AUSTRALIAN SECTION of the
INTERNATIONAL COMMISSION OF JURISTS
NSW Branch
P O Box K847, Haymarket NSW 1238

NSW LEGISLATIVE COUNCIL
STANDING COMMITTEE ON LAW and JUSTICE

NSW BILL OF RIGHTS INQUIRY

SUBMISSION

Introduction

The International Commission of Jurists (ICJ), founded in 1952, has as its mandate the promotion of the rule of law and the legal protection of human rights through out the world. As a non-government organisation it has many national sections and affiliates in all regions of the world, each of whom adhere to the ICJ mandate. The Australian Section of the ICJ (the ASICJ) is one such section and it is supported by branches in almost all States and Territories.

At the international level the ICJ has worked extensively in standard setting of human rights norms and bringing human rights abuses to the attention of the international community. Its sections and affiliates have at the same time worked towards the domestic implementation of human rights norms, which is recognised as the most effective and long lasting means of protecting human rights. Domestic implementation is not limited to the enactment of laws which give effect to human rights norms, it includes developing within society a culture of fundamental rights and freedoms which are "*without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status*"[1].

---

[1] Universal Declaration of Human Rights, Article 2, International Covenant on Civil and Political Rights (ICCPR) Article 2(1)

The New South Wales Branch of the ASICJ, as has the ASICJ itself, sought the domestic implementation of human rights norms within New South Wales and congratulates the Government of New South Wales in its initiative to put before this Committee an inquiry on a *Bill of Rights*.

Fundamental Freedoms and Human Rights

Australia, through the Federal Government, has actively participated in the formulation of numerous international human rights treaties, which set out what has been universally accepted as the minimum guarantees of fundamental freedoms and human rights. The Australian Government has also willingly signed and ratified many of these and voluntarily made itself accountable to the international treaty bodies established under these treaties to monitor State parties performance in meeting its obligations under a the treaty.[2] Australia's commitment to these instruments and the functioning of the treaty bodies is perhaps highlighted by its participation in the workings of the various United Nations bodies and its willingness to support the nomination of prominent Australians, as independent experts, to treaty bodies, established to monitor State Party compliance with their obligations under the treaty. Yet it has been reluctant to give full effect to the rights and freedoms identified in these treaties to the people of Australia through the enactment of domestic laws. Perhaps the most notable failure is the omission to enact a *Bill of Rights*,[3] obliging many Australians to seek international solutions where they believe there has been an infringement of what is accepted as an infringement of a universal human right.

---

[2] For example, Australia signed the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) on 13 October 1966 and ratified it on 30 September 1975, signed the *International Convention on Civil and Political Rights* (ICCPR) on 18 December 1972 and ratified it on 13 August 1980 and signed the *International Covenant on Economic Social and Cultural Rights* (ICESCR) on 18 December 1972 and the instrument of ratification was deposited on 10 December 1975.

[3] The need to incorporate such rights into a local Bill is implied in the ICCPR. Article 2.2 demands that each State Party "adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the covenant." Article 3.3, ICCPR, notes that each State Party undertakes to ensure that parties whose rights or freedoms are violated shall have an effective remedy. A signatory is urged to ensure that a person claiming a remedy can have that claim determined by competent judicial, administrative or legislative authorities and the State is asked to ensure that competent authorities enforce such remedies when granted.

Several efforts have been made to develop a *Bill of Rights* at the Federal level none of which was successful. This is now seen by some as a hindrance to the future development of our democracy and our jurisprudence generally. Canada enacted a *Bill of Rights* in 1980, New Zealand enacted one in 1990 and the United Kingdom (on which our legal system is based) enacted its *Bill of Rights* in 1998. With the enactment of such legislation these countries have provided several different examples of a mechanism for development and determination of human rights norms for the people of their respective countries within their country. It is time for Australia to adapt or adopt one of the forms of *Bill of Rights* used above.

