

**SUBMISSION BY THE
ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION
TO THE
NEW SOUTH WALES LEGISLATIVE COUNCIL STANDING COMMITTEE
ON LAW AND JUSTICE

- BILL OF RIGHTS INQUIRY -**

Central issue

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 courts to take into account rights contained in International Conventions.

Introduction

ATSIC strongly supports the enactment of a statutory New South Wales Bill of Rights as being appropriate and in the public interest. ATSIC recognises the value of a legislated Bill of Rights as a means to achieve a broader understanding of rights and therefore greater enjoyment of rights by indigenous people of NSW, in a context where constitutional entrenchment in the federal Constitution is the eventual aim.

To date Australia has failed to adequately fulfil its obligations to protect relevant human rights with regard to Aboriginal and Torres Strait Islander people. A Bill of Rights can deter Parliament from overriding the rights of minorities and individuals. Moreover, Bills of Rights are important because of their ability to reshape the political process and reshape the community's approach to certain issues.

The experience of Canada suggests it is better to commence with a statutory document, and after time consider a more rigid arrangement. This would allow citizens to become accustomed to the idea and allows original provisions to be interpreted and tested as a trial run for later rewrite.

Terms of Reference

- 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**

Australia has ratified the *International Covenant on Civil and Political Rights* (ICCPR) and the supporting *Optional Protocol* to the Covenant.

The *First Optional Protocol* establishes an optional procedure for the submission of complaints to the Human Rights Committee by individuals claiming to be victims of violations of rights contained in the ICCPR. The Human Rights Committee is the

body established to supervise implementation by States parties of their obligations under the ICCPR.

Australia's accession to the *Optional Protocol* to the ICCPR has "brought to bear on the common law the powerful influence of the Covenant and the international standards it impacts".¹

However many of the rights recognised by the ICCPR are not currently protected by the common law. Australia's ratification of international treaties has little direct impact on domestic law in the absence of legislation to implement the treaty, particularly when the international obligation undertaken by the Commonwealth can only be implemented by the States.

In *Mabo v Queensland*, Justice Brennan noted:²

The common law does not necessarily conform with 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 traditional lands.³

Australia has not domestically implemented Covenant obligations in Australian law except that it is scheduled to its *Human Rights and Equal Opportunity Commission Act* 1989 (Cth) and referred to in the legislation underpinning the Australian Law Reform Commission.

ATSIC supports the incorporation of the ICCPR into a state Bill of Rights. This measure would help address the significant needs of Aboriginal and Torres Strait Islander people in NSW.

b) Whether economic, social and cultural rights, group rights and the rights of indigenous peoples should be included in a bill of rights

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) has also been ratified by Australia, although the Australian government is less accustomed to the notion that some of those rights should be 'justiciable' in terms of court enforcement. Unlike the ICCPR, the ICESCR is not scheduled to the *Human Rights and Equal Opportunity Act* 1989 (Cth).

ATSIC supports the 1993 resolution of the Vienna Conference on Human Rights that both 'sets' of rights embodied in the ICCPR and the ICESCR are indivisible and interdependent. Ideally both sets of rights should be encapsulated in one document, which has been done in 1948 in the Universal Declaration of Human Rights.

¹ Justice David K Malcolm AC "Does Australia Need a Bill of Rights" in *Murdoch University Journal of Law*, Vol 5., no 3 (Sept), 1998)

² (1992) 175 CLR 1 .

³ *Mabo v Queensland* [No 2] at p.42

A bill of rights should be capable of adopting the principles contained in both existing and emerging international instruments as the basis for developing a comprehensive approach to the protection of indigenous rights. To do so would help guide action in such areas as:

- Cultural and intellectual property;
- Recognition of customary law;
- Flexible approach to self-determination including options for self-government and regional agreements;
- Entitlements to land and compensation for dispossession;
- Sharing in mineral and other resources.

Further, ATSIC recommends the separate and collective rights of Indigenous Australians as First Peoples be acknowledged, but defer substantial recognition of the more controversial group rights beyond those which are already acknowledged in the ICCPR under Article 27.

