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THE AUSTRALIAN SOCIETY OF LABOR LAWYERS

14TH ANNUAL NATIONAL CONFERENCE

MELBOURNE 23 MAY 1992

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HUMAN RIGHTS - EMERGING INTERNATIONAL MINIMUM STANDARDS

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The Hon Justice Michael Kirby AC CMG*

A SLEEPING CONTINENT

Progress and human prejudices: The bomb dropped at Hiroshima caused a flash, described as brighter than a thousand suns. In an instant the world was changed. The problem for the coming century is to illuminate the mind of humanity with the message of Hiroshima and of the other technologies for which the mushroom cloud is the symbol.

Intercontinental jets, international, instantaneous telecommunications and novel global challenges (such as HIV/AIDS) demonstrate to the rational mind the commonality of human concerns on this vulnerable, blue planet. They suggest the imperative need to build a real new world order. In truth, we can see in shadowy outline the beginnings of a framework for world government. In the United Nations *Charter*, it is anchored firmly in the bedrock of universal human rights.[1] In the exposition of basic human rights and in the creation of national, regional and international machinery for its protection, our world has made important strides

since Hiroshima. A network of inter-related international and regional statements of basic rights has been adopted. Any visitor to Geneva, Paris, Strasbourg or New York will see the ready evidence of the busy work of the agencies of international government which expound the minimum standards and measure the performance of individual countries, against such standards.

Yet the capacity of the human mind to progress in harmony with great leaps of technology is notoriously limited. Before anaesthesia, it was the skill of the surgeon to remove a limb in a matter of seconds. It took a decade after the advent of ether to adapt general surgical skills to the new environment of the operating theatre. The termination of the Cold War should have liberated the planet for a new era of human rights. Some progress has certainly been made. But in all too many regions of the world we see a return to 19th century nationalism, to the renewed ascendency of local group identity and to the discrimination against minorities left over from the vast Soviet empire which has so quickly collapsed.

In a conference on the rights of minorities held in Tallinn, Estonia in January 1992, I heard many calls for the expulsion of Russian and other ex-Soviet peoples from the Baltic republics. Few people in Australia have any conception of the huge movements of populations forced by political events in earlier times on the face of Europe and other continents.[2] Since Hiroshima, we in Australia have received the overflow of some of these movements. But in our antipodean dreamland, behind stern immigrations laws, we have been immune from most of the suffering. The revival of nationalism, and its melancholy companion, populist politics, comes at a time when technology beckons humanity to a new, international prospective of human destiny. Yet even in our own land, with its many achievements of multicultural diversity, we have lately been diverted into a call

back to nationalism which is frankly old-fashioned and immediately popular in some circles for that reason.

It is vital to see the themes of which I will speak in the context of this large canvas. It is a common jest about lawyers that they sharpen their minds by narrowing their focus. Yet unless the mind perceives the great mosaic of international developments, stimulated by global technology, the outdated narrow focus will persist. Intellectual liberation comes from a perception of the speed with which international human rights principles, developed, stated and applied by international agencies, have begun to influence local law-making.

No Bill of Rights; no Treaty: In my professional career, as an Australian lawyer, I have seen this change and the beginnings of its impact on the laws of Australia. In a small way, I have participated in the change and continue to do so. The major *stimuli* to the concretisation of international minimum standards available in our countries are missing from Australian domestic law. There is no regional charter of human rights equivalent to the *European Convention on Human Rights*, the *American Convention on Human Rights* or the *African Charter on Human and Peoples' Rights*. Accordingly, there is no regional court or commission, external to Australia by which, under a treaty or otherwise, our jurisprudence can be obliged to conform to basic minimum standards of human rights. One of the most interesting developments for a common law lawyer to observe at this time is the way in which law in the United Kingdom (from which so much of Australian law is derived) is now being criticised and altered following complaints which lead to the measurement of that law against regional and international standards. In important respects, English law has been found to fall short of acceptable minimum standards in matters such as freedom of

expression; prisoners rights; discrimination against homosexuals etc.[3]

There is talk about a regional human rights convention for Asia and the Pacific and a court to go with it. The speed with which changes occur in international affairs today makes it impossible to deny absolutely the prospect of a similar development in Australia's region. But the chances appear thin, not least because of the many abuses of human rights by the governments of newly independent countries in the Asia/Pacific region. At least in the North Asia, it is also relevant that Confucian attitudes inculcate notions favouring the community over the individual; duties over rights; and the rule of men of virtue over the just rule of law.[4]

Nor have we in Australia had the stimulus of a national bill of rights, to provide the vehicle for the importation of the developing jurisprudence of human rights emerging from international agencies: most especially the European Court of Human Rights and the United Nations Human Rights Committee. In 1989 Chief Justice Mason pointed out that Australia and New Zealand were virtually alone in standing outside the movement to provide for constitutional guarantees of human rights.[5] Since that time, the New Zealand Parliament has enacted the *Bill of Rights Act* 1990 (NZ). The courts of New Zealand are now busily engaged in applying that important charter. Although not constitutionally entrenched, its impact, already, is significant.[6]

Even in Hong Kong, on the eve of an otherwise shabby capitulation and withdrawal of the British crown without adequate measures for the fundamental right of self-determination and self-government,[7] the departing colonial rulers have provided a Bill of Rights which effectively introduces into the domestic law of the colony key provisions of the *International Covenant on Civil*

and Political Rights (ICCPR). Notably excluded are those which relate to self-determination and self-government.[8] But most of the basic rights in the ICCPR have been made part of the law of Hong Kong.

So here we are in Australia, a sleeping continent. Always the great south land: the victim of the tyranny of intellectual distance, doing it, as usual, our own way. But not quite. For, in legal terms, our own way is all too often living in the past. We continue to apply concepts of law developed in England earlier in the century and before, at times when our international position was quite different from what it is now and before the impact, especially following Hiroshima, of the movement towards the internationalisation of human rights.

There are, of course, notable exceptions to this somewhat bleak landscape. Some of them represent significant achievements of Labor governments at the Federal level. I refer to the *Racial Discrimination Act* 1975 (Cth) which implemented in Australia the *International Convention on All Forms of Racial Discrimination*. I refer also to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth). That Act replaced the Human Rights Commission established under the Fraser Government's *Human Rights Commission Act* 1981 (Cth). It established the new Commission with wider powers. These include the promotion of an understanding and acceptance and public discussion of human rights in Australia and scrutiny of Australian laws to ascertain whether there are inconsistencies with various specified international instruments of human rights including those set out in the five schedules.[9] Also relevant now is the *Sex Discrimination Act (Cth) and the Affirmative Action (Equal Employment Opportunity for Women) Act* 1986 (Cth) designed to give effect to the *Convention on the*

Elimination of All Forms of Discrimination Against Women.

But what we still lack in Australia are general normative rules to which we can appeal to in the courts and use in the daily work of Australian lawyers. Our courts have rejected the notion that there are rights which run so deep that even Parliament cannot override them.[10] I support that rejection. The notion has no legitimacy in our democratic system. It elevates the judges, by their own say-so and without the authority of a constitutional or other law, to a pretention as to their functions which they should not assert without clear authority deriving from the people.[11] The recent attempt, at referendum, to secure the passage into the Australian constitution of human rights provisions did not even come close to the majorities required by s 128 of that Constitution. The Bicentenary referendum in 1988 could muster only 30.4% of the population to support the proposal to extend the right of trial by jury; to extend protection for freedom of religion and to ensure fair terms for persons whose property was acquired by any government. In not a single jurisdiction of the nation was a majority secured. The result bore out, once again, Professor Sawer's striking comment that, constitutionally speaking, Australia is a frozen continent.

It may be said that the Government's strategy and support for the 1988 referendum was wholly inadequate. The ground for bipartisan support was not properly laid. The campaign was muted and unimaginative. There are still some who call for persistence with the path of formal constitutional reform. But the record is sobering. Too much store should not be placed upon transient opinion polls, short of the one that ultimately matters.

On the grand scale, therefore, we appear to have reached something of a blockage in giving effect, in Australian law, to

emerging international minimum standards in human rights. Of course it is possible that all problems will suddenly fall away. Perhaps by the century of federation, our people will radically reform the Australian constitution, abolish the Commonwealth, establish an Australian republic, abolish the states, enlarge the powers of local government, entrench a treaty of reconciliation with the Aboriginal people and set in place a modern charter of rights, justiciable in the courts. Anything is possible. Whether all or any of these developments would be desirable may be debated. I suspect that most of our fellow citizens in Australia would not wish to absorb so many radical changes so quickly. Learned commentators may despair of the indelible conservatism of the Australian people. But Australians look about their country and compare it with other polities and rather prefer at least the broad features of what they presently see.

