

Meeting Universal Human Rights Standards: the Australian Experience*

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The International Bill of Human Rights

It is almost fifty years since the Universal Declaration of Human Rights was adopted by the UN General Assembly, without dissent, on 10 December 1948.¹ The Universal Declaration will stand forever as the first international and universal statement of human rights principles. It expresses the essence of humanity and reflects the need of each individual for freedom, equality, minimum standards of living and a social and international order in which rights and freedoms can be realised.

The Universal Declaration, though it has not the status of a treaty, is now considered by many to have the force of customary international law.² It is drawn upon by the International Court of Justice³ and by national courts, including the High Court of Australia.⁴ It has been the inspiration for the whole United Nations human rights system,

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 22 May 1998.

¹ 48 in favour, and eight abstentions. Australia was a member of the drafting committee.

² See Simma and Alston, 'The Source of Human Rights Law: Custom, *Jus cogens* and General Principles' (1992) 12 *Australian Yearbook of International Law* 82.

³ *South West Africa cases* [1962] ICJ Rep 319, 323; [1966] ICJ Rep 288.

⁴ See observations of Brennan, Toohey and Gaudron JJ and Deane J in *Mabo v Queensland* (1988) 63 ALJR 84, 95, 101, and Kirby, J in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 71 ALJR 1346, 1424 (in both cases the reference was to property, article 17).

for the European and other regional human rights systems and for many national constitutions.

Many principles of the Universal Declaration have become legally binding on States by their incorporation into human rights treaties and conventions. In particular, they are the basis of the two major human rights covenants which, together with the Universal Declaration, form the International Bill of Human Rights:

The International Covenant on Civil and Political Rights⁵
The International Covenant on Economic Social and Cultural Rights⁶.

The principles of the Universal Declaration are also reflected in the other major human rights instruments in the UN system:

The Convention on the Elimination of All Forms of Racial Discrimination⁷
The Convention on the Elimination of All Forms of Discrimination Against Women⁸
The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁹
The Convention on the Rights of the Child.¹⁰

My theme is how Australia has fulfilled the obligations it has undertaken by becoming a party to these covenants and conventions. My focus is on the International Covenant on Civil and Political Rights (ICCPR; referred to as 'the Covenant').

Australia and the International Bill of Human Rights

As a founding member and active supporter of the United Nations, Australia has participated in drafting many international human rights instruments. Australia is in fact a party to each of the six major UN instruments, though with some reservations. It has a legal obligation to give effect to those instruments. That obligation arises under international law, that is it is an obligation between states. But human rights treaties have a special character, since their purpose is not just to regulate relationships between states, but to endow individuals with rights. In the case of the Covenant, this purpose is reinforced by the Optional Protocol, which gives individuals a right to complain to the

⁵ Adopted 1966, in force 23.3. 1976; ratified by Australia in 1982. See *Human Rights and Equal Opportunity Act 1986* (Cth).

⁶ Adopted 1966, in force 3.1.1976; ratified by Australia.

⁷ Adopted 1965, in force 4.1.1969; ratified by Australia in 1975. Implemented by the *Racial Discrimination Act, 1975* (Cth).

⁸ Adopted 1979, in force 3.9.1981; ratified by Australia in 1983. See *Sex Discrimination Act 1984* (Cth).

⁹ Adopted in 1984; in force 26.6.1987.

¹⁰ Adopted 1989, in force 1990; ratified by Australia 17.12.1990, in force 16.1.91.

Human Rights Committee that their rights have been violated. Australia is a party to that Protocol.

The Covenant on Civil and Political Rights covers a wide range of rights and freedoms, such as equality rights, the right to life, liberty and security of person, fair trial, privacy, freedom of religion, opinion, expression assembly and association, protection of the family and children, democratic rights and minority rights. Under Australian law, however, neither the ratification of the Covenant, nor the Protocol, makes those rights and duties enforceable by individuals in Australian courts. How then does Australia fulfil its obligation to respect and ensure the rights protected by the Covenant?

The Commonwealth has not used its legislative power

There is no lack of legislative power to implement human rights treaties. The power of the Commonwealth to enact legislation to give effect to an international Convention, whatever its subject matter, was settled by the High Court in the *Koowarta* case in 1982¹¹ and in the *Franklin Dam* case in 1983.¹²

At issue in the *Koowarta* case was the *Racial Discrimination Act 1975*, which implemented the Convention on the Elimination of Racial Discrimination. That Act made racial discrimination unlawful and conferred enforceable rights on individuals. It occupies a significant place in Australian legal history. It was applied to prevent Queensland from extinguishing the land rights of Torres Strait Islanders by discriminatory legislation.¹³ This left it open for Eddie Mabo to proceed with his claim in respect of his land on Murray Island, in a case which established the common law recognition of Aboriginal native title for the first time.¹⁴ The Racial Discrimination Act was a powerful and effective implementation of the Convention.

The Women's Convention was implemented in part by the *Sex Discrimination Act 1984*. Both the Racial Discrimination Act and the Sex Discrimination Act set up machinery to enable individuals to claim remedies for violation of rights. But there has been no equivalent implementation of the Covenant on Civil and Political Rights.¹⁵ At the time of its ratification in 1980, the view was taken that there were sufficient safeguards of rights in our legal system.¹⁶ In addition, many of the rights under the Covenant fall under state laws.

