

The Law Society of NSW

Submission of the Human Rights Committee to the Inquiry into a Bill of Rights for NSW (Legislative Council Standing Committee on Law and Justice)

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Executive Summary

This submission has been prepared by the Society's Human Rights Committee (the "Committee") and while it does not represent the views of the Council of the Society, it does express the views of expert practitioners from the Committee.

The Inquiry by the Legislative Council Standing Committee on Law and Justice (the "Parliamentary Committee"), contemplates the introduction of a Bill of Rights as part of New South Wales law and not Australian Law. Inquiries into an introduction of a Federal Bill of Rights has occurred four times previously.

The key finding of the Committee is that it supports a Bill of Rights for NSW. This Submission will illustrate that the present common law as well as the Federal and State legislation do not guarantee the rights and freedoms of the individual. In that regard, the British Bill of Rights model is the most favoured.

The Committee recommends that a NSW Bill of Rights should contain an express remedial provision which confirms that anyone, whose rights or freedoms have been infringed or denied, may apply to the court to obtain such remedy as the court considers appropriate and just in the circumstances. Further, the court should be required to construe any legislation in a manner that is compatible with the legislative Bill of Rights.

It is also recommended that the NSW Bill of Rights should apply to both public and private entities. It is recognised that some groups within the community including certain public authorities or public offices may need to be exempted, for example, on national security grounds, from certain requirements to adhere to a Bill of Rights.

The Committee further recommends the incorporation into domestic law of the International Convention on Civil and Political Rights 1966 ("ICCPR"), but the ICCPR ought to be restated to suit the cultural, ethical, social and political position of NSW, as well as taking into account developments in rights jurisprudence that has occurred since the ICCPR was first introduced. There should also be an inclusion of economic, social and cultural rights, group rights and the rights of indigenous people into a NSW Bill of Rights.

Summary of Recommendations

(a) The Committee supports the incorporation into domestic law of the ICCPR provisions restated to suit the cultural, ethical, social and political position of NSW and to take into account developments in human rights jurisprudence that has occurred since the ICCPR was first introduced.

(b) The Committee supports the inclusion of economic, social and cultural rights, group rights and the rights of indigenous people in a NSW Bill of Rights. A carefully drawn Bill will have regard to the rights of all people without undermining the universality of the document.

- (c) The Committee believes a Bill of Rights should focus on rights of the individual. Individual responsibilities should remain the domain of the legislators and to be interpreted by the courts.
- (d) The Committee is of the view that NSW common law does not guarantee the rights and freedoms of the individual. Other common law countries with Bill of Rights instruments will no longer be sources of inspiration and influence. The Committee supports a Bill of Rights for NSW. In particular, the Committee recommends the introduction of the British model.
- (e) The Committee supports the British model for incorporation of a Bill of Rights into NSW where the Bill is introduced by way of an Act of Parliament. The protection of rights while upholding the supremacy of Parliament is paramount to the acceptance of a Bill of Rights in this State.
- (f) While the Committee believes a NSW Bill of Rights should apply to both public and private entities, it is recognised that some groups within the community including some public authorities or public offices, in specified circumstances (for example, on the grounds of national security), may need to be exempted from particular requirements to adhere to a Bill of Rights.
- (g) The Committee recommends that a NSW Bill of Rights should contain an express remedial provision which confirms that anyone whose rights or freedoms have been infringed or denied may apply to the court to obtain such remedy as the court considers appropriate and just in the circumstances. In that regard, the Committee further believes that the British model is the appropriate one for NSW.
- (h) The Committee supports the European Convention on Human Rights model to set any reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic society.
- (i) The Committee supports that the court construe the legislation in a manner that is compatible with the Bill of Rights.

Introduction

The Committee applauds the positive approach taken by the New South Wales Attorney-General, the Honourable Jeff Shaw QC MLC, to refer an inquiry on a Bill of Rights for New South Wales to the Parliamentary Committee. This is a significant inquiry involving consideration of a series of important legal and constitutional issues.

The Society has made this submission in general terms addressing the issues raised by the Parliamentary Committee and other questions. This submission has been prepared by the Society's Committee with special responsibility for human rights. As such, the submission represents the views of New South Wales lawyers with particular interest and expertise in human rights. It is proposed to present the submission to the Law Society Council for consideration in due course.

There are many issues which may interest the Parliamentary Committee during the conduct of the inquiry. There will be questions raised in addition to those in the materials which you have already circulated about the inquiry. The Society offers to the Parliamentary Committee to undertake further research and study on additional aspects, topics and issues which the Parliamentary Committee believes may require attention during the conduct of this inquiry and, in this regard, the Parliamentary Committee is requested to liaise with Shaughn Morgan, Director, Practice and Community Services Division. He may be contacted directly on 9926-0250 or email: spm@lawsocnsw.asn.au. Obviously the Society can make a more effective contribution to the inquiry from a legal perspective and we would prefer to confine our efforts to legal questions, in so far as that is possible.

Why is a Bill of Rights needed?

Many arguments can be made for and against the introduction of a Bill of Rights. While the Committee favours the introduction of a Bill of Rights in New South Wales, this submission does look at some of the arguments against the proposed initiative. One of the possible problems with the proposal is that it contemplates the introduction of a Bill of Rights as part of New South Wales law and not Australian Law. Consideration has been given to the introduction of a Federal Bill of Rights throughout Australia's history:

- . 1896 The idea was raised during the Constitutional Convention debates.
- . 1944 The Labour Government put to referendum a proscription of any government, federal or state, making any law for abridging the freedom of speech or expression, and an extension of section 116 of the Commonwealth Constitution to bind the States. This referendum was defeated.
- . 1973 Attorney-General Lionel Murphy introduced into the Senate the Human Rights Bill which sought to embody the substantive provisions of the International Covenant on Civil and Political Rights 1966. It met with opposition and lapsed on the prorogation of Parliament in April 1974 and was never re-introduced.
- . 1985 Attorney-General Lionel Bowen introduced the "Australian Bill of Rights" into Parliament. Due to prolonged debate in the Senate it was withdrawn by

the government.

