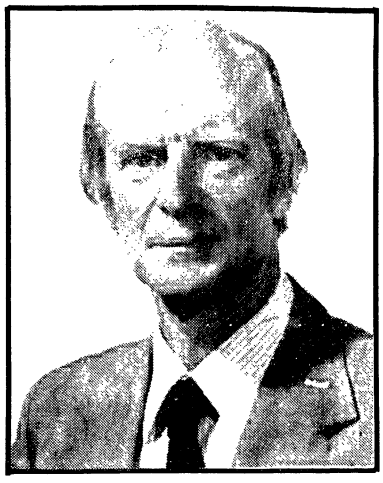

DIFFICULTIES OF LEGISLATING FOR HUMAN RIGHTS IN AUSTRALIA

The Commonwealth's Human Rights Commission

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INTRODUCTORY

I have found it difficult to fit my subject — "Difficulties of Legislating for Human Rights in Australia" — into the broad theme of your conference, "Policing a Democracy".

Probably the underlying reason for including a session on human rights is that to the extent that human rights are adequately protected in a democracy, the task of policing it is made easier. For that reason I am glad to have an opportunity to speak to you about a subject that is currently active, and that is likely to be a lively area of interest in the coming years.

But why is the subject centred on difficulties in achieving legislation? Although there will always be room for improvement, it cannot be said that in Australia generally human rights are seriously deficient. It is true, nevertheless, that difficulties have been experienced here in legislating for human rights. I want first to demonstrate this by reference to recent history in the Commonwealth Parliament and then to discuss the reasons for the difficulties. In so doing, the nature of human rights and their place in a democracy will, I hope, become clearer.

THE HISTORY OF LEGISLATION

An examination of the proceedings of the Commonwealth Parliament over the last nine years reveals a number of unsuccessful attempts to enact general human rights legislation, only culminating this year in successful passing of the *Human Rights Commission Act* 1981.

For this reason, 14 April 1981 is an important date in the legislative promotion of the cause of human rights in Australia. It is the date on which the Human Rights Commission Bill 1981 received the Royal Assent.

The efforts to introduce some form of legislation establishing machinery for the promotion of human rights reach back to 1973, when the then Attorney-General, Senator Murphy, introduced a Human Rights Bill 1973. That Bill contained an extensive list of civil and political rights based on the International Covenant on Civil and Political Rights. These rights were to be available to all Australians and their operation was to be supervised by an Australian Human Rights Commissioner to be appointed under the Act.

The 1973 Human Rights Bill did not get beyond the introductory stages in the Senate. It was not revived after the double dissolution of 1974.

In 1977, the then Attorney-General, Mr. Ellicott, introduced the Human Rights Commission Bill 1977. This time, the Bill was not associated with substantive provisions defining rights, but was a machinery measure designed to establish a Human Rights Commission to ensure that Commonwealth law, and acts and practices under that law, conformed with the International Covenant on Civil and Political Rights. The 1977 Bill also failed to win the approval of the House in which it was introduced.

In 1979 the Government tried again, with the Human Rights Commission Bill 1979. After a good deal of discussion in both Houses, the Bill failed to receive acceptance and lapsed with the dissolution of Parliament in October 1980. It is interesting that the main reason why the Bill did not pass into law was that the two Houses, although agreed on the substance of the Bill, could not agree on an amendment moved by supporters of the right to life cause. Here was a typical occasion on which deep issues of conscience prevailed over party loyalties.

The Human Rights Commission Bill 1981 was introduced in the Senate on 10 March this year. By 25 March, it had been approved by both Houses. Thus it took eight years of fairly continuous effort, and four Parliaments, before a Government was successful in having human rights legislation enacted. This says something for the persistence of governments; for the bipartisan nature of the concern for human rights; and for the political resistances that appear to be generated when legislation for human rights is under contemplation.

WHY ARE THERE PROBLEMS?

It is not easy to identify with any certainty the reasons for the difficulty all Commonwealth Governments appear to experience in enacting legislation relating to human rights — and there is evidence that State Governments experience similar difficulties.

Perhaps the main reasons are:—

- the uncomfortable nature of many human rights;
- the controversial nature of many human rights;
- the fear of loss of rights through change;
- the protection the law tends to give to those with power;
- the nature of our federal structure.

At the heart of the problem appears to be the *uncomfortable nature* of many human rights. They are usually concerned with fundamental issues and at the action point always require change in an existing situation. Accordingly, they tend to evoke strong support and resistance and to become clouded in controversy. One has only to mention, among current con-

cerns, the very different views held by groups within our community about the right to life; about the right to privacy; and about the right to freedom of assembly and of movement.

