HUMAN RIGHTS AND CRIMINAL LAW IN NEW SOUTH WALES: THE INTERNATIONAL CONTEXT

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The CCL engaged Dr Tim Anderson and Ms Solange Rosa to carry out the necessary research and to write a draft report on the project. The draft, after modification and editing, was then approved by the Committee of the CCL.

CONTENTS

1. Introduction

2. Method

3. International Protection of Human Rights
3.1 Introduction
3.2 Sources of international human rights law
3.3 The UN human rights system
3.4 The major human rights instruments
3.5 Human rights and national sovereignty

4. Relevant Articles in International Covenants
4.1 Police powers
4.2 Pre-trial
4.3 Trial
4.4 Criminal and custodial sanctions
4.5 Equality before the law

5. Human Rights in the Australian System
5.1 How International Human Rights Law becomes Australian Law
5.1.1 Implementation of the ICCPR
5.1.2 Implementation of CROC
5.1.3 Mechanisms for promoting and protecting human rights
5.2 Constitutional and Legislative Mechanisms
5.2.1 Australian Bills of Rights
5.2.2 Federal legislation and implied rights
5.3 The Judiciary and Human Rights
5.4 Obligations of States and Territories
5.5 Conclusion

6. Criminal Justice in New South Wales
6.1 Rights and Police Powers
6.1.1 Knife searching powers
6.2 Pre-trial Rights
6.2.1 Offence-based restrictions on bail
6.2.2 Mandatory defence disclosure

7. Further Aspects of Criminal Justice
7.1 Trial Rights
7.1.1 Restricted Cross-Examination of Sexual Assault Victims
7.1.2 The 'Reasonable Explanation' in Weissensteiner
7.2 Rights and Criminal Sanctions
7.2.1 Retrospective life penalties
7.2.2 Compensation for victims of miscarriages of justice

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7.3 Equality Before the Law
7.3.1 General Police immunities
7.3.2 Aborigines
7.4 Conclusion

8. A Bill of Rights?

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1. Introduction

This is a report on the extent to which New South Wales (and relevant Australian federal) criminal justice laws meet internationally accepted human rights standards. We note that, as we were preparing this report, the New South Wales Legislative Council set up a parliamentary inquiry into a State Bill of Rights. We welcome this inquiry.

Human rights have become of increasing relevance, nationally and internationally, in recent years. Despite substantial counter trends in many aspects of the globalisation of corporate power, human rights conventions agreed to in the latter half of the twentieth century are carrying increasing weight, and increasingly affect systems of governance.

International war crimes tribunals and national prosecutions for crimes against humanity have battered the old notion of state or parliamentary 'sovereignty'. It is certainly not true now, if it ever has been in the modern era, that states or their representative bodies have either (i) absolute power, or (ii) the moral authority to negate accepted human rights standards.

The Pinochet case, where the former Chilean dictator was held in Britain pending extradition to Spain on charges of torture, demonstrates the recent rise of human rights in common law jurisdictions, and the corresponding decline in the old notions of state sovereignty. As one Australian newspaper editorial noted:

> General Augusto Pinochet may have escaped justice but future Pinochet's will not. The barrier that state sovereignty had posed to international human rights law has fallen. (The Sunday Age 2000)

Similarly, the respected human rights lawyer Geoffrey Robertson commented:

> The Pinochet precedent marked an astonishing advance for global justice. It identified the Achilles heel in the armour of state sovereignty, the legal fiction which had always protected political criminals…[The duty of all countries] is either to try them, or to extradite them to a country which is willing to put them on trial. (Robertson 2000)

International convergence on this issue has become a refreshing and independently powerful force of globalisation.

In domestic law, human rights have also played an increasing role. The most recent and prominent example has been the national debate over 'mandatory sentencing' laws in the Northern Territory and Western Australia, a debate brought on by Greens Senator Bob Brown's private members' bill to override these laws, using the Commonwealth's external affairs power. In the course of this national debate, and in the face of Prime Minister John Howard's reluctance to support the initiative, important questions about the nature of democracy have been raised. Several Supreme Court judges from New South Wales spoke out, questioning:

> the simplistic notion that democracy is merely the majority will… It is racist and cowardly to enact and implement laws which apply most harshly to a disempowered minority… it is not leadership to pander to ignorance and prejudice. (Wood, Fitzgerald, Beazley and Stein 2000)

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The Liberal-National federal government – reluctant to use its clear constitutional power to overrule State government laws in breach of national human rights commitments, yet anxious to preserve its reputation as a supporter of human rights – apparently pressured the United Nations to alter its advice as to whether the mandatory sentencing laws breached convention obligations. Several adverse judgements were made in draft form which did not appear in the final report of the United Nations Human Rights Commission (Riley 2000).

While the 1970s and 1980s saw some legislative recognition of Australia's human rights commitments (the federal *Race Discrimination Act* 1975, the federal *Sex Discrimination Act* 1984, the *Human Rights and Equal Opportunity Act* 1986, and various State *Anti-Discrimination Acts*), throughout the 1990s there was a long battle to make successive federal governments properly recognise, accommodate and fully accept their human rights obligations. The difficulties of this struggle illustrate the structural weaknesses of the system.

The Australian system is one in which there is no federal or State constitutional or legislative bill of rights. Nor is the attention of parliamentarians drawn to human rights commitments when laws are framed which are likely to breach those commitments. The Australian system, while on the one hand relying on common law rights, on the other hand allows State and federal legislatures to overrule these rights, and to overrule them without serious reference to or respect for national human rights commitments.

Federal government responses to human rights decisions have been mixed. Where favourable, the response has been minimalist and incremental. For example, after Aboriginal land rights campaigners persuaded the High Court to recognise their claims in the *Mabo* case (1992), a federal Labor government instituted a minimalist act in ways which appear to breach the *Convention on the Elimination of Racial Discrimination* (United Nations 1999). The federal Labor government responded slowly, and in a similar minimal fashion, to the United Nations Human Rights Committee's finding that the Tasmanian Criminal Code discriminated against homosexual men (Toonen v Australia 1994). This law (Sections 122 & 123 of the *Tasmanian Criminal Code Act* 1924) was eventually repealed by the Tasmanian Parliament, after passage of the federal *Human Rights (Sexual Conduct) Act* (1994), which prohibits arbitrary interference with the right to sexual privacy. These, two moves, the *Native Title Act* (1993) and the *Human Rights (Sexual Conduct) Act* (1994) represented the high points of federal recognition of human rights in the 1990s. However they were both slow and minimalist responses to many long years of campaigning, including international lobbying, by Aboriginal and gay activists.

On the other hand, the response of Labor and Liberal-National federal governments to the High Court decision in *Teoh's case* (High Court of Australia 1995) has been to attempt to negate the common law recognition of a treaty right. In this case the High Court read into administrative law the requirement of the *Convention on the Rights of the Child* (1989), at Article 3, that "in all actions concerning the children…the best interest of the child shall be a primary consideration". The High Court found that:

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> Australia's ratification of the Convention can give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the convention. (Teoh v R 1995, Mason C.J. & Deane J,183 CLR 273)

However it has now become a matter of bipartisan policy to legislate against this principle, both major parties expressing hostility to the idea that the High Court should infer human rights principles from Australia's treaty commitments, before the Parliament has decided to legislate. A Senate Inquiry into the *Administrative Decisions (Effect of International Instruments) Bill* 1997 produced both conservative and Labor support for the Bill (Senate Legal and Constitutional Committee 1997). This Bill would have the effect of blocking all common law recognition of Australia's human rights obligations, unless there were express parliamentary authorisation by legislation.

At the State level, a strongly condemned New South Wales law, the *Children (Parental Responsibility) Act* 1994 – allowing police to remove young people under 16 from public places – was substantially replicated three years later by the *Children (Protection and Parental Responsibility) Act* 1997. These Acts clearly contravene Australia's international human rights obligations as they deny children freedom of association and freedom of peaceful assembly (*Convention on the Rights of the Child*, Article 15). Both a State Government commissioned report (Evaluation Committee 1997:22) and a UN committee said so (Committee on the Rights of the Child 1997). However the NSW Labor Government ignored these warnings.

As a recent report on youth rights noted, there is a weak culture of human rights in Australia, and a deep structural weakness in the systemic response to human rights matters:

> *Toonen* has not forged an immediate path for protecting children's rights under CROC, nor the rights of refugees in detention under the ICCPR, nor the rights of NSW citizens who are now subject to arbitrary police stop and search powers through the NSW Labor Government's *Police and Public Safety Act* 1998 (Anderson, Campbell and Turner 1999:42).

This systemic weakness is one of the issues we will address in this report.

The purpose of this report is to consider and report on the problems faced in recognising human rights within the New South Wales criminal justice system, especially insofar as criminal justice laws may breach the ICCPR and CROC. We have chosen to audit criminal justice laws for three reasons. Firstly, the criminal law is a force which can dramatically alter the face of society, by redefining rights and responsibilities, either in support or in defiance of accepted human rights standards. Secondly, the breach of human rights standards by State laws often has far more serious consequences than breaches by individuals, or breaches through the actions of State servants. Thirdly, in New South Wales in recent years, there has been much evidence that the criminal law has been altered so as to degrade the human rights of all citizens of this State, and without reference to human rights commitments. It is these matters we plan to investigate.

We begin in chapter two by setting out our method of investigation. Chapter three then explains the international system of human rights, its origins and structure. Chapter four sets out the relevant articles of the *International Covenant of Civil and Political Rights*

ICCPR), thus establishing the benchmarks for our study. In chapter five we consider how human rights have been accommodated within the Australian system. Chapters six and seven take up a series of criminal justice laws, mainly State laws but also federal law applicable in New South Wales, seeking to explain their origins and applying international jurisprudence to these laws, to determine whether or not they breach human rights commitments. Finally, we draw some conclusions about the protection of human rights within the State and national system.

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2. Method

This report considers the criminal justice laws of New South Wales in several steps. First, it will set out and explain the international human rights framework. Second, it will detail the relevant articles and international jurisprudence on human rights law applicable to criminal justice. Third, it will examine the Australian legal and institutional framework for upholding human rights obligations. Fourth, it will audit existing criminal justice law against a number of questions based on the relevant principles of the major human rights treaties: the *International Covenant on Civil and Political Rights* (1966) and the *Convention on the Rights of the Child* (1989). These questions are spelled out below, and are organised into groups in chapters four six and seven. Finally, we will consider options to reform existing legal and institutional arrangements, which might better give effect to our international human rights obligations.

We accept a broad definition of criminal justice laws, as those rules which regulate the commission of serious wrongdoing ('crime'), by providing for state investigation, intervention, independent process and judgement, leading either to exoneration or to sanctions against the wrongdoer.

We focus our attention on questions which are formulated on clear and universally accepted human rights principles, but which also direct our attention to commonly contested and movable fields of legal regulation. The construction of these questions has been influenced by a similar 'democratic audit' on civil and political rights in the United Kingdom (Klug et al 1996). In interpreting the principles underlying these questions we have regard to (i) the qualifications attached to some rights under the respective treaties, (ii) the general comments made by the UN Human Rights Committee by way of treaty interpretation, and (iii) other related human rights instruments and declarations.

Our questions cover the five important areas of criminal law: police investigations, arrest and detention; pre-trial hearings and trials; sentencing and punishment and, more generally, equality before the law.

We have collected information on the State's criminal justice laws (i) by a review of criminal justice policy concerns drawn to the attention of the Council for Civil Liberties over the past thirty-seven years, (ii) by close analysis of the criminal justice legislative debate over the years 1994-1999, (iii) by interviews with several practising criminal lawyers, and (iv) by a questionnaire sent out to a number of community justice groups in New South Wales.

In the end we had so many candidates for analysis that we decided, in chapters six and seven, to deal with the more recent and most hotly argued alleged breaches of our human rights commitments. Not all of our questions have been practically addressed by the case studies of chapters six and seven, but the jurisprudence on the questions is developed in chapter four in any case. In chapters six and seven we have considered examples in each of the five criminal justice areas.

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We address the qualifications concerning, and the contextualisation of, treaty rights as each question and each legislative dilemma is posed. In principle we give little weight to Australia's (generally small and rare) reservations and declarations, preferring the Treaty formulations of rights. In practice, we address the concerns raised at the relevant point. For example, in Chapter Five we address Australia's attempts to distance itself from the provisions of ICCPR Article 2 (which requires rights to be recognised in all parts of a federation) by the reservation that rights will be dealt with by the relevant State or territory authorities, or "in consultation with" the federal government.

The audit questions are as follows. In chapters four six and seven they have been grouped into the abovementioned five categories. The source of the questions in the two relevant treaties is noted here after each question.

1. Cruel treatment
How effectively does the law prohibit the use of cruel, inhuman or degrading treatment or punishment, and to what extent does the law provide an effective remedy in case of such treatment? [ICCPR 7; CROC 37(a)]

2. Arbitrary arrest
To what extent does the law protect the right to life, liberty and security of the person, and prohibit arbitrary arrest or detention, and to what extent does the law provide an effective remedy in case of such treatment? [ICCPR 9(1); CROC 37(b)]

3. Right to bail
How clearly does the law ensure that it shall not be the general rule that persons awaiting trial be detained in custody? [ICCPR 9(3)]

4. Compensation for wrongful arrest and conviction
How effectively does the law provide for an enforceable right to compensation for unlawful arrest or detention, and for wrongful punishment? [ICCPR 9(5) & 14(6)]

5. Purpose of imprisonment
To what extent does the law and practice provide that the essential aim of the prison system shall be reformation and social rehabilitation? [ICCPR 10(3)]

6. The trial process
To what extent does the law provide for (i) a fair and public hearing before an independent tribunal, in which those charged with a crime (ii) may have adequate time and facilities to prepare their defence, (iii) are able to question witnesses called against them and call their own witnesses, and (iv) are afforded free assistance of an interpreter, where necessary? [ICCPR 14; CROC 40(2)(b)(iii)]

7. Presumption of innocence
How clear is it under law that a person is to be presumed innocent until proven guilty? [ICCPR 14(2); CROC 40(2)(b)(i)]

8. Right to legal assistance
How effective are procedures to ensure that those charged with a criminal offence may (i) defend themselves in person or through a lawyer of their choice, (ii) have free legal assistance if they cannot afford to pay? [ICCPR 14(3)(d); CROC 40(2)(b)(ii)(vi)]

9. Right to silence
How clearly does the law establish it that a person must not be compelled to confess to a crime or to provide evidence against him or herself? [ICCPR 14(3)(g); CROC 40(2)(b)(iv)]

10. Right to appeal
To what extent are all persons ensured the right to have a criminal conviction and sentence reviewed by a higher tribunal? [ICCPR 14(5); CROC 40(2)(b)(v)]

11. No double jeopardy or retrospective criminal law
How effective are procedures to ensure that a person is not finally tried or punished twice for the same offence, and that there are no retrospective crimes or penalties? [ICCPR 14(7), 15(1); CROC 40(2)(a)]

12. No arbitrary interference with privacy
To what extent does the law prohibit arbitrary invasion of privacy, in the course of criminal process, and to what extent does the law provide an effective remedy in case of such treatment? [ICCPR 17; CROC 16, 40(20)(b)(vii)]

13. Young people – avoiding arrest and imprisonment
To what extent does the law provide that arrest, detention and imprisonment for young people under eighteen is only to be used as a measure of last resort and for the shortest appropriate time, and that no child is subject to imprisonment without possibility of release? [CROC 37(a) (b)]

14. Young people – avoiding judicial process
To what extent does the law provide that, so far as possible and while respecting human rights, measures other than judicial proceedings be used for young people under eighteen? [CROC 40(3)(b)]

15. Equality before the law
To what extent does the law ensure that persons are treated as equals before the law? [ICCPR 2(1) & 14(1); CROC 2(1)]

16. Right to Life
How effectively does the law protect the right to life and defend the security of the person? [ICCPR 6 & 9(1)]

3. International Protection of Human Rights

By ratifying the major international human rights treaties Australia has taken on the obligation to ensure that everyone under its jurisdiction enjoys the rights set out in those treaties. Australian governments actively participated in the development of these treaties and, by an act of free choice, have agreed to be subject to scrutiny by the international bodies set up to administer the treaties. Australia has also agreed to some processes by which individuals may claim that their treaty rights have been violated.

In this Chapter we examine the basic concepts of international law directly relevant to the field of human rights. We outline briefly the important sources of international human rights law, in particular the major human rights instruments; the structures of the United Nations relevant to human rights development, monitoring and enforcement; and the international remedial mechanisms for breaches of human rights. The application of this system in Australia will be dealt with in following chapters.

3.1 Introduction to International Human Rights Law

The dominant concept of human rights, particularly characteristic of liberal and/or social democratic societies, relates to the individual human being. The human being is regarded as able to hold rights both against the state and against society. Proponents of human rights hope to create a countervailing force against oppressive state action.

The concept of 'human rights' accentuates the worth and dignity of the individual. As it is generally used today, the term 'human rights' refers to a spectrum of rights and freedoms regarded as being inherent, inalienable and universal. Inherent in that people enjoy these rights simply by reason of their humanity. Inalienable in that people cannot agree to give them up or have them taken away. Universal in that they apply to all persons, regardless of their sex, status, nationality, race or religion (DFAT 1998: 8).

A historical examination of human rights theory and practice is beyond the scope of this report, but it is important to note that various dimensions of human rights have existed for centuries. Though much focus is given to western lore on the origins of human rights, this does not imply that the concept is not relevant to non-western philosophies of human dignity. From Hindu and Buddhist texts, to notions of natural law and idealism during the time of Plato and Socrates, to the Magna Carta in 1215, to the American Declaration of Independence of 1776 and France's 1789 declaration of the Rights of Man and the Citizen (DFAT 1998: 10), there are outstanding examples.

The latter two represented important attempts to enshrine human rights as fundamental and guiding principles for newly emerged nations. These documents aspired to guarantee citizens fundamental freedoms against the arbitrary exercise of power by the state, although these freedoms did not apply to slaves.

The emphasis on individual rights is a radical departure from the way most traditional societies are organised. For many societies, insofar as 'rights' might be considered to be applicable at all, collective or communal rights are preferred to individual rights (Howard

1992: 81). A collective language of rights corresponds to something essential in our culture, a reflection in the political and legal fields of our fundamental conception of the human person and human dignity (Taylor 1986: 49).

For these reasons, a distinction is made in human rights theory between individual and collective rights. In contrast to the liberal notion of the isolated human being, the idea of collective human rights is founded on the view of humans as social beings. Collective rights are those rights exercised by individuals in groups: for example, the right to association, assembly, trade union rights and the right to self-determination. These rights are also classed as human rights.

Groups can be based on race, ethnicity, class, gender or sexuality. Collective human rights advocates seek to put constraints on the actions of states and other institutions toward these specific groups, by extending the framework of human rights around group rights. This requires not only constraints against the oppression of these groups, but also positive action on the part of organisations to meet basic entitlements.

We need to recognise the legitimacy of collective rights and their essential role but this does not have to occur at the expense of individual rights. The two are certainly compatible.

Traditionally, international law was concerned with relations between states and not with the domestic affairs of states, but gradually the international community came to acknowledge that human rights transcend domestic politics and are a legitimate concern of the international sphere. This is a position based on the belief that the universal observance of human rights principles will result in a more just international order, from which the security and prosperity of all nations and individuals will benefit. Prior to 1945 there was some protection for human rights at the international level, for example the protection of workers' rights under the International Labour Organisation (ILO) Conventions and the League of Nations system for the protection of minorities and the doctrine of humanitarian intervention (Blay et al 1997: 271). However, the atrocities committed in the name of the 'State' during the Second World War provided the major impetus for human rights protection at the international level. After the devastation of World War II, the international community decided it was time to set down specific principles for the proper treatment of human beings.

Since its inception at the end of the war in 1945, the United Nations (UN) played the pivotal role in developing, entrenching and promoting human rights principles among its member States. According to Article 1 of the United Nations Charter, the promotion and protection of human rights is one of the chief purposes of the United Nations. On 10 December 1948, the UN General Assembly (GA) adopted the Universal Declaration of Human Rights (UDHR). It may be noted that the President of the General Assembly at the time was the Australian External Affairs Minister, H.V. Evatt. The Universal Declaration was proclaimed by the General Assembly "as a common standard of achievement for all peoples and all nations," and is regarded as the foundation of the international human rights system. This was the first time in history that a document of

universal significance was adopted with broad international support. Although not a legally binding document, it is the most profound expression of international human rights norms. The continuing validity of the Universal Declaration was reaffirmed by the international community in the 1993 Vienna Declaration and Program of Action adopted by the Vienna World Conference on Human Rights.

The Universal Declaration rests on the notions that human rights are held by all human beings simply by virtue of their humanity and that there is a universally valid conception of what it means to live a fully human life. Contemporary international law went on to embrace the concept of human rights by defining them more precisely as those fundamental rights and freedoms acknowledged by states as having universal application in human relations. However, some non-western states have questioned the western roots of the assumption. In particular, these states have questioned the individualism of human rights. They argue that in their indigenous cultures, human dignity is based on the individual's participation in the community. Consequently, the individual's rights may differ according to cultural context (Blay et al 1997:272). Many of these distinctions and debates have contributed to the rich development of the international human rights system.

Following the adoption of the Universal Declaration, the UN commenced intensive negotiations on the drafting and adoption of a number of international instruments, which form the foundation of international human rights law. The human rights movement has since developed as a set of internationally recognised norms embedded in agreements and institutions, some of them state and some international. The human rights system relies primarily on international organisations, particularly the United Nations, to uphold and promote these norms.

3.2 Sources of International Human Rights Law

Public international law has developed as a set of rules and principles governing the conduct of states and their relations with other states. An important underlying condition in the evolution of international law is the consent of states to the corpus of international law. This consent can be clearly ascertained by reference to express agreements between states, for example treaties, and also by the way that states behave towards one another.

Unlike the sources of law in national systems of government, such as legislation or judicial decisions of the higher courts, there is no supreme law-making body in the field of international law. However, principles of international law are clearly enunciated in international conventions and other important sources of law. International law is the product of the actions of states, primarily through the acceptance of treaty rules or participation in the development of customary norms.

Article 38 of the Statute of the International Court of Justice (ICJ), the principal judicial body of the United Nations, enumerates a list of the main sources or 'evidence' of international law that an International Court would look to and the processes of

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lawmaking to be taken into account. The International Court's perspective is a useful point of departure for examining basic characteristics of international law.

The whole sources debate, whether at a theoretical or practical level with regard to identifying the rules of international law relevant to a particular dispute, centres upon Article 38(1).

Article 38(1) provides that the ICJ should apply:

- international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- international custom, as evidence of a general practice accepted as law;
- the general principles of law recognised by civilised nations; and
- judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law.

There is the question of whether Article 38(1) establishes a hierarchy of sources. If the parties to a dispute have established relevant rules by treaty, the Court will first look to that instrument and its interpretations, for the answer to the question. As the ICJ stated in the North Sea Continental Shelf Cases:

> "The first question to be considered is whether the 1958 Geneva Convention on the continental shelf is binding for all the parties in this case… Clearly if this is so, then the provisions of the Convention will prevail in the relations between the Parties, and would take precedence over any rules having a more general character, or derived from another source. On that basis the Court's reply to the question put to it…would necessarily be to the effect that as between the Parties the relevant provision of the Convention represented the applicable rules of law… and its sole remaining task would be to interpret those provisions, insofar as their meaning was disputed or appeared to be uncertain, and apply them to the particular circumstances involved" (ICJ 1969: 24).

An example in which a customary rule could outweigh a treaty provision would be where the rule in question is part of the *jus cogens*. Article 53 of the Vienna Convention on the Law of Treaties 1969 describes the *jus cogens* as a norm from which no derogation is allowed. For example, a treaty for the purpose of carrying out operations of piracy would be void and would not be enforced by an international tribunal. The existence of a rule of *jus cogens* is related to both general principles and customary international law which, as will be explained below, requires acceptance by the international community (Blay et al 1997:61-62).

From a human rights perspective, the two most important sources of international law remain treaty law and customary international law. But other sources, noted in Article 38, are also relevant to international human rights law. For example, there have been several important ICJ judgements concerned with upholding the universality of human rights. Similarly, the European Court of Human Rights has developed a jurisprudence of case law which, while it applies the provisions of the European Convention, has had a major effect on the jurisprudence of international human rights law. In addition, the writings of

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legal scholars have contributed to the understanding and development of international human rights laws and standards.

3.2.1 Treaties and international conventions

It is generally held that treaty making is an important part of international relations and an important source of international human rights law. Treaties have been the primary means for development of the human rights movement, as the path toward international regulation of many contemporary problems. Only treaties can create international institutions in which State Parties participate and to which they may owe duties.

Treaties may take many forms and are designed for a variety of functions. They can take the form of contracts between two or more parties; legislation that members of the international community use to regulate a particular aspect of their relations; and the constitutions of international institutions (Blay et al 1997:69) Treaties create legal obligations between states, and certain treaties may have major political bearings on relationships between states.

Generally states will regulate by treaty the relationship between themselves that would otherwise be governed by the rules of customary international law. Though less prevalent, it is also possible for a treaty to be adjusted to incorporate common practices arising between the parties to that treaty.

A whole body of law has developed to deal with the operation of a treaty – for example, formation of a treaty, its interpretation and performance, remedies for breach and amendment or termination. The law on treaties has been codified through The Vienna Convention on the Law of Treaties (VCLT), adopted by a Diplomatic Conference of States on 3 May 1969. This treaty on treaties entered into force on 27 January 1980 and as of May 1996 there were 79 parties to it. The VCLT is the binding international law between states that are party to it, in respect of treaties which fall within its terms.

A question arises as to whether the treaty-making rules that the Convention sets down in fact represent the customary international law of treaties. Many states have expressed the view that it does constitute customary international law and the ICJ has also stated that certain provisions of the Convention represent custom. Australia acceded to the Convention on 13 June 1974. At the time, Australia stated that the VCLT was widely considered as 'authoritative' and that Australian treaty practice would adhere to its terms.

The VCLT only applies to 'treaties', defined in Article 2(1)(a) as:

"an international instrument concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

Treaties, conventions and agreements are what are referred to as international 'black letter law'. The terminology for this large and diverse body of international law varies. Agreements may be called pacts, protocols (which are generally attached to another agreement), covenants, conventions, instruments, charters and treaties. All these terms

may be interchangeable in their legal impetus, and in fact, terminology is not decisive in defining whether a document is legally binding (Steiner 1996:27). The VCLT indicates that the name of the document in question is not determinate. In some cases, the name may indicate the intentions of the parties. The intention of the parties is critical in identifying whether agreements are legally binding, and this may be evidenced "from its subject matter, the nature of the commitments, the language used elsewhere in the text, the inclusion of formal clauses usually only found in treaties, provision for legally binding dispute resolution, or the circumstances of its conclusion" (Blay et al 1997:98). For example, the expression 'convention' is usually used only with respect to a multilateral treaty. Another indicator may be whether the document is registered under Article 102(1) of the UN Charter, wherein it is required that all treaties and international agreements entered into by a UN member must be registered with the UN Secretariat. But this may not be entirely conclusive due to delays in registering.

Although the Universal Declaration of Human Rights deals with civil, political, social and economic rights, it is no more than a resolution of the General Assembly. It is strictly speaking not a treaty. Therefore, though it has great legal, moral and political authority, it does not create binding obligations on states under international law. It was for this reason that the standards set out in the Universal Declaration were reaffirmed in two legally binding agreements: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which were formally adopted by the UN General Assembly in 1966, for subsequent ratification by states. Both the ICCPR and the ICESCR are called 'covenants'. Through adoption of the various Conventions and Protocols the ideals and objectives of the UN Charter in the human rights field have assumed a concrete and legally binding form. We discuss these instruments more fully below.

A treaty is formed by the express consent of the parties. Only duly authorised agents of states have the power to enter into a treaty. Each state has to follow its own constitutional procedures before it is bound by the terms of a treaty. Under Australian law, the Prime Minister and the Minister for Foreign Affairs are regarded as having the authority to represent Australia. Other federal Ministers and Ambassadors routinely sign treaties, but they must rely on full powers authorised by the Governor-General acting on the advice of the Federal Executive Council. There is no need for the approval of Federal Parliament before Australia can be deemed to be bound by a treaty (Blay et al 1997: 99). We discuss this in the following chapter. In May 1996, the Australian Government introduced reforms in the treaty-making process to encourage broader consultation with interested parties; to increase the opportunity for parliamentary scrutiny of treaties; and to enhance the dissemination of information on treaties to State and Territory governments and the wider community (DFAT 1998: 23).

Part II of the VCLT deals with the conclusion and entry into force of treaties. Treaty making is usually a multi-stage process, including the adoption of a text by negotiators and future formal action by states as an expression of their will to be bound.

The ‘adoption’ of the text of multilateral treaties can occur at various international forums. Adoption is generally associated with a call to all states to sign a treaty. This may take place at a diplomatic conference or a meeting of an international body, such as the UN General Assembly. The VCLT enunciates that the adoption of the text takes place by the consent of all the states that participated in drawing it up, except where this takes place at an international conference. At a conference, the rule is that a two-thirds majority of the states present must vote to adopt the text, unless by the same majority they decide to apply a different rule (Article 9). The negotiation process has important implications for the outcome because the text adopted is then open for formal action by states as the treaty stands, except in so far as the rules or reservations allow. In general, having as many states as possible participate in the negotiation of a treaty will heighten the authority of the text and increase the likelihood of broad acceptance by states. Adoption of a text is a step that does not necessarily bind a state to become a party to the treaty.

After the text is adopted, the treaty becomes 'open for signature' by states, thereby indicating their intention to become a party, following any further domestic legislative or executive action. However, signature alone does not bind a state to a treaty. There are various ways by which states can express their consent to be bound by treaties. A particular method can be outlined in the text of the treaty or those involved can agree to the necessary method. Article 11 of the VCLT indicates that consent to be bound by a treaty may be expressed by signature, exchange of letters, ratification, acceptance, approval, accession or by any other means agreed to by the negotiating parties.

For most multilateral (including human rights) treaties, ratification is usually required as a second step. Ratification is the confirmation of the signature of a treaty. Academic writers have expressed a difference of views about whether customary international law requires that signature of a treaty has to be confirmed by subsequent ratification (Blay et al 1997:100). The VCLT leaves the issue of the need for ratification to the intention of the parties (Article 14). Ratification is also called 'acceptance', 'approval' or 'confirmation'. Treaties will remain open for signature for a period of time until the requisite number of states' ratification is achieved. Multilateral treaties usually stipulate a requirement that a specific number of states’ ratification is needed before a treaty can come into force, the reason being that a multilateral treaty will usually establish a regime of legal obligations and wide participation in the treaty is desired. Some treaties may impose other conditions for entry into force, such as the requirement that specific states become party. For example, the recently adopted Comprehensive Test Ban Treaty on nuclear weapons requires forty-four named states to become parties before it enters into force (Blay et al 1997:100).

A treaty enters into force, and states who have expressed consent to be bound are thereby bound, in the manner and on the date provided by its terms or as the negotiating states agree. Once a treaty has entered into force, a state may become party to the treaty by the process of ‘accession’ (DFAT 1998:25).

In the case of multilateral human rights treaties, states are generally not bound by the terms of the treaties until they have formally ratified or acceded to these treaties, which is

usually by deposit of a duly authorised Instrument of Ratification or Accession at the UN Secretariat in New York.

At the core of treaty law, reflected in the maxim of *pactum sunt servanda*, is a consensual arrangement purporting to bind or benefit parties to a treaty (Steiner 1996:31). As enunciated in Article 26 of the Vienna Convention, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This concept is analogous to the common law notion that parties to a contract should perform their side of the bargain. The treaty thus represents the most effective legal means through which the international community can realise the protection of human rights.

Equal to the variety of treaties is the abundance of approaches to their interpretation. Different approaches serve the variety of purposes laid down in treaties. Article 31 of the Vienna Convention provides some guidelines:

> a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose.

The treaties we are concerned with in this report, international conventions relating to human rights, necessarily use some broad and abstract terms and standards like morals or public order. The interpretation of international human rights treaties is assisted by decisions and comments of the international institutions that govern them. For example, the General Comments on the ICCPR by the Human Rights Committee and its decisions on complaints the Committee has handled, serve to add depth and consistency to the application of the treaties and the complex standards they set out to uphold.

Generally, states cannot pick and choose what parts of a treaty they are prepared to accept, but the VCLT provides for two exceptions to this rule. Firstly, the treaty itself, or the treaty parties, may acknowledge the possibility that a state might only accept a part of a treaty (Article 17). Secondly, a state may make a formal reservation to a treaty (Articles 2.1(d), 19-23) (Blay et al 1997:101).

Reservations in treaties are unilateral statements made by a state when accepting a treaty whereby the state purports to exclude, or to modify the legal effect of, certain provisions of the treaty in their application to that state (Vienna Convention on the Law of Treaties, Article 2(1)(d)). The traditional rule said that acceptance of the reservations by all parties was required, but the expanding number of state parties has required more flexibility. This is particularly so with agreements such as the human rights conventions where widespread adherence is thought to be more important in advancing the rights of individuals than is the precise correspondence of the commitments of the consenting states.

Reservations are commonly used in multilateral treaties. The law relating to reservations to multilateral treaties has a long history. Until the post World War II period, the 'unanimity rule' was the customary international law. The rule allowed a state to make a reservation to a treaty only if the treaty permitted reservations and the specific reservation was acceptable to all other treaty parties.

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In 1950, the UN General Assembly requested an Advisory Opinion from the ICJ on reservations. In the Reservations Case, the Court held that a state that proposed a reservation could become a party to the Genocide Convention provided the reservation was compatible with the object and purpose of the treaty. In the absence of a judicial decision on the issue of compatibility pertinent to a treaty, it was open to the treaty parties to express their views about compatibility, and thereby regard the reserving state as not being a party to the treaty (ICJ 1951a). Articles 19 to 23 of VCLT reflect the compatibility test and its complexities. Article 19, in particular, permits a state to formulate a reservation unless it is 'incompatible with the object and purpose of the treaty.'

Given the increase and variance of reservations that states are attaching to their ratifications of basic human rights treaties, questions about the validity of those reservations under general treaty law or under the terms of a specific treaty have become matters of high concern within the human rights movement (Steiner 1996:34). Many writers argue that the present law on reservations has permitted states, in human rights treaties, to make reservations that undermine the basic protections and rights that those treaties are intended to ensure. The UN Human Rights Committee also took this view in its 1994 General Comment no.24 on the ICCPR. In Comment no.24, the Committee went on to note, in relation to reservations or declarations to the ICCPR made by the United States of America upon accession to that Covenant, that as of its date, 46 of the 127 state parties to the ICCPR had entered a total of 150 reservations, ranging from exclusion of the duty to provide particular rights, to insistence on the "paramountcy of certain domestic legal provisions." Those reservations tend to weaken respect for obligations and may undermine the effective implementation of the Covenant.

Declarations on the other hand, do no more than record a particular interpretation or detail the means of implementation. Some declarations may, nevertheless, amount to reservations. See more on declarations below.

3.2.2 Customary international law

The second major source of international law is 'customary international law'. Custom in earlier times formed the largest part of international law and still provides the foundation upon which the development of international law in treaties is based. Customary law refers to conduct, or abstention from conduct, of states that to some degree become absorbed into the international legal order (Steiner 1996:28). It appears in many forms, from debates on human rights within the UN General Assembly to the arguments of counsel before an international or national tribunal.

Certain preconditions need to be met before a rule of customary law can be said to have emerged. Article 38(1)(b) of the ICJ statute emphasises the two requirements of international customary law, namely first, state practice, and second, acceptance of the practice as obligatory or *opinio juris,* as it is often described. Though some authorities have stated that custom is a fluid, more flexible and dynamic force in lawmaking (Steiner 1996: 28), it is slow in developing.

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To determine the relevant rules of international law by examining state practice, it is necessary to take into account every activity of the organs and officials of states that relate to that purpose. There are many sources of this material for the formation of custom, but principally the involvement of the majority of states in the conduct of international relations will be at meetings of international organisations of which they are members. It is in such forums, including the UN General Assembly, that states are able to contribute to state practice by voting and expressing their views (Blay et al 1997:63).

The notion of 'practice' in establishing a customary rule implies a regularity of that practice. In the Fisheries Jurisdiction (Merits) case, it was stated in a Joint Opinion that,

> "an essential requirement for the practice of States to acquire the status of customary law…(is) that such state practice must be common, consistent and concordant" (ICJ 1974:50).

Because of the size of the international community, obviously the practice that gives rise to the rule does not have to be followed by all states, nor does it have to be entirely uniform. But there must be a sufficient degree of participation, especially by those states that would be directly affected by the rule (ICJ 1969:42), and there must not be substantial dissent from the practice (ICJ 1986:98). Therefore, as long as there is sufficient evidence of 'the general toleration of the international community,' the rule can be accepted as part of customary law (ICJ 1951b:139).

The idea of custom suggests that a rule is created over a long period of time in international law, but due to the rapid development of modern technology, in appropriate circumstances there may be 'instant custom' (Blay et al 1997:73). This is usually achieved through General Assembly resolutions, but can also be found in the effects of international treaties.

The ICJ has frequently referred to *opinio juris* as being of equal status to the requirement of state practice, but there is some opinion that the role of the psychological element in the creation of customary rules is uncertain (Blay et al 1997:66). Reasons for this uncertainty are that a wealth of state practice usually carries with it a presumption that *opinio juris* exists and that such practice will include articulations that indicate the existence of *opinio juris.*

In cases where the practice of which evidence is given, comprises abstentions from acting, the apparent consistency of conduct will not necessarily establish the existence of a rule of customary international law. For example, in the Legality of Nuclear Weapons Advisory Opinion (GA), the ICJ held that the fact that no nuclear weapons had been used since 1945 did not render their use illegal under customary international law, because the necessary *opinio juris* was lacking. There was still an acceptance of the use of such weapons in appropriate circumstances (ILM 1996: 826).