¹¹ *Koowarta v Bjelke-Petersen*, 1982, 153 CLR, p. 168.

¹² *Commonwealth v Tasmania* (1983) 46 ALR 625. The case concerned the *World Heritage Properties Conservation Act 1983*, implementing the UNESCO World Heritage Convention 1972 which had been ratified by Australia in 1974. See also *Richardson v Forestry Commissioner*, 1988; *Polyukovich v Commonwealth* (1991); *Victoria v Commonwealth* (1996) (Industrial Relations Act).

¹³ The Racial Discrimination Convention prohibits discrimination in regard to the right to own and inherit property, s 5 (d)(v) and (vi).

¹⁴ *Mabo v Queensland* (1988) 63 ALJR 84.

¹⁵ See Charlesworth, 'The Australian reluctance about rights' in Philip Alston (ed.) *Towards an Australian Bill of Rights*, Canberra, Centre for International and Public Law, 1994.

¹⁶ These safeguards included responsible government, the rule of law, and independent judiciary etc.

The Covenant is annexed as a Schedule to the *Human Rights and Equal Opportunity Act 1986* (Cth).¹⁷ However, this does not confer enforceable rights on individuals.¹⁸

The Court can apply Covenant rights only in a limited sense

Australian Courts, and in particular the High Court, have taken notice of the Covenant and have sometimes drawn upon its principles and those of other human rights instruments. In *Mabo*¹⁹ Brennan J observed that the opening up of international remedies pursuant to Australia's accession to the Optional Protocol to the ICCPR brought to bear on the common law the powerful influence of the Covenant and the international standards it imports. He regarded international law as a legitimate and important influence on the development of the common law, especially when it declares the existence of universal human rights. Consideration of those rights disposed his Honour to overturn earlier common law doctrine which did not recognise the rights and interests of the indigenous inhabitants of this country. In his Honour's view, a common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demanded reconsideration.

Some Justices of the High Court have been willing to have regard to human rights treaty obligations in order to remove any ambiguity in legislation, on the presumption that Parliament intended to legislate in accordance with its international obligations.²⁰ Some have joined Justice Brennan in accepting those obligations as an influence on the development of the common law.²¹

A new approach was taken by the High Court in the *Teoh* case.²² The Convention on the Rights of the Child requires Governments to make the best interests of children a primary consideration in all actions concerning children. Mason CJ and Deane J held that Australia's ratification of the Convention gave rise to:

a legitimate expectation, absent statutory or executive indication to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration."
[Convention art. 3]

¹⁷ The Covenant is also referred to in the *Law Reform Commission Act 1974* (Cth) and in the *Evidence Act 1995* (Cth).

¹⁸ See observations of Mason CJ And McHugh J in *Dietrich v the Queen* (1993) 67 ALJR 1 at 6.

¹⁹ *Mabo v Queensland* (1992) 66 ALJR 408, 422-423.

²⁰ *Chu Kheng Lim v Minister for Immigration, LG and Ethnic Affairs* (1992) 67 ALJR 125, 143; Brennan, Deane and Dawson JJ would favour a construction of a Commonwealth statute which accords with Australia's obligations under an international treaty, in case of ambiguity. *Polites v The Commonwealth* (1945) 70 CLR 60, 68-69. *Dietrich v The Queen* (1993) 67 ALJR 1, per Mason CJ and McHugh J at 6-7, Brennan J at 15, Dawson J at 31, Toohey J at 37, Gaudron J at 44. *Teoh* at 430.

²¹ *Dietrich v The Queen* (1993) 67 ALJR 1, per Brennan J at 15; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 69 ALJR 423 at 430 per Mason CJ and Deane J.

²² *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 69 ALJR 423 (7 April 1995).

It followed that if a decision-maker proposed to make a decision inconsistent with that legitimate expectation, procedural fairness required that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.

This decision was far from bestowing on individuals a right to enforce the Convention directly. It recognised no more than a procedural right.²³ . But it caused panic in Canberra. Within a very short period the Attorney-General and the Minister for Foreign Affairs issued a statement on behalf of the government which said in part that:

entering into a treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law.

This statement was followed by the introduction of the Administrative Decisions (Effect of International Instruments) Bill 1995. It provides that the ratification of an international instrument by the executive imposes no obligation on that executive to respect the provisions of that instrument for the purposes of domestic law.

This comprehensive rejection by the government of any obligation to respect the principles of a treaty it has entered into puts it in a Janus-like position, promising the international community that it will comply, while telling the Australian people that they cannot count on it doing so. How much more satisfying was the view taken by the High Court that the ratification by the government of a treaty was a positive statement by the executive *to the world and to the Australian people* that the executive government and its agencies will act in accordance with the treaty. The latest version of the bill has not yet been passed, and so *Teoh* stands for the time being, subject to any effect of the ministerial statement. Meanwhile, in the *Kruger* case the High Court has drawn some boundaries around the extent of implied rights in the Constitution.²⁴

The conclusion I draw is that, though recognition of human rights principles by the Courts is impressive and important, it falls short of providing comprehensive protection of Covenant rights and cannot be an effective way of implementing the obligations undertaken by Australia when ratifying human rights treaties. It is not the task of the High Court to determine whether Australia has in fact fulfilled its obligations under international instruments. How, then, are we to determine whether Australia has in fact fulfilled the obligations it assumed when it ratified the relevant instrument? Once again, the focus is on the Covenant on Civil and Political Rights.

