Human rights for all

Submission to the Inquiry into a NSW Bill of Rights

of the

Legislative Council Standing Committee on Law and Justice

Uniting Church Board for Social Responsibility

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Introduction

The Board for Social Responsibility has, throughout the life of the Uniting Church (inaugurated in 1977), played an active role as human rights advocate both generally and in specific areas of policy. The Board consistently based such work on authoritative studies such as the reports from the Human Rights and Equal Opportunity Commission. Research has also included examination of the human rights literature, and the documents of other churches on this subject. This submission draws on all this work. Much of this work is documented on the Social Justice and Human Rights section of the Board's website, or in Ann Wansbrough *Speaking Together: a methodology for the National Council of Churches Contribution to the Public Policy Debate in Australia* Ph.D. Thesis, Sydney University 2000.

Part A Response to the Terms of Reference

> *That the Standing Committee on Law and Justice undertake an Inquiry into and report on whether it is appropriate and in the public interest to enact a statutory New South Wales Bill of Rights and/or whether amendments should be made to the Interpretation Act 1987 to require the courts to take into account rights contained in International Conventions, with particular reference to*
>
> *(a) whether the rights declared in the International Covenant on Civil and Political Rights should be incorporated into domestic law by such a Bill of Rights; and*
>
> (b) *whether economic, social and cultural rights, group rights and the rights of indigenous people should be included in a Bill of Rights;*

The human rights in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are universal, indivisible, and interdependent according to the Universal Declaration of Human Rights, the 1993 United Nation Conference on Human Rights in Vienna, and the Australian Government's *Human Rights Manual 1998*. The fact that historical circumstances required that the two covenants be developed separately should not be allowed to cloud this understanding. This submission therefore deals with these two sets of rights together.

While there is some tendency for courts to recognise that Australia's ratification of these international covenants should be taken into account in interpreting Australian law, such a position is under constant pressure from politicians and more conservative understandings of how the courts should operate. The interests of citizens would be best served by these covenants being clearly incorporated in domestic law. Until this happens, the concept of human rights has little real force, with citizens dependent on the favours of the government of the day, and the occasional, somewhat whimsical (from the viewpoint of the average citizen) developments in common law.

The fact that human rights is more a matter of favour and whimsy that right is evident from numerous reports on human rights in Australia. These include the many reports from the Human Rights and Equal Opportunity Commission that clearly document that the human rights of particular groups are at risk. Issues on which HREOC has reported include numerous aspects of Aboriginal affairs policy, racist violence, problems faced by people of non-English speaking background, homeless children, the rural situation, the problems of people with disabilities and the situation of people

with mental illness. Other evidence is available in the work of the New South Wales Council of Social Service (NCOSS) and the Australian Council of Social Service (ACOSS) and many other bodies. A growing gap between rich and poor, and the ideological battle to reduce what is already, by OECD standards, very low government expenditure, places many human rights at risk. Not enough is done to redress the well-documented disadvantage of Aboriginal communities, as if their human rights were less important than that of other citizens. Low legal aid budgets effectively limit the right to a fair trial. People in New South Wales do not all enjoy equality of health care and education. The human rights of many children, especially many wards of state, have been ignored and violated through inadequate policies. A recent issue of the *Human Rights Defender* had articles drawing attention to question of the right to food in Australia, and the human rights issues surrounding homelessness. When the question of a Bill of Rights is looked at from this perspective, there is clearly need to enshrine human rights in law, and to test all legislation and policy against them.

However, merely stating these human rights in a Bill of Rights is not enough. At present Australia, at all three levels of government, lacks mechanisms for ensuring (a) that human rights are taken into account in the development of policy and (b) that parliament assesses legislation for its impact on all the relevant human rights. In particular, legislation is not scrutinised by parliamentary committees for its impact on economic, social and cultural rights.

This means that for a Bill of Rights to be effective, it must include mechanisms for

- parliamentary committees to scrutinise all future legislation for compliance with the bill of rights ;

- requiring that all advice to government, whether from public servants, statutory bodies, consultants or other mechanisms, takes into account the requirements of the Bill of Rights;

- providing adequate budgets for the program areas that fulfil the government's responsibility for human rights (this includes a wide range of policy areas such as Aboriginal Affairs, legal aid, DOCS, hospitals, and education)

- Requiring that the courts interpret all legislation in accordance with the Bill of Rights.

- Assessing the impact of implemented policy on human rights, through the use of benchmarks based on the Bill of Rights. (The question of a system of benchmarks and indicators has been explored by the Senate Legal and Constitutional Reference Committee Inquiry into National Citizenship Indicators).

Term of reference (b) seems to go beyond the International Covenants to other international declarations and conventions. The Convention on Indigenous Rights is only in draft form. A Bill of Rights is most likely to be understood as beneficial to all citizens and as soundly based in legal theory and practice if it is restricted to the human rights in the two international covenants. The two covenants already provide significant basis for understanding some group rights, especially the rights of indigenous peoples, as the reports of the first Aboriginal and Torres Strait Islander Social Justice Commissioner have demonstrated.

That is, different human rights instruments have different purposes. The international covenants provide the basic foundations for a Bill of Rights: the definition of those rights that everyone has by virtue of their humanness. The international declarations and conventions on the rights of particular groups such as women, children, people with disabilities, and Indigenous peoples redress discrimination, by interpreting the meaning of human rights for those particular groups. They are most appropriately used in the way they are presently used in Australia, namely as the basis for anti-discrimination and affirmative action legislation. They also give fuller meaning to the human rights in the covenants, and should be recognised in the Bill of Rights as appropriate guides to its interpretation.

(c) whether individual responsibilities as distinct from rights should be included in a bill of Rights

The primary role of the international covenants on human rights is as benchmarks by which governments can be assessed. The concept of a Bill of Rights is essentially about the responsibility of government, and this should be the focus of any NSW Bill of Rights. In a complex economy that is influenced by global trade and investment and where some transnational corporations are larger than many nations, business can play a powerful role in enhancing, undermining or violating human rights. It would be appropriate for a Bill of Rights to place on business the responsibility to respect the human rights of all citizens in the way they conduct their business.

