Comment

Professor David Weisbrot, President, ALRC

When I arrived in Australia in 1979, I was greatly in awe of the quality and breadth of the work of the Australian Law Reform Commission and its then chairman, Justice Michael Kirby. So it is with more than the usual politeness that I say I am deeply honoured to have been appointed to lead the Commission into the next century.

The context of law reform in Australia has changed markedly since the establishment of the ALRC by statute in 1973. Certainly the field has become much more crowded.

The system of active and well-supported committees in both houses of federal parliament is now well-entrenched, with these committees now ranging over many of the same sorts of complex socio-legal problems that were once largely the preserve of the ALRC – how to assure privacy in the computer age, how to regulate the rapid advances in bio-medical technology, how to provide procedural fairness for persons in the armed services charged with offences, and so on.

Similarly, departmental and inter-departmental committees, task forces and working parties now routinely engage in law reform, and adopt some of the techniques pioneered by the ALRC to stimulate public debate, canvass opinions and elicit submissions. Royal Commissions and other ad hoc inquiries are also used to investigate particular matters of public concern – and to make recommendations for law reform. In recent years, with the blurring of the public-private distinction, it is increasingly common for public authorities to commission private consultants to review operations and report on means for improvement.

Within the Commonwealth Attorney-General's portfolio alone, there are a number of bodies besides the department providing specialist advice – among them the Administrative Review Council, the Family Law Council, the Human Rights and Equal Opportunity Commission, and the Model Criminal Code Officers Committee. The Corporations Law Economic Reform Project (CLERP) and the tax law simplification project are also, effectively, specialised law reform bodies.

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References and events

Government as a litigant conference

The Commission worked with the Australian Competition and Consumer Commission (ACCC) and the Commonwealth Ombudsman to hold a conference entitled *The management of disputes involving the Commonwealth – is litigation always the answer?* The conference was held in Canberra on April 22 this year and was well attended by government officers, legal practitioners and academics interested in the area of dispute resolution. The conference was a timely initiative, given the changes to federal government legal service delivery, which commenced operation in September this year.

The Cost of Justice

The ALRC is examining the costs of justice as part of its review of the federal civil justice system, and this was the topic of a Sydney seminar discussion during Law Week in May.

An eminent panel - chaired by the then ALRC President **Alan Rose** - created a diverse and animated discussion on different aspects of the cost of justice.

Professor Philip Williams of the University of Melbourne commented on his report on fee scales, *Report of the review of scales of legal professional fees in federal jurisdictions.* **Susan Pattison** from the costing firm Pattison Hardman discussed the benefits of costs disclosure to clients, including how this practice can be used to focus a particularly litigious client or encourage settlement. **Senator Helen Coonan**, Liberal Senator for New South Wales, also spoke on access to justice and the need for a legal system which people are confident will deliver affordable justice. **Michael Lavarch**, special counsel for Dunhill Madden Butler and former federal Attorney-General, considered the cost to the federal government of the federal civil justice system. **Bret Walker SC**, of the NSW Bar, focused on the cost of litigation. He pointed out that prices for goods and services are not controlled in Australia for political and social reasons and price fixing should similarly not be applied to fees charged by lawyers.

POC launch

ALRC 87 *Confiscation that counts – review of the Proceeds of Crime Act* was tabled in Parliament on June 15 this year, and officially launched the next day by Attorney-General **Daryl Williams** at a function in the Commission's Sydney office.

The Attorney-General's Department is currently considering the Commission's

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recommendations. The Commission hopes to receive a response to this report in the near future. For further information on this reference, see articles beginning on page 47.

A new President

The ALRC has a new President, with the appointment of **Professor David Weisbrot** to the post on June 7, for a period of three years. Professor Weisbrot is the first legal academic to hold the position.

Professor Weisbrot was the Pro-Vice Chancellor and Head of the College of Humanities and Social Sciences at the University of Sydney, and has been Dean of Law at the University of Sydney and the University of Papua New Guinea. He has also served as an acting Judge of the District Court of NSW.

