MEASURES FOR THE PROMOTION OF HUMAN RIGHTS:

General Observations on Underlying Principles and Philosophy of Human Rights Legislation Introduced into the Australian Parliament

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The purpose of this paper is to make some general observations on the underlying principles and philosophy of the legislation that has been introduced recently into the Australian Parliament to promote the observance of fundamental rights and the elimination of racial discrimination.

It is the policy of the present Government that legislation of the Australian Parliament should be employed to implement international treaties on human rights and to enable those treaties to be ratified by Australia[1]. In pursuance of this policy, the Attorney-General of Australia, Senator Lionel Murphy, QC, has introduced into the Senate a Human Rights Bill[2] to implement the International Covenant on Civil and Political Rights and a Racial Discrimination Bill[3] to implement the International Convention on the Elimination of All Forms of Racial Discrimination. In the development of this legislation some underlying principles have emerged concerning the measures that ought to be adopted to promote the principles contained in these treaties. The treaties contemplate both the introduction of legislation to guarantee rights and prohibit discrimination and the adoption of judicial, administrative and other measures.

The promotion of human rights is one of the central features of the United Nations Charter. In the Charter, members of the United Nations have pledged themselves to undertake action, in co-operation with the United Nations Organization, for the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[4] It is to be observed that members have pledged themselves to take this action both "separately" and "jointly" — that is to say, by individual national action as well as by actions of international co-operation.[5]

The International Covenant on Civil and Political Rights provides that each State Party is to undertake to ensure to all the rights recognised in the Covenant without distinction of any kind. The Covenant requires that such legislative or other measures as may be necessary are to be taken to give effect to the rights recognised in the Covenant. Each State Party is to ensure

that any person whose rights or freedoms are violated shall have an effective remedy, to ensure that any person claiming to have such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities and to ensure that such remedies are enforced when granted.[6] The Covenant also requires States' Parties to undertake to submit reports on the measures they have adopted to give effect to the rights recognised in the Covenant.[7]

The International Convention on the Elimination of All Forms of Racial Discrimination provides that States' Parties are to pursue by all appropriate means a policy of elimination of racial discrimination in all its forms and promoting understanding among races. States' Parties are to prohibit racial discrimination by legislation as required by circumstances,[8] and to assure to everyone effective protection and remedies through the competent national tribunals and other State institutions.[9] States' Parties are also to adopt effective measures, particularly in the field of teaching, education, culture and information to combat racial discrimination.[10] States' Parties are to submit reports on the legislative, judicial, administrative and other measures adopted to give effect to the provisions of the Convention.[11]

Consideration has therefore been given not only to the role of legislation but also to the role that should be played by a variety of other measures to give effect to the treaties. The principles that have emerged in the development of the legislation and the implementation of the Government's policies on human rights are as follows—

(1) the guarantee of fundamental rights and the prohibition of racial discrimination should be embodied in legislative form;
(2) there should be created a comprehensive framework of legal remedies for the enforcement of these rights;
(3) there should be established formal administrative machinery to investigate infringements of fundamental rights and individual instances of racial discrimination and attempt to achieve a settlement of issues by conciliation; and
(4) facilities should be established to enable programs of education and research and other programs to be fostered to promote human rights and to combat racial discrimination.

Role of Legislation

The role of legislation in the promotion of human rights has both policy and legal aspects. The importance of the role of legislation as a stratagem in the promotion of human rights and the elimination of racial discrimination is widely recognised. History has demonstrated repeatedly that the giving of written expression to rights is an important means of safeguarding them. Statutes and Charters proclaiming fundamental rights have provided enduring monuments that have both practical and educative value. The embodiment of rights in legislative form can make people more aware of their rights and make infringements of rights more obvious and conspicuous. The proscribing of racial discrimination can provide not only important legal sanctions but also furnish an essential social background upon which to base changes to basic community attitudes. The fact that racial discrimination is unlawful can make it easier for people to resist social pressures that result in discrimination.[12]

