HUMAN RIGHTS: THE CHALLENGE FOR LAW REFORM *

(TURNER MEMORIAL LECTURE)

By the Honourable Mr Justice M. D. Kirby **

THE HUMAN RIGHTS DEBATE

The human rights debate is not dead in Australia. It slumbers, fitfully. In other countries, with political and legal systems similar to our own, the debate is proceeding. How do we in the modern age, without resort to shibboleths, best protect the human and civil rights of our citizens? In England, Canada, New Zealand and elsewhere, this issue is the focus of public and learned controversy. In Australia the issue becomes unnecessarily enmeshed in the toils of partisan politics. We have a duty as lawyers and as members of a learned society to free this concern from such unnecessary impedimenta. I propose to use this occasion to show how important is the issue. I will illustrate its practical significance by reference to Australian legal developments. I will refer to the course which the debate has taken overseas. I will say something about what the Australian Law Reform Commission is doing and can do to advance the protection of human rights in Australia.

EMBARRASSING CASES

We all know that the law has an unacceptable face. I decline to define my terms. I simply say that occasions exist when legal principle, the application of the common law or statute law, produces a result which society will say unanimously or with near unanimity, is unjust. There is no point in a lengthy debate about why this should be so. At the risk of offending the purist, I refuse even to examine the values that bring us collectively or individually to such a conclusion. The fact remains that the law does on occasion work injustices. The issue is how,

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* The E. W. Turner Memorial Lecture delivered at Hobart on 14 October 1976. *Editor's note*: On 26 December 1976, following this Lecture, the Commonwealth Attorney-General, the Hon. R. J. Ellicott, Q.C., announced that the Commonwealth Government had decided to establish a Human Rights Commission. One function of the Commission would be to examine Commonwealth, State and Territory laws and practices and advise on their consistency with the International Covenant on Civil and Political Rights.

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in our legal system, such wrongs, when they emerge, are to be righted. That we do not ask whether they are to be righted merely underlines our quest for the perfect, just society. We have all seen the law work injustices. I choose my illustration at random. Many more will occur to lawyer and layman alike. I take a case involving one aspect of prisoners' rights because it was recently called to my attention by a letter from a prisoner. I have many such letters. They are written with anguish and have a quality of reforming zeal that commands attention.

Sidney Golder is one of that small but famous class of troublesome litigants who have done much to secure British liberties.[1] But Golder is the first to be constrained to take his plea for justice beyond the Queen's Courts. The result is universally regarded as an embarrassment to the received doctrine about the standards of British Justice. It is an embarrassing case. Let us hope that it becomes well known in this country. It will be a tonic to legal self-congratulation.

Golder was a prisoner serving a long term. He became involved in a prison disturbance. A prison officer accused him of assault. Although no charges were brought against Golder, the allegation was noted on his prison record. Pursuing the rights and procedures which exist in England, Sidney Golder petitioned the Home Secretary. He sought permission to consult a solicitor for the purpose of instituting proceedings for libel against the officer. The Home Secretary declined the petition on the ground that in his opinion Golder had no good claim in law. So far as the procedures and rights of English law were concerned, Golder had exhausted his avenues of redress. The issue was not a theoretical one for Sidney Golder. The time of his release could be affected by such a note on his record.

The European Convention for the Protection of Human Rights and Fundamental Freedoms is one of a number of international Bills of Rights now in force. It was ratified by the United Kingdom and came into operation in 1953. Its purpose was stated in the Preamble to be 'to take the first steps in the collective enforcement of certain rights stated in the Universal Declaration [of Human Rights]'.[2] This Convention was not a continental trick which slipped through unnoticed whilst positivist English lawyers were looking the other way. Churchill, as early as 1948, in supporting the movement for European unity through the Council of Europe suggested that 'in the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law'.[3]

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1 See e.g., W. Holdsworth, *A History of English Law*, VI, at pp. 52ff.

2 The Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, 4th November 1950: 213 *N.T.S.* 221.

3 Quoted in *The Rights of the European Citizen*, Strasbourg, Council of Europe, 1961, at p. 21.

Sidney Golder, although a prisoner, was fired with just this spirit. In March 1971 he petitioned the European Commission. He asserted a violation by the United Kingdom of Article 6 (1) which guarantees: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. He also complained of a breach of Article 8 which guarantees: 'Everyone has the right to respect for his private and family life, his home and correspondence'.

The Commission admitted the petition and referred it to the European Court of Human Rights.[4] The Court, on 21st February 1975, judged that the United Kingdom Government had violated article 6 (1) of the Convention by denying a prisoner the right of access to a court. This was a decision by a majority of 9 to 3. The Court was unanimous, however, in ruling that a violation of article 8 was involved in the refusal to permit correspondence with a solicitor. The Court rejected the argument of the United Kingdom that the Home Secretary's refusal had not prevented Golder from having access to a court but merely postponed it whilst he was in prison. The strictures of the court, grounded in the general rights set out in the European Convention, caused justifiable embarrassment in the United Kingdom. The sequel is not told. I cannot say whether, to this day, Golder has had the chance to test his version of that disturbance in 1971 against the warder's. In all probability, in the general embarrassment that followed his case, a typical British compromise was worked out. The fact remains that there was a tribunal to which an appeal could be made to general principles which civilised countries had agreed should govern their citizens' rights.

What of Australia? Darcy Dugan is a prisoner in a gaol in Maitland, N.S.W. In 1950 he was tried and convicted of a charge of wounding with intent to murder. He was sentenced to death, although in 1951 that sentence was commuted to penal servitude for life. He was released on licence but in 1970 was again convicted of assault and robbery. He was sentenced to 14 years' imprisonment with hard labour. Each of these sentences he is still serving.