The Federal Government has ratified a series of International Treaties and Conventions under the External Affairs power in the Australian Constitution. Some of these have contained provisions covering rights and obligations. The *International Covenant on Civil and Political Rights 1966* (the "ICCPR") was ratified by Australia in 1980. Legislative initiatives have been taken at the federal level based on the ICCPR including the assessment of the Human Rights and Equal Opportunity Commission ("HREOC") which has special responsibilities in connection with human rights issues. The Federal Government has attached the ICCPR as a schedule to the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*.

The approach taken by the Federal Government has fallen short of the introduction of a Bill of Rights. It has focussed on creating rights in special areas such as privacy, race and sex discrimination and it has sought to enforce standards through HREOC in ways that have been challenged in law. Clearly, the preferable approach would be to have an Australian Bill of Rights, but this does not appear likely in the foreseeable future. In the absence of a national approach, are there any advantages in a State taking the initiative to introduce a Bill of Rights?

Firstly, one answer is that it is appropriate for a State, especially New South Wales, which has the largest population, to take the initiative and lead developments in Australia. Secondly, there are areas covered by the ICCPR which relate more to matters of concern to the State and Territory Governments rather than to the Federal Government, such as rights and obligations about criminal trials. Thirdly, human rights enactments in New South Wales will pass on benefits to the community in this State and enhance its standing in the international community.

There is also an issue whether New South Wales should enact the ICCPR or *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* (the "ECHR"), but this depends on the differences between the two conventions. The Committee believes that there should be an review of both Conventions, which will then determine those articles most suitable to a NSW Bill of Rights.

Australia, and New South Wales, appear isolated on human rights issues in today's world. Many countries have introduced human rights legislation to give effect to the ICCPR. While the Federal Government became a signatory to the Universal Declaration of Human Rights in 1948, there still remains no settled or agreed definition of human rights in Australia. In the contemporary environment of rapid social, legal and technological change, it is more important than ever to establish a benchmark for human rights in NSW. We should not be afraid of affirming what we regard to be the important linchpins of our democracy and freedom.

Australian jurisdictions have been characterised for the introduction of large amounts of legislation and regulations effecting all areas of life and the community. However, what is lacking in NSW is a clear and succinct statement of the rights and obligations of people, against which legislation and regulations can be checked and held in balance.

A Bill of Rights in NSW will reinforce and emphasise long standing and universal values, freedoms and liberties, which are already understood and recognised by most Australians.

Unfortunately, the range of remedial measures in place across all jurisdictions in Australia is somewhat limited, being restricted by the Federal Government. This is especially so in the area of administrative law. A Bill of Rights would introduce more certainty to protected rights, and provide clearer guidelines to Courts and other decision makers on the nature and extent of those rights. Decision makers must give careful consideration to such rights before enacting legislation or publishing regulations.

While some constitutional rights such as the right to vote and the right to religious expression are enshrined within the Australian constitution, New South Wales has introduced specific legislation, including legislation covering discrimination. This legislation enhances the rights enjoyed by its citizens resulting from developments in the common law. However, these fall short of the rights and obligations contained in the ICCPR.

The evolution of common law rights is a slow process, occurring as it does within the constraints of precedent and case law. Further, the process is becoming more insular. As more common law countries adopt a Bill of Rights, a jurisprudence has evolved from the rights enunciated in their respective Bills, rather than from common law principles, and the relevance of judicial decisions in these countries to New South Wales courts becomes marginal.

An appropriately drafted and implemented Bill of Rights will be an important tool, by which individuals in NSW could seek redress when their rights have been violated, and by which traditionally disadvantaged groups can gain access to the political process. This will also develop community and governmental awareness and understanding of peoples' rights, ensuring that more care is taken to protect those rights. It will, correspondingly, bring NSW into line with most modern western liberal democracies, most of which have a Bill of Rights as part of their political and legal arrangements.¹

The New South Wales government has an important role to play in promoting and protecting the rights of people in the State, in accordance with its "power to make laws for peace, welfare and good government of NSW"². A Bill of Rights is a mechanism to achieve such an outcome.

The Committee does not accept that a Bill of Rights will result in an explosion of litigation or an apprehended dilution in the sovereignty of Parliament as strong reasons for opposition to a Bill. At the moment our system of government lacks a sound ethical foundation for political and constitutional decision making. A Bill of Rights, once accepted by administration and legislators, will help to ensure that decisions are reached, only after considering their impact on our fundamental freedoms and human rights. Currently, much decision making and the consequent plethora of laws and regulations, are the result of decision makers acting on a particular situation without regard to its overall effect.

Instead of increasing the prospect of litigation, a Bill of Rights would ensure a more reasoned and considered decision making process, which would be less susceptible to judicial challenge. Indeed, the supremacy of Parliament will be enhanced. Current dissatisfaction

¹ The United States, Canada, New Zealand, The United Kingdom, South Africa

² Constitution Act 1902 (NSW), Section 5

with our legislative and administrative decision makers would be removed if the community was aware that such decisions were being made within a framework of a Bill of Rights. A properly constructed Bill of Rights should seek to protect rights but still acknowledge the supremacy of parliament. This paper will also address other jurisdictions that have implemented a Bill of Rights.

NSW will have global prominence during the 2000 Olympic Games. This would be a significant and opportune time to commence work on the Bill, and to move positively towards its enactment. It would send a strong message to the rest of the world regarding this State's commitment to human rights, and the rule of law.