Article 27 of the ICCPR provides that:

Persons belonging to ethnic, religious or linguistic minorities must not be denied the right, **in community with the other members of the group**, to enjoy their own culture, to profess their own religion or to use their own language.

In the context of the rights elaborated in the ICESCR as they pertain to the indigenous peoples, this would include the following:

- the right to revive, maintain and develop their ethnic and cultural characteristics and identities, including;
 - their language and educational institutions;
 - their religion and spiritual development;
 - their relationship with indigenous lands and natural resources;
- the right to manage their own affairs to the greatest possible extent while enjoying all the rights that other Australian citizens have in the political, economic, social and cultural life of NSW;

ATSIC strongly recommends that a Bill of Rights include specific recognition and protection of the rights⁴ of indigenous people of NSW, including land rights and rights related to culture.

General Comment 23 of the Human Rights Committee notes that article 27 of the ICCPR recognises a distinct right of minorities that is additional to the other rights they are entitled to enjoy under the ICCPR as individuals.

Moreover, “although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of the minority.”

⁴ ATSIC Board adopted a number of goals for constitutional change on a national level at the Constitutional Convention, 2 February 1998.

Most significantly, the General Comment affirms the significance of article 27 in protecting land and resource rights of indigenous peoples:

The Committee observes that culture manifests itself in many forms, including a particular way of life with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

Specific recognition of such rights could be achieved in a few simple provisions. In Canada this was achieved under section 35 of the Canadian Constitution as:

The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed

While there are no treaty rights in Australia, specific recognition of the existing rights of indigenous people would embody international standards, both in existing Conventions, including ILO 169, and customary international law.

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

Reference to ‘responsibilities’ in a Bill of Rights, as distinct from rights, is not necessary in so far as individuals are concerned. It is sufficient for a Bill of Rights to embody those ‘rights’ articulated in international human rights Conventions to which Australia is a party.

Responsibility falls upon Government to ensure that Aboriginal and Torres Strait Islander people of NSW enjoy their rights entitlements and thereby adhere to its commitments under international Conventions referred to above. i.e. the right to various services, and the right to have those services delivered in a culturally appropriate manner.

- Right to non-discrimination

Aboriginal and Torres Strait Islander people have the right to non-discrimination, under Article 26 of the ICCPR, and the Convention on the Elimination of All Forms of Racial Discrimination which has largely been legislated into Australian law under the *Racial Discrimination Act 1976* (Cth) and state-based anti-discrimination regimes.

The NSW government has a responsibility to take positive steps to enforce this according to the Human Rights Committee which asserts that States parties may need to take affirmative action to eliminate conditions that perpetuate discrimination.

This may mean that where Aboriginal and Torres Strait Islander people of NSW are not accessing complaint procedures to fight against discrimination, the government has a responsibility to remove barriers. For example, provide improved interpreter services, or ensure that documentation is available in plain English or explore other ways to disseminate information.

- Right to Social Security

The mutual obligation policy in the welfare sector demonstrates how enjoyment of 'rights' can be diminished by the imposition of responsibilities or 'duties' upon individuals where such entitlements exist as of right.

By becoming a signatory to the ICESCR, Australia confirmed its support for Article 9 by which Australia recognises "the right of everyone to social security". Any mutual obligation regime must recognise this right. Thus safety net payments are a citizenship right to which all Australians are entitled, particularly in a historical context in which there is insufficient employment for everyone. A mutual obligation regime focused on empowerment will ensure that individuals and communities are not stigmatised for receiving their entitlement, which is their right.

d) The consequences for Australian common law of Bills of Rights in the United Kingdom, Canada and New Zealand.

Australian judiciary look to decision-making in other jurisdictions to inform decisions in this country. Therefore judicial decisions in other jurisdictions influence the common law within the ambit of legislation in this country.

Australia, without a Bill of Rights, is now outside the mainstream of legal development in English speaking countries, particularly those most comparable in their political and legal systems, including New Zealand and Canada. While it is true that the UK lacks a Bill of Rights, the possibility and increasingly the fact of recourse to the European Court of Human Rights and the flow-on effect to decisions by United Kingdom courts, means that the United Kingdom does, in effect have a Bill of Rights.

