CRIMINAL JUSTICE AND MINORITY GROUPS

BY BRIAN E. BURDEKIN.

Mr Brian E. Burdekin

Brian Edward Burdekin is a Commissioner of the Human Rights and Equal Opportunity Commission. He was born and educated in Melbourne. After a distinguished career as a student, he graduated from the University of Melbourne with degrees in Arts and Law. He entered into private legal practice but, after some years, he was enticed to join the Department of Foreign Affairs where he had a distinguished career. His service included a three year appointment as Australian representative at the United Nations Committee on Human Rights. He was also Australian representative on the sub-committee on the Rights of Minorities. Later, he did a tour of duty as first secretary at the Australian Embassy in Washington. Before taking up his present appointment, Mr. Burdekin was principal adviser to the Honourable Lionel Bowen, Deputy Prime Minister and Minister for Trade, and later Attorney-General.

During his service overseas, Mr. Burdekin found time to obtain his Masters Degree in International Law at the Georgetown University in the United States.

It is hard to imagine how one could be better qualified to be a Human Rights Commissioner. Mr. Burdekin displayed the depth of his qualification in addressing the Conference, "Criminal Justice – Towards the 21st Century" held in Adelaide. In reading this report of his speech, it should be remembered that the Adelaide Conference took place some eighteen months or so ago. It has, indeed, been a pity that we have only had sufficient space to report the papers and addresses then delivered a few at a time. We think, however, that you will agree that the issues addressed by Mr. Burdekin remain as important today as they did upon the day that he presented his address.

The subject that I have the honour to address you on this morning, is one that one could say a great deal about. In thinking about the way in which I should focus my remarks, I have decided, in accordance with your overall theme "Criminal Justice – Towards the 21st Century", to take a perspective which is perhaps somewhat different from some of the other sessions. I hope that it commends itself to you as an interesting approach. It is one in which the Federal Human Rights and Equal Opportunity Commission has a particular interest because, as you will hear from the burden of my remarks, it is really in relation to international instruments, as

incorporated in Australian legislation, or otherwise, that the Federal Commission of which I am a member seeks to protect fundamental human rights. It seeks to protect, in particular, those of minorities and I want to look at several examples that are more specifically related to the criminal justice system than my initial general remarks may be.

I would like first to look at the role, in an increasingly international world, of relevant international instruments; the role that they are, or in my view should be, playing in the setting and guaranteeing of basic standards for the treatment of minorities. As many of you would know, after World War II there was a sustained effort by a number of very distinguished men and women to produce basic documents involving or incorporating commitments to fundamental human rights in the hope that those documents would lead to a more just world. There was a sense of determination, I think it is fair to say, in the late 1940s and the early 1950s, which is very much reflected in the optimism, not unjustified optimism I hope, of such basic documents as the Universal Declaration of Human Rights and, more particularly, the International Covenant on Civil and Political Rights which has a great deal to say about the rights of minorities.

The next thing that I would like to do is just briefly place the Federal Commission which I represent in context. I do that because there has been a great deal of misunderstanding about its role, its jurisdiction and its limitations. I do it because I think that I should not waste the opportunity of addressing such a learned group of people to inform you, to the extent that you are not already aware of it, of the areas in which perhaps the Federal Commission can be of assistance to people that you may be dealing with in the course of your day to day work.

The legislative history is that, in 1980, Australia ratified the International Covenant on Civil and Political Rights and within a year the Fraser government had enacted the Bill which brought the first Human Rights Commission into existence. That legislation incorporated several instruments relating to minorities: the Declaration on the Rights, unfortunately titled in this day and age, of Mentally Retarded Persons, as it was and still is called, the Declaration on the Rights of Disabled Persons, the Declaration on the Rights of the Child. The introduction to the Human Rights Commission

Act of 1981, succinctly sums up from the point of view of my colleagues and I on the Federal Commission, what our role in relation to minorities in this country is. That introduction says, "Whereas it is desirable that the laws of the Commonwealth and the conduct of persons administering these laws should conform with the provisions of the International Covenant on Civil and Political Rights, the Declaration on the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons and other international instruments relating to human rights and freedoms."

