Criminal Justice Without a Bill of Rights

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Australia is a free society in which the citizen enjoys basic democratic and individual rights.[1]

THE vast majority of Australians consider themselves fortunate to live in a country where they enjoy freedom under the rule of law. In this climate there is no political movement to guarantee or entrench human rights in legislation. This complacency about human rights has been described as Australia's 'greatest weakness'.[2]

Despite this complacency, Australia has ratified all the major international conventions protecting human rights, including the International Covenant on Civil and Political Rights (ICCPR),[3] the International Convention on the Elimination of All Forms of Racial Discrimination ,[4] the International Covenant on Economic, Social

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1. A Mason 'A Bill of Rights for Australia?' (1989) 5 Aus Bar Review 79.
2. H Charlesworth 'The Australian Reluctance About Rights' in P Alston (ed) *Towards an Australian Bill of Rights* (Canberra: ANU Centre for International and Public Law, 1994) 21.
3. Aust TS 1980 No 23: adopted 19 Dec 1966, entered into force generally 23 Mar 1976.
4. Aust TS 1975 No 40: adopted 7 Mar 1966, entered into force generally 4 Jan 1969.

and Cultural Rights,[5] the Convention on the Elimination of All Forms of Discrimination Against Women,[6] and the Convention on the Rights of the Child.[7]

However, in contrast to all other comparable common law countries, Australia has chosen not to enact a Bill of Rights. The US Bill of Rights 1789, the Canadian Charter of Rights and Freedoms 1982, the New Zealand Bill of Rights Act 1990, the South African Bill of Rights 1996 and, most recently, the UK's Human Rights Act 1998, which came into force on 1 October 2000, all serve to demonstrate that Australia, by choosing not to enact a Bill of Rights, has placed itself on a course well removed from mainstream thinking.[8]

Even in the absence of a Bill of Rights, international human rights norms have a legitimate role to play in the development of the common law and the interpretation of statute law in Australia. This paper focuses on the criminal law of Western Australia, where it is suggested that international human rights norms and jurisprudence should play a greater role in judicial decision-making.

It is important that Australia's domestic law develops in harmony with international standards on human rights. However, for this to happen, lawyers and judges will have to broaden their horizons and increase their knowledge of international human rights jurisprudence.

THE ROLE OF INTERNATIONAL TREATIES

Treaties are not self-executing in Australia. Australia's ratification of a treaty has no direct effect on rights or obligations in this country unless the Commonwealth parliament gives domestic effect to the treaty by legislation.[9] But that does not mean that international treaties such as the ICCPR, which have not been incorporated into domestic law by legislation, should be ignored by the Australian courts. The

5. Aust TS 1976 No 5: adopted 19 Dec 1966, entered into force generally 3 Jan 1976.
6. Aust TS 1983 No 9: adopted 18 Dec 1979, entered into force generally 3 Sep 1981.
7. Aust TS 1991 No 4: adopted 20 Nov 1989, entered into force generally 2 Sep 1990.
8. There have been a number of attempts to entrench human rights in Australia: (1) The Human Rights Bill 1973 (Cth), implementing the ICCPR in Australia, was introduced in the federal parliament, but lapsed in 1974. (2) The Human Rights Bill 1985 (Cth), again an attempt to implement the ICCPR in Australia, was passed by the House of Representatives, but failed in the Senate. (3) A Constitutional Commission was established in Australia in December 1985 and reported in 1988. It recommended that a new Chapter VIA, 'Rights and Freedoms', be inserted in the Commonwealth Constitution. But before the Commission reported, a referendum covering four proposals for constitutional change was held on 3 September 1988. All four proposals were defeated. In consequence, the Constitutional Commission's recommendations were not acted upon. One positive outcome of the Commission's report, however, was the preparation of a draft Bill for an Australian Charter of Rights and Freedoms. That Bill has never been introduced into parliament, and from a political point of view it seems to be a dead letter at present.
9. *R v Dietrich* (1992) 177 CLR 292, Mason and McHugh JJ 305.