Professor Weisbrot admits to taking "one of the more unusual routes" to the position, having been raised from an early age in New York and gaining an honours degree in politics and communications before studying law. He spent the early part of his legal career as a legislative counsel in the Micronesian Islands and as a legal academic in Papua New Guinea.

Professor Weisbrot arrived in Australia in 1979, after five years in the Pacific Islands. He has a particular expertise in the area of law reform, having served both as a full-time and part-time Commissioner with the New South Wales Law Reform Commission, as Commissioner of the Fiji Law Reform Commission, and a consultant to the Papua New Guinea and Australian Law Reform Commissions.

He has published extensively, especially in the areas of criminal law and procedure, regulation of the legal profession, customary law, and international and comparative law.

Farewell, Alan Rose

Alan Rose AO ended his five-year term as President of the ALRC on May 22. Mr Rose brought a direct experience of politics and the bureaucracy to the process of law reform.

His term as President coincided with a challenging time in the life of the Commission in terms of its administration. The Commission's Parliamentary Appropriations were reduced from $4.224 million in 1995/96 to $2.884 million in 1998/99. As a result, staffing levels dropped from a full-time equivalent of 37.7 in 1995/96 to 22 in 1998/99, excluding members of the Commission.

During the period that Mr Rose was President, the Commission produced 61 publications, including 14 final reports - the final one being *Confiscation that counts: a review of the Proceeds of Crime Act 1987 (Cth)*, which was tabled after his departure.

The extensive and effective public consultation process, the main pillar in the operation of the Commission established by the first Commission Chairman, the Hon Justice Michael Kirby, continued to be a priority during Mr Rose's term in office. Such consultation is essential to ensure that the law evolves in a manner that is in tune with society.

Mr Rose presided over an active public affairs strategy in support of the law reform program, and had frequent contact with the print and broadcast media, providing background information and interviews.

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During his term as President, Mr Rose put considerable energy into *Reform*, which began as a 16-page bulletin in 1976. In 1997, he oversaw the redesign of *Reform*.

The Commission members and staff extend their thanks to Alan Rose for his term as President, wishing him well for the future.

Deputy President retires

The Commission has also farewelled its Deputy President **David Edwards PSM**. Mr Edwards, who became a member of the Commission on December 13, 1995, retired on September 15.

Prior to his appointment to the Commission, Mr Edwards was First Assistant Secretary, Business Law Division in the Attorney-General's Department. He has extensive legal policy expertise, working at senior government levels in constitutional and administrative law, business law and international trade law. He served as Counsellor (Legal) at the Australian Embassy in Washington DC from 1982 – 85, and played a major role in the establishment of the national companies and securities scheme and reform of the Corporations Law.

The Commission expresses its gratitude to Mr Edwards for his service as Deputy President, and wishes him all the best in his retirement.

Inquiry into the statutory functions and powers of the ALRC

Arising from recommendations contained in the 73rd Report of the Senate Committee of Privileges, in December 1998 the Senate Legal and Constitutional Legislation Committee received a reference to inquire into the statutory powers and functions of the Australian Law Reform Commission.

The main focus of the inquiry has been on the Commission's powers to make submissions to parliamentary committees and other law reform bodies. The Commission has a practice of providing submissions where the subject matter under review is one in which the Commission has developed particular expertise in the course of conducting its references, and the Commission's knowledge would be of assistance to the committee or reform body.

The Commission made a written submission to the Committee on August 5 this year. Public hearings relating to the inquiry were held in Sydney on August 18. The Commission appeared before the Committee to elaborate on the information and proposals put forward in its submission. The Attorney-General's Department, the Hon Elizabeth Evatt (former President of the ALRC), and the Hon Lionel Bowen also appeared before the Committee.

At the time of publication, the Committee had not yet reported its findings to parliament in relation to this inquiry.

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Implementation update

In 1996 the Commission released its report ALRC 82 *Complaints against the Australian Federal Police and the National Crime Authority*. The recommendations contained in this report are still under consideration by the government. Options for a complaints system within the National Crime Authority, including those recommended in ALRC 82, were to be considered by Cabinet in September. The result of Cabinet deliberations will influence further consideration of the Australian Federal Police complaints system.