The legislation which set up that first Commission had a Sunset clause and that Commission went out of existence in December 1986 pursuant to that clause. It had a five year term. After a great deal of debate in the Federal parliament, some of it I am bound to say not terribly enlightened, the former Hawke government decided to establish a successive Commission. It is comprised of three full-time commissioners

and a part-time president who is a Federal Court Judge, Mr. Justice Einfeld. Particularly since I am in Adelaide I would like to place on record our gratitude to a very famous Australian, Dame Roma Mitchell, without whose work this present Commission would not be in existence.

If I could come now to the functions of the Commission and move on to the way in which they relate to minorities in the criminal justice system? The Commission is a permanent independent statutory body. Its primary functions include the examination of federal and state legislation, and in certain cases proposed legislation, to determine whether such legislation is in conformity with the basic human rights set out in the International Covenant on Civil and Political Rights and the

other basic human rights, treaties, conventions or declarations to which Australia is a party. The Commission is empowered to enquire into actual practices throughout Australia that may be inconsistent with any of those rights. It is charged with co-ordinating and promoting through educational progrogrammes those rights. It is obliged to report to the Federal government on any action that is inconsistent with the rights of any of those minorities that I have mentioned, be they ethnic minorities, be they indigenous Aboriginal minorities, be they either intellectually or physically disabled people, be they mentally ill and so on. It can, on its own initiative, or, when requested by the government, examine any situation in Australia which it believes is in conflict with those basic human rights that I have referred to. Perhaps most importantly and most specifically in terms of the context of this conference, it is empowered to intervene if it considers it appropriate in any court proceedings which are, in the view of the Commission, involving or are likely to involve, fundamental human rights and most particularly those set out in the International Covenant. That power is subject to the leave of the Court and to any conditions that the Court may see fit to impose. I mention that right because it is one of the reasons I wanted to open my remarks by referring to the role of the Commission. It is not a right that is very well known, if known at all, among members of the legal profession. It is an obligation and a provision in its legislation that my colleagues and I take quite seriously and I think you will find that the current Human Rights Commission will, subject to the leave of the Courts involved, be intervening in a number of cases, to attempt to bring the common law, where it is possible, more into conformity with some of those perhaps optimistic rights which are set out in the international documents that I have referred to.

To summarise then, the federal legislation establishing the Commission incorporates in that legislation, the Human Rights and Equal Opportunity Commission Act 1986, five basic instruments. They are the International Covenant on Civil and Political Rights, the Declaration on the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons, the Declaration of Rights of Disabled Persons and the International Labour Organisation Convention on Equality of Opportunity and Employment. Those are the international instruments for which the Commission is responsible. The Acts for which it is responsible are the Sex Discrimination Act, the Race Discrimination Act and its own enabling legislation, the Human Rights and Equal Opportunity Commission Act.

So, that is the second specific point I would like to make today. In relation to race and sex, we have now put on a domestic legislative footing, or given the domestic legislative basis, if you like, to the rights that are incorporated in that International Covenant on Civil and Political Rights. I am not saying that we have yet done that adequately, but certainly with the race discrimination legislation passed in the 1970s and the sex discrimination legislation passed in 1984, I think Australia has gone a considerable distance towards making provision for the protection of the rights of our ethnic

minorities, and other minorities, including those rights as they relate to the criminal justice system.

The Commission is, therefore, charged with the responsibility of administering a variety of international and national instruments. Our fundamental objectives in relation to minorities in the criminal justice system are twofold. The first is to use the legislation which gives us the powers that we have to address existing inequalities which may lead to minorities being discriminated against in the criminal justice system. The second is, where persons from minority groups do become involved in the criminal justice system, to ensure that their fundamental human rights are not abused.