The fact that the Federal Government has failed[4] to enact a *Bill of Rights* does not prevent any State from doing so. It will be of limited effect in that it will only apply to areas over which New South Wales Government has jurisdiction. However, this could be a significant advance in that this most populous and litigious State will have in place a mechanism that recognises and protects those fundamental rights and freedoms which are the foundation of our democracy. This will then provide a model and encouragement for other States and Territories to follow.

In addressing the specific terms of reference of the Committee, New South Wales Branch of the ASICJ wishes to make the following points:

1. Whether the rights declared in the International Covenant on Civil and Political Rights (ICCPR) should be incorporated into domestic law by such a Bill of Rights;

1.1 The starting point for any *Bill of Rights* must be the inclusion of those rights, which are regarded as being basic and fundamental to our democratic system. These are without question those rights protected under the International Covenant on Civil and Political Rights (ICCPR) and which form the basis of the

[4] In *Ireland v. United Kingdom*, 2 EHRR 25 (1976). the European Court of Human Rights held that although the convention did not oblige contracting parties to directly incorporate its rights and freedoms into national law, the Court also held that incorporation best reflects the intentions of the framers of the Convention (*A British Bill of Rights* IPPR, London, 1996 2nd ed pp 5).

legislation that has been enacted in Canada, New Zealand and the United Kingdom.[5] In depositing its instrument of accession on 25 September 1991 to the First Optional Protocol to the ICCPR, Australia has also provided each Australian with the ability to seek redress for alleged human rights abuses to the Human Rights Committee. This avenue of redress is however only available after the person has exhausted domestic remedies. It can be a long, exhausting and expensive process.

1.2 It is well recognised that the common law has an absence of written guarantees of freedom. That is, the common law has always treated liberty as a "defeasible" right, whereby every citizen has a right to do what s/he likes, unless restrained by the common law or by Statute.[6] Consequently, under the common law, the liberty of the subject is what is left over when all the prohibitions have limited the area of lawful conduct. While it may be argued that this provides flexibility, it fails to provide protection for what are today accepted as guaranteed freedoms and allows for the erosion of freedom where a legislature is willing to countenance infringement of liberty or where it is simply blind to the effect of what is seen as a well intentioned piece of legislation. As has been said before:

> *"In considering the proper rule of the common law in the protection of human rights we have to bear in mind that in Australia the High Court is working within a system in which there is no bill of rights, entrenched or unentrenched, to guide it. The court has 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".*[7]

---

[5] *A British Bill of Rights* IPPR, London, 1996 2nd ed pp 16-20

[6] Albert Venn Dicey *Introduction to the Study of Law of the Constitution* (10th ed, Macmillan 1959).

[7] Doyle, J & Wells, B (1994) How far can the common law go towards protecting human rights ? in Alston, P (1994) Towards an Australian Bill of Rights, Centre for International and Public Law, Canberra at p.1110

1.3 Justice Millhouse said for another State:

> *". . . in the absence of a Bill of Rights . . . the citizens of this State do not have rights which may not be overridden by Act of the South Australian Parliament."*[8]

1.4 The High Court has suggested that while the common law will be influenced by international law it will not necessarily conform with that law.[9] There is no question that there is a long-standing and strong commitment to the Rule of Law within Australia. It is something of which we are all extremely proud, and it is because of this commitment that it is essential that we enhance our law through the incorporation of a *Bill of Rights* that sets out what is accepted as forming our fundamental freedoms and human rights.

1.5 The High Court has held that there is an implied constitutional freedom of speech in the Australian Constitution in respect of publishing material that discusses government and political matters or that concerns members of Parliament and their performance as parliamentarians.[10]

1.6 In another case, the High Court struck down NSW legislation (*Community Protection* Act 1987), which provided for the detention of a person without the person having committed a crime.[11] The NSW Court of Appeal had up-held the legislation as being valid, notwithstanding that it infringed a fundamental safeguard of the democratic right of individuals.[12] On appeal the High Court overturned this decision on the basis that a State court could not act in a manner that was incompatible with Chapter III of the Commonwealth Constitution, which embodies the doctrine of the separation of legislative and judicial powers. This doctrine is also incorporated into the ICCPR which provides that impartial and independent judiciary is the corner stone for the legal protection of human rights.