Fundamental rights need to be included in a Bill of Rights:

- . People should have a right to self-determination and be free to pursue economic, social and cultural development;
- . All persons should be equal before the law and be entitled, without any discrimination, to the equal protection of the law. (As an example, children should not be subject to discrimination of any kind, irrespective of the child's or his or her parent's language, religion, sex, colour, political, ethnic or social origin, property, disability, birth or other status);
- . Children should also be entitled the right of an education and to achieve this on the basis of equal opportunity;
- . Freedom of speech and association;
- . Freedom from fear and violence.

The Committee's submission will indicate the importance of a Bill of Rights for NSW.

TERMS OF REFERENCE

This Submission will address the Terms of Reference of the Parliamentary Committee.

(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

The purpose of the ICCPR was to put into a legally binding form many of the civil and political rights proclaimed in the Universal Declaration of Human Rights. The Federal Parliament ratified the ICCPR in 1980. It is also attached as a schedule to the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*.

The Committee defines 'human rights' by reference to the International Human Rights Conventions to which Australia is a party, and to the many United Nations declarations which address human rights concerns for specific groups. At present, the rights of individuals living in NSW are protected via limited means from the Federal Constitution, Federal and NSW legislation as well as common law principles.

Federal Constitution

The Federal Constitution provides a few limited individual rights. Many of these are not expressed in terms of rights, but rather, as prohibitions on Federal or State legislative power. For instance:

1. Section 51(xxxi) provides that the Commonwealth may only compulsorily acquire property if it does so on just terms;
2. Section 80 provides that persons are entitled to a trial by jury for an indictable offence. The Committee however notes, that since *R v Archdall*³ in 1928, the High Court has severely limited the protection offered by this provision;
3. Section 92 provides that trade, commerce and intercourse among the states shall be absolutely free. This guarantee has been applied many times to strike down federal and state legislation;
4. Section 116 prohibits the Commonwealth from making laws with respect to the establishment of, or prohibition on the exercise of, religion, thereby conferring a limited right of freedom of religion at the federal level. The High Court has generally reached a narrow interpretation of section 116; and
5. Section 117 protects residents of one State from special disability or discrimination, based upon residence, in other States.

The High Court has also found implied freedoms in the Constitution in that it contains an

³ *R v Archdall & Roskrige; Ex parte Carrigan and Brown*, (1928) 41 CLR 128

implied right to freedom of political communication. Using sections 7 and 24 of the Federal Constitution, the High Court struck down sections of the *Political Broadcast and Political Disclosures Act 1991 (Cth)*. The Act limited political advertising on radio and television during election periods.

The High Court has also recently interpreted Chapter III of the Federal Constitution as giving rise to what might be described as some limited due process guarantees with respect to the exercise of judicial power. The separation of powers doctrine restrains both Federal and State Parliaments from legislating to prohibit the proper exercise of judicial power. While the connotations derived from Chapter III of the Constitution do not create actual rights for the individual, they do provide limited due process rights.

The Committee submits that the protection of human rights by the Federal Constitution is deficient in many ways. The few constitutional freedoms are scattered about or within the text, and are ad-hoc rather than comprehensive. In addition, there are gaps within the coverage of human rights in the Constitution when they apply to the common law. Largely, due to High Court interpretation, certain rights do not extend to the territories. Also non-citizens are afforded only limited protection by the rights in the Constitution. Further, the Federal Constitution in its interpretation offers very little by way of remedies or recourse for a breach of a constitutionally protected right.

The Federal Constitution has failed to comprehensively guarantee rights. This has been explained as an institution of responsible government which is regarded as the ultimate guarantee of justice and individual rights. This requires addressing, and whilst this can only be achieved through the Federal Government enacting a Bill of Rights, the Committee believes that this can be strongly encouraged through a NSW Bill of Rights.

Federal and State Legislation

Some Federal and NSW statutes are enacted to protect human rights, through expressly protecting particular human rights or as a result of their indirect operation, such as protection offered by Federal and NSW anti-discrimination legislation. However, there is no one enactment that comprehensively sets out the basis rights and freedoms of the people.

The legislation enacted gives some effect to some of Australia's international human rights obligations, although only in a limited way. The *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* defines human rights by reference to the ICCPR, but it limits complaints about breaches of ICCPR Articles to acts and practices of Commonwealth agencies. It further limits the remedies available if there is a breach of the rights expressed in the ICCPR: the 'remedy' is a report prepared by the Human Rights Commissioner.

In NSW, the most significant human rights enactment is the *Anti-Discrimination Act 1977(NSW)*. In addition to anti-discrimination laws, the *Disability Services Act 1993 (NSW)* sets out a range of non-enforceable principles relating to the treatment of people with disabilities. The *Privacy and Personal Information Protection Act 1998 (NSW)* extends privacy protection at the State level.

At a Federal level, there are enactments which protect specific human rights but in a limited way. Legislation including the *Racial Discrimination Act 1992 (Cth)*, the *Sex Discrimination*

Act 1984 (Cth) and the *Disability Discrimination Act 1992 (Cth)* demonstrates the role which Federal Parliament has already played in protecting human rights. Further, the *Privacy Act 1988 (Cth)* guarantees the rights in Article 17 of the ICCPR.

The *Family Law Act 1975 (Cth)* adopts the welfare and 'best interests' principles which are a foundation of the Convention on the Rights of Child⁴. The Family Court endeavours to make decisions, taking into account the best interests of a child. The child's views are also taken into account by the court; but they are given only so much weight as the court thinks appropriate, given the age and maturity of the child. This offers a measure of human rights protection for a child's rights.

There are also enactments, not expressly designed to protect human rights, which have the effect of protecting particular human rights in limited circumstances. Examples include, the *Evidence Act 1995 (Cth and NSW)*, the *Freedom of Information Act 1989 (NSW)*, and the *Freedom of Information Act 1982 (Cth)*. In section 138(1) of the Evidence Act 1995, judges have the discretion to exclude evidence which was illegally or improperly obtained in contravention of an Australian law. Section 138(3)(f) gives judges the discretion to consider whether the contravention was inconsistent with or contrary to a right recognised by the ICCPR.