I would like to turn now, in some more detail, to some of those minority groups that I have mentioned. The point I want to make, is that, in relation to minority groups, as we see it, there are a number of minority groups who have not had the benefit of having been provided with the domestic legislative basis for the protection of their rights. We have moved in the area of race discrimination. We have moved in the area of sex discrimination. But, so far, in this country, it is true to say that we have done precious little about the rights of the intellectually disadvantaged, the mentally ill and, to some extent, the physically disabled. I also think in relation to minorities in the criminal justice system, although one might not consider children to be a minority, at least in relation to the fundamental obligations of our Commission to protect children from exploitation (which is probably the fundamental provision in that Declaration of the Rights of the Child) the

are again elements of our criminal justice system that need fairly close attention, and hopefully, in the near future.

If I might turn for a minute to the minority group of migrants. Unfortunately, at least as far as our Commission is aware, there is not a great deal of information available on migrant minorities and their relationship to our criminal justice system and the way it functions. But there are certain obvious problems in relation to minorities and I will touch on one or two of those.

The first is that the possibility of ignorance of the law in migrant minorities in our community is obviously greater. Article 26 of the International Covenant which is incorporated in the federal legislation establishing the Federal Human Rights Commission, lays down that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law should prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination. I think that raises several questions, including whether there is a obligation for our immigration or other federal authorities to ensure that people migrating to this country have at least a fundamental understanding of the basic principles in our legal system which may differ from that which they have left. That may sound like a pious hope, but I do not think it is an unreasonable expectation.

Secondly, in relation to migrant minorities, there is a greater chance of ignorance of accessibility to legal services or of inhibition in general terms about dealing with our legal system. One can think of many examples. You can imagine a migrant woman who is unaware of the fact that she may be able to get a restraining order if there is a problem of domestic violence or threat of assault. I do not think that it is important to canvass the details. I simply want to make the point that there are a number of problems in our migrant communities of which we are not, perhaps, often enough aware. We did a preliminary review when this second Human Rights Commission came into existence. It was really interesting to look at the 10,000 odd cases that the old Commission had

handled. There was a great deal of evidence amongst that material that these points that I have just mentioned, ignorance of the law, ignorance of legal rights, ignorance of accessibility to legal services or how to get them, raise quite a serious problem in relation to our migrant minorities in this community and should, as we move towards the 21st century, be a challenge to all of us.

Thirdly, communications problems. Once accused of a crime, people from our ethnic minorities often face significant problems of communication. Although there appears to have been great progress in the area of providing interpreter services for migrants in contact with the law in recent years,

there is still no certainty that a person will be able to obtain an interpreter for police interviews if desired. Again, there is a fundamental right laid down in the International Covenant on Civil and Political Rights and incorporated now in federal legislation that a person has the right to be tried in his presence, to defend himself in person or through legal assistance of his own choosing and to be informed if he does not have legal assistance, of this right. He also has the right to have the free assistance of an interpreter if he cannot understand or properly speak the language used in court and so on.

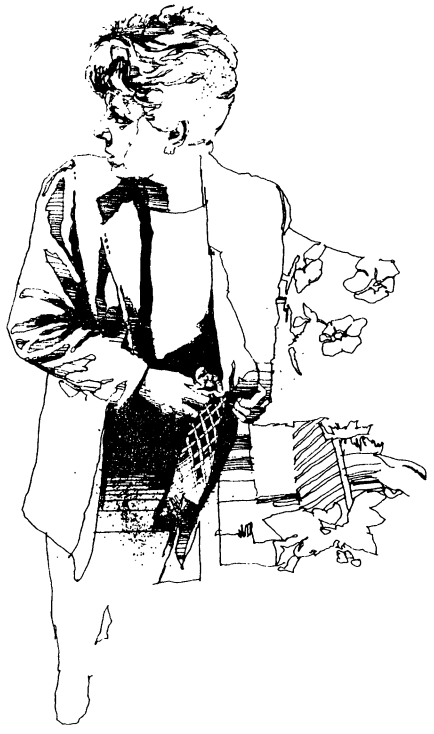
Now those three examples probably suffice to indicate the potential dimension of the problem and, in actuality, the real dimension of the problem which we see on a day to day basis of complaint handling in the Federal Commission. There is a great deal yet to be done in this area of our migrant community minorities.