Shortly after the second conviction in May 1971, a newspaper with wide circulation in New South Wales published articles concerning Dugan which, he asserted, defamed him. He issued writs out of the Supreme Court of New South Wales. Three years later he commenced proceedings against another newspaper concerning further material about him. Defences were filed which were based upon a principle that a convicted felon, still serving the sentence imposed upon him, was precluded by the common law from suing for damages at law. It was

4 *Golder* v. *United Kingdom* (unrep.), 21st February 1975. A fuller version of the *Golder* case may be found in G. Triggs, 'Prisoners' Rights to Legal Advice and Access to the Courts: The Golder Decision by the European Court of Human Rights', (1976) 50 *A.L.J.* 229.

asserted that this defence had been brought to the Colony of New South Wales as part of the common law of England. Although subsequently modified and now abrogated in England by statute, it was argued that either Dugan was deprived of his causes of action entirely or alternatively until such time as he had been pardoned or served his sentence.

The argument of the defendants was sustained by Yeldham J. in the Supreme Court.[5] After tracing the history of attainder in England, corruption of blood and forfeiture or escheat of land, personal property and rights of action, his Honour traced the reception of this principle into New South Wales. He concluded:

> In the result I have come to the conclusion that the plaintiff, having been ordered to serve a sentence of life imprisonment is, during the whole of such sentence, unless he be granted a pardon, incapable of suing in this or any other court. Although the same result would follow from the ancient law as to attainder, with consequent corruption of the blood, so far as an action for defamation committed after the date of sentence is concerned, it is not necessary to rest my decision upon that basis.[6]

Accordingly the proceedings were defeated and verdicts for the defendant were entered in each action. An appeal has been lodged by Dugan to the Court of Appeal in New South Wales. I am informed that this appeal will not be heard until 1977. The matter is therefore still before that Court. You will understand that in dealing with the general question of prisoners' rights, as disclosed in Dugan's case, I must show a certain circumspection lest, in asserting prisoners' rights, I lose my own.

Assume the Dugan decision to be good law. Can we say that justice is done by a principle of law that denies, to certain prisoners at least, full access to redress in the Queen's courts? Is there a principle or a court or tribunal to which Dugan or others in his position, like Golder, can appeal? Let this be the law. Is it just?

The historical origins of the Dugan principle are carefully traced by Yeldham J.[7] In earlier times, with no organised police force and limited means of keeping law and order, it was entirely understandable that a person who had suffered judgment of death or outlawry should suffer attainder, i.e. the extinction of civil rights and capacities. He became *civiliter mortuus* because he was, in truth, all but dead. If he escaped, he was a peril to unorganised society. That this is scarcely a principle applicable in a modern State was recognised by the *Forfeiture Act 1870* in England. But this Act was not part of the law of England on the date when the Colony of New South Wales was founded. Nor was the Act expressed to extend to New South Wales.

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5 *Dugan* v. *Mirror Newspapers Limited* (unrep.), Supreme Court of N.S.W. (Yeldham J.), 18th June 1976.

6 *Ibid.*, at pp. 10-11.

7 *Ibid.*, at pp. 3ff.

Dugan's case is not an isolated one. In July 1976 a prisoner wrote to me from the Katingal Special Security Unit in New South Wales. He complained that, when in November 1970 he escaped from prison and was the subject of a wide police search, he was defamed by a Sydney newspaper. This is what he says:

> I was characterised as a 'Crazed Rapist', a crime completely foreign to my nature, and this article caused excessive grief and mental anguish to my immediate family... Although I had to appear on trial for crimes of a different nature in 1972, the stigma surrounding the newspaper article accusing me of being a rapist was instrumental in one of my trials being aborted in June 1972... I hasten to add at this point, although I am charged and convicted for crimes of a serious nature and for which I am currently serving a sentence, at no time was I charged with the rape of which the newspaper has accused me of committing. In fact, during my criminal career, I have never been charged or convicted of any crime which could be classed as a sexual offence.

This prisoner, my correspondent, had commenced proceedings in defamation. He was advised of the Dugan ruling. He asks society, through me, this question:

> What protection does the New South Wales law offer a convicted person by denying him the right to sue for damages or have an action determined under common law? It would appear that Anatole France adequately summed up the situation when he stated: 'With equal impartiality, the law forbids both rich and poor alike to steal bread and to sleep under bridges'. Although I am a prisoner, and in some respects a second-class citizen, I would respectfully draw the Commission's attention to the enlightened views concerning a prisoner's right to sue for defamation which the European Court of Justice handed down in February 1975.[8]

If Golder's case has not become widely known in the Australian legal community, it is currency indeed within prisons. Knowledge of Mr Golder's adventure, and success, drew this conclusion from an Australian prisoner:

> [The European Court's] enlightened view... is a sad contrast to the existing archaic defamation laws of this State. In a free and democratic country there must be freedom of the press. However, does this amount to a carte blanche for the publication of false reports which could endanger the right of a speedy and fair trial for an accused? Does it also entail the right of a newspaper to publish defamatory or libellous articles simply because the person is 'a convicted felon' and therefore has no right of redress under existing law?[9]

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8 Letter of a prisoner at the Katingal Special Security Unit, N.S.W., 11th July 1976. It should perhaps be noted that Darcy Dugan has also written to the Commission from H.M. Gaol, East Maitland, N.S.W. Part of one submission is set out in the Foreword to the Commission's Second Report, *Criminal Investigation*, 1975, A.L.R.C. 2 at p. xiii.

9 *Ibid.*

It may be said that we are becoming too sensitive to the position of the enemies of society. There are surely many cases where perfectly law-abiding citizens face the injustices and delays of our legal system. Some, even today, may assert that a convicted felon has put himself outside the wall of our society and cannot expect to enjoy the same rights in it as a law-abiding citizen can. If he turns his back on the peaceful ways of the community, can he really expect to have the advantages of organised social life? I take the prisoner's complaint about the law (I have many from every other class of citizen) because his is a voice that is not often heard. I think there would be few in Australian society today who would not conclude the answer to the prisoner's complaint and his rhetorical question with a resounding statement that the only punishment for a convicted felon should be deprivation of his liberty. The notion of a loss or suspension of civil rights is an archaic one. It offends not only modern theories about the purposes of imprisonment. It offends, I suggest, something more fundamental. But if the law is as stated in Dugan's case, until it is changed, that is the end of the road. There is no court or tribunal that can blunt the edge of this old principle. There is no weapon in the hands of the judiciary to prevent injustice. Indeed, the legal system becomes the instrument of injustice. It perpetrates, in the name of the law, a rule which may offend its instruments, may be manifestly unjust, but is the law of the land. Should judges and courts be helpless in such a situation? Are we, in the name of legal positivism, to be left bereft of remedies when the law makes such mistakes?