The above legislation protects only a very limited range of individual rights, leaving fundamental rights such as freedom of speech, peaceful assembly, the right to vote, and all economic, social and cultural rights, unprotected. Neither the Federal nor the NSW anti-discrimination legislation is adequate in dealing with problems of systematic discrimination, and in promoting substantive equality, as opposed to merely formal equality.

The various legislation establishes causes of action only for certain specifically enumerated grounds, and applies only in a limited range of situations. The Federal *Sex Discrimination Act 1984*, for example, lists protected grounds including sex, marital status and pregnancy, and prohibits discrimination only in fields such as employment, education, accommodation and the provision of goods and services. Like other anti-discrimination legislation, this Act contains a number of critical exclusions including religious, charity and voluntary bodies.

All legislative human rights protective measures in Australia are contained in ordinary Acts of Parliament, and are therefore subject to amendment or repeal at any time. Although it may at times be politically difficult for governments to amend or repeal these provisions, day-to-day political constraints alone are not sufficient to ensure individual rights in Australia.

The State's power to promulgate a Bill of Rights evolves from the power of Parliament to enact legislation and not on a constitutional basis. Thus the Committee believes there is scope for the Parliament to enact a regime of rights protection that would protect other basic rights listed in the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966, such as freedom of speech, assembly and movement. However, the ICCPR provisions must be restated to suit the cultural, social and political position in New South Wales and to take into account developments in human rights jurisprudence, that has occurred since the ICCPR has been introduced.

⁴ United Nations Convention on the Rights of the Child 1990

The Committee supports the incorporation into domestic law of the ICCPR. Civil and political rights are universally recognised as obligations on all people. Incorporation into domestic law, State or Federal, would ensure that government, parliament and judiciary give full effect to the Covenant in executive, legislative and judicial processes. The Covenant is a living instrument and Australian courts will be able to play a part in its ongoing national and international evolution. Many developed western nations have emphasised civil and political rights and have built their legal structures around their preservation and implementation.

Recommendation

The Committee supports the incorporation into domestic law of the ICCPR provisions, restated to suit the cultural ethical, social and political position of NSW and to take into account developments in human rights jurisprudence that has occurred since the ICCPR was first introduced.

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

The central issue is whether an inclusive approach should be taken whereby the protected rights extend beyond the classical political and civil rights, relating to an individual's right of active participation in society and government and to an individual's right to freedom and protection. There is a need to include economic and social rights such as the right to work, or the right not to be poor, as well as community and cultural rights such as those relating to indigenous peoples in any bill of rights.

The Committee does not support a 'fractured' approach to the drafting of a Bill of Rights, but supports a model of universal application. It recognises the need to acknowledge, and more clearly articulate, the rights of some groups within our community.

Australia currently possesses a Constitution that, 100 years after its drafting, is seriously compromised in its ability to protect the rights of its people, that are culturally and ethnically very different from that of the 1890s. Our current legal system is seriously inadequate in protecting many of the rights of the most vulnerable and disadvantaged groups in the Australian community. There is a need to shield basic rights from the exercise of arbitrary power, such as that exercised in the past to remove indigenous children from their families.

The Committee noted the Canadian Charter of Rights and Freedoms. It does not operate, so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the indigenous peoples of Canada.

A feature of the South African Bill of Rights is its comprehensiveness, in that it includes traditional political and civil, as well as social, economic and cultural rights. It thus protects the rights to a healthy environment, access to health care, food, water, social security, adequate housing and to an education, alongside such rights as the right to equality, freedom of expression and a fair trial.

In NSW there is no protection in the form of human rights. For example, the Committee acknowledges there is legislation requiring children to receive an education but this is not a right but rather a prohibition in that it is an offense that children do not attend school. Thus, any liberty afforded by legislation or the common law is a negative right of what remains when all the prohibitions have limited the area of lawful conduct.

Recommendation

The Committee supports the inclusion of economic, social and cultural rights, group rights and the rights of indigenous people in a NSW Bill of Rights. A carefully drawn Bill will have regard to the rights of all people without undermining the universality of the document.

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

Responsibility is a component of any properly understood and implemented rights framework. Human rights instruments, at the international level, emphasise tolerance and respect for others. A change of focus from "rights" to "responsibility" would undermine this understanding.

While international instruments expressly bind the signatory states, a Bill of Rights may place responsibilities on private individual's and as well as state instrumentalities. A person's responsibility not to infringe upon another's human right is not established on account merely of the existence of the right, nor is it necessarily established as a consequence of the right being exercised. It is only at the point where action, inaction or desisting to act is required, in order that the right not be infringed upon or curtailed, that the responsibility becomes apparent. An individual's right need not necessarily attract corresponding responsibilities owed by the state, organisations or other individuals if they conducted themselves in ways that did not impinge upon the right-holder's enjoyment of that right.

A Bill of Rights will impose responsibilities on people, however, some rights will not be supported throughout the community. As stated, the Committee supports the incorporation into the domestic law of provisions of the ICCPR, which itself contains a wide range of civil and political rights. For example, Article 6 contains the right to life: this will be a cause of difficulty with those individuals who are pro-abortion or those in the euthanasia debate. Article 14 expresses the right to equality under the law and the right to a fair trial. As earlier stated, the rights offered by the Commonwealth Constitution do not necessarily apply to the territories, and any right to a fair trial may be restricted as there is no individual entitlement to a trial by jury for an indictment.

The Universal Declaration of Human Rights⁵ proclaims that human rights should be protected by the rule of law. The Committee believes that the our individual responsibilities

⁵ Universal Declaration of Human Rights 1948, at Paragraph 3

are reflected in the enacted legislation or the present common law.