There are serious dangers in including detailed responsibilities for individuals in a Bill of Rights. First, citizens' responsibilities are already detailed in a plethora of legislation. Citizens already have legally defined responsibilities in a whole range of matters, from paying taxes or sending children to school to fulfilling regulations in running a business and not committing crime. Second, a list of individual responsibilities would shift the agenda of a Bill of Rights from protecting citizens and may give the impression that government responsibility for the human rights of their citizens is conditional rather than absolute. This would be inappropriate, destroying the whole concept of a Bill of Rights. Third, the source of the human rights that might be included in a Bill of Rights is clear (the international human rights instruments), but there is no equivalent statement of responsibilities. To attempt such a statement would be to undermine the credibility of the whole Bill of Rights, and to fall into a morass of different cultural and personal opinions.

Nevertheless, a person's rights and responsibilities are inextricably linked, as the human rights covenants themselves make clear. In the exercise of human rights, the rights of others and the interests of the general community must always be taken into account (eg ICCPR Article 19.3) In daily life many human rights have little meaning unless citizens respect one another's human rights. Sexist or racist behaviour, for example, can seriously damage its victim's experience of human rights. It would therefore be appropriate to include in a NSW Bill of Rights the responsibility of individuals to act in ways that are respectful of the human rights of all other people. If any attempt is made to specify responsibilities beyond this, the responsibilities should be clear corollaries of the human rights included in the Bill of Rights.

(d) the consequences for Australian common law of Bill of Rights in the United Kingdom, Canada, and New Zealand

This is outside the competence of the Uniting Church.

(e) In what circumstances parliament might exercise its ultimate authority to override basic rights declared in a Bill of Rights and what procedures need to be put in place to ensure that any such overriding legislation complies with the Bill of Rights

The Parliament should have the power to override the Bill of Rights only in extreme circumstances that themselves place in jeopardy the rights of citizens, namely external military attack or pervasive terrorist violence. Such power should only exist for the duration of such an emergency. This requires that the Bill of Rights includes a mechanism that renders any legislation overriding it automatically invalid except while such circumstances exist, and then only to the extent necessary to protect citizens during such circumstances.

(f) The extent and manner in which the rights declared in a Bill of Rights should be enforceable

The human rights in the international covenants are intended to be justiciable. Some rights are already justiciable. For example, the right to join (or not) a trade union is a justiciable right, as has been shown in the Patrick Stevedors Case, as is the right to education. It is important that this be the case for all human rights. In the end, citizens should be able to ask the courts to strike down legislation that is inconsistent with the Bill of Rights.

However, this is not sufficient. When citizens have to appeal to courts for their human rights, the system has already failed them and their rights become dependent on their ability to work the system and find the finance for legal representation. So in addition to legal mechanisms to enforce it, the Bill of Rights needs to be accompanied by mechanisms that ensure that it is implemented in the ongoing policy formation process, both bureaucratic and parliamentary.

(g) Whether a bill of rights should be subject to any reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic society

The only reasonable limits to a bill of rights that should be prescribed by law are the limits imposed by the mutual recognition of rights and the clashes between rights of different individuals and groups. This leads to the question of how clashes of human rights may be resolved, since all human rights are equally important, and they are universal and indivisible. The obvious answer is that such clashes should be resolved in favour of those who have least and suffer most – that is, in favour of those people whose experience of human rights is inadequate compared to the rest of the population. This is the basic approach already taken in anti-discrimination, affirmative action and other human rights legislation.

(h) Whether there should be a legislative requirement on courts to construe legislation in a manner which is compatible with international human rights instruments

Yes. The courts are already making tentative moves in this direction, which is both the intention of the human rights instruments themselves, and the natural and obvious implication of ratifying them. However, there are different understandings of the proper limits of the courts in interpreting law, and clarification of their responsibilities in legislation would offer citizens better, more consistent protection of their human rights while at the same time protecting courts from the criticism they currently experience.

If treaties were directly incorporated into the law then it would decrease the likelihood of Australia being taken to the Human Rights Committee of the United Nations under the ICCPR and would be consistent with Australia's legal obligations under the two treaties.

(i) Any other matter arising out of or incidental to these terms of reference.

The comments about mechanisms and benchmarks included in our response to (a) and (b) might also be considered here.

Part B Rationale

Theological Introduction

The Uniting Church Board for Social Responsibility works within the theology and polity of the Uniting Church in Australia, in response to issues of justice, peace and the integrity of creation. Like other Christian Churches, the Uniting Church believes that each human being is made in the image of God, and has intrinsic value that is to be respected by all state powers, by all social and economic institutions, and by all other human beings. Government authority is not absolute, but rather must be tempered by an awareness of ultimate accountability to God and to the human community. While the Biblical tradition recognises that governments have a legitimate place in the ordering of human life (Romans 13), that same tradition also recognises that governments often over-step the rightful use of authority and come under God's judgement (for example, Exodus, the Old Testament prophets, and the Book of Revelation). The 1985 Assembly statement on poor people and the gospel talked of "the insurrection inherent in the resurrection" of Jesus Christ. The UCA recognises that the international human rights instruments are fundamental benchmarks for the responsibility of all governments to their citizens,[1] and to God. The documents of the Orthodox, Anglican and Catholic Churches also describe the importance of human rights, as do the documents of the World Council of Churches, the Christian Conference of Asia, and the World Alliance of Reformed Churches.[2] The Christian Churches played an active part in the development of the human rights instruments. It is also true that the churches have not always respected human rights fully. This shows the importance of effective human rights instruments.

Christians believe that the earth and all its goods were created by God and given to humankind as a gift for the sustenance and delight of all human beings. The Catholic Social Teaching describes this helpfully as the universal destination of created goods. The danger in the contemporary parlance of business as "wealth creators" is that government loses sight of the fact that all business entrepreneurs depend on God's creative activity for their raw materials and for the human ingenuity to transform them into useful products. In contemporary society, the human rights of citizens often depend as much on the activities of business as on the activities of government, and it is essential that government legislation ensure not merely its own accountability, but also that of business.

