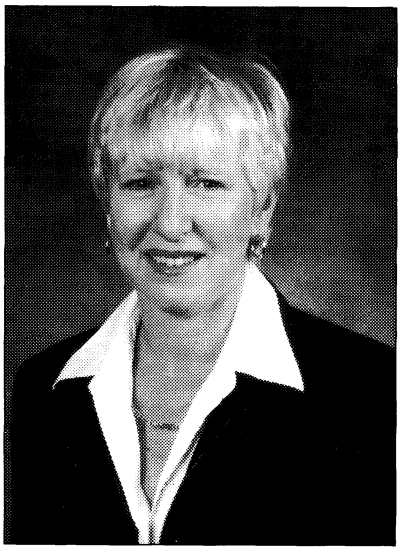
DO WE NEED A BILL OF RIGHTS?



Jacqueline Presbury, NTWLA President

Monday 5 March 2001 marks 1 year since the passing of Dame Roma Mitchell. As previously promised NTWLA has now planned a memorial debate in honour of Dame Roma. Given that Dame Roma was an inspiration to not only legal practioners but also the community at large, the debate will be open to members of the public. The debate is appropriately scheduled to take place on Monday 5 March 2001 at 7.00 pm for 7.30 pm in the Supreme Court foyer. The teams will be gender balanced. The topic has been chosen in recognition of one of many of Dame Roma's contributions and that is 'Do we need a Bill of Rights?'

This month's article is written by Sarah Hawke (nee Beech) whose only direction was to consider an article on the need or otherwise for a Bill of Rights to promote the forthcoming Dame Roma Memorial Debate.

Sarah was born in England having come to Australia with her family when she was quite young. Sarah moved to Darwin from Melbourne where she had been working for the Victorian Legal Aid Commission. Sarch has also worked as a Nurse Assistant in community and nursing homes both in Canberra and Melbourne.

Sarah holds two degrees both of which were completed at the Australian National University. She completed her arts degree in 1993 after which she travelled. She then completed her law degree with honours in 1997. In Sarah's words she followed her love to Darwin in 1999 when she commenced her articles with Cridlands. She was admitted late last year and is now practicing in the "Health" section of Cridlands. To complete the story, Sarah and her love were married in January this year. Sarah is also a committee member of NTWLA.

BOUQUETS

To all of those busy legal eagles who have been commandered to participate in the forthcoming debate. Also to Justice Sally Thomas who has agreed to facilitate the debate.

DO WE NEED A BILL OF RIGHTS?

In light of the commemoration of the anniversary of the death of a boy at Don Dale Centre a year ago on Friday 9 February 2001 1 would like to revisit some of the findings of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC), the response of governments and the need for a Bill of Rights recognising internal human rights law.

We know that most States followed Queensland's lead at the turn of last century and implemented laws taking complete control over Aboriginal lives — where you could live, where you worked, who you married, care of your children, what you could earn and what you could spend of your earnings. We know the results of this century of government controls of indigenous Australian lives: an appalling deficit in every social indicator: infant mortality, health, life expectancy, housing, education, employment, financial security. (Black lives, Government Lies: 2000: 6)

Many submissions to the Stolen Generations Inquiry drew attention to the fact that contemporary juvenile justice and welfare practices were replicating the old policies of removal. The Inquiry found that existing systems have failed miserably to solve the issues relating to juvenile justice and welfare matters and nowhere is this failure more profoundly reflected than in the inability of States and Territories to reduce the number of Indigenous children placed in care, held in police cells and sentenced to detention centres. In all areas Indigenous children and young people remain massively over-represented (NISATSIC 1997. 429-542).

The Inquiry argued for a new framework which respects the right to self determination for Indigenous people and complies with other international obligations for the treatment of children and young people. It advocated a two tiered approach with recommendations for national framework legislation for negotiation and self-determination in areas (including juvenile justice and welfare) that affect the well-being of Indigenous children and young people, and recommendations for the development of minimum standards applicable to juvenile justice and welfare interventions.