As stated above, the International Covenant on Civil and Political Rights provides that the rights recognised in the Covenant must be ensured to all and the International Convention on the Elimination of All Forms of Racial Discrimination requires States' Parties to prohibit racial discrimination (as defined in the Convention) in all its forms. The common law is inadequate to provide the guarantees and protections that are required by these treaties. The passive stance taken by the common law provides no basis for the positive orders that would be required for this purpose. Moreover, the common law is subservient to, and may be set aside by, statutory enactment. If guarantees of fundamental rights and protections against discrimination are to be achieved in Australia to the extent that will be required to enable the obligations contained in the treaties to be fulfilled, legislation will clearly be required.[13] Legislation therefore has a vital role to play in the promotion of human rights.[14]

Creation of effective remedies

The establishment of practical and effective remedies for the enforcement of rights that are established in legislative form is equally vital. As current events in many countries demonstrate, legislative declarations of principle are of little value unless they can be given practical expression. An important objective of the legislation is therefore to provide a comprehensive legal framework for the enforcement of rights. Under the proposed legislation, the Courts will be empowered to grant an injunction, make an order to rectify any injury caused and make an order cancelling a contract and the Court will also be empowered to award damages in respect of the loss suffered by an aggrieved person and the loss of dignity, humiliation and injury to the feelings of an aggrieved person.[15] The legislation therefore adopts existing remedies that apply in other areas of the law and supplements them with additional remedies that are appropriate in the area of human rights.

An important factor is the emphasis on civil, rather than criminal, law. The view has been taken that to provide a criminal sanction as the basic sanction would be wrong, not only because there is a consensus of opinion that there is already an undue proliferation of the criminal law but also because the criminal sanction would often serve to exacerbate the tensions that underlie the infringements of basic rights, particularly in the area of racial discrimination.[16]

Need for procedures for conciliation and systematic enforcement

The establishment of formal administrative machinery that will facilitate the investigation of infringements of rights and the enforcement of rights on a systematic basis, place emphasis on the importance of mediation and conciliation and reduce the need for costly litigation, are matters to which a good deal of attention has been given in the preparation of the legislation.

The view has been taken that it is not sufficient to rely merely on legal remedies and judicial review as a means of enforcement. To depend on the accident of litigation would be haphazard and an unsatisfactory method of achieving the objectives of the legislation.

Clearly something additional is required. To establish a systematic basis for the enforcement of the legislation, a Commissioner is established in each Bill as an independent statutory authority. The Commissioner will

deal with individual infringements of fundamental rights and instances of racial discrimination whether resulting from governmental or private action.

The employment of machinery for conciliation in the settlement of differences between racial groups is a practice that has gained wide acceptance in Northern America as well as in the United Kingdom and New Zealand.[17] These processes recognise that an agreement between the parties to a dispute can often have advantages not available in a judicial decree, in that it can deal more comprehensively with future relationships. It is also recognised that positive and lasting solutions to the problems created by racial tensions are often best achieved by the conciliation process.[18] The legislation now introduced in Australia would involve an extension of these processes to the investigation of infringements of civil and political rights, an innovation not previously provided for on a national level, although there are examples of systems operating at the international level.[19]

The pattern adopted is as follows. The Commissioner is to inquire into alleged infringements of the legislation and to endeavour to effect a settlement of the matters alleged to constitute those infringements. Emphasis has been placed on the Commissioner's role as an independent and impartial conciliator. Care has been taken to avoid any formal requirements in the legislation for the Commissioner to form an opinion as to the legal issues before embarking on conciliation in respect of a complaint. Where settlement cannot be achieved, the Commissioner, as a representative of the public interest, will have power to commence civil proceedings so that the issues can be determined by the courts. An important feature will be that complaint to the Commissioner will not be compulsory and an individual right of action will be provided in addition to that vested in the Commissioner. The establishment of an independent right of action in an aggrieved person is an innovation not provided in the legislative models referred to in the last paragraph. Further aspects are that the Commissioner will have power to take action on his own initiative where it appears that the legislation has been infringed. The Human Rights Commissioner will also have power to take action in respect of proposed infringements of basic rights. In addition, the Racial Discrimination Bill provides for the establishment of conciliation committees.