From a Christian point of view, life is indivisible. The way a government exercises its power over the social, economic and cultural life of the nation and individual citizens is as important as the way it exercises its judicial, political and military power. The Uniting Church therefore accepts the view adopted in the Universal Declaration on Human Rights and re-affirmed at the Vienna Convention, that the internationally recognised civil, political, economic, social and cultural rights are universal and indivisible. This is evident in the Inaugural Assembly's *Statement to the Nation*, the *Statement to the Nation* of the 1988 Assembly and the *Invitation to the Nation* of the 1997 Assembly. All these statements recognise the importance of economic, social and cultural rights. We share with other churches the belief that when we work for human rights, we are sharing in God's work in the world. The violation of human rights, whether by acts of overt violence or by neglect, is demonic, and opposition to such violation has profound spiritual significance – it is exorcism and healing for the world.

Two other Christian concepts that are fundamental to this discussion are service and community. Human beings are interdependent, and only fulfil their human potential when they are in reciprocal relationship with a wider community, both giving to and receiving from it. Human rights are an expression of both the rights and responsibilities of being part of the human community. As some Old Testament scholars have pointed out, the Ten Commandments are not simply a convenient summary of middle class values. Rather they were, in their original context, an expression of the view that all members of the community have rights and responsibilities, and these are not to be sacrificed to the whim of government or fellow citizen. The Old Testament prophets thus challenged the misuse of political and judicial authority, and also condemned the exploitation of the poor by business. Solomon's misuse of his power led to the division of the Kingdom. When Ahab and Jezebel misused the King's political and judicial power for their own selfish motives, they experienced the judgement and wrath of God. This theme recurs in the Gospels, where Jesus Christ as Servant King stands in stark contrast to those rulers of this world who pursue their own glory and ride roughshod over their citizens. In Matthew 25, Christ as King holds the nations accountable for their response to the naked, the homeless, those who are sick and those who are in prison. Human beings have the right to have their basic needs met, and nations are guilty of evil when they ignore this as well as when they commit acts of overt violence. The failure to take the positive action within one's power, that is, sins of omission, can be as evil as deliberate actions of harm, sins of commission.

Why do we need a NSW bill of rights?

We hope that the Committee will not get bogged down in general philosophical issues about human rights. Australia has ratified both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Over 140 States are parties to each of these instruments (out of a total membership of 188 members of the United Nations). Australian governments have the responsibility in international law to enhance their subjects' enjoyment of both sets of rights in a way commensurate with Australia's level of economic development. Both the ALP governments under Hawke and Keating, and the Liberal-National Party governments under Howard, have accepted that these two sets of human rights are universal, indivisible and interdependent.[3] The New South Wales Social Justice Directions Statement, *Fair Go, Fair Share, Fair Say* (October 1996) makes general references to "rights" some of which clearly assume economic, social and cultural rights, although the term "human rights" is not used.

While Australia has a generally good reputation in the area of human rights, there is substantial authoritative literature that shows that human rights are not as well protected in

Australia as is often assumed. Only some human rights are protected in the national or state constitutions or in common law or legislation. Judges have been slow to adapt the common law to take account of the international human rights instruments, and the common law can be over-ridden by Parliament. While Australian governments see themselves as respecting human rights, a different picture emerges from the reports of the Human Rights and Equal Opportunity Commission, the NSW Anti-Discrimination Board, the Royal Commission into Aboriginal Deaths in Custody, the NSW Law Reform Commission, the Australian Law Reform Commission and several other bodies with expertise in this area. The most obvious examples of people who do not experience their full human rights are Aboriginal people and Torres Strait Islanders, people of non-English speaking background (especially women), young people without a home or effective family, and people with disabilities. However, the work of legal academics such as George Williams and Peter Bailey shows that the problem is more fundamental than this, with inadequate statement and protection of the human rights of all Australians.[4]

In looking at these and other issues in this submission, we are not seeking to lay blame or to attack any particular government or party. We believe that issues of human rights must transcend party politics. We also believe that both Liberal-National Party governments and ALP governments have from time to time, at both state and federal level, sometimes enhanced and sometimes diminished human rights by particular policies and acts. Our concern in this submission is simply to provide examples that show that there is a need for better policy mechanisms if all Australian citizens are to experience their human rights.

In NSW, anti-discrimination legislation provides some protection for such groups where the violation of their human rights is related to discrimination. However, that is clearly not enough, as the *Toomelah Report* and statistics on Aboriginal health, education and unemployment make clear. Twelve years after the *Toomelah Report*, many of the problems it documented, both the specific problems at Toomelah and the underlying problems of government administration and coordination, persist. Similarly, in spite of the bureaucratic activity in response to the reports of the Royal Commission into Aboriginal Deaths in Custody, there are more Aboriginal people in custody in NSW (and elsewhere) than ever before, prisoners continue to die in custody, and many economic, social and cultural issues highlighted in those reports have not yet been effectively dealt with.

In recent years, it has become clear that the rights of workers to associate, to organise and to strike are under threat. The BSR commends the NSW government for its recent initiatives to protect and enhance the rights of outworkers in the garment industry. However, those initiatives have only emerged after a concerted campaign by community and church groups and the unions, in solidarity with the workers themselves. Progress is constantly put at risk, for example by the current federal government's attempts to strip back awards, to limit the role of the Australian Industrial Relations Commission, to make the work of unions more difficult, and to outlaw industry wide agreements such as the code of practice for retailers and manufacturers in the garment industry.

Other areas where not all citizens enjoy the standard of living one would expect in an Australia that respects human rights are housing, education, health, employment, physical services such as water and sewerage, income levels, child protection, and juvenile justice. These are problems in NSW as well as elsewhere in Australia. On the United Nations Human Development Index, for example, Australia's position has deteriorated in recent years. Papers at the conference *Measuring Progress*, in 1997 showed that there were reasons to be concerned about the well-being of citizens in a number of areas of life.[5] Recent work by the HREOC shows that the human rights of many rural people are at risk in several areas such as health, education and employment.