The Commonwealth response to the Inquiry states on page one that "...we do not believe our generation should be asked to accept responsibility for the acts of earlier generations". This and other government responses can be seen as a distortion of history enabling the shirking of responsibility. This is particularly so given that legislation legitimising the removal of children was not repealed until the 1950s and1960s in most States and Territories, when Australia was already party to international covenants outlawing racial discrimination and genocide.

The Commonwealth response to the recommendation concerning self-determination was that it is "not applicable" to the Commonwealth and that it is primarily a State responsibility. To this we can add the Northern Territory's introduction of mandatory sentencing and NSW Premier Bob Carr's recent vehement opposition to a proposed Bill of Rights . According to Carr, a Bill of Rights is "an admission of the failure of parliaments, governments and the people to behave in a reasonable, responsible manner." However, it would seem that the legal profession does not necessarily agree.

The New South Wales Law Society's Human Rights Committee has recently strongly recommended a NSW Bill of Rights to a NSW Parliamentary Inquiry. It would require the State's court to take into account international human rights conventions. The international dimension of indigenous peoples of Australia was clearly recognised by Prime Minister Gough Whitlam in 1972 when he said:

> More than any foreign aid program, more than any international obligation which we meet or forfeit, more than any part we may play in any treaty or agreement or alliance. Australia's treatment of her Aboriginal people will be the thing upon which the rest of the world will judge Australia and Australians.

There has, however, been a degree of ambivalence in Australia regarding its international obligations in respect of indigenous Australians. The New South Wale's Law Society Committee concluded that the Federal Constitution has failed to guarantee human rights and that State and Federal human rights legislation provides very limited protection. The Committee's submission set out the fundamental rights that need to be included in a Bill of Rights. Amongst these core rights is the right to self-determination and freedom to pursue economic, social and cultural development.

The recommendations of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families are founded within internationally accepted principles of reparation (NISATSIC 1997.278-280). The recommendations of the Inquiry are built on an understanding and acceptance that fundamental breaches of international law in relation to racial discrimination and genocide have occurred. The failure of the Commonwealth government to accept this basic finding has lead to a mean spirited and inadequate response by governments. In particular the recommendations that action be taken against the contemporary removal of Indigenous children has been ignored.

There is a great need for the legal recognition of a fundamental right to Indigenous self determination so that decisions affecting the physical and cultural survival of Aboriginal people are more firmly controlled by Aboriginal people. Both the New Zealand and British Bill of Rights models require courts to construe legislation so that it is compatible with their Bill of Rights legislation. The NSW Law Society's Committee on Human Rights supports this approach for Australia. The Committee also recommends a requirement for Parliament to consider whether or not any proposed Bill or regulation does, or has the potential to, breach the rights contained in the Bill of Rights. This would prompt the broader examination of the impact of laws such as mandatory sentencing in the Northern Territory.

Sarah Hawke, Cridlands

At a national conference of the Australian Plaintiff Lawyers Association in 1999,Chief Justice Spigelman said the incorporation by the Human Rights Act 1998 of the European Convention into English law gives rise to a radically different approach to the influence of international human rights instruments on the development of the common law. He said that:

> It is in this respect, more than any other, that Australian common law and that of England will progressively diverge. ...One of the greatest strengths of Australian common law is that it has been able to draw on a vast body of experience from other common law jurisdictions. Now both Canada and England, and to a lesser extent New Zealand, will progressively be removed as sources of influence and inspiration. This is a transition of great significance for Australian lawyers. At the present time, for the vast majority of us, American Bill of Rights jurisprudence is incomprehensible. Within a decade it is quite likely that in substantial areas of law, British and Canadian cases will be equally incomprehensible to Australian lawyers. The Australia common law tradition is threatened with a degree of intellectual isolation that many would find disturbing.

A process of trivialisation, rationalisation and denial by the governments in the face of the findings of the Inquiry has demonstrated how specific harms to Indigenous people can be and have been denied legitimacy. I believe that an incremental path toward a Bill of Rights acknowledging principles of international human rights law, in the form of an Act of Parliament built on the participation of all Australians, could go a long way towards preventing the contemporary removal of Indigenous children like the boy who died at the Don Dale Centre.