The *controversial nature* of human rights often makes it difficult to hold together the uneasy coalitions which represent our political parties. The elected members do not act simply as automatic supporters of the principles enunciated by their parties. Rather, political parties are composed of persons with often strongly held views of their own, and heavily influenced by their electorates and the people among whom they move. They will not necessarily agree about particular issues of human rights and, where the issues run deep, they may feel more loyalty to their convictions or to basic principles than to the Party Whip. The result is that it is difficult to get clear and unequivocal action at Parliamentary level. A prime example is the Human Rights Commission Bill 1979, the precursor of the present Act.

Although the courts are often held up as protectors of human rights — and indeed they are — they too find it difficult to break substantial new ground. Indeed, it might be said that courts are even more inhibited, at least in the Australian and British environment, than are Parliaments in the matter of taking action that will stir up political controversy. They will, where possible, stand on existing precedents and avoid opening up issues on which there are strongly held and differing viewpoints in the community. In the area of right to life, Australian courts have been very cautious in their interpretation of the criminal law; in the area of privacy, there has been a tendency for courts to attempt to avoid the issues by indicating, as is in fact true, that there is no common law right of privacy and that because legislation which has an effect on privacy is usually directed not at privacy but at some other issues, its provisions have to be followed. Examples are the powers of investigation given to the Trade Practices Commission under legislation relating to the regulation of trade practices and the powers available for the policing of Customs Law.

Another reason for resistance to legislation on human rights is that in the community generally there is always a degree of apprehension about measures changing the underlying structures of our community, a *fear of change.* For example, people become anxious when there are proposals to change the criminal law, particularly where it is related to basic moral attitudes such as towards homosexuals; and there are always hesitations about extending the rights of police to apprehend people, however worrying the offence, as in the case of drug trafficking. We grow accustomed to the existing state of affairs and even if it contains injustices, people tend to be apprehensive, often with good cause, about changing it. The remedy for a particular deficiency may well create a less satisfactory situation for the community as a whole than the deficiency being remedied. This kind of fear has been expressed over the recent changes in the New South Wales law relating to vagrancy and consorting.[1]

It is often said that criminal law serves *the interests of those in power.* To the extent that it does, it would be natural to expect those holding power to resist changes in existing legislation which are effected in the name of human rights, because these usually affect the people, or some of the people, to whom the legislation applies: easing the penalties is seen as threatening the position of those who find the existing situation satisfactory. For example, legislation designed to give consumers time to reflect before completing sales of goods hawked by travelling salesmen is, understandably, resisted by many of those who market their goods in this way. On the other hand, the changes made in recent years in many areas of the criminal law — the death penalty, sexual offences, consorting — suggest a very real degree of responsiveness to changing views. But the changes are not always easily made or enthusiastically enforced.

There are good reasons for demanding a careful approach to legislation affecting human rights. Human rights are very important to us all, and are the product of a *complex situation.* The existing often delicate balance of interests should not be changed unless it is clear that the situation after the change will provide for an improved balance of rights. It might not, for example, be satisfactory, in the interests of the equality of men and women to legislate so that all criminal sexual offences applied equally to men and women if, by so doing, the penalties applicable to homosexual offences by women were to become more severe than they are at present. Here one is balancing the importance of equality as between the sexes against provisions which at present are less onerous in their application to women than they are to men. On the other hand, the community may well not be willing to reduce the penalties for sexual offences committed by males on males, thereby bringing about equality between the two sexes.

Finally, there is the nature of our *federal system.* There is an attraction in the view that the Commonwealth should simply legislate to provide for human rights across the board. However, in our federal system two points need consideration. First, there is the question whether there is adequate Constitutional power so to legislate. Even if the external affairs power were to be relied upon, there are limited to the extent to which international obligations can form the basis for acceptable domestic legislation. Second, there is the question whether, given a federal structure, it may in the long run be preferable to get each jurisdiction to assume direct responsibility for human rights in its own area and so to legislate in its own way.

Whatever the abstract merits of the alternative courses, the present Commonwealth Government has in this area preferred to proceed by giving a lead in its own jurisdiction and by developing consultative and co-operative links with the States and the Northern Territory. However, this way is necessarily slower, and adds to the difficulty of legislating universally for human rights.

HUMAN RIGHTS AND THE CRIMINAL JUSTICE SYSTEM

In a most interesting paper on "The Police and the Criminal Justice System", Peter Sallmann suggests that discussion would be helped by identifying within that system some areas for more particular examination.[2] Drawing on a paper by A.J. Ashworth[3] he suggests that a useful framework within which discussion of the role of the police could take place would identify a number of qualifying factors which should be borne in mind and could be the focus of discussion.