One of the fundamental problems appears to be that there is a lack of policy mechanisms at both national and state level to ensure that human rights are taken into account throughout the policy formation process. At the national level, the Joint Committee on Foreign Affairs, Defence and Trade has the responsibility for "an annual review of human rights policy, limited in extent to the context of the international system for the promotion and protection of those rights".[6] It has suggested that it is not its role to scrutinise domestic compliance in detail; this is the role of other Parliamentary committees.

> ... the various domestic committees of the Parliament have responsibilities for the

> scrutiny of government policy in many of these areas of compliance; Parliament's Committees on aboriginal (sic) affairs, community services, legal and constitutional matters all deal with such details.[7]

Unfortunately, the Committee's claim is not substantiated by any reference to work or reports of those committees. The claim seems to ignore the Human Rights Commissioner's concern about inadequate mechanisms for economic, social and cultural rights in Australia, although this is quoted at length in the committee's report and offers a serious criticism of Australian human rights policy mechanisms. The quote in the report reads:

> In my view, the most serious violations of human rights in Australia are not violations of what my profession calls civil and political rights; they are violations of what are generally described as economic, social and cultural rights...It does not matter whether you are talking about Aboriginal people, mentally ill people, homeless people, the intellectually disadvantaged, people with dual and multiple disabilities...they are the key areas of violations of human rights.[8]

The same report went on to comment:

> Mr. Burdekin believed the international conventions were not sufficiently part of the "bureaucratic culture" of Canberra and that beyond those people who negotiated them in the Department of Foreign Affairs and Trade and the Attorney General's Department, they were not widely known. The vehicle for greater understanding, he believed, was parliament.[9]

That is, Australia has no mechanism for ensuring that ESC rights are taken into account by the relevant policy departments and ministers in formulating and reviewing policy. Careful examination of the National Action Plan of 1994, and its subsequent revisions, shows no evidence of using human rights as standards against which to test policy or policy proposals. The ESC rights are reduced to slogans under which whatever policy exists can be gathered.[10]

This situation might be improved if the Parliament were to take up the one recommendation the JSCFADT made with reference to the ICESCR, which relates to scrutiny of legislation:

> The Committee recommends that the terms of reference of both the Senate Scrutiny of Bills Committee and the Senate Regulations and Ordinances Committee include a requirement to examine the compliance of legislation with the specific terms of the ICCPR and the ICESCR.[11]

However, while such a mechanism is essential, on its own it does not get to the core of the problem. Charlesworth comments on the need for human rights education in Australia, because "human rights are not well understood in Australia, either by the general public, by Members of Parliament or officials at the various levels of government".[12] It is clear that there needs to be improved mechanisms for feeding HREOC reports into the public policy making machinery (Cabinet, parliament and the bureaucracy) so that they impact on legislation (including budgets) and directives from the relevant Minister to government departments. There also needs to be improved education of the relevant policy makers about human rights, and improved parliamentary mechanisms of accountability. Cabinet needs to be put under pressure to adopt appropriate policy. Ideally there needs to be an appropriate provision in both national and state Constitutions. In the absence of these mechanisms, churches and community groups have an important role to play as human rights advocates to cabinet, parliament, the bureaucracy and the electorate.

At the state level, the problem appears worse, since there appears to be no committee with a brief for human rights. Yet in every day life, state legislation and other policy has a dramatic effect on the human rights of every person living in the state. States not only play a significant role in civil and political rights. They also are responsible for delivering many of the services that are required for people to enjoy their economic, social and cultural rights.

The Australian Constitution

It has often been claimed that human rights are protected by the Australian constitution, by common law and by the political process, and that therefore other mechanisms such as a Bill of Rights are unnecessary. Some people are likely to argue to the present inquiry that human rights are best left to he Commonwealth Government. We question all these arguments.

The Australian constitution offers only limited protection of human rights.[13] Many civil and political rights are absent from the constitution, and exist in Australia only by convention or by legislation that can be changed.[14] There is no mention of any of the rights covered by the ICESCR. Some legal writers have suggested that the Constitution should include a bill of rights, and that it should cover ESC rights as well as civil and political rights.[15] The trend towards "globalisation" creates new problems that expose some of the weaknesses of Australia's human rights mechanisms.[16]

In international discussions on human rights, as with other international matters, Australia is represented by the Commonwealth Government of the day. It is the Government, not Parliament, which enters into international agreements. Parliament then takes the action to implement international arrangements within Australia. There has been a move to involve Parliament more fully in the adoption of treaties, through recent legislation requiring the tabling the treaties in Parliament before signature, together with an impact statement.[17] The right of the Federal Government to enter into treaties and agreements exists under the External Affairs power[18]. Until recently, it has been assumed that until Parliament acts, international agreements do not affect the rights of Australian citizens.[19] This assumption has not been accepted by the High Court in *Teoh*[20] and some other cases. It has been the practice of the Australian Government not to ratify human rights instruments until domestic legislation is consistent with it[21]. The Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) 1994 Report notes that

> Nationally, Australia has committed itself to the genuine implementation of the human rights treaties. Unlike many states within the system, the treaties are signed when it is believed the obligations can be fulfilled. In recent years efforts have been made to ratify all treaties with a minimum of reservations.[22]

The problem is that while this ensures that there is a correspondence between the instruments and Australian law at the time of ratification, legislation can be changed at any time. This is particularly a problem with ESC rights that are implemented through social policy that may be changed quite often, at both state and federal level, by different governments with different ideologies, and even by the same government as circumstances change.