I want to move just briefly to another minority group which is causing us considerable concern and where, perhaps, the challenges are even greater. I refer to the intellectually disabled and to people who can broadly be described as mentally ill. I hasten to add that I do not want to treat those two groups together. They certainly have many, many distinctions that must always be acknowledged and observed. But in relation to their relationship to the criminal justice system, it is very often the case that the deficiencies which exist in our system for people who are intellectually disabled or mentally ill can be said to apply to both groups. Unfortunately, again, there is little statistical information that we are aware of and so the remarks I am making to you really are based on our day to day experience of individual complaint handling.

Article 7 of the International Covenant on Civil and Political Rights stipulates that, "No-one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment". Now that sentence is extremely well known. There would not be a person present in this room who has not heard it before. But we have got some considerable way to go, in relation to our criminal justice system, before we can be satisfied that this country has properly incorporated into our law what that obligation means in relation to people who are mentally ill, institutionalised or intellectually disabled. One of the projects that the Commission has embarked upon is an examination of the human rights issues connected with "Governor's pleasure" provisions. As part of this investigation, we intend to examine closely the reasons why persons of ethnic backgrounds are disproportionately represented in the number of prisoners who become subject to "Governor's pleasure" provisions and institutions for the

criminally insane after being found guilty of a criminal offence.

It is possible that there are many factors – from what we can see from the work that we have done so far there are many factors – but some of them may be very simple. One of



them may be simply the very small number of bi-lingual psychiatrists who are available to make a proper and professional assessment in relation to these people. That perhaps, is hardly a legal problem, but that is hardly any consolation to somebody who finds themselves in this minority in our community and institutionalised at the "Governor's pleasure".

The issue has been highlighted by the report of the Advisory Committee to the Constitutional Commission entitled "Individual Democratic Rights." Mr. A.R. Castan Q.C., who is a member of that committee has stated, "There are a large number of instances of where things go wrong. Where people who have suffered intellectual impairment or mental illness are locked up without even being looked at and for 20 or 30 years are not looked at and are then discovered not to have really been ill. There are some terrible cases that have been brought to our attention, and that area of mental illness is one of them, and we are concerned that there should be provisions that prevent that happening". Some of you may think that Mr. Castan's assessment may be exaggerated. All I can say to you is that, on the basis of the evidence coming before the Human Rights and Equal Opportunity Commission on a day to day basis, I would support his statement. There is a great deal to be done in this area in relation to this minority within our community and the way in which our criminal justice system must adapt to adequately acknowledge and protect their basic human rights.

The recent trend towards the institutionalisation of intellectually disabled people has not, as far as I am aware, yet seen any significant increase in the number of these people coming into contact with the criminal justice system. However, there are and will continue to be cases involving disabled people whether they be plaintiffs, accused or witnesses and possibly in greater numbers than some of us realise. There are already very disturbing signs that large numbers of these people who have been de-institutionalised are not really able to enjoy their new freedom.

At a seminar on the homeless in Sydney, it was stated that up to 30 per cent of the people seeking shelter from one highly reputable charitable organisation are mentally ill. That is a staggering statistic even if it is only close to being true. It, I think, poses a challenge for all of us. We see the complaints that come to the Commission, but I suspect that what we do not see is the very large number of people who would fall into this category who either do not have somebody acting on their behalf or simply do not know where to find us or somebody else who may be able to help them. As a part of the Commission's responsibilities in administering the Declaration on the Rights of Disabled Persons, the Commission will seek to play an active role and co-operate with any organisation, which is seeking to bring change to our criminal justice system to protect more effectively the rights of these people.

I might briefly refer to a report that has been completed in the United Kingdom and which has recommended that the law should be changed so that the court should not be able to make a hospital order for psychopathic offenders, but should sentence them to terms of imprisonment. The idea, as best I understand it, was that the offenders could then be transferred to a hospital and, if cured or no longer curable, would be returned to prison to serve the rest of their sentence. The recommendation, and this is from an organisation called "Justice" which is the British chapter of the International Commission of Jurists, is that the detention of an offender in prison beyond the time when he or she would have been released if he were not mentally disordered was not in accordance with the fundamental standards of human rights in