These same elements seem to be useful in considering the relevance of human rights to the criminal justice system. I shall use them for the purposes of this paper, but you may with your greater expertise be able to suggest preferable alternatives.

The first focus mentioned by Sallmann — considerations of system — includes factors like budgetary restraints and the limitations on the capacities of the people employed. In this area questions of priority for resources arise — between, for example, police and social workers and, within the criminal justice system, between say prisons and other institutions. On the whole, there do not involve human rights issues.

A second focus — control of abuse — relates to the important legal and procedural controls placed upon the officials who operate the criminal justice system. These basically are designed to ensure that the officials do not over-step the proper limits of their authority and would include such requirements as the issue of a warrant prior to arrest. Important human rights issues are involved in this area, because of the elemental forces at work on both sides. Indeed, these issues were the primary concern of the two United National regional symposia

on Police and Human Rights — the first held here in Canberra in 1963 and the second in the Hague in 1980.[4] I commend the records of these symposia to you, and especially to those involved in police work.

The third focus in the criminal justice system relates to the protection of rights of suspects. It is clearly relevant to broader issues of human rights. Sallmann illustrates the protection of rights of suspects by referring to such principles as that of double jeopardy, the presumption of innocence and the principles of natural justice.

It is probably in this third area — the protection of rights of suspects and of others — that the role of human rights is most usefully considered.

Ashworth, in a valuable paper "Concepts of Criminal Justice", has this to say[5] —

"The pressing of claims in the name of individual or human "rights" has often been viewed with suspicion in this country. The fact that there is no evident or accepted test of what qualifies as a "right" has often been taken to suggest that any person or group can use the terminology of "rights" or "Liberties" to advance their own interests. Yet, whilst there may be some reason for this scepticism, the difficulty of stating precise criteria for what should and what should not count as a right need not and does not prevent the assertion of well-accepted rights such as the right not to be tortured and the right to be informed of the charge before a trial."

Ashworth specifically mentions in the quotation I have just read the right not to be subjected to torture. This is a right included in the International Covenant on Civil and Political Rights which, as I shall mention later, is currently the basic statement of human rights for Australian purposes. The Covenant defines other rights of a positive kind, such as the right to life, the right to a fair trial, and the right to liberty of person.

Many of the rights defined in the Covenant will be relevant to those involved in criminal justice — the police, the courts and the prisons. All of us involved in the process need to remember that we now have a new set of rights created for us and that the Human Rights Commission is there to promote their observance. This is a consequence of Australia's ratification of the Covenant in August 1980. It means that the protection of each of the rights set out in the Covenant has become an international obligation on Australia. We have in solemn treaty form agreed that through all available processes these rights will be guaranteed to our citizens without discrimination on any grounds.

I shall return to this point later. Meanwhile, I want to attempt to define human rights a little more specifically.

WHAT ARE HUMAN RIGHTS?

In a country such as the United States of America, the question "what are human rights?" will tend to be answered—albeit too facilely—by referring to their Bill of Rights. We in Australia have no Bill of Rights, no Declaration of Rights, nor any other statement of basic rights.

The decision of the Government to annex the International Covenant on Civil and Political Rights to the Human Rights Commission Bill was a bold and innovative step. We now have for the first time a statement of basic civil and political rights which have been approved by the Parliament as a basic statement of human rights. Although we do not have a Bill of Rights, as was proposed in 1973, we have in a sense a first step towards an Australian Declaration of Rights.

Let me now ask more precisely: what are human rights? The phrase is uncomfortable, vague, and some of the confusion about human rights results from failing to distinguish between the various kinds of rights involved.

First, we have *legal rights.* Many human rights are already enshrined in the law — either the common law or statute. For example, our electoral legislation gives all people, with few exceptions, the right to vote at national elections, and the common law gives every person the right to freedom from unprovoked assault. These legal rights are no less human rights because they are enshrined in the law.

In the case of human rights which are also legal rights, there may be a need to refine or modify the law in some respect to achieve more perfect realisation of the right. The Human Rights Commission Act recognises the importance of the law itself by enabling the Commission to review its provisions and make recommendations for change if they are inconsistent with the provisions of the International Covenant. It also allows the Commission to review acts and practices under the law, including the actions of those enforcing the law, to assess whether they also are consistent with the Covenant.

