

**New South Wales Young Lawyers Human Rights Committee's
Submission to the Standing Committee on Law and Justice
on a New South Wales Bill of Rights**

New South Wales Young Lawyers represent lawyers aged 35 years and under, or lawyers in their first 5 yrs of practice. This submission represents the views of the Human Rights Committee of New South Wales Young Lawyers.

(a) Whether the rights declared in the International Covenant on Civil and Political Rights should be incorporated into a Bill of Rights?

The application of the International Covenant on Civil and Political Rights (ICCPR) in Australia has been the subject of increasing comment and judicial consideration. In the case of *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) a majority of the High Court found that the executive government had created a legitimate expectation that administrative decision-makers would not violate the international instrument's provisions. However, the legitimate expectation did not mean that decision-makers had to comply with ratified treaty obligations.

If the State has not implemented by legislation, the rights declared in the ICCPR, then it is only persuasive rather than authoritative. It does not create a definitive base on which citizens can rely. In the event that any or some of the rights embodied in the ICCPR have been legislatively enshrined, then they are subject to amendment and the possible whims of changing governments. It is only by incorporating the principles of the ICCPR in a Bill of Rights that New South Wales citizens can rely on their full force in law.

The ICCPR should be incorporated into domestic law by the Bill of Rights

(b) Whether economic, social and cultural rights, group rights and the rights of indigenous people should be included in a Bill of Rights.

To the extent that the New South Wales Parliament has jurisdiction and or responsibility for various economic, social and political rights in the Australian Federal system of government, it should implement in a Bill of Rights, provisions of the International Covenant on Economic Social and Cultural Rights (ICESCR).

New South Wales Young Lawyers submits that these economic and social rights would include the:

1. recognition of the right to work (article 6 of the ICESCR),
2. recognition of the rights to the enjoyment of just and favourable conditions or work (article 7 of the ICESCR),
3. right to form and join trade unions (article 8 of the ICESCR),
4. right to the widest possible protection and assistance for the family, especially mothers, children and young persons (article 10 of the ICESCR),

5. right to an adequate standard of living, including the right to adequate food, nutrition, shelter, clothing, education, health and medical services (article 11 of the ICESCR),
6. right to the enjoyment of the highest attainable standard of physical and mental health (article 12 of the ICESCR),
7. right to education (articles 13-14 of the ICESCR).

The right to an adequate standard of housing

Under Commonwealth and State Housing agreements, direct reference has been made to Australia's international obligations to ensure that an adequate standard of housing is available for Australian citizens. Article 11 of the ICESCR states the right to adequate housing is a human right which Australia has agreed to respect. Whilst New South Wales has reaffirmed its commitment to this basic human right, New South Wales Young Lawyers submits that the most appropriate place for Parliament to state its commitment to an adequate standard of housing is in the Bill of Rights. The reason for this is that this is a basic human right and its inclusion in the Bill of Rights indicates the importance that Parliament attaches to it.

The right to an adequate standard of education

There have been several reports¹ that have examined the standard of education provided in Australian schools for children that need special attention: children that are disabled, from migrant or aboriginal families. They have found that there is a lack of concern by relevant Education departments of the special needs of these children. Also they have found the level and standard of education that is provided to these children is inappropriate. The conclusion of these findings is that Australia has breached its international obligations to provide an adequate standard of education for all children: articles 13-14 of ICESCR.

The Parliament should ensure that the right to an adequate standard of education is accorded to all children in New South Wales; this right should be included in the Bill of Rights.

(c) Whether individual responsibilities as distinct from rights should be included in a Bill of Rights.

It is important to remember the reason for a Bill of Rights when examining this question. It is to protect fundamental human rights, this in turn reaffirms the dignity of humans:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person²

To bring the concept of individual responsibilities within the meaning of human rights, detracts and dilutes the purpose of human rights. It acts as an "add-on", something that needs to be complied with before these rights are accorded. To take this view is to be totally out of step with international human rights law. Human rights are fundamental, they cannot be made subject to a precondition, they are what

¹ See for example Report to the Commonwealth Schools Commission, Report of the Working Party on Special Education on Commonwealth Policy and Directions in Special Education (Canberra, May 1985).

² Preamble to the Universal Declaration of Human Rights. This was declaration was made at the United Nations by the General Assembly. As such it forms part of international human rights law, which Australia must respect.

protect human dignity. They are non-derogable by a state; it cannot deny human rights to its citizens for failure to not comply with responsibilities, for it to do so would be in breach of international human rights law.

(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.

New South Wales Young Lawyers submits that it is bad law and flawed jurisprudence for Parliament to be granted the ability to override the basic rights granted in a Bill of Rights.

To maintain the rule of law, an individual citizen must be able to enforce his or her rights against the State (either the executive arm of government, or in relation to the legislative arm) in any of the courts or tribunals without limitation or exception.

The basic rights and freedoms found in the Bill of Rights should be enshrined and protected from being usurped by the Legislature or Executive.

Any ability by Parliament to override the rights of the individual is endemic to abuse. It can lead to an oppressive and at worst tyrannical government.

Notwithstanding this position, if Parliament intends to allow for the overriding of the Bill of Rights, it needs to examine the issue of derogation from the human rights within the context of international human rights law.

