

OPINION

From rights to expectations

The 1945 Charter of the United Nations formally recognised that the observance of human rights is a matter of international concern. That momentous shift in human rights consciousness was consequential upon the atrocities of the second world war. The Charter determined 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small', and 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom'.

The first 50 years of the United Nations have been marked by both outstanding achievements and disappointments. At the core of achievements is the International Bill of Rights, which consists of three instruments: the *Universal Declaration of Human Rights* proclaimed by the General Assembly in 1948, the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic Social and Cultural Rights* (ICESCR), which were adopted by the General Assembly in 1966.

These documents set out the core definitions for human rights and fundamental freedoms which state parties are called on to observe, and by which performance can be measured. The principles have been supported and strengthened by the development of more than 50 related conventions and declarations which further define the general principles in pursuit of universal enjoyment of fundamental and inalienable rights. Australia has been an active participant in these international developments. For example, it was centrally involved in the development of the Universal Declaration, indeed, Dr Evatt, Australia's Foreign Minister and Attorney General, was President of the General Assembly when it was adopted. It has continued to make significant contributions, for example, more recently it has been involved in drafting the *Convention on the Rights of the Child* and the *Draft Optional*

Protocol on the Sexual Exploitation of Children. Australia is also, for example, taking a leading role in fostering the creation of regional domestic human rights commissions within the Asia-Pacific area.

Yet despite the unrelenting efforts of the United Nations, it is clear that human rights are not yet a matter of primacy for all governments and all peoples. In many parts of the world where not even the right to life, liberty or security of the person can be respected, human rights remain an abstract concept.

In the Australian domestic scene, there has been huge progress in the development of mechanisms whereby rights can be enshrined and asserted. National action commenced with the signing of the ICCPR by the Whitlam Labor Government in 1972, and ratification by the Fraser Liberal Government in 1980. In the 20 years since the *Racial Discrimination Act 1975*, Australia has taken many positive steps.

There are general anti-discrimination laws in every mainland State and in both the Northern Territory and the Australian Capital Territory. The ACT also has a draft Bill of Rights before its legislature.

The Federal Government established the Human Rights and Equal Opportunity Commission (HREOC) in 1981 and restructured it and its functions and powers in 1986. The Commission administers the *Race Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992*, the *Privacy Act 1988*, and contains the Office of the Aboriginal and Torres Strait Island Social Justice Commissioner. Important safeguards for non-discrimination in employment and occupation were also effected by the *Industrial Relations Reform Act 1993*.

The Commission has a monitoring role in respect of a number of human rights instruments scheduled to the Act, including the ICCPR and the *Convention on the Rights of the Child 1991*, which assists in promoting and protecting the observance of human rights in Australia. For example, in exercise of its powers to conduct pub-

lic enquiries, the Commission has focused national attention on issues such as racist violence, the human rights of people with mental illness, and homeless children. The Commission has just received a reference from the Attorney-General to conduct a National Inquiry into the removal of Aboriginal children from their families.

In its complaint handling, policy advising and intervention activities, the Commission endeavours, within resource constraints, to actively secure adherence to the principles contained in the international human rights instruments to which Australia is a party.

Of course, there is a long way to go before the ideals subscribed to in the ICCPR become a reality. Prohibitions on the incitement of racial hatred, which were contained in the initial 1975 *Racial Discrimination Bill*, are still being debated by our Federal Parliament in 1995. There is much work to do, for example, in reconciliation with indigenous Australians, to more effectively entrench and protect the human rights of refugees, prisoners and children, and in non-discrimination on grounds such as age and sexual preference.

And following the decision of *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1 there is much work to do on the establishment of constitutional mechanisms for the enforcement of determinations of the Commission.

Another important mechanism for the advancement of human rights results from ratification of the *First Optional Protocol* to the ICCPR. Under the Protocol, individuals may complain of violations to the United Nations Human Rights Committee, which through its findings may call nations to account. For example, the decision of the Human Rights Committee in relation to a complaint¹ about certain sections of the Tasmanian Criminal Code, prompted the enactment of Commonwealth legislation which provides that sexual conduct between consenting adults shall not be subject to any arbitrary interference with privacy (*Human Rights (Sexual Conduct) Act 1994*).