ICCPR has a role to play in a number of ways. For example, in *Mabo v Queensland (No 2)*[10] Brennan J spoke of the 'powerful influence' of that Covenant on the common law in Australia:

> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the Indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[11]

The same point was made by Brennan J in *R v Dietrich.*[12] The question in that case was whether, under Article 14(3)(d) of the ICCPR, an indigent accused had the right to be provided with counsel at public expense. No such right was found to exist in Australian domestic law, but Brennan J said of the Article:

> Although this provision of the Covenant is not part of our municipal law, it is a legitimate influence on the development of the common law. Indeed, it is incongruous that Australia should adhere to the Covenant containing that provision unless Australian courts recognise the entitlement and Australian governments provide the resources required to carry that entitlement into effect. But the courts cannot, independently of the legislature and the executive, legitimately declare an entitlement to legal aid.[13]

The ICCPR has been scheduled to the Human Rights and Equal Opportunity Commission Act 1986 (Cth).[14] The Commission has been given power to examine Commonwealth and Territory legislation for the purpose of ascertaining whether such legislation is 'inconsistent with or contrary to any human right'.[15] The Commission has also been empowered to inquire into acts and practices of the Commonwealth or Territories that may be 'inconsistent with or contrary to any human right'.[16] Remedies include conciliation and a report to the relevant

10. (1992) 175 CLR 1, 42. See also *R v Dietrich* ibid, 321; *R v Chow Hung Ching* (1948) 77 CLR 449, 476; *R v Chung Chi Cheung* [1939] AC 160.
11. *Mabo* ibid, 42. The Optional Protocol referred to by Brennan J was ratified by Australia in 1991.
12. Supra n 9.
13. Ibid, 321.
14. Sch 2.
15. Human Rights and Equal Opportunity Commission Act 1986 (Cth) s11(1)(e).
16. Ibid, s11(1)(f).

Commonwealth or Territory minister. The Commission has no such power over State legislation or acts and practices of the States.

THE TEOH CASE

The role that international treaty obligations can play in the development of the common law had been discussed in a number of cases.[17] The role is not new. It is a role that was acknowledged in early decisions of the High Court of Australia and the English courts, but its modern re-statement is of much wider application because of the rapid expansion of human rights standards under international law since 1948.

It is an area in which some care is required because of the problems noted in *Teoh's*[18] case, where Mason CJ and Deane J cautioned against allowing judicial development of the common law to be 'seen as a backdoor means of importing an unincorporated convention into Australian law'.[19] In their view —

> A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials. Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.[20]

In *Teoh,* the majority (Mason CJ, Deane, Toohey and Gaudron JJ) found that ratification of the Convention on the Rights of the Child gave rise to a legitimate expectation that the Minister would act in conformity with it and treat the best interests of the applicant's children as a primary consideration.[21] That approach was, on one view, relatively conservative. In international law, ratification of a treaty does give rise to the expectation that it will be implemented. The High Court, however, left parliament and the executive their traditional role of determining policy. It was only in the absence of 'statutory or executive indications to the contrary' that

17. See eg *Jago v NSW District Court* (1988) 12 NSWLR 558 (NSW Court of Criminal Appeal, Kirby J); *Mabo v Queensland (No 2)* supra n 10; *R v Dietrich* supra n 9.
18. *Minister for Immigration v Teoh* (1995) 183 CLR 273.
19. Ibid, 288.
20. Ibid (footnote omitted).
21. See *Teoh* supra n 18, 290: '[R]atification of a 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. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications 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".'

the decision-maker would be obliged to 'act in conformity with the convention and treat the best interests of the children as a 'primary consideration'".[22]

This aspect of the decision in *Teoh's* case was 'greeted with dismay by the then Labor Government, which quickly attempted to repudiate its effects'.[23] The Attorney-General and the Minister for Foreign Affairs issued the following joint statement:

> Entering into an international treaty is not a 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. It is not legitimate, for the purpose of applying Australian law, to expect that the provisions of a treaty not incorporated by legislation should be applied by decision-makers. Any expectation that may arise does not provide a ground for review of a decision. That is so, both for existing treaties and for future treaties that Australia may join.[24]

A Bill was introduced into Commonwealth parliament to override *Teoh*, but the Bill lapsed.[25] The episode indicates that the political climate in Australia is one highly protective of national sovereignty and highly resentful of any intrusion of international human rights standards into domestic law except as determined by parliament. It is a troubling development which does not rest easily with Australia's active involvement in the development of international human rights conventions and its active participation in international human rights bodies. It puts in question the legitimacy of Australia's ratification of human rights treaties.