The placing of emphasis on the Commissioner's role as an independent and impartial conciliator is an important feature of the legislation. Overseas experience in the area of racial discrimination tends to show that a conciliator who has an independent and impartial role and who places emphasis on effecting a settlement rather than on determining the legal issues between the parties enjoys greater co-operation from respondents than a conciliator whose functions require him to make a judgment of the issues and identify himself with the complainant's cause. The success of Canadian Human Rights Commissions in this field is attributed partly to the emphasis placed on the independent and impartial approach. Those supporting this approach point out that confrontation and accusation tend to reinforce the discriminatory attitude and lead to a denial and to resistance to conciliation overtures.

The Race Relations Board of the United Kingdom often finds difficulty in obtaining satisfactory co-operation from respondents and it is to be noted that the function of the Board includes that of making a judgment of

the issues between the parties. The Race Relations Act of the United Kingdom provides that the Board is to inquire into the facts and "form an opinion" whether a breach of the Act has occurred.[20] If, on investigation of a complaint, the Board "forms the opinion that an act has been done which is unlawful" under the Act and it is unable to effect a settlement, the Board may commence civil proceedings. However, the Canadian laws avoid provisions of this kind. For example, the Ontario Human Rights Code provides that a person who has reasonable grounds for believing that any person has contravened a provision of the Act may file a complaint with the Ontario Human Rights Commission. The Code goes on to provide that the Commission "shall enquire into the complaint and endeavour to effect a settlement of the matter complained of" and that "where it appears to the Commission that a complaint will not be settled" the Commission is to recommend to the Minister whether or not a board of inquiry should be appointed to hear and decide the complaint.[21]

A related factor of some practical importance is the need to ensure that the conciliation procedures operate on a compulsory basis. Overseas experience has shown that the work of a Commissioner is liable to be frustrated by a lack of co-operation on the part of a respondent unless compulsory evidence-gathering powers are provided. The absence of evidence-gathering powers in the United Kingdom legislation is said to seriously impede the effectiveness of that legislation.[22] Respondents are not obliged to co-operate with the Race Relations Board in the United Kingdom and it is understood that a great number do not in fact co-operate satisfactorily. It may take eighteen weeks or more to investigate a complaint and respondents are able to delay and frustrate the settlement process.

The Ontario Human Rights Commission, on the other hand, appears to receive satisfactory co-operation. This may be due to a number of factors, but it would seem that one important factor is that the Commission has the powers of a Commission under the Public Inquiries Act, 1971, of Ontario[23] (an Act similar to the Royal Commissions Act of Australia). It appears that these powers are, in fact, rarely if ever used but the fact that they have been given to the Commission means that a respondent cannot frustrate the Commission's endeavours to effect the settlement.

The Racial Discrimination Bill[24] does not vest compulsory evidence-gathering powers in the Commissioner.[25] In keeping with the emphasis on the Commissioner's independent role it was decided to devise a different system. Accordingly, the Bill gives power to the Commissioner to call a compulsory conference for the purpose of inquiring into a complaint and endeavouring to effect a settlement.[26] In addition, the Bill will enable the Commissioner to apply to a Judge for the issue by the judge of a notice requiring a person to give evidence in relation to a matter that is the subject of an inquiry under the Act.[27] Evidence so obtained will not be admissible in other proceedings, except proceedings for giving false evidence. However, the procedure will enable the Commissioner to obtain information which is required to enable him to properly investigate the complaint and conduct meaningful negotiations for a settlement of the issues. It is hoped that the procedure will ensure that the conciliation process is not frustrated by non-co-operation. As an additional safeguard to the processes established by the legislation, the Bill also makes it an offence to obstruct or interfere

with the Commissioner or to intimidate or dismiss from employment a person who seeks a remedy under the Act.