²³ See observations of Gaudron J in *Teoh*.

²⁴ *Kruger v The Commonwealth, Bray v The Commonwealth* (1997) 71 ALJR 991.

Have we complied with our obligations under the Covenant?

Internal mechanisms

As mentioned, the Covenant is annexed as a Schedule to the *Human Rights and Equal Opportunity Act 1986* (Cth). The Human Rights and Equal Opportunity Commission (HREOC) has the function of inquiring into and reporting on any act or practice inconsistent with or contrary to human rights set out in the Covenant or other relevant instruments.²⁵ It has reported on many issues, and most recently on the stolen generation and on the detention of unauthorised arrivals, or ‘boat people’.²⁶ The reports of the Human Rights and Equal Opportunity Commission show where Covenant standards may not be met, but they result only in recommendations to the Commonwealth, and do not give remedies to individuals.

External mechanisms/ monitoring bodies

The Covenant itself provides for a monitoring mechanism. Its implementation is supervised by the Human Rights Committee, an independent body of eighteen experts elected by the states parties (there are about 140 at present).²⁷ The members of the Human Rights Committee are legally trained, and have experience as academics, judges and legal counsel. Once elected, Committee members serve in their personal capacity and act according to conscience. They are not answerable to their own governments, but to the Covenant. The Committee, though independent, has neither the legal status nor the powers of a court.

Reporting procedures

The Human Rights Committee monitors the progress of each state in giving effect to Covenant rights, primarily through the reporting process. States parties are obliged to submit written reports to the Committee every five years, explaining what they have done to give effect to Covenant rights and the progress made in the enjoyment of those rights.²⁸ The Committee examines the reports in the presence of representatives of the government concerned, over one or two days. The Committee members ask many questions of the government, probing into laws and practices to ascertain whether they comply with Covenant standards.

Non-governmental organisations, such as Amnesty International, Human Rights Watch and other international and national non-government organisations, assist in this process by providing the Committee with written information about laws and practices from their own point of view. Sometimes the Committee is sent an alternative NGO report, presenting a picture considerably less flattering to the state than the government report.

²⁵ s 11 of the HREOC Act 1986.

²⁶ HREOC, *Those Who've Come Across the Seas; Detention of Unauthorised Arrivals*, Sydney, 1998.

²⁷ ICCPR, arts 28, 40, 41 and First Optional Protocol.

²⁸ Article 40. The reporting period may be varied by the Committee.

After its dialogue with government representatives, the Committee prepares a written assessment, or ‘Concluding observations’ about the state, with recommendations to revise those aspects of law and practice which appear to fall short of Covenant standards.²⁹ These observations are not legally binding, but they are important indicators to domestic law makers and human rights advocates as to areas where standards are not being met. They provide a bench mark for the next periodic report. The Committee expects that states such as Australia will consider their observations in good faith and respond in a positive way to the Committee’s concerns.

Each of the six principal UN human rights instruments has a comparable monitoring body operating in a similar way to the Human Rights Committee. Undoubtedly the six instruments create a burden of reporting for states; a reform process is under way in an attempt to reduce these burdens. But that does not excuse individual States from compliance.

Australia’s failure to report to the Human Rights Committee

The Australian government, and I do not distinguish between the major parties here, has disregarded its reporting obligations under the Covenant. Australia’s second report was considered by the Committee in 1988. The third report should have been submitted in 1991, and the fourth in 1996. Neither has been submitted. Delays of a year or two are not uncommon, though some countries manage to report on time. But Australia has not reported for ten years; it is near the bottom of the class. It has been named by the Committee as one of about 20 States that have failed to co-operate in the reporting process. It is in such excellent company as North Korea, Syria and Somalia. Australia is also late in preparing reports for other treaty bodies.³⁰

Australia’s usual answer to the reminders of the Committee is that the report is nearly ready; this has become a rather bad joke. The failure to report represents a serious failure to comply with article 40 of the Covenant. As a result, Australians have lost the benefit of having our record of implementation of the Covenant scrutinised by an independent and impartial Committee.

Communications under the Optional Protocol

A further accountability mechanism under the Covenant is the individual complaints procedure established by the first Optional Protocol. The Protocol is ‘Optional’ in the sense that States who ratify the Covenant choose whether or not to ratify the Protocol and allow individuals to take cases to the Human Rights Committee. Out of 140 parties to the Covenant, 90 have ratified the Optional Protocol. Australia did so in 1991.

The Optional Protocol procedure is of special importance to Australia in the absence of any way to enforce Covenant rights directly in the courts. There have been about 100 initial letters of complaint from Australia so far. Of these about 19 have become registered

²⁹ This also provides an opportunity to interpret Covenant principles.