Circumstances under which Parliament may choose to derogate from the Bill of Rights

The International Covenant on Civil and Political Rights (ICCPR) provides for the derogation of Parliament from the human rights contained within it, under one circumstance. If a public emergency threatens the state, and it is officially proclaimed as such.³

We submit that the Parliament must only override the Bill of Rights, when a State of Emergency has been declared. This is the only method that Parliament can ensure that it complies with the ICCPR.

Procedures to ensure that the overriding legislation complies with the Bill of Rights

We submit that to ensure that the overriding legislation complies with the Bill of Rights (to the extent that this is possible) the following in relation to the overriding legislation should apply:⁴

1. derogation of the human right in the Bill of Rights should only be to the extent the exigencies of the State of Emergency requires;
2. the measures adopted in it should not be inconsistent with other international obligations of Australia;
3. the measures do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin;
4. the measures should never result in the derogation of fundamental human rights: the right to life (article 6), right to freedom from torture or inhumane treatment (article 7), right to freedom from slavery (article 8), right to not be imprisoned merely on inability to fulfil a contractual obligation,

³ Article 4 of the International Covenant on Civil and Political Rights.

⁴ Article 4 of the International Covenant on Civil and Political Rights.

right to freedom from retrospective criminal laws (article 15), right to be recognised as a person before the law (article 16), right to freedom of thought, conscience and religion (article 18).

New South Wales Young Lawyers submits that the 4 above requirements are necessary for Parliament to be satisfied with before it passes legislation that overrides the Bill of Rights. These requirements will ensure that the ICCPR and international law are complied with.

Parliament can ensure that these above requirements are complied with when it seeks to override a provision of the Bill of Rights by putting a general provision in it which sets out under what conditions human rights are able to be derogated from.

It is critical that the Bill of Rights is not overridden by a simple piece of legislation. For it to be effective as a way of guaranteeing the human rights of citizens in New South Wales, it must be sufficiently robust, unable to be easily overridden by a majority in Parliament.

Parliament must follow a system and comply with it before the provisions of the Bill of Rights can be derogated from. A system could be by ensuring that there is a 2/3 majority in both Houses of Parliament, before the Bill of Rights could be overridden. This is a complex constitutional issue and one that would need to be looked at in greater detail,

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

New South Wales Young Lawyers submits that there should be legislative recognition given to the case of *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995). The High Court in *Teoh* did provide judicial authority to the effect that courts should construe legislation in a manner compatible with international human rights instruments.

Parliament should reaffirm the importance of international human rights instruments (including those which have not be incorporated into our domestic law). This should be done by the Parliament explicitly stating in the preamble to a Bill of Rights that all legislation in New South Wales should be interpreted by the judiciary with respect to the letter and spirit of the Bill of Rights and international law. This is essential if Australia wishes to further build its reputation as a nation which respects and adheres to universally declared individual rights and obligations.

It is well settled that the provisions of an international treaty do not form part of Australian law unless those provisions have been validly incorporated by statute. In this event, those provisions become a source of individual rights and obligations applicable to all Australians.

However, the fact that an international treaty has not been incorporated into our domestic law does not mean its ratification holds no significance for the Australian judiciary. International instruments have two roles in shaping our common law, they can be used as a:

1. canon of construction. This means courts can favour that construction which, as far as the language of the legislation permits, is in conformity with the instrument. In this way, our common law will, as much as possible, develop in conformity with universally declared rights and obligations.
2. legitimate guide in the development of the common law. Although judicial interpretation should never be used as a backdoor means of importing instruments not incorporated into Australian law, there is a place for the consideration of relevant instruments as extrinsic materials. However, a

cautious approach should prevail so that the intentions of Parliament are not superseded by the views of an unrepresentative, unelected judiciary.

(j) Any other matter arising out of or incidental to the terms of reference.

Incorporating the provisions of the Convention on the Rights of the Child

The Federal Parliament in a recent Report by the Joint Standing Committee on Treaties (Senate committee) recommended that Australia ratify the Convention on the Rights of the Child (CROC) and make it enforceable in Australian law. New South Wales Young Lawyers submits that the rights that are contained in CROC be incorporated into a Bill of Rights. The reason for this is that the human rights that CROC seeks to protect are of our most vulnerable members in our community, and as such CROC is an important source of fundamental human rights for children.

National Bill of Rights

The New South Wales Parliament should consider the rights contained in the International Covenant on Civil and Political Rights (ICCPR) and other international instruments discussed in this submission in the context of Australia as a whole. There are rights contained in the ICCPR that should be provided to all Australians, not just those that live in New South Wales: for example article 9, the right not to be subject to arbitrary arrest or detention. The New South Wales Parliament should lead Australia by its example. It is only when it passes a Bill of Rights for its own citizens that there will be pressure on the national Parliament to ensure that the human rights that would be accorded to the citizens of New South Wales be made available to all Australians.

Whilst New South Wales Young Lawyers is mindful of the limits of the jurisdiction of the New South Wales Parliament with respect to Australia as a whole, we suggest that after it enacts the Bill of Rights, that it pass a resolution addressed to all State and territory parliaments and the Federal parliament, calling for a national approach on a Bill of Rights for all Australians.

The New South Wales Parliament in affirming the importance it gives to human rights by passing the Bill of Rights, cannot be held to further human rights if it does not also attempt, by any means at its disposal, to ensure that there is national respect for human rights in all the Australian jurisdictions, through a Bill of Rights that is effective across all jurisdictions in Australia.

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31/3/00