Attaining modest objectives: If this is the conclusion that is reached, the way ahead for the domestic application of emerging international human rights standards appears to involve a more subtle and piecemeal approach. More of the same. More international treaties ratified. More willing acceptance of the authority of international agencies established by such treaties to investigate complaints by individual Australians about suggested non-compliance of Australian laws and practises with such treaties. More jurisdiction to the Human Rights and Equal Opportunity Commission under such treaties to investigate and identify local disharmonies with international law and to educate lawyers and other citizens in this country. Obviously, these are desirable developments.

Mr E G Whitlam, in a relentless pursuit of the Federal Labor government, has asserted that:

"*The Hawke government ... failed to keep pace with*

community aspirations in human rights; ... It may well be true that no nation has said more about human rights than Australia; it is certainly true that dozens of nations have done more about human rights and have done so more promptly and whole-heartedly. Australia is seen in Europe and Asia to be constantly making bilateral protests to other countries on human rights and constantly stalling on the most effective steps to bring human rights into a framework of international law."[12]

Mr Whitlam's assessment may be an overly harsh one and especially after the accession of Australia in September 1991, to the *First Optional Protocol* to the ICCPR. It is this accession which will permit the United Nations Human Rights Committee to receive, and deliver non-binding but highly authoritative opinions on, individual complaints which allege violation of rights recognised under the *Covenant* where domestic remedies have been exhausted and where no effective domestic remedy is available. The path to this important step was a long and tortuous one. Mr Whitlam deserves full credit for his single-minded pursuit of successive Ministers in their ultimately fruitless attempts to persuade all members of the Standing Committee of Attorneys General to agree to the step. Ultimately, only New South Wales and the Northern Territory held out. The Federal Government, as the international representative of Australia, went ahead and ratified anyway. Approbation must also be given to Senator Gareth Evans, to Mr Robert Tickner and to the Hawke Government for taking this bold step. Once taken, it is difficult to reverse. The full measure of its impact on Australian domestic law remains to be seen. To this subject I shall return.

For the moment, I wish to examine the two ways in which Australia's domestic law may be stimulated, and where necessary changed, by reference to the developing standards of human rights, formulated in international agencies. The first of these ways is relatively uncontroversial. The other is, however, the subject of

much controversy in legal circles in Australia and elsewhere. For each of them, I wish to draw upon my own experience. I do so not for the usual reasons of vanity but because my opportunities have provided me with an insight which I wish to share with Australian lawyers. I believe they have relevance for the development of our legal culture for the century to come.

The first involves the development, in international agencies, of principles which then influence highly specific areas of domestic law in ways which bring that law into harmony with internationally accepted principles. The second concerns the rôle of the judiciary (and hence of lawyers generally) in interpreting ambiguous legislation or filling gaps in the common law by reference to international human rights principles.

APPLICATION OF SPECIFIC INTERNATIONAL PRINCIPLES

Privacy: In 1975 I was appointed first Chairman (as the office was then styled) of the Australian Law Reform Commission (ALRC). The *Law Reform Commission Act* 1973 (Cth) contained in s 7 a provision unusual for Australian legislation, Federal or State:

> "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:*
>
> *(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*
>
> *(b) that, as far as practicable, such laws and proposals are consistent with the articles of the International Covenant on Civil and Political Rights."*

At the time this provision was enacted, Australia was not a party to the ICCPR. Still less had it accepted the jurisdiction of the Human Rights Committee established under the *First Protocol* to that

Covenant. Nevertheless, the criteria of the Covenant were accepted by Federal Parliament as a standard against which the work of the Commission should constantly be measured.

In the first task received from the Whitlam government (concerning complaints against police and criminal investigation) the preamble to the reference affirmed:

> *"(b) The commitment of the Australian government to bring Australian law and practice into conformity with the standards laid down in the International Covenant on Civil and Political Rights."*

The Law Reform Commission never took the commitment to those principles lightly. In discharging its first reference, regard was paid to the requirements of the Covenant.[13] However, in the light of my later knowledge of human rights jurisprudence, it would be honest for me to say that less attention was paid to the principles of the Covenant than might have been. Like other Australian lawyers, the Commissioners and the consultants were to a large extent cut off from human rights jurisprudence. In any case, in the 1970s such jurisprudence (at least in international *fora*) had not reached anything like the development which was later to come and is now such a feature of the international scene. For many Australian lawyers the 1970s (indeed many today) international principles, as stated in the ICCPR and elsewhere, were expressions of aspiration rather than actual principles of law. This thought has been expressed by Tom Campbell in these words:

> *"The language of human rights carries great rhetorical force of uncertain practical significance. This is both its persuasive strength and its legislative weakness."*[14]

In more sober terms, the same idea was expressed by Dawson J in the High Court of Australia in *Gerhardy v Brown*.[15] Writing of

the *International Convention on the Elimina... of All Forms of Racial Discrimination*, Dawson J explained:

> *"It is the obligation imposed by the Convention which gives rise to the legislative power on the part of the Commonwealth to enact special measures ... [T]he limitations are entirely understandable in the context of the Convention, which envisages that the issues raised may be adjudicated by the Committee or the Conciliation Commissions for which the Convention provides ... The subject-matter of the legislative power which the Commonwealth derives from the obligation imposed by the Convention upon it to take special measures is ... something different from the manner in which, or the purpose for which, the Convention requires the Commonwealth to exercise that power. This is of significance for it must be borne in mind that, except to the extent that the Commonwealth has exercised its legislative power with respect to that subject-matter, the exercise by the States of their legislative powers with respect to the same subject-matter has no relevant limits and is not subject to any of the requirements of the Convention.*[16]

The election of the Fraser Government in 1975 led to no deletion of s 7 from the *Law Reform Commission Act*. To the contrary, the electoral platform of the Fraser Government included a promise to refer to the Law Reform Commission an investigation into the Australian laws on privacy. When the reference to the Commission came from Attorney General R J Ellicott, it included a preambular reference to s 7 of the Commission's statute and specifically a reference to article 17 of the ICCPR providing that:

> *"No one shall be subjected to arbitrary or unlawful interference with his privacy."*[17]

The Commission's privacy reference was a major one. It ultimately resulted in a report on the brink of 1984. Meanwhile, a very interesting development took place which was to have consequences for the Commission's report and for my perception of the issue under examination.

Within Europe, the Scandinavian countries, collected in the

Nordic Council, evinced an early concern about the potential impact of the new information technology upon the protection of the privacy of the individual. This concern was expressed against the background of a number of international and regional instruments which had expressed the human desire for a zone of privacy as a basic human right. For instance, the preamble to the *Charter* of the United Nations had asserted the determination of the peoples of the United Nations:

> *"To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."*

Article 1 of that *Charter* had defined one of the main purposes of the Organisation to be:

> *"... to achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all."*

Article 56 of the *Charter* required all members of the United Nations to pledge to take action to achieve certain purposes, which included promoting:

> *"... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."*

It was pursuant to the mandate expressed in Article 55 of the *Charter* that the General Assembly initiated the steps which led in due course to the *Universal Declaration of Human Rights* (1948) and to the ICCPR (1966). Both of these referred to the right to privacy.

At the same time, and stimulated by the vivid recollections of the assaults on human rights before and during the Second World War and the peril to an interconnected world made plain by Hiroshima,

many European countries subscribed to the *European Convention on Human Rights* (1950). The creation of the machinery of the *European Convention* proceeded more rapidly than did that of the ICCPR. This was doubtless because of largely common ideals, fewer nations involved and the recent, shared recollection of the assaults on human rights in Europe.

It was against this background that the Nordic Council took its initiatives to develop principles on the special and new problems presented for privacy by the advent of computers and other information technology. Without delay, that initiative triggered action in the Council of Europe. It led to the adoption by the Council of a draft *Convention for the Protection of Individuals with regard to Automated Processing of Personal Data*[18]

The Organisation for Economic Cooperation and Development (OECD) has its headquarters in Paris. It is the successor to the institution established after the Second World War to re-invigorate the shattered economies of Europe (known as 'the Marshall Plan'). Its membership is no longer regional. It is now intercontinental. The core membership is constituted by the countries of Western Europe and North America (the United States of America and Canada). Subsequently Australia, New Zealand and Japan were admitted. The qualification for membership is that of an advanced economy and a shared commitment to democratic government and the rule of law. In such an environment, it was inevitable that human rights should, indirectly at least, become relevant to the members of the OECD. In the field of privacy there was a special problem, with economic implications.