Recommendation

The Committee believes a Bill of Rights should focus on rights of the individual. Individual responsibilities should remain the domain of the legislators and to be interpreted by the courts.

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

Common Law

Australian common law does not guarantee the rights and freedoms of the individual. In limited respects, the common law operates indirectly to protect certain individual rights. Principles like *Rule of law* and *Judicial independence* may play an indirect role in the protection of rights, as well as the development of procedural principles found in administrative law and statutory interpretation. Certain causes of action, such as unlawful imprisonment, can be invoked by individuals to vindicate their rights. Also, the courts are able to exercise discretions which can be used to protect rights, including, for instance, the discretion to exclude illegally or improperly obtained evidence.

Common law rules and presumptions of statutory interpretation also operate to protect human rights in some circumstances. Principles of statutory interpretation which operate to protect human rights include the presumption that legislation should be construed to prevent breaches of human rights, and the presumption that the Legislature intended to legislate in accordance with its international human rights obligations. Legislation should be construed accordingly.

Unfortunately, the common law contains very few human rights guarantees, and to the extent that it does protect rights, does so largely by indirect means. Moreover, the protective value of the common law is significantly compromised by its vulnerability to legislative change. Common law rights stand in a difficult position, given the uncertainties associated with the development of the common law. The availability, scope and application of rights can vary according to changes in the composition of a court, and the remarks of individual judges sometimes leave the judiciary open to charges that the democratic system is being usurped by an unaccountable judiciary.

If no Australian legal remedies are available, or an Australian remedy is ineffective to protect human rights, there are, in certain circumstances, procedures by which an international human rights remedy may be obtained. A complaint may be lodged with one of the specialist international human rights committees.

During the 1990s, the High Court of Australia was influenced by the idea that international human rights law, could influence the development of the common law. For example, in

*Mabo*⁶, the High Court expressed that international law has an important influence on the development of the common law, particularly where the international law declares the existence of universal human rights. In *Minister for Immigration and Ethnic Affairs v Teoh*⁷, the High Court applied the Convention on the Rights of the Child to protect the applicant's interests even though it had not been implemented by domestic legislation. The Court held that the best interests of the child shall be the primary consideration.

There are other jurisdictions that the Committee considered that contain a bill of rights:

The United States

The US Bill of Rights⁸, is restricted to traditional civil and political rights and is expressed mostly in 'negative' terms and without qualification. It has been used as a precedent for the protection of human rights.

United Nations

The Universal Declaration of Human Rights 1948, is expressed in 'positive' terms and includes certain economic and social rights. This is further refined in the European Convention on Human Rights and Fundamental Freedoms, 1950 (ECHR) and the International Covenant on Civil and Political Rights, 1966 (ICCPR). The latter two seek to incorporate justified limits to some of the rights under protection.

Canada

Canada's Charter of Rights and Freedoms⁹, is a constitutionally entrenched document. It has made a huge impact upon Canadian criminal law. Its innovations include a general 'justified limits' clause and a legislative 'override' provision under which a federal or provincial parliament is able to 'opt-out' of certain Charter protections. Pre-enactment scrutiny of Bills occurs after a Bill has been introduced into parliament.

New Zealand

New Zealand's statutory Bill of Rights Act¹⁰ was introduced in 1990. Under the Act, the courts can neither invalidate secondary legislation nor make declarations of

⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1

⁷ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273

⁸ The United States Bill of Rights 1789

⁹ The Canadian Charter of Rights and Freedoms 1982 (Canada)

¹⁰ New Zealand Bill of Rights Act 1990 (NZ)

incompatibility with respect to primary legislation. The Act provides for the pre-enactment scrutiny of Bills, which in the case of Government Bills occurs in the form of a report by the Attorney-General on the introduction of the Bill into Parliament.

Britain

The British Human Rights Act¹¹ comes into effect on 2 October 2000, and those ECHR rights incorporated into domestic law by the Act will be enforceable in the British courts. The Act makes it unlawful for a public authority to act incompatibly with certain ECHR rights and allows for a case to be brought in a British court or tribunal against the authority if it does so. However, a public authority will not have acted unlawfully under the Act if, as a result of a provision of primary legislation, it could not have acted differently. The Act also requires that, when legislation is introduced into either House for a Second Reading, the Minister responsible must make a written statement that he considers the Bill is compatible with the Convention rights, or that he is unable to make such a statement but nevertheless wishes Parliament to proceed with the Bill. The Committee believes this is the appropriate model for NSW.

South Africa

The South African Bill of Rights¹² is an integral part in its new Constitution. As the Constitution is superior law it prevails over legislation which is found to be invalid by the separately constructed Constitutional Court. Consequently, parliament has no recourse to a legislative override. To amend the Constitution, requires at least a two-thirds majority vote of the National Assembly and at least six of the nine provincial legislatures. The interesting feature of the Bill of Rights is that while it binds the legislature, the executive and the judiciary and all organs of the state, it also binds a natural person, which may mean that it also applies to claims between private persons. The Bill of Rights contains a single encompassing justified limits clause, the formulation of which shows the clear influence of Canadian jurisprudence. There is also an interpretation provision which requires a purposive method of interpretation requiring courts to promote the underlying values of democratic society and to consider international law.

Concluding Remarks

The Canadian, New Zealand, British and South African models have all attempted in different ways to resolve the conflict between the doctrine of the supremacy of parliament, on one side, and judicial review, on the other. This takes the form of the legislative override clause in Canada and South Africa; in New Zealand it is the statutory status of the Bill of Rights under which inconsistent legislation cannot be declared invalid; and in Britain the

¹¹ The Human Rights Act 1998 (UK)

¹² South African Bill of Rights 1996

courts may only make a declaration of incompatibility for primary legislation. One of the great strengths of Australian common law is that it has been able to draw on a vast body of experience from other common law jurisdictions. Now both Canada and the United Kingdom, and to a lesser extent New Zealand, will progressively be removed as sources of influence and inspiration as they have greater regard to their own formal human rights instruments.