³⁰ First report under Convention on the Rights of the Child was due Jan 93. It was submitted in Jan 96, three years late.

communications under the Optional Protocol. Eight were found by the Committee to be inadmissible and one was discontinued. Violations have been found in two cases. It is significant to note that in neither case could the complainant have taken the issues arising under the Covenant to the Australian courts.

Toonen

The first case from Australia decided by the Committee was that of Toonen.³¹ The author claimed that his right to privacy was violated by Tasmanian laws which criminalised consenting homosexual conduct between adults. The Human Rights Committee found that there was indeed a violation of Mr Toonen's right to privacy under article 17 of the Covenant. This decision was fully consistent with decisions under the European Convention on Human Rights.³²

The reaction of the Australian government to the Toonen decision was to pass the *Human Rights (Sexual Conduct) Act 1994*, to provide a remedy for any arbitrary interference with the privacy of sexual conduct between consenting adults.³³ Had a remedy been available under Australian law in the first place, as one might reasonably expect, the Human Rights Committee might not have needed to consider Mr Toonen's case, and the Australian Government could have avoided a finding that Australia had violated his rights under the Covenant. The issues concerning Tasmanian laws had been drawn to the attention of the Government by a report from the HREOC.

The legislation was accepted as a satisfactory outcome by the Committee. It can be observed, however, that it did not create a general remedy for violation of the right to privacy within the terms of the Covenant, only for one particular aspect of privacy. The Covenant requires that an effective remedy be provided for every violation of Covenant rights. So that the *Human Rights (Sexual Conduct) Act 1994* stands as a unique and rather limited piece of legislation, a single issue Bill of Rights.

The case of A, a Cambodian asylum seeker

The second case from Australia was the case of 'A',³⁴ one of a group of Cambodian boat people. He had been detained by the Australian authorities for more than four years while lengthy procedures were gone through in relation to his application for asylum. He complained that his detention was arbitrary and in violation of article 9 (1) of the Covenant, which protects against unlawful or arbitrary detention. He also complained that he had been denied the right to judicial review of the lawfulness of his detention, contrary to article 9 (4) of the Covenant.

³¹ *Toonen v Australia*, 488/1992, views adopted March 1994, Human Rights Committee Annual Report for 1994, A/49/40, vol II, p 226.

³² *Dudgeon v UK*, *European Court of Human Rights* 1981 4 EHRR 149.

³³ Through the *Human Rights (Sexual Conduct) Act 1994*.

³⁴ *A v Australia* 560/1993, decided April 1997.

The Committee's view was that to comply with the Covenant every decision to keep a person such as the complainant in detention should be open to review by the court periodically, so that the grounds justifying the detention of that person can be assessed. For example, there may be a need to investigate, a real fear that the person will abscond, or a lack of co-operation. The detention of an individual should not continue beyond the period for which the government can provide appropriate justification. In regard to 'A', however, Australia did not advance any grounds particular to him, which would justify his continued detention for a period of four years, other than the fact of illegal entry. The Committee concluded that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph (1).

On the second point, the Committee's view was that the right of a person to have a court review of the lawfulness of detention is not limited to the question whether the detention is lawful according to domestic law. The review must, according to the Committee, also include the possibility of ordering release if the detention is incompatible with the Covenant itself, such as where it is arbitrary. As the court review available to 'A' was limited to a formal assessment of the self-evident fact that he was indeed a 'designated person' within the meaning of the Migration Amendment Act, the Committee concluded that there had been a violation of the author's right, under article 9, paragraph 4, to have the lawfulness of his detention reviewed by a court.

The Australian government did not welcome this decision. In fact, it rejected the views of the Committee in a formal response which will be considered by the Committee in due course. I will take no part in that discussion and my observations at this point are purely personal. The Australian government's opinion is that it is justified in having a policy of blanket detention for a category of aliens who have not established any right to remain here, regardless of individual circumstances. It does not accept that there should be a judicial remedy in respect of detention which is arbitrary and thus contrary to the Covenant.

My concern is that the government has failed to respect the views of the Human Rights Committee as to the proper application of the Covenant and has preferred its own interpretation. I accept that the views of the Committee under the Optional Protocol are not legally binding as such. Nevertheless, they are part of the framework of obligations under the Covenant, which *is* binding as a matter of international law.³⁵ In ratifying the Protocol, Australia has, in the words of the Protocol itself, recognised the competence of the Committee to receive and consider communications from individuals and to express its views as to whether there has been a violation of the rights set forth in the Covenant.³⁶ It should follow from this that the State will not only co-operate with the Committee, but also respect its views. Australia is obliged under the Covenant to ensure that any person whose rights or freedoms are violated shall have an effective remedy. If the Committee, as the body recognised as competent to do so, forms the view that there has been a violation,

³⁵ Ratification of the Optional Protocol is a recognition of the competence of the Committee to reach a view on the question of violation; article 2 (3) of the Covenant imposes an obligation to provide remedies in case of violation.

³⁶ Optional Protocol articles 1 and 5.

then Australia should give serious consideration to providing a remedy.³⁷ The Committee is competent, where the issue arises, to determine whether a particular remedy is effective within the meaning of article 2 (3) of the Covenant.³⁸

In showing itself unwilling to accept the umpire's opinion, Australia has assumed the role of interpreter of the Covenant over the views of the expert independent body whose competence it has already recognised in ratifying the Protocol. If this attitude were taken by other states, each could interpret the Covenant as it sees fit. The Committee considers, however, that the minimum standards of the Covenant must apply universally, in the same way to all states, and to all people.