A second set of human rights are those which might be described as *rights in principle* or *rights in process of formation.* These are rights which are not yet enshrined in the law, but which have some status. For example, the courts have in many judgments recognised the right to representation of an accused at his trial. But there are occasions when the accused may not be able to obtain counsel, either because he has insufficient means to pay for counsel and cannot obtain legal aid or because for some reason the court decides to proceed without his having counsel. Another example is the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. That right is unequivocally defined in those terms in Article 7 of the International Covenant on Civil and Political Rights. But we all know that there are daily claims that people have been inhumanly or cruelly treated and that community standards on these matters vary from time to time. Law and regulation are unlikely to be adequate here: what is needed is some means of measuring how the system works in practice. This is part of the Commission's task.

The third area in which it is said there are rights is less well defined, and further away from legal enforcement. These might best be described as *moral rights.* Few of us, for example, would feel it inappropriate to say that a newly born infant found wrapped in a blanket had a right to be taken somewhere to be cared for. Few of us also would doubt that each child in a family had a right to be treated kindly and fairly by its parents. Also, most of us would feel that at a public meeting a person has some kind of a right to be heard if he wishes to put a point of view.

None of these situations is directly covered by either a legal right or by one of the human rights as defined in the International Covenant on Civil and Political Rights or any of the other international human rights conventions. However, there is a sense in which some of these are very fundamental rights. It is difficult to say that they are not human rights in the broadest sense. But equally, it must be said that they are not human rights in the sense in which they can be enforced at law or even be the subject of inquiry by the Human Rights Commission.

Some of the "rights" currently claimed in the community today are of this kind. They are more expressions, in today's jargon, of political and emotional desires and objectives than they are of principles which ought in some way to be recognised as legal rights. They are important, but tend to confuse the discussion about human rights and the role of agencies such as the Human Rights Commission.

THE HUMAN RIGHTS COMMISSION

It now seems appropriate to turn to the Human Rights Commission. The Commission has not yet been appointed, but the Attorney-General is currently in the process of selecting the Commissioners.

I have perhaps said enough about the difficulties of legislating in the human rights field, and about the definition of human rights, to indicate that the Human Rights Commission, when it begins its work later this year, is likely to encounter a number of problems. I believe that the people the Attorney-General will be appointing to the Commission are of a calibre that will give the Commission as good a chance as is practicable of developing an effective presence and program.

The Commission's work will, in all its aspects, be relevant to the objectives of the Australian Crime Prevention Council, and also to the theme for your conference — "Policing a Democracy".

For the purposes of the Commission, "human rights" are defined as, first and foremost, the rights and freedoms recognised in the International Covenant on Civil and Political Rights. The Covenant is annexed to the Act as a schedule, and will provide the Commission with its primary point of reference.

To the Covenant are added, for human rights purposes, two other groups of documents. First, there are the rights declared in three international Declarations, each of which Australia has supported. They are the Declaration of the Rights of the Child (1958) and the Declarations on the Rights of Mentally Retarded Persons (1971) and on the Rights of Disabled Persons (1975). The text of each of these is contained in additional schedules to the Act. Second, there are any other international human rights instruments which the Attorney-General may declare for the Commission to use, under section 31 of the Act. None have yet been declared, but the power leaves open the possibility that the jurisdiction of the Commission — and thus the definition of human rights — may be progressively expanded.

It is true that the Commission has no powers to enforce the rights committed to its watchful care. However, the Commission is required to examine legislation and investigate acts and practices under legislation with a view to reporting, with recommendations, on action that should be taken where the legislation or the action is in its view inconsistent with the rights declared in the International Covenant and in the three international Declarations I have just mentioned.

The reason for requiring the Commission to make recommendations, and for requiring that its report be tabled, is that this gives it at least the weapon of publicity with which to attempt to persuade governments and their agencies to act in accordance with the best international standards of human rights.

Thus the Human Rights Commission can be seen as in a sense a midwife of human rights law. Its task is, through a process of investigation, research and public discussion, and of consultation with interested bodies, to attempt to find better ways of spreading human rights through the community. It is required to make recommendations about changes that should be made in the existing state of affairs, and it is hoped that Governments will be receptive to effecting those changes. In this way, the Commission is charged with identifying areas where new legislation is desirable in the interests of human rights.

A closer examination of the functions of the Commission as laid down in section 9 of the Act indicates that all of them are relevant to the prevention of crime.

The first function of the Commission is to review legislation to identify if it is consistent with the human rights and freedoms declared in the international instruments attached to the Act. Where the Commission finds the provision of a law inconsistent with the Covenant, it will recommend changes. Although these recommendations are not directly attuned to the prevention of crime, the objective will be a redefinition of provisions so that they will be more fully in accord with the principles of human rights. In this sense, they will make for juster laws, which will both enhance the reputation of the law for its fairness and remove the cause of dilemmas in the hands of those enforcing laws which are not necessarily always fully just.