---

[8] *Grace Bible Church v Reedman* (1984) 54 ALR at p 585
[9] Brennan J *Mabo v. Queensland [No2]* (1992) 175 CLR 1 at p.42
[10] *Theophanous v Herald & Weekly Times Ltd* (1994) 187 CLR 104
[11] *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.
[12] *Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374.

1.7 In this case the High Court held that the New South Wales constitution did not embody this doctrine, however by virtue of section 106 of the Commonwealth Constitution the doctrine applied to New South Wales. Consequently, the NSW legislation, which had been held to be an exercise of judicial and not legislative power was held to be invalid.

1.8 A *NSW Bill of Rights* would endorse the principles of these cases and other accepted human rights principles and will provide more certainty and consistency in their application and interpretation.

1.9 A NSW *Bill of Rights* incorporating the fundamental rights and freedoms contained in the ICCPR will have the following positive effects:

1.9.1 provide an easily accessible and tangible statement of the fundamental values of our democracy;

1.9.2 provide guidance for legislative, executive and judicial action;

1.9.3 provide the basis for a wider educative role in having a more informed public. As was noted in the United Kingdom:

> *"learning about these principles would become part of the school curriculum and adult education, encouraging people and the students to debate the importance of protecting human rights and the difficulties which arise when they conflict. Such a development would lead to a more informed public, more sensitive to the implications of restricting civil liberties and of extending them."*[13]

1.9.4 provide a permanent and effective check on oppressive action by future governments, whether it be intentional or unintentional. It will provide a proper framework within which to consider issues rather than respond to uninformed public pressure;

---

[13] *A British Bill of Rights* IPPR, London, 1996 2nd ed pp 15

1.9.5 provide that individual fundamental rights, "*which, although not absolute should not be overridden by Parliament or the executive unless there is a really pressing social interest which requires it*"[14]:

1.9.6 enhance the development of our common law in line with developments in other common law jurisdictions such as Canada, New Zealand and the United Kingdom;

1.9.7 provide a mechanism whereby the executive and the judiciary are able to balance the infringement of rights against the necessities of a democratic society. Without a *Bill of Rights* it is not certain that "the proportionality doctrine" will be applied by our courts, although appeal mechanisms can provide a safeguard.[15];

1.9.8 provide a local mechanism to protect fundamental freedoms; and

1.9.9 will ensure that NSW complies with current international obligations, including treaties to which Australia is a party.[16]

1.10 The real issue, which needs to be decided is whether a *Bill of Rights* should:

1.10.1 have rights that are enforceable; and

1.10.2 that are entrenched in the Constitution.

That is, a *Bill* which is not simply a statement of good intent but a statutory right to enforce these rights in the courts or tribunals of New South Wales. It is the view of the NSW Branch of the ASICJ that fundamental rights should be protected against legislative intervention and enforced as this will see the enhancement of our current political system and provide a better guarantee for the protection of fundamental human rights and freedoms. However, it recognises that this will require wide consultation and acceptance.

---

[14] Sydney Kentridge QC "Parliamentary Supremacy and the Judiciary Under a Bill of Rights: Some Lessons from the Commonwealth" 1996 Harry Street Lecture, University of Manchester, October 24, 1996 in Public Law.

[15] Ibid at p.98

[16] UK Government discussion paper June 1976.

2 Whether economic, social and cultural rights, group rights and the rights of the indigenous people should be included in a bill of rights

2.1 While the rights set out in the ICCPR have been more easily identified, many of the obligations on State Parties as set out in the *International Convention on Economic, Social and Cultural Rights* (ICESCR) are of equal importance to ensuring fundamental rights and freedoms. The Universal Declaration on Human Rights, ICCPR and the ICESCR are commonly known as the "*International Bill of Rights*". For these reasons the NSW Branch of the ASICJ would urge the examination of the inclusion of appropriate rights contained in the ICESCR into a *NSW Bill of Rights.*[17]

2.2 The rights contained in the ICESCR include, the right to an adequate standard of living, including adequate food, clothing, housing and to the continuous improvement of living conditions (Article 11) the right to just and favourable conditions of work (Articles 6&7), including the right to form trades union (Article 8); the right to social security (Article 9); protection of the family, particularly mothers and children (Article 10); the right to the highest attainable standard of health (Article 12); to education (Article 13) and to take part in cultural life (Article 15). However, some of these rights are not as well understood as those rights contained in the ICESCR. For example, the right to housing does not mean that State Parties have an obligation to provide every person in their country with a house.