Some Commonwealth legislation related to human rights relies on the external affairs power. According to Lane, legislation to implement international treaties that relies on the external affairs power must "match the treaty 'in substance'" to be valid. However, O'Neill, on the basis of more recent High Court cases, suggests that the legislation "does not have to conform slavishly to the terms of the treaty".[23] Some legislation relies on different powers for different provisions within it. For example, the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth), relies on subsections v, (broadcasting), xi (statistics), xiii (banking), xiv (corporations), xxix (external affairs) of section 51, and on section 122 (territories).[24]

The division of powers between the Commonwealth and the States complicates the issues of human rights in Australia. The Commonwealth Government does not have general power to deal with any issue that it might consider relevant to the Commonwealth, but only specific powers given to it within the constitution.[25] "Concurrent powers" are those shared with the states, and "exclusive powers" are those where only the Commonwealth may legislate. The states have wide and general powers to legislate, being restricted only where the Commonwealth has exclusive power. Most state constitutions give the Parliament power to make laws "in all cases whatsoever", the only restriction being that it be for "the peace, welfare and good government" of the state.[26] In practice, the extent to which citizens enjoy their human rights depends largely on state legislation and policy. This is because states are responsible for delivery of most services such as education, health, community services, police, civil and criminal courts, roads, power, water and sewerage, and so on, even though the Commonwealth may make specific grants for some of these matters. The Federal Government has thus needed to consult with State governments over matters in treaties, since many of them involve areas of state responsibility.[27]

States have power to enact human rights legislation, and under section 51 (xxxvii) can refer that power to the Commonwealth. Where State legislation is inconsistent with Commonwealth legislation then the Commonwealth legislation prevails with regard to the matter where there is inconsistency (Section 109).[28] The commonwealth legislation related to sex, race and disability discrimination now has provisions that explicitly allow for state

legislation on the same subjects with the same intent. This reduces but does not entirely eliminate problems of inconsistency with these acts. Problems of inconsistency can also arise for equal opportunity and industrial relations laws.[29]

In 1981, Hope commented that the States were showing little interest in submitting themselves to the covenants. Bailey refers to the "continuing sensitivity of the States to initiatives by the Commonwealth."[30] Federalism was used as an excuse for this, and led to some initial qualification to Australia's ratification of the covenants.[31] Charlesworth questions the validity of this argument, since it is "the principle of treaty law that a party may not invoke its internal law as justification for the non-performance of a treaty".[32] She concludes:

> "Federalism" has become a weasel word, allowing Australia to rationalise its tardy participation and ambivalent implementation of human rights agreements.[33]

According to the 1994 National Action Plan, there is good cooperation between the states and the Commonwealth, with regard to both implementation and reporting on human rights. Human rights are a regular item on the meeting of Commonwealth and state Attorneys-General.[34] However, a number of HREOC reports, for example the *Toomelah Report*, have been scathing in their criticism of the way all levels of government have used division of powers as a way of avoiding responsibilities.[35]

Whatever the complications the federal arrangements create for implementing the ICESCR in Australia, these do not constitute legitimate excuses in international law. It is time that the states stopped using "state rights" as a means of undermining the human rights of their citizens, and instead took positive action to protect and enhance human rights. A NSW Bill of Rights, clearly based on the ICCPR and ICESCR so that it provided a model that could be adopted by other governments in Australia, would be a significant step forward.

Common law

Where no legal remedies are provided, governments may choose to ignore human rights.[36] O'Neill and Handley argue that when the range of human rights is considered, the common law in Australia has not so far been the great protector of human rights which has so often been claimed, and that it is "the least significant source of human rights law".[37] On the whole the common law upholds the supremacy of Parliament and does not provide remedies when rights are violated.[38] Judges have been more willing to uphold the actions of governments than the human rights of individuals.[39] Common law is case law based largely on precedent, and therefore relies on values from earlier days when human rights were not such a significant concern or so clearly articulated internationally. Common law did not begin from a human rights base, but as an instrument of power.[40] Burdekin supports a similar view.[41] Doyle and Wells argue that the courts have played a significant role in limiting the power of Parliament to encroach on citizens' rights and freedoms; courts are, however, slow to adapt previous principles to modern understandings and circumstances.[42] Alston argues that Australian courts will continue to feel obliged to take account of principles of human rights.[43]

Recently the High Court has shown some willingness to actively shape common law in response to more contemporary values. Brennan J argued in a 1992 judgement:

> The common law has been created by the courts and the genius of the common law system consists in the ability of the courts to mould the law to correspond with the contemporary values of society...Where a common law rule requires some expansion or modification in order to operate more fairly or efficiently, this court will modify the rule provided that injustice is not done thereby. And, in those exceptional cases where a rule of the common law produces manifest injustice, this court will change the rule so as to avoid perpetuating an injustice.[44]

The High Court judgement in *Mabo v Queensland (No 2)* is an example of where common law can have a significant effect on economic, social and cultural rights. Brennan J described the connection between common law and the international law.

> The common law does not necessarily conform to international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards

> and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[45]

Even where the courts uphold rights, Parliament can override the common law by passing new legislation, except if the courts strike that legislation down as constitutionally invalid. Courts are now beginning to recognise "implied rights" in the constitution.[46]

Thus while there are some examples of judges protecting some rights to some extent, there are also many cases where judges have denied that particular human rights exist in common law. This is true even of allegedly radical decisions such as *Mabo*, since the court upheld the validity of legislation which extinguished native title.[47]

The common law may fail whole groups of people. An obvious example is the way, until 1992, courts upheld *terra nullius*, to the detriment of Indigenous Australians. There is strong evidence of the law working to their detriment in many legal areas.[48] The common law has also worked to the detriment of women. O'Neill gives examples in the following areas: exclusion of women from the professions, exclusion of women from elective office and from the right to vote, married women and their property, women and both the criminal and civil law, and women's "right to choose" abortion. Common law torts in favour of women have been slow to develop in these areas.[49] Both Scutt and Naffine have shown that the very language and conceptual framework of the law tends to work against women.[50] Naffine, indeed, argues that the law and the courts assume a concept of the legal person who mirrors the law makers themselves, i.e. a well educated, autonomous male, and thereby ignores working men who do not fit this concept as well as women. Aboriginal women experienced detriment because of both race and gender.[51]

Legislation - what mechanisms implement ESC rights?