The response of the Australian Government can be contrasted with its earlier response, and with that of other countries who have, as a result of Committee recommendations, released prisoners,³⁹ paid compensation⁴⁰ amended legislation or introduced new remedies.⁴¹ Finland made legislative changes and accepted the obligation to pay compensation in a similar case.⁴² Once again, Australia has aligned itself with countries whose records are less than satisfactory.

Does Australia meet Covenant standards?

Australia's failure to report, and its rejection of the Committee's views are significant failings. One would like to think that they are offset by the fact that Australia is generally in compliance with its obligations. Certainly Australia is, by and large, a rule of law country,⁴³ we have a strong democracy, and independent judiciary and a robust media. We

³⁷ The Committee engages in an extensive follow-up procedure to ascertain the level of compliance with its decisions.

³⁸ Art 4(2) of the Optional Protocol authorises the Committee to establish whether an alleged violation has been effectively remedied. There is no violation if a remedy has already been provided.

³⁹ Eg, in *Bolanos v Ecuador*, the author had been kept in pre-trial custody for six years. Upon the Committee finding a violation, he was released from custody and the state assisted him to find employment. 238/1987, 26 July 1989. See also *Vasilikis v Uruguay* 80/1980, 31 March 1983; *Marais v Madagascar* 49/1979, 24 March 1983.

⁴⁰ *Van Alphen v Netherlands* 305/1988; ex gratia compensation was provided for keeping the author, a lawyer, in detention for nine weeks for refusal to co-operate in an investigation against his clients, violating article 9(1); HRC 1991 Annual Report, A/46/40 para 705. *Torres v Finland* 291/1988 38 Session. An alien had been arrested. He was subject to extradition, but he had been unable to challenge the legality of his detention before a court. This was found to violate his rights under article 9 (4) of the Covenant. He was later paid compensation, and the Aliens Act was revised in order to make the provisions governing detention compatible with the Covenant; Human rights Commission 1991 Annual Report, A/46/40 para 705.

⁴¹ Eg, *Pauger v Austria* 415/1990, 26 March 1992. *Vuolame v Finland* 265/1987 7 April 1987. *Zwaan-de Vries v Netherlands* 182/1984 9 April 1987 and *Broeks v Netherlands* 172/1984 9 April 1987. *Aumeeruddy Ciffra v Mauritius* 35/1978 9 April 1981. Some recent positive results are set out in the 1996 report. GAOR Supp 40, A/51/40, 1996, para 455 ff.

⁴² *Torres v Finland*, 291/1988, HRC Report for 1990, p 96. Finland Fourth Periodic Report under the ICCPR, CCPR/C/95/Add. 6, para 45.

⁴³ Dixon J, *ACP v Commonwealth*, 1951, 83 CLR 193.

have anti-discrimination laws, and certain rights are protected by the Constitution and the High Court.⁴⁴ But this is not enough. The Covenant requires that remedies be available in every situation where the rights it protects may have been violated.

Some may think that we have few human rights problems. The Prime Minister is reported to have said that our human rights record is outstanding.⁴⁵ But I wonder how many people would agree? Would indigenous people, minority ethnic groups, the disabled or prisoners on remand agree? International experience over the last 13 years tells me that neither Australia nor any other country has a completely clean human rights record. We are not perfect. Even if we were close to perfection, to maintain the highest standard of human rights requires constant vigilance.

To illustrate this point, I will mention briefly some issues of human rights in Australia, particularly those that may raise questions about our compliance with the ICCPR.⁴⁶ My intention is to show that there are human rights issues arising on a daily basis and that there is a need to ensure that there is a means of recourse so that a remedy can be claimed where a violation is established.

Equality and discrimination, articles 2(1), 3, 14 and 26

Equality is one of the most important of human rights. The proper protection of minorities and disadvantaged groups is an essential counterweight to the power of democratic majorities. The right to equality before the courts, equality before the law, equal protection of the law and to protection from discrimination is protected by the Covenant. The proscribed grounds of discrimination under the Covenant include: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*. States are required to prohibit discrimination in all areas regulated and protected by public authorities. States must ensure that *all* legislation and programs are non-discriminatory, whatever their subject matter—that is whether or not they relate to the specific rights recognised in the Covenant or to other matters, such as social security, which are not provided for or protected under the Covenant. The Covenant thus creates an independent right to non-discriminatory treatment by the State.⁴⁷ The Human Rights Committee has prepared a General Comment on the nature of equality and non-discrimination under the Covenant and has applied the principles to the social security laws of the Netherlands and to the restitution laws of the Czech Republic.

Here in Australia, however, the High Court has rejected an interpretation of the Constitution which would require substantive equality in the application of

⁴⁴ Freedom of religion, participation in elections, compensation for acquisition of property, equality of treatment for interstate residents, s 117.

⁴⁵ *Commonwealth Parliamentary Debates* (H. of R.), 10 December 1996, p. 8111.