The convention of the Council of Europe had begun to bear fruit in the enactment of national laws for the protection of privacy of automated data particularly in the Scandinavian countries. But fear

was soon expressed (particularly in the United States) that disharmonious laws on privacy protection would produce serious diseconomies arising from the attempt of individuals and corporations to conform to them. On the other hand, some European countries thought that common law jurisdictions such as the United States were remarkably insensitive to the perils to individual privacy arising from the new information technology. Out of these conflicting concerns arose the establishment, within the OECD, of an Expert Group on Transborder Data Barriers and the Protection of Privacy.

Because the Australian Law Reform Commission was in the midst of its project on privacy protection, a decision was taken in Canberra that I should be the Australian Government "expert" on this international privacy group. At its first meeting, I was elected chairman of the Group. Between 1978 and 1980, in a series of six meetings, the Group laboured over the preparation of basic Guidelines. It was hoped that these would strike the right balance between the protection of individual privacy (on the one hand) and the assurance of the legitimate free-flow of data so important to advanced economies (on the other).

The Guidelines, as adopted by the Group, were eventually commended to the Council of the OECD in September 1980. They were adopted with a recommendation addressed to member countries that they should take them into account in their domestic legislation; endeavour to remove or avoid creating, in the name of privacy protection, unjustified obstacles to transborder data flows; and cooperate in the implementation of the Guidelines.[19]

During the passage of the Guidelines through the Council of the OECD, Australia, in company with certain other countries abstained. Meanwhile, the work of the Australian Law Reform Commission on privacy protection in this country continued. It was highly

influenced by the OECD Guidelines. That was unsurprising, given my part in their preparation. When, eventually, the report of the Commission was produced, it contained recommendations and draft legislation which were, in turn, profoundly affected by the Guidelines of the OECD. In fact, as slightly modified, the OECD Guidelines were annexed in a schedule to the Commission's draft legislation.[20] The same basic concepts were preserved, namely that there should be restrictions on the collection, storage, access to, use and disclosure of personal information as well as a right to secure correction of such information where it was shown to be misleading, out-of-date, incomplete or irrelevant.

With the election of the Hawke Government in 1983, Australia withdrew its reservations to the Guidelines as adopted by the OECD. It indicated that it subscribed to the Guidelines. Moreover, when, eventually, the *Privacy Act* 1988 (Cth) was enacted, the OECD Guidelines re-emerged, in transmogrified form, as the "Information Privacy Principles" in s 14 of that Act. It is true that there are modifications and variations. It is also true that, to some extent, advances in technology have made some of the original wording of the OECD Guidelines outdated or at least complete. The lesson of technological change is that there is a constant need to monitor and update legislation applicable to technology. The ambit of the *Privacy Act* is still limited. The need for the expansion of the application of the OECD Guidelines into other areas of information management, beyond those provided for in that Act, is obvious. But for present purposes it is enough to note the way in which an interactive technology, whose very nature presented novel problems to the international community, stimulated one organ of that community to an initiative which led on to domestic law making in Australia and beyond.

We could, of course, have done it alone. But the mechanism chosen ensured that the Australian law enacted took advantage of the legal developments which had already taken place (principally in Europe). It also ensured that the disharmonies of legislation, which could cause economic inefficiencies and reduce the effectiveness of remedies applicable to international data flows, were minimised.

The Law Reform Commission closed its report on privacy with a note on "Human Rights and International Developments":[21]

> *"The international nature of the information technology, and its economic as well as human rights implications, are likely to direct the attention of the Australian Government in the future to possible acceptance by Australia of international obligations that impinge upon the domestic legal protection of privacy. General Commonwealth human rights legislation is proposed which will preserve for 'detailed piece-meal legislation' subject to areas such as privacy. There is no doubt that privacy is high among the concerns about human rights in Europe and North America. It is also a proper matter of concern in Australia."*

The forecast of further activities at an international level has proved accurate. In one of these I have also been involved. In 1991 the OECD established a new Expert Group on the Security of Information Systems. The fifth, and probably final, meeting of that Group will take place in Paris in June 1992. It is expected to complete the consideration of Guidelines dealing with data security. The motivation for the production of these new guidelines, with obvious implications for human rights, in a body with the economic mission of the OECD, is the same as that which initiated the highly successful Privacy Guidelines in 1978. Assaults on data security can be international. The need for effective legislation to deter, detect and redress illegitimate intrusions into data security requires the adoption of legislation reflecting principles held throughout the OECD community. Both in Australia and in the other member States of the OECD, the work of this Expert Group will

probably have a like impact.

It is interesting to observe the way in which experts, coming from different legal and (to some extent) political and bureaucratic cultures can reach consensus on fundamental principles which can then guide domestic lawmakers in the enactment of legislation which takes advantage of such principles. Nor should it be thought that the work of the OECD Expert Groups only had an impact in countries with a legal tradition similar to Australia's. In Japan, for example, the OECD principles are reflected in the *Personal Data Protection Act* 1988 which came into force in October 1989. Japan is a country which has been most concerned about the problems presented by the lack of effective international laws and policies on data security. It has shown a keen interest in, and support for, the work of the OECD Group working on the principles of data security.[23] Where technology is international, and especially where it is interactive, it seems likely to me that there will be more efforts of this kind to secure harmonisation. Because technology has such an important impact on human life (and hence human rights) today it is vital that international initiatives should reflect concerns to secure and protect basic rights so that these are, in turn, provided for in domestic legislation and not lost by a resigned acceptance of whatever technology brings.

Public health: AIDS: Between 1989 and 1991 I served as one of the foundation members of the Global Commission on AIDS (GCA) of the World Health Organisation (WHO).

The responsibility of the GCA is to advise the Director General of WHO on the overall strategy of that Organisation in dealing with a completely unexpected challenge to global health arising from the advent of the Acquire Immuno-Deficiency Syndrome (AIDS). The syndrome, which has already caused the death of hundreds of thousands

(and probably millions) of people in all continents, was first described in an authoritative medical journal a little more than a decade ago. It is generally believed that it is caused by a virus now known as the Human Immuno-Deficiency Virus (HIV). HIV suppresses the body's immune system. In the worst cases, it goes on to destroy that system, leaving the patient vulnerable to opportunistic infections which otherwise would be readily resisted.

The pattern and rate of spread of HIV and AIDS varies in different parts of the world. The effect of infection in an individual also varies; although in most cases it is believed that infection ultimately causes death or, at least, extremely serious consequences for health. There is at the moment no simple cure for HIV and AIDS. Some observers doubt that one will be found in the foreseeable future. Nor is there a vaccine to prevent infection; although, many scientists are more optimistic about the development of such a vaccine. Drugs are available which, in some patients, have the effect of slowing the rate of infection or helping them to respond to opportunistic illnesses. However, by any account, AIDS is a terribly serious threat to global health. Particularly in Africa, it threatens to undermine many of the medical, economic and social advances achieved by WHO and other agencies. There is now virtually no corner of the earth which is untouched by AIDS and the virus believed to cause it. Ease of international travel has made the rapid spread of the virus inevitable. In this sense, it is truly a public health condition of the late 20th century world.

The main modes of transmission of HIV/AIDS are through sexual intercourse; blood transfusion; intravenous drug use; and perinatally or neonatally (breast feeding) in the case of infants. The connection of HIV/AIDS with sex, drug-use and death has inescapably produced attitudes of fear from which are born attitudes,

laws and policies of discrimination. The particular connection of HIV/AIDS, in some parts of the world, with groups already discriminated against (homosexuals, bisexuals, intravenous drug users and prostitutes) has, in turn, produced demands for laws and policies designed to isolate still further such groups. Nevertheless, only in Cuba has a system of quarantine or isolation of persons with HIV been adopted. Only in that country and in pre-revolutionary Romania and parts of Russia have policies of universal mandatory screening of the population for HIV been put into force.

The rôle of the GCA, during the time I served on it, involved the protection of human rights of persons with HIV/AIDS, their families and friends. There is, of course, no human right to spread a virus of lethal potential. But the special dangers to human rights, in the wake of the AIDS pandemic, required special initiatives on the part of WHO which were in many ways novel even for that remarkably successful agency of the United Nations. The danger, especially in some developing countries (but not confined to them), was that laws would be adopted with little overall benefit to the containment of the epidemic but with serious consequences for the human rights of those affected.[24] Fortunately, in the first Director of its Global Programme on AIDS (GPA), Dr Jonathan Mann, WHO found an epidemiologist who understood the relevant basic norms of human rights and their relevance to HIV/AIDS.