The Electronic Transactions Bill was introduced into the federal parliament in June this year. The Bill is intended to facilitate use of electronic transactions in business and the community, and in dealings with government. The Bill is a result of the recommendations of the Electronic Commerce Expert Group, which were consistent with the approach taken in ALRC 80 *Legal Risk in International Transactions*.

In June 1999 the Commonwealth Ombudsman released a self-initiated report on the operation of the *Freedom of Information Act 1982* (Cth). The Ombudsman identified a number of problems and made recommendations similar to those raised in ALRC 77 *Review of the Freedom of Information Act 1982*. In a number of instances, the Ombudsman referred to ALRC 77 recommendations and called for their implementation.

The Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth) was passed in August 1999. The offences in the Act, which are directed at slavery, sexual servitude and deceptive recruiting, are based on model provisions developed by the Model Criminal Code Officers' Committee, which were in turn based upon recommendations contained in ALRC 48 *Criminal admiralty jurisdiction and prize*.

Editorial Advisory Committee

Reform acknowledges the contribution of its Editorial Advisory Committee members to this edition. The Committee members are:

Dr Kathryn Cronin, Australian Law Reform Commission
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Controlling immigration: Australian legislation & practice

By Dr Kathryn Cronin*

Australian history resonates with popular and political anxieties about uncontrolled or under-controlled immigration, with concerns about the size, composition or profile of the immigrants arriving here. Such fears are often fanciful.

Australia has a most effective control against immigration - its geography. It does not share a land border with any other country. Immigrants to Australia do not arrive in secret compartments in cars or lorries, swim across border rivers, or dash across its land borders as they do in many other countries. Ships, airlines and the occasional fishing boat provide the carriers for Australia's arrivals. This geographical isolation provides a justification for Australia to implement legislation to control the numbers and types of immigrants to Australia. If almost all your arrivals disembark from established airline and shipping carriers, they are amenable to legislative control. It is relatively easy to regulate in law the procedures for the arrival and entry of such passengers. Australia relies upon legal solutions to control immigration because the laws work.

Immigration to Australia must be seen to be controlled. Indeed, the first legislation passed by the new Australian Commonwealth was the *Immigration Restriction Act 1901* (Cth). This was no coincidence. A significant impetus for federation was the desire to have national immigration legislation. The Immigration Restriction Act was the first Australian immigration legislation but in the 50 years before federation Australian colonial governments had passed, repealed and amended various legislative schemes to control immigration. An analysis of such, and our recent immigration laws, helps us to understand how legislation is constructed to contain immigration.

Colonial legislation

Britain's 19th century immigration procedures were relatively relaxed. Under its *Aliens Act 1836*, ship masters were required to report the numbers and names of alien passengers to customs, but it was assumed that aliens from 'friendly' countries would not be refused entry or stay. Immigration control was reserved for times of war, when

foreigners from 'enemy' countries could be denied entry or detained.[1]

Australia, as a British colony, inherited this liberal regime. The thousands of immigrants who arrived on the Victorian and New South Wales goldfields were admitted without restriction, at least until their number included Chinese. Victoria's then Governor Hotham explained to the British Secretary of State that, given the numbers of Chinese arrivals, it was impossible to uphold the 'old world' principle of encouraging and protecting the foreigner, or at least these particular foreigners.[2]

Victoria's answer to the Chinese arrivals - an *Act to Make Provision for Certain Immigrants 1855* - implemented a control device now much used in modern immigration law, namely, the carrier sanction. The legislation stated that the owner, charterer or master of a ship carrying Chinese immigrants could be fined if they carried to Victoria, Chinese in excess of one for every 10 tons of ship's tonnage or did not guarantee payment by the Chinese passengers of an arrival tax of £10.[3] The Chinese passengers so restricted were identified, not by their nationality, but their ethnicity. Customs officials could decide 'upon their own view and judgement' whether any person before them had the appearance of being a 'person of Chinese race'. This was to ensure that Chinese from British dependencies such as Hong Kong or Singapore, who may have been British subjects, were caught by the restrictive law. The Act was effective to limit the numbers of Chinese arriving in Victoria, although Chinese arrivals did not really decline until all the Australian colonies had enacted similar legislation. It was otherwise easy for the ship owners to by-pass the Victorian restriction by disembarking their Chinese passengers in New South Wales or South Australia.