THE INTERNATIONAL COVENANT

Let us say it bluntly. Australian lawyers have inherited a suspicion, bordering on contempt, for Bills of Rights and statements of fundamental principles. The controversy is not a new one. In modern times, it can be traced at least to the debates which followed the American Declaration of Independence, advertising those rights of men which Rousseau had proclaimed in his *Contrat Social*.[10] The modern successors of Burke and Paine continue their work. Until lately, amongst common lawyers in the English tradition, Paine had few supporters. We all rallied to Burke, Bentham, Dicey and the other legal positivists.[11] This century, particularly since the last War, has seen international moves of which the European Convention is but one.[12] The development of an international definition of rights is one of the major streams of international law. Australia will not be immune from its influence.

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10 Holdsworth, *op. cit.* XIII, at pp. 12ff.

11 See, for example, A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, (10th Edition, 1959, at pp. 197-201.

12 Others are collected in Sir Leslie Scarman's *English Law — The New Dimension*, (26th Hamlyn Lectures, 1974), at pp. 10-12. See also Triggs, *op. cit.*, at pp. 229-31.

Another agreement, of importance beyond the European States which are parties to the Convention, is the International Covenant on Civil and Political Rights.[13] This was adopted on the 16th December 1966. Australia became a signatory on the 18th December 1972. The Covenant came into force, with the deposit of sufficient ratifications, on the 23rd March 1976. It has not yet been ratified by Australia.

The Covenant contains provisions designed to ensure fair criminal and civil proceedings. Article 14 (1) is similar in terms to article 6 (1) of the European Convention which was the subject of the Golder decision. This is what article 14 (1) of the International Covenant provides:

> In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[14]

The principal purpose of the ill-starred *Human Rights Bill 1973*[15] was stated in the Preamble to be 'To Implement the International Covenant on Civil and Political Rights'. It is not my purpose to deal with the manner in which the Bill attacked its object. I say nothing whatever about the machinery provisions which the Bill envisaged and which caused much controversy at the time.[16] Clause 6 in terms gave Parliamentary approval to the ratification by Australia of the International Covenant.[17] The Covenant is Schedule I to the Bill. The practice of seeking Parliamentary approval has doubtless developed because of the distribution of power within Australian municipal law.[18] This is not the occasion to explore the scope of the external affairs powers under the Australian Constitution.[19] Some, including the Commonwealth Attorney-General, Mr Ellicott, have expressed doubts about the power of the Federal Parliament in Australia to legislate on the matter for the whole of the country, the States included.[20] Such a question would never be surely answered until passed upon by the High Court of Australia.

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13 Adopted by Resolution No. 2200 (xxi), General Assembly of the United Nations, 16th December 1966: *G.A.O.R.* xxi, Suppl. No. 16 (A/6316), at pp. 52-58.

14 *Ibid.*

15 A.G.P.S., Canberra, 14th November 1973: ref. 400/14.11.

16 See G. J. Evans, 'An Australian Bill of Rights?' (1973) 45 *The Australian Quarterly*, No. 1, at pp. 4-34.

17 Approval was also given to ratification of the Convention on the Political Rights of Women.

18 Triggs, *op. cit.*, at pp. 238-39.

19 The latest pronouncement by the High Court on the subject is to be found in *New South Wales & Ors.* v. *The Commonwealth* (1975) 50 *A.L.J.R.* 218 (The Seas and Submerged Lands Act case). An interesting exploration of the present position in India, also a federation, is to be found in P. Varma, 'Position Relating to Treaties Under the Constitution of India', (1975) 17 *J.I.L.I.* 113.

20 R. J. Ellicott, *The Citizen and the Law* in an address to the Citizens' Welfare Service of Victoria, University of Melbourne. *Commonwealth Record* Vol. 1 No. 6, 9-15 Aug. 1976, pp. 298-301.

There are many who sincerely fear that ratification by the Commonwealth of treaties of this kind could enable the expansion of the legislative powers of the centre far beyond those which the Constitution envisaged.[21] On the other hand, supporters of the Bill ask how long Australia, as a nation, with constitutional power to subscribe to treaties, can hold aloof from the main stream of international law developments towards a new world order. Can it be postponed for ever because of our domestic federal arrangements?

Clause 24 of the Bill was in terms substantially identical to Article 14:

> 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 Human Rights Bill did not pass the Senate.[22] No steps independent of the Bill were taken to ratify the International Covenant. It is not, as such, part of the domestic law of Australia. But do we need it? Are we getting on fine without resort to a Bill of Rights, local or international?

BILLS OF RIGHTS

The debate concerning Bills of Rights commands the attention of many of the best legal scholars in England, Canada and New Zealand. In Australia, the debate has too often been pedestrian. The issues unhappily became embroiled in the partisan conflicts of the time. We must do what we can to release the debate from this banal level. It raises one of the big issues for resolution by Australian society and Australian lawyers in the last quarter of this century. If it can proceed with astringent bi-partisanship in the United Kingdom, Canada and New Zealand, why cannot this be possible here?

The classical rejection of a written Bill of Rights was stated in Bentham's confident, unqualified assertion:

> Look to the letter, you find nonsense — look beyond the letter, you find nothing... There are no such things as natural rights — no such things as natural rights opposed to, in contradistinction to legal... Natural rights is simple nonsense: natural and imprescriptible rights, rhetoric nonsense — nonsense upon stilts. But this rhetoric nonsense ends in the old strain of mischievous nonsense...[23]

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21 This view was put by many during the controversy, notably by Sir Robert Menzies and a number of State Ministers.