For default of an instant cure or vaccine, WHO was thrown back upon the urgent necessities of behaviour modification. All lawyers know the difficulties of persuading people to modify behaviour - especially in matters such as sexual conduct and drug-taking. But no other strategy was likely to be successful. Except in the most remote regions of the world, strategies of quarantine and expulsion were likely to have little ultimate impact on the spread of HIV

whilst at the same proving extremely burdensome to human rights.

These were the messages which GCA, in harmony with GPA, spread through the network of WHO.[25] By the effects of their decisions and recommendations, these organs of WHO influenced, in turn, the policies and health laws of member countries throughout the world. The message of WHO was clear and simple. It was that laws and strategies for the containment of HIV/AIDS should be based not on prejudice and discrimination but upon empirical data concerning the nature and spread of the epidemic. They should rest on a clear understanding of the modes of infection. Approached in that way, WHO asserted that there was no disharmony between halting the spread of the epidemic and respecting basic human rights. Indeed, the only real hope of securing the cooperation of individuals in their own protection and that of others was by the assurance of their rights. Only in this way could the important messages about HIV/AIDS be transmitted effectively to those most at risk. In that sense, respect for human rights sustained the public health strategies which WHO advocated.

In Australia, under the leadership of the Health Minister Dr Neal Blewett, Federal laws and policies were adopted which, generally speaking, conformed to the WHO standards. Some States proved more reluctant, notably Tasmania which has adhered to the wholly counterproductive strategy of criminalising homosexuals. This is akin to criminalising people who are left-handed. It is wholly intolerable on human rights grounds. But it is also inimical to a successful strategy against the spread of HIV/AIDS.

The WHO programme has included expert groups quite similar to the OECD Expert Groups on privacy and data security on which I have served. One of these concerned the special problem of AIDS in prisons. In 1987, GPA summoned a meeting of specialists from

twenty-six countries to Geneva to draw up guidelines to influence the policies of prison officials throughout the world. At the end of the consultation, a statement, reached by consensus, was approved.[26] This is a common procedure adopted by WHO to provide guidance to member countries from the international pool of talent and expertise available for dealing with major world health problems, such as AIDS.

The Prison Guidelines drew attention to the special risks of intravenous drug use, prostitution and "situational homosexual behaviour" in the prison environment. They laid down a number of rules including in relation to the education of the prison population about HIV/AIDS and its modes of transmission. The expert report noted:

> *"Homosexual acts, intravenous drug abuse and violence may exist in prisons in some countries in varying degrees. Prison authorities have the responsibility to ensure the safety or prisoners and staff and to ensure that the risk of HIV spread within prison is minimised. In this regard, prison authorities are urged to implement appropriate staff and inmate education and drug user rehabilitation programmes. Careful consideration should be given to making condoms available in the interests of disease prevention. It should also be recognised that, within some lower-security correctional facilities, the practicability of making sterile needles available is worthy of further study."*

Perhaps more boldly the experts concluded:

> *"Governments may wish to review their penal policies particularly where drug abusers are concerned in the light of the AIDS epidemic and its impact on prisons."*[27]

Advocates of reform of correctional services practices in Australia have latched onto these WHO recommendations to stimulate changes in Australian prison policy. Such principles, coming from an international agency of the highest repute, have assisted advocates who have urged the provision of condoms and the availability at least

of cleaning bleach for such needles as exist within the prison community. That such instruments for drug injection exist is clear. Unless prison authorities can guarantee a total removal of such instruments from the prison environment, they have a plain moral responsibility to afford protection to prisoners and those in intimate contact with them.[28]

Amongst the other activities of WHO, by which the influence of its opinions is exerted, are regional workshops. One such workshop was held in Seoul, Republic of Korea, in July 1990. In my capacity as a member of GCA, I took part in the workshop. To it were invited public health and legal officials from Asian and Pacific countries: many of them on the brink of developing for the first time laws and policies to deal with HIV/AIDS. The features of the epidemic in the region were explored. But so were the strategies adopted by WHO. In the result, by consensus, a series of Guidelines were developed which laid out a checklist to be considered in the preparation of any legislation. That checklist, in turn, drew on the experience of countries further down the track, such as Australia. In this way, some of the more extreme (and, as it is considered, inefficient) legal responses to the epidemic may be avoided. Furthermore, by this procedure of regional consultation, the commitment of WHO itself to the protection of basic human rights in the midst of this epidemic, potentially so damaging to basic human rights standards, may be translated into positive action worldwide.[29]

I would not, by these remarks, wish to imply that Australia's record in respecting human rights in the face of the epidemic of HIV/AIDS has been perfect. On the contrary, numerous reports demonstrate the gaps in our own strategies.[30] Nevertheless, we have done better than in most earlier epidemics and than in many comparable countries. The consistent instruction of WHO, as the

international agency with a global responsibility for combating the AIDS epidemic, has helped to steady our course. It has provided an important source of support to politicians and administrators, sometimes faced with noisy calls to popular responses which are, at once, oppressive and ineffective.[31]

Labour laws: My most recent experience with the impact of international norms relevant to human rights has occurred in relation to the labour laws of the Republic of South Africa.

It arose out of my election to a Fact-Finding and Conciliation Commission on Freedom of Association of the International Labour Organisation (ILO). That body, the oldest agency of the United Nations, was actually established under the League of Nations by the Treaty of Versailles in 1919. The Commission of the ILO was established in 1950.[32] Its function is to examine such cases of alleged infringements of trade union rights as are referred to it, to ascertain the facts, to discuss with the government concerned any departure from ILO standards and thereafter to report to the Governing Body of the ILO. Where a Member country is a party to a Convention adopted by the ILO, a complaint may be investigated without consent. Where a Member country is not a party to the Convention concerned or where the state complained of is not a Member country, consent of the Government concerned is required before an investigation can take place.

In 1988, the Congress of South African Trade Unions (COSATU) lodged a complaint against the Republic of South Africa. Because that country had ceased to be a member of the ILO in 1966, it was necessary to refer the matter to the Economic and Social Council (ECOSOC) of the United Nations. South Africa remained a member of that Organisation. ECOSOC requested South Africa to give its consent to the COSATU complaint being referred to the Commission of the ILO.

Ultimately that consent was forthcoming. But not before the Government of South Africa had secured the enactment of reforms to its labour laws which, it claimed, removed the source of COSATU's complaint.

Essentially, COSATU's complaint was that amendments to the *Labour Relations Act* 1956, effected in 1988, had favoured and protected unions open only to white members. A number of complaints were also made relating to the alleged impingement by the Act upon the freedom to withdraw labour (or strike) guaranteed implicitly by ILO Conventions and, as it was put, by customary international law supported by those Conventions.

By the amending Act of 1991, the offending provisions of the *Labour Relations Act* were removed. The suggested source of racial discrimination in registering unions was repealed. The prohibition on sympathy strikes was also repealed. Other specific complaints listed by COSATU in its original invocation of the jurisdiction of the ILO Commission were attended to. The presumption of union liability for an illegal strike of its members was removed.

Nevertheless, as an aspect of the dramatic changes now proceeding in South Africa, the Government of that country ultimately agreed to a COSATU request for an expansion of the terms of reference of the panel of the Commission which the ILO Governing Body established. That panel comprised Sir William Douglas (past Chief Justice of Barbados and a member of the Privy Council); Justice Rajsoomer Lallah (Senior Puisne Judge of the Mauritius Court of Appeal) and myself. As expanded, the panel was mandated to:

> "... *deliberate on and consider the present situation in South Africa insofar as it relates to labour matters with particular emphasis on freedom of association.*"[33]

The result was a most interesting examination during three weeks in

South Africa of a vast amount of evidence relating to the law and practice of that country on industrial relations. Its purpose was to scrutinise South African law and practice against the established ILO standards. The principal relevant instruments on freedom of association to which the evidence and submissions of the parties were addressed included the *Declaration of Philadelphia* adopted at the General Conference of the ILO in 1944; the *Convention Concerning Freedom of Association and Protection of the Right to Organise* (No 87),1984 and the *Right to Organise and Collective Bargaining Convention* (No 98), 1949.

The findings of the panel of the Commission are contained in the report to the Governing Body of the ILO, just tabled. The Commission found that, in important respects, South African labour law (even as amended in 1991) fell short of compliance with the standards of the ILO which the government of South Africa agreed to "associate itself with". Particular attention was called to the need to provide, by law, for the rights of farm workers and domestic workers presently excluded from the operation of the *Labour Relations Act*. The strict limitations upon members of the public service joining unions of their choice were also found to conflict with ILO standards. Many of the rules governing the constitutions of trade unions (such as those prohibiting political affiliation) were held to be in breach of the ILO Conventions. The cumbersome procedure for registration of unions was found to be a potential inhibition upon freedom of association. The legal restrictions on trade union activities which date from the apartheid days, when the African National Congress was "banned", were found incompatible with ILO norms. So were some of the provisions regulating the right to strike and permitting Executive Government interference in the collective bargaining process.