In the common law tradition, the written, formal law, in the form of legislation and casebooks of judgements by the courts, is "everything". Davidson and Spegele quote *Entick v Carrington*: "If it is in the law it will be found in our books. If it is not to be found there, it is not law."[52]

There appears to be no explicit reference in Australian law to the ICESCR, although it was included in the now defunct *Human Rights Commission Act 1981*. Charlesworth comments that Australian legislation is "skewed" towards civil and political rights; defining and recognising ESC rights "is a major task in the development of human rights in Australia".[53] The report of the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) in November 1994 has only passing references to the ICESCR and omits the ICESCR from its list of major human rights instruments that are implemented through specific legislation.[54] Australia has implemented some of the conventions against discrimination through legislation: the *Sex Discrimination Act* 1984, the *Race Discrimination Act* 1975, and the *Disability Act* 1992. ILO conventions are taken up mainly in Industrial Relations law. The *Human Rights and Equal Opportunity Commission Act 1986* includes a schedule of human rights instruments so that these provide a guide or charter for the HREOC rather than being directly enforceable.[55] They provide a standard, but only for Commonwealth legislation; the ICESCR is not listed.[56] "Human rights" are defined in the *HREOC Act 1986* as "the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument", where "the Covenant" refers to the ICCPR, and "the Declarations" refer the Declarations of the Rights of the Child, the rights of mentally retarded persons and the rights of disabled persons.[57]

The HREOC has the power *inter alia*, to review legislation, conduct inquiries, promote human rights, and suggest action Australia needs to take to comply with "any relevant human rights instrument".[58] The *HREOC Act* was amended in 1995 to strengthen the basis of the Act and the work of the Commission. The amendments mention the indivisibility of rights, a reference to the fact that while there are two international covenants on human rights, they both implement *human* rights, which cannot be divided or separated.[59] Nevertheless, governments continue to omit the ICESCR from the Act.

Before the major covenants were ratified, there was extensive discussion with state governments and some changes made to Australian law. Such review is itself a major task. Review of NSW law took the Anti-Discrimination Board five years, to ensure its conformity with the Anti-Discrimination Act.[60] Review of law has been part of the task of the Human Rights and Equal Opportunity Commission.[61] Review of Commonwealth and State law with respect to the human rights of Aboriginal people and Torres Strait Islanders is still a matter of major concern.[62] That is, one of the roles the international covenants play in Australia is as criteria by which to assess and review Australian law, by statutory authorities specifically set up for this task, by government and government departments, and by the courts. These reviews seem to focus on discrimination, and do not deal with the extent to which ESC rights are implemented in general.

Summary – An Assessment of ESC rights in Australia

Australia has ratified the ICESCR, conventions outlawing discrimination against particular groups, and a number of ILO conventions. These provide legitimate criteria by which to assess Australian public policy, since Australia has made itself accountable in the international arena on the basis of these rights.

The ESC human rights they contain, however, are not entrenched in Australian law and are experienced more as discretionary favours of particular governments than as human rights. Implementing ESC rights in social policy is not an integral part of the conceptual framework by which Australian policy is formulated by bureaucrats and cabinet or assessed by Parliament. There is no mechanism to ensure that the recommendations of the HREOC and other inquiries relevant to human rights are incorporated into the policy process and lead to appropriate change. Commonwealth governments have been unwilling to use the external affairs power to implement international treaties in Commonwealth law to the extent required to guarantee effectively the ESC rights of all citizens. State rights have taken precedence over citizens' human rights. The division of power between commonwealth and states has put ESC rights of citizens at risk through varying legislation, poor coordination of policy and inadequate funding, especially of Aboriginal and Torres Strait Islander policy.

There is an urgent need to develop an appropriate Australian system of benchmarks and indicators, based not on academic debate about notions of citizenship, but on the fundamental human rights for which Australia has agreed to be accountable internationally. These need to assess both the overall situation of citizens, and provide disaggregated data that allows the situation of the groups whose rights are most at risk to be assessed. The regular publication of such indicators would make governments, and the bureaucracy, both more aware of human rights as policy criteria and more accountable to the electorate for their policies. Some work has already been on this, for example, the Senate Inquiry on National Benchmarks and Indicators, the National Citizenship Project, and the work report at the *Measuring Progress* Conference sponsored by the Australian Bureau of Statistics and the CSIRO in 1997.[63]

The failure to clearly incorporate the ICESCR into domestic law means that when the High Court or other courts attempt to take account of such rights, their decisions come under attack and arouse hostility and division that are themselves inimical to human rights. As there is little effective education on citizenship and human rights, most Australians have little idea of the meaning or implications of ESC rights or how the concept of ESC rights is integral to their citizenship.[64]

The inadequacy of the National Action Plan[65] and the iniquitous failure of Australia to act effectively in response to the many reports on the violation of ESC rights of Australia's Indigenous people, are symptoms of this major weakness in the Australian policy process. These problems are also present in the latest report on the implementation of the ICESCR, which lacks the critical evaluation required by the UN reporting requirements.[66] As Charlesworth says:

> perhaps what is most crucial is for Australians to develop a new, non-utilitarian notion of democracy; a sense that something is wrong if minorities and disadvantaged groups within our society have less possibility of having their human rights observed than other groups. Our present complacency about the protection of human rights in Australia is our greatest weakness.[67]

It is time that this regime of complacency and inadequate mechanisms ended, and that all Australian Governments provided adequate mechanisms to protect and enhance the human rights of Australians.

Conclusion

Whether or not they make it explicit in legislation, governments have a responsibility to respect, protect and enhance their citizens' human rights. The value of a Bill of Rights is that it creates a useful mechanism for ensuring that all citizens know that they have human rights, and that policy proposals should be evaluated in terms of whether or not they enhance human rights rather than whether or not they enhance one's personal agenda. Properly formulated and accompanied by the right mechanism, a Bill of Rights can provide an explicit statement of the criteria against which Parliament should assess legislative proposals, guidance as to how courts should relate Australia's international commitments to our domestic laws, and a general framework within which bureaucrats provide policy advice. A New South Wales Bill of Rights could thus be a significant step forward for the human rights of citizens.