22 Following the second reading speech on 21st November 1973, the Bill was not further debated in the Session and lapsed with the Prorogation of the Parliament for the Double Dissolution of 1974. It was not reintroduced during the 29th Parliament.

23 J. Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued during the French Revolution*: Works ii, 488-534, pp. 497, 500 and 501. The passage is cited at length by S. A. de Smith, 'Fundamental Rights in the New Commonwealth', (1961) 10 *I.C.L.Q.* 83, at p. 84.

The traditional British view of Bills of Rights has been learned by succeeding generations of common lawyers.[24] It is that, in England, the right to individual liberty is part of the Constitution because it is secured by the decisions of the courts.[25] The international movement for a definition of fundamental rights doubtless received impetus from the horrors that have beset the world this century. In Canada, the traditional view of Dicey prevailed at first. But in 1945 members of the Conservative Party submitted motions to the Parliament favouring the adoption of a written Bill of Rights for the Dominion. Mr J. G. Diefenbaker in 1945 and thereafter regularly proposed a written Bill of Rights, but without avail. In May 1947 a Joint Committee of the Senate and House of Commons inquired into the matter. It adverted to the disputed power of the Dominion Parliament to enact a comprehensive Bill of Rights. It concluded that the attempt 'would be unwise'.[26] In 1950 a special Senate Committee in Canada recommended that the Canadian Parliament should, as an interim measure, adopt a Declaration of Human Rights strictly limited to its own legislative jurisdiction. Nothing was done about this until Mr Diefenbaker became Prime Minister in 1957. In 1958 he proposed a Federal Bill of Rights. It was finally enacted on 10th August 1960.[27] It is law today.

Provincial Bills of Rights are now in force in Saskatchewan, Alberta and Quebec, having been enacted in the last two Provinces quite recently. Proposals are now under consideration from the Law Reform Commissions of British Columbia and Manitoba recommending adoption of Bills of Rights.[28] Views differ, of course, about the effectiveness of such legislation in default of constitutional entrenchment. There is no doubt that the mere adoption of a Bill of Rights does not provide a *panacea.* Indeed, some of the more extravagant criticisms of Bills of Rights founder upon the inescapable tendency to conservatism and caution universal among British judges. A real revolution in legal education and social attitudes of the legal profession would be required before reliance upon general 'rights' could divert judges from the ordinary application of legal principles.[29] This certainly has been the experience in Canada to date. That pungent critic of law reform and law

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24 The influence of Dicey's 'masterly exposition' is referred to by E. McWhinney, *Judicial Review,* (4th Edition, 1969), at p. 93 n. 60.

25 Dicey, *op. cit.,* at p. 198.

26 The history of the Canadian *Bill of Rights* is most recently summarised in the *Report on the Case for a Provincial Bill of Rights* by the Law Reform Commission of Manitoba, Report 25, May 1976, at pp. 11-23.

27 8-9 Elizabeth II (1960), Chapter 44 (Canada).

28 British Columbia Law Reform Commission *Report on Civil Rights,* Reports 16, 17 and 18, 1974. See also n. 26.

29 This point and others, that led the Manitoba Commission to recommend a Bill of Rights for that Province, are to be found in the Manitoba Report, at pp. 16ff. The role of legal training in the social sciences necessary to handle complex public issues is emphasised by McWhinney, *op. cit.,* at p. 95.

reformers, Professor J. N. Lyon,[30] recently concluded, with more than a note of despair:

> If we cannot escape the... conception of Canadian Constitutional law that leads Canadian judges mistakenly to adopt the stance of English judges... then the *Canadian Bill of Rights* may die a quiet death for want of a judiciary that is able to cope with its responsibilities. That would be unfortunate because judicial development of a satisfactory human rights jurisprudence is going to be equally difficult on whatever authority it is based, given the neglect of this area for so long.[31]

The worst fears of judicial excess have not been borne out by the Canadian experience. Apart from its educative value and its usefulness in extreme cases of intolerable injustice, the acceptance of standards, such as the unentrenched Canadian *Bill of Rights* asserts, is said to be found most especially on a practical level in the guidance it gives to the public service and the legislators. Section 3 of the Canadian *Bill of Rights* requires the minister of Justice to scrutinise all legislation submitted to Parliament and all delegated legislation to ensure that it accords with the *Bill of Rights.* This ensures that the principles are continually kept in mind both by those who propose and draft legislation and by those who have to administer it.[32] I do not say that such principles are not now before the mind of those who hold equivalent office in Australia.[33] But practical experience in Canada has been said to uphold the value of a public statement of the standards by which proposed legislation must always be tested. Similar criteria for the common law might equally ensure that in appropriate cases judges could avoid the obligation to be a mere cypher for effecting unjust, archaic principles of the common law. This is not a North American aberration. This is not a case of the Canadians infected by the propinquity of American jurisprudence. It is a debate which has been rekindled in New Zealand[34] and the United Kingdom, the two countries with legal systems, social conditions and community attitudes and traditions closest to our own. It is not just a matter for scholarly debate, although it is that too. Things are actually happening. A Bill of Rights was given a first reading in the House of Lords on the 18th February 1976.[35] The Leader of the Opposition, Mrs Margaret Thatcher, has

30 This is a reference to Professor Lyon's stinging criticism of orthodox law reform: J. N. Lyon, 'Law Reform Needs Reform', (1976) 12 *Osgoode Hall L.J.* 421.

31 J. N. Lyon, 'The Central Fallacy of Canadian Constitutional Law', (1976) 22 *McGill L.J.* 40 at p. 58. See also J. N. Lyon, 'A Progress Report on the Canadian Bill of Rights', (1976) 3 *Dalhousie L.J.* 39; W. S. Tarnopolsky, 'The Supreme Court and Civil Liberties', (1976) 14 *Alberta L.R.* 58.

32 This is the opinion expressed in the Manitoba Law Reform Commission Report at p. 20.

33 *Cf.* L. J. Curtis and G. Kolts, 'The Role of the Government Lawyer in the Protection of Citizens' Rights', (1975) 49 *A.L.J.* 335 at pp. 336, 342-3.