The second function of the Commission, to inquire into complaints and, where practicable, to work for a conciliated outcome, is also relevant to the work of crime prevention and the effective operation of a democracy. It will provide a point of complaint for people dissatisfied with existing law and practice, if the law or practice is in some way in breach of human rights. The remedy will not be immediate in the same way as it is when one approaches a court, but it usually will be by way of recommendations designed to achieve a change in existing arrangements that will benefit not only the complainant but also any others who may at a later time find themselves in the same situation. The availability of remedies, even of the relatively soft kind provided by the Human Rights Commission, will help prevent the unhealthy development of discontent and be one means by which people can ventilate their grievances and seek a change in the system.

The Commission has a power, on its own initiative, to report with recommendations as to laws that should be made, or action that should be taken, by the Commonwealth on matters relating to human rights. This is an important function because it enables the Commission to embark on inquiries of its own, without having to wait either for a complaint or for a request from the Minister. This power will give the Commission a way of focusing on issues that may have real significance but have not yet become the subject of general concern.

The Commission also has power to promote understanding, acceptance and public discussion of human rights and to undertake research and educational programs. These will be an important aspect of the work of the Commission and they will clearly be designed to help our democratic system work more effectively. In the area of human rights, conferring a new right on one group of people will normally involve curtailing in some respects the rights or freedoms of another. It is only as people appreciate the problems which their existing way of life creates for others, and come to accept that some change is desirable, that it will be possible to achieve improvements in the rights of under-privileged groups.

The Commission's role will be to attempt, within the limits of its mandate, to sketch out and encourage people to adopt new consensus positions. In some cases, it will be appropriate to recommend staking in these new consensus positions by a change in the law or by the enactment of some new piece of law. For example, if it becomes apparent that the rights of intellectually disabled persons could be protected by certain new provisions relating to consent, then a modification of the existing law relating to consent could be useful. In other areas, and using as an example the same unfortunate group of people, the best way of improving their lot may be to generate increasing awareness of the problems of those with intellectual disabilities who come out into the community generally and to enlist the active care and concern of people throughout the community.

THE STATE AND HUMAN RIGHTS

In most cases, human rights are associated primarily with the activities of government. The more traditional civil and political rights focus on allowing people freedom to participate in national affairs; freedom of movement; liberty of person; humane treatment during punishment; and proper trial of criminal charges. All these are rights which closely involve the state. The newer wave of rights — the rights to education, to a decent standard of living and to work are examples — are also essentially directed towards the state.

At one and the same time, we tend to ask the state both to be more active in promoting the welfare of citizens and also to protect more adequately the human rights of its citizens. There is a dilemma here which is inescapable and real. The more we ask the state to undertake on behalf of its citizens and the welfare of the community generally, the more we need to insist on human rights and a watchful eye on the state which inevitably has to exercise power to produce the new programs.

This is a lesson the present generation of public servants must learn. The Attorney-General has spoken on a number of occasions about the new wave of administrative law which has washed over Australia. Compared with the position ten years ago, we have made remarkable progress in administrative law. We now have an Ombudsman well established and respected; we have a new range of remedies available through the courts under the Administrative Decisions (Judicial Review) Act; and last but by no means least we have that remarkable new institution, the Administrative Appeals Tribunal. On top of this we are now about to have a Human Rights Commission.

Faced with staff ceilings and other problems, today's public servant is inclined to feel somewhat resentful of these new institutional curbs on administration and the exercise of discretion. When to these are added greater investigatory powers by the Auditor-General in pursuit of efficiency, and increasingly active Parliamentary Committees, the climate does seem to be one in which the new powers given to or assumed by the state are being reined in. We seem to be entering an era in which the newly powerful — those who work in government departments and agencies — are being made more accountable, just as Ministers were made more accountable last century.

My hope is that departments and agencies of the Commonwealth, as well as Ministers, will see the new Human Rights Commission not as an enemy but as a wise and forward-looking friend. The role of the Commission is to hold up to those who exercise the power of the state in our democracy a new set of standards adopted by the Government to guide the making and administration of laws. The standards have been adopted internationally and are progressively being implemented throughout the world. I hope that Australia, with the assistance of the Human Rights Commission and like agencies will be in the forefront of those committed to improve the human rights of all and that those of you who are concerned with the prevention of crime will see the cause of human rights as promoting good laws and just processes.