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[1] Uniting Church in Australia National Assembly Statements to the Nation 1977 and 1988.

[2] See, for example, the survey of churches in Ann Wansbrough *Speaking Together: a methodology for the National Council of Churches contribution to the public policy debate in Australia* Ph.D. thesis, Sydney University, 2000.

[3] For example, Mr Downer in the covering letter in the 1998 edition of the *Human Rights Manual*.

[4] WILLIAMS George A *bill of rights for Australia* Sydney: UNSW Press 2000 and BAILEY Peter *Human Rights: Australia in an International Context* Sydney: Butterworths 1990.

[5] The conference was jointly sponsored by the Australian Bureau of Statistics and the CSIRO, See ECKERSLEY Richard (ed.) *Measuring progress: is life getting better* Collingwood: CSIRO 1998

[6] Joint Standing Committee on Foreign Affairs, Defence and Trade *A review of Australia's efforts to promote and protect human rights* Canberra: AGPS November 1994 page 111.

[7] Joint Standing Committee on Foreign Affairs, Defence and Trade *A review of Australia's efforts to promote and protect human rights* Canberra: AGPS November 1994 page 111.

[8] Brian Burdekin quoted in Joint Standing Committee on Foreign Affairs, Defence and Trade *A review of Australia's efforts to promote and protect human rights* Canberra: AGPS November 1994 page 51.

[9] Joint Standing Committee on Foreign Affairs, Defence and Trade *A review of Australia's efforts to promote and protect human rights* Canberra: AGPS November 1994 page 51.

[10] This has been documented in Ann Wansbrough *Speaking together: a methodology for the National Council of Churches contribution to the public policy debate in Australia* Ph.D. thesis Sydney University, 2000, in Chapter 4 and Appendix 1 Case Study 4.

[11] Joint Standing Committee on Foreign Affairs, Defence and Trade *A review of Australia's efforts to promote and protect human rights* Canberra: AGPS November 1994 page 53.

[12] Joint Standing Committee on Foreign Affairs, Defence and Trade *A review of Australia's efforts to promote and protect human rights* Canberra: AGPS November 1994 page 55.

[13] WILLIAMS George *Human Rights under the Australian Constitution* Melbourne: Oxford University Press 1999 argues that there need to be changes to the constitution, and the development of a "culture of liberty" in Australia.

[14] DAVIDSON A. and SPEGELE R. *Rights, justice and democracy in Australia* Melbourne: Longman Cheshire 1991 and O'NEILL N. and HANDLEY R. *Retreat from injustice: human rights in Australian law* Leichhardt NSW: Federation Press 1994.

[15] ALSTON Philip (ed.) *Towards an Australian Bill of Rights* Canberra: Centre for International and Public Law, and the Human Rights and Equal Opportunity Commission, 1994.

[16] ALSTON Philip and CHIAM Madelaine (eds.) *Treaty-making and Australia: globalisation versus sovereignty?* Leichhardt: Federation Press 1995. Also, the 1998 debate on the Multilateral Agreement on Investment (MAI) raises these issues in a new way. See for example RANALD Patricia *Disciplining Governments? What the Multilateral Agreement on Investment would mean for Australia* Sydney: UNSW Public Sector Research Centre and the Evatt Foundation, 1998

[17] DFAT*Australia and International Treaty Making Information Kit* Canberra: Department of Foreign Affairs and Trade 1996.
[18] *Constitution* 52 (xxix)
[19] LANE P.H. *An introduction to the Australian Constitution* 3rd edition Sydney: The Law Book Company 1983.
[20] *Minister of State for Immigration and Ethnic Affairs vs Ah Hin Teoh (1995)* 128 ALR 353 ("*Teoh"*).
[21] See JSCFADT 1994 report, discussed below.
[22] JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE *A review of Australia's efforts to promote and protect human rights* Canberra: AGPS November 1994 page 37.
[23] O'NEILL N. and HANDLEY R. *Retreat from injustice: human rights in Australian law* Leichhardt NSW: Federation Press 1994 page 30.
[24] O'NEILL N. and HANDLEY R. *Retreat from injustice: human rights in Australian law* Leichhardt NSW: Federation Press 1994.
[25] LANE P.H. *An introduction to the Australian Constitution* 3rd edition Sydney: The Law Book Company 1983.
[26] LANE P.H. *An introduction to the Australian Constitution* 3rd edition Sydney: The Law Book Company 1983 page 153.
[27] DFAT *Principles and Procedures for Commonwealth-State Consultation on Treaties*
[28]O'NEILL N. and HANDLEY R. *Retreat from injustice: human rights in Australian law* Leichhardt NSW: Federation Press 1994.
[29]O'NEILL N. and HANDLEY R. *Retreat from injustice: human rights in Australian law* Leichhardt NSW: Federation Press 1994.
[30] BAILEY Peter *Human Rights: Australia in International Perspective* Sydney: Butterworths, 1990 page 120.
[31] HOPE RM (J) "Civil liberties in Australia: the case of peaceful assemblies" in TAY et al, *Teaching human rights* Canberra AGPS 1981.
[32] CHARLESWORTH Hiliary "The Australian reluctance about rights" in ALSTON Philip *Towards an Australian Bill of Rights* Canberra: Centre for International and Public Law/HREOC, 1994 page 43, citing Vienna Convention on the Law of Treaties, 23 May 1969, UN Doc A/CONF.39/27 (1969) 8 ILM article 27.
[33] CHARLESWORTH Hiliary "The Australian reluctance about rights" in ALSTON Philip *Towards an Australian Bill of Rights* Canberra: Centre for International and Public Law/HREOC, 1994 page 44.
[34] AUSTRALIAN GOVERNMENT *National Action Plan* at www.dfat.gov.au.
[35] HUMAN RIGHTS AUSTRALIA *Toomelah Report: report on the problems and needs of Aborigines living on the NSW- Queensland Border* Sydney: Human Rights and Equal Opportunity Commission, 1988.
[36] O'NEILL N. and HANDLEY R. *Retreat from injustice: human rights in Australian law* Leichhardt NSW: Federation Press 1994.
[37] O'NEILL N. and HANDLEY R. *Retreat from injustice: human rights in Australian law* Leichhardt NSW: Federation Press 1994 page 85.
[38] O'NEILL N. and HANDLEY R. *Retreat from injustice: human rights in Australian law* Leichhardt NSW: Federation Press 1994.
[39] BAILEY Peter *Human Rights: Australia in International Perspective* Sydney: Butterworths, 1990.
[40] O'NEILL N. and HANDLEY R. *Retreat from injustice: human rights in Australian law* Leichhardt NSW: Federation Press 1994.
[41] BURDEKIN Brian "The impact of a bill of rights on those who most need it" in ALSTON Philip (ed.) *Towards an Australian Bill of Rights* Canberra: Centre for International and Public Law, and Human Rights and Equal Opportunity Commission 1994.
[42] DOYLE John and WELLS Belinda "How far can the common law go towards protecting human rights?" in ALSTON Philip (ed.) *Towards an Australian Bill of Rights* Canberra: Centre for International and Public Law, and Human Rights and Equal Opportunity Commission, 1994.
[43] ALSTON Philip "An Australian bill of rights: by design or default?" in ALSTON Philip (ed.) *Towards an Australian Bill of Rights* Canberra: Centre for International and Public Law, and Human Rights and Equal Opportunity Commission 1994.
[44] *Dietrich v R* (1992) 177 CLR 292 318-20 quoted in O'NEILL N. and HANDLEY R. *Retreat from injustice: human rights in Australian law* Leichhardt NSW: Federation Press 1994 page 86.
[45] (1992) 175 CLR 1, 42 quoted in O'NEILL N. and HANDLEY R. *Retreat from injustice: human rights in Australian law* Leichhardt NSW: Federation Press 1994 page 42.
[46] DOYLE John and WELLS Belinda "How far can the common law go towards protecting human rights?" in ALSTON Philip (ed.) *Towards an Australian Bill of Rights* Canberra: Centre for International and Public Law, and Human Rights and Equal Opportunity Commission, 1994.
[47] MANSELL Michael "The Court gives an inch but takes another mile" *Aboriginal Law Bulletin* Vol. 2 No. 57 August 1992