As suggested by the Honourable Chief Justice Spigelman;

"At the present time....American Bill of Rights jurisprudence is virtually incomprehensible. Within a decade it is quite likely that in substantial areas of the law, British and Canadian cases will be equally incomprehensible to Australian lawyers. The Australian common law tradition is threatened with a degree of intellectual isolation, that many would find disturbing".¹³

Recommendation

The Committee is of the view that NSW common law does not guarantee the rights and freedoms of the individual. Other common law countries with Bill of Rights instruments will no longer be sources of inspiration and influence. The Committee supports a Bill of Rights for NSW. In particular, the Committee recommends the introduction of the British model.

(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;

Acts of Parliament

A Bill of Rights could be introduced by the NSW Parliament by way of an Act of Parliament. The advantage of a statutory Bill of Rights lies in the ease with which it could be introduced. The NSW Parliament would simply follow its usual legislative procedures. However, the disadvantage of a statutory Bill of Rights is that the NSW Parliament could amend or repeal the Bill of Rights at any time without recourse to any special procedures. This could lead to a lack of stability, and undermine the enduring nature of the rights protections it conferred. The NSW Constitution can be amended or altered in the same way as any other legislation. In fact, constitutional amendment can occur even where there is no explicit intention to alter the Constitution expressed in the amending Act of Parliament.

Human rights enactments in some jurisdictions have been described as semi-constitutional. Here the courts, when interpreting these enactments, have accorded them special status. For instance, the *New Zealand Bill of Rights Act 1990* has been treated by the New Zealand Courts as a fundamental constitutional document which must be given a purposive

¹³ Keynote address by the Chief Justice Spigelman to the National Conference of the Australian Plaintiff Lawyers Association on 22 October 1999

interpretation.

Entrenched

Where a Bill of Rights is entrenched, it cannot be amended or replaced as easily as an ordinary piece of legislation. A Bill of Rights would have the protection of single entrenchment if it were accompanied by a procedural protection stating that the Bill of Rights could not be amended or repealed unless a particular procedure is followed. The Parliament could then nominate any number of procedures to change the Bill of Rights. A more secure form of procedural protection can be introduced by double entrenchment. In such cases, the procedural protection is applied not only to the substantive provisions of the Bill of Rights, but also to the procedural protection itself.

Britain

The *British Human Rights Act* seeks to protect rights while upholding the legislative supremacy of Parliament. However, in order to minimise the tension between the protection of fundamental rights and the maintenance of the legislative supremacy of Parliament, the Act is not entrenched and judges have no power to strike down primary legislation which is ultimately found to be incompatible with convention rights. Where a court makes a declaration of incompatibility, it triggers a power for a Minister in some circumstances to amend the offending legislation. In respect of all bills before Parliament, the Minister must, prior to its second reading, make a written statement confirming the provisions of the bill are compatible with the *British Human Rights Act*. Where a statement cannot be made, the Minister must make a statement indicating that the government nevertheless wishes to proceed with the bill. While it does not threaten parliamentary sovereignty, it !!does impose an additional burden on the drafters of legislation: that should it be their intention that the bill be incompatible with a convention right, then they are to make their intention absolutely clear and unequivocal. While the declaration of incompatibility can be obtained in respect of primary legislation which is incompatible with a convention right, it remains to be seen how effective that will prove to be in triggering a change in the law.

Recommendation

The Committee supports the British model for incorporation of a Bill of Rights into NSW where the Bill is introduced by way of an Act of Parliament. The protection of rights while upholding the supremacy of Parliament is paramount to the acceptance of a Bill of Rights in this State.

(f) the circumstances, if any, in which a Bill of Rights should be binding on individuals as distinct from the Legislative, Executive and Judicial arms of Government and persons or bodies performing a public function or exercising a public power under legislation;

Generally, human rights legislation has been directed more at promoting the rights of

individuals against the state rather than against private entities. However, there have been developments that have changed the relationship between the state and the individual including, privatisation of government functions, and the growth of large corporations and other organisations. Non-government bodies now exercise power and control over individuals and affect their lives in many important ways. Individuals are now more vulnerable to intrusive and wide-ranging powers which affect many of their rights, and these powers are wholly unconnected with the State.

Traditional checks and balances which applied to government are removed. A rights protection strategy that focuses only on state power leaves the individual increasingly vulnerable to the exercise of other forms of power which are just as invasive as the powers that were once exercised by the state. The question is whether it is possible to protect human rights and freedoms if their protection applies to the decreasing sphere of state power. The Committee believes the protection of individuals' rights requires that the law also apply to traditionally understood non-government entities.

Recent developments in international human rights law suggest that the international community acknowledges that some of the greatest threats to human rights come from the exercise of private power rather than through the acts and omissions of states. The practical implication of this would be to apply the Bill of Rights to both public and private power.

The Committee believes a NSW Bill of Rights should apply to both public and private entities. The protection and enforcement of human rights should not depend on who or what is exercising the power which affects them. A violation of a human right remains a violation of a human right, regardless of whether the violator be a public or private concern.

However, the Committee acknowledges that it is not sufficient to assert that a Bill of Rights should apply equally to all. There are groups within the community, including some public authorities or public offices, which should be exempt from particular requirements to adhere to a Bill of Rights. Criteria, such as national security, could determine whether the Bill of Rights applied in certain circumstances.

Recommendation

While the Committee believes a NSW Bill of Rights should apply to both public and private entities, it is recognised that some groups within the community including some public authorities or public offices, in specified circumstances (for example, on the grounds of national security), may need to be exempted from particular requirements to adhere to a Bill of Rights.