Speaking at a conference on 'Women and the Rule of Law', Justice Elizabeth Evatt expressed her dismay at developments in Australia.[26] Since her Honour has been at the forefront of the development of human rights on Australia's behalf in international forums, her views are significant. Of the government's reaction to *Teoh,* Justice Evatt said:

> This means that the government can ratify an instrument and do nothing about it. It comprehensively rejects the existence of any obligation on the part of government to act in a way consistent with the obligations they have undertaken and in a way compatible with the rights protected by the instrument unless those rights are provided for in legislation.[27]

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22. See the quote from *Teoh* set out at supra n 21.
23. H Charlesworth 'Dangerous Liasons: Globalisation and Australian Public Law' (1998) 20 Adel L Rev 57, 67.
24. Joint Statement of Mr M Lavarch and Senator G Evans 'International Treaties and the High Court Decision in *Teoh*' (10 May 1995).
25. Administrative Decisions (Effect of International Instruments) Bill (Cth) 1995.
26. E Evatt 'Women's Rights and Human Rights: Using the UN Human Rights System' in International Commission of Jurists (Vic Branch) *Women and the Rule of Law* (Melbourne: Spinifex Press, 1999) 73.
27. Ibid, 75-76.

THE INTERPRETATION OF STATUTES

In spite of the government's reaction to *Teoh* it is clear that international treaty obligations do have a role to play in Australian courts in the interpretation of statutes. There are several aspects to this. In the first place, there is the presumption that parliament intends to give effect to Australia's treaty obligations so that where a statute is ambiguous it must be construed in accordance with those obligations.[28]

Secondly, there is a more limited but related rule of construction based on the presumption that parliament did not intend a statute to operate in derogation of a rule of international law recognised in Australia.[29] That rule of construction operates to limit the general words of a statute so as to give effect to the presumption.

Thirdly, there is the well-established principle that legislation is to be interpreted and applied, so far as its language permits, in accordance with established principles of international law.[30] In *Teoh* it was suggested that all rules of construction should be merged into a single rule requiring the courts to favour a construction – to the extent that the language of the legislation permits – that is in conformity and not in conflict with Australia's international treaty obligations. Strong reasons were cited by Mason CJ and Deane J for rejecting a narrower conception:

> If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations.[31]

THE BANGALORE PRINCIPLES

The legitimate role which international treaty obligations can play in the development of the common law, and in the construction of statutes, in countries such as Australia is reflected in the Bangalore principles.[32]

In 1988 a number of eminent international jurists gathered in Bangalore, India, to consider the domestic application of human rights norms recognised by

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28. *Teoh* supra n 18, Mason CJ and Deane J 287; *Kruger v Commonwealth* (1997) 190 CLR 1, Dawson J 71.
29. *Polites v Commonwealth* (1945) 70 CLR 60, Williams J 80-81; *R v Chung Chi Cheung* supra n 10, 168.
30. *Teoh* supra n 18, Mason CJ and Deane J 287-288; *Kruger* supra n 28, Dawson J 71.
31. *Teoh* ibid. See also *R v Swaffield* (1998) 192 CLR 159, Kirby J 214.
32. See M Kirby 'The Role of the Judge in Advancing Human Rights by Reference to Human Rights Norms' (1988) 62 ALJ 514, 531 (where the Bangalore Principles are set out in an appendix); and by the same judge, 'The Impact of International Human Rights Norms: "A Law Undergoing Evolution"' (1995) 25 UWAL Rev 30, 32-34.

international law. They produced 10 principles now known as the Bangalore principles. Principles 4 and 5 are worth re-stating:

> 4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.
> 5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.

HUMAN RIGHTS NORMS IN WESTERN AUSTRALIA

While the legitimate role of international treaty obligations in the development of the common law, and in the construction of statutes, has been sanctioned by the High Court and confirmed by the eminent international jurists who met at Bangalore it has not yet become a reality in the Supreme and District Courts of Western Australia in the exercise of their criminal jurisdiction. A search of the reported and unreported decisions of those courts reveals that international human rights norms, particularly those under the ICCPR, play virtually no role in judicial decision-making. Litigants simply do not cite them to the courts. On the rare occasions when reference is made to the ICCPR, our courts repeat the mantra in *Dietrich*[33] that ratification of the ICCPR has no direct legal effect on domestic law.