34 [1975] N.Z.L.J. 589; [1976] N.Z.L.J. 167.

35 (1976) 126 *New L.J.* 210.

suggested that Bill of Rights clauses should be inserted in the devolution Acts which are to establish the Scottish Assembly.[36] The then Home Secretary, Mr Jenkins, discussing these developments in February 1976, was able to point with pride to the fact that the issues were not a matter of controversy between the major political parties.[37] A number of considerations have explained these developments which amount to nothing less than a revolution in traditional English constitutional thought. Why has it happened? What are the lessons in it for us in Australia?

Mr Jenkins ascribes the development to international pressures arising from the European Convention. Mr Golder's case saw Britain in an unaccustomed role before an international tribunal upon a breach of an International Covenant which it had ratified. But there are other cases.[38] Most recently the Irish Government took action against the United Kingdom before the European Court and the Court's findings of torture and ill-treatment of prisoners and internees excited a great deal of public and legal disquiet.[39] The accession of the United Kingdom to the European Economic Community exposes Britain to yet another international tribunal which asserts a jurisdiction based on the Treaty of Rome but supplemented by unwritten Community law deriving from the general principles of the member States. Mr Jenkins's point is put succinctly by Lord Justice Scarman, a major advocate of a new Bill of Rights for the United Kingdom:

> By its adherence to these international instruments the United Kingdom has recognised and declared the existence of fundamental human rights, has recognised the right of individuals to have an effective remedy for their violation in the courts of the land, and has accepted the competence of the Commission to consider individuals' complaints of violation and, at its discretion, to refer any such complaint that it believes to be well-founded to the Court of Human Rights.[40]

Although it is true that pressures for an English Bill of Rights have accelerated as a result of the decisions of the European Court of Human Rights in Strasbourg and the European Community's own Court of Justice in Luxembourg[41] these developments alone could not explain the vigour of the debate which is currently alive in Britain. The explanation must be found in the writings of one or two controversialists, coinciding with great constitutional developments.

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36 See 'A New Constitution?', (1976) 126 *New L.J.* 78.

37 Speech to the Birmingham Law Society, reported in (1976) 73 *Law Soc. Gazette* (England) at p. 134.

38 One of them, the *Knechtl* case, is described in Triggs, *op. cit.*, at pp. 232-3.

39 Scarman, *op. cit.*, p. 18.

40 *Ibid.*, at pp. 13-14.

41 For a statement of the present position concerning European human rights as they affect Britain, see the series of articles by Hector Munro, (1976) 126 *New L.J.* 293, 305, 330 and 369. The May 1974 decision of the Federal German Constitutional Court rejecting the theory of the absolute supremacy of Community law is summarized by V. O'Donovan, (1976) 126 *New L.J.* 161.

Sir Leslie Scarman's *Hamlyn Lectures*, the twenty-sixth in the series, were delivered in 1974. The author is now a judge of the Court of Appeal. He was first Chairman of the Law Commission. He speaks with confidence and conviction of the challenge to the efficiency of the common law in the modern age. He traces the challenge originating in the human rights movement and accession to the Common Market; he outlines the retreat of the law from control over great areas of administrative decision making; he scrutinizes the challenge of the environment and, taking the bit between his teeth, examines the dangers for the rule of law inherent in the power of industrial unions and multi-national corporations.[42] Scarman's warning is that the universal common law is in retreat. Faced with this retreat, human rights are inadequately protected by the present legal system. He calls for a 'New Dimension', a new constitutional settlement including an entrenched Bill of Rights and a Supreme Court of the United Kingdom with power to invalidate legislation that offends such rights.[43]

Although we in Australia have become used to judicial review and the invalidation of Acts of Parliament, it can be imagined how provocative is this design to those weaned on Dicey. Scarman is not alone in this. The last Conservative Lord Chancellor, Lord Hailsham, is a doughty ally. In his recent biography, this is what he had to say:

> What is needed is an explanation of rights which are universally acknowledged to exist both in the individual and the State, and some guidance of what these rights are and what is to happen when there is a conflict of interest... [P]articipation in the machinery of government by the individual provides no answer since his own will can always be overridden by more powerful or more numerous neighbours. Majority rule provides no answer since majorities can be and often are wrong...[45]

The opponents have been equally vigorous. Lord Lloyd answered his question, *Do we need a Bill of Rights?*, with a resounding 'No'.[46] The real question, he asserts, is who in the last resort is to have the final word. Is it Parliament or the courts? Sir Leslie Scarman's answer (and Hailsham's) is that 'it is the duty of the courts to protect even against the power of Parliament'. Lord Lloyd finds this argument 'both inexpedient as well as difficult to reconcile with democracy'.[47]

This debate has been further enlivened by two developments which should be mentioned. The first is the impetus for reconsideration of the constitutional settlement caused by the moves to devolve certain powers presently exercised at Westminster to a Scottish Assembly. The implications of this for judicial review and for the resolution of disputes

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42 Scarman, *op. cit.*, at p. 61ff.

43 *Ibid.*, at p. 76.

45 Lord Hailsham, *The Door Wherein I Went* (London, 1975), at p. 63.

46 Lord Lloyd of Hampstead, 'Do we Need a Bill of Rights?', (1976) 39 *Modern L.R.* 121.

47 *Ibid.*, at p. 129n.

concerning the distribution of power have not been lost on observers in the United Kingdom.[48] A new constitution would, of necessity, be a written constitution.

A mechanism, probably judicial, would have to be found to resolve disputes as to the distribution of powers; disputes with which we in Australia are well familiar. An activated judiciary, a written constitution and judicial review present the occasion to face the challenges outlined by Scarman and his supporters.