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

A Bill of Rights should provide more secure and permanent safeguards against the infringement of human rights. It should act as an additional safety standard and provide one additional means by which bureaucratic action could be reviewed. A Bill of Rights would provide more secure and permanent safeguards, and would seek to create a minimum

standard for the community, particularly if such rights are primarily considered as rights that should be accorded to others. To achieve this end, appropriate enforcement mechanisms must be in place to properly guarantee and protect the rights it proclaims within a legal context. The manner of judicial review, and the priority such matters are afforded in our Courts, will be key determinants to the effectiveness of the Bill to reduce and minimise human rights violations in NSW.

Enforcement

The Committee considered different approaches of enforcement. In the interpretative approach, no new enforcement mechanisms are created. No legal sanctions are created, and no legal redress is available, when an individual's rights are violated. The Bill of Rights could include an express provision which reflects the common law position. This is merely a directive provision, and would lack any true enforcement power and have no legal consequence if an entity ignored this provision. Alternatively, the Bill of Rights could give the courts power to declare that action or decisions, including legislation, are inconsistent with the Bill of Rights. This position is found in Section 3 of the British Human Rights Act 1998 which operates in this manner with respect to legislation. The British courts can make this declaration of incompatibility but do not have the power to order that the legislation is void.

Enforcement could also be by way of individuals or groups initiating complaints. Remedies from a court or tribunal could determine a complaint and make an enforceable remedial order. However, here the enforcement is dependent on the individual or group deciding to pursue an action and any remedy derived will only benefit that particular individual or group who initiated the complaint.

Another enforcement approach could be by way of a body with the responsibility of administering and supervising the Bill of Rights. This body would be responsible for the monitoring, supervisory, promotion and implementation of a Bill of Rights. It would also be responsible for the conciliation, enforcement and prosecuting functions.

The various enforcement procedures in other jurisdictions are also considered:

The United States

The United States Bill of Rights does not contain express enforcement mechanisms. The Bill does contain provisions that Congress shall have power to enforce requirements by appropriate legislation. Most of the guarantees are expressed in absolute terms but have been judicially interpreted to being subject to limitations. Over the last fifty years the US Supreme Court has taken a more activist role in the protection in the rights expressed in the Bill. However, the absence of a provision guiding the court in balancing the various rights and the lack of any provision indicating that the rights may to some extent be qualified in the wider public interest, has restricted the degree of flexibility available to the courts. Thus, the US Bill of Rights relies on a court-based enforcement mechanism although the courts' enforcement powers are limited.

New Zealand

The New Zealand Bill of Rights Act is a statutory Bill of Rights and has no constitutional status. The courts have no power to declare legislation which is inconsistent with the Bill of Rights invalid. The key provision is section 6 which requires that an interpretation consistent with the Bill of Rights is to be preferred. In the interpretation of any enactment, a court is to prefer a meaning that is consistent with the Bill of Rights to any other meaning. However, this needs to be read alongside section 4 which provides that no court may 'hold any provision of an enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective' or to 'decline to apply any provision of the enactment' by 'reason only that the provision is inconsistent with any provision of this Bill of Rights'. Section 5 is the justified limitations clause, which states that the rights protected under the Act may be 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society', and is then made 'Subject to section 4...'.

Further, Section 7 provides that where a Bill is introduced into the House of Representatives, the Attorney-General shall bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights. There exists in the New Zealand Bill of Rights no other express enforcement provision. However, judicial interpretation of the Act has extended the mechanisms available to enforce the New Zealand Bill of Rights, and has thereby broadened out the enforcement mechanisms of the New Zealand Bill of Rights to include a limited court-based enforcement approach. However, the Act offers only an emasculated version of judicial review. Under the New Zealand model, the courts can neither invalidate secondary legislation, nor make declarations of incompatibility with respect to primary legislation. In other words it would seem that a different balance has been struck between judicial review and the sovereignty of parliament, and in New Zealand it is one that greatly favours the latter.

Canada

In the Canadian Charter of Rights and Freedoms, remedies rely on a court-based enforcement mechanism, which are broader than of those in the United States. As the Canadian Charter is constitutionalised, the courts can invalidate any Federal or Provincial legislation that they consider contravenes the Charter, and make a declaration of invalidity. Section 24 of the Canadian Charter is a remedial provision which confers a cause of action upon victims of Charter rights violations in civil matters, and which makes provision for the exclusion of evidence where it has been obtained in breach of Charter rights. What remedy is expedient and just will depend on the nature of the rights violation.

Britain

The British Human Rights Act applies against the legislature, and the Act employs an interpretive enforcement model. The British model stands somewhere between the New Zealand and Canadian approaches, giving the courts the power to strike down subordinate legislation while leaving primary legislation securely in parliament's hands. The courts have no power to declare the legislation void and invalid, and

inconsistent legislation continues to operate until such time as the legislature may choose to do something about it. When public authorities are found in breach of the British Human Rights Act, the Act takes a limited court-based approach to enforcement. The Act provides for a cause of action against the public authority, and the usual rules of standing apply. A court may grant such relief or remedy, or make such order as are within its powers!! and which it considers just and appropriate. There is a very broad remedial discretion in the courts, similar to that in Canada, although a complainant's right to damages appears to be more limited than in Canada.

One of the weaknesses of the common law in protecting individual rights and freedoms is the traditional reliance on negative remedies such as prohibitive injunctions or declarations of invalidity.

Recommendation

The Committee recommends that a NSW Bill of Rights should contain an express remedial provision which confirms that anyone whose rights or freedoms have been infringed or denied may apply to the court to obtain such remedy as the court considers appropriate and just in the circumstances. In that regard, the Committee further believes that the British model is the appropriate one for NSW.

(h) 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;

Rights and freedoms in a Bill of Rights are usually expressed in absolute terms, but rarely applied in that way by the courts. The question is whether a Bill of Rights should state explicitly that the rights and freedoms are subject to limitations and articulate the standards for adjudging permissible limitations. The ECHR and the ICCPR achieve this by adding a series of qualifications specific to particular guarantees.