There do not appear to have been any submissions to the Western Australian courts that treaty provisions should be used as an aid to the interpretation of common law rules or ambiguous statutory provisions. This is so despite the recent enactment in Western Australia of legislation governing aspects of criminal law and procedure which have clear human rights implications. Examples are the Young Offenders Act 1994 (WA), the Sentencing Act 1995 (WA) and the Criminal Law (Mentally Impaired Defendants) Act 1996 (WA). These Acts have significantly altered the law and numerous judicial interpretations of them have been necessary – but none has taken account of the relevant international human rights standards.

There is one very recent exception. In *R v Lauritsen*,[34] Malcolm CJ noted an unfortunate and dangerous gap in the Criminal Law (Mentally Impaired Defendants) Act 1996 (WA) insofar as it makes no provision for hospital or institutional custody

33. Supra n 9, 305.
34. (2000) 22 WAR 442.

orders by way of or in lieu of sentence. Malcolm CJ referred to Australia's obligations under the Declaration on the Rights of Mentally Retarded Persons, which appears as Schedule 4 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth). His Honour noted that the Declaration 'does cast obligations on Australian governments to pursue fulfilment of its principles'.[35]

The decision in *Lauritsen's* case is exceptional for Western Australia. Generally the courts of this State deal with matters of criminal law and procedure without reference to Australia's treaty obligations. No submissions based on the ICCPR or other treaties are made to the courts when they are required to interpret legislation or to exercise discretion. The hope and promise of the majority of the High Court in *Teoh* has had little or no effect on the reality of the development of the common law and the interpretation of legislation in this State.

One explanation for this is that in Western Australia the common law and statutory rights of defendants are extensive and are rigorously applied by the courts. The presumption of innocence,[36] the right to silence and the privilege against self-incrimination[37] are fundamental elements of a fair trial guaranteed by the common law in this State. Some limited protection is also available at common law for unfairness arising because of delay in bringing an accused to trial.[38] Numerous other common law safeguards for accused persons regarding such matters as interrogation while in police custody,[39] visual identification evidence,[40] and the accused's right to be fully informed of the charge and evidence against him or her ensure that criminal proceedings are fair.

In criminal cases, litigants, counsel and judges focus their attention on giving effect to these common law protections and rights; any reference to international law and to Australia's obligations under the ICCPR and is virtually unheard of in the District Court.[41] The use of Australia's treaty obligations as a tool for interpreting

35. *Lauritsen* ibid, 466; but his Honour noted that these obligations were 'not part of domestic law per se'.
36. *R v Burns* (1975) 132 CLR 258; *R v Robinson (No 2)* (1991) 180 CLR 531.
37. *R v Glennon* (1994) 179 CLR 1; *R v Petty* (1991) 173 CLR 5; *R v Ireland* (1971) 126 CLR 321; *R v Woon* (1964) 109 CLR 529.
38. *Jago v NSW District Court* (1989) 168 CLR 23; *R v Barton* (1980) 147 CLR 75.
39. *R v McKinney* (1991) 171 CLR 468; *R v Kelly* (1994) 12 WAR 405; *R v Sell* (1995) 15 WAR 240.
40. *R v Domican* (1992) 173 CLR 555; *R v Alexander* (1981) 145 CLR 395.
41. A search of the unreported decisions database of the WA District Court found only one reference to the ICCPR. This was in a case involving the apprehension of bias: *Smales Jewellers v Protea Diamonds Pty Ltd* [2000] WADC 267. A search of the unreported decisions database of the WA Supreme Court found half a dozen decisions where the ICCPR was referred to. In each of those cases decided after 1992 the rule in *Dietrich* that Australia's international treaty obligations under the ICCPR create no rights or obligations in Australian domestic law was applied. In no case was it contended that the ICCPR could be used in considering the common law or in the interpretation of a statute.

and developing the common law of this State simply does not happen in that court. International law is not relied on. Litigants are not aware of ICCPR provisions and trial judges are not asked to consider them.

BRINGING HUMAN RIGHTS JURISPRUDENCE INTO THE CRIMINAL COURTS

It is not intended in this paper to canvas exhaustively all the areas of criminal law and procedure where international human rights norms could or should be considered in judicial decision-making. Instead, four areas will be discussed.