Perhaps emboldened by the public controversy, the courts in England have shown, even in the past months, a growing vigour in asserting individual rights against the Executive. The Court of Appeal in *Congreve* v. *Home Office*[49] held that the Home Secretary had no power to revoke a television licence which overlapped an existing licence and which had been bought before the date fixed for an increase in the licence fee. The Home Office had given the plaintiff the choice between paying the increased fee or having the new licence revoked prematurely. The plaintiff refused to pay. Phillips J. held against him. The Court of Appeal declared the purported revocation unlawful and of no effect. The demand for the increased fee and subsequent revocation would, so the Court held, be a misuse of power by the Minister and a contravention of the *Bill of Rights* 1689.[50] They were, said Lord Denning, an attempt to levy money for the use of the Crown without the authority of the Parliament. To Crown Counsel's assertion that if the court interfered in the case 'it would not be long before the powers of the court would be called in question', Lord Denning responded: 'We trust that this was not said seriously, but only as a piece of advocate's licence'.[51] Is it significant that Counsel was required to make a special apology to the Court and to explain that he was referring to the possibility of Parliament and not the Executive reviewing the exercise of such a power by the court. The Home Secretary apologized in the House of Commons. He stressed the independence of the judiciary whilst pointing out that fresh legislation might be necessary to overcome the difficulties that had occurred.[52]

Within recent weeks another case has arisen. *Regina* v. *Thameside Metropolitan Borough Council; Ex parte Secretary of State for Education and Science*[53] has shown again that the British judiciary is growing less deferential. In the result, a ministerial decision concerning a number of Thameside Grammar Schools was set aside. Of course, these decisions

48 (1976) 126 *New L.J.* 78; *The Economist*, 7th August 1976, at p. 10.
49 [1976] 2 *W.L.R.* 291.
50 *Ibid.*, at p. 308 (Lord Denning M.R.).
51 *Loc. cit.*
52 G. Ganz, 'T.V. Licences and the Bill of Rights', (1976) *Public Law* 14 at p. 15.
53 'Law Report', *The Times*, 26th July 1976 (Court of Appeal); 29th July 1976 (House of Lords).

with their appeal to individual rights against the Executive have enjoyed wide public support.[54] But they have also had their opponents, one writer even suggesting that the *Thameside* decision 'has certainly put paid to any Bill of Rights being supported by the Labour Party'.[55]

THE AUSTRALIAN DEBATE

As the United Kingdom and Canada edge gradually towards the international movement for court-enforced guaranteed civil rights, what are we in Australia doing to review our situation? We are surely not entirely immune from the pressures that have led to these developments elsewhere in like communities. Many of the challenges to the rule of law and to the relevance and effectiveness of the legal system mentioned by Scarman in his *Hamlyn Lectures,* and more recently in his *Goodman Lecture,*[56] face us in Australia. No State of Australia has a Bill of Rights. The Founding Fathers, when they settled the Australian Constitution, agreed by a small majority not to include a Bill of Rights, after the American model.[57] Such 'rights' as were mentioned in the Constitution (section 92 apart) have received scant attention and circumscribed interpretation. The traditional explanation for this, in Sir Owen Dixon's words, is as follows:

> Civil liberties depend with us upon nothing more obligatory than tradition and upon nothing more inflexible than the principles of interpretation and the duty of courts to presume in favour of innocence and against the invasion of personal freedom under colour of authority.[58]

The doctrine of parliamentary sovereignty, even within its federal limits, dies hard. Important civil liberties have been defended by the High Court but always by the techniques of 'strict and complete legalism',[59] and often without the slightest mention of the 'civil right' involved.[60]

The traditional approach has been taken in Australia that matters of this kind are best left to Parliaments; that judges are ill-equipped to deal with such issues; that we would destroy the standing and impartial apolitical reputation of the judiciary if we were to involve them in such matters; that in a democracy, it is for elected legislators and not judges to change the law.

Scarman and others say that this theory breaks down under the pressures of modern life. Power has moved from Parliament to the

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54 *The Economist*, 7th August 1976, at p. 10.

55 C. Price, 'The New Lawmakers', *New Statesman,* 6th August 1976, 163 at p. 164.

56 The Right Hon. Lord Justice Scarman, *Fourth Goodman Lecture,* 18th May 1976, *mimeo,* at pp. 9ff.

57 J. A. La Nauze, *The Making of the Australian Constitution,* (Melbourne, 1972), at pp. 227-32.

58 Sir Owen Dixon, *Jesting Pilate and other Papers and Addresses* (Sydney, 1965), at p. 153.

59 (1951-52) 85 *C.L.R.* at p. xiv.

60 McWhinney, *op. cit.* at pp. 81-95.

Executive and from the Executive, elsewhere.[61] Parliament has neither the time nor the inclination nor (save in exceptional circumstances) the power, to right the many wrongs that exist in society. One can add to this contention the additional complications in a federal State where responsibilities are all too often avoided by the simple device of ascribing the obligation for action to others.

In recent years under successive Governments, the Commonwealth Parliament has been relatively active in advancing civil rights. The Administrative Appeals Tribunal is now in operation to hear appeals from the decisions of administrators. Where it thinks fit it is empowered to overrule these decisions and substitute its own.[62] The proposed federal Ombudsman will have a function to investigate complaints, detect what might broadly be called maladministration and make recommendations for remedial action. If his recommendations are not accepted he can inform the Prime Minister and make a report to the Parliament.[63] The Commonwealth Attorney-General, Mr Ellicott, has also foreshadowed an *Administrative Procedure Act* to provide uniform procedures before Commonwealth administrative tribunals and to ensure that the basic rules of natural justice are observed. He also foreshadows legislation to simplify procedures whereby legal proceedings can be taken against Commonwealth public servants.[64] These are undoubtedly comprehensive measures that will help to remedy, without a Bill of Rights, some of the challenges that the English debate has focused upon. They do not end the catalogue of legislation on this subject initiated in the Commonwealth Parliament. Important legislation has been brought down in respect of aboriginals. A *Racial Discrimination Act* has been passed with machinery for enforcement. Specific legislation has been designed to meet specific problems.

THE LAW REFORM COMMISSION AND CIVIL RIGHTS

The Australian Law Reform Commission has a special place in this design. It was established following the *Law Reform Commission Act* 1973,[65] and in Parliament it had bipartisan support. This was reflected in a number of significant amendments moved by the then shadow Attorney-General, Senator Greenwood, and accepted by Senator Murphy, then Attorney-General. One of those amendments is particularly relevant in the present context. It is now section 7 of the Act:

> 7. In the performance of its function, the Commission shall review laws to which this Act applies and consider proposals, with a view to ensuring —

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61 Scarman, Goodman Lecture at p. 9.