In this way states may be bound by human rights rules, even though they may not be parties to the relevant treaty or where the principle is found in documents - such as declarations or resolutions of the United Nations General Assembly - which are not even treaties. This is because such rules, principles or Statements may have acquired the status of customary international law. While resolutions of the General Assembly are

recommendatory only, they can well develop into sufficient evidence of both state practice and *opinio juris* to generate customary laws. Several factors play a role in this respect, not least the voting patterns on resolutions and the degree of international consensus demonstrated in the adoption of, and ongoing reference to, such resolutions (DFAT 1998:30). Another obvious example of this process is the Universal Declaration of Human Rights. Other evidence of customary international law can be found in bilateral treaties and conclusions of international conferences.

Certain rules of customary law are so fundamental that they cannot be set aside by treaty. These rules, called *jus cogens*, include for example, prohibitions against genocide, slavery and torture. On the other hand, where a treaty incorporates norms of customary international law, those norms will bind all states regardless of whether they are a party to the treaty.

Customary law has been the major source of international law until relatively recent times. But because these laws tend to reflect Western historical and legal antecedents, developing nations prefer to use treaties to define and establish rules of international law.

3.2.3 General principles of law

The general principles of law referred to in Article 38(1) (c) of the Statute of the ICJ can operate in two ways. Firstly, as a directive to the Court to apply general principles to fill any gaps in the law. In order for an international judge to devise or adapt a rule to fit the facts of a particular case, he or she would be likely to employ general notions of justice and equity in refining an existing rule or creating a new one. The rule created would then be referred to as a general rule of international law.

Secondly, historically, rules drawn from municipal law have been employed in the development of international law. Jurists were prepared to allow the application of general principles of law provided that they had been accepted by states as part of the international legal order. Article 38(1) (c) specifically mentions general principles 'recognised' by states, and Article 53 of the Vienna Convention defines *jus cogens* as a norm 'accepted and recognised by the international community as a whole.' The reference to the principles covered by Article 38(1) (c) as 'general' was to signify that if rules were adopted from municipal law, they must be sufficiently generally applied in many municipal systems. A principle unique to a particular municipal system would not be capable of being transposed into international law. This means that the principles of municipal law should be regarded as sources of inspiration rather than as sources of rules of direct application (ICJ 1950; Blay et al 1997:77).

3.2.4 Judicial decisions and the teachings of publicists

According to Article 38(1) (d) of the ICJ Statute, the Court may also apply "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." Clearly, sub-paragraphs (a), (b) and (c) are intended to be the primary sources for the determination of rules of

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international law, while the sources in (d) are regarded as secondary means for assisting the Court in making those determinations.

The judges or writers merely express opinions on the interpretation of international law, and the degree of influence of their views will depend on the status of the tribunal or individual concerned, and the persuasiveness of the arguments or principles put forward. Interestingly, the judgements of the ICJ seldom refer to material other than its own previous decisions or resolutions of international organisations (Blay et al 1997:90).

As the principal judicial organ of the United Nations, the ICJ has a paramount role in extracting and expounding the rules that stem from the sources listed in Article 38(1) (a) to (c) of the Statute. However, the Court's power to create binding rules of international law is limited by Article 59 of its Statute. According to this provision, a 'decision of the Court has no binding force except between the parties and in respect of that particular case.' Nevertheless, the Court does use its prior decisions for guidance as to the law. Moreover, the ICJ has shown that it regards itself as free to develop international law, without being tied by the weight of prior decisions. Quite apart from the attitude of the ICJ towards its own prior decisions, the judgements and advisory opinions delivered by it are considered by international lawyers generally as elucidating the law, as being the expression of what the most authoritative international judicial body holds to be the international law on a given point, having regard to a given set of circumstances.

The International Military Tribunal at Nuremberg in 1946 is an example of a temporary international judicial body, which contributed substantially to the development of international law. This Tribunal laid down important principles relating to crimes against the peace and security of mankind. In addition, decisions of regional international courts such as the European Court of Human Rights and the Inter-American Court of Human Rights, have similarly expanded the realm of international law.

International legal issues occur with greater frequency before municipal courts, due to the increasing globalisation of the economic and social relations of States. The decisions of state courts in these cases may lead to the formation of rules of international law in one of two ways, namely: as judicial decisions in the sense used in Article 38(1) (d) of the Statute of the ICJ; or they function as 'state practice' within Article 38(1) (b) of the Statute, leading directly to the growth of customary rules of international law. An example of the latter is where certain rules of extradition law and of state recognition were in the first instance derived from the uniform decisions of state courts.

Where a state court gives its interpretation of a rule of international law, whether in applying a treaty, deducing a rule of customary law from state practice, or relying upon some general principle of law, it is performing the role envisaged for it by Article 38(1) (d). To an extent, the distinction above is thus artificial in that many cases provide both an assertion by the court as to what is the current rule of international law, and an example of the practice of the state that might contribute to the future emergence of such a rule.

3.2.5 The role of international organisations

International organisations play a vital role in the development of rules of international law, as many inter-state relations are conducted within organs of international institutions, such as the UN General Assembly. Decisions or determinations of these organs or of international conferences may lead to the formation of international law in various ways: through rules for the internal workings of international institutions; the law-making effect of organs of international institutions in respect of decisions on questions of its own jurisdiction; determinations of international institutions concerning the interpretation of their constituent instruments; general decisions or directives of organs of international institutions which have quasi-legislative effect, binding on all the members to whom they are addressed; and determinations or opinions of Committees of Jurists in the investigation of legal issues, for example Ad Hoc Committees and Special Rapporteurs. How this occurs is that the activity can be classified as state practice, or as evidence of *opinio juris*, contributing to the making of customary law (Starke 1972: 51-54).

A particularly important source of law for the purposes of this report is the adoption of Resolutions by the UN General Assembly. Resolutions may contribute as final steps in the evolution of customary rules. The decisive criterion is the extent to which the decision, determination or recommendation has been adhered to in practice. A significant number of UN General Assembly Resolutions have been structured in the form of a Declaration or Charter and these have subsequently formed the basis for the adoption of conventions on the same subject matter, for example the Convention on the Elimination of All Forms of Racial Discrimination of 1965.

The principle of ‘one member one vote’, in Article 18(1) of the Charter means that resolutions of the Assembly will inevitably reflect their views. Therefore resolutions are designed to affect international law and will often be regarded by member states as more important than some international conventions, and as having quasi-legislative effect.

There is some suggestion that these resolutions are declaratory of existing customary law, while others argue against their legislative effect since the General Assembly is empowered only to discuss, initiate studies and make recommendations so that its powers are restricted principally to making non-binding recommendations under Articles 10-14. Although the Assembly has attempted to present them as something more by designating some of its resolutions as ‘declarations’, they nevertheless remain, in a formal sense, only recommendations. According to the weight of opinion, the legal value of these resolutions must vary in the light of their subject-matter and the surrounding circumstances, including the voting pattern in respect to their adoption. Certain writers have treated these pronouncements, even if not binding in any legal sense, as ‘soft law’. This means that GA Resolutions may be regarded primarily as setting out non-binding rules that may in time be converted into legal rules. Some writers have said that ‘soft law’ is restricted to a consideration of instruments with a binding legal quality, but the relevant provisions of which have a soft or limited content. ‘Soft’ in this context refers to an obligation that is vague or inchoate (Blay et al 1997:86). Some undertakings may be

inchoate because there is a necessary additional step to convert them into hard obligations. The issue arose before the High Court of Australia in the Tasmanian Dams case. Here the Court had to consider whether the Convention for the Protection of the World Cultural and Natural Heritage 1972 imposed obligations upon parties that enabled the Commonwealth parliament to exercise its external-affairs power to take measures, overriding Tasmanian law, for the protection of an area that Australia had arranged to have listed under the Convention as a World Heritage Area. Opinion was divided over whether these provisions created any obligation for a party to the Convention. It is suggested that the position under international law was enunciated by Justice Murphy who said:

> taking into account the imprecise standards of obligation under international law…the Convention …imposes a real obligation.

3.3 The UN Human Rights System

International peace and security in the twentieth century was deeply affected by the two world wars of 1914-1918 and 1939-1945. At the end of the Second World War, the United Nations was established after a series of conferences involving those States at war with Germany and Japan. The UN Charter was adopted at the San Francisco Conference on International Organisations on 26 June 1945, and came into force on 24 October 1945. Great hopes were placed on the UN to maintain international peace and security for all countries.

Since 1945, international relations have been dominated by the UN and the structures that were established under it. While the UN has been the subject of significant criticism, it has nevertheless played a paramount role in the progress of international law. This has been achieved through the institutions established within the UN system, with the aim of maintaining international peace and security and of establishing a legal regime to uphold it. The UN's significance lies in the fact that almost every country in the world is a member. Australia is one of the fifty-one original members.

The United Nations thus became the central organ responsible for establishing that the human rights of individuals are matters of international concern and must be protected by international law. It is the umbrella organisation under which human rights treaties have been drawn up and reviewed, and has provided the mechanisms through which complaints can be made alleging breaches of those treaties.

3.3.1 UN Charter and purpose

The UN Charter was adopted in 1945, and every UN member is a party to its Charter. The purposes of the UN are set out in Article 1 of the Charter. These are: to maintain international peace and security, develop friendly relations among states, achieve international co-operation in solving international problems, and co-ordinate and harmonise actions to achieve these ends. Formally written and ratified as a multilateral treaty, the UN Charter is a de facto constitution (Riggs and Plano 1993:17).

As Stated in Article 1.3 of the Charter, an important purpose of the UN is to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. This is reinforced by Article 55(c) which requires the UN to promote "universal respect for an observance of those human rights and fundamental freedoms", whilst Article 56 is a pledge by all members to take joint and separate action in co-operation with the UN to achieve the purpose set out in Article 55.

These provisions of the Charter underpin the UN's pivotal role in developing a series of human rights treaties, ratified by a large number of the world's nations, as well as providing mechanisms for the implementation and enforcement of human rights principles. As early as 1948 the General Assembly adopted the Universal Declaration of Human Rights (Resolution 217 (1948)). The Declaration, supported by most states, sets out those human rights that are so fundamental that all are entitled to benefit from them. The Declaration is not legally binding in itself but it has the force of customary international law because of the acknowledgement of the rights contained therein in other forums and institutions.

3.3.2 UN Bodies and the implementation of human rights

The UN is perhaps better described as a system than an organisation, for it operates through a multiplicity of interconnected and integrated organs and units. The main stem of the UN is represented by the organs expressly named in the Charter, but from this initial basis have evolved unprecedented off-shoots including organs, units as well as Special and Ad Hoc Committees designed to play a significant role in international affairs (Starke 1972:631). Here we will focus on those branches that concern themselves with the implementation and enforcement of international human rights to varying degrees. The enforcement of human rights principles has been a dilemma since the inception of the UN system. The proliferation of rights is accompanied by a plethora of supervisory bodies. Two broad categories of bodies are associated with human rights protection in the UN system: Charter-based organs and Treaty-based organs.

The powers and functions of the UN under the Charter are distributed among six 'principal' organs. These are the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the Secretariat and the International Court of Justice. Each organ has clearly defined spheres of action and each plays an important role. The General Assembly, ECOSOC and the sub-organs established under ECOSOC, the Human Rights Commission and the Sub-Commission on the Prevention of Discrimination Against and Protection of Minorities, and the Commission on the Status of Women, have primary roles in human rights protection.

In addition, the United Nations Charter and various human rights treaties have established numerous other bodies more integral to the supervision, investigation, implementation and enforcement of human rights obligations. Paragraph 2, Article 7 of the Charter provides that "such subsidiary organs as may be found necessary may be established in accordance with the present Charter", and Articles 22 and 29 empower the General Assembly and the Security Council respectively to establish subsidiary organs deemed necessary for the performance of their functions.

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Charter Bodies
The General Assembly (GA) is dealt with in Chapter IV of the Charter, in Articles 9 to 22. The GA is the plenary organ of the United Nations and has broad competence under the UN Charter to consider issues of human rights. It comprises all the member nations of the UN, each of which has one vote. The role of the GA under Articles 10 and 11 is to consider, discuss and recommend. In the field of international law, the Assembly has sponsored and promoted some of the most significant developments of the last 50 years through the adoption of multilateral treaties. The Convention on the Law of the Sea 1982 and the Vienna Convention on the Law of Treaties 1969, are two of the most prominent examples.

Article 13 gives the UN General Assembly the power to initiate studies, and make recommendations for the purpose of "assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". The GA has exercised a role in human rights protection through debate in plenary meetings and through the Third Committee, which deals with social, humanitarian and cultural matters, and is responsible for the majority of the work of the Assembly on human rights treaties. It also receives reports from ECOSOC, sub-organs established under ECOSOC and the treaty bodies, on issues relating to human rights.

The Economic and Social Council (ECOSOC) has 54 members elected by the GA. They are elected on the basis of an equitable geographic distribution. ECOSOC's activities are outlined in Articles 62 to 71 of the Charter. ECOSOC co-ordinates much of the activity of the various specialised UN agencies. The ambit of its functions is in fact very wide. Article 63(2) of the United Nations Charter entitles the ECOSOC to make recommendations to the General Assembly, United Nations member states and to bodies established by international agreement "for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." ECOSOC may also prepare draft conventions for the General Assembly, initiate studies, convene international conferences and coordinate specialised agencies. In addition to its key functions, ECOSOC develops relationships with inter-governmental agencies that have international responsibilities for human rights under multilateral treaties. The Council also supervises the International Covenant on Economic, Social and Cultural Rights.

ECOSOC has set up a number of subsidiary bodies, including standing committees and commissions. Although it does not have the authority to make binding decisions, it has played a significant role in the promotion of human rights, especially in the adoption of the ICCPR (1966) and the ICESCR (1966). The institutions subsidiary to, or associated with ECOSOC, are largely responsible for most of the UN's activities in relation to human rights. It appears that ECOSOC, though envisaged in the Charter to have a primary function regarding human rights, is now little more than a rubber stamp for the activities of its sub-organs. The Human Rights Commission has become the central Charter-based human rights body, and does most of ECOSOC's human rights work (Blay et al 1997:281).

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ECOSOC established the Commission on Human Rights (CHR) in 1947. It is the UN's most important human rights body. The CHR assists the ECOSOC in coordinating human rights activities of the United Nations. It will also undertake studies, submit reports and recommendations on human rights issues and draft international human rights instruments. An important function that the CHR has developed is the various procedures for investigating alleged human rights violations, including thematic procedures, "1235 Country Procedure" and the "1503 Communications Procedure". Thematic procedures were instituted to investigate specific types of human rights violation in various countries. The CHR has also set up a number of subsidiary bodies to assist in its work.

The Commission on Human Rights has also developed procedures to manage specific problems (Robertson 1982: 64-66). One such problem has been how to handle the thousands of individual communications alleging human rights violations received every year by the UN. For many years, the Commission was unable to take any action on these communications. Then, in 1967, ECOSOC Resolution 1235 authorised the Commission to examine and respond to allegations of, and publicly debate gross human rights violations or consistent patterns of human rights violations. The 1235 procedure has included the establishment of a working group or special rapporteur to examine the allegations and report to the Commission, which then discusses the report and may make recommendations to ECOSOC.

In 1970, ECOSOC Resolution 1503 approved a further proposal for the Commission to examine "communications, together with the replies of governments, if any, which appear to reveal a consistent pattern of gross violations of human rights". The procedure by which communications are examined to see whether a consistent pattern of gross violations is revealed, is a confidential one. The communications are first referred to a working group of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which makes recommendations to the full Sub-Commission. A group of five Commission members then considers the complaints and makes recommendations to the full Commission which makes a determination.

If the Sub-Commission finds a consistent pattern of gross violations, the matter is referred to the Commission, which may keep the matter under review for the next year, send an envoy to the state concerned who will report back to the Commission, appoint a committee to facilitate a friendly solution to the situation if the state concerned consents, or transfer the case to the 1235 procedure for public debate.

The Commission may also decide to employ its ad hoc special procedures and appoint a working group or individual rapporteur to examine either the human rights situation as a whole or the situation with regard to a specific right in the state in question. The first thematic mechanism was the Working Group on Enforced or Involuntary Disappearances, which was established in 1980. A more recent mechanism is the Special Rapporteur on Violence Against Women.

Enforcement through the Human Rights Commission does not have much impact in terms of sanctions, as is the problem with international law in general. However, the

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establishment of investigatory mechanisms places pressure on governments, and public debate of human rights violations by the Commission results in bad publicity for the state. States are thereby pressured into complying through political embarrassment.

In January 1994, the UN created the High Commissioner for Human Rights. The High Commissioner is expected to initiate action and is empowered to 'promote and protect the effective enjoyment of all civil, cultural, economic, political and social rights' (GA Resolution 48/141). The High Commissioner has played a role in Rwanda, Chechnya and the former Yugoslavia.

A recent development has been the establishment of two ad hoc criminal tribunals by the Security Council, in the former Yugoslavia and Rwanda. These tribunals are an important step in recognising the link between peace and human rights.

Treaty Bodies

The UN provides the umbrella under which implementation procedures of human rights treaties are conducted. The UN system comprises six major human rights treaties monitored by committees. They are the International Covenant on Civil and Political Rights (ICCPR), which is monitored by the Human Rights Committee; the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is monitored by the Committee on Economic, Social and Cultural Rights; the Torture Convention (CAT), monitored by the Committee Against Torture; the Convention on the Elimination of Racial Discrimination (CERD), monitored by the Committee on the Elimination of Racial Discrimination; the Convention on the Elimination of Discrimination Against Women (CEDAW), monitored by the Committee on the Elimination of Discrimination against Women; and the Convention on the Rights of the Child (CROC), monitored by the Committee on the Rights of the Child.

The main difference between the six treaty committees and the Charter bodies, is the fact that the committees have a limited mandate to oversee a particular treaty and states' implementation of that treaty. In addition, the committees are generally made up of independent experts as opposed to governmental representatives.

Three means of implementation are adopted in the UN human rights treaties. Firstly, State Parties are required to submit periodic reports on the domestic implementation of the treaty, for example Article 40 of the ICCPR. States' periodic reports are often late and tokenistic but the committees have played their role by engaging in 'constructive dialogue' with the member parties concerned and requesting additional information to that supplied in reports from non-government organisations.

Secondly, another means of implementation of treaty regimes is the provision for complaints to the supervising committee by member states against other member states, for example, Article 41 of the ICCPR. The Article 41 procedure requires states to make declarations accepting the Human Rights Committee's jurisdiction to hear complaints by other states and only states that have made such declarations may make complaints against other states. There have been no complaints lodged with the HRC under Article

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41 to date. An equivalent procedure exists under CERD, which has not attracted any direct complaints either.

Thirdly, there is the inclusion of an avenue for individual victims of human rights abuses to complain against responsible member states. This is revolutionary because traditionally, international law was only about the law between nations, in other words only individual nations had legal capacity to act, to appeal to international bodies and to intervene in international forums on behalf of individuals. However, the UN will now consider communications from individuals alleging breaches of human rights.

Article 28 of the ICCPR provides for the establishment of a Human Rights Committee. The UN Human Rights Committee, which is made up of an expert body of judges and legal specialists, supervises the implementation of the ICCPR. It is composed of 18 members elected by the State Parties to the Covenant who should serve in their personal capacities and not as government representatives (Human Rights Committee 1982). The Human Rights Committee has the power under the First Optional Protocol to the ICCPR to consider individual petitions, similarly the power of CERD under the RDC and the CAT under the Torture Convention. Individual communications and the reporting procedures have led to the development of an invaluable body of jurisprudence concerning the interpretation of treaties. This jurisprudence has frequently been collated in the form of 'general comments' by the committees.

Apart from these standard procedures, the Torture Convention also contains a provision that allows the Committee against Torture to investigate complaints of torture on its own initiative based on reliable information that it receives regarding the systematic practice of torture by a state (Article 20(1)). The Human Rights Committee has also appointed Special Rapporteurs with powers to act between sessions of the Committee and at short notice, to ensure more effective protection and prevention of human rights violations.

3.4 The Major International Human Rights Instruments

The development of international human rights law began with the adoption of the *Universal Declaration of Human Rights* by the United Nations General Assembly on 10 December 1948. This instrument incorporates wide-ranging civil, political, economic, social and cultural rights. Though it is not a technically binding document on individual states, the Universal Declaration being no more than a resolution of the General Assembly, it can be said that most of its provisions have the status of customary international law.

The rights proclaimed by the Universal Declaration are often divided into two distinct thematic categories of rights: the so-called civil and political rights (Articles 1 to 21) and economic, social and cultural rights (Articles 21 to 28). This conceptual dichotomy is reflected in the existence of two separate Covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), formally adopted by the UN General Assembly on 16 December 1966. These three instruments are often referred to as the International Bill of Rights.

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Both the ICCPR and the ICESCR required 35 ratifications or accessions before they came into force. The International Covenant on Economic, Social and Cultural Rights entered into force on 3 January 1976. As at February 1993, there were 118 State Parties to the Covenant. The International Covenant on Civil and Political Rights entered into force on 23 March 1976. As at February 1993, there were 115 State Parties to the Covenant. Over 100 countries have ratified the two Covenants and indeed many of these countries have incorporated the Universal Declaration into their Constitutions. Australia ratified the ICESCR in 1975 and it came into force for Australia in 1976. Australia ratified the ICCPR, subject to reservations in 1980, and that Covenant came into force in Australia in the same year.

In addition to the Bill of Rights, the UN system has developed many treaties devoted to particular rights and groups of people. Two of the earliest are the Convention on the Prevention and Punishment of the Crime of Genocide 1948, and the four Geneva Conventions 1949, which codified and further developed the law relating to treatment of human beings during armed conflicts. Other major treaties that focus on particular human rights abuses include the Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD); the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment 1984 (Torture Convention); the Convention relating to the Status of Refugees 1951 (Refugee Convention) and its 1967 Protocol; the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW); and the Convention on the Rights of the Child 1989 (Children's Convention).

3.4.1 The International Covenant on Civil and Political Rights

The Preamble to the ICCPR and ICESCR recalls the obligation of states under the UN Charter, to promote human rights; reminds individuals of their responsibility to strive for the promotion and observance of those rights; and recognizes that, in accordance with the Universal Declaration, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone is able to enjoy civil and political rights, as well as economic, social and cultural rights.

Civil and political rights are those rights that protect the individual from the arbitrary exercise of power by the State. These rights have historically been seen as the core of the philosophy of human rights. The rights are at times referred to as "negative" rights, meaning that the State is required to refrain from certain actions against the individual that impinge upon the individual's freedom to be left alone. This is correct in principle, but ignores the fact that States often have to undertake many "positive" acts - such as training police and judiciaries - in order to protect civil and political rights (DFAT 1998:15).

Civil rights are usually taken to include those rights set out in Articles 1 to 18 of the Universal Declaration, including "physical integrity rights" such as the right to life and the protection against torture, and "due process rights" such as the right to a fair trial, the presumption of innocence or the right to legal representation.

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Political rights include freedom of expression, freedom of association and assembly and the right to vote in free and genuine elections by secret ballot. They refer to the rights which allow for participation in democratic political life: see Articles 19 to 21 of the Universal Declaration and Articles 18, 19, 21, 22, 25 of the ICCPR.

Article 5 provides safeguards against the destruction or undue limitation of any human right or fundamental freedom and against misinterpretation of any provision of the Covenant as a means of justifying infringement or restriction of a right or freedom. It also prevents States from limiting rights already enjoyed within their territories on the ground that such rights are not recognized, or recognized to a lesser extent, in the Covenants.

The standards proclaimed in the ICCPR relevant to the criminal justice process include:

- The prohibition against arbitrary deprivation of life (Article 6(1));
- Freedom from torture, cruel, inhuman and degrading treatment or punishment (Article 7);
- Due process rights upon arrest or detention (Article 9) and at trial (Article 14(3));
- Freedom from arbitrary arrest and detention (Article 9(1));
- The right to be treated with humanity where deprived of liberty (Article 10);
- The right to a fair and public hearing by an independent, impartial tribunal (Article 14(1));
- The presumption of innocence when charged with a criminal offence (Article 14(2));
- Freedom from being tried twice for the same offence (Article14(7));
- The prohibition against retrospectively criminalising conduct (Article 15(1)).
- Equality before the law and entitlement to equal protection of the law without any discrimination (Article 26);

The ICCPR is set out in the Second Schedule to the Australian federal Human Rights and Equal Opportunity Act 1986 and provides a substantial constitutional basis for that legislation.

The Second Optional Protocol to the ICCPR entered into force in Australia on 11 July 1991. Thus Australia has undertaken the international obligation that no one within its territory shall be executed. No execution has been formally carried out in Australia since 1967.

The implementation machinery under the ICCPR is onerous and comprises three parts. First, under Article 40, State Parties undertake to “submit reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights.” The first report must be submitted within one year of the Covenant entering into force for the State Party concerned, and thereafter at the request of the Human Rights Committee. In 1981, the Committee decided that each state that has ratified the Covenant must submit a report every five years to the Human Rights Committee on the legislative and other measures it has adopted to give effect to the rights

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in the Covenant (Human Rights Committee 1981). Australia has recently submitted its 3rd and 4th periodic reports on the ICCPR, which were due in 1991 and 1996.

The Committee studies each report and sends the state involved a list of questions. The State's representatives then make a presentation to the Committee at a public hearing to deal with questions and any matters arising. The Committee in turn makes comments and observations, which the state is obliged to make public. The 'General Comments' assist member states to fulfil their obligations under the International Covenant. These comments draw their attention to general deficiencies in state reports, suggest improvements and interpret particular provisions of the Covenant. The Committee may transmit these comments plus the Article 40 reports to ECOSOC, which will in turn report to the General Assembly. The main problem with this procedure has been the failure of State Parties to submit their reports.

Secondly, under Articles 41 and 42 there is a procedure for complaints, whereby one State Party can complain to another State Party that the latter is not giving effect to the provisions of the Covenant.

Thirdly there is an Optional Protocol to the Covenant. The First Optional Protocol, which required ten ratifications, came into force at the same time as the ICCPR. Australia ratified it, and it came into force for Australia on 25 December 1991, for the first time giving people in Australia a right to bring complaints of human rights violations to an international body. The First Optional Protocol to the ICCPR provides that a nation, which is a party to the ICCPR, may also become a party to the First Optional Protocol. By becoming a party to the Protocol, the State Party recognises the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that state of a right set forth in the ICCPR. Petitioners must have exhausted all domestic remedies of that nation before directly petitioning the Human Rights Committee. The Committee will investigate such communications.

Pursuant to Article 2, individuals are entitled to submit written communications to the Committee. Any communications determined to be admissible by the Committee according to conditions for admissibility laid down in Article 2, 3 and 5(2) are brought to the attention of the State Party alleged to have violated the ICCPR. That state must, pursuant to Article 4, submit to the Committee written explanations or statements within six months, clarifying the matter and indicating the remedy, if any, it may have taken. The Human Rights Committee considers the admissible communications, at closed meetings, in the light of all written information made available to it by the individual and the State Party concerned. It then forwards its views to the State Party and to the individual pursuant to Article 5. Strictly speaking, those views are not legally binding, so there is no enforcement procedure.

This right of individual petition to an international body in respect of a violation of rights is an innovation in international law, despite the fact that the Human Rights Committee's

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powers are very limited, and its procedures not those of a court. Since 1991 a number of cases has come before the HR Committee against Australia.

3.4.2 The Convention on the Rights of the Child

The Convention on the Rights of the Child came into force generally in 1990 and in Australia on 16 January 1991. The Convention is in Schedule 3 to the federal Human Rights and Equal Opportunity Act 1986.

Due to its breadth and universal acceptance, the Convention on the Rights of the Child is an invaluable touchstone of children's rights, and we apply it in this report. While CROC may not be the last word on children's rights, a number of its articles provide an important basis for auditing existing policy and legislation regarding childrens' and young peoples' rights in the criminal justice arena. While recognising the need to continually regard CROC in its entirety, we draw attention to the following provisions (which we paraphrase), relevant to our discussion:

- Article 2 non-discrimination,
- Article 3 considering the best interests of the child,
- Article 5 the responsibilities, rights and duties of parents,
- Article 12 the right to be heard,
- Article 15 freedom of association and peaceful assembly,
- Article 16 no arbitrary or unlawful interference with privacy,
- Article 37 no cruel or inhuman treatment; no arbitrary, unlawful deprivation of liberty; and arrest and imprisonment are to be measures of last resort, and
- Article 40 due process rights are to be observed including the presumption of innocence, the right to silence and access to justice options other than judicial proceedings and institutional care.

There are no qualifications to the provisions prohibiting discrimination, prohibiting "cruel, inhuman or degrading treatment or punishment", asserting the best interests of the child or requiring that a young person be heard. Rights to privacy and liberty are not to be denied by either "arbitrary" or "unlawful" means. There are some qualifications on the rights and responsibilities of parents, as well as the weight to be given to a child's views, depending on the stage of development of the child. Due process rights are formulated in a very similar fashion to those of the International Covenant on Civil and Political Rights. The only relevant broad qualification applies to the right to freedom of association and peaceful assembly in Article 15. This freedom may be qualified by restrictions:

> “imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others” (CROC Article 15 (2)).

The Australian commitment to CROC has just one reservation on Article 37(c), concerning the segregation of children from adults in custody.

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The Committee on the Rights of the Child supervises the CROC through periodic reporting and consists of 10 members. The Committee on the Rights of the Child has no power to hear state complaints or individual complaints. However, the fact that the Convention received sufficient ratifications for its entry into force within one year of its adoption by the General Assembly and has now 190 State Parties, is an indication of the universal acceptance of the Convention.

Under CROC, Australia has acceded to an international reporting mechanism. Every five years the federal government is obliged to report to the UN on our practical response to commitments under the Convention. Australia has recently been questioned for breaches of treaty commitments under CROC. The UN Committee on the Rights of the Child has been reported to be concerned that although Australia has signed and ratified CROC, it appeared not to have upheld it on several specific issues such as the mandatory sentencing legislation for juveniles in Western Australia (Criminal Code Amendment Act W.A. (No2) 1996), the Northern Territory (Juvenile Justice Act (NT) 1997 Sec 53(a(e)); and the sweeping powers of the NSW Children (Protection and Parental Responsibility) Act 1997 (Loane, 1997).

3.4.3 Other major human rights instruments

As well as the Universal Declaration and the two Covenants, the United Nations has adopted and attempted to implement numerous instruments which deal with particular categories of human rights. Some of the instruments are treaties and are legally binding, whilst others, such as declarations, are simply statements of principle.

Other Human Rights treaties include:

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted December 1965, entry into force January 1969.

The questions of both race and sex discrimination have been of great concern to the UN. One of its purposes is to dispose of those forms of discrimination (UN Charter, Article 1.3). To this end, the Universal Declaration contains three articles setting out principles concerning the dignity and equality of all human beings (Universal Declaration, Articles 1,2 & 7). Similarly both the ICCPR and the ICESCR contain anti-discrimination clauses. But it was apparent from the outset that more would have to be done to ensure equality in the world.

The Convention on the Elimination of all forms of Racial Discrimination was thus drafted and adopted by the General Assembly in 1965 and opened for signature, ratification or accession in 1965. It came into force after receiving the required 27 ratifications or accessions in 1969 and Australia ratified it in 1975. The federal *Racial Discrimination Act* 1975 is based on it.

The Committee on the Elimination of Racial Discrimination supervises the CERD. It consists of 18 experts. States report periodically to the Committee. There is also a provision under CERD for a right of individual communication.

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Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted December 1979, entry into force September 1981.
The Convention came into force after many years of drafting and considerable debate. Australia ratified the Convention, but with a reservation and a Statement, in 1983. The federal *Sex Discrimination Act* 1984 is based on it.

The Committee on the Elimination of Discrimination Against Women supervises CEDAW. It consists of 28 experts. Again the Committee's supervision is based on states periodically reporting. Observations on the reports studied go to the UN Commission on the Status of Women.

Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), adopted December 1984, entry into force June 1987.
The Convention was adopted by the UN General Assembly in 1975. In Australia, The Torture Convention is set out in the Schedule to the *Crimes (Torture) Act* 1988. The Act however only operates in Australia's external territories and extraterritorially. The reason for this is that the government considered that the laws of the States and the (internal) Territories were already adequate to fulfil Australia's international obligations under the Convention in relation to acts of torture committed in Australia.

The Committee against Torture supervises compliance with the CATOCICT. The Committee consists of 10 members. The mechanisms of supervision are periodic reporting, and optional inter-state and individual complaints procedures. However, CAT can also decide to investigate a state's conduct on its own initiative when it receives reliable information that torture is being systematically practiced in that state.

The federal *Crimes (Torture) Act* 1988 provides that where a public official acting in an official capacity, or a person who is acting at the investigation of or with the consent of a public official, does an act of torture outside Australia which would have been an offence if committed within Australia, that person may be prosecuted for the relevant offence. No person may be charged with an offence unless they are either an Australian citizen or present in Australia.

3.4.4 International Instruments on the Administration of Justice
In addition to multilateral instruments of treaty status, the General Assembly and ECOSOC have adopted various resolutions and declarations which have played a major role in the setting of international standards in the field of human rights. These instruments cover a wide range of specific areas of human rights concern. Whilst they are not legally binding, but simply statements of principle, they have assumed strong moral force.

Human rights are relevant at all stages of the criminal justice process, from the initial investigation of alleged offences, through to the trial process and punishment of offenders. Basic human rights protections in the context of the administration of justice are enunciated in a legally binding document, the ICCPR. These standards have since

been refined and extended in a series of instruments that have been formulated and promoted by UN bodies.

The first set of standards relating to the administration of justice were laid down in respect of the treatment of prisoners. The First United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Standard Minimum Rules for the Treatment of Prisoners in 1955. The Rules were approved by ECOSOC on 31 July 1957 and on 13 May 1977. Principles on the treatment of prisoners and the management of institutions were laid out. To complement the Standard Minimum Rules, the General Assembly adopted the Basic Principles for the Treatment of Prisoners on 14 December 1990. These principles confirm the fundamental rights of prisoners.

Instruments concerning torture and other cruel, inhuman and degrading treatment were also established. The General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 9 December 1975. On 26 June 1987 the GA put those principles in a legally binding form by adopting the Torture Convention which is legally binding on all States party to it.

Standards were further developed by the GA's adoption, on 18 December 1982, of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In relation to standards prescribing the proper behaviour of law enforcement officials, the General Assembly adopted the Code of Conduct for Law Enforcement Officials, on 17 December 1979. This was followed by the establishment of standards relating to the propriety of law enforcement officers in the context of the use of force. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials were adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders in 1990, and welcomed by the GA on 18 December 1990.

Various standards have also been formulated in relation to the role and responsibility of the judiciary and legal counsel. The Basic Principles on the Independence of the Judiciary were adopted and recommended by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and were endorsed by the GA in resolutions on 29 November 1985 and 13 December 1985. The Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders between August and September 1990.

On 29 November 1985, the General Assembly adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as 'the Beijing Rules'. These rules outline general principles concerning juvenile justice. On 14 December 1990, the GA went further and acted on the recommendations of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to consolidate

principles relating to the administration of juvenile justice. Firstly, the United Nations Guidelines for the Prevention of Juvenile Delinquency ('the Riyadh Guidelines') were adopted and secondly the GA adopted the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

The due process of detainees was addressed in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. This was adopted by the GA on 9 December 1988.

The UN has also sought to encourage the use of non-custodial measures in punishing criminal offences. On 14 December 1990, the GA adopted the United Nations Standard Minimum Rules for Non-custodial Measures ('The Tokyo Rules').

The status of these different instruments relevant to the administration of justice ranges from legally binding standards to those standards that are simply statements of principle. As explained above, standards, if they are put into treaty form, are legally binding on those states party to the treaty, or if they assume the status of customary international law, then they are binding on all states. It is unclear which declarations of principle in the administration of justice have assumed the status of customary international law. While they all have strong moral force, they are not necessarily binding.

3.5 Human Rights and National Sovereignty

The fundamental consensual nature of international law is based on the sovereignty of states and their supreme authority within their own territory, implying that all states are equal in international law and are obliged to respect the sovereignty of all other states.

A fundamental tenet of traditional international law has been the notion of the national sovereignty of states and the associated prohibition against states interfering in the domestic affairs of other states. The universality of the philosophy of human rights necessarily requires the reconcilement of notions of national sovereignty and non-interference with the belief that the promotion and protection of human rights is an international priority.

The international community has increasingly recognised and accepted that human rights are a legitimate international issue, justifying the criticism by states of human rights abuses in other countries. Articles 55 and 56 of the UN Charter expressly state that human rights are a legitimate issue for consideration at the international level, and this principle has since been reiterated in the 1993 Vienna Declaration.

Though some States (for example Burma, apartheid South Africa and more recently Australia in the attempted deportation by the government of a Somalian refugee in December 1998) reject international scrutiny and criticism of their actions on the basis that this constitutes an unacceptable interference in their internal affairs, it is becoming increasingly rare. Certainly, any country which has accepted a human rights treaty, whether or not embodying a complaints procedure, cannot use this argument since it has expressly agreed to be bound by the terms of the treaty.

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The above precepts are often used to argue that states are the only subjects of international law and consequently that individuals cannot enjoy rights and freedoms under international law independent of the will of their sovereign state. These arguments have traditionally been used to justify the inability of individuals to make claims against their states. However, the current established view in contemporary human rights law recognises that human rights are inalienable and universal, as explained above. This is enhanced further by the enactment of international human rights complaints mechanisms for individuals, such as the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and the development of similar procedures under other major international Conventions.

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4. Relevant Articles in International Covenants

In this chapter we examine the relevant articles of the International Covenant on Civil and Political Rights, and of the Convention on the Rights of the Child. We organise these articles into five groups: police powers, pre-trial rights, trial procedures, criminal and custodial sanctions and equality before the law. This is an account of the international law and jurisprudence, which we will apply to New South Wales criminal justice law in chapter six.

4.1 Police Powers

International Covenant on Civil and Political Rights, Article 9(1)

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Convention on the Rights of the Child, Article 37(b)

States Parties shall ensure that:

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

4.1.1 Liberty and security of person

The jurisprudence of the Human Rights Committee, established by the UN under the ICCPR, affirms that states are obliged to ensure the right to security of person in relation to deprivations of liberty [*A. and H. Sanjual Arevalo v Columbia* (181/1984) (Views adopted on 3 November 1989, Thirty-seventh session) UN Doc A/45/40 para 11].