Within the prevailing, racist ideology, it was not enough that colonial governments control Chinese arrivals, they were pressured to exclude the Chinese who had managed to secure entry to Australia. Colonial governments arranged this exclusion not via immigration legislation but by discriminatory legislation which imposed selective taxes on Chinese, restricted their ability to work as miners, carpenters, fishermen and domestic servants and denied them the opportunity to purchase land, to be naturalised as British subjects or given consular representation. This array of discriminatory legislation directed at 'persons born to a Chinese father or mother', denied Chinese the right to participate in colonial political, economic or social life, forcing most of them to return to China. There were very few remaining in Australia by the end of the 19th century.

Britain's liberal immigration procedures were significantly eroded by such legislation. These Australian enactments were matched by similar laws in the British colonies of New Zealand, Canada and South Africa. The Privy Council effectively endorsed such legislation, confirming that a Chinese immigrant, as an alien, had no legal right expressible by action to enter British territory.[4] The Australian High Court extended the principle of immigration control. The state was said to have 'supreme', 'sovereign' power to select the non-citizens it would permit to enter, to set the terms or conditions of their entry or stay and to deport them from the territory 'for whatever reasons it thinks fit'.[5] Modern restrictive immigration legislation had arrived.

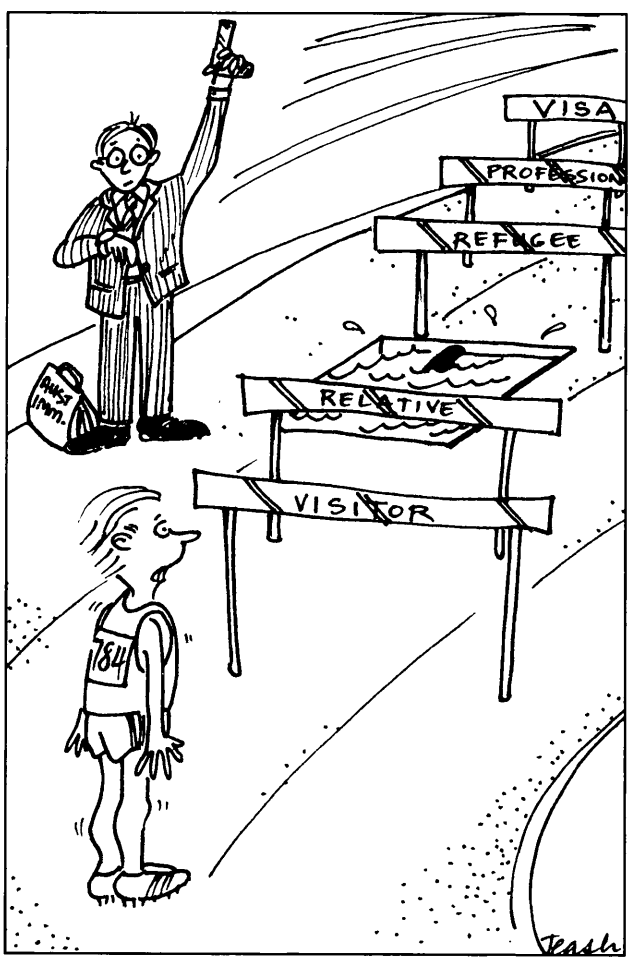
Federation legislation

Colonial immigration legislation may have been effective in limiting Asian immigration, but it created diplomatic problems for Britain in its dealings with China, Japan and the Indian subcontinent. Not surprisingly, such countries resented discrimination against their nationals and their explicit designation as undesirable immigrants barred in several British colonies. The solution – termed the 'Natal Formula' – was devised by the British Province of Natal. Natal's immigration legislation did not define the immigrants sought to be excluded, but gave power to its immigration officers to require any immigrants to be subjected to a dictation test in a European language chosen by the officer. Immigration officers could select the immigrants they did not want and devise a test they could not pass. Dictation tests could be applied on arrival or after entry. The test was a useful device to deny entry and to remove persons from the territory. In promoting the scheme, the British Secretary of State for the Colonies noted that such legislation would give the colonies all the power and discretion they wanted, in a form which 'avoided hurt' to particular nationalities.[6]