62 *Administrative Appeals Tribunal Act* 1975 (Cth).

63 Ombudsman Bill 1976 (Cth).

64 R. J. Ellicott, *op. cit.* n. 20, at p. 6.

65 Act No. 221 of 1973, assented to on the 20th December 1973, proclaimed to commence on the 31st December 1974.

(a) that such laws and proposals do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and
(b) that, as far as practicable, such laws and proposals are consistent with the articles of the International Covenant on Civil and Political Rights.

So far as I am aware, this is the only reference in an Australian statute to the International Covenant. It imposes a novel, special statutory duty on the Law Reform Commission. I pass over the terms of section 7 (a). It has its origins in the principles adopted by the Australian Senate Regulations and Ordinances Committee.[66] Explaining the incorporation of reference to the International Covenant, Senator Greenwood said this:

> I think that there is some novelty in the provision relating to the articles of the International Covenant on Civil and Political Rights. Its use as a standpoint from which all legislation which is being reviewed could be tested in order to ascertain whether it accords with those principles is also a desirable function of the Commission to have in mind. I think that the projected Human Rights Bill which has yet to come up for debate in this Senate seeks to incorporate those articles as part of the substantive law of the Commonwealth. I am sure that the Attorney-General is already aware of the many comments which are being made as to the problems this Bill will create. That is a matter for subsequent debate and subsequent decision. But at least in the work which this Commission undertakes it can certainly perform a useful function by having regard to the general standards and principles which are contained in the International Covenant on Civil and Political Rights, and I think that this is of benefit. I cannot see disadvantage in it being part of the obligation of the Commission to act in that way.[67]

Senator Murphy embraced the amendment as a 'very welcome one' and thanked Senator Greenwood for the suggestion. It became section 7 of the Act. It may in time become a provision of considerable importance.

A number of important questions raising civil rights have already been referred to the Commission. The Commission's first two reports on *Complaints Against Police*[68] and *Criminal Investigation*[69] involved inevitably striking a balance between the protection of human rights and civil liberties on the one hand and the community's need for practical and effective law enforcement on the other. In the preamble to the Terms of Reference signed by the Attorney-General, specific attention was drawn to this need and to 'the commitment of the Australian Gov-

66 Senator I. J. Greenwood, Q.C., *Commonwealth Parliamentary Debates (The Senate)*, 6th December 1973, at p. 2603.
67 *Loc. cit.*
68 A.L.R.C. 1, Canberra, 1975.
69 A.L.R.C. 2, Canberra, 1975.

ernment to bring Australian law and practice into conformity with the standards laid down in the International Covenant on Civil and Political Rights'. The Covenant was therefore before us, not only in our statute but in the Reference which initiated our work on the project.[70] In fulfilment of the Reference, the Reports proposed the introduction of independent elements in the receipt, investigation and determination of complaints against police. The *Criminal Investigation* report reflects in many places the scheme, content and even language of the International Covenant.[71] New procedures are proposed for custodial investigation by police.[72] Special provisions are suggested for disadvantaged members of the community: aboriginals, those not fluent in English and children.[73] Fair procedures for taking confessions, holding identification parades, the granting of bail and the conduct of searches are laid out.[74] The requirement, parallel to article 10 of the Covenant, is reflected in clause 28 of the draft legislation attached to the Report. Clause 28 (1) proposes that a person shall, while under restraint, be treated with humanity and with respect for human dignity.[75] These Reports are still under the consideration of theGovernment.

The references received in 1976 include those on *Privacy* and *Defamation* law reform. The reference on Privacy recites section 7 of the Act and calls particular attention to article 17 of the Covenant with its provision, *inter alia*, that 'no one shall be subjected to arbitrary or unlawful interference with his privacy'.[76] Likewise, the reference on *Defamation* calls to particular attention article 19 of the Covenant which asserts the right of everyone to have freedom of expression subject to restrictions provided by law including 'those necessary for respect of the rights or reputation of others'. Article 17 is also referred to with its provision that 'everyone has the right to the protection of the law against [unlawful] attacks on his honour and reputation'.[77]

In the area of privacy, there is no doubt that the common law has proved relatively barren and statutory protection is at best piecemeal and inadequate.[78] In respect of defamation, many other problems exist which need not be recounted here. A reference on the *Bankruptcy Act* in its application to small or consumer debtors, on the other hand, does

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70 The Terms of Reference are set out on p. v of A.L.R.C. 1 and p. ix of A.L.R.C. 2.

71 *Criminal Investigation*, A.L.R.C. 2, at p. 59; Clause 28 (1) of the draft Bill.

72 *Ibid.* Ch. 4.

73 *Ibid.* Ch. 9.

74 *Ibid.* Ch. 5.

75 *Ibid.* at pp. 59, 177.

76 Reference to the Law Reform Commission on *Privacy* by the Hon. R. J. Ellicott, Q.C., M.P., Attorney-General, 9th April 1976.

77 Reference to the Law Reform Commission on *Defamation* by the Hon. R. J. Ellicott, Q.C., M.P., Attorney-General, 23rd June 1976.

78 As to the common law, see *Victoria Park Racing and Recreation Grounds Co. Limited* v. *Taylor* (1937) 58 *C.L.R.* 479.

not draw specific attention to the Covenant. But the Covenant is not for that reason irrelevant to the reference. Bankruptcy typically involves deprivation of property and occasionally involves loss of liberty, just as State debt-enforcement systems may involve either. In examining laws which deal with insolvency, the Commission must bear in mind both article 14, to which I have already referred, and article 11 of the Covenant, which states: 'No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation'. Recent American decisions amply attest to the relevance of fundamental freedoms in a proper assessment of creditors' remedies and debt-enforcement systems. Like observations could also be made on the Commission's other references on *Human Tissue Transplants* and *Insurance Law*.