The documented evidence of interference by South African state organs in the internal union affairs of unions in that country was cited as totally incompatible with respect for freedom of association as guaranteed by international law. Covert funding of pseudo-union bodies inimicable to COSATU was condemned as incompatible with the independence and freedom of trade unions provided for by ILO principles. The lack of protection to unionists in the so-called "Homelands", to which South Africa has purportedly provided varying measures of "independence" during the time of apartheid, was called to attention. South Africa remains responsible in international law for those Homelands and for compliance, within them, with internatinal law found in ILO standards.

The Commission emphasised that its conclusions were not based upon the personal opinions of its members. In every case, they were derived from the application to proved South African law and practice of the ILO Conventions mentioned above and certain other Conventions applicable to particular problems.[34] Also called in aid was the jurisprudence which has developed around these international conventions by the Governing Body decisions and the Recommendations and Findings of the Committee of Experts of the ILO on the Application of Conventions and Recommendations.[35] In this sense, the project was a normative one. The presentation of the report followed, therefore, a conventional pattern. The mandate of the Commission was explained. The evidence, as presented, was recounted. The findings on the evidence were recorded. Those findings were tested against the applicable ILO norms. Conclusions were then reached by reference to those norms. There followed a series of recommendations for action designed to bring the law of South Africa into conformity with ILO standards.

To some extent, the parties in South Africa, doubtless lulled

by four decades of apartheid, were content to allow the division of trade unions upon racial lines to wither away over time. But the Commission had a greater sense of urgency. Its recommendation on that issue was imperative:

> *"No trade union or employer's organisation should be entitled by law to limit its membership by reference to race. There should be a transitional period during which a special officer should be appointed with a statutory duty to facilitate, within a given time, the removal of all provisions whereby membership of such organisations, or the holding of office in them, is confined to persons of a particular race."*[36]

Such racially based unions were found to be completely incompatible with the implications of free association contained in the ILO Conventions.

I do not pretend that the report of the ILO Mission will be a major factor in the current changes occurring in South Africa. But it does seem likely to me that it will influence the shape of future reforms of the *Labour Relations Act* of that country. It interesting to observe the way in which the moral force of internationally accepted principles was accepted by all parties: as much by the Government of South Africa as by COSATU and employers' organisations. Whilst asserting some peculiarities of the local scene, the representatives of the Government, the unions and the employers acted upon the basis that it was highly desirable, if not imperative, to ensure that South African law and practice was brought into conformity with international principle. Within the changes that are occurring in that country, I would therefore expect the ILO Commission report to be highly influential. It provides a good example of the way in which international principles relating to basic human rights (such as the right of free association and to withdraw labour) can be translated into action by international machinery which had no ultimate effective sanction other than the

force of world opinion.

In closing this section it is perhaps worth noting that following the passage of amended *Labour Relations Act* in New South Wales, a complaint similar to that lodged by COSATU was sent to the ILO by the New South Wales Labor Council. In the event, the complaint was not upheld. No mission similar to that to South Africa was initiated by the ILO. But there is no reason of principle why, in appropriate circumstances, disconformity of Australian law from ILO standards should not be subject to similar scrutiny, and persuasion.[37]

Juvenile justice: In another field, quite recently, the suggested disconformity of an Australian statute with international standards became an important consideration in public and political debate.

I refer to the *Crimes (Serious and Repeat Offenders) Sentencing Act* 1992 (WA) enacted on the proposal of the Labor Government of Western Australia. The Government's Advisory Committee on Young Offenders immediately made it plain that provisions in the proposed legislation allowing the imprisonment of juveniles of the Governor's pleasure, were "in clear breach of article 44 of the *International Covenant on Civil and Political Rights*". The fact that the legislation was aimed at juvenile offenders as a discrete category was also said to raise a possible breach of article 56 of the *United Nations Guidelines for the Prevention of Juvenile Delinquency* 1990. Reference was further made to the *United Nations Convention on the Rights of the Child*, article 41, which dictates that any penalty must be consistent with the age of the child.

What it is important to note is that the need to ensure conformity to United Nations standards was not contested by the

Government of Western Australia. The Premier (Dr C Lawrence) justified the legislation upon the basis of the "deficiency in the UN Guidelines".[38] Within Australia, the most serious agitation against the legislation arose from the conviction of many that, in operation, the legislation was aimed expressly at the Aboriginal community.[39] In a letter written to me following representations made by me for the Australian Section of the International Commission of Jurists, the Premier acknowledged the need to have the legislation comply with the "various international obligations". She expressed the view that the Act was consistent with those obligations. Nevertheless, she indicated that the Act would be the subject of further report by a Committee of the Legislative Council of Western Australia.

The influence of the ICCPR and the newly ratified *Convention on the Rights of the Child* upon the shape of the ongoing controversy in Western Australia, is to be welcomed. In the event that disconformity continues, procedures are now available, in the first instance through the Australian Human Rights and Equal Opportunity Commission and subsequently through the Human Rights Committee established under the Optional Protocol to the ICCPR, by which individuals in Australia can complain about these suggested breaches of Australia's international obligations. Assuring such conformity has become a new factor in the political equation in Australia, wherever local legislation is deemed to depart from internationally accepted human rights standards. The sanction of access, ultimately, to the United Nations Committee, ensures that governments, and those advising them, will usually seek to conform to those standards. Where they do not, the advocates of human rights have an important new weapon in their armoury which they will not hesitate to use. In these indirect ways, Australia is finally

joining the international human rights movement. It is doing so without a formal Bill of Rights of its own or of its region.

DOMESTIC APPLICATION OF HUMAN RIGHTS BY JUDGES

The Bangalore Principles: During the past four years I have participated in a further series of meetings organised by the Commonwealth Secretariat concerned with the Domestic Application of International Human Rights Norms.

The first meeting was held in Bangalore, India in February 1988. It was convened by the former Chief Justice of India, P N Bhagwati. At that meeting were formulated the *Bangalore Principles*.[40]

The thesis of the *Bangalore Principles* is not that international legal norms on human rights are incorporated, as such, as part of domestic law. Still less is it that domestic judges are entitled to override clear domestic law by reliance upon such international norms. But it is that judges should not ignore such important rules, living in a blinkered comfortable world of judicial provincialism and jurisdictionalism. Instead, they should become familiar with the international norms on human rights. When appropriate occasions present (as in the construction of an ambiguous statute or the declaration and extension of the common law) they should ensure, so far as possible, that their statement of the local law conforms to the basic principles of human rights collected in international law.

Judges of the common law have choices. Their task is not mechanical. To exercise their choices, they must have points of reference or criteria. Choices should not depend upon the idiosyncratic whim of a particular judge. Where relevant they should be made, by reference, amongst other things, to fundamental principles of international human rights.

The second colloquium on the *Bangalore Principles* was held in Zimbabwe in April 1989. At the end of that meeting, the participants joined in the *Harare Declaration on Human Rights*. It contained the reminder that:

> *"Fine statements in domestic laws or international and regional instruments are not enough. Rather it is essential to develop a culture of respect for internationally stated human rights norms which sees these norms applied in the domestic laws of all nations and given full effect. They must not be seen as alien to domestic law in national courts."*[42]

The third meeting in the series was held in Banjul, The Gambia in November 1990. It resulted in the *Banjul Affirmation*. By this, the judicial participants accepted the *Bangalore Principles* and pledged their commitment to implementing them.[42] In this way, leading judges of the majority of Commonwealth countries accepted a simple idea. In most of the jurisdictions represented at this series of meetings, the domestic constitution already provides a vehicle for introducing the developing international jurisprudence of human rights. Many of the rights, collected in the post-colonial constitutional guarantees of Commonwealth countries, already reflect concepts similar to those collected in the ICCPR and in the regional human rights conventions. But the *Bangalore Principles* go further. They are particularly relevant to countries, like Australia, which have no such constitutional provisions.

The fourth meeting in this series conducted by the Commonwealth Secretariat was held at Abuja, the new capital of Nigeria, in December 1991. Present was a very large contingent of judges from all parts of Nigeria, the third most populous common law jurisdiction of the world. Also present were judges from other Commonwealth countries of West Africa. For the first time there was a judge from the civil law tradition (Brazil) and from the European Court of Human

Rights (the Hon Rolv Ryssdal, President). Also attending were judges of the Sharia courts of Nigeria: presenting a first opportunity in the series to examine the jurisprudence of international human rights from the perspective of the Sharia law.