Education and Research

Finally, the legislation recognises the important role to be played by programs of education and research and other programs to promote human rights and combat racial discrimination. Overseas experience has shown that the success of legislation dealing with racial discrimination depends very much on the effectiveness of programs of this kind. In the field of racial discrimination, the changing of community attitudes and the promotion of understanding, tolerance and friendship among racial or ethnic groups is a matter of vital significance. The Racial Discrimination Bill thus recognises that anti-discrimination laws cannot operate in a vacuum, but must be accompanied by positive programs designed to reduce racial tensions. The Bill recognises that both governmental and community-based programs to combat racial discrimination are necessary.[28]

As recognised in the Racial Discrimination Convention,[29] action in the fields of teaching, education, culture and information is required. Explanatory material on human rights must more actively be brought to the attention of educational institutions and professional, trade and community organisations as well as the general public. Working relationships between relevant groups need to be strengthened and new relationships with ethnic and other groups need to be established. Research at both the governmental level and within academic institutions needs support on a systematic basis.

A specific framework is therefore required within which the broader social issues that affect the observance of human rights can be tackled and it is necessary to establish a body with trained staff and a budget that will have the specific function of dealing with these issues. It is also necessary to establish bodies on which the community will be represented on these matters at both the national and local levels. Of great importance will be the enlistment of the support of resources at the local community level. Emphasis will need to be placed on the need for local resources to participate in the determination of measures to promote human rights and tolerance and friendship among racial or ethnic groups, and in putting these measures into effect.

To meet these objectives, the Racial Discrimination Bill 1974 provides that the functions of the Commissioner are, among other things, to promote an understanding and acceptance of, and compliance with, the Act and to develop, conduct and foster research and educational programs and other programs for the purpose of—

(a) combating racial discrimination and prejudices that lead to racial discrimination;
(b) promoting understanding, tolerance and friendship among racial and ethnic groups; and
(c) propagating the purposes and principles of the Convention.[30]

The latter objectives are those encompassed in Article 7 of the Racial Discrimination Convention which will place an obligation on Australia to conduct programs of this kind. A separate body is set up under the United Kingdom Act to foster harmonious community relations[31] but functions of this kind are combined with the conciliation functions of Human

Rights Commissions under the Canadian legislation.[32] It has been decided to follow the latter course in the Australian Bill and vest these functions in the Commissioner, rather than create a separate body. Similar functions could be vested in the Commissioner established by the Human Rights Bill, when that Bill is revised and re-introduced.

The legislation also establishes a Human Rights Council and Community Relations Council that will have important advisory functions. The Councils will enable representatives of the community to have a voice in these matters. They will have power to make recommendations with respect to the observance and implementation of the relevant treaties, the promotion of educational and research programs, the publication and dissemination of material, and the promotion of respect for human rights and understanding, tolerance and friendship among racial and ethnic groups.

Conclusion

It has not been the purpose of this paper to deal with all of the issues that arose for consideration in the preparation of the Bills under discussion. For a variety of legal and policy reasons, improvements in some areas that are in contemplation overseas have been avoided in the Australian legislation.[33] The development of legislation in this field in both Australia and overseas is still in its formative stages and will require revision and reassessment.

It has been the purpose of this paper to describe in general terms the objectives of the legislation. The legislation has been based on the philosophy that laws guaranteeing basic rights and proscribing discrimination are vital, but not in themselves sufficient. It recognises that there must also be effective and systematic enforcement of rights and the promotion of education and research, if the full measure of human rights is to be achieved in fact as well as in theory.

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1 See third recital of Racial Discrimination Bill introduced on 31 October 1974 which places reliance, inter alia, on the power of the Australian Parliament to make laws with respect to external affairs.

2 Introduced into the Senate on 21 November 1973, but not reached for debate before Parliament was prorogued early in 1974. The Government proposes to reintroduce the Bill.

3 Introduced into the Senate on 21 November 1973. Re-introduced on 4 April 1974 shortly before Parliament was dissolved for general elections. Introduced again on 31 October 1974. At the time of writing, the Bill had not been reached for debate.

4 Article 55

5 Article 56

6 Article 2

7 Article 40

8 Article 2. In regard to the requirement to "prohibit" racial discrimination, see debates of Human Rights Commission on 27 February 1964 (E/CN4/SR787 and 788).