What is to be noted is the mechanism adopted to add flesh to the human rights asserted in the International Covenant. The vehicle used is the Law Reform Commission. Its role, bearing in mind the Covenant and the specific areas under reference, is to give content to the declaration of general rights and provide machinery through legislation and otherwise for their protection and advancement. The Commission will ventilate its tentative views in the community. It will seek to enlist expert and community opinion by the method of working papers. But it will also aim to enlist a more active participation by use of public sittings, public exposure of its ideas in the media and consultations in all parts of Australia.

The Commission has no general warrant to reform even that attentuated part of Australian law which is within the power of the Commonwealth Parliament. It acts only on references received from the Commonwealth Attorney-General. I have said that an important function of the Canadian *Bill of Rights* is the role it assigns by statute to the Canadian Minister of Justice to scrutinize legislation to ensure its compliance with the principles contained in the Bill. The obligation imposed upon the Law Reform Commission by Senator Greenwood's amendment is not at large. It is limited to the performance by the Commission 'of its functions'. These functions are to review laws and proposals 'in pursuance of references to the Commission made by the Attorney-General'.[79] Clearly, therefore, a reference is necessary before the Commission can pursue any given course of enquiry. This does not necessarily mean that the reference must be highly specific in focus. It would seem quite possible to me for the Commonwealth Attorney-General to give the Commission a general reference to 'review laws to which the Act applies'. Such a reference might require the Commission to report either at regular intervals or as frequently as infringements were found against the criteria set out in the International Covenant.

The reference now given to the Commission on *Privacy* requires it in terms to scrutinize the laws of the Commonwealth Parliament or of the

79 *Law Reform Commission Act* 1973, s. 6 (1).

Territories and to identify any that give rise to or permit undue intrusions into or interferences with privacy.[80] This is a wide mandate, but one worthy of a national law commission. Without incorporating the International Covenant on Civil and Political Rights into domestic Australian law at this stage, would it not be possible for a reference to be given to the Law Reform Commission which required it to consider Commonwealth legislation against the general principles which the international community has adopted for civil and political rights? The notion of giving an executive agency a watchdog role over legislative activity is by no means unique, especially in this area. The value of independent scrutiny, separate from the executive government, does not require elaboration.[81]

RIGHTING WRONGS

The move for a new Bill of Rights in the United Kingdom has received impetus substantially because of the conclusion of many that the piecemeal approach now favoured in Australia is inadequate. Parliament, it is said, is just not capable of dealing with all of the wrongs of society. It must arm the judiciary with new weapons to enable judges to do so in appropriate cases. Mr Golder should have his remedy in the United Kingdom. The Queen's courts should fulfil their traditional role, adapting to the challenges and needs of modern times.[82]

What happens to the complaint of a prisoner like Sidney Golder or my Australian correspondent? He may complain to Parliament. But Parliament has many problems to solve. The complaint is a special one. In any case, it is a State matter. He is a member of a small, unrepresentative and probably unpopular group. He in all probability cannot exercise a right to vote. He enjoys little power as a lobby. A resolution or two may be passed by those concerned with civil liberties or by a group of sensitive lawyers.[83] Under our system, the realistic chances of anything much being done to right his wrong are relatively small.

The Law Reform Commission now has a reference on *Defamation.* It requires us to review, in the Commonwealth's domain, the law of defamation and report on desirable changes to the existing law, practice and procedure. There is, of course, no power to deal with the law of the State of New South Wales or the rights of a prisoner such as this. We may, within our Reference, be able to deal with the general issue and clarify the law for the Territories. If a uniform law could be achieved, perhaps this apparent injustice could be remedied for the future. There are so many 'ifs' and 'buts'. Foremost of these is the

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80 Reference on *Privacy*, paras (1) and (2) (a).

81 Apart from the Canadian example mentioned, there are many such bodies. The *Conseil Constitutionnel* in France and the United States Civil Rights Commission do like work of 'executive review'.

82 T. Harper, 'Unpredictable Watchdog', (1976) 126 *New L.J.* 327.

83 R. E. McGarvie, *Civil Liberties and Law Reform*, mimeo, 1969 at p. 3.

acceptance by parliament or parliaments of the proposals for law reform. The record for parliamentary implementation of law reform proposals in Australia is no better and no worse than that elsewhere.[84] The merits of parliamentary supremacy can only be seriously advanced where the parliamentary processing of reform proposals is a reality, not just a myth. The ultimate rationale advanced by Sir Leslie Scarman for his call for a Bill of Rights is put this way:

> The real contribution of the legal process is to ensure that disputes will be handled in a low-key way, that their resolution will be a routine business, that controversy will be kept within limits and handled without passion.[85]

We cannot solve all of the problems of society through parliament, through a Law Reform Commission, through specific legislation or through a new Bill of Rights. Certainly, the Law Reform Commission offers a potentially valuable new mechanism to assist parliaments to reform, modernize and simplify the law. A general reference, suggested by section 7 of the Commonwealth statute, might be a new means to enliven parliamentary awareness of the international movement for civil rights. It might heighten sensitivity to impairment of rights in parliament, within the bureaucracy and in the community generally.

Especially in a federation, this leaves significant areas of the law where injustice can persist. Can new means be found to promote parliamentary reform of the law and to facilitate the implementation of law reform proposals and the expansion of the work of law reform? Unless they can, I predict that the civil rights debate will be rekindled in this country. A system of law may perpetuate uncorrected injustice. It may do so by passing the constitutional buck, procrastinating on law reform proposals or turning a blind eye to the injustices of minorities who have no immediate leverage. If this happens in Australia, the demand of the people, even those appreciative of all the risks, will be that judges should be armed to do justice with the same vigour as their forebears did in earlier times. If this means arming them with new weapons, then a new Bill of Rights may be required and a new breed of lawyers found with a passion to reform the law and to right its wrongs.

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84 The Law Reform Commission (Cth), *Annual Report 1976*, A.L.R.C. 5, para 17.

85 Scarman, Goodman Lecture, at p. 20.