At the end of the meeting, the judges unanimously adopted the *Abuja Confirmation of the Domestic Application of International Human Rights Norms*. By this, they reaffirmed the principles stated at Bangalore, reflecting:

> *"... the universality of human rights - inherent in human kind - and the vital duties of the independent judiciary in interpreting and applying national constitutions and laws in the light of those principles."*

According to the *Abuja Confirmation* the process envisaged by the Bangalore idea involves nothing more than use of the:

> *"... well established principles of judicial interpretation. Where the common law is developing, or where a constitutional or statutory provision leaves scope for judicial interpretation, the courts traditionally have had regard to international human rights norms, as aids to interpretation and widely accepted sources of moral standards. ... Obviously the judiciary cannot make an illegitimate intrusion into purely legislative or executive functions; but the use of international human rights norms as an aid to construction and as a source of accepted moral standards involves no such intrusion."*

The controversy: The use of international human right standards in this way, at least in Australia, is still controversial. What is not in contest is that such norms, unless lawfully incorporated into domestic law, are not by our legal theory part of Australian law as such.[43] The supporters of the *Bangalore Principles* have never asserted to the contrary. But it remains a question as to whether it is legitimate for Australian judges to have regard to human rights standards, expressed in

international conventions, either:

(a) where such conventions are ratified by Australia; or

(b) (even if not ratified) where the rules stated have come into force and have come to express international customary law.

Some Australian judges have taken the view that such statements of international principle are completely irrelevant to Australian law. They are mere exhortations or rallying cries. They are not legal norms to which any regard whatsoever should be paid in expounding or developing the law of Australia. Various justifications are given to support this stance. They include the potential tension between the Executive Government (which ratifies treaties) and the legislature (which gives effect in domestic law to their provisions).[44] Also relevant is the Federal nature of Australia's polity and the limited extent to which that basic feature of the Australian constitution may be undermined by the mere ratification of an international convention on human rights: still less where the rights in question have not been enacted as part of domestic law by a valid Federal statute and least of all where, for the default of federal law, no valid State law operates.[45]

These controversies in Australia reflect similar judicial and scholarly debates in other major common law jurisdictions, such as the United States and England. In the United States, by conventional theory, treaties are self-executing. They create rights and liabilities without the need for legislation by Congress.[46] However, a subsidiary question has lately arisen in that country as to whether, for the construction of the United States constitution, it is appropriate and permissible to have regard to the views of the international community upon the meaning and purpose of words which appear both in that constitution and in international instruments of

human rights. Specifically, the question has arisen as to whether the phrase "cruel and unusual punishment" in Amendment VIII to the United States Constitution imports to the jurisprudence of that country the learning which had developed around the same provision in international instruments and in other common law countries. In *Thompson v Oklahoma*[47] Stevens J endorsed the opinion (supported by Blackmun, Brennan, Marshall and O'Connor JJ) that:

> *We have previously recognised the relevance of the views of the international community in determining whether a punishment is cruel and unusual."*[48]

Scalia J (with whom Rehnquist CJ and White J concurred) dissented:

> "We must never forget that it is the Constitution of the United States of America that we are expounding ... Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the justices of this court may think them to be, cannot be imposed upon Americans through the Constitution."[49]

A year later in *Stafford v Kentucky*[50], with a change in the composition of the Court, Scalia J's opinion prevailed. He was joined in it by Kennedy J and, on this occasion, O'Connor J. According to commentators this has "cast a dark shadow over the internationalist *dictum* previously accepted by the United States Supreme Court". Brennan J's dissent in the later case, called in aid the fact that the death penalty for juveniles was prohibited by the *International Covenant on Civil and Political Rights*, the *American Convention on Human Rights*, the *Geneva Convention Relative to Protection of Civilian Persons in Time of War* and by other resolutions of agencies of the international community. But for the moment, Scalia J's "classical" or "statist" view has prevailed in the United States.[51]

The position reached accords entirely with the opinion of

Professor Robert H Bork:[52]

> *"The major difficulty with international law is that it converts what are essentially problems of international morality, as defined by a particular political community, into arguments about law that are largely drained of morality. ... A moment's reflection makes it clear that, in the real world, arguments about the 'morality' of the United States invasion of Granada could not [have weight in international law]. In order to be international, rules about the use of force between nations must be acceptable to régimes that operate on different - often contradictory - moral premises. The rules themselves must not express a preference for freedom over tyranny or for elections over domestic violence as the means of coming to power. This moral equivalence is embodied in international charters. The charters must be neutral and the easier neutral principle is: No force. The fact that the principle will not be observed by those who simply see international law as another foreign policy instrument does not affect the matter ... International law thus serves, both internationally and domestically, as a basis for a rhetoric of recrimination directed at the United States."*[53]

Similar explanations for the resistance to the utilisation of international law have been ventured in other legal jurisdictions. In Ireland, for example, it has been put down to cynicism about, and hostility to, the laws of foreigners; confusion about the binding force of international rules; and lack of information and training of lawyers in the applicable international human rights law.[54]

In Britain, the conventional or statist view has long prevailed. By and large, its courts have been uncomfortable in the world of human rights enforcement. Indeed, the record of the Judicial Committee of the Privy Council, as the ultimate appellate court for Commonwealth countries with entrenched human rights provisions, has been roundly criticised.[55] Approaching such rights by the "austerity of tabulated legalism" has produced sharp differences among the Law Lords themselves. Perhaps the most acute case recently illustrating this comment concerns the much delayed enforcement of capital sentences in Jamaica considered in *Riley v*

Attorney General of Jamaica.[56] A commentator, contrasting the clash of opinions of Lords Hailsham, Diplock and Bridge (on the one hand) and Scarman and Brightman (on the other) observed:

> *"Since human lives depended on this split decision, Riley is a deeply troubling authority. The head-on clash in the Judicial Committee seems to have been as deeply rooted as the split in the Law Lords over the role of the press in the first Spycatcher decision. Riley will surely have been reargued and reconsidered if the death row challenges that are now accumulating in Jamaica are to have a substantial chance of success in the future."*[57]

In fact, these cases were duly taken to the United Nations Human Rights Committee which accepted them and has considered them in ways more attentive to developments in international human rights law than the Privy Council majority evinced.

Nevertheless, in Britain's own courts there has more lately been a significant shift. In part, this is no doubt affected by a series of decisions by which conclusions were reached in the European Court of Human Rights critical of the results accepted by the highest English courts as expounding the law of England. In *Regina v Secretary of State for the Home Department; ex parte Brind & Ors*[58] a number of hints were given by the Law Lords that a Convention to which the United Kingdom has subscribed (in this case the *European Convention on Human Rights*):

> *"... may be deployed for the purpose of the resolution of an ambiguity in English primary or subordinate legislation."*[59]

In that case, no ambiguity could be found. But it was different in *Derbyshire County Council v Times Newspapers Limited*.[60] The question was whether a local government authority could sue for libel under the law of England. The English Court of Appeal held that it could not. Relevant to the reasoning of the judges was a

consideration of United States authority. Also relevant were decisions in Commonwealth countries, including Australia[61] about the importance of the basic right in a democratic society to criticise government action without unreasonable legal inhibition. Perhaps most critical of all were the perceived requirements of the provisions of the *European Convention on Human Rights*. It was held that these might be resorted to in order to help resolve *"uncertainty or ambiguity in municipal law"*.[62] Butler-Sloss LJ stated the principle thus:[63]

> *"Where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to [the convention] is unnecessary and inappropriate. ... Where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English Court is not only entitled but, in my judgment, obliged to consider the implications of [the Convention]."*

Australian law: - It might be said that the position reached, somewhat belatedly, by the English courts is itself a product of the United Kingdom's earlier adherence to the *European Convention on Human Rights*. There being no exactly equivalent regional Convention in Australia, to which litigants disaffected by Australian court decisions can have access, it could be suggested that the position in Australia is distinguishable. But I think not.

There is now, indeed, an avenue of redress open to Australians when they contend that the application of Australian law results in a breach of fundamental human rights standards. Having exhausted domestic remedies, they may complain to the Human Rights Committee established under the *First Optional Protocol* to the ICCPR. Many in the future will doubtless do so. Still more belatedly therefore, I expect Australian law, in this way, to come under the discipline of international human rights jurisprudence. Just as the English courts have had to consider the development of English law conformably with

European Convention law, I believe that our courts will come to the same conclusion in relation to the jurisprudence of the Human Rights Committee and other bodies which consider language analogous to that appearing in the ICCPR.