Since 1990 the UNHRC has expanded the ambit of Article 9(1) to cases which involved neither arrest nor detention [*Delgado Paez v Columbia* (195/1985) (Views adopted 12 July 1990, Thirty-ninth session) UN Doc A/45/40 para 5.6. *Angel N. Olo Bahamonde v Equatorial Guinea* (468/1991) (Views adopted on 20 October 1993, Forty-ninth session) UN Doc A/45/40 para 9.2]. The UN Human Rights Committee, General Comment 8 on Article 9 of the ICCPR, states that the principle of liberty and security of persons is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. [Human Rights Committee 1994: GC 8 in Human Rights Committee (1994)].

This principle could also apply to harassment, intimidation and threats to suspects and witnesses during investigations, irrespective of whether or not they are detained. State

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Parties must ensure the security of person of those under investigation, including witnesses and families of suspects.

The basic right of personal liberty does not aim at the complete abolition of state measures that deprive liberty; rather it represents a procedural guarantee against the deprivation of liberty which is arbitrary and unlawful.

4.1.2 Arbitrary arrest and detention

The *UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*, states clearly that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorised for that purpose. It does not allow any restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment. Furthermore, detention or imprisonment must be subject to the effective control of a judicial or other authority.

Australia was found to be in violation of Article 9(1) of the ICCPR by the UN Human Rights Committee in *A v Australia* [(560/1993) (Views adopted on 3 April 1997, Fifty-ninth session) UN Doc A/52/40]. In that case, A entered Australia illegally and then applied for refugee status. A was detained for a number of years in various locations, hampering contact between A and his legal representatives. A was subsequently released when his wife was granted refugee status. The Committee held that Australia was not justified in the continuing detention of A. Unlawful entry into Australia and the 'perceived incentive' to abscond did not constitute sufficient grounds to justify a prolonged and indefinite detention. The Committee found further that Australia did not provide A with an effective way to challenge his detention in court, thereby breaching its obligations under the Covenant. The Human Rights Committee concluded that A was entitled to an effective remedy, including adequate compensation for the length of detention to which A had been subjected.

Complaints relating to arrest and to pre-trial detention can be submitted to the Human Rights Committee as well as Working Groups and Special Rapporteurs of the UN Commission on Human Rights.

4.1.3 Arbitrary and unlawful interference with privacy

International Covenant on Civil and Political Rights, Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Convention on the Rights of the Child, Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 40

1.(a) To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
…
(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
…
(vii) To have his or her privacy fully respected at all stages of the proceedings.

Article 17 of the ICCPR establishes the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. According to the Human Rights Committee, the right must be guaranteed against all interferences whether by the state or other natural or legal persons. The state is required to adopt legislative and other measures for the protection of this right [Human Rights Committee 1994: GC 16].

Where a state authorises interference according to the law, the law itself must comply with the provisions, aims and objectives of the International Covenant. Legislation providing for interferences with privacy cannot be 'unlawful' [*Shirin Aumeeruddy-Cziffra et al v Mauritius* (35/1978) (Views adopted on 9 April 1981, Twelfth session) UN Doc A/36/40 para 9.2 (b)2(i)4]. In *Nicholas Toonen v Australia* the Human Rights Committee referred to General Comment 16, paragraph 4, in deciding whether a 'lawful' interference with a person's privacy can be considered 'arbitrary'. [(488/1992)(Views adopted on 31 March 1994, Fiftieth session) UN Doc A/36/40 para 8.2.] The concept of arbitrariness is intended to guarantee that even interference provided for by law must be in accordance with the provisions, aims and objectives of the Covenant and must be reasonable in the particular circumstances.

The Committee also discussed the requirements of 'reasonableness'. It was established that a 'reasonable' interference with privacy must be "proportional to the end sought and be necessary in the circumstances of any given case".

In addition, relevant laws must specify in detail the precise circumstances in which such interferences may be permitted and must only be made by the authority designated under the law.

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Article 17 further purports to guarantee the integrity and confidentiality of correspondence. Correspondence must be delivered to the addressee without interception and without being opened or otherwise read. Electronic or other surveillance, interceptions of communication and wire-tapping of conversations is prohibited.

With regard to searches of a person's home, they must be limited to searches for necessary evidence and must not correspond to harassment. Effective measures must be in place to ensure that personal and body searches are carried out with respect for the dignity of the person who is being searched. Persons being subjected to body search by representatives of the state, may only be examined by persons of the same sex.

Any compilation and storage of personal data on computers, databases or other devices, by public or private bodies, must be regulated by law.

4.1.4 Young people – arrest and detention

Convention on the Rights of the Child, Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

4.2 Pre-Trial Rights

4.2.1 Rights of arrested or detained persons

International Covenant on Civil and Political Rights, Article 9:

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. 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. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

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4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

4.2.2 ***Right to be informed [ICCPR 9(2)]***
The rights contained in Art. 9 (2) of the ICCPR relate only to the stage of arrest. At the point at which one is deprived of personal liberty, every person who is arrested must be informed of the reasons. When an arrest is made pursuant to criminal justice, the person arrested must be promptly informed of the charges lodged against him or her. The *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Article 10) further reinforces the principle that anyone who is arrested should be informed at the time of his arrest of the reason for his arrest and should be promptly informed of any charges against him. Once the person concerned has been charged with a criminal act, (s)he is to be informed pursuant to Art. 14(3)(a) "promptly and in detail in a language which he understands of the nature and cause of the charge against him."

The Human Rights Committee has held that one of the most important reasons for the requirement of 'prompt' information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority [*Glenford Campbell v Jamaica* (248/1987) and *Adolofo Drescher Calder v Uruguay* (43/1979)]. In order to fulfil this purpose, the notice must contain sufficient detail about the facts and the applicable law, so that the arrested person can know if the arrest is in accordance with the law [*Monja Jaona v Madagascar* (132/1982)].

In two cases against Zaire and Uruguay, the Human Rights Committee indicated that the lack of a written arrest warrant might be an indication of an arbitrary arrest. [No 90/1981; No 139/1983)]. However, the authors in both cases had not been informed at all of the grounds for their arrest.

Under Article 9(2), a two-stage notification process is provided. Firstly, initial information must be provided at the time of arrest, which may merely be a limited description of the reasons for arrest. In *Drescher Calder v Uruguay*, the Committee stated that a mere reference to the legal basis ("prompt security measures") without any indication of the substance of the complaint against him was insufficient [(43/1979) para 13.2,14].

Secondly, subsequent information must be provided promptly, and must contain the specific accusations. The Committee has found a violation of this right in several cases in which no information at all or with a delay of several weeks had been provided (Nowak 1993: 175).

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4.2.3 Right to bail [ICCPR 9(3)]
Article 9(3) of the ICCPR applies only to persons against whom criminal charges are brought [Human Rights Committee 1994: GC 8]. These persons must be brought promptly before a judge or some other officer authorised by law to exercise judicial power. It has been left open as to what 'promptly' means, but the Human Rights Committee stated in its General Comment to Article 9, in no event may this last longer than "a few days" [Human Rights Committee 1994: GC 8. See further the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Article 37].

The requirement that a person be brought before a judge or "other officer authorised by law to exercise judicial power" is precisely the same as Article 5(3) of the ECHR. Thus the interpretation developed by the European Court of Human Rights in the *Schiesser* case would be useful for the interpretation of this provision: a judicial assistant must be independent of the executive, personally hear the person concerned and be empowered to direct pre-trial detention or to release the person arrested. Thus, custody must end within a few days with either release or remittal by a judge to pre-trial detention [*Schiesser* 1979].

Article 9(3) contains the principle that pre-trial detention is only permitted in limited circumstances. It is to be limited to essential reasons, such as danger of suppression of evidence, repetition of the offence and absconding. If preventive detention is used, it must not be arbitrary, and must be based on grounds and procedures established by law. In *Hugo van Alphen v the Netherlands*, the Human Rights Committee held that the State Party had violated the author's right to freedom from arbitrary arrest in keeping him in detention for a period of nine weeks owing to his refusal to provide information for the investigation of his clients. The Committee discussed the meaning of 'arbitrary' and stated:

> 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that *remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime* [*Hugo van Alphen v the Netherlands* (305/1988) para 5.8].

Pre-trial detention should be an exception and as short as possible. Article 9(3) refers to a 'reasonable time'. 'Reasonable time' must be deduced from the particular circumstances of a case. In the case of *Fillastre v Bolivia* 1988 the Committee held that the lack of adequate budgetary appropriations for the administration of criminal justice does not justify a period of four years until adjudication at first instance (Nowak 1993: 177). This time limit is considered to be shorter than the time limit provided for in Article 14(3)(c) within which prosecution is to be initiated, but longer than the time taken to impose a judgement against a juvenile pre-trial detainee, which must be made 'as speedily as possible'. In *Kone v Senegal* the Human Rights Committee also held that detention of over four years was not compatible with Article 9(3) of the ICCPR, unless special circumstances existed where the delay was attributable to the actions of the accused or

the accused's representative [*Famara Kone v Senegal* (386/1989) (Views adopted on 21 October 1994, Fifty-second session) UN Doc A/50/40, paras 8.6-8.7].

The UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Articles 36 and 39, enunciate further the principles of the presumption of innocence for detained persons, and the entitlement of a person facing a criminal charge, to release pending trial, unless required for the purposes of the administration of justice.

The *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)* Article 6, sets down that pre-trial detention should only be used "as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim," and should be no longer than is necessary.

Art. 9(3) also contains a provision for release from pre-trial detention in exchange for bail or other guarantee. The guarantee does not have to be of a financial nature. State Parties have been provided with broad discretion on this issue and a violation of this right to bail has only been found by the Committee in rare cases. For example, in *Bolanos v Ecuador* it was held by the HR Committee that pre-trial detention for a period greater than five years constituted unlawful detention in violation of Article 9(1) and (3).

In *Hill v Spain*, the applicants were foreigners in Spain who were arrested on suspicion of firebombing a bar. The complainants stated that they were refused bail in violation of Article 9(3) of the ICCPR. The State Party argued that it had a well-founded concern that the applicants would leave Spain if they were to be released on bail, but did not provide sufficient evidence to sustain the claim. The Committee reaffirmed the principle that:

> Pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State Party [*Michael and Brian Hill v Spain* (526/1993) (Views adopted on 2 April 1997, Fifty-ninth session) UN Doc A/52/40 paras 2.1, 12.3].

It held further that "the mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial." The Committee thereby found that the rights of the applicants under Article 9(3) had been violated.

The accused must have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed according to *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*, Article 6.

Right to Habeas Corpus [ICCPR 9(4)]

A person detained on a criminal charge is entitled to be brought before a judicial or other authority provided by law promptly after arrest to have the lawfulness and necessity of his/her detention reviewed [*Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 37]. This right stems from the Anglo-American legal principle of habeas corpus.

The UN Human Rights Committee is of the view that control by a court of the legality of the detention applies to all persons deprived of their liberty by arrest or detention [Human Rights Committee 1994: GC 8].

As in Art. 14(1), the term "court" covers not only ordinary courts but also special courts, including administrative, constitutional and military courts [Nowak 1993:179]. The decision of the "court" relates exclusively to the lawfulness of deprivation of liberty. If this is not the case, then the court must order the immediate release of the person concerned. The decision must be made "without delay" and this usually means within several weeks. The time limit will depend on the circumstances of each case. In *Ines Torres v Finland*, the Committee held that " the question of whether a decision was reached without delay must be assessed on a case by case basis." [(291/1988) para. 7.3]. In this case it was found that a period of almost three months was too long. Similarly in *Kelly v Jamaica*, a detention of five weeks without access to a "court" was held to constitute a violation of Articles 9(3) and (4) [(253/1987) paras. 5.6 and 6].

Right to compensation for unlawful arrest or detention [ICCPR 9(5)]

International Covenant on Civil and Political Rights, Article 2

3. Each State Party to the present Covenant undertakes:

> **(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;**
> **(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;**
> **(c) To ensure that the competent authorities shall enforce such remedies when granted.**

Article 9(5) guarantees a claim to compensation to all persons who have been unlawfully deprived of their liberty of person. This is a claim of the specific type of domestic remedy referred to in Art. 2(3) relating to liberty of person, similar to the claim for compensation for erroneous conviction under Art. 14(6).

The claim set down in Art. 9(5) is available to every victim of unlawful arrest or detention. An arrest or detention is unlawful when it contradicts one of the provisions in Art. 9(1) to (4), and/or a provision of domestic law. Nowak explains that the principle of legality in the third sentence of Art. 9(1) has the effect that a deprivation of liberty in violation of domestic laws usually represents a violation of Art. 9. If a person succeeds in establishing, via a domestic remedy, that arrest was unlawful but did not receive compensation, that person may then approach the Committee with a communication

solely on the basis of a violation of Art. 9(5). The Committee thus does not have to review whether the rights in paragraphs. 1 to 4 were violated (Nowak 1993:181).

An arrest may be consistent with domestic laws but still be unlawful under international law. Even in cases where deprivation of liberty was in itself lawful but the claim to remand was violated, the person is entitled to compensation. As in *Santullo v Uruguay,* the Committee held that the government was obliged to render compensation solely due to the fact that the right to habeas corpus in Art. 9(4) was violated [(9/1977) paras. 12-13].

Compensation claims are furthermore not limited to culpable conduct, that is malicious or grossly negligent conduct.

Though the Committee has not yet established an express violation of Art. 9(5), in its final views in a number of communications, it has pointed out that as a result of violations of other parts of Art. 9, the State concerned is obliged to grant compensation pursuant to Art. 9(5) [No. 9/1977, para 13; No. 132/1982, para. 16; No. 188/1984, para. 12. No. 238/1987, para 10]. While the Committee does not have the power to grant just compensation, it has the authority to review the domestic implementation of the rights of the Covenant pursuant to Art. 2(3).

4.3 Trial Procedures

International Covenant on Civil and Political Rights, 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 (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, 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 judgement 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.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

4.3.1 Equality before the courts [ICCPR 14(1)]

The right to equality before the courts is a specific statement arising from the general doctrine of equality laid down in Article 26. The right to equality before the courts can be said to go beyond equality before the law, referring to the specific application of laws by the judiciary. It should be seen in conjunction with the general prohibition of discrimination under Art. 2(1), meaning that all persons must be granted, without distinction as to race, religion, sex, property, etc., a right of *equal access to a court*.

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The Human Rights Committee found an instance of sex discrimination and a violation of the right to equality before the courts in *Ato del Avellanal v. Peru* (202/1986). The issue was that the Peruvian Civil Code entitled only the husband to represent matrimonial property before the courts. However, this provision does not preclude distinctions between the rights of plaintiff and respondent in civil cases and between the accused and the prosecution in criminal cases, as long as this does not violate the principle of a 'fair trial'.

In *Angel N. Olo Bahamonde v Equatorial Guinea*, the Committee stated that:

> The notion of equality before the courts and tribunals encompasses the very access to the courts and that situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of article 14, paragraph 1 [(468/1991) UN Doc A/49/40, para 9.4].

In *B. d. B. et al v The Netherlands*, the Committee held that while article 14(1) of the ICCPR guarantees procedural equality, it does not guarantee equality of results or absence of error on the part of the competent tribunal [(273/1989) UN Doc A/44/40 para 6.4].

4.3.2 Right to a fair and public hearing [ICCPR 14(1)]

The right to a fair and public hearing before a tribunal is the essence of 'due process of law'. The provisions in Article 14(2) to (7) are the necessary components of a 'fair trial' in criminal cases.

Article 14(1) incorporates a number of requirements for the state to set up independent, impartial tribunals where hearings must be fair and public. Many of the terms used in this provision are convoluted and require further interpretation.

Hearing before a Tribunal

Civil suits or criminal charges must be heard and decided by 'a competent, independent and impartial tribunal established by law'. This is termed a specific *institutional guarantee*, requiring action by the state. The use of the concept 'tribunal' covers national civil and criminal courts, and in certain circumstances may also refer to administrative authorities that are independent and 'established by law'.

The requirement of independence relates primarily to the division between the powers of government and judiciary. Judges or other members of a tribunal may not be subject to directives from other state organs in the exercise of their positions. This criterion of independence goes beyond the separation of state powers, to include the assurance that tribunals are not overly influenced by powerful interest groups, (Nowak 1993:245) for example the media, the business sector, industry or political parties.

This protection against influence from political parties is the basis for the requirement that tribunals be 'impartial'. Independence relates to the appointment of members of tribunals, while 'impartial' refers to the need for unbiased hearings and judgements.

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Fair trial
This principle is the core of the civil and criminal procedural guarantee, and with respect to criminal trials is specified by a number of rights in Article 14(2) to (7) and further in Article 15. The guarantee of a 'fair trial' in Article 14(1) is much broader than the individual guarantees enunciated in Art. 14(3) which expressly refers to those provisions only as 'minimum guarantees', the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1 [Human Rights Committee 1994: GC 13].

The Human Rights Committee has held that the requirements for a 'fair trial' include independent and impartial judicial authorities; equality of arms; and respect for the principle of swift, adversarial proceedings.

The most important criterion of a fair trial is the principle of equality of arms between the plaintiff and respondent in a civil case, or between the prosecution and the defence in a criminal trial. A procedural example of this would be where the inspection of records or submission of evidence must be dealt with equally for both parties. In cases that have come before the Human Rights Committee, a variety of circumstances were found to deny an accused a fair trial, namely: where the accused was denied the opportunity to personally attend the proceedings; where the accused was unable to properly instruct his or her legal counsel; where the accused was not served a properly motivated indictment [*Dieter Wolf v Panama* (289/1988) para. 6.6]; where criticism of the government led to the imposition of lengthy prison sentences in the absence of procedural guarantees [No. 138/1983]; and where there were lengthy delays not caused by the complainant [*Sandra Fei v Colombia* (514/1992) para. 8.4-8.5; *Robert Casanovas V France* (441/1990) para. 7.4]

Publicity
The requirement of publicity is based on the need for transparency in the administration of justice and is an essential element of the right to a fair trial. The purpose of this principle has been expressed in the phrase "justice must not be secret" [A/C.3SR.964, p.15, expressed during the drafting of Art. 14 in the 3rd Committee of the GA]. The UN Human Rights Committee has stated that the publicity of hearings is an important safeguard in the interest of the individual and of society at large.

While the public may be excluded from the proceedings for a number of reasons, the principle of publicity of the decision applies almost without exception (Nowak 1993:248). Exclusion must not be limited only to a particular category of persons [Human Rights Committee 1994: GC 13].

The right to a public hearing means that all civil and criminal trials must in principle be conducted orally and publicly (Nowak 1993:249). In *A. van Meurs v The Netherlands*, the Human Rights Committee considered the right to a public hearing in a labour law dispute and found that proceedings held *in camera* were a violation of the right in article 14(1) of the ICCPR. Their reasoning was that if labour disputes are argued in an oral hearing before a court, they must be held in public. The Committee stressed that this is "a duty

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upon the State" that is not dependent on any request by the interested party that the hearing be held in public. Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish. This includes making information on the hearing available to the public and providing adequate facilities to allow the public to attend. [(215/1986) UN Doc A/45/40 paras. 6.1 and 6.2].

The principle of publicity is thus also a right of the public in a democratic society (Nowak 1993:249). It applies only to that part of a trial where there are submissions of the opposing parties in a matter and the determination of facts. However this does not apply to appellate proceedings limited to a question of law. In *R.M. v Finland*, the Committee observed that the absence of oral hearings at the appellate proceedings in a criminal case raised no issue under Article 14 of the Covenant [(301/1988) para 6.4].

The public, including the press, can be excluded from all or parts of a trial for various reasons listed in Article 14(1). The public can be excluded for reasons of: morals in, e.g., a hearing regarding a sexual offence; public order, which relates to order within the courtroom mostly; and national security, relating to the secrecy of important military facts (Nowak 1993:250). The last two reasons require the further satisfaction of the principle of a democratic society. In addition, the public may be excluded in the interest of the private lives of the parties, which may include family matters, sexual offences or other cases in which publicity might violate the private and familial sphere of the parties or of the victim. Finally, the public may also be excluded in the interests of justice, but only in "special circumstances" and only "to the extent strictly necessary in the opinion of the court".

The last part of this provision requires the public pronouncement of the judgement, applied equally to civil and criminal trials. Even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public [Human Rights Committee 1994: GC 13]. The only exceptions allowed are in the interests of juveniles, proceedings concerning matrimonial disputes and the guardianship of children. There is nothing to indicate a privilege for the media.

In various cases dealing with secret military trials in Uruguay, the Committee found not only a violation of the requirement of publicity of the proceedings, but also a violation of the duty to publish the judgement [No.s 281978; 3/1978; 44/1979].

4.3.3 Presumption of Innocence [ICCPR 14(2)]

Article 14(2) of the ICCPR provides the right to be presumed innocent to "everyone charged with a criminal offence". It has been generally accepted that the presumption, as well as most of the other rights in Article 14, applies both to the defendant in a criminal case and an accused person prior to the filing of a criminal charge (Nowak 1993:254). A person has this right until a conviction is recorded.

The presumption of innocence is an extremely important aspect of the criminal trial itself, in that the prosecutor must prove the defendant's guilt. The Human Rights Committee has emphasised that the presumption of innocence is fundamental to the protection of

human rights. The provision does not state that the proof must be beyond a reasonable doubt, but the Human Rights Committee has established that that is the acceptable standard of proof. Furthermore, the presumption of innocence implies a right to be treated in accordance with this standard [Human Rights Committee 1994: GC 13].

A judge also has the duty to conduct the trial without previously having formed an opinion on the guilt or innocence of the accused. This duty applies to *all public authorities* too. It has been argued that in the case of excessive "media justice" or the danger of impermissible influencing of lay or professional judges by powerful social groups, one has to assume that the state is under a corresponding positive duty to ensure the presumption of innocence (Nowak 1993: 254).

Violation of the right to be presumed innocent is extremely difficult to prove. The Human Rights Committee, which has dealt with a vast number of cases, has only held Art. 14(2) to have been violated in two communications against Uruguay [Nos. 5/1997; 8/1977; 203/1986 individual opinions of Cooray, Dimitrijevic and Lallah].

4.3.4 Right to be informed of the Charge [ICCPR 14(3)(a)]

The duty to inform under Article 14(3)(a) is more precise and comprehensive than that for arrested persons under Article 9(2), because the former includes the words "in detail". It also applies to persons not under detention.

The *nature and cause* of a criminal charge includes the exact legal description of the offence and the facts underlying it (Nowak 1993: 255). The information must be sufficient for the preparation of a defense under Article 14(3)(b) and must be supplied to the defendant *promptly.* The Human Rights Committee has commented that *promptly* requires that the information is given "as soon as the charge is first made by a competent authority." The right arises when procedural steps are taken by a court or other authority of the prosecution against a person suspected of a crime or the person is publicly named in respect of a crime. The charge may be stated either orally or in writing, including information on the law and the alleged facts [Human Rights Committee 1994: GC 13/21].

There is a further requirement that the information be provided in a language which the accused understands. In *Sendic v Uruguay* (16/1977) for instance, the Committee found an express violation of the duty to inform under Article 14(3)(a).

4.3.5 Preparation of defence [ICCPR 14(3)(b)]

The accused has several rights under Article 14(3)(b). Firstly, the accused has the right to have adequate time and facilities for the preparation of his defence, referring to all stages of the trial. What period of time is adequate depends on the circumstances and complexity of the case. A few days is not sufficient [(283/1988) 8.3 and 8.4)

The Human Rights Committee has held that the *facilities* to be provided must include access to documents and other evidence necessary for the preparation of the defence [Human Rights Committee 1994: GC 13/21]. This does not, however, give rise to a claim to be furnished with copies of all relevant documents [*O. F. Norway* (158/1983) para 5/5]

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The accused also has the right to communicate with counsel of his own choosing. If the accused does not wish to act on his or her own behalf, he should have recourse to a lawyer. The Human Rights Committee has also said:

> Further, it is required that counsel be able to communicate with the accused in conditions that allow for the confidentiality of their communications. Lawyers should be able to conduct their representation without any interference [Human Rights Committee 1994: GC 13/21 para 9].

This right has been interfered with in a number of HRC cases against Uruguay, Panama, Zaire, Jamaica and Madagascar [Nos. 6, 8/1977; Nos. 28, 32/1978; Nos. 49, 63/1979; Nos. 70, 73, 74, 80, 83/1980; Nos. 92, 103, 110/1981; Nos. 123, 124/1982; No. 139/1983; Nos. 283, 289, 338/1988].

4.3.6 Right to trial without undue delay [ICCPR 14(3)(c)]

The right to trial without delay has been interpreted by the Human Rights Committee as encompassing the right to a final judgement without undue delay. All stages of the proceedings should take place without undue delay and adequate procedures must be in place to ensure this [Human Rights Committee 1994: GC 13/21].

The Human Rights Committee has found a number of violations of Article 14(3)(c) of the ICCPR. The majority of these decisions have been held against Uruguay, where there have been unjustified delays lasting several years before military tribunals [No 43/1979); *Raul Cariboni v Uruguay* (159/1983) – proceedings lasted for six years; *Violeta Setelich v Uruguay* (63/1979) – held for ten years before being brought to trial]. In *Francoise Bozize v the Central African Republic*, the Committee found a violation of this provision where the accused had still not been tried at the first instance after four years of detention [(428/1990) UN Doc A/49/40]. The point at which a delay becomes 'undue' depends on the circumstances and complexity of the cases.

In *Pinkney v Canada*, the production of trial transcripts took 29 months, delaying the appeal for nearly three years. The Committee found here that Article 14(3)(c) had been violated and stated that it is the responsibility of the state to ensure that the whole process is completed without delay [(27/1978)]. Similarly, the Committee found a violation of Article 14(3)(c) in *Pratt, Morgan and Kelly v Jamaica*, where there was a period of almost 5 years between the dismissal of the author's appeal and the delivery of the Court of Appeals written judgment, which prevented the appellants from proceeding to appeal before the Privy Council [No.s 210/1986; 225/1987; 253/1987].

In *Hill v Spain*, the authors argued that their right to be tried without undue delay was violated. The authors were arrested on 15 July 1985, formally charged on 19 July 1985 and their trial did not start until November 1986. Their appeal was not disposed of until July 1988. Only a minor part of this delay was attributable to the authors. The State Party argued that the delay was due to the complexities of the case but provided no evidence thereof. The Committee thus found that in these circumstances, the State Party had violated the authors' right under Article 14(3)(c) to be tried without undue delay.

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However, the Human Rights Committee has failed to develop clear criteria for determining 'undue delay' in a particular case (McGoldrick 1994: 424)

4.3.7 Right to defence [ICCPR 14(3)(d)]

This right can be divided into a list of separate rights:

- To be tried in one's presence;
- To defend oneself *in person*;
- To choose one's own counsel;
- To be informed of the right to counsel; and
- To receive *free* legal assistance.

It is not clear under this right whether the State may enforce an absolute requirement of mandatory counsel in criminal trials and then force an accused to accept a defence counsel if he cannot afford his own attorney (Nowak 1993: 258). Nowak indicates that the literature has taken the view that the accused may not be deprived of the right to defend himself. The following interpretation of this provision, supported by the case law, has been put forward:

> Everyone charged with a criminal offence has a primary, unrestricted right to be present at the trial and to defend himself. However, he can forego this right and instead make use of defence counsel, with the court being required to inform him of the right to counsel. In principle, he may select an attorney of his own choosing so long as he can afford to do so. Should he lack the financial means, he has a right to appointment of defence counsel by the court at no cost, insofar as this is necessary in the interest of administration of justice. Whether the interests of justice require the State to provide for effective representation by counsel depends primarily on the seriousness of the offence and the potential maximum punishment (Nowak 1993: 259-60).

In various cases involving military court trials in Uruguay, a violation of the right to be present at the trial was found by the Human Rights Committee (for example: Nos. 28, 32/1978; 44, 63/1979; 70/1980; 92/1981; 139/1983; 289/1988)
It has been held that it is only permissible to hold a trial without the presence of the accused if he has been timely summoned and informed of the proceedings against him [*Mbenge v Zaire* (16/1977)]. When, for justified reasons, trials *in absentia* are held, strict observance of the rights of the defence is necessary.

In *Kelly v Jamaica*, the Committee stated the "while Article 14(3)(d) does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice. The accused or his lawyer has the right to pursue all available defences and to question the conduct of the case if they believe it to be unfair [Human Rights Committee 1994: GC 13/21].

4.3.8 Calling and examining witnesses [ICCPR 14(3)(e)]

This provision requires that the accused be entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same legal powers as are available to the prosecution [Human Rights Committee 1994: GC 13/21].

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The right to call and examine witnesses under the same conditions as the prosecution is an important element of the principle of "equality of arms" and of a fair trial.

However, the right of the accused to obtain examination of witnesses on his behalf is restricted to "the same conditions as the witnesses against him." An express violation of this provision was found by the Human Rights Committee in *Sendic v Uruguay*, where the author was sentenced by a military court to 30 years prison in absentia and in camera without an opportunity to call witnesses on his behalf [Sendic v Uruguay (63/1979)]. A violation was also found in the case of *Lloyd Grant v Jamaica* where the witness called on behalf of the defence was unable to attend the hearing, as she could not afford to travel to court. The Committee held that the judge should have adjourned the hearing and issued a subpoena to ensure the attendance of the witnesses, since the charge was a serious one.

The right to examine, or have examined, witnesses for the prosecution is formulated without restriction. In *G. Peart and A. Peart v Jamaica*, the Committee held that the failure to make the police statement of the main prosecution witness available to the defence seriously undermined the defence ability to cross-examine the witness, thereby not allowing the defendants a fair trial. The important principle here is that the parties have equal opportunity to introduce evidence through the interrogation of witnesses.

4.3.9 Right to an interpreter [ICCPR 14(3)(f)]

Article 14(3)(f) establishes the right of accused who do not understand the court's language, to the free assistance of an interpreter. The Committee has stated that ignorance of the language used by a court or difficulty in understanding may be an obstruction to the right of defence, and hence a fair trial [Human Rights Committee 1994: GC 13/21].

The Human Rights Committee has expressed in *Yves Cadoret* and *Herve Le Bihan v France* that Article 14 is aimed at protecting procedural equality and enshrining the principle of equality of arms in criminal proceedings [(221/1987); (323/1988) UN Doc A/46/40, para 5.6].

With respect to this Article 14(3)(f), the Human Rights Committee has stated that this provision does not give the accused the right to express him or herself in the language in which they are most proficient or have court proceedings conducted in the language of one's choice, if they are not sufficiently proficient in the official court language [*Z.P. v Canada* (341/1988) UN Doc A/46/40, para 5.3; *Guesdon v France* (219/1986); *Cadoret* and *Le Bihan v France* (221/1987); (323/1988); *Barzhig v France* (237/1988); *C.E.A. v Finland* (439/1990)].

It is unclear whether "the language used in court" also applies to written documents. The general principle of a right to a fair trial may require that the accused has a right to the translation of all written materials and oral statements pertaining to the criminal trial, since he must be able to understand them in order to have the benefit of a fair trial.

An interpreter must be provided free of charge. This applies equally to citizens and non-citizens.

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4.3.10 Prohibition of self-incrimination/ Right to Silence [ICCPR 14(3)(g)]
Article 14(3)(g) provides that the accused may not be compelled to testify against himself or to confess guilt. The prohibition of self-incrimination is an essential element of the right to a fair trial. It relates only to the accused. The term “to be compelled” refers to a variety of physical and psychological forms of coercion, ranging from methods which would be prohibited under Articles 7 and 10, to duress and the threat of imposition of judicial sanctions for failure of the accused to testify. A number of communications against Uruguay have involved cases where the accused were subjected to severe torture in order to compel them to confess and sign written statements incriminating themselves [No.s 52/1979; 73,74/1980; 139, 159/1983].

The Human Rights Committee has called upon states to set down in law the prohibition of the admissibility as evidence in criminal trials of forced confessions or statements by the accused. Judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution [Human Rights Committee 1994: GC 13/21].

4.3.11 Juvenile trials [ICCPR 14(4)]
In the case of juvenile persons, the procedures must take into account their age and the importance of promoting their rehabilitation [Human Rights Committee 1994: GC 13/21]. It must be made clear by the state as to the minimum age at which a juvenile may be charged with a criminal offence and the maximum age at which a person is still considered to be a juvenile. Special courts and procedures against juveniles must also be provided. Equally important is that Juveniles must enjoy at least the same guarantees and protection as is accorded to adults under article 14.

Article 14(4) compels State Parties to conduct criminal trials against juveniles by taking account of “their age and the desirability of promoting their rehabilitation”. The term “juvenile persons” is not defined in the Covenant, but refers to those years in a person’s life from the onset of the age of criminal responsibility and ending with majority age. The specific setting of these age limits is left to the individual States, but they must not deviate greatly from the accepted international norm which is roughly 14 to 18 or 19 years (Nowak 1993: 265).

This provision does not expressly require states to establish separate juvenile courts, but they must ensure that criminal trials against juveniles are conducted differently to adults. The type of special court for juveniles is left to the states to determine. However, the Human Rights Committee has stipulated that a juvenile trial must promote the rehabilitation of juveniles. This maxim seeks to discourage the imposition of the “stigma of crime” on juveniles through the use of punishment, but alternatively to encourage educational tools for rehabilitation (Nowak 1993: 266). Article 40(1) of the Convention on the Rights of the Child mentions the objective of “promoting the child’s integration and the child’s assuming a constructive role in society.”

This right is further developed in Article 40 of the Convention of the Rights of the Child.

4.3.12 Right to Appeal [ICCPR 14(5)]

The right to appeal against a criminal conviction in a higher tribunal is purposefully formulated quite generally to allow for implementation by differing legal systems (Nowak 1993: 266). However, the appeal must be a genuine review of either the facts or the questions of law. It is furthermore unclear whether proceedings reviewing only the questions of law are sufficient (note the reservation of Denmark to this provision, necessary because it does not permit an appeal on the question of guilt against a jury conviction).

The proceedings must be heard before a "higher tribunal", where the guarantees of a fair and public trial must also be observed, as stated by the Human Rights Committee [1994: GC 13/21 para 17]. In *Salgar de Montejo v Colombia* (64/1979), a review of the original judgement was confirmed by the judge in the original case. This was not deemed to be a review by a "higher tribunal." In *Pinkney v Canada* (27/1978), the Committee found a violation of Article 13(5) in that it took nearly 3 years to complete the trial transcripts thereby delaying the appeal.

The right to appeal must be available to all persons convicted of a crime, and the General Comment indicates that this provision is not limited to serious criminal offences. The insertion of the proviso "according to law" does not allow deviation from the right, as confirmed by the Human Rights Committee in *Salgar de Montejo v Colombia*:

> The Committee considers that the expression 'according to law' in article 14(5) of the Covenant is not intended to leave the very existence of the right of review to the discretion of the States parties, since the rights are those recognized by the Covenant, and not merely those recognized by domestic law. Rather, what is to be determined 'according to law' is the modalities by which the review by a higher tribunal is to be carried out [Salgar de Montejo v Colombia (64/1979)].

In this case, an offence for which a one-year prison sentence was imposed, was regarded as being sufficiently serious for the application of Article 14(5).

Domestic provisions for appellate proceedings must not merely be made available by law but must also be accessible to convicted persons [Henry v Jamaica (230/1987); Little v Jamaica (283/1988)].

4.3.13 Right to compensation for wrongful conviction [ICCPR 14(6)]

International Covenant on Civil and Political Rights, Article 2

3. Each State Party to the present Covenant undertakes:

> **(d) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;**
>
> **(e) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative**

authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(f) To ensure that the competent authorities shall enforce such remedies when granted.

Article 14(6) provides for compensation according to law in certain cases of a miscarriage of justice. The Human Rights Committee has observed that a claim to compensation under Article 14(6) must be based on certain prerequisites:

- *Final* conviction for a criminal offence (including petty offences);
- Suffering of punishment as a consequence of such conviction;
- Subsequent reversal of the conviction or pardoning of the person convicted on the ground of a new or newly discovered fact showing conclusively that there had been a miscarriage of justice.

In *W.J.H. v The Netherlands* (408/1990), the author was convicted of fraud and forgery. His conviction was overturned on Appeal but he was not permitted by the Court of Appeal to claim for compensation. The Human Rights Committee held that he had no claim for compensation under Article 14(6) since he had suffered no punishment as a result of his conviction.

A person who has his or her conviction reversed, or is pardoned, will only be entitled to compensation when the grounds supporting the reversal demonstrate conclusively that there has been a miscarriage of justice on the basis of a *new or newly discovered fact*. In *Muhonen v Finland* (89/1981), the Human Rights Committee could not uphold the author's claim under this provision because the Committee found that the author's pardon was not due to proof of a miscarriage of justice based on new or newly discovered facts. The Committee held the view that his conviction had been set aside on the basis of equity.

If the reversal of the conviction is based on a newly discovered fact, the disclosure of which is attributed to the person convicted, compensation need not be granted. The burden of proof in this case would still rest on the State (Nowak 1993: 271).

Compensation can only be granted when a person has suffered punishment, either in the form of a prison sentence or other types of punishment. Compensation must also be granted in accordance with the law. These laws will regulate in detail the mechanisms for granting compensation, as well as setting the appropriate amounts.

Australia's reservation to Article 14(6) allows for administrative procedures to determine compensation rather than specific legal provision.

4.3.14 Double jeopardy [ICCPR 14(7)]

The Human Rights Committee has observed that different views have been expressed as to the scope of article 14(7). But it holds that the principle of "ne bis in idem" or *res judicata* or the prohibition of double jeopardy, means that a person may not be tried or

punished again for an offence for which he or she has already *been finally convicted or acquitted*. This latter requirement is applicable only to a conviction or acquittal *in accordance with the law and penal procedure of each country*.

In *A.P. v Italy* (204/1986) the Committee held that the principle of "ne bis in idem" has no effect on proceedings in other states. The Committee observed that "this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State. The author had claimed a violation of article 14(7) because he was convicted in both Switzerland and Italy for the same kidnapping. Nowak expresses the opinion that the Committee's interpretation was too "general" and "absolute" in this case. (Nowak 1993: 273).