Australia's *Immigration Restriction Act 1901* (Cth) incorporated the Natal Formula. The Act stated that 'prohibited immigrants' could be removed from Australia. A 'prohibited immigrant' was 'any person who fails to pass the dictation test'. Over the

years, the test was used to deny entry or secure the removal of many non-Europeans as well as socialists, Irish republicans and anti-fascist campaigners. It became the cornerstone of the White Australia policy and political conservatism.[7] Although the Act studiously avoided reference to non-Europeans as a class to be excluded, the application of the dictation test to such persons continued to give offence to countries in the region. Japan, in particular, was determined to prove in an international forum that discriminatory immigration policy was not simply a matter of domestic law, but a factor in regional relations.[8]

The White Australia policy was progressively dismantled. International and domestic campaigns and a series of significant legal challenges to the legislation and practice of the policy saw the repeal of the Immigration Restriction Act. The High Court held that immigrants could not be removed from Australia if they had become 'absorbed', and were 'a constituent part of the Australian community'.[9] The application of the dictation test was likewise controlled. The High Court declared that the test language must be one in common use in Europe, not an arcane dialect such as the Scottish Gaelic test administered to the anti fascist linguist, Egon Kisch, to ensure he failed the dictation.[10] From 1973, officers choosing migrants were instructed to be 'colour blind,' and disregard the race of migrant applicants.



Current legislation

From 1989 the rules for the entry, stay and removal of all persons not Australian citizens have been exhaustively codified in legislation. Certain features of the control model continue to be controversial, but the selection of immigrants is now in accordance with transparent criteria. The significant distinction is between those here for a temporary purpose – students or visitors – and those arriving as migrants, or seeking, after entry, to obtain permanent residence. Those qualifying for permanent entry or stay generally are the partners, children or close family of Australian citizens or residents, are refugees or have high level business, professional or trade qualifications. Governments have tried to adjust the mix of these categories by limiting family and humanitarian and increasing skilled migrants. This is arranged using a well-established immigration control device – the visa.

The term 'visa' simply means a ticket or pass. In many countries it is the evidence that a person, not a citizen of the country, can enter or stay. Citizens do not need a visa, but have a right to enter and reside in their own countries. Australia is one of the few countries to operate a universal visa system, such that, with the exception of Torres Straits Islanders entering for traditional activities, every non-citizen requires a visa to enter and stay here.[11] Non-citizens in Australia without a visa are required to be detained and removed. The requirement to have a visa extends even to visiting heads of state, although they are not expected to apply for such a visa before entry but are taken under the *Migration Act 1958* (Cth) to qualify for the visa on arrival. Most non-citizens are expected to get a visa before arriving in Australia. Those arriving here without such are detained at the airport or when customs intercepts their boats. At any time there may be significant numbers of immigration detainees, some of them held for extended periods of time. This is the most controversial feature of Australia's immigration law. Most of those detained seek recognition and residence as refugees.

The Migration Act details classes of, and the criteria for, visas. Non-citizens must qualify for a visa class to travel or stay here. There are some 70 different visa classes for which non-citizens can qualify. It is an elaborate, complicated scheme. The Minister can set quotas for the numbers of a

particular visa class issued in any year so as to limit the persons qualifying. To qualify for a visa, applicants must satisfy all the relevant criteria. Decision makers have no discretion to bend the rules and grant a visa to a person who does not so qualify. 'Hard' cases cannot easily be accommodated. The Minister has some discretion to bend the rules, reserved for applicants who apply for review of an immigration decision. The Minister cannot be compelled to exercise this discretion and it is generally exercised sparingly.