⁴⁶ See, too, *The Australian Human Rights Register*, compiled by the Catholic Commission for Justice, Development and Peace, Melbourne Archdiocese, May 1998.

⁴⁷ See *S.W.M. Broeks v The Netherlands*, 172/1984, views adopted 9 April 1987. *F.H. Zwaan-de Vries v the Netherlands*, 182/1984, views adopted 9 April 1987. General Comment No 18 on Equality and non-discrimination.

Commonwealth laws.⁴⁸ There may be some lingering support for a requirement of equality in the exercise of judicial power. But, by and large, we are left without a general protection of equality, only an incomplete set of laws against discrimination. Not all grounds of discrimination and not all areas of activity are covered.⁴⁹ There are exceptions and exemptions. If the Covenant were fully implemented a general guarantee of equality would be available.

The right to life, article 6

Article 6 of the Covenant protects the right to life and provides that no one shall be arbitrarily deprived of life. This provision requires that measures be taken to prevent and punish arbitrary killing by police and security forces. States must also take positive measures to protect life, such as those in respect of HIV/AIDS or, where necessary, to reduce infant mortality and to increase life expectancy.⁵⁰ Such measures are clearly necessary, even mandatory, when one particular group, defined by race, that is the indigenous people of this country, have a life expectancy well below that of the general population and do not enjoy the right to life on equal terms. The right to life of indigenous people is also devalued by their exceptionally high rate of deaths in custody.⁵¹ In fact, many of the most glaring human rights failures concern Australia's indigenous people.

Asylum seekers, Refugees, articles 7, 9 and 10

The right to liberty and security of person is in question in regard to the detention of unauthorised arrivals. The Human Rights and Equal Opportunity Commission reported in May 1998 that the detention policies of Australia breach international human rights standards for handling refugees, first because they result in mandatory and prolonged detention, and secondly because of the conditions at different centres. The Report concludes that the conditions in which many asylum seekers are held are inadequate and that this contributes to a violation of rights when people, and especially children and other vulnerable people are detained for prolonged periods.⁵² The government has rejected the HREOC findings. One reason for this apparently was that HREOC ignored advice from the Attorney-General's Department that there was no breach of international standards.⁵³

The stolen generation

⁴⁸ *Kruger v The Commonwealth, Bray v The Commonwealth* (1997) 71 ALJR 991; *Leeth v The Commonwealth* (1992) 66 ALJR 529.

⁴⁹ As to the *Sex Discrimination Act 1984*, See *Equality before the Law: Womens' Equality*, Sydney, Australian Law Reform Commission, 1994, Part II, p. 69.

⁵⁰ Human Rights Committee, General Comment 6, Article 6, (Sixteenth session, 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN. Doc. HRI/GEN/1/Rev.1 at 6 (1994).

⁵¹ See, eg, Chris Cunneen and David McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, Canberra, ATSIC, 1997.

⁵² *Those Who've Come Across the Seas*, op. cit.

⁵³ *Sydney Morning Herald*, 15 May 1998.

The Covenant protects the family and children, the right to equality, to liberty and security of person and freedom of movement. These rights are also found in the Universal Declaration of Human Rights, dating back to 1948. The experiences of the stolen generation involved numerous violations of these principles,⁵⁴ violations which have been compounded by the absence of an official apology. It is now almost a year since the report was published, and the anniversary would be a good time for a change of heart on this issue. National Sorry Day is less than a week away.

Australia should pay attention to the experience of South Africa and of those Latin American countries which are trying to confront the appalling violations of the past openly, and often painfully, as a way of ensuring that the future will be built on truth and understanding. An apology alone is not an effective remedy, but it is a step towards forgiveness and reconciliation.

Need for new responses

The few examples I have given reinforce my regret that eighteen years after ratifying the Covenant, and more than six years since ratifying the Optional Protocol, Australia has not yet found a way to give full effect to all Covenant rights or to provide the remedies which the Covenant requires for all violations of those rights.

It is clear that neither the common law nor the Constitution can adequately protect individual rights against the encroachment of legislation or governmental powers or deal with pervasive discrimination. The case of *A*, mentioned earlier, is an example.

Why has Australia moved so slowly in this area? The human rights of the Covenant are not alien or hostile influences forced on Australia to diminish our sovereign rights. The Covenant, and most other human rights instruments, were drafted by representatives of the governments, including Australia, who later agreed to be bound by their provisions. Those instruments reflect the experience and/or the law of States from all regions of the world combined into a consensus view as to the minimum standards that should apply at national level.

There is a credibility gap here. It is very difficult to understand or to explain to colleagues who work in human rights that Australians who consider that their rights under the Covenant have been violated can take their case to the Human Rights Committee, but cannot challenge those violations in the Australian courts. Members of the High Court commented on this anomalous situation.⁵⁵

A Bill of Rights for Australia?

It is time to fulfil our obligations under the Covenant by ensuring that Australian courts have jurisdiction to determine whether the rights of Australian people have been infringed and to provide remedies where a violation of rights is established. Rights would be better protected if Australian courts had power to apply international standards directly.

⁵⁴ *Bringing Them Home*, Sydney, Human Rights and Equal Opportunity Commission, 1997, CCJ 16.