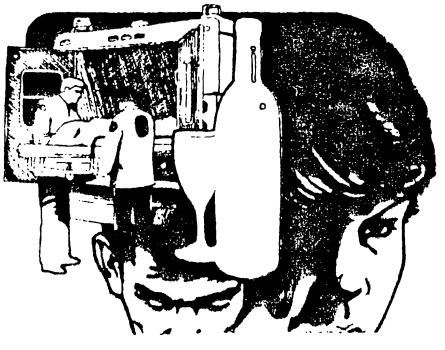
that case laid down in the European Human Rights Convention, but in all material respects the same as those

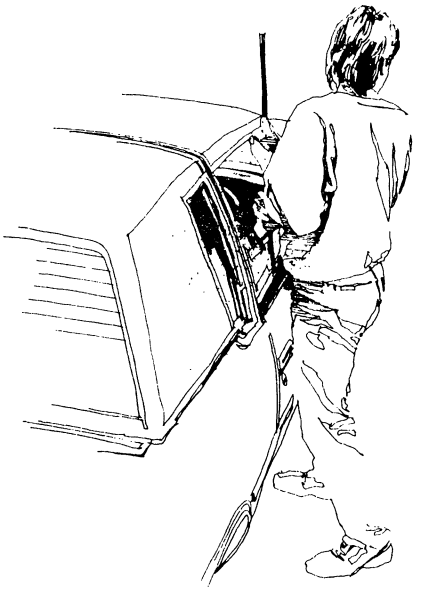
rights set out in the International Covenant on Civil and Political Rights incorporated in Australian federal legislation.

May I turn briefly to children? As I said, you might think that it is a somewhat strange interpretation to refer to them as a minority group. Perhaps I should only say that under the Declaration on the Rights of the Child, the basic rights, stripped of the rhetoric in the rest of the declaration, are that children should enjoy special protection, and that in the enactment of laws, the interests of the child shall be the paramount consideration in relation to ensuring that special protction, and that children shall be protected against all forms of neglect, cruelty and exploitation.

Now, I would like to say a few words about one of the Commission's projects. It relates to the particular vulnerabilities of the increasing numbers of homeless children that we are seeing in Sydney where the Commission is located. I think there are some very relevant challenges to us and I think it is appropriate in some ways to see children as a "minority" in relation to our criminal justice system, given the lack of attention perhaps that they have had from the common law over the past 800 or 900 years. One relevant example, I suppose, is the seeming inability of our children's court system to develop an effective and appropriate legal representation service for children that come before it. Now, that is possibly a controversial thing to say. I am sure that there are many here who would know more about that than I do. But, again, I simply mention that it is a subject of complaints coming to the Commission on a fairly regular basis in relation to the basic rights of children and the extent to which these are not at present currently protected by our criminal justice system. At least they are not protected not to the standard of these, perhaps, optimistic standards laid down by that international covenant.

May I move on to the subject of Aborigines? It is not one about which any of us have much to be proud. It is one which has occupied a lot of attention by the Federal government and by State governments. It is one which the Federal Commission has been looking at for some time and one in which the rights of minorities are very clearly brought into contrast with the provisions of the International Covenant on Civil and Political Rights. There is to be considered the way in which our criminal justice system has or has not (more the latter), been able to effectively deal with providing the same basic and fundamental rights to our indigenous minority that we, in the Anglo-Saxon and wider Australian community, have traditionally simply expected to be the recipients.





Again, Article 10 of that International Covenant is the relevant provision. It stipulates that all persons deprived of their liberty shall be treated with humanity and respect and so on. That simply has not been happening, as many of you would know, and I do not in any sense attempt to make judgments about what the Royal Commission that has been set up may ultimately find. But, one only has to be aware of some of the most rudimentary facts to know that this particular minority in our community have not and are not enjoying, if I can use that term, the benefits, if I can use that term, of our criminal justice system in a way which represents an equal treatment and a basic respect for their human rights in all or most cases.