2.3 Under the Australian federal system, it is the states, which have responsibility over many of the areas covered by the ICESCR and it is therefore appropriate that New South Wales includes these rights in its *Bill of Rights* at least in the education sense rather than create enforceable rights. This is highlighted by the

---

[17] It is worth noting that the draft Australian Bill of Rights successfully incorporated economic, community, cultural and social rights within its framework, going beyond the ICESCR to include provisions in relation to the right to ecologically sustainable development.

incorporation into Australia's periodic reports to the UN Committee on Economic and Social and Cultural Rights. [18]

2.4 To incorporate the ICESCR into a *NSW Bill of Rights* would provide a powerful statement of the State's acknowledgement of the provisions of the ICESCR and its commitment to the economic, social, and cultural development of all persons living in New South Wales, regardless of a persons wealth, religion, race, sex, regional location, or other circumstances.

2.5 In particular need of added protection are the indigenous peoples in New South Wales, especially in the area of cultural life[19]. Indigenous peoples' right to revive, maintain and develop their languages, traditions, religion, ownership and management of land and water resources, rights to manage their own affairs and receive technical assistance, which will assist them in pursuit of their political, economic, social and cultural development are all rights which are embodied in the ICESCR. Greater expression or recognition would be given to those rights if the provisions of the ICESCR were incorporated into a *NSW Bill of Rights*[20].

3. Whether individual responsibilities as distinct from rights should be included in a bill of rights

3.1 Articles 29 and 30 of the Universal Declaration of Human Rights provides for duties on the individual. Article 29(1) provides for a duty to the community and Article 39 provides that everyone has a duty not to destroy the rights and

---

[18] See for example *Australia's Report Under the International Covenant on Economic, Social and Cultural Rights* submitted to the Economic, Social and Cultural Rights Committee of the United Nations on 19 June 1998, which contained a report specifically from New South Wales in relation to progress in these areas.

[19] See for example Janke, Terri "Respecting Indigenous cultural and Intellectual Property Rights", Vol 22(2) UNSWLJ 631, especially at 634-5.

[20] note the idea of an Indigenous Bill of Rights has been suggested in the "social justice package" reports by ATSIC, the Council for Aboriginal Reconciliation and the Aboriginal & Torres Strait Islander Social Justice Commissioner, as cited by Nettheim, Garth in "Reconciliation and the Constitution", UNSWLJ Vol 22(2) 1999, 625 at 629. See also Scott, Evelyn, "The Importance of Formal Reconciliation", UNSWLJ Vol 22(2) 604 at 607

freedoms of another. Otherwise, the ICCPR and the ICESCR do not cotain duties or responsibilities on individuals.

3.2 The 1981 African Charter of the Organisation of African Unity is an example of how duties have been created. This Article contains a duty to the family, to use one's physical and intellectual abilities for the benefit of the country, to avoid compromising the security of the country, to preserve and strengthen social and national solidarity, to preserve and strengthen the national independence and territorial integrity of one's country and to contribute to its defence, to work to the best of one's ability and to pay taxes, to preserve and strengthen positive African cultural values and to promote the moral wellbeing of society, and to do one's best to promote African unity. However, duties and responsibilities expressed in this way has not been part of the Australian tradition.

3.3 Accordingly, it is the submission of the NSW Branch of the ASICJ, that a *NSW Bill of Rights* should not impose responsibilities on individuals except as they apply as a natural conclusion of the rights that are prescribed.