4.3.15 Retrospective laws [ICCPR 15(1)]

International Covenant on Civil and Political Rights, Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 15 is significant for criminal trials in particular, for the purposes of legal certainty. The rights in Article 14 are related to the prohibition of retrospective laws in this provision. Due to the overall importance of this provision, Article 15 was made non-derogable.

Article 15(1) states that no one shall be held guilty of any criminal offence based on an act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. There is a general duty here on the state to define precisely in law all criminal offences for the purposes of legal certainty.

The reason for inclusion of a reference to international law was to prevent a person from escaping punitive measures under international law by proving that the offence was not criminal under the law of his/her state. Under this Article, a person may thus be held guilty of an act or omission not punishable by national law at the time the offence was committed but was punishable under international law. The individual is however, still protected against the retrospective application of international criminal norms (Nowak 1993: 276).

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In a number of cases reviewed by the Human Rights Committee, members of the opposition in Uruguay were sentenced to prison terms for their former participation in subsequently outlawed parties [*Weinberger Weisz* (28/1978); *Pietraroia* (44/1979). The Committee held that Article 15 had been violated.

In addition, Article 15(1) prohibits the imposition of a penalty which was not provided for at the time the crime was committed. This includes the instance where a penalty heavier than the one that was applicable at the time the offence was committed is to be imposed.

In *Van Duzen v Canada* (50/1979), a case concerned with the granting of parole, the Canadian government argued that Article 15 referred only to criminal penalties and not to civil or administrative penalties. The Committee held the view that the term 'penalty' had to be interpreted autonomously from Canadian law.

It is argued by Nowak that the third sentence of Article 15(1) places a duty on States to apply a subsequently enacted law that provides for a lighter penalty retrospectively (Nowak 1993: 279). However, this interpretation is not without controversy.

4.4 Criminal and Custodial Sanctions

4.4.1 Prohibition of cruel, inhuman or degrading treatment

International Covenant on Civil and Political Rights, Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Convention on the Rights of the Child, Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;

The aim of Article 7 of the ICCPR is to protect the dignity and the physical and mental integrity of the individual. The article is complementary to the positive provisions in article 10(1), and requires states to provide protection through legislative and other means against these sorts of acts by state officials or private actors [Human Rights Committee 1994: GC 20].

No derogation of this right is permitted under any circumstances, including a situation of public emergency. No justifications or extenuating circumstances may be invoked to

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justify a violation of article 7, including acts based on orders from superior authorities [Human Rights Committee 1994: GC 20].

Torture is almost universally recognised as particularly reprehensible. However it still occurs all over the world. Its prevalence has prompted the international community to provide special protection of the right to personal integrity by way of a specialised convention, the UN Convention against Torture (CAT) of 10 December 1984. It provides for universal criminal jurisdiction over torture offences, the principle not to return a person to a state where he or she is likely to be tortured and the establishment of a Committee against Torture. The Committee may consider state reports, individual and inter-state communications.

There is no defined list of prohibited acts, but those that are prohibited include treatment that causes mental or physical suffering. There are various terms used within the provision that can be seen as differing with regard to the intensity of the suffering imposed, from the lesser degrading treatment or punishment to that which is cruel and inhuman to torture (Nowak 1993: 129). The Committee has pointed out that it is unnecessary to draw distinctions between these various categories with respect to whether Article 7 has been violated [Human Rights Committee 1994: GC 7/16, para. 2 and GC 20/44, para 4]. However, the various terms may be loosely defined by drawing on the Convention against Torture and the HR Committee cases.

A definition of “torture” is contained in Article 1(1) of the 1984 Convention Against Torture as acts of public officials that *intentionally* inflict *severe* physical or mental *pain* or suffering in order to *fulfil a certain purpose*, such as the extortion of information or confessions or the punishment, intimidation or discrimination of a person. Although this definition is not binding, it may be helpful for interpretation and outlines the essential elements for a finding of ‘torture’ (those in italics) (Nowak 1993: 129). The HR Committee has recognised a broader interpretation than the Convention by acknowledging the duty of public authorities to ensure protection against torture by law, even by persons not acting in an official capacity [Human Rights Committee 1994: GC 7/16, para. 2 and GC 20/44, para 4].

Due to this stringent definition, the HR Committee has only found that torture occurred in a few cases, namely against Uruguay, Colombia and Bolivia. The victims had been subjected to a variety of practices during interrogations in detention, including beatings; electroshocks; burns; standing for great lengths of time; simulated executions and amputations. In many cases, the fact that the health of victims was permanently affected was an important consideration for the Committee [*Grille Motta v Uruguay* (11/1977); *Lopez Burgos v Uruguay* (52/1979); *Sendic v Uruguay* (63/1979); *Angel Estrella v Uruguay* (74/1980); *Arzuaga Gilboa v Uruguay* (147/1983); *Carboni v Uruguay* (159/1983); and *Berterretche Acosta v Uruguay* (162/1983); *Herrera Rubio v Colombia* (161/1983); *Lafuente Penarrieta, et al v Bolivia* (176/1984)].

It is argued that the intentional severe mistreatment of a person without a certain purpose will not be considered torture, but cruel treatment. In fact, ‘inhuman and/or cruel

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treatment' includes all forms of severe suffering that cannot be defined as torture due to a lack of one of its essential elements. The Committee has held that being forced to stand blindfolded for 35 hours or to sit motionless on a mattress for several days is inhuman or degrading treatment [*Massera v Uruguay* (5/1977)] and likewise a detainee being forced to submit to psychiatric experiments [*Viana Acosta v Uruguay* (110/1981)]. Deprivation of food and drink for four days after arrest was considered inhuman treatment in the case of *Tshisekedi v Zaire* (242/1987). Harsh conditions of detention have also been found to be inhuman treatment within the meaning of Article 7; however, in the majority of cases in which the Committee determined the conditions to be inhuman, they found violations only under Article 10 (Nowak 1993: 132).

Degrading treatment is the weakest part of Article 7, where the humiliation of the victim is the important element. In *Conteris v Uruguay* (139/1983), the HR Committee held that certain practices in a prison in Montevideo designed to humiliate prisoners and make them feel insecure, amounted to degrading treatment. The practices included the use of solitary confinement and exposure to the cold. Other cases against Uruguay involved the treatment of women prisoners where they were humiliated by being hung naked from handcuffs and being forced to maintain a certain position for an extended period of time [*Arzuaga Gilboa v Uruguay* (147/1983); *Soriano de Bouton v Uruguay* (37/1978)]. Here again, the Committee held that the special element of degrading treatment was present.

In order for *punishment* to be considered a violation of Article 7, it must be reprehensible according to the ordre public (Nowak 1993: 134). Actions that have fallen into this category are caning, public executions and severe corporal punishment such as amputation, castration, sterilization [Human Rights Committee 1994: GC 7/16, GC 20/44].

Most of the cases that the HR Committee has had to deal with, though, have simply involved a determination of a violation of Article 7 as opposed to specifically qualifying the treatment or punishment. The issue of torture and punishment has usually arisen before the Human Rights Committee in the context of arrest and the initial period of detention, and usually a violation of Article 10 is also found. For example in *Teran Jijon v Ecuador*, the complainant was tortured and kept shackled and blindfolded for five days to force him to make a confession [(277/1988) UN Doc A/47/40 para 5.2]. The Committee found this to be a violation of articles 7 and 10(1).

The Human Rights Committee specifically mentions in its General Comment that prolonged solitary confinement of detained or imprisoned persons may amount to an act prohibited by article 7 [Human Rights Committee 1994: GC 20].

The Human Rights Committee held in *Albert Womah Mukong v Cameroon*, that once the author of a complaint has provided detailed information of his or her treatment by the state, the State Party is then required to refute the allegations made. In this case the author claimed that he had been held in detention in conditions that constituted a violation of Article 7 and the State Party argued that the author carried the burden of proving his allegations. With regard to the conditions, the Committee stated that certain minimum

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standards of detention must be adhered to, as outlined in the UN Standard Minimum Rules for the Treatment of Prisoners.

There are a number of UN instruments which deal with “torture and cruel, inhuman or degrading treatment”. They are: *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 6; *UN Code of Conduct for Law Enforcement Officials*, article 5; and the *UN Guidelines on the Role of Prosecutors, rule 16; UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, in general and specifically principle 2.

In addition, the UN Commission on Human Rights has appointed a Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, to receive reports of alleged human rights abuses from governments, specialised agencies and intergovernmental and non-governmental organisations. The Special Rapporteur’s task is to bring information on specific allegations of torture to the attention of the government concerned, in the form of a letter or an urgent appeal procedure, and to ask for comments. After the government has replied, the Special Rapporteur is empowered to investigate the allegations further and then make conclusions and recommendations to governments on the issues. The Special Rapporteur can also undertake visits to states to gather more information on the cases. Annually, the Rapporteur will submit a report to the UN Commission on Human Rights outlining his activities, conclusions and recommendations.

Under Article 2(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment, each State Party is required to take effective legislative, judicial, administrative and other measures to prevent any acts of torture from being committed in its jurisdiction.

The *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 14, requires State Parties to ensure redress and compensation for victims of torture. If the victim dies as a result of the torture, then the victim’s dependents should be entitled to compensation.

In addition, the HR Committee requires State Parties to provide safeguards for the special protection of particularly vulnerable persons.

The *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principle 35, states further that any damage incurred because of acts or omissions by a public official, which are contrary to the rights in the principles, must be compensated or liability provided by domestic law. Any information required to claim compensation must be made available.

4.4.2 Right of detainees to be treated with humanity and dignity

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International Covenant on Civil and Political Rights, Article 10(1)

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Article 10 connects the rights to liberty of person in Article 9 and personal integrity in Article 7. Article 10 establishes a right to a minimum of humane treatment in conditions of detention. This provision arose out of an acknowledgement that massive violations of human rights occur within closed institutions such as prisons where power relationships are so disparate. The violation of human rights often goes far beyond the deprivation of personal liberty and may be justified as a necessary corollary of the lack of liberty (Nowak 1993: 184). Article 10 therefore maintains minimum guarantees of humane treatment to restrict and define the permissible encroachments upon other rights of those in detention. In *Angel Estrella v Uruguay* (74/1980), restrictions placed on correspondence by prisoners had to be measured against the standard of humane treatment in Article 10(1).

The *Standard Minimum Rules for the Treatment of Prisoners* were adopted by the United Nations on 30 August 1955 and although is not binding, the delegates in the General Assembly stated that they should be taken into account in interpreting and applying Article 10 (Nowak 1993:185). In addition, the HR Committee requested State Parties to report on their application of UN standards on the treatment of prisoners, including the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment [Human Rights Committee 1994: GC 21/44].

The scope of applicability of Article 10 varies according to the specific paragraphs. Paragraph 2 relates only to persons in pre-trial detention, paragraph 3 applies to convicted prisoners, while paragraph 1 is relevant to all cases of deprivation of liberty. Similar to Article 9(1), the requirement of humane treatment is applicable to hospitals, psychiatric institutions, correctional centres, etc [Human Rights Committee 1994: GC 9/16; GC 21/44].

The Committee has made the important point that though the conditions in closed facilities of different countries will vary greatly, it is not dependent solely on financial resources [Human Rights Committee 1994: GC 9/16; GC 21/44].

In many individual communications to the Committee, the view has been held that violations of both Articles 7 and 10 have occurred, without clearly distinguishing between them. The cases mostly involved torture and inhuman treatment in custody. In other cases, the Committee found that the conditions of detention represented inhuman treatment pursuant to Article 10(1) but did not breach Article 7. Nowak is of the view that this implies that inhuman treatment, according to the meaning in Article 10, indicates a lower level of neglect of human dignity than that for Article 7.

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“Incommunicado” detention (isolation without anyone knowing where the person is located) and solitary confinement are examples of violations of Article 10(1). In several cases against Uruguay, the conditions of detention at a prison in Montevideo were held by the Committee to be a violation of Article 10. Constant harassment, threats, humiliation and arbitrary punishment by prison officials took place regularly and there was also a lack of food and natural light [No.s 66, 74/1980; Nos. 88, 92, 105,/1981; Nos. 159, 162/1983]. Similarly, the conditions of detention in a prison in Madagascar, where cells were tiny and barely had light, were held to violate the Article [*Marais* (49/1979); *Wight* (115/1982)].

It can be discerned from the Committee’s case law that Article 10(1) relates to the general state of detention facilities and other closed institutions and to conditions of detention. Article 10 also covers positive obligations of the state to ensure a minimum standard of humane conditions of detention by ensuring the provision of basic needs for detainees and prisoners, such as food, clothing, medical care, communication, light, privacy, etc. [Human Rights Committee 1994: GC 7/16; GC 21/44; GC 9/16].

Article 10 goes beyond the scope of Article 7, in that the requirement of humane treatment extends to the necessary respect for the inherent dignity of the human person (Nowak 1993: 189).

4.4.3 Purpose of imprisonment – rehabilitation

International Covenant on Civil and Political Rights, Article 10

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

Under Article 10(3), the penitentiary system must be essentially aimed “to the fullest possible extent” at reformation and rehabilitation. Article 10(3) imposes a positive duty on states but does not outline what measures must be implemented to achieve the aims of reformation and rehabilitation of prisoners. Therefore the states have broad discretion in fulfilling their obligations under this Article. The HR Committee has emphasised the need for legislative and administrative measures and has given examples of the need for education, vocational training and work [Human Rights Committee 1994: GC 9/16; GC 21/44].

The Committee has accentuated the significance of visits, from families especially, for the social rehabilitation of prisoners. Most importantly, the principles of humane treatment and respect for human dignity are integral to the achievement of the objectives laid out in Article 10(3).

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4.4.4 Right to life

International Covenant on Civil and Political Rights, Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The Human Rights Committee has consistently held that the right to life is the "supreme right" [Human Rights Committee 1994: GC 6/16; GC 14/23]. Without effective guarantee of this right, all other rights would have no meaning. The right to life is one of the non-derogable rights within the meaning of Art. 4(2), which may never be suspended even in the event of an emergency threatening the nation. Some have deemed the right to life to be *jus cogens* under international law (Nowak 1993: 105).

The use of the adjective "inherent", which is only used in Art.6(1), and the use of the present tense "has" instead of "shall have", is indicative that the majority of delegates in the 3d Committee of the GA sought to give expression to the natural law basis of the right to life (Nowak 1993: 105). The Human Rights Committee has thus been led to conclude that the right to life must not be interpreted restrictively [Human Rights Committee 1994: GC 6/16 paras 1, 5]. In particular, the Committee has stated that it is not to be understood as a negative right directed solely at the state but rather that it calls for positive measures to ensure it.

The second sentence of Art. 6(1) of the Covenant obligates the State Parties to protect the right to life by law. However, as with all positive obligations to ensure rights, the duty to protect by law the right to life is relative in the sense that state legislatures have broad discretion in fulfilling this obligation. A clear violation of the duty of protection would be only when state legislation is lacking altogether or when it is manifestly insufficient as measured against the actual threat. In addition, the Committee is of the opinion that Art.6(1) may be violated by a broad definition of the right of self-defence, according to which, e.g. police officers are granted a general statutory presumption of justification for combating certain offences [No. 45/1979, 13.3].

The Committee has extended the right's scope of protection beyond the criminal prohibition of homicide offences, to include other threats to human life, such as malnutrition, life-threatening illness, nuclear energy or armed conflict. The Committee has stated that protection requires positive measures on the part of states, for example in the area of public health. The state is subject to a special duty with regard to persons under arrest: such omissions as deprivation of food or medical treatment, or failure to prevent suicide, may constitute a violation of Art. 6(1) [No. 84/1981. para 9.2].

The third part of Art. 6(1) represents the protection of life against interference by the state. This protection is not absolute though, and only arbitrary deprivation is considered a violation of Art. 6. The Human Rights Committee adopted the term "arbitrarily" even though it was criticised as being too vague. It was said to cover more than intentional killing, and did away with the need to list all the instances of permissible deprivation of

life. In addition, the term “arbitrarily” was found in other provisions of the ICCPR (Arts. 9(1), 12(4), 17(1)).

Much discussion was held in the 3d Committee of the GA about the meaning of “arbitrarily”. Some delegates equated it with lack of due process of law and others argued that it contained an ethical component. The Committee of Experts concurred that arbitrary deprivation of life contained elements of unlawfulness and injustice, as well as capriciousness and unreasonableness (Nowak 1993: 111, citing CE Doc. H(70)7,10].

The Human Rights Committee has placed great significance on the prohibition of arbitrary deprivation of life by state security forces, calling upon states to limit by law the cases of permissible deprivation and to control this strictly [Human Rights Committee 1994: GC 6/16 para 3]. The term ‘arbitrarily’ aims at the specific circumstances of an individual case and their reasonableness (proportionality).

The UN Commission on Human Rights has in the past appointed a Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. All acts and omissions of state representatives that constitute violations of the right to life, fall within the Special Rapporteur’s mandate. Allegations are generally received from non-governmental organisations, governments, individuals and some intergovernmental organisations.

The Special Rapporteur groups the provisions of international instruments relating to the right to life into the following categories:

- Violations of the right to life in connection with the death penalty;
- Deaths in custody;
- Deaths due to the use of force by law enforcement officials;
- Violation of the right to life during armed conflicts;
- Expulsion of persons to a country where their lives are in danger;
- Genocide;
- Breach of the obligation to investigate violations of the right to life [Report of the Special Rapporteur of the UN Commission on Human Rights, Mr. Bacre Waly Ndiaye, Extrajudicial, summary or arbitrary executions, UN Doc E/CN4/1994/7, para 11].

Colombia, Suriname, Uruguay and Zaire are the few States against which individual communications have asserted a violation of the right to life. The governments did not admit responsibility in any of the cases. The Committee based its decisions on the accusations of the authors and the lack of co-operation on the part of the governments to assist in solving the deaths.

In the case of *Suarez de Guerrero v Colombia* [(45/1979) UN Doc A/37/40 para 1.2] police killed seven suspected kidnappers of a former Colombian ambassador. The police raided a house where the ambassador was believed to be held, but there was no one there. They remained in the house awaiting the return of the suspects. When seven people entered the house later, they were all shot dead without warning. Criminal proceedings

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were undertaken against the police, but they were all found innocent on the basis of legislation that allowed for killings, "[by] the members of the police force in the course of operations planned with the object of preventing and curbing the offences of extortion and kidnapping…" [*Suarez de Guerrero v Colombia* (45/1979) (Views adopted on 31 March 1982, Fifteenth session) UN Doc A/37/40 para 1.2].

The Human Rights Committee stated that the "deprivation of life by the authorities of the State is a matter of the utmost gravity" [UN Doc A/37/40 para 13.1]. The Committee found the killings were intentional and without warning to the victims. The police action was "disproportionate to the requirements of law enforcement in the circumstances of the case" [UN Doc A/37/40 para 13.2]. The Committee held, therefore, that an arbitrary deprivation of life in violation of article 6(1) of the ICCPR had occurred, and the legislation should be amended so as not to violate article 6(1) [UN Doc A/37/40 para 13.3]. The Committee also noted that the victims were merely suspects and that the killings could not be justified by any of the generally recognised grounds (necessary use of force in connection with self-defence, emergency, arrest or prevention of escape). In this case the Committee held that the right to life was not adequately protected by the Colombian law as required by the second part of Art. 6(1), similarly in the case of *Sanjuan Brothers v. Colombia* (45/1979).

In the case of the December Murders in Suriname, the Committee called upon Suriname to investigate the deaths of 15 members of the opposition, to bring to justice those responsible, to compensate the surviving families and to take adequate precautions for the protection of life [*Baboeram et al v Suriname*, No.s 146, 148-154/1983].

Finally, in two cases against Uruguay, the Committee held that the right to life had been violated [*Bleier v Uruguay* (30/1978); *Dermit Barbato v Uruguay* (84/1981)]. In particular in the *Dermit Barbato* case, the victim was not released after having served an 8-year prison sentence. The authorities eventually turned over the body to his family, alleging that he had committed suicide. Since the government had not conducted an investigation into the cause of death, the Committee found a violation of the right to life [(84/1981) para 9.2].

Several UN documents have laid out specific principles as guidelines for law enforcement officials and their use of force and firearms, namely the *UN Code of Conduct for Law Enforcement Officials* and the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*. These principles establish the importance of respect and protection of human dignity and human rights of all persons in the performance of their duties. Non-violent means must be applied before resorting to the use of force and firearms. Force may only be used when strictly necessary and to the extent required for the performance of their duties [*UN Code of Conduct for Law Enforcement Officials*]. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials must exercise restraint and act in proportion to the seriousness of the offence.

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Law enforcement officials may only use firearms against persons in the following instances:

- in self-defence or defence of others against the imminent threat of death or serious injury;
- to prevent a particularly serious crime involving grave threat to life;
- to arrest a person presenting such a danger and resisting their authority;
- to prevent escape in these circumstances;
- only when less extreme means are insufficient to achieve these objectives; and
- only when strictly unavoidable in order to protect life [*UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*]

4.5 Equality before the law

International Covenant on Civil and Political Rights

Article 2
1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 26 - Equality before the law and equal protection of the law
The UN Committee has defined discrimination in article 26 of the ICCPR as:

> … to imply any distinction, exclusion, restriction or preference which is based on any ground … and which has the purpose or effect of nullifying or impairing the recognition,

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enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms [Human Rights Committee 1994: GC 18].

However, the HR Committee has stated that the equal enjoyment of rights and freedoms does not mean identical treatment in every circumstance, for example article 10(3) requires the segregation of juvenile offenders from adults.

A distinction has been drawn between the principle of non-discrimination in article 2(1) and the equality before the law and the equal protection of the law without discrimination in article 26. According to the Committee, article 26 prohibits discrimination in law and in fact in any area governed by public authorities. Article 26 is concerned with the obligations of states not to enact discriminatory legislation. Thus the application of the principle of non-discrimination in article 26 is not limited to those rights protected in the ICCPR [Human Rights Committee 1994: GC 18].

The HR Committee has expressed in many of its responses to communications alleging violation of article 26, that not all differences in treatment will be considered discriminatory [*M. Th. Sprenger v The Netherlands* (395/1990) UN Doc A/47/40, para 7.4]. The discrimination will not be prohibited if it is based on reasonable and objective criteria.

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5. Human Rights in the Australian System

In this Chapter we look at how international human rights law, in particular that of the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CROC), which have been ratified by Australia, are incorporated into Australia's domestic legal system. Giving full legal force to the rights stated in the ICCPR and CROC is clearly a significant goal in the struggle for human rights (Donnelly 1989: 18).

Historically, international and domestic law were almost entirely separate. However, there is now much legal authority supporting the incorporation of international human rights jurisprudence into the domestic legal system. Although Australia does not have a comprehensive Bill of Rights, it has a number of common law, constitutional and statutory mechanisms for the protection of human rights. A central question addressed in this report is whether these mechanisms are adequate. To what extent has the tentative legislation in favour of human rights, in recent years, protected the rights of Australian citizens? And to what extent have judges acted, or been able to act, to fill gaps in the common law by reference to international human rights jurisprudence (Kirby 1995a). Have Australian legislators and Australian judges been able to ensure that domestic law adheres to those important principles?

Australia's foreign policy is said to be predicated on the pursuit of improved standards of human rights, to safeguard the dignity and improve the well-being of the individual (DFAT 1998). At the same time the Australian government recognises that Australia must acknowledge for itself the validity of subscribing to the principles and rights it seeks to promote elsewhere. Australia's National Action Plan on Human Rights 1994 states:

> the universal enjoyment of human rights remains a matter of fundamental importance for Australia. As such, Australia accords a high priority to the promotion and protection of human rights, both internationally and domestically.

A Commonwealth government policy statement (1997: par 26-31) also emphasises the importance to Australia of promoting human rights protection, both within and outside Australian borders. There can be no denying that Australia's record has been far from perfect, in particular with respect to the treatment of Aboriginal and Torres Strait Islander peoples. Even the current conservative Coalition Government admits this (Ruddock in United Nations 2000a).

In our view it is the obligation of both the Australian federal government and the governments of the States and Territories to ensure that criminal justice laws fall into line with the human rights principles Australia has committed itself to by ratifying the ICCPR and CROC.

5.1 How international human rights law becomes Australian law

The international body of human rights treaties is an important and powerful source of law which may be called on to assist in promoting the protection of rights globally and within nation States. As Australia is a party to various international human rights

instruments, including all the major conventions, there is a strong argument for implementation of the standards in those treaties to be upheld in Australia. But what are the mechanisms within the Australian legal-political system for upholding internationally established rights and are they effective?

The system by which the law incorporates international human rights standards in Australia, both directly and indirectly, is complex and involves various institutions, public and private, as well as sub-systems within the legislature, executive, judiciary and bureaucracy of the States and territories. A thorough detailing of this broad context is beyond the scope of this report but it is nevertheless worthwhile noting that despite the lack of a formal Bill of Rights there are various avenues for advocating broader application of and adherence to human rights in Australia. Here we focus mostly on the formal mechanisms of implementing international human rights treaty law and only mention some of the indirect mechanisms.

The legal means by which nation states give effect to their treaty obligations depends on its national constitutional legal arrangements. The Constitutions of many countries regard treaties as forming part of domestic law. Other countries, mostly countries with a common law tradition (including Australia), adopt a 'dualist' approach, whereby a specific act of transformation into domestic law is necessary before treaty requirements can be regarded as having effect in the national sphere (DFAT 1998).

In Australia, the incorporation of human rights treaties requires specific enabling legislation to be enacted by federal or State parliaments in order to give effect to the terms of the treaty. The introduction of rights legislation, based on international conventions, by the federal parliament has depended on a range of constitutional powers, including the external affairs power. Before the High Court of Australia’s decisions in *Koowarta* and and the *Tasmanian Dams* case in 1982-3, there was doubt as to whether the external affairs power could be used to enact laws which would affect the legal systems of the States, based on treaties ratified by the Commonwealth. Because of these cases, it was established that a treaty entered into bona fide by Australia is enough to attract the external affairs power. Therefore, legislation based on the ICCPR or other international conventions ratified by Australia will be upheld as valid exercises of the external affairs power.

There are several examples where federal legislation has partially enacted the international human rights treaties that Australia has signed. In some cases, the full text of the treaty is included as an annex to such legislation. So, for example, the *Racial Discrimination Act* 1975 partially enacts the *International Convention on the Elimination of All Forms of Racial Discrimination* 1965; the *Sex Discrimination Act* 1984 partially enacts the *International Convention on the Elimination of All Forms of Discrimination Against Women* 1979; the *Human Rights and Equal Opportunity Commission Act* 1986 has the *International Covenant on Civil and Political Rights* 1996 as a Schedule to it; the *Crimes (Torture) Act* 1988 partially enacts the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* 1984; and the *Disability*

Discrimination Act 1993 partially enacts the *Declaration on the Rights of Mentally Retarded Persons* 1971 and the *Declaration on the Rights of Disabled Persons* 1975.

When Australia ratifies a treaty, it binds itself, as a matter of international law, to comply with the terms of that treaty. Human rights treaties generally impose obligations on the states that are parties to them to comply, both in their laws and their governmental practices and procedures, with certain standards. The Department of Foreign Affairs has described its responsibility in this way:

> Australia also upholds vigorously the principle of international accountability. It therefore adheres to the major human rights instruments and responds in detail to inquiries raised as a consequence of the monitoring process established under these instruments (DFAT 1998).

5.1.1 Implementation of the ICCPR

The *International Covenant on Civil and Political Rights* was ratified and came into force in Australia on 13 November 1980. In December 1991, Australia became a party to the First Optional Protocol to the *International Covenant on Civil and Political Rights* (ICCPR), thereby recognising the competence of the Covenant's monitoring body, the Human Rights Committee, to receive communications from persons within Australia concerning Australia's compliance with the Covenant. In 1990, Australia deposited its instrument of accession to the Second Optional Protocol to the ICCPR against capital punishment.

The Government is required to submit, in compliance with its obligations as a party to the ICCPR, reports on measures it has taken to give effect to their provisions. Two recent reports were submitted by Australia on the ICCPR: the Third Report in March 1987 - December 1995; and the Fourth Report in January 1996 - December 1996. The Federal Government can thereby be assessed on the extent to which it has met its obligations under the ICCPR, by the UN Human Rights Committee. However, the Committee does not have the judicial power to force a change in legislation. Despite this, political pressure and embarrassment a decision of the Human Rights Committee may lead to change in Australian domestic law, as happened in the *Toonen* case (1994) – the first individual complaint upheld against Australia under the First Optional Protocol to the ICCPR. In this case the Human Rights Committee found that the Tasmanian Criminal Code, by criminalizing male homosexuality, had breached an individual's right to sexual privacy. The Federal Government then passed the *Human Rights (Sexual Conduct) Act* (1994), which eventually forced the Tasmanian Parliament to repeal the offending law.

At the time of ratifying the ICCPR in 1980, the Australian Government maintained that no new legislation was required since existing law was in full conformity with the requirements of the Covenant. As a result, individuals who felt that the Covenant was violated by laws or acts of a Federal or State Government and who wished to litigate the relevant issue, were obliged to do so on the basis of Australian laws. Yet these laws, in some instances did not directly address the Covenant's provisions. Since Australia has no Bill of Rights and existing privacy legislation did not deal with the issues raised by *Toonen* case, the ICCPR Committee concluded, in its view, there were no available domestic legal remedies. *Toonen* shows that the mechanism for asserting rights at

international law is in existence, and can be potent. However, the protection of individual rights via the ICCPR's First Optional Protocol requires, firstly, an individual with sufficient resources to exhaust all domestic remedies and then lodge a complaint and, secondly, a Federal Government willing to exercise its powers to obligate States (or the Commonwealth itself) to change their laws. This is a costly and time-consuming path. Yet although there is not direct coercive remedy under the ICCPR, use of the First Optional Protocol to the ICCPR to expose rights abuses can help create political pressure for change.

The Human Rights and Equal Opportunity Commission (HREOC) has been allocated, under its Act, the responsibility for monitoring compliance with the ICCPR. The HREOC model is indicative of a trend in Australian human rights protection, to relegate the enforcement of human rights to an administrative body rather than to the courts. Administrative jurisdiction is said to be less formal, inexpensive and more expeditious. Yet HREOC can only seek to enforce human rights abuses which involve a breach of domestic law (eg a breach of the *Sex Discrimination Act*) and, since the *Brandy* case (1995), its decisions can only be enforced by the Federal Court.

5.1.2 Implementation of CROC

The United Nations Convention on the Rights of the Child was ratified by Australia on 16 January 1991. It has not been incorporated into Australia's domestic law by statute. Under CROC, Australia has acceded to an international reporting mechanism. Every five years the Federal government is obliged to report to the UN on its practical response to its commitments under the Convention (Article 44). The Australian Government's first report of its compliance with CROC was tabled in the Senate on 21 December 1995, and then forwarded to the UN Committee on the Rights of the Child. A large number of laws, policies and programs were listed, but not evaluated (Anderson, Campbell & Turner 1999).

The Government's first report to the CROC Committee was criticised for inadequately indicating what steps had been taken to bring domestic law in to line with the principles of CROC and for not containing an honest and objective appraisal of Australia's performance in implementing the principles of CROC over the three and a half years since it had been ratified (National Children's and Youth Law Centre 1996). An alternative report by Defence for Children International was produced the following year, and submitted to the UN Committee. This report noted the lack of community consultation involved in preparation of the Federal Government's report, and the lack of Government commitment to the Convention. Attention was drawn to a number of serious denials of children's rights, including abuses in systems of care, denial of the rights of children of asylum seekers, denial of the rights of indigenous children in legal and welfare systems (by the *Northern Territory (Juvenile Justice Act)* 1997 Sec 53a(e)), regressive laws designed to deliver harsh punishment to young offenders, police protection of paedophilia, and preventive detention laws which deny children the right to public space (*NSW Children (Protection and Parental Responsibility) Act* 1997). The alternative report called for CROC to be implemented in Australian law, for a

Commissioner for Children and for administrative procedures to ensure compliance with the guaranteed principles of CROC (Defence for Children International 1996: 9-12).

In more recent times, argument over mandatory sentencing in the Northern Territory and Western Australia (sparked by Greens Senator Bob Brown's *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* 1999, seeking to override these laws) has raised the issue of further breaches of CROC. Opposition Leader Kim Beazley asked the UN Secretary General to refer the matter to the UN's Human Right's Commission, and it has also been drawn to the attention of the Committee supervising the *Convention on the Elimination of Racial Discrimination*, as mandatory sentencing mainly affects Aboriginal children (Mann 2000: 1). In this case the Australian Government (while expressing disapproval of the laws) has chosen not to use its external affairs power (to enforce treaty commitments), and its power under s.109 of the Australia Constitution (enabling it to override State and Territory law), despite advice from Australian and international jurists that mandatory sentencing breaches a variety of human rights principles (Wood et al 2000) including those of CROC (imprisoning children only as a last resort, Article 37(b)), the ICCPR (the right to be sentenced by an independent tribunal, Article 14(1)) and those of CERD (governments must take active steps to end racial discrimination, Article 2).

Thus CROC has not been enacted into federal legislation. To the contrary, legislation has been prepared to prevent the common law moving in advance of the legislature on CROC. In the controversial case of *Teoh*, the High Court, seeking a modest incorporation of CROC's provisions into administrative law (see the section below on The Judiciary and Human Rights), was rebuffed by the Federal Parliament. The as yet unenacted *Administrative Decisions (Effect of International Instruments) Bill* (introduced in 1997, reintroduced in 1999) was designed to ensure that ratified treaties "do not give rise to a legitimate expectation in administrative law that the Government will act in accordance with the treaty" (Australian Senate 2000: 4). This approach, supported by both major parties, represents a rejection by the Australian Parliament of even a modest incorporation of treaty rights by judges, within the common law system. The parliamentary anxiety to block developments such as *Teoh* has not yet been matched by an equal anxiety to legislate to give force to Australian treaty commitments.

5.1.3 Mechanisms for promoting and protecting human rights

Both the ICCPR and CROC provide standards around which the actions of our governments can be measured. They provide tangible standards which non-government and community organisations can assert as the basic rights of Australian citizens. The community must continue to stress the obligations that governments have accepted through the treaty process and through other mechanisms besides the formal ones provided under the treaties. NGO's, including national and international organisations, and Community Legal Centres play a significant role in the promotion and protection of human rights laws throughout the community. So do the Councils for Civil Liberties.

Public policy formulation may be influenced by human rights philosophy through parliamentary inquiries, scrutiny, debates or resolutions, or by judicial developments in the common law or statutory interpretation. (However legislation in apparent conflict

with international obligations still passes through parliaments.) Inquiries into human rights issues; community education programs; scrutiny and analyses of government policies; ongoing consultation with interested parties; Ombudsman's; law reform bodies; all these may be mechanisms for the promotion and protection of human rights.

A governmental rights monitor has been created. In 1981, the Fraser Government established the Human Rights Commission, to advise the Commonwealth on whether its legislation and practices were consistent with the ICCPR and other Conventions. This body was replaced by the current Human Rights and Equal Opportunity Commission (HREOC) during the Hawke Government in 1986. The Human Rights and Equal Opportunity Commission has specialised Commissioners empowered to investigate complaints of discrimination on racial, sexual, disability or privacy grounds.

The Coalition Government, after coming to office in 1996, attempted to change the nature of HREOC, though its efforts faced opposition in the Senate. The *Human Rights Legislation Amendment Bill (No. 2)* 1998 – now referred to the Senate – follows on from the *Human Rights Legislation Amendment Bill* 1997 and was driven by two developments. The first was the High Court decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995), which held that the mechanism for registration and enforcement of HREOC determinations through the Federal Court breached the doctrine of the separation of powers implicit in Chapter III of the Constitution. The second was the tripartite review of the functions and management of HREOC, carried out by the Attorney General's Department, the Department of Finance and HREOC. The *Human Rights Legislation Amendment Bill (No.2)* 1998 provides for the reorganisation of the Human Rights and Responsibilities Commission. Critics have seen this proposed change as a downgrading of the Federal Government's commitment to human rights, and of its commitment to the Commission. Albeit, it must be said, the separation of power doctrine was a factor.

In the States, specialist bodies also exist to promote and protect rights, such as the Anti-Discrimination Board of New South Wales, the Privacy Committee, the Mental Health Review Tribunal, and the Guardianship Board. These are non-judicial bodies.

The Department of Foreign Affairs and Trade liaises on a regular basis with parliamentary representatives, particularly with the parliamentary Group of Amnesty International and with NGOs and individuals on human rights issues and cases of interest to the Australian community. It also appears when required to discuss human rights matters before the Parliamentary Joint Committee on Foreign Affairs, Defence and Trade, and the Human Rights Sub-Committee. Since 1992, DFAT has been required to present an annual report to the Sub-Committee detailing the Australian Government's human rights policy and international activities.

5.2 Constitutional and Legislative Mechanisms

Despite the various mechanisms described above, there is no comprehensive constitutional guarantee of human rights in Australia. Very few rights are included in the Australian Constitution, though there are some particular guarantees:

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- property can only be acquired by the state on just terms (s.51(xxxi))
- trial by jury is a right, for all federal indictable offences (s.80)
- free trade within Australia is guaranteed (s.92)
- there is to be no federal religious test (s.116), and
- there is to be no discrimination against citizens on the basis of their State of residence (s.117)

However, even basic human rights such as equality before the law, anti-discrimination and freedom of speech receive no explicit recognition in the Australian Constitution. The Constitutions of the States also have no Bills of Rights, nor is there any federal or State statutory Bill of Rights. Queensland, however, does have the *Legislative Standards Act* (1992), which requires that Queensland legislation pays "sufficient regard" to a list of principles, including some basic human rights standards. These fragmentary offerings have so far done little to lift the weak cultural and legal commitments to rights, and the lack of constitutional protection of human rights has a significant dampening effect on human rights protection and jurisprudence. The States have not yet rushed in to fill the gaps in human rights protection, left by federal inaction.

5.2.1 Australian Bills of Rights

Since Federation, a number of attempts have been made to introduce a bill of rights or bill of rights provisions in the Australian constitution. Inquiries into the Constitution in 1929 and 1959 rejected the idea.