9 Article 6

10 Article 7

11 Article 9

12 See A E Bonfield, *The Role of Legislation in Eliminating Racial Discrimination* (Race, Vol 7 No 2, October 1965); Lester and Bindman, Race and Law pp 85-6 (Penguin, 1972)

13 See Lester and Bindman, op cit, pages 25-6.

14 See generally Gareth Evans, *Anti-Discrimination Laws, Monash University Seminar, Aborigines and the Law*, 12-16 July 1974 and *New Directions in Australian Race Relations Law* (48 ALJ 479). See also Lasok, *Some Legal Aspects of Race Relations in the United Kingdom and the United States* (1967, Vol 16 Journal of Public Law 326).

15 Human Rights Bill 1973, clause 40; Racial Discrimination Bill 1974 (31 October 1974), clause 26. The power to make positive orders is contained in Ontario Human Rights Code, s 14c, but is not contained in the United Kingdom or New Zealand Acts. The extension of damages for loss of dignity and humiliation is included in New Zealand Act, s 22, but is not provided for in the United Kingdom or Canada.

16 See Tarnopolsky, *The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada* (46, *CBR* 565 at page 586). Compare McRuer, *Inquiry into Civil Rights* (Ontario, Vol 5, at pages 1982-3).

17 Eg Ontario Human Rights Code, Revised Statutes of Ontario, 1970, Chapter 318 as amended in 1971 and 1972; Race Relations Act 1968, United Kingdom; Race Relations Act, 1971, New Zealand.

18 K J Keith, *Essays on Race Relations and the Law in New Zealand*, p 65 (Sweet and Maxwell, 1971); Daniel G Hill, *The Role of Human Rights Commission: The Ontario Experience* (19 University of Toronto Law Journal 390 (1969)). See also Ian A Hunter, *The Development of the Ontario Human Rights Code: A Decade in Retrospect* (1972), 22 University of Toronto Law Journal 237).

19 Eg European Commission of Human Rights

20 Section 15

21 Sections 13, 14 and 14a

22 Lester and Bindman, op cit, page 379. See also B A Hepple, *The British Race Relations Acts* 1965 *and* 1968 (1969, 19 University of Toronto Law Journal at page 255).

23 Section 14(4)

24 As introduced on 31 October 1974

25 Cf compulsory evidence-gathering powers included in such Acts as the Copyright Act (Ss 167, 172), the Income Tax Assessment Act (Ss 263, 264), the Industries Assistance Commission Act (Ss 34, 35), the National Health Act (Ss 127-9), the Prices Justification Act (Ss 23-6), the Public Accounts Committee Act (Ss 13-15), the Royal Commissions Act (Ss 2-5), the Trade Marks Act (Ss 119-121), and the Trade Practices Act (Ss 155-160). Similar powers are vested in the Race Relations Conciliator under the New Zealand Race Relations Act.

26 Clause 22

27 Clause 23

28 See Louis Kushnick, *British Anti-discrimination legislation in Prevention of Racial Discrimination Legislation in Britain*, Ed by S Abbott (Oxford University Press, 1971); Daniel G Hill op cit (Note 18).

29 Article 7

30 Clause 20(d) of Bill introduced on 31 October 1974.

31 Community Relations Commission established by Part III of Race Relations Act 1968.

32 In Canada, the following bodies have been established to investigate complaints of racial (and other) discrimination and to develop programs of education and research to combat such discrimination—

Alberta Human Rights Commission
Human Rights Commission (British Columbia)
Manitoba Human Rights Commission
New Brunswick Human Rights Commission
Human Rights Commission (Newfoundland)
Nova Scotia Human Rights Commission
Ontario Human Rights Commission
Minimum Wage Commission (Quebec)
Saskatchewan Human Rights Commission

The establishment of a Canadian Human Rights Commission is also under consideration.

33 Eg provisions relating to discrimination in private clubs; provision of power to investigate patterns of behaviour and suspected instances of unlawful discrimination. See Lester and Bindman, op cit page 378; Brockway Bill introduced in House of Lords on 20 March 1974.