4. The consequences of an Australian common law of a bill of rights in the United Kingdom, Canada and New Zealand

4.1 The consequences on Australian common law, without a *Bill of Rights* is identified above and has been highlighted by the President of the Western Australian Branch of the ASICJ, the Hon Justice Malcolm when he stated:

> *"Australia, without a bill of rights, is now outside the mainstream of legal development in English speaking countries, particularly those most comparable in the political and legal systems* . . . "[21]

4.2 People in France, Germany, the Netherlands and Italy have remedies in their own courts in a case of a breach of the European Convention on Human Rights and many other countries give similar protections.

4.3 Australia has and continues to extensively drawn on the common law of the United Kingdom, Canada and New Zealand. These countries now each have a *Bill of Rights,* which will has and will continue to have a considerable impact on the development of their jurisprudence. If Australia, including the states and the territories, omit to enact a *Bill of Rights*, then our ability to draw upon the jurisprudence of these countries will become increasingly limited, notwithstanding our foundational values and aspirations remain the same.

5. 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.

5.1 As mentioned above, the preference is that a *Bill of Rights,* containing significant enforceable rights as are contained in the ICCPR, should be entrenched. However it is recognised that this is essentially a question of political will requiring extensive consultation. This should not prevent the taking of steps to put into place a legislative scheme that provides some security against easy amendment by future governments. For example, it could provide that the legislation can only be amended by a vote of 2/3rd of the members of both houses of parliament sitting together.

5.2 Another means of providing that the legislation is not easily amended by successive governments is to adopted the British system of requiring the tabling of a "*Bill of Rights Impact Statement*" whenever legislation is introduced. This is an effective means of alerting both politicians and civil servants to the requirements of the Bill of Rights.

6. **The circumstances, if any, in which a Bill of Rights should be binding on individuals as distinct from the Legislative, Executive and Judicial arms**

---

[21] The Hon. Mr Justice David Malcolm AC Bill of Rights and the Common Law, Plenary address

of Government and persons or bodies performing a public function or exercising a public power under legislation

6.1 Originally, legal protection for human rights was primarily intended to protect individuals and minorities against the misuse of power by government bodies and other public authorities. It was not designed to be a source of rights and obligations as between private persons."[22]

6.2 However, developments in recent years has seen more and more private bodies or companies performing "public" functions, particularly with privatising and corporatising government functions, and to that degree should be bound by the provisions of a *Bill of Rights*. One suggested clause is:
"The bill of rights applies to any act or omission by or on behalf of any person or body (including the Crowns) in the performance of any public function[23]

7. **The extent and manner in which the rights declared in a Bill of Rights should be enforceable**

7.1 A *Bill of Rights* that contains rights that are appropriately entrenched, must be able to be enforced by all those individuals who believe they have suffered as a consequence of its breach and those rights must be enforceable in all courts and tribunals. An analysis of the ICCPR and the ICESCR will reveal those rights that should be enforceable and those that are not.

7.2 The real issue is what remedies should be available to those persons who seek to enforce these rights. It is important that remedies in some form be available for those rights that are enforceable and it is essential that a public body such as the Human Rights Commission be given funding and power to bring actions and seek remedies on behalf of individuals or a class of individuals, who are

---

given to Law and Justice Conference - July – 1 August 1997
[22] *A British Bill of Rights* IPPR, London, 1996 2nd ed p.21
[23] *A British Bill of Rights* IPPR, London, 1996 2nd ed p.21

disadvantaged.

8. **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**

8.1 The principle of proportionality is central to the jurisprudence surrounding any human rights legislation and should continue to be so with an *NSW Bill of Rights*. A starting point should be the international treaty that sets out the right and there should be no derogation from those rights, which the treaty provides are non-derogable. If it is possible to derogate a right, the *Bill of Rights* should prescribe the circumstances in which a right may be derogated so that any restrictions placed on a right is limited and does not operate to over-ride the right itself. Again the United Kingdom legislation provides a good example of how this might be achieved.