I do not wish to say anything about the formal enquiry. I comment, however, that no issue better illustrates the difficulties, of jurisdiction in this country in a federation in relation to the criminal justice system and in relation to the examination of an issue such as treatment of Aborigines in places of detention where there are the most basic human rights involved. I do not want to go into detail, but the basic problem for the Human Rights Commission and for the government was to ensure that the enquiry had adequate jurisdiction. That is why it is a joint Royal Commission with the States. But there are many problems flowing from the fact that, as we move towards the 21st century, we are in a transitional phase and one in which it is fair to say that international instruments are slowly, if one looks at the broadest picture, being incorporated into federal law through the use of the external affairs power. Those in turn, and not necessarily with uniform speed or alacrity, are being incorporated into State law, but those of us who have some responsibility for or contact with the criminal justice system are faced with providing the same fundamental human rights to this minority in our community, notwithstanding the fact that I suspect it will be well into the 21st century before, perhaps, a true internationalist approach or a true federal

approach to the incorporation of these basic rights in all State law will come to fruition.

The jurisdictional problems are, as I said, somewhat interesting, but I will pass over those and mention briefly something else. I would commend to your attention the Australian Law Reform Commission report of 1986 in relation to the recognition of Aboriginal customary law. I suggest that a conference with this agenda and with this theme cannot seriously consider the question of minorities in our criminal justice system without at least acknowledging that for 200 years there has been precious little in this country by way of acknowledgement of the system of justice that our indigenous people had before we arrived.

I just throw out a couple of other specific instances in relation to this general topic so that, I think, it is possible to see that it is an extremely broad one, but also one that is very challenging to all of us. Incitement to racial hatred is a contentious issue. Should it be unlawful? Should it be a criminal offence? Can we seriously consider our criminal justice system and the rights of minorities in this country, at least ethnic and indigenous minorities, without talking about whether there is incorporated in the basic freedom of speech, the right to incite to racial hatred? Certainly, a number of countries have decided that the two are not such that one has to be preserved at the expense of the other. That is, some countries including Canada and New Zealand and others have made some steps towards making incitement to racial hatred unlawful. We in Australia have so far taken the view that the basic international covenant provisions relating to freedom of expression preclude the making unlawful of incitement to racial hatred, let alone making it a criminal offence.

What I would like to say by way of conclusion is that there is an enormous range of issues in relation to our criminal justice system and minorities which not only deserve, but demand, serious, and in some cases, quite urgent attention. This is so whether those minorities be our ethniminorities, our indigenous Aboriginal people, those in our society who are intellectually disabled or mentally ill or those who for some other reason can genuinely be described as minorities in terms of disabilities which they face in coming into contact and dealing with and being treated equally by our criminal justice system. The thought was recently expressed by one of our leading politicians that really there is no need for a Human Rights Commission because the common law protects the rights of minorities, or words to that effect. Now, it is some time since I was a practising lawyer, but if that is the case, there was a great deal of the common law that my legal studies overlooked.

I doubt that anyone could seriously sustain the argument that our common law in any way adequately protects the rights of the intellectually disabled, the mentally ill or ethnic minorities. I suggest that the real challenge for us in Australia, as we move towards the 21st century, is to have a view of the broader canvass, if you like; to be, if necessary, internationalist rather than parochial, in our approach to fundamental human rights and our criminal justice system and the protection of the various minorities within our community; and to acknowledge that the basic standards which have been laid down in a number of key international instruments are there, not as otiose declarations of good intent given criminal justice systems here or anywhere else that protect these minorities, but are there precisely because these men and women in the late 1940s and early 1950s saw in the post-lude to World War II the enormous importance of embodying in international instruments, and thereby transferring into domestic legal systems, proper respect for the fundamental human rights of minorities, whoever they be, so that the sorts of tensions which played some part in the lead-up to that massive conflagration would not be repeated; and I do not for a minute suggest that it is anywhere near as simple as that. All I would say is that I think it is almost a self-evident truth that a lack of respect for the fundamental and basic rights of minorities within our community, including in relation to our criminal justice system, is guaranteed to produce conditions which will lead to tension, social unrest, even dislocation, and to the extent that our criminal justice system does not already reflect adequate protections or contain adequate protections for the fundamental rights of the minorities that I have referred to, I suggest that it is encumbent on all of us to do everything that we can to address that situation.