Western Australia is a Code jurisdiction. The Criminal Code 1913 was enacted long before the expansion of human rights jurisprudence began during the second half of the 20th century and long before Australia ratified the ICCPR and other human rights conventions. The presumptions on which the use of international human rights norms and treaty obligations in statutory construction are based have no application to previously enacted legislation.[42] The usefulness of international human rights norms in the criminal courts is thus limited to common law procedural matters and the interpretation of recent statutes.

1. Judicial bias

The legal principles that apply to judicial bias are clear and well known. In *Johnson v Johnson,* the High Court said:

> It has been established by a series of decisions of this court that the test to be applied in Australia in determining whether a judge is disqualified by reason of the appearance of bias ... is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.[43]

The test is objective and is founded on the need for public confidence in the judiciary and the trial process.[44] Article 14(1) of the ICCPR reflects this view:

> Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

In *Johnson v Johnson,* Kirby J quoted[45] from the UN Human Rights Committee's decision in *Karttunen v Finland*[46] regarding the meaning of 'impartial'

42. *Kruger* supra n 28, Dawson J 71.
43. *Johnson v Johnson* (2000) 174 ALR 655, 658.
44. Ibid.
45. Ibid, 665.
46. Unreported, UN Human Rights Committee 5 Nov 1992 CCPR/C46/D/387/1989.

in Article 14(1):

> [Impartiality] implies that judges must not harbour preconceptions about the matter put before them, and ... they must not act in ways that promote the interests of one of the parties.... A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be a fair or impartial trial within the meaning of Article 14(1).[47]

Equally stringent rules have been adopted by the European Court of Human Rights in relation to the equivalent guarantee of impartiality under Article 6(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms.[48] The approach of the European Court and the UN Human Rights Committee towards bias is comparable to that taken by the courts of Australia.

The provisions of Articles 6(1) and 14(1) reflect principles of universal application and they should be taken into account in developing the common law of Western Australia and other Australian States and Territories. As Kirby J said in *Johnson v Johnson*:

> In expressing the common law of Australia, it is legitimate, at least in the case of any uncertainty, to take into account the exposition of international human rights law where that law states principles of universal application. The ultimate foundation of the principle of the common law rests, relevantly, on the presupposition that a court deciding a matter between parties will be independent and impartial. The fundamental requirements of independence and impartiality do not imply that adjudicators must be absolutely neutral, in the sense of having 'no sympathies or opinions'. But they do require that adjudicators 'strive to ensure that no word or action during the course of the trial or in delivering judgment' leaves an impression of pre-judgment of a point in issue.[49]

A judge in a criminal case may be called upon to consider whether there is bias, or an apprehension of bias, in two circumstances. In the first place, he or she may need to apply the test to himself or herself following an application by counsel, or where the judge is aware of issues which might ground an application based on a reasonable apprehension of bias. Secondly, a judge in an appellate court may be called on to consider the decision made by another judicial officer not to disqualify himself or herself on the ground that, in that judicial officer's view, there could be no apprehension of bias. International human rights law stating principles of universal application may legitimately and usefully be referred to in either of these two circumstances.

47. Ibid, para 7.2.
48. *Johnson v Johnson* supra n 43, 665.
49. Ibid, 665-666 (footnotes omitted).

2. Delay

No legal right to a speedy trial or to a trial within a reasonable time is guaranteed under Australian law.[50] Unlike the United States where the right to a speedy trial is found in the Sixth Amendment, and unlike Canada where the right to trial within a reasonable time is found in section 11(b) of the Charter of Rights and Freedoms, in Australia the only obligation for trial within a reasonable time is found in Articles 9(3) and 14(3)(c) of the ICCPR. These Articles state:

> **Article 9(3)**
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> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.
>
> **Article 14(3)**
>
> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (c) to be tried without undue delay.