Most decisions concerning visas, at least those made in respect of non-citizens in Australia, carry a right to merits review of the decision before the Migration or Refugee Review Tribunals. Where the tribunals make an error of law in their review, applicants can seek judicial review of such decisions in the Federal Court. Review applicants can remain in Australia pending the outcome of their challenge to the decision. This is the new battleground for immigration controls. Debates concerning immigration law no longer focus on the mechanisms for controlling numbers but on the features that insulate visa decisions from judicial review. These controls operate in a variety of ways. Governments want what they term 'credible' review to ensure that regulations are interpreted according to their intentions.[12] The Migration Regulations are written with clear, concrete and prescriptive criteria. There are few criteria calling for subjective evaluations by tribunal or the judiciary. The regulations are frequently amended to modify decisions by courts and tribunals. Australia has also limited the grounds and decisions amenable to judicial review and the present government proposes a privative clause, which will insulate almost all immigration decisions from judicial review. The privative clause is presently being debated by federal parliament.

The control of decision making and review represents a principal objective of current immigration law. In this regard, Australia's sounding of the retreat from judicial review echoes developments in Europe and the Americas. Such controls may give certainty and consistency in decision making, but limit the capacity to do justice in deserving immigration cases. The losers in this contest are not only the visa applicants seeking to enter or stay, but our own systems of accountability and justice.

Dr Kathryn Cronin is a full time Commissioner with the Australian Law Reform Commission. She is an Associate Professor of Law at the University of New South Wales, and was previously legal consultant to the Parliamentary Joint Standing Committee on Migration and to the Refugee Review Tribunal. She has practised at the English Bar and has written extensively on citizenship, migration, refugee law and human rights.

Endnotes

1. TWE Roche The Key in the Lock: A history of immigration control in England from 1066 to the present day John Murray 1969, 56.

2. Hotham to Secretary of State Russell, 15 June 1855, Dispatch No 80, quoted in K Cronin Chinese in Colonial Victoria: The Early Contact Years PhD thesis Monash University 1977, 48.

3. Act 18 Vic No 39, ss 3, 4.

4. Musgrove v Chun Teeong Toy (1891) AC 272. The case involved a Chinese national excluded from Victoria who sought damages for wrongful imprisonment from the Victorian colonial government, which had refused to let him disembark from a ship in Melbourne.

5. See Robtelmes v Brennan (1906) 4 CLR 395, Pochi v MIEA (1982) 151 CLR 101.

6. RA Huttenback Racism and Empire: White Settlers and Colored Immigrants in the British Self –Governing Colonies 1830-1910 Cornell UP 1976, 139-54.

7. K Cronin 'A Culture of Control: An overview of immigration policy-making' in J Jupp & M Kabala, The Politics of Australian Immigration, 88-90.

8. See S Brawley The White Peril: Foreign Relations and Asian Immigration to Australasia and North America 1919-1978, UNSW Press Sydney, 47.

9. See Potter v Minahan (1908) 7CLR 277; R v MacFarlane: ex parte O'Flanagan & O'Kelly (1923) 32CLR 518.

10. R v Wilson Ex parte Kisch (1934) 52 CLR 234.

11. Most visitors are required to apply and qualify for a visa before travelling to Australia. New Zealanders qualify for their visas on arrival.

12. MIEA Second Reading Speech Migration Reform Bill 1992, CPD: HR 4 November 1992.

Torture, persecution and the state: recent developments in international law

Last year, former Chilean President Augusto Pinochet was arrested in Britain, to face extradition to Spain on charges of murdering and torturing Spanish citizens. Pinochet is fighting the extradition, arguing that as a former head of state, he should have immunity from criminal prosecution before a domestic court in respect of official acts done as a public official on behalf of the state.

In March this year, the British House of Lords rejected his argument. Pinochet's extradition is set to continue.

Nicholas Blake QC* explains that this internationally important judgment, and other significant cases protecting individuals subject to torture and persecution, show a trend by courts in the United Kingdom, Europe and the United Nations to reduce the scope for immunity from prosecution or evasion of human rights responsibility by states.

As a result of the necessity of having to re-hear Pinochet's case because of Lord Hoffman's connections with an intervenor,[1] 12 Law Lords have now given their opinion on the question whether a former head of state enjoys immunity from criminal prosecution before a domestic court by reason of the subject matter of the allegations.