Britain

The Human Rights Act comes into effect on 2 October 2000, incorporating the ECHR and the limits prescribed in its Articles into British domestic law. The typical approach taken by the ECHR is to state the substantive right it seeks to guarantee in apparently absolute terms in the first paragraph of the relevant article, and then in the second paragraph to include several important limitations or qualifications. Further, there are two general 'exceptions' provisions which can be used by a state to justifiably limit the operation of a right. One is Article 15 which provides that in certain public emergency situations a state may derogate from its obligations, provided it takes into account certain ECHR articles. Article 17 provides that the protections guaranteed in the ECHR may not be used by groups or individuals in such a way as to undermine the liberal democracy which the ECHR seeks to protect.

Canada

Alternatively, the more contemporary approach is to include a single qualifying provision, as in the case of the Canadian Charter of Rights and Freedoms. Section 1 guarantees the rights and freedoms set out in the Charter are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. This was the first general provision of this kind to be included in a human rights instrument. Before then the norm had been for rights to be accompanied by specific qualifications. The basis of Section 1 justifications require that legislation pursue an important objective which is 'pressing and substantial' and consistent with democratic values which are rationally connected with the objective. Further, the legislation is to be designed carefully enough to satisfy judicial notions of proportionality, so that it impairs the right as little as reasonably possible and does not use means where the burdens imposed outweigh the salutary effects the objective is intended to serve.

New Zealand

A similar contemporary approach has been followed by New Zealand in Section 5 of the New Zealand Bill of Rights Act 1990. Both New Zealand and Canada provide that the rights and freedoms they contain may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

South Africa

Section 37 of the South African Bill of Rights contains arrangements for the declaration of a state of emergency, including a statement of the extent to which certain rights are non-derogable.

Recommendation

The Committee supports the European Convention on Human Rights model to set any reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic society.

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

The *New Zealand Bill of Rights Act 1990* and the *British Human Rights Act 1998* both require the court to construe legislation in the manner which is compatible with their Bill of Rights legislation, and the Committee supports this approach for Australia. The British approach asserts that any proposed legislation goes further than the common law on the basis that parliament was presumed to intend to legislate in accordance with its international obligation. Any ambiguity is understood in the sense that a word or phrase may have more than one meaning.

The Committee also believes that there should be a requirement for Parliament to consider whether or not any proposed Bill or regulation does, or has the potential to, breach the rights referred to in the Bill of Rights.

Recommendation

The Committee supports that the court construe the legislation in a manner that is compatible with the Bill of Rights.

Conclusion

The language of the Bill of Rights should be simple, but inspirational. Clarity of principle that can be achieved through the introduction of a Bill of Rights, will have enormous social, economic and individual benefits in the short and longer term. An affirmation of basic values and fundamental freedoms might seem, to some, unnecessary, but recent events in Australia would suggest that there is an erosion of an understanding of the importance of civil and personal liberties.

A Bill of Rights will reinforce respect for the law, our judicial and social systems, and will help amplify the importance of tolerance in our community. It will necessarily lead to greater harmony between a number of legislative instruments which seek to protect human rights, privacy, and civil liberties.

The Committee believes that instead of an amorphous and disparate package of rights, future generations will have a benchmark, a reference point for those freedoms which we regard as important. Respect for the rule of law can only be greater, and public understanding of human rights can only benefit. A Bill of Rights will contribute to social cohesiveness, and will remove ignorance as a defence to breaches of human rights and infringement of civil liberties.

The Committee will watch the progress of this Inquiry with great interest, and regards this Inquiry as one of the most significant Government initiatives in the public arena. The Committee strongly endorses the development of a Bill of Rights in NSW, and urges the Inquiry to establish a timetable for its drafting and introduction.

As noted earlier, the Committee offers to conduct research on any issues which the Standing Committee on Law and Justice wants to explore and the Law Society invites you to direct any requests for assistance to Shaughn Morgan, Director, Practice and Community Services Division, on 9926-0250.

Summary of Recommendations

- (a) The Committee supports the incorporation into domestic law of the ICCPR provisions restated to suit the cultural, ethical, social and political position of NSW and to take into account developments in human rights jurisprudence that has occurred since the ICCPR was first introduced.
- (b) The Committee supports the inclusion of economic, social and cultural rights, group rights and the rights of indigenous people in a NSW Bill of Rights. A carefully drawn Bill will have regard to the rights of all people without undermining the universality of the document.
- (c) The Committee believes a Bill of Rights should focus on rights of the individual. Individual responsibilities should remain the domain of the legislators and to be interpreted by the courts.
- (d) The Committee is of the view that NSW common law does not guarantee the rights and freedoms of the individual. Other common law countries with Bill of Rights instruments will no longer be sources of inspiration and influence. The Committee supports a Bill of Rights for NSW. In particular, the Committee recommends the introduction of the British model.
- (e) The Committee supports the British model for incorporation of a Bill of Rights into NSW where the Bill is introduced by way of an Act of Parliament. The protection of rights while upholding the supremacy of Parliament is paramount to the acceptance of a Bill of Rights in this State.
- (f) While the Committee believes a NSW Bill of Rights should apply to both public and private entities, it is recognised that some groups within the community including some public authorities or public offices, in specified circumstances (for example, on the grounds of national security), may need to be exempted from particular requirements to adhere to a Bill of Rights.
- (g) The Committee recommends that a NSW Bill of Rights should contain an express remedial provision which confirms that anyone whose rights or freedoms have been infringed or denied may apply to the court to obtain such remedy as the court considers appropriate and just in the circumstances. In that regard, the Committee further believes that the British model is the appropriate one for NSW.
- (h) The Committee supports the European Convention on Human Rights model to set any reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic society.
- (i) The Committee supports that the court construe the legislation in a manner that is compatible with the Bill of Rights.