In recent years two major attempts have been made to introduce a Bill of Rights, both in the form of a non-constitutional statutory enactment. In 1973, Attorney General Senator Lionel Murphy introduced his Human Rights Bill into the Senate. This Bill was substantially based on the ICCPR. Substantial opposition to the Bill resulted in the Whitlam Labor Government's decision not to re-introduce the Bill after the double dissolution of the Parliament in 1974. Despite this setback, in 1975 the Whitlam Government introduced the *Race Discrimination Act*, while in 1984 the Hawke Government introduced the *Sex Discrimination Act*. The first preceded, whiles the second followed, the New South Wales *Anti-Discrimination Act* 1997, which also proscribed racial and sexual discrimination.

The next attempt at a comprehensive Bill of Rights was made in 1983 by the Commonwealth Attorney General, Gareth Evans. His Australian Bill of Rights (weaker than the Murphy Bill, and applying only to governmental actions) was adopted in principle by Cabinet in 1984, but its introduction into Parliament was deferred until after the 1984 election. Evan's successor, Attorney General Lionel Bowen, watered down the Evans Bill and introduced it as the *Australian Human Rights Bill* 1985. It passed the House of Representatives but failed to pass through the Senate. In the face of conservative opposition, the Bill was finally withdrawn in November 1996 (Williams 2000: 30), though after a somewhat strengthened *Human Rights and Equal Opportunities Commission Act* had replaced the previous *Human Rights Commission Act.*

In 1988 the Hawke Government set up a Constitutional Commission, which in turn proposed the adoption of a charter of human rights. Following the recommendations of

this Commission, the 1988 referendum was held. Proposals for a modest list of protections, including the extension of the limited federal constitutional rights (to trial by jury, freedom from religion test and the acquisition of property on just terms) to the States were rejected by the people. George Williams (2000: 32-33) observes that the failure of these modest proposals "undermined any move to insert other rights into the Constitution, or to implement the final report of the Constitutional Commission."

None of this has reduced the obligation of the Federal Government to act in defence of its citizen's rights, and to meet its international commitments. Upon ratification of the *International Covenant on Civil and Political Rights* in 1980, Australia imposed upon present and future governments the obligation to respect, and to guarantee to all individuals within its territory and subject to its jurisdiction, the rights recognised in the Covenant. It also imposed upon itself the obligation to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the Covenant. However the Australian Government, when ratifying the ICCPR with the UN Secretary General, added some reservations, including the following (DFAT 1999:15):

> Australia…accepts that the provisions of the Covenant extend to all parts of Australia as a federal state without any limitations or exceptions. [However] it enters a general reservation that Article 2, paragraphs 2 and 3, and Article 50 shall be given effect consistently with and subject to…constitutional processes which in the case of Australia are the processes of a federation in which legislative, executive and judicial powers…are distributed among the federal (Commonwealth) authorities and the authorities of the constituent States.

This statement appears vague and open to varying interpretations, but it underlines probably the major stumbling block for a Bill of Rights – the federal-state relationship. Foreseeing such problems, the ICCPR requires that, in a federal system:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind…The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions (Article 2 and 50).

The Australian Government's reservation could mean that the Commonwealth will use its constitutional power to implement the Covenant and enter into co-operative arrangements with States. On the other hand it could carry the less favourable interpretation that the Commonwealth will not enter into legislative areas where the States and Territories are also competent to legislate. Such arguments have beset the mandatory sentencing debate, with a conservative federal government, despite its clear powers, apparently anxious not to override the laws of a State or Territory (Mann 2000).

5.2.2 Federal legislation and implied rights

While the Constitution does not expressly grant the Federal Government power to legislate in the human rights area, Section 51(xxix) of the Australian Constitution vests in the Federal Government the specific 'external affairs power'. This is one of the most important Commonwealth powers and a source of occasional dispute between the Commonwealth and the States. It was not an important power when the Constitution first

came into effect but changed in the post world war two period, when Australia gained full independence and began to enter into important international agreements. The High Court was in the vanguard of this development.

The 'external affairs' power has been interpreted by the High Court (in the *Koowarta* and *Tasmanian Dams* cases) as including the power to conclude treaties (including human rights treaties) on behalf of Australia and to legislate as appropriate to give effect to these international obligations. The consequence is that Australia can now enter into international treaties on its own behalf under Commonwealth executive power. Without this external affairs power, many of the treaties that have been entered into would not have been within the Commonwealth power (Constitutional Centenary Foundation 1997: 55). In a number of cases, culminating in the *Tasmanian Dams* case, the High Court has held that the external affairs power enables the Commonwealth Parliament to pass laws to implement any of Australia's international obligations. This has broadened Commonwealth power considerably, limited only by the fact that the Commonwealth may only legislate to implement the treaty. It may not pass laws generally on the subject matter of the treaty (Constitutional Centenary Foundation 1997: 55).

Apart from ratifying a treaty and legislation provisions in the Constitution, there exist some constitutional implied rights. The Constitution provides for a separation of powers and the exercise of Federal judicial power by an independent judiciary. Recently, an implied constitutional right has been developed, protective of freedom of expression. The case of *Australian Capital Television Pty Limited v The Commonwealth* (1992) opened a limited freedom of expression in political affairs, held to be part of the necessary conditions of a parliamentary democracy. The interpretation of this right was later modified in the case of *Lange* (1997). The suggestion of an implied right to 'equality before the law' was also made by Justices Deane and Toohey in *Leeth v Commonwealth* (1992). Former Chief Justice Anthony Mason (in Kinley 1998: 42) calls this case the "high water mark" of efforts to find implied rights in the Australian constitution. Such implied rights, if not overruled by the Parliament, may be enforced by the courts.

The protection of human rights in Australia is therefore largely based on statute, Commonwealth and State legislation dealing with specific aspects of human rights. Australia's common law tradition requires that parliament endeavour to define legal rights in legislation (Kinley 1998: 21). This is vital in respect of human rights as legislators will then define the essence of the right, the legal components of its protection and the limits of its application. Rights are also indirectly defined by laws which delimit their boundaries. Examples of this are the proscription of racial vilification under the *Anti-Discrimination Act* 1977 (*NSW)* and pertinent, implied constitutional limitations on legislative power (Kinley 1998: 21). The various State and Territory defamation laws are basically limitations on the right to freedom of speech.

5.3 The Judiciary and Human Rights

The judiciary has a vital role to play in the articulation of legal rights, not only in respect of common law rights not enshrined in statutes, but also in respect of those rights inadequately addressed in legislation. Here the judiciary can refine the rights in question.

The power of the judiciary (in particular the High Court) to determine existing legal rights is an integral part of their function as provided under Chapter III of the Australian Constitution. However, it has used these powers cautiously. Former High Court Chief Justice Anthony Mason has spoken of the contrast between the Australian judiciary's "strong development" of rules of procedural fairness, and the "absence of a corresponding development of rules of substantive fairness". He suggests that, despite the rise in rights arguments, Australian judges are "not [yet] comfortable with 'rights jurisprudence'" (Mason in Kinley 1998: 46).

There is much evidence of the failure of the common law to adequately develop and protect human rights. For instance, in the case of *McInnes v The Queen* (1979), the High Court refused to hold that a person on trial for serious offences was entitled to the assistance of counsel. However this issue was revisited in the case of *Dietrich* (1992), where the High Court, referring to human rights principles, held that a trial could be stayed if there were not appropriate representation. In *Dugan v Mirror Newspapers Ltd* (1978), the High Court held that a convicted criminal was 'civilitur mortuus', that is, he had lost his rights to sue in the courts. The effect of this ruling in New South Wales was later reversed by the NSW *Felons (Civil Proceedings) Act* 1981, which restored a restricted right to sue to a capital felon. These 'rights-insensitive' cases illustrate that judges in the past have often tended to equate the interests of government and bureaucrats with that of the public interest, thereby limiting the rights of individuals. Further, it appears that in the common law tradition, rights only exist after all the possible exceptions and limitations to them have been extracted (O'Neill 1987: 17). The main problem has been that there is no statutory basis judges can use to interpret legislation so as to ensure that rights are not unreasonably limited.

Despite this, there are also cases where the courts have upheld basic rights in the name of the common law, for example in the fair trial of suspects (*McKinney* 1991; *Jago* 1989; *Dietrich* 1992), and in freedom of speech (*Australian Capital Television* 1992). The judiciary has had an impact upon the meaning and extent of anti-discrimination laws and immigration law, which are detailed in legislation, and has played some role in the constitutional development of the right to free political speech and the right to a fair trial, which are hardly detailed in legislation. However in the criminal justice field these judgements have generally been about procedural, rather than substantive, rights.

Of particular interest to us in this report is the interaction between international law and the common law. When formulating principles of common law in relation to human rights, the High Court in recent years has occasionally emphasised the importance of international law and the provisions of international conventions that have been ratified by Australia. In a number of cases, in particular the well-known case of *Mabo*, the High Court declared that international law is a legitimate and important influence on the development of the common law, especially in the area of human rights. *Mabo v Queensland (No. 2)* (1992) established a substantive principle governing land rights of indigenous people with respect to unalienated lands of the Crown. This was followed by the acknowledgement of a majority of the court, in *Wik Peoples v Queensland* (1996),

that indigenous rights to the use of land might not be fully extinguished under a pastoral lease, and that pastoral lease land might therefore be shared.

Other common law decisions affecting human rights in the past decade include the recognition of the individual's right to physical integrity and autonomy in *Re Marion* (1992). In *Coco v The Queen* (1994), the High Court adopted rules of interpretation designed to ensure that rights traditionally protected by the common law and fundamental rights are not undermined unless by express provisions in statute to do so.

The High Court in *Minister of State for Immigration and Ethnic Affairs v Teoh* considered the effect, in municipal law, of relevant provisions of a treaty ratified by the Executive but still unincorporated by domestic legislation implementing it. In *Teoh's* case, the majority of the court held that article 3(1) of the *Convention of the Rights of the Child* generated a legitimate expectation that the rights of the child would be taken into account as a 'primary consideration', when a decision was made which affected that child. This decision introduced CROC into administrative law, by acknowledging that an act of the Executive (ie. ratifying a treaty) may give rise to a legitimate expectation on the part of an individual affected by the decision-making processes of an agent of the Government. Majority judgments by Mason CJ and Deane held:

> It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute…[However] ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification 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' (High Court in *Teoh* 1995:353).

However, the judges also pointed out:

> The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door (High Court in *Teoh* 1995:286-291).

Successive governments have reacted adversely to the *Teoh* decision. On 10 May 1995, the Labor Minister for Foreign Affairs and the Labor Attorney General issued a joint statement concerning legitimate expectations and international instruments. On 25 February 1997, the Coalition Minister for Foreign Affairs and the Coalition Attorney General issued a further joint statement. Both statements said, on behalf of the Commonwealth, that the act of entering into an international instrument should not give

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rise to such legitimate expectations, and that legislation would be introduced to set aside any such legitimate expectations. A Bill to give effect to this statement the *Administrative Decisions (Effect of International Instruments) Bill*, passed the House of Representatives in 1997 but was directed to a review committee in the Senate. That committee eventually supported the Bill, which was resurrected after the 1999 election, but has not yet passed through the Parliament. This Bill would have the effect of blocking all common law recognition of Australia's human rights obligations, unless there were express parliamentary authorisation, by legislation.

South Australia has a similar law, the *Administrative Decisions (Effect of International Instruments) Act* 1995. Section 3 provides that an international instrument (even though binding in international law on Australia) affects administrative decisions and procedures under the law of the State only to the extent that the instrument has the force of domestic law under an Act of the Parliament of the Commonwealth or the State. However, this Act does not prevent a decision-maker from having regard to an international instrument if the instrument is relevant to the decision.

There are many other Australian examples in the Federal Court of Australia, the Family Court of Australia and the Court of Criminal Appeal of New South Wales where judges are referring to the text of relevant international instruments and the development of the jurisprudence by courts, tribunals and committees. The hopeful view is that, in this way, gaps and ambiguities in the common law and legislation might be remedied by reference to human rights principles (Kirby 1995a). By this view, giving effect to international law where a country has formally ratified a relevant treaty merely gives substance to the act which the executive government has taken.

Justice Michael Kirby has argued strongly over the past decade, for the recognition of international human rights principles by the courts, tribunals and other bodies established to give them content and force, based on the *Bangalore Principles* (Kirby 1995b). These principles are a modern approach described in February 1988 in Bangalore, India. The principles were agreed to by a group of lawyers from a number of Commonwealth countries. They read:

> (1) International law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries;
>
> (2) Such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare the norms thereby established to be part of domestic law;
>
> (3) The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty - even one ratified by their own country;
>
> (4) But if an issue of uncertainty arises (as by a lacuna in the common law, obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and

> (5) From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which makes it part of domestic law (in Kirby 1993: 373)

Justice Kirby says that a change has occurred in Australian courts since the pronouncement of the Bangalore Principles, in a number of decisions of the High Court of Australia and of the New South Wales Court of Appeal (eg. *Daemar* 1988; *S & M Motor Repairs* 1988; *Jago* 1988 & 1989; *Gradridge v Grace Bros* 1988; *Cachia v Hanes* 1991; *Smith v The Queen* 1991; *Young v Registrar* 1993). In these cases reference was made to international human rights principles in the development of domestic law. Although the fundamental principles of the ICCPR have not yet been translated into Australian legislation, the Covenant may provide increasing guidance to the courts in their development and application of the common law.

However, Australian courts do not have the jurisdiction to compel parliaments to comply with obligations arising under international conventions (eg *Horta v The Commonwealth* 1994). Further, the impending negation of the modest advance in *Teoh*, by the *Administrative Decisions (Effect of International Instruments) Bill* 1999, shows the fragility of some of the common law advances. Similarly, there are structural constraints on the High Court's ability to impose human rights standards. In particular, the capacity of the States to legislate as they wish, so long as they do not breach valid federal law, limits the High Court's power in defining criminal justice standards. Such was the case in the Weissensteiner decision (see Chapter Seven). Therefore, the primary responsibility for giving expression to human rights will remain with parliaments, with only further definition, occasional urging and supplementation coming from the judiciary.

5.4 Obligations of States and Territories under International law

Under a federal system of government it is equally important for States, as well as the Commonwealth, to provide adequate protection of human rights. But what obligation do the States have to uphold human rights under the ICCPR and CROC, and what measures are available to check possible abuses by State governments?

Many of the governmental powers in Australia that potentially infringe human rights, particularly in the criminal justice area, belong to State governments. Alarmingly, there is a serious lack of restraint on those powers. Yet because the States are the arena of policy development most relevant to human rights in the criminal justice field, advances in rights education and rights law are most needed and most critical at the State level.

In Australia, ratification of a treaty has no formal effect on the internal legal order, although of course the federal government can be held accountable, internationally. State parliaments have powers that are virtually unlimited and constitutions that are generally far less entrenched and less restrictive. An effect of this, combined with the weak culture of rights and the States' sense of being 'one step removed' from the treaty process, is that State governments have been less sensitive to human rights commitments. The law-making powers of State parliaments are unrestricted and broad. The simple notion of 'parliamentary sovereignty', meaning unfettered power, has flourished in this climate. Under the *NSW Constitution Act* the Parliament of New South Wales, for example, has

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power to make laws 'for the peace, order and good government of the State'. This phrase is customarily used in constitutional law to refer to a plenary power and the use of the expression has not given rise to any right of review.

Although State parliaments have no significant limits on their capacity to legislate against rights, they are limited by overlapping federal legislation. Under section 109 of the Australian Constitution, a valid federal law will prevail over any inconsistent State law, and the State law "shall to the extent of the inconsistency, be invalid". Provided that a human rights law can be brought within the scope of federal jurisdiction, the Commonwealth has the power to legislate to protect rights against State action and to override any conflicting State law. This happened in the Tasmanian gay rights case of *Toonen* (1994). Tasmania would not amend its laws prohibiting male homosexuality, despite an adverse ruling by the United Nations Human Rights Committee in *Toonen.* The federal government introduced the *Human Rights (Sexual Conduct) Act* (1994), to protect consenting adults who might otherwise be affected by those laws. The Tasmanian parliament eventually repealed the offending law.

Under the 'external affairs' power, the federal government, which has exclusive power to enter into treaties, can undertake obligations which then bind the country as a whole, including the States. The High Court has now established that the subject matter of a treaty need not relate to any enumerated head of federal power. Australia's ratification of the ICCPR therefore provided the Commonwealth with the possibility of legislating in relation to any matter dealt with in the Covenant, including matters previously considered to be the exclusive domain of the States. Article 50 of the ICCPR reinforces this result by providing that the Covenant's provisions 'shall extend to all parts of federal States without any limitations or exceptions.'

To the extent that Commonwealth legislation fails to implement treaty obligations, State law may remain inconsistent with the unimplemented international obligations without being inconsistent with Commonwealth law (Griffith 1987: 100). In addition, it is within Commonwealth constitutional power to do nothing to implement Australia's international obligations, leaving room for States to legislate freely against Australia's human rights obligations. This has been the case with the implementation of CROC. Since no federal legislation exists to incorporate the Convention, the States are not obliged under federal law to consider it.

However when a State does decide to act on CROC principle, there is no mechanism in place to maintain that principle. For example the New South Wales *Young Offenders Act* (1997) introduced the valuable principle of diverting children from formal legal processes. It did this by creating a hierarchy of diversionary measures, such as warnings, formal cautions and family conferences. This was in accord with CROC, which maintains that the arrest, detention and imprisonment of children should be a last resort, and that measures should be taken to divert children from judicial proceedings (Articles 37(b) and 40(3)(b)). However a 1999 amendment to the *Young Offenders Act* undermined this concordance by making the record of police cautions a matter which could be taken into account in sentencing in the Children's Court (ss.66 & 68). The diversionary measure

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(applied with far less procedural safeguards than formal legal process) thus became a ‘criminal record’ of consequence. The valuable principle of a general entitlement to bail, in the Bail Act 1978, has been similarly watered down (see Chapter Six). These examples demonstrate the fragility of well intentioned law in a system which has no firm institutional grounding in human rights.

State laws in breach of any unfulfilled obligations would derive validity from the State Constitutions. They do not need any positive authority from the Commonwealth and remain valid in the absence of inconsistent Commonwealth legislation. In *Gerhardy v Brown,* the judge said:

> Except to the extent that the Commonwealth has exercised its legislative power with respect to that subject matter, the exercise by the States of their legislative powers with respect to the same subject matter has no relevant limits and is not subject to any of the requirements of the Covenant.

It is both plausible and desirable that the States could coordinate their efforts with the federal government, to give effect to human rights commitments. The issue of co-operative implementation of treaty obligations by Commonwealth and State laws was touched upon briefly by Brennan J. in the *Tasmanian Dams* case at 783-4:

> It is no objection to the validity of the Wilderness Regulations that the Commonwealth in making those Regulations implements the Convention only in part. The relevant obligation arising under Arts. 4 and 5 is imposed upon Australia but, so far as the performance of the obligation calls for legislative or executive action with respect to a property in a State, the obligation may be performed by the Commonwealth or by the State or partly by each of them. Where a treaty obligation gives rise to a legislative power in the Commonwealth to perform the obligation fully and the Commonwealth chooses to exercise the power only to a limited extent, the validity of the law it chooses to make is not affected by its failure to exercise its powers and to perform Australia's obligation more fully. Unless such a law, on its true construction, could not fairly be regarded as "sufficiently stamped with the purpose of carrying out the terms of the convention” it would be a valid law.

Another example of co-operation between the Commonwealth and State is that when implementing international treaties into Australian law, there is often a requirement for State and Territory legislation to be created or amended to implement the provisions of a treaty. This means that Federal-State consultations may be required in order to establish the appropriate legislative framework to ensure that Australia can comply with its international legal obligations. Agreement may be reached before the Australian Government proceeds to accession or ratification. This is especially so in UNESCO education conventions and International Labour Organisation (ILO) conventions, where a State government interest is apparent (Wiltshire 1995). Consultation is necessary because generally problems with compliance as a result of domestic conflicts arising from Federal-State relations are no excuse under international law. International principles establish that States cannot justify a breach of an international obligation on the basis of domestic Federal-State implementation problems (DFAT 1998: 30). Where consultation with State governments is not necessary, there has been little debate on treaties prior to ratification.

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However, the management of Australia's treaty obligations is mostly handled in a co-operative manner. The ILO conventions are commonly overseen by meetings of Commonwealth and State labour ministers, human rights conventions by the Attorneys General and education matters by Ministers of Education. At a Commonwealth level, there is an interdepartmental committee specifically charged with coordinating reports for international human rights committees by collecting information from Commonwealth departments and the States. States did contribute to the preparation of the third and fourth ICCPR reports.

Despite this cooperation, a constitutional restraint must eventually be placed upon the legislative powers of States, so as to protect the citizen from legislation enacted in breach of human rights. The best course would be for the States themselves to adopt and promote the international standards. In the meantime there is much room for assessing laws against human rights standards, publicising those standards, and introducing law to recognize Australian human rights commitments. In Victoria, there is a Scrutiny of Bills and Regulations Committee of the Victorian Parliament, unique in State parliaments, with the function of alerting Parliament to all reductions in rights or to any undue effect on human rights resulting from legislation. The scrutiny covers laws and regulations. This is a similar process to that which occurs at Commonwealth level, where the Senate now regularly scrutinizes Bills for their rights content. However no such process yet exists in New South Wales. A committee or preferably an independent agency, which alerted and warned the parliament before it legislated to undermine human rights, would be a valuable advance, and a useful precursor as well as a complementary process to a Bill of Rights.

5.5 Conclusion

The rights of Australian citizens are inadequately protected yet, at the same time, it is true that human rights treaties are having an increasing impact upon common and statute law in Australia (Kirby 1995c: 18). Treaty law adopted under the auspices of the United Nations, and accepted by almost all nations on earth, is continuing to influence Australian law both directly and indirectly. Yet as Anthony Mason says, while rights jurisprudence is growing, there are serious limits to the attempts to find substantive rights in the 100 year old Australian Constitution.

Endeavours to interpret the Constitution as a manifestation of underlying principles embedded in the common law or as a charter of unexpressed citizen's rights and freedoms…have not prevailed in the face of a constitutional history which gives scant comfort to the existence of such an intention on the part of the framers (Mason in Kinley 1998: 43)

Australia is not on the path towards a judicially created bill of rights. We agree with George Williams when he says that an Australian Bill of Rights "should not be based on judicial innovation…[but] upon the commitment and participation of the Australian people and their elected representatives" (Williams 2000): 13).

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Australian citizens' rights have not been adequately protected by the variety of mechanisms at State and federal levels, and this problem has become more serious in recent times. There are several reasons for this. First, there have been increased demands for 'social control' legislation, especially in the criminal justice and industrial relations area. The weak culture of human rights in Australia has meant that much of this legislation and associated policy formation has been poorly informed. This is especially the case for New South Wales, where there is less rights monitoring than in the federal sphere, or even than in some other States, such as Victoria and Queensland. Second, tension has developed between judiciary and parliaments, with on the one hand the judiciary reaching the limits of 'implied rights' arguments and, on the other, parliaments reacting against perceived judicial infringements on their territory ('judicial activism'). The best recent example of this jealousy is the Bill proposed to negate the decision in *Teoh's* case. However this reaction to rights jurisprudence in the courts has distracted parliaments from their real task – to adopt and make use of the responsibility they are so jealously guarding. Rather than simply complaining of judicial, federal or international encroachment on their turf, parliamentarians must take on the task of legislating for the protection of citizens' rights. Third, the confusion of a 'States rights' argument has held back the legislative adoption of rights, partly because of the blurred lines of accountability within the Australian federal system, but mainly because of the fear of political conflict over these jurisdictional lines. Fourth, social and racial chauvinism and parochialism has enjoyed a resurgence in Australia in recent years, aided by the weak culture of rights and a mass media used to portraying calls for 'rights' as some sort of sectional interest claim – a competition between groups for resources and social approval.

A fuller assessment of the efficacy of the current system requires a close examination of how recent law making measures up against human rights standards. That is what we intend to do in the next chapter. But our analysis so far suggests the need for legislators and rights advocates to promote the fact of human rights as universal and applying to all citizens. Human rights must not be seen as simply the privilege of some worthy or favoured social group. Further, the cloud of federal-State conflict over rights must be lifted and State parliamentarians must play a far greater role in legislating in support of our rights commitments. Rights, and particularly criminal justice rights, are mainly at stake at a State level. While the federal parliament has responsibility for human rights treaties, and while cooperative federal-State action is desirable, it is vital that the responsibility of legislating for human rights also be taken up by the States.

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6. Criminal Justice in New South Wales

Background

The rest of the material in this report is focussed primarily on current criminal justice laws in Australia in relation to the relevant international standards. However, these standards do not cover all aspects of human rights or civil liberties and it is necessary first to look at the broader picture.

Historically, each Australian State has developed its own structure of parliamentary law and courts – and a separate police force as an enforcement agency. Each State varies markedly from others in the detail of its laws but there is a sufficiently common pattern for it to be feasible to adopt one particular State – in our case, New South Wales – as an exemplar for all of them.

The court system is also similar in the various States. At the head is a Supreme Court and a structure of District Courts where judges, in their criminal jurisdiction, deal with such serious offences as murder, rape and other serious assaults. At a much lower level, there are many magistrates' courts, dispensing justice in summary fashion on a range of less serious offences – which may nevertheless result in terms of imprisonment for the convicted persons. At the national level, there is the Federal Court and the High Court of Australia.

While the superior courts have high standards of judgement, this is not necessarily true of magistrates' courts. The quality and competence of magistrates has generally improved in recent years, but in the past there have been many instances of magistrates being biased in favour of accepting the unsupported word of police, despite the legal requirement that evidence of an offence in a criminal case must be established beyond reasonable doubt in order to warrant a conviction.

The importance of magistrates is highlighted by the fact that the great majority of all criminal cases in Australia are heard and decided upon by them. Most of the accused in these cases come from poor or underprivileged backgrounds – labourers, Aborigines, sexual workers and so on. They are likely to have little or no previous experience of courts or of how to secure (or pay for) legal representation.

Police officers are well aware of these circumstances, and in New South Wales they have a long tradition of giving false evidence – for example, by concocting alleged confessions – to obtain convictions. Furthermore, after the Second World War, there was growing evidence of police corruption and brutality, notable the bashing of suspects in police stations. The standard response by Police Commissioners to media stories about such incidents was to promise an enquiry; but there was never a published report on any incident subsequently.

These circumstances, concerning both police and magistrates' courts, provided the main impetus for formation of a Council for Civil Liberties (CCL) in Sydney in 1963. It was a voluntary body which drew support in particular from a number of barristers who were

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appalled by their experience of what went on in magistrates' courts. In 1965, the CCL published a booklet entitled *If You Are Arrested*, which set out clearly the rights of a person arrested or questioned by police. At a low price, the booklet was eagerly purchased by members of the public; and it has been frequently produced, in revised editions, since then. The CCL also gave legal aid in civil liberties cases, notably to Aborigines and gay persons, at a time when very little such free aid was available from other sources.

The CCL has been particularly concerned with cases arising out of a piece of legislation originally termed the *Vagrancy Act*, later changed to the *Summary Offences Act*. This Act, with its ambiguous references to offensive, riotous, indecent or insulting behaviour or language was a gift to police. It meant that they could make street arrests of anyone inclined to be cheeky or resent their assumption of authority. A charge could easily be sustained by telling the court that the accused had uttered a few swear-words (especially the four-letter words most common in use between one policeman and another). During the Wran Labor government in the 1970s the CCL managed to secure some amendments to the wording of the Act, and its interpretation by magistrates was narrowed to some extent, but it remains a favourite of police. The *Summary Offences Act* was repealed in 1979 and replaced by the *Offences In Public Places Act* 1979, which modified some of the draconian content of the *Summary Offences Act*. In 1988, the Coalition came to power and repealed the *Offences in Public Places Act* and in lieu thereof it enacted the *Summary Offences Act* 1988, which restored some of the harsher elements of the former Act. There are similar statutory offences in other Australian States, and it should be noted that in course of time other CCLs corresponding to the original one in NSW, were set up, notably in Victoria, Queensland and South Australia.

The work of the CCL was not restricted to police matters. It engaged in protests and lobbying in a variety of areas: freedom of speech (opposition to censorship); freedom of assembly and association; the right to privacy; penal reform; opposition to phone-tapping and covert listening devices; and sexual freedom. To give specific examples, the CCL gave evidence to three consecutive Commonwealth Royal Commissions on Security conducted by Justice Hope. The CCL argued that ASIO, as a biased secret police apparatus, served no useful purpose and should be disbanded. ASIO nevertheless survives, despite the end of the Cold War.

Other initiatives by the CCL were successful. Thus the federal Customs Department's arbitrary power to ban the importation of certain books – the Department had a long list, including some literary classics – was decisively broken by the production within Australia of a book, *The Trial of Lady Chatterley*. This book, though previously published in Britain by Penguin as a straightforward account of an unsuccessful prosecution of D. H. Lawrence's book, *Lady Chatterley's Lover*, was on the Australian Customs banned list. The CCL, by guaranteeing free legal aid in the event of prosecutions, played a crucial role in the publication of *The Trial of Lady Chatterley* in Sydney, and the Customs Department beat a hasty retreat. There still remain State and federal forms of censorship over films as well as books and the CCL is watchful in these areas.

A final example of CCL interest and activity concerns womens' rights to abortion if they so wish. Inclusion of abortion in the NSW Crimes Act, with severe penalties, meant that abortions were often carried out in fearfully dangerous and unsanitary conditions by unqualified people. This situation was remedied as a result of an unsuccessful police prosecution of an abortion case in NSW in 1971. In effect, the judgment meant that abortions performed by medical practitioners in certain circumstances with the woman's consent were legal. The successful barrister in this case was James Staples, a member of the Committee of the CCL.

This background sketch is designed to emphasise, firstly, that the reality of justice and injustice is not to be gleaned simply from scrutiny of the text of laws and other documents. Implementation of laws may be profoundly affected by influential bodies such as a police force which has its own agenda and aims, invariably conservative in nature. Secondly, there are organisations which do not appear directly in courts or parliaments but nevertheless have some effect in determining outcomes. Councils for Civil Liberties, which are not recognised as parties to the justice system and are rarely mentioned by academic authorities, need to be taken into account. (For further information on CCL history and activities, see Ken Buckley, *All About Citizens' Rights*, Sydney, Nelson, 1976; and Ken Buckley, *Offensive and Obscene: A Civil Liberties Casebook*, Sydney, Ure Smith, 1970).

Having made these important qualifications to standard accounts of the criminal justice system, we proceed to measure particular criminal justice laws in New South Wales against the relevant international standards. In what follows, each element of law is examined under several questions focussed on articles of the *International Covenant on Civil and Political Rights* (1966) and the *Convention on the Rights of the Child* (1989). These questions are under five headings:
(1) Rights and Police Powers, (ii) Pre-trial Rights, (iii) Trial Rights, (iv) Rights and Criminal Sanctions, and (v) Equality Before the Law. These represent the major areas in which an individual's rights may be affected by the criminal law. Each legal issue to be examined under these headings is then subject to four steps:

- identifying the law about which there is concern, and the possible human rights breach,
- recounting a brief background to the law,
- applying the international jurisprudence, and identifying the suggested breach and possible justifications of the law (counter arguments, compensatory mechanisms, defences, exceptions, provided for by human rights law),
- reaching a conclusion, which may be that the law under consideration (or a part of it) represents (i) a clear breach, (ii) a possible breach, or (iii) no breach of human rights standards.

6.1 Rights and Police Powers

In examining the human rights compliance of criminal justice laws which relate to police powers, mostly to do with detention, search and arrest, we must consider the following:

1. To what extent does the law protect the right to life, liberty and security of the person, and prohibit arbitrary arrest or detention, and to what extent does the law provide an effective remedy in case of such treatment? [ICCPR 9 (1); CROC 37 (b)]
2. To what extent does the law prohibit arbitrary invasion of privacy, in the course of criminal process, and to what extent does the law provide an effective remedy in case of such treatment? [ICCPR 17; CROC16 40(20)(b)(vii)]
3. To what extent does the law provide that arrest [and] detention for young people under eighteen is only to be used as a measure of last resort and for the shortest appropriate time? [CROC 37(a) (b)]

As an example in this area we consider the knife searching powers, introduced under the *NSW Crimes Amendment (Police and Public Safety) Act* 1998.

6.1.1. Knife searching powers

The law and the possible breach

In 1998 the NSW government introduced a law to allow widespread powers for police to search for knives. The law was aimed primarily at young people and adds to a range of laws related to the possession, sale, carrying and use of knives. This particular power of search is of concern for the way it attempts to redefine 'reasonable grounds', to allow police to stop and search. This may breach the provisions of the ICCPR and CROC which prohibit "arbitrary arrest or detention" and "arbitrary invasion of privacy" (Anderson, Campbell & Turner 1999). The relevant section of the *Crimes Amendment (Police and Public Safety) Act* 1998 creates a new s.28A(3) of the *Summary Offences Act* 1988, which sets out the basis for police intervention and search for knives.

> For the purposes of this section, the fact that a person is present in a location with a high incidence of violent crime may be taken into account in determining whether there are reasonable grounds to suspect that the person has a dangerous implement in his or her custody.

Subsequent parts of the Act regulate the way in which the search must be carried out. It is a more restrictive search than that allowed under other laws – for example the searches authorised by the *Drug Misuse and Trafficking Act* 1985 – and it must not involve a strip search. However, our concern here is not with the nature of the search but the basis for it. In considering this law we look at two matters about rights and police powers, that is, to what extent does the law prohibit arbitrary arrest or detention? [ICCPR 9(1); croc 37(b)] and to what extent does the law prohibit arbitrary invasion of privacy? [ICCPR 17; CROC 16]. In doing this we bear in mind the fact that such searches apply mainly to children and young people (Youth Justice Coalition 1990 & 1994). We note also the comments of Wilke (1995) who argues that police 'stops' on young people are so routinely abusive that they should be limited wherever possible. She points out that both CROC and the Beijing Rules require the "least possible intervention" by legal authorities in young people's lives. The relevant question here is whether the 'reasonable grounds'

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of s.28A(3) are contemplated and allowed by the treaties, or whether this device for detention and invasion of privacy is 'arbitrary' and so prohibited.

Background

The *Crimes Amendment (Police and Public Safety) Act* 1998 arose out of the NSW Labor Party's 1995 'anti-gang' policy, aimed at groups of young people in public spaces who were said to be a threat to public safety. A *Street Safety Bill* incorporating 'move on' powers was drafted in 1996, but this idea lapsed. However by early 1998 the 'move on' law had been revived and combined with new police powers to search for knives, in the *Police and Public Safety Act* (Anderson, Campbell & Turner 1999).

In late 1997 two knife law changes had been made to the *Summary Offences Act.* First, the use or public display of a knife in a public place or school was made an offence (s.10 already made it an offence to carry a knife); and second, the sale of all knives to children under 16 years of age was banned. These knife-related offences were said to have arisen from the bashing and fatal stabbing of police officer David Carty in April 1997 (Blake 1998: 7).

The February 1998 fatal stabbing of a second young police officer, Peter Forsyth, catalysed further community debate about knives, and led to a raft of new summary offences. Constable Forsyth, off-duty with two colleagues, was said to have been attempting to arrest some young people who had tried to sell drugs, when he was stabbed to death. One of his colleagues was also wounded. Following a Police Association request (Harris & Sutherland 1998: 5), Police Minister Whelan announced he was considering allowing off-duty police to carry guns. Victorian police commented that they would not consider such a move (Herald Sun 1998). This proposal stalled, but the knife debate widened. Criminologist Paul Wilson called for public denunciation and 'shaming' of those who carried knives (Wilson 1998). Police Association Secretary Mark Burgess called for laws to prohibit the sale of 'attack weapons' (Blake 1998: 7) though existing law provided for this in the *Prohibited Weapons Act* 1989. The Police Association later agreed that the *Summary Offences Act* already provided "sufficient scope to deal with knives of any description" (Police Association 1998: 3). The supposed link of the use of knives with youth gangs was then exaggerated by the Sunday Telegraph and the Police Association, the former citing several unnamed knife sellers who spoke of "lots of gangs" who would spend "hundreds of dollars for any kind of knife" (Blake 1998: 7) while the latter claimed that knives were readily available to 'gang' members (Police Association 1998: 3).

Conscious of the pending State election, the Police Association demanded additional restrictions on knives, stop and search powers, identification powers, and dispersal powers (Police Association 1998). The call for a review of the knife laws had been backed by Police Commissioner Ryan (Harris & Snell 1998: 1), and in early May crime statistics showed that robbery 'with a weapon other than a gun' had risen significantly (though this was to fall again in 1999). Bureau of Crime Statistics Director Don Weatherburn made an association to heroin addicts, rather than youth gangs, but pointed to a parallel increased use of knives in assaults (Morris 1998: 9). While rival victim

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groups battled over what penalties should apply to the new knife offenders, Premier Carr accepted the Police Association claim almost in its entirety (Milohanic 1998: 5).

By late May 1998 the *Crimes Amendment (Police and Public Safety) Bill* had passed the NSW Lower House and had entered a long debate in the Upper House. The Bill made five main changes to existing law: on knives in public places, police searches for knives, confiscation of knives, police powers to give 'reasonable directions' in public places and a limited police power to demand names and addresses. Human rights concern has been expressed most strongly about the new search powers and the new move on other powers, and the way in which these powers were aimed at juveniles (Anderson, Campbell & Turner 1999).

The Bill amended the *Summary Offences Act* to create a new offence of having custody of a knife in a public place or a school without a reasonable excuse. (This paralleled an existing and wider summary offence of having custody of an "offensive implement" in a public place, without reasonable excuse.) Reasonable excuse was to be proved by the person, but the new provision gives some examples of reasonable excuse for carrying a knife, including food preparation and lawful occupation, recreation or sport. The Bill also amended the *Summary Offences Act* to allow police to search for "knives and other dangerous implements" in public places and schools. (Police already had a similar power under the Crimes Act s.357E, but only for "any thing used or intended to be used" in an indictable, or serious, offence.) Police must "suspect on reasonable grounds" that the person has possession of a dangerous implement before exercising this new power, but the meaning of "reasonable grounds" was extended to include "the fact that a person is present in a location with a high incidence of violent crime". This particular search power regulates the search in several ways, and does not allow a strip search. However it was made an offence to refuse such a search. Police officers must identify themselves and warn the person that to refuse to comply with the search is an offence. This was intended to add a civil libertarian gloss to the legislation. It did not.