⁵⁵ *Dietrich v the Queen* [1993] 67 ALJR 1, 6 Mason CJ and McHugh J.

Countries with backgrounds and legal systems comparable to Australia, such as the US and Canada have entrenched constitutional bills of rights. New Zealand has a legislative bill of rights, based on the International Covenant on Civil and Political Rights. This has given the Court the opportunity to develop the concept of rights for New Zealanders.

Many European countries have incorporated the European Convention on Human Rights into their legal systems. An exception, until recently, was the UK. It has been, for a long time, the country most likely to be found in violation of the European Convention on Human Rights. For many years, British lawyers have had to take their cases to Strasbourg because their own courts could not enforce the rights which the UK had undertaken to respect. The British judges, though increasingly aware of the requirements of the European Convention, were powerless to apply its provisions directly. The Human Rights Committee has expressed concern that the legal system of the United Kingdom does not fully ensure that effective remedies are available for violation of rights.⁵⁶

Late last year the Blair government introduced a Bill of Rights, based on the European Convention. Under this Bill, legislation must be read and given effect to in a way compatible with Convention rights whenever possible. The UK courts may make a declaration of incompatibility where legislation is incompatible with the Convention. It will be unlawful for public authorities, including courts, to act in a way which is incompatible with Convention rights.

Australia is beginning to look rather lonely. The enactment of the UK Bill of Rights Act will leave Australia as the only country of similar background and legal system not to provide a general right of recourse to the courts when human rights are under threat or have been violated.

The question of a Bill of Rights for Australia is by no means a new issue.⁵⁷ There have been some failed attempts in the past. They have left us with a good supply of models for the implementation of the Covenant. For example, the Australian Human Rights Bill 1985, incorporated many provisions of the ICCPR in a legislative Bill of Rights. The Constitutional Commission recommended in 1988 that the Constitution be amended to include guarantees of rights and freedoms, based on the ICCPR and the Canadian Charter.⁵⁸ Those recommendations are fully supported by draft provisions.

All models for an Australian Bill of Rights give the Court a role in determining the scope and application of rights. That is necessary to make Covenant rights real for Australians. No one can pretend it would be an easy or even a popular task. But it is a task which the High Court is well equipped to perform, in light of its constitutional experience and its already awesome understanding of human rights principles, even those it cannot apply itself. A Bill of Rights, constitutional or legislative, would establish clear principles under which the High Court could restrain the use of power which infringes the rights of the

⁵⁶ Human Rights Committee, Annual Report 1995, A/50/40, para 416.

⁵⁷ Hilary Charlesworth, 'The Australian reluctance about rights' in Philip Alston, (ed.) *Towards an Australian Bill of Rights*, op. cit., Murray Wilcox, *An Australian Charter of Rights?* Sydney, Law Book Company, 1993.

⁵⁸ *Report of the Constitutional Commission 1988*, pp. 536 ff.

individual. It would achieve a satisfactory diffusion of power and be a counter-balance to majoritarian rule, and the burgeoning power of the executive.

The process which began with the adoption of the Universal Declaration fifty years ago is as yet incomplete. Rights have to be turned into realities. For this we need to make provision for our courts, and in particular the High Court to determine whether our laws, policies and practices comply with our obligations under the Covenant.



Question — I would like you to comment on the discrimination practised by the Roman Catholic Church. In Sydney, a homosexual mathematics teacher was dismissed from his employment on the grounds that he was a homosexual. Now there were no complaints about this man's teaching, he had given some twenty years of service to the Roman Catholic teaching service. He told me that the principal of the school said he was dirty and immoral.

The second question concerns two young schoolteachers in Queensland, Toby and Mary. They were young people, nineteen and twenty. They were teachers there. They were in love. Unfortunately they were sleeping together and they did not have a marriage licence. Get that licence or get out.

Again, a young man took part in the gay and lesbian mardi gras here in Sydney. The Catholic Church authorities hauled him up and said 'you are doing the wrong thing, you run the risk of being dismissed.'

As far as I can see this is discrimination. If, for example, Elizabeth Evatt put an ad in the paper for a home to let, saying no homosexuals, lesbians or Roman Catholics need apply, she would find herself before the courts, she would be breaking the law. The Catholic Church gets away with it scot-free.

My second question concerns the charge of sedition. In 1950 a man called Lance Sharkey was charged with making a seditious utterance. He was charged and convicted and sentenced to three years imprisonment for expressing a particular political view. It seems to me that that is a violation of human rights. When I asked Sir Anthony Mason about this conviction of Mr Lance Sharkey, he refused to even comment about it.

Again, I would like to ask you about the case of Mr Albert Langer. He broke some rules of the Australian Electoral Act. Now it is perfectly legal under the electoral system for people, in the privacy of their own homes, to say 'vote one, two, three under a preferential system', but the moment you go outside and advocate that, you can find yourself in prison and Mr Langer found himself in prison. I would like you to comment on those three points please.