[48] See for example HANKS P and KEON-COHEN B *Aborigines and the law* Sydney: George Allen and Unwin, 1984, also *Aboriginal Law Bulletin*, and AUSTRALIAN LAW REFORM COMMISSION *The Recognition Of Aboriginal Customary Laws* at http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/alrc/custlaw1

[49] O'NEILL N. and HANDLEY R. *Retreat from injustice: human rights in Australian law* Leichhardt NSW: Federation Press 1994.

[50] SCUTT J *Women and the Law: commentary and materials* Sydney: The Law Book Company 1990. NAFFINE, N *Law and the sexes: explorations in feminist jurisprudence* Sydney: Allen and Unwin 1990.

[51] SCUTT J, *Women and the Law: commentary and materials* Sydney: The Law Book Company 1990. GALE F "Seeing Women in the landscape: alternative views of the world around us" in GOODNOW J and PATEMAN C (eds.) *Women, social science and public policy* Sydney: George Allen and Unwin 1985.

[52] *Entick v Carrington* XIX State Trials, 1044 cited in DAVIDSON Alistair and SPEGELE Roger *Rights, justice and democracy in Australian society* Melbourne: Longman Cheshire 1991 page 4.

[53] Charlesworth Hiliary "The Australian reluctance about rights" in ALSTON Philip (ed.) *Towards an Australian Bill of Rights* Canberra: Centre for International and Public Law, and Human Rights and Equal Opportunity Commission 1994 page 40.

[54] Joint Standing Committee on Foreign Affairs, Defence and Trade *A review of Australia's efforts to promote and protect human rights* Canberra: AGPS November 1994.

[55] BAILEY Peter *Human Rights: Australia in International Perspective* Sydney: Butterworths, 1990.

[56] In the 1994 reprint it is mentioned in section 46 C (4) 9a), regarding the work of the Social Justice Commissioner.

[57] HREOC Act, Part I.

[58] *HREOC Act* 11 (k).

[59] WILSON Sir Ronald, "Statement from the President" in *Human Rights and Equal Opportunity Commission Annual Report 1994-5* Canberra: AGPS 1995.

[60] BAILEY Peter "Commonwealth initiatives in the field of human rights" in TAY et al, *Teaching human rights* Canberra AGPS 1981.

[61] *Human Rights and Equal Opportunity Commission Act* (Cth).

[62] DODSON Michael Aboriginal and Torres Strait Islander Commissioner.

[63] ECKERSLEY Richard (ed) *Measuring progress: is life getting better* Collingwood: CSIRO 1998, the proceedings of a conference sponsored by CSIRO, ABS and the Citizenship Project in July 1997.

[64] On some of the current issues, see ALSTON Philip and CHIAM Madelaine (eds) *Treaty-making and Australia: globalisation versus sovereignty?* Leichhardt: Federation Press 1995. Also, the 1998 debate on the Multilateral Agreement on Investment (MAI) raises these issues in a new way. See for example RANALD Patricia *Disciplining Governments? What the Multilateral Agreement on Investment would mean for Australia* Sydney: UNSW Public Sector Research Centre and the Evatt Foundation, 1998.

[65] See case study in Appendix 1.

[66] See section on reporting early in this chapter. The need for evaluation is acknowledged at the beginning of the draft report, but evaluation is missing from the report itself. Australia's draft report was available at http://www.dfat.gov.au in March-April 1998.

[67] Charlesworth Hiliary "The Australian reluctance about human rights" in ALSTON Philip (ed.) *Towards an Australian Bill of Rights* Canberra: Centre for International and Public Law, and Human Rights and Equal Opportunity Commission 1994 page 53.