**Bill introduced on motion by Mr Paul Lynch, read a first time and printed.**

## Second Reading

**Mr PAUL LYNCH** (Liverpool) [10.17 a.m.]: I move:

That this bill be now read a second time.

The object of the bill is to provide an amendment to the Interpretation Act to insert a provision that in the interpretation of part of an Act, statutory rule or other instrument consideration may, in some circumstances, be given to Australia's obligations under international human rights conventions and covenants to which Australia is already a party. The covenants and conventions as spelt out in the bill are: the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of Persons with Disabilities; the Convention on the Rights of the Child; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the International Convention on the Elimination of All Forms of Racial Discrimination. Some would call this a human rights interpretation model. It is that, but in many ways it is really a continuation of the common law tradition. The only difference here is that there is a democratic direction from the Parliament to inform that common law tradition.

The context of this bill lies in the decision of the High Court of Australia in *Coco v The Queen, (1994) 174 CLR 227*. The decision in that case is settled law and quite clear. Some argue persuasively that the principle existed well before that case. That case means that legislation is interpreted by the courts on the presumption that Parliament does not intend to abrogate what the court terms "fundamental rights". Such a presumption can be rebutted by clear legislative intent—that is, the Parliament can do whatever it likes and breach whatever principles it likes if it is clear enough in legislation, although not, of course, in relation to constitutionally entrenched obligations. However, if the legislation does not clearly abrogate fundamental rights then in cases where there is lack of clarity in legislation the courts will assume that it is not intended to infringe fundamental rights. That much is clear. What is very much less clear is what those fundamental rights actually are. We do not have a bill of rights in this jurisdiction so there is no parliamentary or democratic direction to the courts as to what those rights should be. In practice, that means that those fundamental rights currently being used by the courts will be identified by the courts on a completely ad hoc basis, depending upon the exigencies of litigation between contending parties.

That is inevitably the result of the common law tradition of our legal system. I am much less troubled by the common law tradition than I suspect many other members in this Chamber are, but there are some issues arising out of it. A useful listing of some of the rights that have been identified in various courts in various jurisdictions is provided by James Spigelman, the previous Chief Justice of the Supreme Court of New South Wales, in his work *Statutory Interpretation and Human Rights*. I note that there is a list on pages 27, 28 and 29, and I am happy to refer members who are interested in the topic to that publication. However, relying purely upon the traditions of the common law to identify those fundamental rights seems to

be problematic. First, as Spigelman notes, many of the rights that have been identified in the common law tradition overlap with but are not identical to the list of rights specified in human rights conventions that have been adopted by Australia.

Second, it must increase the likelihood of uncertain results. If the rights concerned are not identified until a particular piece of litigation is concluded, without people knowing precisely what it is before that, there is an obvious issue about uncertainty. Third, as a matter of principle, it seems much more appropriate for rights to be nominated by the Parliament as fundamental rights. In a democratic society it should not be left to unelected bodies to specify what are fundamental rights in our society; that is a role that our Parliament should be fulfilling. Fourth—I think this flows from the third point—the fundamental rights thrown up by the vagaries and exigencies of litigation with detours to appellate jurisdictions will be more likely to be matters associated with property than people.

Almost everyone who looks seriously at our legal system acknowledges the very real issues about accessibility to justice. It is statistically much more likely that the rights of the wealthy will spark court cases than will the rights of those who are not wealthy. *Coco* itself was on appeal from the Court of Appeal in Queensland and concerned listening devices gathering evidence used in criminal prosecution. The fundamental right, however, was not a right to privacy, a right not to be bugged, but the right of a person in possession or entitled to possession of premises to exclude others from those premises. That "fundamental common law right" was a property right. Granted the historical development of the common law, that is hardly a surprise. It will more likely find property rights than any other sort of right. That is no surprise. But I think it emphasises the need for democratic directions from Parliament as to what those fundamental rights should be rather than leaving it to the courts to discover them as they proceed with litigation.

The solution is contained in this bill, which identifies as fundamental rights those things to which Australia is explicitly and legally committed. Of course, international law can already influence Australian law. It can be specifically incorporated into our domestic law. As recently as yesterday the Attorney General second read the Succession Amendment (International Wills) Bill 2012, which is an explicit inclusion of international law into our domestic legal system. Section 34 of the Interpretation Act—the principal Act in this debate—already allows the use of international treaties or agreements in interpreting legislation that specifically refers to them. As both the National Human Rights Consultation Committee and Sir Gerald Brennan have acknowledged, courts can already take international human rights law into account when interpreting legislation, although that occurs in a quite ad hoc and unstructured way.

In an analogous sense, the identification of specific objects and principles is important in assisting with interpretations. That is why in more recent years all new legislation has included an objects clause, which traditionally had not been there previously. It is a way of trying to assist with interpretation. That is an analogous point to the argument I am making here. For example, the Electoral Commissioner has argued the need for a redrafted electoral law, including the provision of an objects clause. In a recent submission he said:

> A well-drafted objects clause may be more balanced and certainly more explicit and hence procedurally democratic than common law intuition.

As I said, that is an analogous argument to the one I am putting here. I note a number of particular aspects of the legislation. The legislation provides for courts to have regard to those instruments when there is a lack of clarity in the legislation and when it is appropriate to do

so. That is, it elects the discretionary course rather than the mandatory course. It is not mandatory for courts to have regard to such instruments in every case of uncertainty in legislation but only when the court regards it as appropriate. In a sense, that becomes a codification of the common law, albeit in a much more structured and democratic way. The instruments to which reference is made are only Australian-adopted human rights obligations.