Elizabeth Evatt — I will comment on the second and third first, because they are somewhat easier. Article 19 of the Covenant protects freedom of expression, but it also allows for restrictions, provided they are imposed by law and are necessary to respect

rights or reputations to protect national security or public order, public health or morals. The Human Rights Committee tends to take a very narrow view of what restrictions are permissible. Without expressing any concluded view about the sedition laws that you are referring to, the Committee has, on more than one occasion, commented adversely on sedition laws which impose restrictions which go beyond those permitted under the Covenant. The same principles would apply in regard to the Langer case. A state would have to justify the restriction on freedom of expression on the ground that it was necessary to protect public order, public health or morals, or security. There again, one imagines that a case could be made out to say that it might go beyond that, no matter what justifies it under the Constitution.

Discrimination; again, there the Covenant has, in some ways, more to offer than national laws, because the grounds on which discrimination must be prohibited are wider than we find in national laws because they include the 'other status' ground which potentially allows many issues to come in as a ground of discrimination. Where it is not so clear, is whether the Covenant requires government to apply anti-discrimination laws to private activities, and in this case the question would be whether, in carrying out education functions, the Catholic Church was carrying out what could be regarded as a public function. That is an issue that would need debating and discussing. But the principles are there. Those are the principles that would be applied and obviously I cannot give a concluded view about it.

Question — Next week in Australia is schizophrenia awareness week. I address a question to you because you did not have the time in your address to address some issues relating to mental illness. One of the problems of many people who come before the courts and receive treatment orders and the like is to know what their rights are in terms of the treatments that may be provided. You may have had time to read the *Canberra Times* this morning about an elderly person who received electro-convulsive treatment, with their permission, and something went wrong. I have been interested to find out with regard to treatments, that the Royal Australian and New Zealand College of Psychiatrists has asked for clinical trials to test the efficacy and the ethical aspects of introducing a treatment called autonomic psychiatry, or some may prefer it as clinical ecology, or environmental medicine; basically, drug-free approaches to complement psychiatric drugs. I understand there are certain problems regarding the definition that has been given by the Royal Australian and New Zealand College of Psychiatry, and one doctor, Chris Ready, has had tremendous fights with the Royal College and with others about the misuse or abuse of his definition under the position statement 24 of the Royal Australian and New Zealand College of Psychiatrists. I mention that in the context of the rights of individuals to know what alternatives and treatments are available to them, and where that stands in relation to the United Nations, which has no legally binding Covenant upon the Australian government, states and territories and commonwealth.

Elizabeth Evatt — I am not quite sure what you are asking, but if you are asking whether the international Covenant provides any guidance here, the answer is probably not a great deal. It does provide that no one is to be subjected, without consent, to medical or scientific experimentation. No one is to be subjected to inhuman treatment. Those provisions are very important, as well as the right to liberty and security. Those provisions are most important for persons who may be mentally ill and detained on that account. I am afraid the question you are asking is a bit beyond me to deal with any detail. I am sorry.

Question — In the midst of perusing various UN covenants and bills of right and what have you, what would be the benefit of class actions in countries around the world, of people suing their country in courts internationally, for having violated UN covenants? I am interested in the ramifications of codification.

Elizabeth Evatt — There are not any international courts that individuals can sue their governments in, except perhaps the European Court of Human Rights. There are no courts in which you can sue a country, except your own national court. There are no international courts, where individuals or groups of individuals have standing; the European Court of Human Rights may be an exception there. The point I am trying to make here today is that the individual cannot, in general, sue the Australian government in Australia for violation of rights. If they could, then a group could act together to do that, and certainly if you wanted to take a case under the Covenant to the Human Rights Committee, a group of identified individuals can take such a case. It could be quite a large group, but they have to be individuals, which means they have to be identified. There is no class action as such under that. People who feel that rights are not respected, can certainly pursue that much of a remedy and hope that the outcome will be respected.

Question — The House of Representatives has twice passed the Native Title Amendment Bill and the Senate has twice rejected it. Ian Viner QC, a former Liberal Minister, has published, saying that the bill has constitutional problems. Would you care to comment on constitutional or international problems in that Native Title Amendment Bill?

Elizabeth Evatt — I do not feel that I can comment on constitutional problems. If there are international problems, it may be that there are discriminatory aspects of the bill which may fall foul of the Racial Discrimination Convention, and if they fall foul of that, they may indeed fall foul of the Covenant on Civil and Political Rights, which also protects against racial discrimination. I am not expressing a concluded view about that. I am sorry I cannot do that.

Question — I am interested in how the funding of the United Nations is impacting on the role of the United Nations Human Rights Committee. In particular, what sort of backlog is there on individuals coming to it with different human rights breaches of the twin covenants?

Elizabeth Evatt — I did not raise that in my address, but it is an extremely serious issue. The failure of countries like the US to pay their dues to the UN has led to quite a significant reduction in the resources available for the work of the Human Rights Committee. That, in turn, has contributed to an escalation in delay in dealing with cases under the Covenant, and delays of two to three years are normal. The committee has a number of urgent cases that involve application of the death penalty, particularly in the Caribbean countries. Priority has to be given to urgent cases; they have to jump the queue; which means cases that are not urgent can be two or three years delayed. The Australian government is supportive of the work of the treaty bodies, in principle. At least it says it is. The Human Rights Committee does not have the resources to do the job as we would like to do it. Whatever we can do to encourage the US to pay up, would be good.