apt to think of our legal protections for the human rights of Australians as a happy blend between British justice and the Australian "fair go". This illusion is a dangerous one. There is no doubt that our legal protections fall short, in many respects, of internationally accepted standards. That is not to say that we are significantly worse than most countries in the protection of human rights. Far from it. But there is no room for complacency.

Because of the Law Reform Commission's statutory obligation to test its proposals against the International Covenant on Civil and Political Rights (even before Australia has ratified the Covenant) close attention has been paid in the Commission to the terms of the Covenant and to the extent to which current Australian laws and practices measure up to its requirements.

In our project on the reform of the law governing the sentencing and punishment of Commonwealth and Territory offenders regard has been had to a number of Articles of the Covenant. Article 7 forbids "cruel, inhuman or degrading treatment or punishment". Yet there is little doubt that conditions in some Australian prisons could be seen as "cruel" and "degrading". One judge recently wrote to me, in this connection, that the average Australian would be horrified if he knew the condition of most of our prisons. Whilst mental health laws have been reformed and twenty years ago we reformed the 19th century lunatic asylums, the 19th century prisons remain. A television programme is current at the moment which presents a women's prison as a shiny, laminated, automated, hospital-like institution. The great majority of our prisons bear no relationship to such a place as the Nagle Report vividly terrifies.

Article 9(3) guarantees anyone arrested on a criminal charge that he will be "entitled to a trial within a reasonable time or to release". Whilst we do have bail pending trial in Australia, and have recently enacted reforms, some of them based on the Criminal Investigation report of the Commission, there is no legal entitlement to trial within a reasonable time. Long delays before criminal trial are becoming increasingly common in some States. This is especially burdensome if bail is refused.

Article 10(2) requires that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and subject to separate treatment, appropriate to their status as unconvicted persons. Prisoners on remand in Australia are generally kept separate from convicted prisoners. But the conditions of some remand centres, particularly those at Pentridge, are such that their treatment could not fairly be said to be "appropriate to their status as unconvicted persons".

Article 10(3) requires that a penitentiary system shall comprise treatment of prisoners "the essential aim of which shall be their reformation and social rehabilitation". Although reformation and social rehabilitation are one aim of the Australian prison system, it would be hard to describe these as the "essential" aim. The predominant goals in Australia are, rather, the protection of society and the punishment of offenders.

Article 14(3)(b) requires that in the determination of any criminal charge against him, everyone shall be entitled to certain "minimum guarantees". One is "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing". The limited visiting entitlements of inmates in most prisons hamper the opportunity for communication with legal advisers. The fact that Capital Territory prisoners are sent to New South Wales prisons, a long way from their home, restricts, in practical terms, their ability to communicate with counsel of their own choosing, when on remand awaiting trial or when awaiting an appeal hearing.

Article 14(6) requires that where a person's conviction is reversed or he is pardoned on the ground of miscarriage of justice he shall be compensated according to law. In Australia there is no legal right to compensation, although often an ex gratia payment is made.

Article 25 guarantees that every citizen shall have the right and opportunity without distinction or unreasonable restriction to take part in public affairs, vote and have access to public service. Prisoners and ex-prisoners in Australia may be permanently disqualified from eligibility for jury service. They are unlikely to be employed in the Public Service of most of the States, if sentenced for a serious offence, even after they have served their punishment. They are subject to disqualifications, some of them provided in the Constitution, in respect of standing for election to Parliament. The Senate Standing Committee on Constitutional and Legal Affairs is currently examining the constitutional provisions in this regard. In all jurisdictions except Tasmania (where restrictions are even more rigid) a person sentenced to imprisonment for 12 months or more loses his right to vote whilst serving his sentence. Although other prisoners are theoretically entitled to vote, in practice voting facilities are often not made available to them.

Many other provisions of the Covenant are relevant to the work of the Law Reform Commission. Some of them have been identified. Article 11 forbidding imprisonment for a civil obligation has already been mentioned in connection with our efforts to reform Australia's debt recovery laws. Articles 17, 18, 22 and 24 are relevant to the project on privacy protection. Article 26 guaranteeing equality without discrimination before the law is relevant to the discriminatory provisions in insurance contracts and is under consideration in connection with the Law Reform Commission's inquiry into insurance. Articles 14 and 26 are relevant to the project on child welfare. Article 26 is also relevant to the project on access to the courts and class actions. A great number of provisions in the

International Covenant are critical to the report on Criminal Investigation, which has already been mentioned.

Perhaps the most difficult issue facing us is the extent to which the standards applied in the International Covenant are apt for application to the recognition and enforcement of Aboriginal customary laws. Article 1(1) of the Covenant guarantees all people the right of "self-determination" by virtue of which they may pursue, amongst other things, social and cultural development.

Until now the Australian legal system has paid little regard to the laws and customs of traditional Aboriginals. We have proceeded to enforce our notions of justice and fairness through our institutions applying our laws. This attitude is widely condemned today as an arrogantly ethno-centric one. It is seen as out of keeping with the desirability of permitting diverse groups within the Australian community to preserve and develop their own cultural identity.

Nevertheless, the endeavour to recognise and provide for the enforcement of Aboriginal customary laws runs into problems with the International Covenant on Civil and Political Rights. Article 2, for example, requires that rights should be ensured to all individuals within its territory and subject to its jurisdiction "without distinction of any kind such as race or colour ...". Article 3 seeks to guarantee equal rights of men and women. In the view of some, Aboriginal customary laws provide women with an inferior standard of protection. Article 7 forbids torture or cruel, inhuman or degrading punishment. Yet a typical punishment of customary law is spearing through the leg or thigh.

Article 18 guarantees freedom of religion. But Aboriginal law is itself based upon and inseparable from religious beliefs. Article 23(3) forbids marriages to be entered into "without the free and full consent of the intending spouses". Although a tribal Aboriginal may have



a very limited choice of spouse, because of relevant taboos, there is some evidence that Aboriginal girls may be "married" before reaching puberty without what we would describe as "free and full consent".

There are very many provisions of this kind. They simply serve to illustrate the difficulty of applying to this problem internationally agreed standards of human rights which originated in Western Europe and which some have challenged as "ethno-centric", i.e. peculiar to our culture.

The moves towards an accord between the Commonwealth and the States that will permit Australia to subscribe to the International Covenant promise a revival in the human rights debate in our country. The provision of new machinery for the protection of human rights will almost certainly concentrate attention on the definition and meaning of those rights. This is a healthy debate for a civilised society. Though there are acute differences between our political leaders on many things, including the precise way in which human rights may best be protected and advanced, it is reassuring that on the fundamental question there is harmony. There is agreement at the national level between Government and Opposition that the International Covenant should be signed by our country. There is agreement that new protections are needed in domestic Australian laws. There is agreement that we should test the Commonwealth's legislation against the internationally agreed standards. That there is disagreement about machinery may, in the long run, be less important.