Parliament has not legislated to prescribe limits or set standards for Australia as has happened in the United States where, in most jurisdictions, trial within three to six months after committal is required by law.[51] In the absence of legislation it would be inappropriate for the courts in Australia to be involved in any 'backdoor' implementation of Articles 9(3) and 14(3)(c).[52]

In Canada, where the guarantee of a trial within a reasonable time is enshrined in the Charter of Rights and Freedoms, parliament failed to establish standards but the courts did so in *R v Askov*.[53] Those standards were substantially modified 12 months later in *R v Morin*.[54] It is instructive to recall that in the five months immediately following the *Askov* decision approximately 30 000 criminal charges were stayed or withdrawn in Ontario on the ground that section 11(b) of the Charter

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50. *Jago* supra n 38.
51. MA Code *Trial Within a Reasonable Time: A Short History of Recent Controversies Surrounding Speedy Trial Rights in Canada and the United States* (Ontario: Carswell, 1992). The impetus for legislated speedy trial standards in the US began in the 1960s with the President's Commission on Law Enforcement and Administration of Justice: see Code 39.
52. *Teoh* supra n 18, 288.
53. (1990) 59 CCC (3d) 449 (Can Sup Ct).
54. (1992) 71 CCC (3d). In *Morin,* the court identified two interests: society and the accused have a shared interest in a *prompt* trial, but society has an opposing interest, namely to bring the accused to trial. These opposing interests are discussed in the judgment of McLachan J. The court held that in balancing these interests greater weight should be given to the law enforcement interest in convicting the guilty in the case of the most serious offences.

required it.[55] In those cases delays of 10 to 15 months were considered 'completely unacceptable'.[56]

Although no statutory right to a speedy trial or trial within a reasonable time is recognised in Western Australia, at common law an accused has a right to a *fair* trial and the courts may intervene to avoid an abuse of process.[57] In *Jago* Mason CJ said:

> The continuation of processes which will culminate in an unfair trial can be seen as a 'misuse of the court process' which will constitute an abuse of process because the public interest in holding a trial does not warrant the holding of an unfair trial.[58]

In the same case Deane J said:

> If circumstances exist in which it can be seen in advance that the effect of prolonged and unjustifiable delay is that any trial must necessarily be an unfair one, the continuation of the proceedings to the stage of trial against the wishes of the accused will constitute an abuse of that curial process. In such a case, the continuation of proceedings to the stage of trial will inevitably infringe the right not to be tried unfairly and a court which possesses jurisdiction to prevent abuse of its process, possesses jurisdiction, at the suit of the accused, to stay the proceedings pursuant to that power.[59]

So far as Western Australia is concerned, section 608 of the Criminal Code 1913 establishes what is known as the 'two-term rule':

> **Section 608 — right to be tried**
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> A person committed for trial before any court for an indictable offence may make application in open court at any time during the first sittings of the court held after his committal to be brought to his trial.
>
> Any person committed as aforesaid, who has made such an application to be brought to his trial, and who has not been brought to trial at the second sittings after his committal for trial, is entitled to be discharged.

In England, the two-term rule had its roots in Magna Carta (1215) and the Habeas Corpus Act 1679.[60] In Alabama the rule has been held to embody the concept that trial delays should not ordinarily exceed nine months, but no such interpretation has been adopted in Australia.[61] It would not be appropriate to rely

55. Code supra n 51, 113.
56. *R v Askov* supra n 53.
57. *R v Barton* supra n 38, 96, 107, 116; *Jago* supra n 38.
58. *Jago* ibid, 30-31.
59. *Jago* ibid, 57-58.
60. Code supra n 51, 2-3.
61. *Mayberry v State* 264 So 2d 198 (Ala CA 1972); *R v Diaz* [1982] WAR 60.

on international human rights norms such as those embodied in Articles 9(3) and 14(3)(c) of the ICCPR in the interpretation of section 608 of the Criminal Code because its enactment preceded the ratification of that Convention by the Australian government so that the presumptions on which the rules of construction are based can have no application.[62] However, international jurisprudence may have a role to play in Western Australia when judges are called upon to consider the issue of whether delay has, in a particular case, so prejudiced the accused that his or her trial would constitute an abuse of process.

Human rights jurisprudence in Canada, the United States and Europe contains a wealth of material showing the prejudicial effects of delay. It is trite to say that 'justice delayed is justice denied', but no general rule to this effect has been promulgated in Australia. It is necessary in this country to consider prejudice brought about by delay in the particular case.[63] The circumstances need to be considered to determine whether delay will 'inevitably'[64] result in an unfair trial and therefore an abuse of the court's process. International human rights jurisprudence can legitimately be referred to in order to assist the court in determining this question.