Although the speeches will be picked over for years to come on questions relating to *jus cogens*, act of state, state immunity, and double criminality in extradition law, what eventually persuaded nine of their Lordships[2] that extradition proceedings should continue was the definition of torture in Article 1 of the 1984 Torture Convention.[3] This definition provides that the requisite intentional acts causing severe pain or suffering, physical or mental, are inflicted "by or at the instigation of or with the consent or acquiescence of a *public official* or other person acting in an *official capacity*" (my emphasis).

The UK parliament had incorporated this definition into the specific criminal offences of torture it had created in 1988 so as to be able to ratify the Torture Convention. The purpose of the legislation was to ensure official torturers were either prosecuted in their own country, or if abroad were either prosecuted in the state of residence or extradited for prosecution elsewhere. It was inconceivable that parliament intended that the customary international law doctrine of immunity from suit in respect of official acts done by public officials on behalf of the state could have been intended to apply to this new offence with the

consequence that it would be rendered devoid of all practical purpose. If the police officer or other lowly operative in the state headquarters was liable to prosecution for official acts, it would be absurd if the official who ordered the acts was permanently immune from prosecution for such conduct. Historically, all acts of public officials acting as such would have been immune from examination in another domestic court.

This short but simple conclusion, based on the plain meaning of an unambiguous statute giving effect to an equally plain international instrument, was not to be defeated by doubts as to whether a head of state was a public official or whether express waiver of state immunity was required before the Convention could be said to have displaced previous international law and custom. Notwithstanding the effect of the UK legislation it would appear that their Lordships would still have concluded that serving heads of state were immune from the domestic criminal process of other states by reason of their personal immunity as such. This conclusion would not prevent an international court from having jurisdiction over such current heads of state, and so the question might arise in the future as to the duty of a state who has custody of a serving head of state where an international tribunal made the request for surrender. If the lure of Harrods (or whatever else) was to bring President Slobodan Milosevic to London, as well as Pinochet, we might find out the answer to this question.

Advance of the individual

The consequence is that the case has witnessed the further advance of the individual in international law. Once only states were the subjects of this elevated form of jurisprudence and the citizens of the state merely the chips in the great roulette wheel of international relations and the treaties made between states. Now the individual can complain to a prosecuting authority in another state and require penal proceedings at least to be taken against the former head of state for abuse of official power by ordering torture.

International obligations that have not been expressly incorporated into domestic legislation may give rise to continuing difficulties. It remains a little unclear whether a victim of torture in Country A may sue the state of that country in the courts of Country B for compensation. Lord Browne-Wilkinson concluded that acts of torture condemned by the international community were not official functions for the purpose of immunity by reason of the subject matter.[4] Lord Hope could not agree with such an approach although he accepted that there could be torture ordered by the head of state for purely personal reasons that fell outside of this category.[5] In his view, torture employed as part of the official policy of the state remained covered by the Vienna Convention on Diplomatic Immunity Article 32, wherever the acts in question took place. It may be that a foreign state could defend proceedings for damages on the grounds of a state immunity that it was not prepared to expressly waive.[6] On the other hand, the Torture Convention Article 14 provides that:

> *"Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation ..."*

It might be thought that the assertion of an immunity by another state party to the Convention would be just as inconsistent in civil proceedings as in criminal proceedings

> ***"If the lure of Harrods...was to bring President Slobodan Milosevic to London...we might find out the answer to this question."***

and so the conclusion that the immunity exists in the latter case should also apply to the former.[7] When the *Human Rights Act 1998* (UK) comes into force on October 2, 2000 it may be that the courts would want to look again at the civil liability of foreign officials for torture.

As stated, the narrow and specific definition of torture under the Torture Convention focuses on the acts of public authorities and officials. This might lead to a conclusion that torture could only be inflicted where there is a recognised and functioning state in existence, but there is no reason to confine it to such a circumstance. The recent decision of the UN Committee Against Torture (CAT) in *Elmi v Australia*[8] is a case in point. The member of a vulnerable minority clan in Somalia sought refugee status in Australia. He was refused asylum although the appalling human rights background in Somalia was recognised, and the murder and rapes of close members of his family by the majority clans accepted. Australia proposed to remove the claimant to Mogadishu via Johannesburg and Nairobi.