The *Summary Offences Act* was also amended to allow police in a public place or a school to confiscate "any thing" suspected of being an unlawfully held "dangerous implement". The Ombudsman was required to monitor the operation of this new *Crimes Amendment (Police and Public Safety) Act* and the Police Minister was required to review and report on it to parliament.

The Bill was subject to some amendment in the Upper House. Firstly, the Government amended its own Bill to double the penalty for knife possession where the person had been "dealt with previously" for a knife related offence. It also created an offence for parents who "knowingly authorised or permitted" their child to carry a knife. As the *Children (Protection and Parental Responsibility) Act* 1997 already provided for this, the amendment required that "the offender is not liable to be punished twice" for the same offence. Independent MLC Richard Jones then succeeded with an amendment which added "or drink" to "the preparation or consumption of food", as one of the reasons why one might legitimately be carrying some form of knife (eg. a pocket knife with a corkscrew). Independent MLC Alan Corbett had two amendments passed which extended

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police powers. The first was an amendment which extended the power to search for dangerous implements to school lockers (the original Bill only provided for 'pat down' body searches and bag searches). A locker search must be done in the presence of the student and, if "reasonably possible", a nominated adult who is on school premises. Corbett's second amendment gave police the additional power to "request a person [who is a witness to serious crime] to provide proof of that person's name and address".

This Act is thus a composite law, primarily containing some 'anti-gang' dispersal powers and additional police powers to conduct wholesale (though regulated) searches for knives. Our concern here is limited to whether the 'reasonable grounds' of s.28A(3) are contemplated and allowed by the treaties, or whether this device for detention and invasion of privacy is 'arbitrary' and so prohibited.

Does the law breach human rights commitments?

Critics have said that the 'stop and search' power is drawn far too wide (eg. Anderson, Campbell & Turner 1999). This is of particular concern, given that most police searching is done under a notional but usually coerced view of 'consent'.

Even though "reasonable suspicion" has been a poorly defined term in New South Wales law, this redefinition of "reasonable grounds" for suspicion, as encompassing "the fact that a person is present in a location with a high incidence of violent crime", might be seen as an artificial contrivance, to arbitrarily widen the law but retain the language of 'reasonableness'. Location in a certain general area – in ordinary circumstances – is unlikely to be a specific or particular enough reason to suspect a person of committing an offence. However the social circumstances of this law must also be considered.

There is no doubt that a police 'stop' for the purpose of a search is a 'detention' or a deprivation of liberty and that the provisions of paragraph 1 of ICCPR Article 9 apply broadly, and to detentions other than those for the purpose of arrest and charge (Human Rights Committee 1994): GC 8; Nowak 1993: 169). And while deprivations of liberty are only violations of rights where they are arbitrary or unlawful, both the detention and the privacy provisions of the ICCPR make it clear that an 'arbitrary' act may be one provided for by law (Human Rights Committee 1994: GC 16). This same formulation of arbitrariness occurs in the relevant Articles (16 and 37(b)) of the *Convention on the Rights of the Child.* It was in fact an Australian proposal in 1994, gaining unanimous Human Rights Commission support, which led to the ICCPR formulation which prohibits 'arbitrary' arrest or detention. The interpretation of the word 'arbitrary' was contentious, but was designed to avoid an attempt at exhaustively listing all the permissible types of deprivation of liberty (Nowak 1993: 164, 172).

What then does 'arbitrary' mean in these circumstances? The Human Rights Committee has said, regarding the right to privacy, that the law must not be arbitrary and "should be, in any event, reasonable in the particular circumstances" (Human Rights Committee 1994: GC 16). The majority in the Human Rights Commission gave a broad meaning to 'arbitrary', saying it contained "elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality", as well as lack of due process (Nowak 1993: 172).

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We feel the 'unproportionality' argument is most relevant to widely framed searching laws. For example, when could wholesale, near-random street searching for weapons ever be 'reasonable' and proportional? Possibly in time of war or serious civil disturbance, when there is widespread possession of weapons and when this is causing a serious threat to life. In this circumstance, effectively a 'state of emergency', a power to intervene and stop people in a zone or region might be considered proportional. However there are internationally recognised limits to search powers, even in times of war. Deprivation of liberty, where justified, must not be "manifestly unproportional, unjust or unpredictable", nor must it be discriminatory (Nowak 1993: 173). Is there that sense of proportionality in the use of a near-random search power on a civil population which is overwhelmingly not armed, and peaceful? We think not. Advocates of this law may suggest that increased crime levels pose such a high level of threat that a special response is called for and proportionate. We do not believe there is evidence to support this view. Some others, in support of this law, have argued that if the new law produces 'results' (ie detects weapons, or leads to arrests) then the law is justified. However this is a purely instrumental argument which does not seek to address the rights issues. One might as well say that imprisoning all poor people may reduce levels of theft, therefore it is justified.

We note the Australian government's acceptance, in its reservations to the ICCPR, of the limited circumstances that may apply to interference with a person's privacy, ie "national security, public safety…[and] protection of the rights and freedoms of others" (DFAT 1999: ICCPR). A near-random search power must base itself on arguments of national security or public safety. In doing so it must constitute a proportional response to the threat. However this law is not proportionate. We do not believe that the somewhat higher crime rates of the so-called 'hot spots' (poorer or inner city areas) justify the type of wholesale searching instituted by this law.

The British government's report to the UN's Committee for the Elimination of Racial Discrimination retained the language of 'reasonableness' by claiming that police officers were "subject to a strict discipline code" which might include dismissal for offences including conducting a search "without sufficient cause" (CERD 1996: par 30). That Government also said that its *Police and Criminal Evidence Act* 1984 ensured that "stop and search powers are used appropriately and responsibly" and that "searches can be made only on the grounds of reasonable suspicion, and not in a random or discriminatory fashion" (CERD) 1996: par 31). However since then the British Government introduced the *Knives Act* 1997, which allows for 24 hour periods of near-random searching, in designated areas and after authorisation by a police inspector. The test for the invocation of this power is if the inspector "reasonably believes" that serious violence may take place "in any locality", or if people are carrying dangerous weapons "in any locality…without good reason" (Home Office 1999). If the British model is one of a temporary and formally authorised 'State of emergency', the New South Wales model is the permanent version. There do not appear to have been any cases before the Human Rights Committee, as yet, on the issue of street searching as arbitrary detention or arbitrary invasion of privacy. However, First Optional Protocol complaints, under Article 9 and/or Article 17, are clearly possible.

The NSW government proposed this knife searching law partly in response to fatal knife attacks on two police officers, over a period of ten months. There was also some evidence that the use of knives in robberies had increased over a short period. However, robbery is still a relatively rare crime in this State, and murder even more so. Despite the tragic deaths of the two police officers, there was no suggestion that the State's murder rate had risen. In these circumstances we believe there is no real proportionality in the provisions of Section 28A(3) of the *Summary Offences Act.* In this sense the law acts to allow an 'arbitrary' detention and an 'arbitrary' invasion of privacy of persons (mostly young people) going about their own legitimate business, including that of occupying public space. The main purpose of the section is to redefine "reasonable grounds" in terms of general geography (so called 'hot spots'), which is an attempt to force the meaning of the 'reasonableness' test.

In our opinion, therefore, Section 28A(3) of the *Summary Offences Act* 1988 (inserted by the *Crimes Amendment (Police and Public Safety) Act* 1998) most likely breaches the Australian commitment to *ICCPR* Article 9(1) and *CROC* Article 37(b) (which prohibit arbitrary detention) and *ICCPR* Article 17 and *CROC* Article 16 (which prohibit arbitrary interference with privacy), in that the section allows for 'arbitrary' detentions and 'arbitrary' invasions of privacy.

6.2 Pre-trial Rights

In examining the human rights compliance of criminal justice laws which relate to pre-trial processes we must consider the following questions:

1. How clearly does the law ensure that it shall not be the general rule that persons waiting trial be detained in custody? [ICCPR 9 (3)]]
2. How clearly is it maintained under the law that a person is to be presumed innocent until proven guilty [ICCPR 14(2); CROC 40(2)(b)(i)]
3. How clearly does the law establish that a person must not be compelled to confess to a crime or to provide evidence against him or herself? [ICCPR 14(3)(g); CROC 40(2)(b)(iv)]
4. To what extent does the law provide that, so far as possible and while respecting human rights, measures other than judicial proceedings be used for young people under eighteen? [CROC 40(3)(b)]

As examples in this area we consider offence-based restrictions on bail, and pre-trial mandatory defence disclosure.

6.2.1 Offence-based restrictions on bail

The law and the possible breach

A number of provisions in the *Bail Act* 1978 now either create a presumption against bail for certain offences, or exceptions to the presumption for bail. This latter category has expanded rapidly in recent years. Section 9 of the *Bail Act* 1978 now provides that the presumption in favour of bail has several exceptions. These exceptions, added between 1986 and 1988, initially included several armed robbery offences, failure to appear on bail, which is an offence under s.51 of the *Bail Act*, and then murder and related attempts and conspiracies. In November 1998 this list was extended to include eight additional

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charges: manslaughter, wounding with intent, kidnapping and several sexual assault offences. In addition to the 'no presumption for bail' offences, s.8A of the *Bail Act* was added in 1988 to provide that there is a positive 'presumption against bail' for certain drug offences as defined in the *Drug Misuse and Trafficking Act* 1985 and the Commonwealth *Customs Act* 1901.

The issue here is whether these various offence-based restrictions on bail constitute a breach of the human rights principles that "it shall not be the general rule that persons waiting trial be detained in custody" [ICCPR 9 (3)] and that "a person is to be presumed innocent until proven guilty" [ICCPR 14(2); CROC 40(2)(b)(i)]. For the purpose of this analysis the various provisions are considered as two groups: (i) the "presumption against bail" provisions (of s.8A) and (ii) the "no presumption for bail" provisions (under s.9). The relevant question here is whether these groups of provisions are allowed by the treaties, or whether they breach the principles of pre-trial custody and the presumption of innocence.

Background

The *Bail Act* 1978 began with the principle that persons are entitled, at the least, to conditional liberty pending the hearing of a charge against them. The Bail Review Committee which recommended the Act made the point that "it was difficult to overstate the importance of bail", as it affected whether a person could continue his or her normal life, pending the hearing of a criminal charge, and that bail decisions must respect both the legal right to be presumed innocent and the need of society that accused people be brought to trial (Simpson 1997).

In its original form the *Bail Act* 1978 would have been unobjectionable, for the purpose of this analysis. The Act provided for bail and set out two categories of offences: those lesser offences to which there was a "right to release" (s.8) and those more serious offences for which there was a "presumption in favour of bail" (s.9), provided that "an authorised officer or court" was satisfied certain criteria (set out in s.32) were met. In addition, a court could dispense with bail altogether (s.10). The only exceptions to some form of release entitlement under this regime were where a person had previously failed to appear (s.51), had failed to comply with previous bail conditions, was convicted of the offence, was "incapacitated" by drugs or alcohol, was in need of physical protection, or was already serving a sentence of imprisonment and was likely to remain in custody longer than the likely bail period (ss.8-9).

Arguments about entitlement to release, from the late 1980s onwards, began to change this approach. In particular, specific cases of breach of bail, or the commission of serious offences whilst on bail, led to popular generalisations about the risks involved in granting bail. Legislative changes followed highly publicised cases, where a person on bail or on parole had been charged with another serious offence. The notion of serial offending thus became a driving theme in law reform, to the detriment of the presumption of innocence.

In 1986 the Act was amended to remove the presumption in favour of bail to those charged with serious drug offences, and in 1988 this was extended to create a new

presumption *against* bail for serious drug offences (s.8A). In 1987 the presumption in favour of bail was removed for those charged with domestic violence offences, where there had been a failure to comply with prior bail conditions, and in 1993 this was extended to include cases where there had been a prior history of violent offending. The removal of presumptions in favour of bail (under s.9) were progressively added for those charged with robbery, then those charged with murder, and later a range of other serious offences.

Moves to generically restrict bail are not unique to Australia, despite being criticised by the United Nations Human Rights Committee. The British government in its *Criminal Justice and Public Order Act* (1994) moved to deny bail to those charged with homicide or rape, having previous convictions for such offences, and to those alleged to have committed offences while on bail (sections 25-26). However while these are generic rules, rather than matters to be considered in an individual case by a judicial officer, they only apply to extreme and compound cases. The NSW laws go much further than this. In South Africa moves to deny bail to those charged with certain categories of offence – at a time of high levels of violent crime – have been variously criticised as an attack on judicial independence (Schonteich 1997) and as a false assertion that denying fair trial rights will somehow control violent crime (Mureinik 1995). Debate there has focussed around the limited right to bail, formulated by the South African constitution, that is:

> Everyone who is arrested for allegedly committing an offence has the right…to be released from detention if the interests of justice permit, subject to reasonable conditions (s.35 (1)(f))

a formulation somewhat less firm than that of the ICCPR, which states that pre-trial custody "shall not be the general rule" [Article 9 (3)].

The logical extension of the categorical restriction of bail move – where bail comes to be determined solely on the seriousness of the charge and without reference to individual circumstances – would seem to be the Bolivian model. Here, under certain drug laws, release on bail is simply denied to all those charged with offences that carry a penalty of two years or more of imprisonment. The Human Rights Committee has criticised this legislation as having (amongst other things) "severely restricted" bail and "not respected" the presumption of innocence (Human Rights Committee, Concluding Observations on Bolivia, U.N. Doc. CCPR/C/79/Add.73 (1997)).

As with many 'law and order' initiatives, the offence-based restriction on bail in NSW was pursued by both major parties, in association with the popular media. However, there was opposition. In 1997 the NSW Law Society called for the repeal of section 8A of the *Bail Act*, pointing out that "the presumption of innocence is affronted by a denial of bail where the decision regarding bail is based squarely upon the seriousness of the offence and little else" (Law Society of NSW 1997 b:1). In later letters to parliamentarians the Law Society noted its alarm at the rise in the remand population – the unconvicted persons held in prison – which had risen from around 800 in 1996 to well over 1100 by late 1998 (Law Society of NSW 1998), causing a crisis of overcrowding in the newly built remand centre at Silverwater. This rise appears to come from changing attitudes in policing and the courts, rather than as a result of restrictions in the *Bail Act*. However, following the killing of two schoolgirls on the south coast, and the revelation that one of

those charged with murder had been on bail for another offence, a review of the *Bail Act* 1978 was directed by the NSW Attorney General. A fair amount of the argument in this January 1998 review turned on the question of extending or repealing the offence-based restrictions on bail.

The NSW Police Service urged greater offence-based restrictions on bail. The late Bev Lawson, then Acting Commissioner of Police, argued for amendment of the *Bail Act* "to create a presumption against bail for all serious sexual offences" and also for all "serial" offences (Anderson 1998 b:7). Juris Laucis of the DPP mounted a direct attack on the presumption of innocence, underlying as it does much of bail law. He claimed the Bail Act's exemptions to the presumption for bail:

> clearly indicate that the original philosophy, based on the presumption of innocence, whilst serving the altruistic approach of legal purists, failed to come to grips with the reality that the community needs to be protected (Laucis 1998)

Laucis went on to propose a presumption against bail for accused persons "requiring drug rehabilitation", as all drug addicts were said to be repeat offenders, and a presumption against bail for all those "charged with offences of a non-trivial nature, whilst on bail". He argued that the rise in the remand population should not be addressed by facilitating access to bail, and called for an end to the notion of the presumption of innocence (Laucis 1998). This latter view was later disowned by DPP Nicholas Cowdery, who added that his office did not suggest that the provisions of s.8A be "further extended" (1998). On the other side of the argument, Gurdev Singh, Principal Solicitor of the Intellectual Disability Rights Service, urged that the "relevant legislation" be amended to make a presumption against arrest – and in favour of proceedings by summons or court attendance notice – for those with an intellectual disability. This would virtually make bail irrelevant (Anderson 1998 b:7). The Council for Civil Liberties (CCL) went further, noting the large rise in remandees, and called for urgent measures to facilitate bail. Any additional considerations the parliament felt warranted in bail applications should be added to the existing criteria to be considered in bail applications (s.32) rather than in new attempts at "discriminatory and ultimately unjust exclusion clauses" (Anderson 1998a). The CCL and the Law Society urged the repeal of the restrictive provisions of ss.8A and 9 of the *Bail Act* (Anderson 1998 b:7).

This review of bail by the Attorney General's Criminal Law Review Division did not appear to recommend the expansion of offence-based restrictions on bail, as no new proposal for change emerged for more than six months. The Attorney General later reported that the review had found the "the Act was generally working well" (Shaw 1998: 8976). However in the course of the 1998-99 election campaign, the issue resurfaced, with the Government announcing, in its *Bail Amendment Bill* 1998, several new categories of offence to be subject to s.9's "no presumption for bail" provision. The contribution of the Opposition in the subsequent debate was focussed on the difference between the s.8A and the s.9 restrictions. They wanted bail restrictions on more categories of offence, and at the higher s.8A standard (Andrew Tink in Lynn 1998: 8981). In face of this consensus for restriction, crossbench objections were muted, leading the Attorney General to comment in the parliament that "the only substantial question that was raised is whether there ought to be more offences in respect of which the presumption in favour of bail should be abolished" (Shaw 1998: 8984). Concerns about

those with intellectual disabilities were met with a provision in the Bill that bail conditions be set as "appropriate" for those persons (Shaw 1998: 8977), a provision that clearly does not encompass the potentially inappropriate denial of bail. The *Bail Amendment Act* 1998 went on to extend the "no presumption for bail" provisions of s.9 to charges of manslaughter, wounding, several sexual assaults and kidnapping.

That the presumption of innocence was marginalised in arguments over offence-based restrictions on bail is fairly clear from the language of the legislators. In South Africa, there was strong criticism of labelling those "who are merely accused of crime as 'criminal'" (Mureinik 1995). In NSW, Attorney General Jeff Shaw said his Bill was intended to "restrict the availability of bail to serious offenders" (Shaw 1998: 8976), rather than citizens charged with a serious offence. Such comments reflect the notion that bail is being seen more as a benefit to an offender, which should be measured against the seriousness of the offence, rather than as a right accorded an individual who was to be presumed innocent until proven guilty, by a process of fair trial. In the 1998 parliamentary debate both Jeff Shaw and Opposition MLC Charlie Lynn argued bail changes as important to "protecting the community" (Shaw 1998: 8976; Lynn 1998: 8981), confirming the force of 'protection' arguments within most law and order initiatives.

Does the law breach human rights commitments?

The international jurisprudence on Article 9(3) of the ICCPR has repeatedly stated that the refusal of bail should be an "exception" and that there must be specific reasons for such refusal:

> pre-trial detention should be the exception and bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State Party (Michael and Brian Hill v. Spain, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (2 April 1997))

So pre-trial detention for specific reasons, such as to prevent flight, interference with evidence or recurrence of crime, is permissible. However, in the wider scheme of things, "remand in custody pursuant to lawful arrest" must not only be lawful but "reasonable in all circumstances:" (Hugo van Alphen v The Netherlands, No 305/1988 CCPR: 5.6-5.8; Nowak 1993: 173; W.B.E. v. The Netherlands, Communication No. 432/1990, U.N. Doc. CCPR/C/46/D/432/1990 (1992): 6.4; & Womah Mukong v Cameroon, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994): 9.8).

While a number of other Human Rights Committee decisions dealing with Article 9 (3) have been concerned with the length of pre-trial detention, and none as yet appear to have dealt directly with offence-based restrictions on bail. Human Rights Committee comments on State reports have expressed concern with legal systems which limit bail and deny the presumption of innocence. HRC comments on Argentina for example:

> express concern that bail has been established according to the economic consequences of the crime committed, and not by reference to the probability that the defendant will not appear in court or otherwise impede the due process of law. Nor is [the law] compatible with the presumption of innocence that the length of pre-trial detention is not a product of the complexity of the case but is set by reference to the possible length of sentence (Human Rights Committee, Comments on Argentina, U.N. Doc. CCPR/C/79/Add.46 (1995)).

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In more recent comments on Bolivia the HRC, in its traditionally cautious language, has "expressed concern" over Bolivia's *Coca and Controlled Substances Law,* which provides that:

> release on bail is never possible for those persons charged with offences that carry a penalty of two years or more of imprisonment…[therefore] the presumption of innocence is not respected under current Bolivian legislation (Human Rights Committee, Concluding Observations on Bolivia, U.N. Doc. CCPR/C/79/Add.73 (1997)).

Returning to the relevant words of ICCPR Article 9 (3), that is, "It shall not be the general rule that persons awaiting trial shall be detained in custody", it seems reasonably clear that offence-based restrictions on bail, at least those which do not go to the likelihood of persons charged to appear, are not allowed under international law. Provisions which (for example) do not presume bail for persons who had previously failed to appear, or who had previously failed to meet bail conditions, might not breach Article 9 (3). However, offence-based presumptions not relevant to the "probability that the defendant will not appear in court or otherwise impede the due process of law, and relevant to the likelihood of reoffending", must be *ultra vires*. Such provisions seek to reverse the presumption for bail. They must be *ultra vires* when they categorically deny the right to access bail. This is especially the case when the laws presume against bail, but also when they remove the presumption for bail.

In our opinion, therefore, provisions of s.8A and s.9 of the *Bail Act* 1978, insofar as those sections act to impose a presumption against bail, or to remove the presumption for bail are most likely to breach the Australian commitment to Article 9(3) (which prohibits a general rule for pre-trial imprisonment) and 14(2) (which recognises a person's presumption of innocence until proven guilty) of the *International Covenant on Civil and Political Rights.* They do so, to a greater (s.8A) or lesser (s.9) degree, by wrongly imposing a legal presumption for pre-trial imprisonment.

6.2.2 Mandatory Defence Disclosure

The law and the possible breach

At issue here are the legal requirements that compel defendants to give advance notice to the prosecution of defence evidence they may call at trial. Section 405A of the *Crimes Act* 1900 provides that notice must be given of a defence intention to call alibi evidence:

> On a trial on indictment the defendant shall not without the leave of the Court adduce evidence in support of an alibi unless, before the end of the prescribed period, he or she gives notice of particulars of the alibi.

This section goes on to specify that details of names and addresses must be given. The committing justice must give notice of the requirement and disclosure must be made in writing to the Director of Public Prosecutions. The fact that "leave of the court" is required in the absence of notice suggests that leave might not be given, and that defence witnesses might not be called, if the pre-trial disclosure rule is not followed.

Similarly, section 405AB of the *Crimes Act* 1900 provides that notice must be given of a defence intention to call evidence of 'substantial impairment' of mind, in defence of a murder charge:

> 405AB. (1) On a trial for murder, the defendant must not, without the leave of the Court, adduce evidence tending to prove a contention by the defendant that the defendant is not liable to be convicted of murder by virtue of section 23A, unless the defendant gives notice, as prescribed by the regulations, of his or her intention to raise that contention.

A successful defence of 'substantial impairment' of mind, under Section 23A of the *Crimes Act* 1900, reduces the crime of murder to manslaughter by reason of 'diminished responsibility'. This section requires that names and addresses of witnesses must be given, and that disclosure must be made in writing to the Director of Public Prosecutions. Once again, the fact that "leave of the court" is required suggests that leave might not be given, and that a defence witness might not be called, if the pre-trial disclosure rule is not followed.

In a recent discussion paper prepared by the NSW Law Reform Commission (1998a), at the request of the Attorney General, it has been suggested that additional pre-trial disclosures might be required of defendants. Those canvassed by the paper include disclosure to the prosecution of defence expert evidence, disclosure of the intention to raise certain defences, and disclosure of issues to be litigated at trial. Subsequently, the Criminal Law Review Division of the Attorney General's Department set up a working party to formulate recommendations concerning additional pre-trial disclosure requirements. In December 2000, the NSW government introduced in Parliament a Criminal Procedure Amendment (Pre-Trial Disclosure) Bill which was radically amended in the Legislative Council and is still under discussion in early 2001.

However international law suggests that the prosecution must prove a criminal case, and that a person charged must not be compelled to assist the prosecution. The relevant question here, then, is whether the existing defence pre-trial disclosure rules breach the Australian commitment to the presumption of innocence, equal treatment in the calling of witnesses and rights to silence provisions of the *International Covenant on Civil and Political Rights,* Articles 14(2), 14(3)(a), 14(3)(b) and 14(3)(g):

> (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law…[and]
>
> (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality…
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;…
>
> (g) Not to be compelled to testify against himself or to confess guilt.

Background

The NSW Law Reform Commission Report (1998a: 58-61) notes that, despite court rules and the subpoena process, there has been no common law duty of 'disclosure' (using the civil law term) on either party in a criminal trial, but that the position has been modified by statute. Rules have been introduced to require advance notice of prosecution witnesses, and provision to the defence of a copy of their Statements. Section 405A, requiring disclosure of alibi defence to the prosecution, was introduced in 1974, then amended in 1986 and 1994. The common law has then allowed the prosecution to cross-examine a defendant where this alibi requirement is not complied with until the last

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available opportunity (Latouf v The Queen, 1980). Section 405AB, requiring defence disclosure of the 'diminished responsibility' defence to murder, was introduced in 1997. The *Evidence Act* 1995 (ss.67, 97 & 98) now also requires either party in a criminal trial to give advance notice of an intention to lead evidence of tendency or coincidence, or first-hand hearsay evidence. There has been a trend in legislation, therefore, to treat pre-trial criminal procedure as civil trials, where pre-trial disclosure may add to the efficiency of the eventual litigation, and where the defence and the prosecution are treated more and more as equal parties, which they are not.

The common law and the Supreme Court rules, however, have tended to maintain the special status of the criminal procedure. This approach seeks to maintain a defined set of defendant's rights, and to maintain distinct roles for the prosecution and the defence, for the very good historical reasons that the criminal procedure most often pits a relatively powerless individual (after his or her arrest) against the resources of the state. The Supreme Court Standard Directions (1994) require, amongst other things, a draft prosecution case statement and an invitation to resolve some issues informally, or by consent. These Standard Directions also provide for disclosure of all psychiatric reports, but there is no penalty for non-compliance (NSW Law Reform Commission 1998a: 65-66).

The 1981 British Royal Commission on Criminal Procedure proposed only compulsory pre-trial prosecution disclosure, but subsequent inquiries (including a subsequent British Royal Commission on Criminal Procedure in 1993, and a 1986 NSW Law Reform Commission report) have recommended "mutual pre-trial disclosure" (NSW Law Reform Commission 1998a: 75). But with the tradition of the special status of criminal trials, detailed rules for the terms and timetables of prosecution disclosure have been developed, while defence disclosure requirements have been patchy. This in turn has led to a desire to 'equalise' the terms of disclosure, based on a supposed 'mutuality' of obligation. For example, the NSW Director of Public Prosecutions has pushed for defence pre-trial disclosure, arguing that the notion of a 'right to silence' be dropped in favour of "approaching the whole issue on the basis of mutual disclosure and procedural reform" (Cowdery c1998).

The arguments for defence disclosure are inevitably based on improved efficiency for the courts. The prosecution would not have to waste time and resources guessing what defence might be advanced. Non-contentious issues might be resolved before trial, adjournments might be avoided and trials might be shortened (NSW Law Reform Commission 1998a: 79). In the spirit of mutual obligation, a Deputy Commissioner of NSW Police suggested that defence disclosure generally would bring the two parties to a "more level playing field" (Jarrett 1997). Arguments against defence disclosure have stressed the fundamental and distinctive principles of the criminal justice system, which maintain the burden of proof on the prosecution, maintain the privilege against self-incrimination and maintain the presumption of innocence. The creation and maintenance of these principles, in turn, have been influenced by the typically unbalanced resources available to the defence and prosecution, the great difficulty unrepresented defendants would have in complying with pre-trial requirements, possible unfair penalties for

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departures from a disclosed defence 'case', and the creation of opportunities for police to fabricate evidence or intimidate defence witnesses, after defence disclosure (NSW Law Reform Commission 1998a: 81). Finally, if someone is really to be considered innocent, he or she does not have a 'defence case' to prove. Barrister Stuart Littlemore (1998) has supported this view, saying that without recognition of basic rights, the unique features of criminal system would collapse, leaving it "just litigation".

The NSW Law Reform Commission (1998a: 84 & 93) proposed an extension of some pre-trial disclosures in the District and Supreme Courts, but recognised that there would be particular problems for unrepresented defendants. During the 1999 State election campaign, Labor announced that it would proceed with further mandatory defence disclosures.

The weakness in human rights analysis in the Australian legal system has allowed a fairly cynical attitude to rights in international law. The NSW Director of Public Prosecutions, Nicholas Cowdery (c1998: 1), in arguing for greater defence disclosure, has asserted that "there is no right to silence". He also argued, contrary to the principles of 1994 Vienna Convention, that rights might be "considered in isolation" when amending the law (Cowdery c1998: 2). These proposals come at a time when (i) the defence right to cross-examine prosecution witnesses, pre-trial, has been severely restricted, and (ii) cuts to legal aid have driven up the number of unrepresented defendants.

Does the law breach human rights commitments?

Resistance to mandatory defence disclosure stems from adherence to the right to silence, which is rooted in the internationally accepted and coherent form of the criminal process. Persons charged are presumed innocent until proven guilty, they are prosecuted by the state which carries the burden of proof of the charge, and they are not to be compelled to assist the state in this process. The *International Covenant on Civil and Political Rights*, by requiring detailed prosecution information, and the time and facilities for defence preparation (Article 14(3) a & b), does demand a detailed disclosure of the prosecution case. However there is no corresponding requirement for defence disclosure, as suggested by the proponents of 'mutual obligation'. The need to protect traditional defence rights is underscored by the overwhelming resources of the state, when pitted against those of the individual. It is also reinforced by the abuses and deceits of police interrogation, actions likely to be encouraged by a state's express disregard for rights.

The validity or otherwise of defence disclosures in international law must therefore require consideration of a number of provisions within Article 14 of the *International Covenant on Civil and Political Rights.* The argument that there is a human rights breach in mandatory defence disclosure of some evidence which might be used to defend a charge (as opposed to disclosure of a plea, or of some procedural notification), must make the links between Articles 14(2), 14(3)(a), 14(3)(b) and 14(3)(g), concerning the presumption of innocence, the right to be informed of details of the charge, the right to prepare one's defence, and the right not to be compelled to testify, respectively. The Human Rights Committee's General Comments (1994: Comment 13) clarifies that these provisions (i) maintain the burden of proof on the prosecution and a right to be tried in

accordance with this principle, (ii) require that the prosecution case indicate both the alleged offence and alleged facts on which the charge is based, (iii) insist that the right to defence preparation "must include access to documents and other evidence which the accused requires to prepare his defence", and (iv) that "any form of compulsion [to require an accused to testify against himself] is wholly unacceptable".

There appear to be no decided Human Rights Committee cases on mandatory defence disclosure. However, the argument that there is a breach would rely on the combination of prosecution burden of proof, required prosecution disclosure, provision for defence preparation and prohibition of forced testimony. This combination does not contemplate, and implicitly excludes, an additional pre-trial procedure whereby the defence is forced and the prosecution has an opportunity to respond and so improve its case, prior to the trial. On the one hand, there is nothing in the Covenant to prevent codes which allow pre-trial resolution of non-contentious issues by consent. However, on the other hand, there is no suggestion in the Covenant of a 'mutual obligation' to disclose, such as exists in the civil law. Those arguing that mandatory defence disclosure constitutes a human rights breach would say that the combination of rights within Article 14 militates against a 'mutual obligation' to disclose.

Principle 5 of the Vienna Declaration of 1993, that human rights are "universal, indivisible and interdependent and interrelated" would ensure that the Cowdery argument (c1998: 2), of explicitly treating rights in isolation, would not go far. However, the counter argument would have to rely on a narrow interpretation of Article 14, and the fact that there is no explicit prohibition on mandatory defence witness disclosure, pre-trial. The burden of proof on the prosecution could be maintained with existing mandatory defence disclosures, the prosecution case would still be disclosed and the prohibition on forced accused testimony could be distinguished from disclosure of defence witness evidence.

However in our opinion, this argument would be decided on two issues (i) the need to maintain the integrity of the form of combined rights in the criminal process, as outlined in Article 14, an integrity which is undermined by laws which seek to prosecute a 'mutual obligation' to disclose, and (ii) an overriding concern that procedures must also be assessed for their likely impact on unrepresented accused persons, who are certain to be disadvantaged by these procedures. In our opinion, therefore, the existing defence pre-trial disclosure rules most likely breach the Australian commitment to the presumption of innocence, equal treatment in the calling of witnesses and right to silence provisions of the *International Covenant on Civil and Political Rights*, Articles 14(2), 14(3)(a), 14(3)(b) and 14(3)(g). They do so by compromising the principles that the prosecution carries the burden of proof, and that an accused person presumed to be innocent should not be required to present a 'defence case', except by an act of free choice.

For Bibliography of Chapter 6 see Chapter 7

7. Further Aspects of Criminal Justice

7.1 Trial Rights

In examining the human rights compliance of criminal justice laws which relate to the trial process we must consider questions relating to (i) the guaranteed 'due process' provisions of international human rights law (ii) the right to an interpreter and to legal aid (iii) the right to appeal (iv) the elimination of double jeopardy and retrospective crimes and penalties.

In particular, the human rights instruments pose these questions:

1. To what extent does the law provide for (i) a fair and public hearing before an independent tribunal, in which those charged with a crime (ii) may have adequate time and facilities to prepare their defence, (iii) are able to question witnesses against them and call their own witnesses, and (iv) are afforded free assistance of an interpreter, where necessary? [ICCPR 14; CROC 40(2)(b)(iii)]
2. How effective are procedures to ensure that those charged with a criminal offence may (i) defend themselves in person or through a lawyer of their choice, (ii) have free legal assistance if they cannot afford to pay? [ICCPR 14(3)(d); CROC 40(2)(b)(ii)(vi)]
3. To what extent are all persons ensured the right to have a criminal conviction and sentence reviewed by a higher tribunal? [ICCPR 14(5); CROC 40(2)(b)(v)]
4. How effective are procedures to ensure that a person is not finally tried or punished twice for the same offence, and that there are no retrospective crimes or penalties? [ICCPR 14(7), 15(1); CROC 40(2)(a)]

As examples in this area we consider the restricted cross-examination of sexual assault victims, and the 'reasonable explanation' rule in the Weissensteiner decision.

7.1.1. Restricted cross-examination of sexual assault victims

The law and the possible breach

Section 409B of the NSW *Crimes Act* provides that, in proceedings involving serious sexual assault, evidence of the sexual reputation of the complainant is inadmissible, and evidence of the prior sexual experience of the complainant is also inadmissible, except for a list of stated and detailed exceptions. There is no judicial discretion apart from the following:

- sexual activity at the time of the alleged offence,
- the relationship between the alleged offender and the complainant,
- any relevant evidence of sexual disease,
- any relevant evidence that the complainant's allegation of sexual assault was made after discovery of pregnancy or sexual disease,
- where the prosecution asserts some issue of the complainant's sexual experience and the accused might then suffer some prejudice if not able to cross-examine, and where the probative value of the questioning outweighs "any distress humiliation or embarrassment" the complainant may suffer.

Witnesses shall not be asked to give evidence which is inadmissible under these rules.

However, a number of judges and lawyers have expressed concerns about the restrictions this section places on cross-examination, in some cases, and the section has now been reviewed by the NSW Law Reform Commission.

The law was designed to put an end to unfair inferences against complainants, on the basis of their sexual reputation or experience, and to limit the extent of distressing and irrelevant cross-examination. However, the criticism has been that the formulaic and rigid response to relevance in s.409B has led in some cases to real injustice, and to the denial of a fair trial.

The relevant question here, then, is whether the prohibitions on cross-examination in s.409B are allowed by the treaties, or whether they breach the accepted human rights principle which provides an entitlement to question witnesses (ICCPR 14 (3)(e)).

Background

We will briefly consider here the origins of s.409B, the reviews of the section that have been conducted, the problems created by it, and the NSW Law Reform Commission's proposed amendments.

Sexual assault laws in NSW were reformed in the early 1980s, after concerns were raised in the 1970s about the conduct of rape trials, where many women were accused of 'deserving' or 'asking' to be raped (see NSWLRC 1998: 33-37). Amongst a package of proposed reforms in many jurisdictions were proposals to limit the admissibility of evidence concerning the sexual experience and reputation of the complainant/victim. This was to sustain a focus on the real issues of the criminal trial (ie whether an assault occurred) and to exclude offensive and irrelevant questioning, which could again traumatise rape victims.

Section 409B was introduced as an amendment to the NSW *Crimes Act* in 1981, and this completely banned evidence of sexual reputation, and restricted evidence of sexual experience as described above. The NSW Law Reform Commission (1988b: 37-39) notes from the parliamentary debate that the new law had four objectives. Firstly, it was designed to end the practice of using sexual experience to infer that the complainant was either untruthful or was likely to have consented to sex. There was concern that male judges with sexist attitudes, given a discretion, would continue to allow irrelevant evidence of sexual experience or reputation. Secondly, the law was designed to limit the extent to which complainants/victims could be subject to distressing cross-examination about their sexual history. Thirdly, it was hoped that these controls would encourage sexual assault victims to report the offence. Fourthly, it was said that the new law (through the exceptions to the general rule) would continue to allow the accused person room to question complainants about relevant facts. The section was amended in 1987 and 1989, but only to extend its application to a wider range of newly created sexual offences, including child sexual assault.

Over 1981-85 a review of the new section was carried out by the Bureau of Crime Statistics and Research. This review (Bonney 1987) examined transcripts from 1979 to

1983 and found that, in local court cases, evidence related to sexual experience of the complainant had halved since the introduction of the section. In the higher courts, evidence of sexual experience had fallen from 68% of cases (before s.409B) to 41% (after s.409B).