There are limitations on the ability of the common law to protect human rights. The first is the principle of parliamentary supremacy which, in the context of common law protection of civil rights, holds that parliament may legislate to alter, restrict or negate any protection created by the common law. The second is the basic approach of the common law to the question of rights in terms of identification of what is left after the limitations and restrictions imposed by law.

In the words of Hilary Charlesworth:

Common law protection of rights is minimal; the Commonwealth government's power to legislate to implement international obligations with respect to human rights has been only partially and inadequately exploited; the States generally have given the protection of human rights a low legislative priority; and Australian participation in international human rights instruments has often been diffident."⁵

The Bangalore Principles 1988 offer guidance for a legitimate approach for the introduction of human rights jurisprudence. Simplified, these Principles provide that where a local statute is ambiguous or where there is no exactly applicable common

⁵ Charlesworth, H. (1994) "The Australian Reluctance About Rights", in Towards an Australian Bill of Rights, Ed. Alston, P., Centre for International and Public Law, Canberra and Human Rights and Equal Opportunity Commission, Sydney 1 at 21.

law principle, the judge may resolve the ambiguity or fill the gap in the common law by reference to universal human rights jurisprudence where this is relevant.⁶ An increasing number of judges in the common law countries are now doing this, including Australia.⁷

Where bills of rights in other jurisdictions guide judicial decision-making, and the Australian judiciary look to the common law of those jurisdictions to guide their own decisions, such bills of rights will necessarily influence the development of Australian common law albeit indirectly. “As long as this continues to be the case, Australia runs the risk of either acquiring a Bill of Rights by default.”⁸ While this is better than nothing, it would be preferable to develop Australian legislation reflecting the circumstances and needs of Australian society and in particular the needs and aspirations of the indigenous people of Australia.

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

Judges are constantly engaged in the application of fundamental human rights. They do so at every level of the judicial hierarchy.

Legislative requirement to construe legislation in light of Australia’s human rights obligations could be achieved by amendment to the *Interpretation Act 1987* (NSW) requiring courts to take into account human rights standards in international instruments, as they are ratified and accepted by Australia as appropriate and in the public interest.

The NSW Court of Appeal and the High Court of Australia have indicated it is permissible to refer to international human rights instruments in resolving ambiguities in the meaning of legislation or in developing the common law. It would be valuable to incorporate this principle into the *Interpretation Act 1987*.

However, at present the courts have no clear mandate from society to strike down legislation for contravening human rights and no guidance as to the rights to be protected. “The courts might act more confidently in this area if parliament provided some indication of the rights which are to be given the greatest weight.”⁹

ATSIC supports the legislative requirement on courts to construe legislation in manner which is compatible with international human rights instruments. Other jurisdictions have approached this in different ways, such as the UK where an Act is declared incompatible, in New Zealand where Acts are interpreted in accordance

⁶ Young v Registrar, Court of Appeal [No 3] (1993) 32 NSWLR 262 CA; Smith v The Queen (1991) 25 NSWLR 1 CA 13.

⁷ Justice Kirby “The Judges Role” at *International Seminar on Human Rights*, Belfast, May 1998

⁸ Alston, P. (1994) “An Australian Bill of Rights: By Design or Default?” in *Towards an Australian Bill of Rights*, Ed. Alston, P., Centre for International and Public Law, Canberra and Human Rights and Equal Opportunity Commission, Sydney 1 at p.17.

⁹ Doyle J. & Wells B., “How Far Can the Common Law Go Towards Protecting Human Rights?” in *Towards an Australian Bill of Rights*, Ed. Alston, P., Centre for International and Public Law, Canberra and Human Rights and Equal Opportunity Commission, Sydney 1 at p.110.

with rights, or the proposed model of simply declaring legislation invalid.¹⁰ An Australian model would need to be drafted carefully.

¹⁰ An invalidation system is appropriate because even though it gives the courts more power it is important to recognise that parliaments do not always make just laws, just as majorities have not always made just laws especially with regard to minorities. Parliament could have an override such that if parliament disagreed with the courts interpretation of its statute, it could either pass the statute anyway and suffer community and political backlash or have a clause stating “this statute is to operate notwithstanding the right.