Before Australia adhered to the ICCPR and the *Optional Protocol*, I expressed the opinion, in a series of decisions of the New South Wales Court of Appeal, that it was entirely legitimate for an Australian court to have regard to the statements of universal rights contained in international law. I embraced exactly the same principle as has now been accepted in the English Court of Appeal. I took the applicable provisions of the ICCPR as the starting point of my analysis where the common law offers no binding authority on the point or where a local statute was ambiguous. The cases have included cases where a bankrupt was deprived of civic rights[64]; a litigant complained of apparent bias of a judge who had previously, as a barrister, enjoyed a retainer from the opponent[65]; a claim to have a trial on criminal charges without undue delay[66]; a claim of a deaf mute to have an interpreter present, translating the proceedings of the court even during legal argument[67]; and the right of a litigant in person to suffer no discrimination for the lack of a lawyer.[68] There have been many other cases.

Generally the other judges of the Court have opted for a different approach. Sometimes, they have found more attractive the "classical" or "statist" view which would bar even consideration of or reference to international human rights law by way of analogy.[69] On the other hand, more recently, there have been signs of a greater willingness of Australian judges to follow the course urged in the *Bangalore Principles*.

In the High Court of Australia, I believe that Deane J did so

in *J v Lieschke*.[70] Speaking extracurially, and since his retirement, Sir Ronald Wilson (formerly a Justice of the High Court of Australia) has expressed the following views:

> *"I suggest there is a more indirect, but nevertheless important, impact that must be taken into account ... [I]t is increasingly recognised that in appropriate cases international law may be of assistance notwithstanding that it has not been incorporated into municipal law. In cases involving statutory interpretation, where words to be interpreted are ambiguous or lacking in completeness, it will be right for the court to consider whether the case is one where the search for legislative purpose will be furthered by the assumption that Parliament would have intended its enactment to have been interpreted consistently with international law ..."*[71]

In one case in the Court of Appeal, Samuels JA felt it relevant to note that the ICCPR had now been annexed as Schedule 2 to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).[72] In dealing with the right of a mute to an interpreter, Samuels JA considered it useful to have regard to the standard, albeit established for criminal proceedings, contained in the ICCPR.

More recently still in the Family Court of Australia, Nicholson CJ (in a dissent later upheld by the High Court) recanted an earlier adherence to the "classical" or statist" view.[73] In *Re Marion*[74] Nicholson CJ revised that opinion. He concluded that the passage of the Federal *Human Rights and Equal Opportunity Commission Act* and its schedules constituted:

> *"... a specific recognition by the Parliament of the existence of the human rights conferred by the various instruments within Australia and, that it is strongly arguable that they imply an application of the relevant instruments in Australia."*

Marion was appealed to the High Court of Australia. In a sense, Nicholson CJ's opinion went further than the *Bangalore Principles* require. The obligations of those principles are neatly expressed by Butler-Sloss LJ in a passage in the *Derbyshire Council Case* which

I have cited. The High Court's decision in *Marion* casts no new light on the duty of Australian courts. But neither does it contradict the *Bangalore Principles*. I respectfully hope that in future cases, the High Court will offer guidance, pointing to the future of Australian law as part of the law of the emerging world community. The mechanical application of statist notions of law developed by English and Australian courts in utterly different international circumstances provides a very shaky foundation for the modern world in which Australian law must operate. In that world, Australia must find its part. In it, Australia's laws are now accountable to international agencies armed with a growing body of detailed jurisprudence and supported by the power of international opinion.

CONCLUSIONS

The recognition, expression and enforcement of human rights is a crucial element of the new world order which has followed the Second World War. In a small number of cases, international statements of human rights have been enacted as part of domestic Australian law, federal or state. But generally it is not so. Nor does Australia as a whole have a constitutional Bill of Rights to provide a ready means for importing the growing body of jurisprudence on human rights, as most common law countries may now do.

Nevertheless, there are two important vehicles which should be kept in mind.[75] The first depends upon the utilisation of the many international agencies with objectives relevant, directly or indirectly, to the protection of human rights. By reference to the OECD, WHO the ILO and the Human Rights Committee, I have illustrated the ways in which internationally accepted principles have come to influence domestic law, including in Australia.

It is likely, given the global nature of many problems today,

their complexities born of technological change, the incapacity of local laws adequately to deal with them and the need to avoid inefficiencies of incompatible laws, that there will be many more instances of such legal developments. They are not coercive. However, their influence derives from the high authority which is increasingly accorded to the opinion and advice of international agencies surpervising the elaboration and enforcement of human rights throughout the world.

The opportunities for most judges and lawyers to take part in such contributions to domestic law-making are necessarily limited. Much more promising, as a means of importing human rights principles into Australian domestic law by the activities of local judges and lawyers, is the acceptance of the simple idea contained in the *Bangalore Principles* and reaffirmed since at meetings of judges of Commonwealth countries in Harare, Banjul and Abuja.

Using principles of human rights, which have become part of international law to fill the gaps of the common law and to aid the interpretation of ambiguous legislation involves no heretical leap into the unknown. It is, in a sense, the inevitable consequence of submitting our legal system to the scrutiny of the agencies of the international community, such as the Human Rights Committee established under the *Optional Protocol* to the ICCPR.

We can, of course, simply persist in our own views whilst the United Nations Committee repeatedly tells us that our common law and statutory interpretation has departed from international norms of human rights jurisprudence. But it is much more likely that in Australia, as in Britain, our courts will, over time, seek to harmonise Australian common law with universal notions of fundamental human rights, as expounded by distinguished regional courts and by agencies of the United Nations. Any other view involves an attempt

to persist with notions concerning the sources of law appropriate to the days of Empire, long after the sun has set on the imperium and when Australia is seeking to find its proper place as a good citizen of the world community. It is akin to persisting with the horse and cart in the age of interplanetary flight, nuclear physics and the microchip. Only lawyers could be guilty of such blind folly.

Courts may, of course, adhere to their fancies and refuse to have anything to do with international human rights law until it is expressly incorporated into domestic law by valid local legislation. But I believe the time has come for the judges of Australia, supported by a legal profession knowledgeable about the international jurisprudence of human rights, to utilise that jurisprudence in helping to solve Australian legal problems. We should do so for reasons of principle, accepted by judges of the Commonwealth of Nations operating within the same intellectual tradition. But if we remain so blinkered that we still wait for the leadership of the English courts, we can now take our green light from some of the speeches in the House of Lords in *Brind* and from the even stronger recent statement of the English Court of Appeal in *Derbyshire Council*.

Judges, distracted by their busy court lists are often unfamiliar in this country with the great body of international human rights jurisprudence. Many are even unaware of the provisions of the principal instruments, including those to which Australia has adhered. It must surely be the rôle of enlightened, reformist lawyers of the next decade to lead the Australian judiciary into the 21st century by submissions which call that jurisprudence to notice, where it is relevant. And where appropriate, to urge its adoption to guide the development of the law of Australia. We must all become more internationalist in our outlook. This applies to us as

citizens. But it also applies to us as lawyers. The provincialism of lawyers generally, and of Australian lawyers in particular, is profoundly discouraging. We must do better in the years ahead. The means of doing better are available to us. They are comfortably orthodox and, by now, legally sanctioned. Yet, in Australia, they require boldness of spirit and determination to escape the bog of provincial jurisdictionalism. The lingering question is thus stated: Do Australia's judges and lawyers have the imagination and foresight to seize the opportunity that beckons them?

ENDNOTES

* President, New South Wales Court of Appeal. Chairman of the Executive Committee, and Commissioner, of the International Commission of Jurists, Geneva. Member of the Fact-Finding and Conciliation Commission of the International Labour Organisation on South Africa. Chairman of the OECD Expert Group on Security of Information Systems, Paris. Formerly Chairman of the OECD Expert Group on Transborder Data Barriers and the Protection of Privacy. Formerly Commissioner of the Global Commission on AIDS of the World Health Organisation. Australian Human Rights Medal, 1991.

1. United Nations *Charter*, Preamble 1; Article 2.
2. See A M de Zayas, *Nemesis at Potstam - The Expulsions of the Germans from the East*, Uni Nebraska Press, Lincoln, 1977.
3. C Palley, *The United Kingdom and Human Rights*, 42nd Hamlyn Lectures, Stevens, London, 1991, 113ff.
4. R Little and W Reed, *The Confucian Renaissance*, Federation, Sydney, 1989, 54.
5. A F Mason, "A Bill of Rights for Australia?" (1989) 5 *Aust Bar Rev* 79, 80.
6. See eg *R v Kirifi* [1991] NZLR - forthcoming. See note 1991 *NZ Current Law* 870, para 2002.