9. **Whether there should be a legislative requirement on courts to construe legislation in a manner, which is compatible with international human rights instruments;**

9.1 NSW courts and tribunals have no general express power to apply international human rights jurisprudence in construing legislation. As mentioned above, there have been circumstances where the Court has applied international human rights jurisprudence to strike down laws, but this is rare. Where an international instruments giving rise to this jurisprudence has been enacted into domestic law, either by the State itself or by the Federal Government, then the ability of the Court to strike down incompatible state laws is clearer. However, a *Bill of Rights* would have the same effect.

9.2 The High Court has applied provisions of international instruments that Australia has ratified in order to determine an ambiguity under domestic law.[24] The same could apply to NSW Courts in the case of an ambiguity.

9.3 There is an understandable reluctance by the courts to apply international jurisprudence as was explained by Justice Michael Kirby, former world and Australian President of the ICJ:

> *" for countries which have to solve their problems by reference exclusively to common law principles as supplemented by local legislation, the International Bill of Rights and the doings of committees in Geneva courts in Strasbourg seem far away. Either they are irrelevant because the rules of the common law are parallel, sufficient, complete, binding and authoritative, or they are inferior because they are not justiciable and enforceable, are mostly made by foreign politicians, are stated in the language of extreme generality and are not susceptible to amendment or clarification with changing attitudes, changing needs and changing times".*[25]

9.4 His Honour Justice Kirby has of course not been constrained with the same level of reluctance. Meanwhile, his statement supports the need for a *Bill of Rights.*

9.5 As has already been explained, the benefits of requiring Australian courts and tribunals, in particular New South Wales courts and tribunals, to construe legislation in a manner that is compatible with international human rights instruments, is that it will be the Australian courts which will be determining the issue with a knowledge of the Australian issues. This will bring to Australia jurisprudence that has developed in other countries, and also allow Australia to contribute to this wide reaching and developing jurisprudence. At the same time it will be Australian courts that will be the determiner of the issue within

---

[24] *Teoh v Minister for Immigration and Ethnic Affairs*, [1994-1995] 183 CLR 273

[25] Kirby, Michael, " The Australian Use of International Human Rights Norms: from Bangalore to Balliol - A View From the Antipodes", Vol 16(2) UNSW Law Journal, 1993 363 at 364.

Australia, and not necessarily an international body. This can only enhance our law and benefit our society as a whole.

10. Any other matter arising out of or incidental to these terms of reference

10.1 In addition to its recommendations on the enactment of a *NSW Bill of Rights,* the NSW Branch of the ASICJ would urge this Committee to recommend that as a minimum, the Government establish a bi-partisan Standing Committee that is given responsibility to scrutinise all Bills to ascertain whether they comply with Australia's obligations under international human rights law. This Committee should have power to receive submissions and be required to report to Parliament when the Bill is being debated. This will provide an immediate and minimum form of protection for those rights contained in the ICCPR, ICERD and ICESCR.

CONCLUSIONS

A: The NSW Branch of the ASICJ supports a *Bill of Rights* in New South Wales, following extensive consultation within the community.

B: It supports a *Bill of Rights* as explained hereunder that:

i) contains rights that are enforceable; and

ii) is entrenched in the Constitution.

C: It recommends that at a minimum enforceable rights should be those contained in the ICCPR and the appropriate rights contained in the ICESCR.

D: It recommends that the remaining rights contained in the ICESCR should also be incorporated into a *Bill of Rights,* but without those rights initially being enforceable, enabling the legislation to have an educative effect, with a view, where appropriate, to subsequent enforceability.

E: It urges that consideration be given to the Canadian legislation as a model for a *Bill of Rights*, however it would also support a model based on the United Kingdom legislation.

F: That the recommendations set out in paragraph 10.1 be given immediate effect. This would be the first step towards improving government policy making and administrative decision-making in implementing human rights norms. It would also provide an important form of education for all those who are unfamiliar with these norms and how they apply locally.

G: The NSW Branch of the ASICJ would be pleased to provide more details on specific issues once proposals have been formulated.

Dr Keith Suter
Vice President
NSW Branch of the ASICJ
31 March 2000