However, by the 1990s, defence lawyers were signalling problems with the section, pointing out that relevant evidence had been excluded in some cases. They argued that the section was too rigid to deal with cases which required relevant exploration of a complainant's sexual experience outside the list of exceptions in s.409B(3). For example, s.409B creates a bar to the questioning of complainants about prior false accusations of sexual assault. This problem had been raised in a number of cases of child sexual assault. Further, under 409B, a complainant may not be questioned about sexual assault by someone other than the accused. Yet in some cases such evidence may be relevant, to help determine the charge.

Several such 'problem cases' have been identified and described (NSWLRC 1998b: 45-55), and these cases led some judges to comment that s.409B operated too restrictively, could exclude relevant evidence and that there was therefore a "danger that s.409B may operate to deny an accused person a fair trial" (NSWLRC 1998b: 44). As a result of this view, in the cases of Grills and PJE, trial judges granted stays of proceedings, on the basis that the accused was prohibited from exploring relevant evidence and therefore could not be assured a fair trial. Stays of proceedings are ultimately an unsatisfactory remedy, as the matter charged cannot be determined. However, courts grant stays if there is no prospect of a fair trial. The NSW Court of Criminal Appeal later overturned these rulings, stating that the courts could not rule that legislation created by parliament was inherently unfair. This CCA decision was upheld by the majority of the High Court, but the High Court also unanimously suggested that 409B needed legislative review (Grills and PJE 1996). Accordingly, the NSW Attorney General directed the NSW Law Reform Commission to review the section.

In the meantime, the Department for Women had carried out its own review of the experiences of women in sexual assault trials. This *Heroines of Fortitude* report (1996) revisited 409B, broadly confirming Bonney's earlier conclusion on the reduction of evidence of sexual experience in the higher courts, but commenting that "in a high proportion of trials" evidence of a complainant's sexual experience was still admitted "without this material being first subjected to the tests and limitations set out in Section 409B". Some evidence of sexual reputation had also been allowed, despite the complete ban. This report proposed a clearer definition of the term 'sexual reputation', Judicial Commission education for judicial officers on the difference between 'sexual experience' and 'sexual reputation', and Judicial Commission guidance on proper interpretation of the various exceptions under s.409B(3) (Department for Women 1996: 248). The Law Reform Commission, however, criticised the methodology behind the Department for Women's finding of procedure failure. It said that the authors of the *Heroine*'s report "did not know…whether the issue of admissibility had been dealt with before the trial, or informally during the trial" (NSWLRC 1998b: 67). The assessments of the *Heroines of*

Fortitude report certainly focussed more on how law and practice affect women's experience than on how they deliver justice to all participants in the criminal trial.

In reviewing the section, the Law Reform Commission posed several questions, and took submission from a range of interested parties. The main questions posed were: (i) should the section be retained, or simply be subsumed by the *Evidence Act* (ii) has it been successful? (iii) should any additional specific categories (where sexual experience might be relevant) be added to the section?

A large number of submissions from sexual assault services and women's groups generally supported the existing form of s.409B or called for further restrictions on the admissibility of sexual experience, under s.409B(3). Some of the exceptions were argued to be too broad, or to allow too broad an interpretation by the courts (NSWLRC 1998b: 67-78). On the other hand, a large number of lawyers argued for reform of the section, to accommodate relevant material which had been excluded. These arguments were generally not unsympathetic to the original intent of the section (ie generally excluding evidence of sexual experience) but rather were concerned about the means by which the exceptions to the rule were determined. The Public Defenders, for example, argued that s.409B generally worked well in adult complaints, where the issue at trial was consent. In some cases, however, the exceptions of s.409B(3) were inadequate to admit relevant evidence and so ensure a fair trial (NSWLRC 1998b: 51). The NSW Council for Civil Liberties also wrote to the Commission, saying that s.409B was:

> a difficult issue, involving consideration of the legitimate but at times apparently opposed rights of victims of sexual assault, to be protected from distressing and unnecessary questioning, and accused persons, to a fair trial…[however] the regular exclusion of evidence of possible histories of false complaints [*M* 1993 67 A Crim R 549, *Bernthaler* NSW CCA unreported 17.12.93, *PJE* NSW CCA unreported 9.10.1995, and *Morgan* 67 A Crim R 526 at 537] and the acceptance that this is unjust, by both public defence and prosecution barristers, demonstrates to us the danger of attempting a tight legislative prescription of all possible forms of relevance (Anderson 1998c).

Prosecution lawyers also accepted that there were problems with the section. The Crown Prosecutors said there were cases where s.409B had excluded evidence to the detriment of the complainant and the case for the prosecution (NSWLRC 1998b: 55).

The Law Reform Commission ultimately decided to propose reform of s.409B, to abolish the list of exceptions and introduce a form of controlled discretion. It had considered several options for reform (NSWLRC 1998b: 116-146) which included extending the list of exceptions under 409B(3), creating a separate provision for child sexual abuse, or adding an overriding judicial discretion. However it settled on a total reformulation of s.409B, to retain the ban on evidence of sexual reputation and sexual experience, but with a "restricted discretion" for determining the admissibility of the exceptions. While it supported the special treatment of evidence in sexual assault proceedings, for the reasons argued in the early 1980s, it said the arguments for a discretionary model to deal with the exceptions were "compelling" and "the only means of ensuring a fair trial" (NSWLRC 1998b: 152). The discretion to introduce exceptions would be restricted by (i) a prohibition on the old common law position of generally allowing evidence of sexual experience from which to draw inferences about consent or credibility (ii) a requirement

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that a court weigh up the relevance of such evidence, with competing considerations, and (iii) detailed procedural requirements to be followed if evidence of sexual experience is to be admitted (NSWLRC 1998b: 156).

This is a similar approach to that of the Standing Committee of Attorney Generals' *Model Criminal Code*. In its final report on *Sexual Offences Against the Person*, the Standing Committee noted that "the rigid structure" of s.409B "remains an area of contention in New South Wales". Noting that Canada had moved from a mandatory regime to a discretionary one, and noting "the undoubted difficulties encountered with the New South Wales model in recent times, and the fact that the rest of Australia and indeed the rest of the common law world has rejected the mandatory model", the Committee supported "a strictly circumscribed discretionary model", where questioning of a complainant on prior sexual experience would be prohibited "unless leave of the judge is obtained" (MCCOC of SCOG 1999: 243, 245).

At the time of writing, section 409B of the NSW *Crimes Act* 1900 remains unamended.

Does the law breach human rights commitments?

While the High Court expressed concern about this section, and suggested a review, on jurisdictional grounds it could offer no remedy. The High Court did not attempt to reformulate the law and the matter was sent back to parliament. A human rights assessment of this law, however, has no such limitations. This law can and should be assessed against the human rights obligations of the *International Covenant on Civil and Political Rights*.

The relevant part of Article 14 (3)(e) of the ICCPR provides that:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality…(e) to examine, or have examined, the witnesses against him

The Human Rights Committee's General Comments (1994) associated with this subparagraph state that the provision:

> is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.

Nowak (1993: 262) notes that

> the right to examine or have examined witnesses for the prosecution is…formulated without restriction. Nevertheless, the Strasbourg organs have accorded the courts a certain amount of discretion to reject some questions that do not serve in ascertaining the truth.

So the Covenant would be unlikely to provide any support for *irrelevant* questions concerning a complainant's sexual experience. However, as the review bodies have determined that s.409B of the *Crimes Act* 1900 acts to exclude material that may be relevant to determination of the charge, the position is different.

An argument in support of this section might most usefully draw on the right to privacy, honour and reputation of the complainant (ICCPR 17). However privacy is protected only from "arbitrary or unlawful" attacks, while honour and reputation are only protected from "unlawful" attacks. An invasion of privacy for a purpose associated with the

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administration of justice would be allowed if it did not contain "elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality", or lack of due process (Nowak 1993: 172). Therefore an exploration of a complainant's sexual experience, so long as it were relevant, reasonable and proportionate to the matter before the court, would not constitute an "arbitrary" invasion of privacy, and so violate the Covenant. On the other hand, the recognised right of an accused person in a criminal trial to examine witnesses, on relevant matters, does not have any qualifications. This view is reinforced by the Human Rights Committee's ruling that an accused person must have the "same legal powers" of cross-examination as the prosecution.

In our opinion therefore, s.409B as it presently stands clearly breaches the Australian commitment to Article 14(3)(e) of the *International Covenant on Civil and Political Rights*. So long as the section excludes material relevant to the conduct of a fair trial, this will remain the case. The matter could be remedied in a number of ways, including that proposed by the NSW Law Reform Commission and the Australian Model Criminal Code.

7.1.2 The 'reasonable explanation' rule in Weissensteiner

The law and the possible breach

The common law principle of the 'right to silence' is finally determined and defined in Australia by the High Court. However the High Court must also respect constitutionally valid laws passed by the States, which may reflect on and affect this right. The cases of *Weissensteiner* (1993) and *Petty and Maiden* (1991) spell out the relevant common law regarding the 'right to silence' in Australia.

However the decision in *Weissensteiner* appears to undermine this right, as it suggests an obligation on accused persons to testify in their own trial, if it is thought they have special knowledge of the crime. By this case, accused persons are expected to explain themselves, in some circumstances. A "failure to explain" may then lead to comments by the judge and prosecutor (in States where statute allows this) that this silence supports the prosecution case, or is "inconsistent with innocence". In NSW, since 1995, judges (but not prosecutors) have been allowed by statute to make some comment on the failure of accused persons to testify.

The relevant question here is whether the High Court decision in *Weissensteiner* (as it applies to NSW) breaches the Australian commitment to the right to silence as defined by the International Covenant on Civil and Political Rights, Article 14:

> (3) in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality…
> (g) Not to be compelled to testify against himself or to confess guilt.

Background

Weissensteiner was a case where the appellant had been convicted of murdering the owners of a yacht (Hartwig Bayerl and Susan Zack) who had disappeared. Their bodies were never discovered. Manfred Weissensteiner had possession of the yacht and some of the missing persons' possessions, and it was suggested that he had special knowledge of

their disappearance and presumed deaths. In September 1990 he was arrested in the Marshall Islands and charged in Cairns with murder and with theft of the yacht. The evidence against him was entirely circumstantial. At his trial he chose not to give evidence, and his silence was used against him. The inferences allowed to be drawn from his silence were then matters that were argued before the High Court. At issue was the trial judge's directions to the jury:

> The accused bears no onus. He does not have to prove anything. For that reason he was under no obligation to give evidence. You cannot infer guilt from his failure to do so…[however, an inference of guilt] may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can easily be perceived must be within his knowledge.

The High Court unanimously expressed the principle that an explanation from the accused was called for ('might reasonably be expected') in certain limited circumstances, and that failure to provide such an explanation may tend to support the prosecution case. The judge may comment to this effect in a State (such as Queensland) where there is no statutory bar to such comment. Five judges (Mason, Deane and Dawson in one judgement, and Brennan and Toohey in another) held this principle, and approved of the trial judge's directions. Two others (Gaudron and McHugh) upheld this same principle, but found that there was nothing in the evidence to establish that Weissensteiner had special knowledge of the whereabouts of Bayerl and Zack, much less to implicate him in murder.

Until 1995, there was a bar to judicial or prosecutorial comment on the "failure" of an accused to give evidence. The *NSW Crimes Act* 1900 (s.407(2)) read:

> The failure of an accused person, or the wife or husband, as the case may be, of an accused person to give evidence, shall not be made the subject of any comment by the judge or by counsel for the Crown.

This section was repealed and replaced by a provision in the *Evidence Act* 1995 (s.20), which allowed some judicial comment, but not so as to suggest guilt:

> (2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.

The same provision applies to comment on failure of a spouse or de facto spouse, parent or child, and in a joint trial the judge may comment on the criticism of a co-accused about another co-accused's failure to give evidence (s.20).

In the earlier case of *Petty and Maiden* (1991, 173 CLR 95 F.C. 91/029) the High Court had expressed strong support for the right to silence, holding six to one that a trial judge could not suggest that an initial exercise of silence might undermine a later explanation by the accused of his or her actions. Justices Mason, Deane, Toohey and McHugh had expressed strong support for the right

> to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. That is a fundamental rule of the common law…no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right to

> silence or to render it valueless…[further] it should not be suggested, either by evidence led by the Crown or by questions asked or comments made by the trial judge or the Crown prosecutor, that an accused's exercise of the right to silence may provide a basis for inferring a consciousness of guilt.

This was a NSW case where, at that time, there was a statutory bar on judicial comment about the 'failure' of an accused to give evidence. The four-judge majority added that "the right to remain silent applies to the conduct of a committal hearing". Six of the judges in *Petty and Maiden* (Dawson J dissenting) rejected the distinction made in some earlier cases between "reliance on silence as evidence against the accused and reliance on it by way of answer to or comment upon a defence raised for the first time." Some of the judges noted that such a distinction had been described as "gibberish" by Professor Rupert Cross, author of a leading text on evidence.

However in *Weissensteiner*, Justices Mason, Deane and Dawson distinguished *Petty and Maiden* from *Weissensteiner*, saying that while the former case maintained it was

> not permissible to suggest that an accused's exercise of the right to silence before trial can provide a basis for inferring a consciousness of guilt or inferring that a defence raised at trial is a new invention or is otherwise suspect

the latter asked:

> whether it is permissible for the trial judge to instruct the jury that inferences available to be drawn from facts proved by the Crown case can be drawn more safely when the accused elects not to give evidence on relevant facts which the jury perceives to be within his or her knowledge.

All seven judges in *Weissensteiner* answered this latter question in the affirmative. An explanation might be "reasonably expected" in some circumstances, and inferences could be drawn from a failure to explain. Mason, Deane and Dawson cited with approval Justice Windeyer (*Bridge v The Queen* 14 1964, 118 CLR at 615), who maintained that "the failure of an accused person to contradict on oath evidence that to his knowledge must be true or untrue can logically be regarded as increasing the probability that it is true." This clearly suggests an obligation, in some circumstances, to give evidence and so breach one's right to silence.

The case poses some peculiar questions. Firstly, if this was an exceptional circumstance where the right to silence as stated in *Petty and Maiden* was to be effectively compromised, how might such an exception be characterised? Secondly, was it being said that remaining silent could amount to evidence, or to corroboration? Thirdly, when the accused remains silent, how can the trial judge determine which "relevant facts…the jury perceives to be within his or her knowledge"? The judges answered these questions in different ways.

On characterising the exceptional case, Mason, Deane and Dawson left the question open, simply saying:

> a jury should not be invited to take into account the failure of the accused to give evidence unless that failure is clearly capable of assisting them in the evaluation of the evidence before them.
>
> Noting that previous cases did not determine this question, Gaudron and McHugh said there was no general answer, but that it could occur when the silence was "inconsistent with innocence". However such a circumstance could not be generally characterised:

> the circumstances which so obviously suggest a particular conclusion that they call for an explanation…are not susceptible of definition…the circumstances must be such that failure to explain is inconsistent with innocence.

Both these approaches leave great room for an imaginative prosecutor or judge to suggest suspicious inferences to be drawn from the 'failure' of an accused to testify. The result of following this decision is likely to expand the range of cases in which a right to silence will not be respected.

The High Court judges in *Weissensteiner* did not present a clear view on whether silence could amount to evidence or corroboration. Brennan and Toohey suggested a distinction between silence as evidence and silence to support adverse inferences.

> An accused's failure to testify "has no evidential value'…If there is insufficient evidence of the facts from which an inference of guilt could be drawn, a failure to testify cannot supply the deficiency. But the jury may draw inferences adverse to the accused more readily by considering that the accused, being in a position to deny, explain or answer the evidence against him, has failed to do so.

Mason, Deane and Dawson were no less opaque, saying on the one hand that an accused's silence could not be evidence, or an admission of guilt, yet on the other that silence could amount to "an admission by conduct".

> The failure of the accused to give evidence is not of itself evidence. It is not an admission of guilt by conduct. It cannot be…[but] In some other circumstances, silence in the face of an accusation when an answer might reasonably be expected can amount to an admission by conduct.

The suggestion here is that there is a distinction between the drawing of inferences from conduct (ie. silence), and the drawing of inferences from conduct as evidence. But it is a laboured distinction, and one which invites the jury to look beyond the evidence and to suspect what an accused's silence may mean.

Two further distinctions were made, in the course of sustaining the in-principle decision in *Weissensteiner*. Justices Brennan and Toohey suggested that the right to silence at trial warranted less protection, given that testimony was "directly under judicial control":

> *Petty and Maiden* and *Woon* [19 1964 109 CLR 529] were cases relating to the responses of a suspect to enquiries by police; the present case related to the non-exercise by an accused of his statutory right to testify in his own defence at trial…to the course of proceedings directly under judicial control.

However it is not clear how an expectation that one should testify at one's own trial might be less onerous than a demand to answer police questions. It is well recognised that there are reasons why persons might not testify at their own trial. Justice Isaacs in *Bataillard v The King* (30 1907 4 CLR 1282 at 1290-1) noted that there were many reasons not to testify:

> other than a sense of guilt, such as timidity, weakness, a dread of confusion or of cross-examination, or even the knowledge of a previous conviction [which might be exposed].

One might add to this list: a sense of shame about or fear of exposing other related non-criminal, or other criminal, matters. Building on this 'friendly' expectation that one should testify at one's own trial, Justices Gaudron and McHugh proposed a distinction between testifying 'against' oneself and testifying 'for' oneself, the suggestion being that there could be no dread of the latter "in circumstances involving an assumption that an innocent person would offer an explanation, the accused is not asked to testify against

himself, but in favour of himself." However this tends to ignore the practical reasons (fear of contradiction, ridicule, enhanced suspicion and cross-examination generally) why people choose not to testify. An accused person really just testifies, or not. Whether the testimony is 'for' or 'against' him or herself is a matter of how the jury sees it as a question of fact.

A range of arguments were thus presented by the judges to explain why, in some circumstances, an accused might be expected to testify at trial, and how this does not breach the common law respecting the right to silence. However the consequences of these variously and sometimes loosely defined lines of reasoning become clear when we see what very different inferences from Weissensteiner's silence were drawn by the High Court judges themselves. On the one hand, Mason, Deane and Dawson concluded that only Weissensteiner knew how he came to own the boat "in the absence of Bayerl and Zack". The assumed detail of this peculiar knowledge was suggested as being able to strengthen the murder charge against him.

> The appellant, if anyone, could have explained not only his possession of the boat, but his possession of the boat in the absence of Bayerl and Zack. His failure to give evidence was, therefore, capable of strengthening the prosecution case by enabling the jury, in the absence of any explanation by him, to accept the inferences for which the prosecution contended as the only rational inferences from the evidence.

On the other hand, Gaudron and McHugh said that, while there were unanswered questions about which Weissensteiner may have unique knowledge, this did not go so far as to indicate he knew where the two were, let alone implicate him in their assumed murders:

> there is nothing in the evidence to provide the basis for an assumption that the appellant had some special knowledge as to the whereabouts of Ms Zack and Mr Bayerl, as might be suggested if, for example, it had been established that they sailed with him from Cairns. Much less can it be said that the facts so obviously implicate him in murdering them that they call for an explanation in the sense discussed.

The difference between the conclusions of these two judgments illustrates a basic danger in the *Weissensteiner* principle. If it is assumed that an accused has some unique knowledge, yet that person chooses to remain silent – who can safely define the nature and extent of that assumed knowledge? In this case the High Court judges could neither define the circumstances in which a person would be required to explain, nor could they agree on what inferences could be safely drawn from Weissensteiner's failure to explain. If the judges cannot agree on it, what is to be gained from inviting a jury to do so? Inviting jury speculation on assumed knowledge may well be inviting them to depart from the evidence, and to form conclusions based on suspicion and prejudice.

The *Weissensteiner* case is further clouded by reports that the two presumed victims may still be alive. On 19 April 1998 newspaper reports indicated that Interpol was tracking an Austrian man across Europe who was believed to be Bayerl. Interpol experts believed that there existed a "good similarity" between recent photos of the suspect and Bayerl. Manfred Weissensteiner is currently serving a life sentence in Borallon prison, in Queensland.

In NSW the decision in *Weissensteiner* has been applied on many occasions since 1993. In each case the NSW Court of Criminal Appeal has noted the combined effect of the High Court judgement in *Weissensteiner* and s.20 of the *Evidence Act* 1995. For example in *Lewis* (1998) the CCA noted that:

> Pursuant to s20 of the Evidence Act the trial judge was entitled to comment on his failure to [give evidence], but could not suggest that the reason he failed to give evidence was because the appellant was, or believed that he was, guilty of the offence concerned. Section 20 does not prohibit any other comment which may be made on a failure to give evidence: see Weissensteiner v R (1993).

In that case, multiple and confusing directions by the trial judge led the CCA to direct a retrial. However, in Davis (1999) the following direction by trial judge Nader was upheld by the CCA:

> The accused has a right to remain silent, and it extends to this trial as well as other periods of time between the accusation and the trial itself…Now the only effect that his failure to give evidence may have on you is this. His failure to give evidence here may affect the value or weight that you give to the evidence of some or all of the witnesses who have testified in the trial if you think the accused was in a position to himself give evidence about the matter. His failure cannot be treated as an admission. But it may enable you…to evaluate the weight of other evidence in the case.

Justice James Wood, writing the leading judgement for the CCA, added that the fact the accused participated in an electronic interview with police

> [did not] necessarily militate against giving a Weissensteiner direction. The account given by an accused to police in an [electronic interview] is far from being the equivalent of sworn evidence in a trial.

In Fernando (1999) the CCA approved of the following direction by trial judge Abadee:

> However, a failure to contradict or explain incriminating evidence, in circumstances where it would be reasonable to expect it to be in the power of an accused to do so, may make it easier for you to accept or draw inferences from evidence relied upon by the Crown. Inferences available to be drawn from facts proved by the Crown's case can be drawn more safely or more readily where the accused elects not to give evidence on relevant facts which you, the jury, perceive to be within his knowledge. Where the evidence of the Crown witnesses is left undenied or uncontradicted by, for example, an accused's evidence, in circumstances where the accused must have personal knowledge of the relevant facts, doubts about the reliability of the Crown witnesses may be more readily discounted and the evidence of those witnesses more readily accepted.

Justices Newman, Studdert and James found that this adverse direction was allowed against one of the accused, though he had

> waived his right to remain silent when he was interviewed by the police, he had given his version to the police, he had participated fully in the process of being interrogated by the police.

The effect of *Weissensteiner* on cases such as *Davis* and *Fernando* had thus not simply been to demand an explanation from an accused, but to demand an explanation on oath, and where the accused may be cross-examined. This may compound the problem, from the accused's point of view, in that an unwillingness to testify out of fear of cross-examination (which may include the fear of prejudicial exposure of previous misconduct or criminality) will invite adverse comments, inviting suspicion about the failure to testify.

Does the law breach human rights commitments?

The High Court of Australia determines its decisions independently. However the court works in the absence of an Australian Bill of Rights and must also respect constitutionally valid laws passed by the States. In this case, s.20 of the NSW Evidence Act 1995 does allow some comment on the 'failure' of an accused person to testify. The High Court therefore has structural constraints on its capacity to fully express human rights principles.

However, there is no such structural problem in applying international jurisprudence to the rule in *Weissensteiner*. What is to be assessed is the effect of the High Court ruling combined with the State legislation, and the benchmark is the relevant provision of the *International Covenant on Civil and Political Rights*. In this case the *ICCPR* (Article 14) says that:

> (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality…
> (g) Not to be compelled to testify against himself or to confess guilt.

Nowak says this provision came from a Filipino proposal, and that the term "to be compelled" includes:

> various forms of direct or indirect physical or psychological pressure, ranging from torture and inhuman treatment prohibited by Articles 7 and 10, to various methods of extortion or duress and imposition of judicial sanctions in order to compel the accused to testify (Nowak 1993:264).

The General Comments of the Human Rights Committee explain the provision in this way:

> 14. Subparagraph 3(g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of Article 7 and Article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

Case law from the Human Rights Committee has mostly come from complaints in which torture and physical coercion have been used by police to obtain confessions (eg. *Miguel Angel Estrella v Uruguay* 1983; *Delia Saldias de Lopez v Uruguay* 1984; *Raul Caribon v Uruguay* 1988). However, "to testify against himself or to confess guilt" has clearly been read widely to mean both "testify" in court and "confess" to police so that the evidence might then be used as evidence in court. For this reason, a compulsion to "testify against" oneself in court, as suggested by *Weissensteiner*, would appear to violate the Covenant. There is no such exception to the treaty provision, in the way that the High Court has constructed an exception to the right to silence in *Weissensteiner*. At the very least they are inconsistent.

If the Australian government chose to defend the rule in *Weissensteiner*, it might argue in two ways. Firstly, it might argue that there is no compulsion involved in the rule, as there is in a confession extracted by torture. The accused is not "compelled" to testify, it is simply that certain adverse inferences may be drawn by the jury, and some comment may be made by the judge, if the accused does not testify in a limited number of cases. Secondly, it might adopt the argument of Justices Gaudron and McHugh in *Weissensteiner*, that there is a distinction between testifying "against" oneself and

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testifying "for" oneself, that is "the accused is not asked to testify against himself, but in favour of himself".

Neither of these arguments seem to us to be particularly impressive. There is indeed compulsion in the prospect of knowing that, if one does not testify at one's trial, the judge may make adverse comments, attracting suspicion rather than accepting silence as the exercise of a universal right. And the distinction between testifying "for" or "against" is a facile one. Prosecutors typically want accused persons to testify, so that they may be cross-examined and attention may be drawn to the weaknesses of their defences, or the inconsistencies in their explanations. Defence lawyers may then draw attention to the strengths of their client's testimony. However in our view it is pointless to argue (particularly in an adversarial structure) whether an accused person has been invited to or has in fact testified "in favour" of, instead of "against", him or herself. As we said earlier, an accused person simply testifies, and others then comment and draw inferences.

The right to silence is rooted in the internationally accepted and coherent form of the criminal process. Persons charged are presumed innocent until proven guilty, they are prosecuted by the state which carries the burden of proof of the charge. Accused persons are not to be compelled to assist the state in this process. The need to protect this right is underscored by the overwhelming resources of the state, when pitted against those of the individual. The danger of the rule is well illustrated by the fact that, while all judges agreed that juries should be allowed to draw inferences from an accused's 'failure' to testify, in certain cases, the judges themselves disagreed widely on what inference to draw in this particular case. The ruling does not encourage decision making based on evidence, and may instead encourage decisions based on innuendo and speculation. In our opinion, therefore, the High Court decision in *Weissensteiner* (as it applies to NSW) most likely breaches the Australian commitment to the right to silence as defined by the *International Covenant on Civil and Political Rights* (Article 14 3(g)). It does so by raising the threat of judicial censure at trial, prejudicing the accused person's prospects of an acquittal, in order to compel an accused person to testify.

7.2 Rights and Criminal Sanctions

In examining the human rights compliance of criminal justice laws which relate to criminal and custodial sanctions we must consider the following questions:

1. How effectively does the law prohibit the use of cruel, inhuman or degrading treatment or punishment, and to what extent does the law provide an effective remedy in case of such treatment? [ICCPR 7; CROC 37(a)].
2. How effectively does the law provide for an enforceable right to compensation for unlawful arrest or detention, and for wrongful punishment? [ICCPR 9 (5) & 14 (6)]
3. To what extent does the law provide that the essential aim of the prison system shall be reformation and social rehabilitation? [ICCPR 10 (3)]
4. To what extent does the law provide that…imprisonment for young people under eighteen is only to be used as a measure of last resort and for the shortest

appropriate time, and that no child is subject to imprisonment without possibility of release? [CROC 37(a) (b)]

5. How effectively does the law protect the right to life and defend the security of the person? [ICCPR 6 & 9 (1)]

As examples in this area we consider retrospective 'life' sentences, and compensation for victims of miscarriages of justice.

7.2.1 Retrospective life sentences

The law and the possible breach

A 1993 amendment to the NSW *Sentencing Act* 1989 allowed those sentenced to imprisonment for 'life' sentences (subject to eventual release on license) to be resentenced to 'natural life' (never to be released) – a far more severe penalty, and one which did not occur at the time of their offence or trial. The resentencing procedure for those serving previously indeterminate 'life' sentences, [*Sentencing Act* s.13A(8)] was amended to provide that:

> (8) If the Supreme Court declines to determine a minimum term and an additional term, the court may direct that the person who made the application:
> (a) never reapply to the court under this section…
> (8A) …[this] person is to serve the existing life sentence for the term of the person's natural life.

Another *Sentencing Act* amendment in 1997 substantially lengthened the time (from 8 years to 20 years) before a person, subject to a "non-release" recommendation by the trial judge, could apply for a redetermination of an indeterminate 'life' sentence. Section 13A (3) of the *Sentencing Act* was amended to read:

> (3) A person is not eligible to make such an application unless the person has served:
> (a) at least 8 years of the sentence concerned, except where paragraph (b) applies, or
> (b) at least 20 years of the sentence concerned, if the person was the subject of a non-release recommendation.

However the *International Covenant on Civil and Political Rights* opposes retrospective offences or penalties, in unambiguous language.

> No one shall be held guilty of any criminal offence…which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. [Article 15 (1)]

At issue in this case is whether the retrospective nature of 'resentencing' penalties, under the *Sentencing Act* 1989, breach human rights commitments. The relevant questions are therefore (i) whether s.13A (8) of the *Sentencing Act*, by allowing for retrospective 'natural life' penalties breaches Article 15 (1) of the *ICCPR*, and (ii) whether s.13A (3)(b) of the Sentencing Act, by introducing a 20 year bar to application for redetermination of sentence, breaches Article 15(1) of the *ICCPR*.

Background

In 1989 the NSW *Sentencing Act* was introduced and the NSW *Crimes Act* (1900) was amended, repealing s.19 and adding s.19A, to allow a 'natural life' sentence (never to be released) to be imposed on a person convicted of murder. Previously, those sentenced to

'life' (under s.19) served an indeterminate sentence, from which they might hope for release 'on license' after serving at least 10 years. The average life sentence at the end of the 1980s was 11.6 years. However the NSW *Sentencing Act* 1989 required all sentences to be determinate under so-called 'truth in sentencing'. Under this procedure both the system of remissions and administrative release on license were abolished, and a release date was set by a sentencing judge. Those sentenced to indeterminate 'life' were then required to have their prison sentences converted to a determinate sentence, with a specific date of eligibility for parole. The *Sentencing Act* 1989 (despite its title) only dealt with sentencing to prison, release on parole and some other prison related matters. It did not deal with those 95% of sentences which do not involve imprisonment. By abolishing all remissions from sentence it effectively lengthened all maximum sentences, and the range of applicable sentences, and required a specified date of eligibility for parole, for all sentences. It did in fact lead to an increase in terms of imprisonment (Potas 1992: 318). It did not initially apply to 'life' sentences [s.13(c)]. However, later in the same year it was introduced, the *Sentencing Act* was amended to add a provision [s.13A] whereby a person serving a life sentence, imposed before the Act was introduced, could apply to the Supreme Court to have his or her sentence redetermined. A minimum term and an additional term could then be specified, as with other sentences. Those applying to have their sentences converted were prohibited from making application until they had served "at least 8 years" of their sentence [s.13A(3)]. This was broadly in line with previous practice, where a 'lifer' might seek a lowered security rating within the prison system, at about this time, with the expectation of possible release after serving at least 10 years.

Amidst public debate about the possible release of some notorious persons, convicted of murder, a 1993 amendment to the *Sentencing Act* [s.13A (8)] (see above) allowed for those sentenced to 'indeterminate life' to be resentenced to 'natural life'. This resentencing to 'natural life' may only be for the crime of murder, for "a most serious case" and when it is "in the public interest that the determination be made" [s.13A (8C)]. While several people have now been sentenced to the new penalty of 'natural life', under s.19A of the *Crimes Act*, no-one as yet has been resentenced to 'natural life' under s.13A (8) of the *Sentencing Act*. Further, most of those sentenced to indeterminate 'life' have now been resentenced to fixed terms. Only a few pre-1989 life sentence prisoners remain 'un-resentenced'. The 1997 amendment to the *Sentencing Act* [s.13A (3)] (see above) appeared to impose yet another legislative barrier to the release of this dwindling group of unpopular persons (including William MacDonald, Leonard Lawson, Kevin Crump and John Cribb). It lengthened the time (from 8 years to 20 years) before a person, subject to a "non-release" recommendation by the trial judge, could apply for a redetermination of sentence.

Both the 1993 and the 1997 amendments to the *Sentencing Act* were formulated in the context of public debate about the possible future release of a handful of notorious NSW prisoners convicted of murder and sometimes multiple murder. However, a disturbing feature of the legislative process was the appearance of parliament formulating law to ensure that specific individuals remained in jail. In a 1997 speech the then NSW Chief Justice Murray Gleeson attacked politicians and media commentators for competing with

each other over ever 'tougher' sentencing proposals. Such campaigning and higher sentences had little impact on crime, he said (in Lagan 1997). The 1997 amendment had been pushed through parliament after the resentencing of Kevin Crump to a possible release date in the year 2003, an effective 19 year minimum term. The Labor government had responded to public criticism of the prospects of Crump's release, by shifting the 8 year bar on application for resentencing to (in certain cases) a 20 year bar on application. Law Society President Patrick Fair criticised the move, saying the parliament should not get involved with sentencing matters. Sentencing should be left to the courts, as "hard cases make bad law" (Law Society 1997A). The possibility of retrospective penalties formed part of a populist "law and order auction" (Hogg and Brown 1988) between the major parties.

How does Australian law view retrospectivity? Where there is no retrospective statute, the common law is against retrospectivity, but retrospective statutes are allowable. In the High Court case of *Nicholas*, Toohey J observed that:

> absent a clear statement of legislative intention, a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation (Nicholas v The Queen [1998] HCA 9 2 February 1998, M60/1996, AT 59).

In that same case Kirby J applied the accepted common law, that:

> Parliaments may enact laws of evidence of general application to govern the trial of matters in the courts, including with retroactive operation, without being regarded as impermissibly invading the courts' domain or the judicial power (at 197).

The case of *Polyukhovich v The Commonwealth of Australia* (1991, 172 CLR 501 F.C. 91/026), where the Commonwealth *War Crimes Act* 1945 had been amended with retrospective effect, affirmed this principle. However if a law was seen to be aimed at particular individuals, it usurped the judicial power and breached the separation of powers under the constitution. So according to Kirby J in *Nicholas*:

> If [the statute] is highly selective and clearly directed at a particular individual or individuals, it is much more likely that it will amount to an impermissible intrusion upon, or usurpation of, the judicial power. The position is clearer where the legislation in question names the individual or individuals affected. However, such express identification is not required…regard will always be had to its substance rather than its form (at 201).

The argument in *Nicholas* noted a tendency for legislation to avoid retrospective formulations, but also that there was no constitutional bar to legislative retrospectivity. However, the position in international law is different.

Does the law breach human rights commitments?

Commentators (eg Robertson and Merrills 1996) have noted the various regional human rights instruments which prohibit retrospective criminal laws. *The European Convention on Human Rights* bars retroactivity of the criminal law (Article 7). *The American Convention on Human Rights* declares freedom from retroactivity of the criminal law, while the *African Charter on Human and Peoples' Rights* supports freedom from retrospective punishment. More importantly, for the purpose of this audit, the ICCPR gives special protection to its anti-retrospective provision, and holds prohibition of retrospective criminal law as one of the Covenant's non-derogable rights [Article 4(2)]. There is a qualification to the ICCPR's widely stated anti-retrospective principle [15(1)],

that trial and punishment for international criminality shall not be prejudiced [15(2)], but that is not relevant to this issue.

In 1984 the Human Rights Committee decided in two Uruguayan cases that retrospective use of laws violated the Covenant [*Luciano Weinberger Weisz v Uruguay,* Communication No 28/1978 (29 October 1980), UN Doc CCPR/C/OP/1 at 57 (1984); and *Alba Pietraroia v Uruguay*, Communication No 44/1979 (27 March 1981) UN Doc CCPR/C/OP/1 at 65 (1984)]. In these cases persons were arrested and then punished according to military law promulgated after their arrest. This is categorically similar to the case of those serving indeterminate life sentences for murder, then being potentially subject to a more severe judicial resentencing [per *Sentencing Act* s.13A(8)] after their offence (*and* after their trial).

An unresolved argument was held at the Human Rights Committee in 1982, over a Canadian criminal case [*Gordon Van Duzen v Canada*, Communication No R.12/50 (18 May 1979) UN Doc Supp No 40 (A/37/40) at 150 (1982)]. At issue was the applicability of a more lenient parole procedure, introduced after the commission of the offence, and whether Van Duzen should get the benefit of that, according to the final sentence of Article 15 (1). Argument turned on whether Article 15 (1) applied to penalties broader than a 'criminal penalty' as defined by Canadian law. The Human Rights Committee affirmed that it was not bound by national legal definitions, and must regard the terms and concepts of the Covenant as having an "autonomous meaning". This might have meant that they would accept Van Duzen's argument that the Article was about "punishment for crime", encompassing procedures wider than judicial sentencing. However, as Van Duzen was released to early parole, the Committee avoided a conclusion on this matter. It seems to us that the answer to this question may have some bearing on the second question we have posed, whether the increased effective minimum qualifying period for an application for resentencing for some persons [*Sentencing Act* s.13A(3) (b)] also violates Article 15 (1). There is probably a stronger argument here (than there was in Van Duzen), in that this section involves an increased barrier to what is an essential precondition for judicial resentencing. However, with the unresolved argument over what is a criminal 'penalty', the argument against s.13A (3)(b) is not as clear as the argument against s.13A (8).

In our opinion, therefore, s.13A (8) of the *Sentencing Act*, by allowing for retrospective 'natural life' penalties, clearly breaches the Australian commitment to non-derogable Article 15 (1) of the *ICCPR*. In addition, s.13A (3)(b) of the *Sentencing Act*, by introducing a 20 year bar to application for redetermination of sentence, possibly breaches the Australian commitment to non-derogable Article 15 (1) of the ICCPR. The first clearly does so, and second possibly does by violating the principle that there shall be no retrospective application of the criminal law.