There is a debate among those who are interested in these topics as to whether this should extend beyond that category of instruments and include, for example, international law principles. I have elected not to do that in this bill because, frankly, that would increase rather than decrease the level of uncertainty. The bill, in my intent, is to reduce uncertainty, not to increase it. I have also restricted it to the clear specific documents that have already been accepted by this country rather than ones that may be accepted in the future. The bill does that by itemising the specific conventions. If other conventions are adopted in the future they can be added by other specific legislation. There is no automatic inclusion of other obligations. That is done on the basis that the Parliament should know precisely what provisions it is enshrining in legislation.

A contrast can be made between what the critics of the Charter of Rights model said that that mechanism did and what is being done here. The critics of the Charter of Rights said that far too much discretion was given to judges to decide what the law would or would not be. Whether or not that criticism is fair, this bill provides exactly the opposite course, that is, it provides parliamentary direction to judges as to how to exercise their discretion. That is exactly the opposite of the criticism made of the Charter of Rights. It is about setting rules for courts rather than letting courts just rely upon their intuition. The bill commenced with a discussion paper that I released last year. I thank those organisations and individuals that contributed to that process and made submissions on the paper. A number of groups and organisations have been very supportive of the concept enshrined in this bill. The President of the Law Society, Justin Dowd, relayed to me the views of the society's Human Rights Committee. He wrote:

> The Committee congratulates you on your proposal to amend the Interpretation Act 1987 to require courts to construe legislation in a manner that is consistent with human rights obligations, and strongly encourages you to introduce a private member's bill in this regard. The Committee supports the enactment of a human rights Act in New South Wales, but notes that if passed, this amendment would represent a significant advancement in the protection and promotion of human rights in NSW.

The letter from the President of the Law Society also noted that State Parliament should observe international law. The country as a whole is bound by obligations we undertake. I quote:

> Enacting legislation such as that which you suggest would see Australia moving towards complying with its international obligations.

Likewise, the Gilbert and Tobin Centre of Public Law wrote as follows:

> We welcome the proposal to amend the Interpretation Act 1987 (NSW) to require courts to construe legislation in a manner that is consistent with human rights obligations, insofar as it is possible to do so consistently with Parliament's purpose in enacting the legislation.

Part of the submission also stated:

> The proposed amendment is effectively a codification of the common law rule that unless Parliament makes unmistakably clear its intention to abrogate a fundamental right, freedom or immunity, the courts will not construe a statute

> as having that operation. Many of the fundamental rights recognised at common law overlap with rights which are specified in international human rights instruments, and indeed, such international instruments may influence the articulation of new rights recognised at common law. The amendment to the Interpretation Act will enable the NSW Parliament to clarify which rights constitute a legitimate point of reference for courts engaging in the task of statutory interpretation and to elucidate how such rights are to be taken into account.

The Australian Lawyers Alliance also provided support for this proposition. I quote:

> It is acknowledged that courts are allowed and currently refer to international conventions of which Australia is signatory. However, the courts of NSW are restricted in their ability to apply these conventions when interpreting domestic legislation in circumstances where the Legislature has expressed no intention to acknowledge the fundamental rights referred to in the abovementioned instruments.

I acknowledge the valuable submissions made by, among others, the Redfern Legal Centre, the Hawkesbury Nepean Community Legal Centre and the Arts Law Centre of Australia. Apart from explicit support for this proposal, it is appropriate to note support for similar propositions. In 2010 the National Human Rights Consultation Committee, in recommendation 12, recommended a similar proposal. The recommendation states in part:

> … as far as it is possible to do so consistently with the legislation's purpose, all Federal legislation is to be interpreted consistently with the interim list of rights …

Earlier than that consideration was given to these and related issues by the Standing Committee on Law and Justice of the other place in a 2001 report. That committee recommended that section 34 of the Interpretation Act be amended to confirm what it understood to be the common law position:

> … that judges are able to consider international treaties and conventions, to which Australia is a party, when there is ambiguity in the NSW statute.

I understand that that recommendation was unanimously agreed to in a bipartisan committee. There is also support for this approach from the Public Interest Advocacy Centre. In its submission on the proposed amendments to the Commonwealth legislation, to which I have referred, it made this point:

> This recommendation does not constitute a major departure from the established common law principle that the courts will interpret legislation on the rebuttable presumption that the legislation in question was not intended to infringe human rights.

It cited the case of *Coco* and referred to a line of authority dating back to 1908. It also notes:

> Amending the AI Act to include a human rights interpretation provision would allow Parliament to establish unambiguous parameters regarding the application of the interpretative principle.

Parliament, the Public Interest Advocacy Centre [PIAC] argued, had left to courts the decision whether to refer to rights with some longevity at common law, or to those recognised in international law and adopted by democratically elected governments. The Public Interest Advocacy Centre, I think acutely, noted:

> Through inaction, Parliament seems tacitly to encourage the courts to develop their own principles of statutory interpretations.

This bill restores Parliament to its proper place in setting out a proper basis for the human rights interpretation of uncertain legislation instead of leaving it exclusively to an unelected judiciary. It does so by building on a common law tradition and codifying that tradition with the human rights interpretation. I commend the bill to the House.

**Debate adjourned on motion by Mr Mike Baird and set down as an order of the day for a future day.**