7. International Commission of Jurists, *Countdown to 1997 - Report of a Mission to Hong Kong*, Geneva, Switzerland, 1992.

8. Bill of Rights Ordinance 1991 (HK). See Discussion in *Countdown* (above n 7) 96ff.

9. See s 11 and Schedules 1 to 5.

10. See *Union Steamship Co of Australia Pty Limited v King* (1988) 166 CLR 1; *Mabo v State of Queensland* (1988) 166 CLR 186, 202; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1987) 7 NSWLR 372 (CA); *Adler v District Court of New South Wales* (1990) 19 NSWLR 317 (CA); *Eastgate v Rozzoli* (1990) 20 NSWLR 188, 201 (CA). Cf I D Killey, Peace, Order and Good Government: A Limitation on Legislative Competence (1989) 17 *MULR* 24; P A Joseph and G R Walker, "Theory of Constitutional Change" (1987) 7 *Oxford J L Studies 155*.

11. See *BLF* case, above n 10, 402ff.

12. E G Whitlam, *Human Rights in One Nation: The Keating Government and the Whitlam Legacy*, unpublished address to a conference, Melbourne, 3 April 1992, 1, 25.

13. See eg The Australian Law Reform Commission *Criminal Investigation* (ALRC 2), 1975, 59 para 135.

14. See T Campbell, "Introduction: Realising Human Rights" in T Campbell, D Goldberg, S McLean and T Mullen (eds) *Human Rights: From Rhetoric to Reality*, 1986, 1. Cited P Bain, "Human Rights and a Ministry of Law" (1990) 64 ALJ 203.

15. (1985) 159 CLR 70.

16. *ibid*, 160f.

17. The Australian Law Reform Commission, *Privacy* (ALRC 22), 1983, vol 1, xxxvii.

18. *Council of Europe Convention*, cited ALRC 22, vol 1, 270.

19. See ALRC 22, vol 2, 269f.

20. *Ibid*, vol 2, 265.

21. *Id*, vol 2, 207.

22. M D Kirby, "Information Security - OECD Initiatives" (1992) *Computer Law & Security Rep* 102. Address to Japan Information Processing Development Center Conference, October, 1991. To be published in *Australian Journal of Law and Information Science*, forthcoming.

23. See P C Sieghart, *AIDS and Human Rights: A UK Perspective*, BMA Foundation for AIDS, 1989, London. See also L J Moran "HIV, AIDS and Human Rights" (1990) 12 *Liverpool Law Rev* 3 and UN Centre for Human Rights, *Report of an International Consultation on AIDS and Human Rights*, Geneva, 1989. For applications of the *European Convention* to the benefit of persons with AIDS, see *X v France*, unreported judgment of the European Court of Human Rights noted *Times Law Reports* 20 April 1992.

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27. *Ibid*, cited in Oration, *loc cit*, 9-10.

28. H Heilpern and S Egger, *AIDS in Australian Prisons: Issues and Policy Options*, report commissioned by the Federal Department of Community Services and Health, Canberra, 1989. Cf R M Douglas *et al*, "Risk of Transmission of the Human

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30. See eg United Nations, Economic & Social Council, report by Special Rapporteur (L V Quirós) *Discrimination against HIV-infected people or people with AIDS*, New York, DOC E/CN.4 sub 2/1991/10. See also New South Wales Anti-Discrimination Board, *Discrimination - The Other Epidemic*, Report of the Inquiry into HIV and AIDS Related Discrimination, 1992. Cf Victorian Law Institute, Young Lawyers Community Issues Committee, *Aids and Discrimination*, Record of a Seminar held in Melbourne on 19 July 1991.

32. See International Labour Organisation, Minutes of the Governing Body, 110th Session, 62-90. The establishment and procedures of the ILO Commission are explained in Chapter I of its report *Prelude to Change: Industrial Relations Reform in South Africa*, ILO, Geneva, 1992.

33. ILO Report, above, n 32, para 43.

34. See eg *Workers' Representatives Convention* 1975 (No 135).

35. See ILO, *Freedom of Association and Collective Bargaining - General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, ILO, Geneva, 1992; *ibid*, *Freedom of Association - Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 3rd ed, Geneva, 1985.

36. ILO Report on South Africa, Chapter 14, Recommendations.

37. See New South Wales Labor Council: Complaint to the ILO on the *Industrial Relations Act* 1991 (NSW).

38. As reported in the *West Australian*, 6 February 1992, 1.

39. See "Juvenile Injustice in Western Australia" in Australian Council of Social Service, *Impact*, May 1992, 5.

40. The *Bangalore Principles* are published in (1988) 14 *Commonwealth Law Bulletin* 1196 and (1988) 62 ALJ 531. See also Advisory Group, Commonwealth Human Rights Initiative, *Put Our World to Rights*, 1991, 73-4.

41. The *Harare Declaration* is published in Commonwealth Secretariat, vol 2, 9. See also (1989) 15 *Commonwealth Law Bulletin* 999.

42. The *Banjul Affirmation* is found in Commonwealth Secretariat, Developing Human Rights Jurisprudence, vol 3, *A Third Colloquium on the Domestic Application of International Human Rights Norms*, London, 1991, 1 at 3.

42a. *Ibid*, 19.

43. (1983) 153 CLR 168, 224. See also Barwick CJ in *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582f; and cf *Kioa & Ors v West & Ors* (1985) 159 CLR 550, 570, 604.

46. See *Foster v Neilson* 27 US 164, 202 (1829) (SC).

47. 108 S Ct 2687 (1988) (SC).

48. At 2696.

49. *Ibid*, 2717.

50. 109 S Ct 2969 (1989) (SC).

51. See note "Judicial Enforcement of International Law Against the Federal and State Governments", 104 *Harvard L Rev* 1269, 1285 (1990); K Norman "Practising What We Preach in Human Rights: A Challenge to Rethinking for Canadian Courts" (1991) 55 *Saskat L Rev* 289, 297; see also L Brilmayer, "International Law in American Courts: A Modest Proposal", 100 *Yale L J* 2277, 2291 ff (1991).

52. Robert H Bork, "The Limits of 'International Law'" in *The National Interest*, 3 (Winter 1989-1990).

53. *Ibid*, 9-10.

54. M O'Flaherty, "International Protection of Human Rights by the Irish Legal Practitioner", *Irish Legal Times*, December 1991, 285.

55. See eg A W Bradley, Comment, "The Constitutional Protection of Human Rights in the Commonwealth" [1991] *Public Law*, 477, 479.

56. [1983] 1 AC 719 (PC).

57. Bradley *op cit* n 55, 479. See also "Optional Protocol to the International Covenant on Civil and Political Rights: Individual Complaints" (1991) 16 *Commonwealth Law Bulletin* 272; *Reid (Junior) v The Queen* [1990] 1 AC 363 (PC).

58. [1991] 1 AC 696.

59. [1991] 1 AC 696; [1990] 2 WLR 787 (HL).

60. Unreported 19 February [1992]: House of Lords (CA).

61. *Commonwealth of Australia v John Fairfax & Sons Limited* (1980) 147 CLR 39, 52.

62. *Derbyshire*, manuscript, 19.

63. *Ibid*, 5.

64. See eg *Daemar v The Industrial Commission of New South Wales & Ors* (1988) 12 NSWLR 45; 79 ALR 591 (CA).

65. *S & M Motor Repairs Pty Limited & Anor v Caltex Oil (Australia) Pty Limited & Anor* (1988) 12 NSWLR 358 (CA).

66. *Jago v District Court of New South Wales & Ors* (1988) 12 NSWLR 558 (CA); affirmed (1989) 168 CLR 23. The High Court made no reference to the issue.

67. *Gradidge v Grace Bros Pty Limited* (1988) 93 FLR 414 (CA).

68. *Cachia v Haines & Anor* (1991) 23 NSWLR 304, 312 (CA).

69. See eg Samuels JA in *Jago* (above), 580-2.

70. (1987) 162 CLR 447.

71. R Wilson, "The Domestic Impact of International Human Rights Law". Address to the Australian Academy of Forensic Sciences, 29 October, 1991 in *Australian Journal of Forensic Sciences*, 1992, forthcoming.

72. *Gradidge* (above), 426.

73. Expressed in *Re Jane* [1989] FLR #92-007 (F Fam C).

74. [1991] FLC #92-193 at 78, 301 (F Fam C).

75. I leave aside invocation of the Bill of Rights 1688. See *R v Arthur Stanley Smith* (1991) 56 A Crim R 148, 159 (NSWCA).