The High Court has been prominent in entrenching the fundamental principle that it is proper that, on matters of international concern, the Commonwealth has powers to give domestic effect to its international human rights obligations.² The recent statement by Mason CJ, Deane and Toohey JJ of the High Court that 'the ratification of an international convention is a positive statement by the executive government of this country to the world, and to the Australian people, that the executive government and its agencies will act in accordance with the Convention',³ provides an indication of the High Court's current thinking. The High Court in this case declared that individuals can legitimately expect Commonwealth administrators to have regard to relevant international instruments. The Government has already rejected this view, and is proposing legislation to limit the High Court's ruling.⁴

The President of the Commission, Sir Ronald Wilson and I consider that the legitimate expectation found by the High Court to exist in *Teoh*, rested on much stronger ground than the mere ratification of the Convention on the

Rights of the Child. The effect of annexure to the *HREOC Act*, we consider, is to confer on it a special status. The Commission's President has said 'it is unthinkable that the Parliament should even be asked to consider' reversing the legitimate expectations created by the provisions of the *HREOC Act*,⁵ which should be recognised as governing Commonwealth decision making.

It is interesting to observe that in 1995, just as in 1975, it is the observance of human rights which has rejuvenated interest in the exercise of federal government prerogative to enter treaties and the scope of the Commonwealth external affairs power.⁶

For 50 years, the Charter of the United Nations, and Australia's role in promoting the observance of fundamental rights and freedoms, has proceeded in the recognition that these are matters which transcend inter and intra national borders.

We should ensure that we never lose sight that this principle is inherent in the fundamental nature of human rights. We should continue to strive for the full realisation and protection of human

rights and fundamental freedoms and it is proper that citizens of Australia look to the Federal Government for the leadership in doing so.

KEVIN O'CONNOR

Kevin O'Connor is Acting Federal Human Rights Commissioner.

References

1. Lodged on 25 December 1991 by Mr Nicholas Toonen in relation to s.122(a) & (c) and s.123 of the *Tasmanian Criminal Code 1924*.
2. Developed over a series of decisions commencing with *Koowarta v Bjelke-Petersen* (1982) 56 ALJR 625.
3. *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*, Decision No. FC 95/013 at 15.
4. Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Michael Lavarch, 'International Treaties and the High Court Decision in *Teoh*', 10 May 1995.
5. Submission to the Senate Legal and Constitutional Affairs Committee on 'The Constitution — External Affairs Power' 15 May 1995.
6. See the reference of the Senate Legal and Constitutional Affairs Committee on 'The Constitution — External Affairs Power', 15 May 1995.



NOTICES

CHILDREN FIRST CAMPAIGN

On 23 May 1995 the Victorian Council for Civil Liberties launched the Children First! Campaign. The campaign, which is supported by a variety of agencies working to improve the situation for Australia's children and young people, is directed towards recognising the rights set out in the UN Convention on the Rights of the Child.

The campaign consists of a background paper on the status of Australia's children, a poster to raise awareness of children's rights and postcards which will be sent to the Prime Minister calling for:

a charter of Children's and Young People's Rights enacted in legislation;

the appointment of a Commissioner for Children;

resourcing of a national children's and young people's legal advocacy program.

A variety of initiatives are being conducted in association with the cam-

paign, including national consultations with young people conducted by the National Children's and Youth Law Centre on the content of a children's Charter.

A copy of the postcard is enclosed in this edition of the *Alternative Law Journal*.

If you would like to know more about the campaign or can distribute material please call Joseph O'Reilly on (03) 9629 5222.

TRAFFIC MATTERS IN THE MAGISTRATES COURT

The Legal Aid Commission of Victoria has recently published 'Getting Court', a guide for people appearing for themselves in traffic matters in the Magistrates Court. There are two booklets in the series, one for pleading guilty and one for pleading not guilty.

In addition to the publications, the Commission has also, in conjunction with Film Victoria produced an up to date video, 'Getting Court'. This video looks at a person representing themselves in the Magistrates Court using a

guilty plea as an example. The video and the guides are designed for use in self-help classes such as traffic summons workshops, or can stand alone as part of community legal educational activities. *Contact:* Legal Aid Commission of Victoria, tel (03)9607 0223.

CONTRIBUTIONS SOUGHT: DECEMBER ISSUE — QUEER LAW

Seeking Articles/Briefs/Comments/Drawings/Cartoons on lesbian, gay, transgender issues and the law for the December issue of the *Alternative Law Journal*. *Contact* Miranda Stewart on (03) 9419 5136 (ah) for more information.

JUSTICE KIRBY: SPEAKER

The Hobart branch of the United Nations Association has invited Justice Michael Kirby to be guest speaker.

Date: 25 August 1995

Time: to be advised (evening)

Venue: Law Faculty, University of Tasmania

Contact: Helen Gwilliam, tel (002) 202 068