3. A public trial

Section 635A of the Criminal Code 1913 provides that a criminal trial must be held in an open and public court to which all persons may have access; but the judge is able to close the court or to exclude persons or prohibit publication of proceedings 'if satisfied that it is necessary for the proper administration of justice to do so'. Article 14(1) of the ICCPR contains a similar provision, applicable to all trials, whether criminal or civil:

> **Article 14(1)**
>
> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order ... or national security in a democratic society, or when the interests of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

62. *Kruger* supra n 28, Dawson J 71.
63. *Jago* supra n 38.
64. Ibid, Deane J 57-58.

Section 635A, although part of the Criminal Code, was not enacted until 1992. It would therefore be appropriate for judges in giving content to matters 'necessary for the proper administration of justice' to be informed of the relevant international human rights jurisprudence that has developed in relation to Article 14(1) so that decisions under section 635A are made consistently with Australia's obligations under that Article.

4. Interpreters

Judges are occasionally called upon to approve an interpreter for an accused who does not speak English as his or her first language. When the accused is an Aboriginal person from a remote community English is often the second or third language spoken. Such an accused may be able to speak a form of broken English which may, or may not, be sufficient to enter a plea and to be tried.

In exercising the judicial discretion to approve the appointment of an interpreter for such a person it is appropriate to bear in mind Australia's obligations under Article 14(3)(f) of the ICCPR:

> **Article 14(3)**
>
> In the determination of any criminal charge against him, everyone shall be entitled to the following minimal guarantees, in full equality: ... (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

This rule directs attention to the accused's ability to 'understand' and 'speak' the language used in court. In considering whether an interpreter should be provided for an Aboriginal or other person it would be appropriate for the court to have regard to the developing jurisprudence under this Article of the ICCPR.[65]

PRACTICAL PROBLEMS

The Australian legal profession has been accused of insularity. One result of this insularity is that trial courts are rarely referred to the developing international jurisprudence on human rights. As Kirby J has said:

> The provincialism of ... Australian lawyers ... is profoundly discouraging. In Australia they still require a boldness of spirit and a determination to escape the bog of provincial jurisdictionalism.[66]

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65. See M Flynn 'International Law, Australian Criminal Law and Mandatory Sentencing: the Claims, the Reality and the Possibilities' (2000) 24 Crim LJ 184, 190-194.
66. M Kirby 'Implications of the Internationalisation of Human Rights Law' in Alston supra n 2, 298.

Although Australian lawyers are, for the most part, well versed in their own domestic law, they are often ignorant of the developing international jurisprudence on human rights and fail to cite arguments based on it in court. This necessarily affects the quality of the decisions that are ultimately reached. Under an adversarial system judges must rely on the submissions of opposing counsel in deciding cases. In the absence of any reference to, or submissions on, international human rights norms, judges must inevitably reach their decisions without taking them into account. In Australia there is a need to train lawyers so that they are better equipped to consider, reason and argue in terms of human rights.[67] This in turn would have the effect of bringing international human rights law into the courts where judges could take account of it in interpreting and developing domestic law.

What needs to be done? Without exception international law and human rights law are included in the curriculums of Australian law schools. Students who take these courses graduate from university and commence their careers with a sound knowledge of international human rights law. Indeed, it is an area of study that normally inspires some enthusiasm among law students. However, within a few years of commencing practice this knowledge has all but been forgotten.

My experience as a judge in the District Court is that criminal lawyers almost never put their learning on this subject to practical use. Criminal practitioners develop their skills as common lawyers, but their knowledge of international human rights jurisprudence, acquired at law school, is not retained and utilised.

If international human rights jurisprudence is to play a significant role in shaping Western Australia's criminal law, barristers and solicitors practising in the criminal courts need to keep up-to-date with the latest developments. The Law Societies in the various States and the various specialised criminal lawyers' organisations need to provide their members with educational opportunities to keep them abreast of this important subject. In short, practitioners in the criminal courts of Western Australia and other States and Territories need to expand their intellectual horizons.

CONCLUSION

Australia stands apart as a common law country without its own bill or charter of human rights. The lack of such a document need not isolate the country from international human rights jurisprudence, but changes in the training and further education of Australian lawyers are necessary if our domestic law is to develop in harmony with prevailing international standards.

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67. J Doyle & B Wells 'Can the Common Law Protect Human Rights?' in P Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: OUP, 1999) 74.