7.2.2. Compensation for victims of miscarriages of justice

The law and the possible breach

In New South Wales compensation has been paid to a number of people who have been pardoned after the disclosure of fresh evidence led to a special inquiry, and a pardon resulted. In New South Wales (but not in other Australian States) there has long been a special section of the *Crimes Act* 1900 (previously s.475, now s.474 or part 13A) which provides for such a special inquiry. This section predated, and now operates concurrently with, the *Court of Criminal Appeal Act* 1912. In the early 1990s the section was amended to allow, amongst other things, for a pardon by the Government (an executive act) to be 'converted' into an acquittal by the Court of Criminal Appeal (a judicial act). In recent years all such pardons (whether 'converted' or not) have had the same factual basis as an acquittal, that is, the new evidence must have indicated that there was a reasonable doubt about the conviction. Thus all pardons in recent years have been the *factual equivalent* of an acquittal. There have been no 'compassionate grounds' pardons to confuse the matter.

Compensation paid to these victims of miscarriages of justice, however, has been by way of an 'ex gratia' payment. That is, it has been an act of 'grace' or favour on the part of the executive government. In some cases it appears that such payments have been made to avoid possible common law actions against the State. Although in recent times there have been attempts to make public some of the criteria on which these decisions are made, there remains considerable uncertainty about the process, eligibility for compensation and the amount which should be paid. Above all, compensation in these circumstances has been treated as a privilege and not a right.

Article 2(3) of the ICCPR provides that persons shall have "an effective remedy" when their rights are violated. Article 9(5) goes on to assert that victims of "unlawful arrest or detention shall have an enforceable right to compensation". In particular, on compensation for the victims of miscarriages of justice the Covenant says:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him. (Article 14(6))

As NSW has no real system of compensation "according to law", the relevant question here is whether the ex gratia system of compensation comes within the scope of the Covenant or whether this practice breaches Article 14(6).

Background

There is currently no legally regulated way by which persons in NSW – wrongly convicted but then exonerated – can obtain compensation. Where compensation has been paid it has been by way of ex gratia payment from the government, with very uneven results. The difficult alternative is to pursue a common law claim, and prove a case against the State. This is even rarer than ex gratia payments. Access of victims of miscarriages of justice to the Victims Compensation Tribunal has not yet been tested, but

would not appear applicable, as this system is open only to those who have been subject to an "act of violence".

In practice, the ex gratia system is extremely uneven. Large payouts under the system have been made where a special inquiry has been instituted *after* the person has been exonerated. Thus Arthur Allan Thomas in New Zealand (who served 10 years for murder before being pardoned in 1979) was awarded $1.1 million and Harry Blackburn in NSW (who was not convicted and served no time in prison) received almost $1 million. Both had Royal Commissions into their cases *after* they had been exonerated. The Blackburn case was unusual in that compensation was paid despite the fact that no conviction or punishment had occurred. Lindy and Michael Chamberlain received a total of $1.3 million for wrongful convictions over the death of their baby daughter Azaria (Lindy had served 3.5 years in prison), but others pardoned have received much less:

> Edward Splatt in South Australia received $270,000 for 6 years jail,
> Ziggy Pohl in NSW received $200,000 for 10 years jail,
> Douglas Rendell in NSW received $100,000 for 8 years jail, and
> Paul Alister, Ross Dunn and Tim Anderson in NSW received $100,000 each for their 7 years jail.

All ex gratia payments are made with no fault admitted by the State, a move intended to head off any subsequent common law suit. Most of these claims took several years to resolve, on top of the many years which the victims had already spent seeking vindication.

In 1994 it was reported that the Attorney General of NSW, John Hannaford, was preparing a system of independent assessment of compensation for people who had suffered miscarriages of justice. This was to replace the ex gratia system.

> Mr Hannaford told the Herald yesterday that a system introduced in Britain in 1988, which replaced an ex gratia scheme, was being examined.
> "We are looking at the most effective and efficient way of dealing with these to minimise court cases with regards to disputes over compensation," he said.
> "We have never anywhere in Australia had a statutory scheme for assessment of compensation. Here in NSW the ex gratia payments have not been compensation, but some payment to help a person get re-established in life."
> He agreed that the proposed change was a radical shift in policy. One factor he had taken into account was the number of applications in the system for quashing of verdicts (Brown 1994).

At this time two private members bills on compensation were before the parliament, both from Opposition Labor MPs. The first was from George Thompson while the second was from John Mills, seeking independent assessment of compensation. A third was being contemplated by Peter Anderson (ALP), on behalf of Alexander McLeod-Lindsay, who was pardoned after having served nine years for attempted murder. However, the then Coalition government made no such changes, and subsequent Labor governments have rejected similar proposals. There has thus been no progress towards a system of compensation "according to law", as required by the ICCPR.

Some of the sense of Article 14(6) of the ICCPR is incorporated into the considerations apparently taken into account when making ex gratia payments. That is, payment is often made when a person is exonerated after all the normal processes (usually including a

High Court appeal) have failed. Such exoneration usually happens by way of a Royal Commission or, in the peculiar case of NSW, an enquiry under s.474 (previously s.475) of the *Crimes Act*. In 1995 Labor Attorney General Jeff Shaw said that the considerations of the ex gratia system would include findings of wrong doings against the State or its witnesses, such as would be relevant to any common law action.

> If it is found the evidence is fabricated or if the prosecution misconducts itself, then compensation would be paid (Shaw 1995).

The Attorney General said this when rejecting a compensation claim by Jonathan Manley, who was acquitted of murder by the Court of Criminal Appeal, on the grounds that the verdict was unsafe and unsatisfactory. Manley had spent 12 months in prison and was acquitted because the case against him was hopelessly weak. Had there been a finding of fabricated evidence, then, according to Shaw, Manley may have been compensated. However this distinction had no real relevance to the actual wrong suffered by Manley.

In 1996 the NSW Council for Civil Liberties called for a tribunal to assess compensation, based on Article 14(6) of the ICCPR, but with wider eligibility provisions:

> The present system of providing compensation to the victims of miscarriages of justice is inadequate. To ensure equality of access and equity, an independent Miscarriages of Justice Compensation Tribunal should be established to assess the compensation to be paid to those wrongly arrested, detained, prosecuted, convicted or imprisoned for a crime. Founding considerations should be those of Section 14(6) of the International Covenant on Civil and Political Rights. Compensation should be based on (i) the impact of the wrongful arrest, detention, prosecution or conviction and (ii) the impact of any period of wrongful imprisonment. In determining the quantum, the Tribunal should be able to consider all aggravating and mitigating factors. However victims should not be required to establish any specific wrongdoing by the prosecution, other than to prove that there had been a miscarriage of justice (CCL 1996).

The suggestion here was not only to add prosecution misconduct to the 'fresh evidence' criteria of Article 14(6), but to extend compensation to all those who had been demonstrably victims of a miscarriage of justice.

In 1997, with support from several community groups including the CCL, Liberal Shadow Attorney General John Hannaford introduced a private member's bill into the State's Upper House. The *Criminal Appeal Amendment (Review of Criminal Cases) Bill* 1997 provided for the establishment of an independent Commission which would review wrongful convictions. This followed a Royal Commission into the NSW Police which had revealed massive corruption, including wholesale fabrication of evidence to secure convictions. The Bill also included a compensation provision. It sought to amend the *Court of Criminal Appeal Act* 1912 to insert section 23Q, providing a 'Statutory Right to Compensation' for victims of miscarriages of justice. The Bill was supported by Coalition and crossbench MPs and passed through the NSW Upper House in early 1998. However, the Labor government refused to pass it through the Lower House. An amendment to the Bill, put up by Greens MLC Ian Cohen and passed by the Upper House, had added "misconduct by the prosecution" (including that known at trial or appeal, as opposed to such misconduct as a "new or newly discovered fact") as a matter which "may" be considered by the Commission in determining payment of compensation

for wrongful conviction. It was argued that the principles applied should not be less favourable nor less fair than those applied to the determination of ex gratia payments. Hence "misconduct by the prosecution" should be added to the basic considerations that create a right to compensation. The initial compensation provisions of clause 23Q were thus based on Article 14(6) of the *International Covenant on Civil and Political Rights*, but slightly expanded on amendment. The provisions were intended to replace the current system of ex gratia payments.

A proper legal system for compensating miscarriage of justice victims has thus been considered but not yet implemented in New South Wales. A new system has been proposed because there are demonstrable problems with the ex gratia system, and because it is recognised that our human rights commitments demand a legal system. In summary, the main problems of the existing ex gratia system of compensation are these:

- the ex gratia model limits itself to (i) those few who have exhausted all channels of appeal, have managed to secure a special inquiry and have then (by the longest route possible) been exonerated, or to (ii) those acquittals where there has been a finding of wrongdoing by the prosecution or its witnesses, and therefore the State may face the prospect of a common law suit;
- there are long delays in the consideration of ex gratia matters;
- there are inexplicable inconsistencies in payments;
- there is no open process of hearings, or avenue for appeal;
- the common law route involves placing an unfair and extremely difficult burden of proof on a person already found to have been wrongly convicted (and often jailed) by the State.

There can be little doubt that an independent tribunal or panel of assessors would act more rapidly, more transparently and with greater consistency than governments of any stripe using the ex gratia system.

Does the law breach human rights commitments?

Nowak (1993: 269-271) says that, in the drafting process, 14(6) of the ICCPR was the most controversial provision of Article 14. It was first attacked by the USA, then by several European countries. However by 1984 the European Convention on Human Rights had created a nearly identical provision to that of 14(6). One reason for the initial controversy was that a 'pardon' in some countries meant a remission of sentence on humanitarian grounds, rather than an effective reversal of conviction, though the final wording makes it clear that the only pardon which attracts compensation under 14(6) is one which occurs as a result of a finding that there has been a miscarriage of justice.

Five elements must be satisfied, to meet the needs of the provision. First, there must have been a conviction by a final decision; that is, all normal avenues of appeal must have been exhausted. Second, the conviction must have been reversed in circumstances where it has been acknowledged that there has been a miscarriage of justice. Third, a new or newly discovered fact leads to that reversal. Fourth, the person was suffering some punishment for the conviction. Fifth, the person convicted was not responsible for non-disclosure of the new fact. Nowak (1993:271) says that this latter provision was inserted at the initiative of France, to rule out cases where a person allows himself to be convicted

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to shield the really guilty party. In one case against the Netherlands (*W.J.H. v The Netherlands* 408/1990) the Committee found that a person convicted and subsequently acquitted was ineligible for compensation because he had not been punished. In a case against Finland (*Muhonen v Finland* 89/1981) the claim for wrongful imprisonment was rejected because the pardon was not based on newly discovered facts.

However, it is very clear that the compensation is to be "according to law" so as "to regulate in detail the modalities for granting compensation, as well as the amount, particularly in the case of non-pecuniary damages (eg. with prison sentences)" (Nowak 1993:271). In its General Comments on Article 14 (6) the Human Rights Committee (1994) says that in many states "this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant." These comments could well have had New South Wales in mind. The State's ex gratia system is not supplemented by victims compensation law (the Victims Compensation Act 1996 only applies to victims of "an act of violence") and the difficult but possible common law remedies do not meet the State's responsibility to provide compensation according to law.

In our opinion, therefore, the ex gratia system of compensation for victims of miscarriages of justice does not satisfy the Covenant. The current practice is therefore clearly in breach of Article 14(6) of the *International Covenant on Civil and Political Rights*.

7.3 Equality Before The Law

In examining the human rights compliance of a range of criminal justice laws we must consider the question of equality before the law. In particular, the human rights instruments pose this question:

> To what extent does the law ensure that persons are treated as equals before the law? [ICCPR 2 (1) & 14 (1); CROC 2 (1)]

As examples in this area we consider the general police immunities granted under 'controlled operations' legislation.

7.3.1 General police immunities

The law and the possible breach

In 1997 the NSW government introduced a Bill which allowed for general immunities from prosecution for police engaged in 'controlled operations'. The Bill was supported by the Opposition and passed without much debate. It followed from the High Court case of *Ridgeway*, where evidence was excluded because of the criminality of undercover Australian Federal Police. The result of the Act is that there is now a process whereby senior executive officers of the NSW Police Service can authorise 'controlled operations', in the course of which law enforcement officers gain a general immunity from any criminal charge or civil claim.

Previously, undercover or other operational police officers acting improperly or illegally avoided prosecution because of their lack of intent to commit a crime (criminal intent being a component of most crimes) and because of the selectively applied discretionary powers of their fellow police and prosecutors. Through such practice, any question of illegality was said to be resolved by consideration of the facts of the individual case. 'Controlled Operations' legislation changes all this, by creating a formal blanket immunity for police engaged in an operation authorised by a senior executive officer. The problem is that the potential crimes for which police are indemnified include crimes which have victims (eg. assaults, serious assault, up to and including manslaughter and murder) and thus may involve serious violations of rights of other citizens, for which the potential remedies have been removed. Further, general immunities tend to create a class of citizen which is above the law.

However Article 2 of the *International Covenant on Civil and Political Rights* provides that all are to be considered equal before the law, are entitled to equal protection of the law and are entitled to an effective remedy if their rights are violated:

> Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status…[Article 2(1)]
>
> Each state party to the present Covenant undertakes:
>
> (a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity… [Article 2(3)]

Article 2(3) goes on to reinforce this initial proposition by asserting that the "effective remedy" shall be determined by a competent authority and shall be enforced. Article 26 then reinforces the principle of equality before the law and equal protection of the law:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law…[Article 26]

In addition, Article 6(1) asserts a special protection of the law, that of the right to life:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The relevant question here is whether the system of general immunities, provided to police by the NSW *Law Enforcement (Controlled Operations) Act* 1997, is allowed by the Covenant, or whether it breaches the principles of equality before the law, access to an effective remedy and the right to life (ICCPR Articles 2, 6 and 26).

Background

In the case of *Ridgeway v The Queen*, the High Court (1995) restated the common law principle that illegally obtained evidence might be excluded from a criminal trial on public policy grounds. In this case, Ridgeway's possession of 140g of imported heroin would not have occurred without the deep involvement of police in the importation.

> The illegality of [the police] importation was not only calculated. It was necessary to procure the commission of the appellant's offence.

While the majority of the High Court (Mason CJ, Deane and Dawson JJ) found that there was no common law defence of 'entrapment' (as there is in the United States), the

criminal activity by police officers might require that their evidence be excluded from a criminal trial on discretionary grounds.

> The critical question was whether…the considerations of…the public interest in maintaining the integrity of the courts and ensuring the observance of law and minimum standards of propriety by those entrusted with powers of law enforcement, outweighed the obvious public interest in the conviction and punishment of the appellant of and for the crime (HCA 1995).

The High Court decided that, in view of the extent of police illegality, public policy required that Ridgeway's conviction be quashed and that there be a permanent stay of proceedings against him.

Alarmed by this decision, police bodies around Australia pressured governments to change their laws to specifically authorise undercover and other law enforcement activities which involved illegality, so that police evidence would not be rejected by the courts. The law could also ensure that police were not prosecuted or sued for their illegal activities. The High Court majority in *Ridgeway* had foreseen such a possibility, saying:

> It is arguable that a strict requirement of observance of the criminal law by those entrusted with its enforcement undesirably hinders law enforcement. Such an argument must, however, be addressed to the legislature and not to the courts. If it be desired that those responsible for the investigation of crime should be freed from the restraints of some provisions of the criminal law, a legislative regime should be introduced exempting them from those requirements. In the absence of such a legislative regime, the courts have no choice but to set their face firmly against grave criminality on the part of anyone.

This may be the constitutionally correct position, but it persists with the modern myth that parliaments are 'sovereign', and may reshape public policy as they like, according to administrative convenience and without boundaries defined by rights. A human rights analysis does not share this mindset.

The federal government was first to develop a legislative response to Ridgeway's case. The Commonwealth *Crimes Amendment (Controlled Operations) Act* 1996 (which became Part 1AB of the *Crimes Act* 1914) deals only with 'controlled operations' related to offences under the *Customs Act* 1901 and the import of narcotic drugs. By this law a 'controlled operation' authorises law enforcement officers to engage in conduct which would otherwise be a narcotic drug offence (s.15H). Law enforcement officers are not liable for prosecution if they had in force a certificate under s.15M which authorises the controlled operation (s.15I). They can obtain such a certificate from the Commissioner, the Deputy Commissioner or an Assistant Commissioner of the Australian Federal Police or a member of the National Crime Authority (s.15J). The indemnity does not apply if the officer induces the target to commit an offence (under s.233B *Customs Act*) and the person would not otherwise have committed that offence (s.15I). In case of urgency an application for a certificate may be by phone or by "any other means of communication" (s.15L). Evidence of an import of narcotics is not to be disregarded by a court because a law enforcement officer has committed an offence in importing the narcotics, provided that the import was part of a controlled operation and had been authorised by an AFP Regional Director (s.15X). The Commonwealth law thus responds to the specific drug operation in Ridgeway's case, and creates an indemnity for strict liability drug offences.

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The NSW law goes much further than this, by providing a general immunity for all crimes and all civil actions. Introducing the Bill, Attorney General Jeff Shaw claimed that, on the one hand, police would be allowed access to "any methods" yet, on the other, there would be "strict" accountability.

> Criminals will use any methods to commit crimes and protect themselves and their ill gotten gains. The purpose of this bill is to allow enforcement agencies to use similar methods to fight crime, while at the same time providing a strict system of accountability for the use of otherwise unlawful activities.

The new law would "legitimise the actions of undercover officers" and ensure that their evidence would remain admissible in criminal trials (Shaw 1997: 3035). The Opposition supported the new law.

The NSW *Law Enforcement (Controlled Operations) Act* 1997 creates a wide criminal and civil indemnity for law enforcement officers (and at times civilians) engaged in 'controlled operations'. Officers (of the NSW Police, the Police Integrity Commission, the Independent Commission Against Corruption and the NSW Crime Commission) may apply to the chief executive officer of their agency for authority for a controlled operation. When doing this they must specify the nature of the controlled operation and of the criminal or corrupt activity in which they propose to engage (s.5). The CEO may then authorise the activity, subject to being satisfied that several criteria are met. The officer is then subject to a code of conduct (s.6). Then the general immunity applies. "Despite any other Act or law", an activity of a controlled operation "does not constitute an offence or corrupt conduct" so long as it is authorised and engaged in according to the authority for the operation (s.16). There are some matters which are not to be authorised: (i) inducing another person to engage in a crime, which would not otherwise have occurred (ii) engaging in conduct likely to "seriously endanger the health or safety" of any person, or to result in "serious loss or damage to property" (s.7). However if the operation is authorised, activity within it will not constitute an offence (s.16). Authority for criminal conduct may be granted retrospectively in cases of a life threatening situation, if applied for 24 hours after the event and if meeting certain criteria (s.14). Retrospective authority does not apply to "conduct giving rise to the offence of murder or of any other offence for which the common law defence of duress would not be available" (s.14). Creation and use of false documentation may be authorised (s.17). The CEO and participants in an authorised operation "if the conduct was in good faith for the purpose of executing this Act" will not be civilly liable for any action, claim or demand (s.19).

Additionally the *Drug Misuse and Trafficking Amendment (Controlled Operations and Integrity Testing Programs) Act* 1998 authorises controlled operations under the *Drug Misuse and Trafficking Act* 1985. This amendment allows the Commissioner of Police (or the Deputy) to direct the use of prohibited plants and drugs in controlled operations and integrity testing operations (s.39RA). However, in these operations use of illegal drugs need not be linked to an identified controlled operation or integrity testing program, before a direction is made (s.39RA).

Since the introduction of the federal and NSW controlled operations laws there have been attempts to further extend police powers under these Acts. In late 1999 the Joint

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Committee on the National Crime Authority, at the request of the NCA, was considering extending the federal law to allow the NCA to be formally immune from laws other than the *Customs Act*. At the same time, the NSW *Law Enforcement (Controlled Operations) Amendment Bill* 1999 set out to extend the State law. The amendment would make the law apply to the NCA, the Australian Federal Police and the Australian Customs Service; would allow telephonic authorisations; and would allow delegation of the authorising functions to middle ranking officers. Controlled Operations laws have now been introduced in Victoria, Tasmania and South Australia, though not Queensland.

The approach of offering general immunities to police has been supported by police agencies but condemned by civil libertarians. At hearings of the Joint Committee on the National Crime Authority (1999), for example, NCA and police representatives argued the need for wider immunities under controlled operations law, while the NSW Law Society and the NSW Council for Civil Liberties argued the Act was entirely misconceived.

> While we may have few objections to [independently authorised phone taps and] police officers using aliases in undercover operations, we strongly oppose regimes which allow executive authorisation of breaches of privacy and serious criminality. This is simply the dangerous process of licensing arbitrary power (NSW CCL 1999).

In practice there have been very few (if any) occasions where operational police have been successfully prosecuted. This is particularly so in the case of secret police organisations such as ASIO, which engage in a variety of operations using 'bugging' equipment. In one notorious incident, the Australian Secret Intelligence Service (ASIS) engaged in a 'training' operation in Melbourne which entailed violence, including the smashing of doors in a hotel. The escapade went awry with considerable adverse publicity about irresponsible and illegal activity by ASIS – but no prosecutions resulted. However, the formalising in law of a regime of general immunities does represent a significant change. AS the CCL noted:

> We also oppose regimes which create some groups of citizens (in this case law enforcement officers) able to hold 'superior' rights, and consequent immunities from the legal process…we note a parallel trend to create other groups of citizens (such as prisoners) with subhuman rights. This formal fragmentation of citizen's rights, we believe, is deplorable. It is true that such disparities have de facto existed for a very long time. However to formalise them, we believe, exacerbates the fracturing of civil society.

Controlled operations regimes do not simply allow for more convenient law enforcement, they remove the rights of others (suspects, offenders or bystanders) who may be assaulted, seriously injured or killed by police with an operational general immunity. Human rights opponents of controlled operations laws are entitled to ask ' where is the "effective remedy"?' (ICCPR Article 2(3)) if the perpetrator is a state official with a certificate of immunity. Further, regimes of general immunity create such a certainty of legal impunity, in the minds of police officers, that they will be encouraged to believe they are indeed above the law. In this way such regimes may well encourage arrogance, corruption and serious abuse of power.

Does the law breach human rights commitments?

It is hard to see, in controlled operations legislation, where there is support for the consideration, expressed in *Ridgeway* by Mason CJ (HCA 1995):

> Circumstances can arise in which the need to discourage unlawful conduct on the part of enforcement officers and to preserve the integrity of the administration of criminal justice outweighs the public interest in a conviction of those guilty of crime.

A system of general immunities must seriously diminish this view expressed by Mason CJ. Under NSW controlled operations law, such discouragement is therefore now less likely to come from the courts, and must instead be expected (if at all) from supervising police. Similarly, the "high level of accountability" in the law, spoken of by the Attorney General (Shaw 1997: 3037), can only be found (if at all) in hidden, executive police processes, far removed from the public law.

Does the system of general immunities, provided to police by the NSW *Law Enforcement (Controlled Operations) Act* 1997, breach the principles of equality before the law and access to an effective remedy? It might be argued that law enforcement officers have special responsibilities which at times may require some breach of the law, but that provided this is measured and proportionate, and does not intend harm to others, the temporary supralegal status is justified. Such justification, to be consistent with the 'equality before the law' of Article 26, would have to be a temporary measure, solely for the purpose of a particular law enforcement operation. Supporters of controlled operations law (eg Shaw 1999) would argue this is precisely what the authorisation and accountability measures within the NSW law provide. However, in practice, this would depend on whether the immunities extend to a wide category of offences, as well as their scope in time. In other words, the NSW 'controlled operations' model might breach the principle of equality before the law if in practice it offered extensive immunities or was loosely administered. But there remains the problem of an effective remedy. Even in a carefully targeted and supervised 'controlled operation', what if a person were seriously injured by (for example) negligence on the part of a police officer? There is little doubt that the officer would claim his or her immunity from prosecution, under controlled operations law. There is then the possibility that the state might (as a matter of good policy and to meet the deficiency in the law) step in and pay compensation. But it might also not do this. In either case, it seems to us, this is not an "effective remedy" in the terms of Article 2(3).

What of the right to life? What if someone were killed in the course of a 'controlled operation'? In past NSW practice, there has been little recourse for innocent persons maimed and killed in police operations. They have generally sought ex gratia payment from the State government, as with the family of David Gundy, an innocent Aboriginal man killed in a police raid in Marrickville in 1989. Effecting civilian remedies against police has always been difficult, for a number of reasons. However the difference with 'controlled operations' law is that there is formally no possibility of a remedy, and that may encompass no legal protection for the right to life "the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation". Article 6(1) requires that this right be protected by law. The NSW *Law Enforcement (Controlled Operations) Act* 1997 does not countenance the authorisation of conduct likely to "seriously endanger the health or safety" of any person (s.7), but if police do kill a person in the course of the controlled operation, they have a blanket immunity from prosecution or civil suit (s.16). In our view, this is an inadequate

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protection of the right to life, as well as the denial of an effective remedy in case of a breach of rights.

It is our view therefore, the system of general police immunities, provided by the NSW *Law Enforcement (Controlled Operations) Act* 1997, possibly breaches the Australian commitment to the principle of equality before the law (ICCPR Article 26), clearly breaches the commitment to provide an effective remedy for breaches of citizens' rights (ICCPR Article 2(3)) and fails to adequately protect the right to life (ICCPR Article 6).

7.3.2 Aborigines

A further important consideration about equality before the law relates to Aborigines in Australia. An Aborigine's life expectancy is twenty years less than that of a white, unemployment three times higher and imprisonment and suicide rates five times higher. Furthermore, the indigenous population is discriminated against by police and in courts.

There is a streak of racism in police attitudes towards Aborigines, who are exceptionally vulnerable to criminal charges of offensive language or offensive behaviour. This is true of New South Wales as well as other Australian States, but additionally in some of those States there is a new body of law on mandatory sentencing, that is, the imposition of a fixed or minimum gaol sentence whenever a person in convicted of a specified class of offence. The element of discretion normally allowed to a judge in deciding on a penalty is removed.

Mandatory sentencing has been adopted in Western Australia and the Northern Territory. Particularly in the latter region, where the system applies to minor property offences and to juvenile offenders, Aborigines are the main victims of the system in practice. Moreover, the police power to charge and prosecute for a designated mandatory offence becomes all important.

There is undoubtedly a good case for arguing that mandatory sentencing is grossly unfair in removing a judge's discretion to take into account the particular circumstances of the offence or of the offender, so as to make the punishment fit the crime. It can also be regarded as cruel punishment, in breach of international standards. The Supreme Court of Canada has held that, in certain circumstances, mandatory sentencing will be classified as 'cruel and unusual punishment'.

So far, New South Wales has not legislated for mandatory sentencing but there are indications that the Opposition there will include it in its policies for the State election due in 2001. The NSW Chief Justice has issued a set of guideline sentences which are to be followed in respect of certain crimes. Is this the first step towards mandatory sentencing in New South Wales?

7.4 Conclusion

In this chapter and the previous one, we analysed a number of criminal justice laws applicable in New South Wales. Of these, six were matters of state legislation, two were the absence of state legislation and one was a High Court decision. The cases were

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chosen for their currency and the degree of concern expressed about them. In each case we identified the law about which there was concern, noted the suggested human rights breach, gave some background to the development of each law, applied the international jurisprudence and came to a provisional conclusion. In almost every case we found probable breaches (in one case a possible breach) of relevant human rights standards.

These case studies were not a representative group, they were selectively chosen. But they represent an alarming institutional failure of the New South Wales politico-legal system to come to terms with its human rights commitments. When coupled with the increasing rights jurisprudence and rising awareness of rights in this country (and in the region and in the world) these indicate a rising crisis – a reversion, at least in part, to a situation where the NSW police engaged in arbitrary action as a matter of course, while the state turned a blind eye to it. Institutions of state will fast lose credibility and relevance if they do not move quickly to meet this challenge.

We could have chosen to focus on some of the examples of good practice in New South Wales criminal justice law, but we did not. We have mentioned in passing the case of *Dietrich* (1992), where the High Court reversed earlier decisions concerning the right to legal representation, and based its decision on recognised principles of the ICCPR. We have also mentioned the sound principles which founded the NSW *Bail Act* 1978, and the NSW *Young Offenders Act* 1997 – but we have also noted the derogation from these principles through subsequent amendments. Their high standards were not maintained. This process illustrates the problems of a weak human rights culture and the virtual absence of institutional support for legislation based on sound principles.

In scrutinising criminal justice law, we called for suggestions from a variety of community groups and received a healthy response. We were able to deal with only a small fraction of the matters (both administrative and legal) drawn to our attention. Apart from the matters we examined in detail, the Law Society of NSW (1999) suggested we look at offensive language and offensive behaviour matters, where juveniles and young offenders are taken to police stations over matters which do not carry a custodial penalty. The Youth Justice Coalition (1999) suggested we look at (i) the *Young Offenders Act* 1997, in particular the 1999 amendments which made both 'cautions' and 'warnings' matters of greater legal consequence; (ii) the proposals to name and shame young offenders (iii) the *Children (Protection and Parental Responsibility) Act* 1997, which removes children's rights to freely associate and assemble in certain rural areas (this is directed almost exclusively at Aboriginal children and has already been the subject of criticism by the UN's Committee on CROC); (iv) the impact of the *Young Offenders Act* 1997 on Aboriginal children and young people; (v) the "drift from care to juvenile justice"; (vi) the victims compensation restitution scheme, where those in prison are taxed for a general victims fund; (vii) the powers of security guards as used against young people, in public and quasi-public space.

The NSW Young Lawyers (1999) suggested we examine some of the above issues, and as well (i) the rules which authorise routine police strip searches; (ii) the 'move on' power under the *Crimes Amendment (Police and Public Safety) Act* 1998; (iii) the 'no

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loitering' proclamations, organised by police and some local councils, under the Local Government Act; (iv) bail problems for wards of the state, bail problems for those without substantial sureties, and onerous or unreasonable bail conditions (v) unreasonable delays in criminal hearings and trials, particularly in the District Court and in some Children's Courts; (vi) guideline sentencing judgements, which "may compromise the right to a fair hearing by an independent and impartial tribunal"; (vii) the designation of some persons as "habitual traffic offenders", resulting in some elements of mandatory sentencing; (viii) a lack of non-custodial sentencing options in rural areas; (ix) inadequate legal aid funding, and inadequate legal advice for young people and those held in police custody; (x) overcrowding and substandard conditions in prisons, poor communication and visiting facilities for prisoners, sudden transfers within the prison system, poor care and management for transgender inmates, inappropriate custodial facilities for juveniles, especially in rural areas; mistreatment of juvenile prisoners and people held for excessive periods in police custody; (xi) draconian ('zero tolerance') policing practices, especially applied to children and young people; (xii) inappropriate treatment by police of those with an intellectual disability, inadequate law regarding the defence of mental illness and other problems in the treatment of those with an intellectual disability as victims and witnesses, and as defendants and prisoners. The Children of Prisoners Support Group (1999) suggested we look at the rights of children to visit their parents in prison, the rights of children of prisoners to be cared for by their imprisoned parents, and parents' rights to contact and to be with their child whilst serving a sentence of imprisonment. Others suggested we look at discriminatory age of consent laws and inadequate health care options (especially drug treatment options) for prisoners. Unfortunately we did not have time to consider these additional matters in any detail, in this report.

The case studies of this chapter heighten our concern, already expressed in the previous chapter, that the human rights of Australian citizens (and, from our analysis, especially citizens in New South Wales) are inadequately protected, and that there is an urgent need for State parliament to play a leading role in initiating legislation to recognise, defend and protect those rights.

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8. A Bill of Rights?

In this report we have outlined the international human rights system, with its sources, structure and instruments. We noted that states such as Australia made a free commitment to participate in this system, indeed Australian representatives helped create the system. We also noted that confusion has arisen domestically when that international commitment has not been matched by a similar domestic commitment to state clearly the rights and responsibilities of Australian citizens. Criticism by treaty monitoring bodies has then, wrongly, been seen by some politicians as some sort of outside interference. The persistence of this misleading argument demands some clear and public statements about the nature and detail of our human rights commitments, by both state and federal governments.

In chapter four we set out the articles of human rights instruments (the *International Covenant on Civil and Political Rights* (ICCPR) and *Convention on the Rights of the Child* (CROC) relevant to our study of New South Wales criminal justice laws. We divided these articles into five groups: police powers, pre-trial, trial, sanctions and equality before the law.

In chapter five we explained the present institutional system for recognising and protecting human rights in Australia, and we considered how it is supposed to work, as well as some instances of where it has not worked. We considered the tentative and ad hoc manner in which treaty commitments have been incorporated into Australian law, and the near-absence of substantial constitutional protections. Despite many common law attempts and some legislative attempts to recognise and define rights, the Australian system does not provide a fair statement which defines the rights and responsibilities of Australian citizens. As George Williams (2000b) says, “In 1901, the framers of our constitution avoided such issues. For nearly 100 years, we have continued to do the same”.

From the failures and structural limitations of the current system we conclude that the rights of Australian citizens are inadequately protected. Yet alongside this institutional failure, human rights conventions and standards have been increasingly accepted in Australian civil society and in many parts of the world. This rising acceptance of human rights standards, when combined with increased demands for ‘social control’ legislation, a weak culture of human rights, a tension between the judiciary and parliaments over rights, a renewed social and racial chauvinism and parochialism, arguments within the federal system over ‘states’ rights’, and the above mentioned institutional failure, presents a particular problem for Australian governments.

In chapters six and seven, we applied the international jurisprudence, analysing certain justice laws applicable in New South Wales. We identified breaches in human rights standards in police search powers, bail law, mandatory pre-trial disclosures, restricted cross-examination of witnesses, forced testimony from accused persons, no legal process for compensating victims of miscarriages of justice, retrospective penalties, and general police immunities. Most of these breaches occurred very recently, and this list was far

from comprehensive. We paid less attention to actual compliance, choosing to focus on breaches which were easy to find and sometimes very clear.

Our case studies were selectively chosen, but they represent an alarming institutional failure of the New South Wales system regarding its human rights commitments. There is ample evidence of a wider crisis in recent developments, for example:

- the Coalition federal government's fairly desperate attempts to cast doubt on the entire international human rights system, in the face of a series of adverse findings against Australia by the Committee on the Elimination of Racial Discrimination (United Nations 2000b) and the International Labour Organisation (Grattan 2000)
- the failure of the federal parliament to override mandatory sentencing laws for juveniles (which probably breach the ICCPR, CROC and the *Convention on the Elimination of Racial Discrimination*) in the Northern Territory (and for adults in Western Australia) and attempts by the federal government to remove criticism from the advisory report on mandatory sentencing by the United Nations Human Rights Commission (Riley 2000)
- inaction by the New South Wales Labor government, in the face of criticism by the Committee on the Rights of the Child over the *Children (Protection and Parental Responsibility) Act* 1997 (Committee on the Rights of the Child 1997), and
- the near-absence of serious public and parliamentary scrutiny of the enormous increase in police powers in New South Wales (search and 'move on' powers, and now DNA sampling powers, as well as a system of general immunities), despite a very recent Royal Commission inquiry which exposed widespread and systematic abuse of police powers.

These are just some symptoms of a malaise that demands the attention of Australian citizens and governments.

In view of our conclusions about human rights breaches in a number of New South Wales laws, we say there is an urgent need for the New South Wales parliament to legislate for the recognition, defence and protection of human rights. The dilemma at the federal level does nothing to reduce the need to address the problems, and particularly the criminal justice problems, at the state level. The cloud of federal-state conflict over rights must be lifted, and state parliamentarians must play a far greater role. Rights, and particularly criminal justice rights, are most often damaged or protected by state, rather than federal, lawmakers and administrators. While the federal parliament has responsibility for human rights treaties, and while cooperative federal-state action would be desirable, it is vital that the responsibility of legislating for human rights also be taken up by the states. We have also argued in this report that legislators and rights advocates should promote the fact of human rights as universal and applying to all citizens, and not as a sectional claim, or the privilege of some worthy or favoured social group.

At state level, then, we suggest a legislative program to recognise, defend and protect human rights. First, the New South Wales parliament should move that it accepts and recognises, and will endeavour to protect and defend, Australian human rights commitments, in particular the *International Covenant on Civil and Political Rights*

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(ICCPR) and *Convention on the Rights of the Child* (CROC). Second, a system of human rights monitoring of existing and proposed laws should be set up within an independent body of the parliament, such as the office of Parliamentary Counsel. This system would check legislative compliance with Australian human rights commitments (in particular the ICCPR and CROC), and draw to the attention of all parliamentarians any possible or clear breaches in existing or proposed legislation. Third, a Bill of Rights based on the full provisions of the ICCPR, should be enacted by the states. The ICCPR content of the Bill should be supplemented with certain sections from CROC, in particular, those unique civil and political features of CROC:

- Article 3 (considering the best interests of the child),
- Article 5 (the responsibilities, rights and duties of parents),
- Article 12 (the right to be heard),
- Article 37 (including making arrest, detention and imprisonment measures of last resort), and
- Article 40 (including active pursuit of justice options other than judicial proceedings and institutional care).

Fourth, after a period of time in which these provisions have been developed and worked within the state system, this Act should be entrenched within the NSW constitution. A similar process is desirable at the federal level, but an initiative at state level is more likely to break the current paralysis. State action should by no means wait for or be dependent on federal action.

Parliaments cannot afford the luxury of remaining silent on the rights of citizenship. Nor can they, on the one hand, say that rights are best left to the judges yet, on the other, overrule the judges and the capacity of judges with legislation which does not properly regard citizens' rights. Australia is one of the few countries in the world without a Bill of Rights. All other common law jurisdictions have now introduced some form of comprehensive statement of citizen's rights (Canada in 1982, New Zealand in 1990, the United Kingdom in 1998). New regimes in formerly dictatorial states have also introduced them (South Africa in 1996, Thailand in 1997). Even our largest neighbour, Indonesia, is taking some tentative steps towards a human rights jurisdiction. We are falling a long way behind, and the work is ahead of us. The CCL is ready to play its part.

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