IX Individuals

The individual as subject of international law. Mercenaries. Pirates.

On 8 October 1982 Australia's representative on the Sixth Committee of the United Nations General Assembly, Dr De Stoop, addressed the subject of a draft convention on mercenaries. Part of his statement is reported as follows (A/C.6/37/SR.12, p 11):

> 53. His delegation had not concealed, at the previous session, the serious misgivings it had had with the definition of ''mercenary'' and the so-called crime of ''mercenarism'' in draft articles 1 and 2 respectively of the original text. One of the problems was that the definition of ''mercenary'' in that text had relied exclusively on article 47 of the Additional Protocol I to the 1949 Geneva Conventions, which was limited to armed conflicts. The other problems concerned primarily the novelty of the term ''mercenarism'' and the wide range of offences it purported to cover, and the failure, in the draft convention, to draw the relationship between the definitions of ''mercenary''.
>
> 57. He also regretted that the notion of the criminal responsibility of the States, which his delegation had great difficulty in accepting, had been retained, because it might politicize the convention and create legal difficulties. Parallels could not be drawn between the international responsibility of States and the criminal responsibility of individuals, because the norms applicable to each were different and the consequences of a breach of a norm, such as sentencing and imprisonment, were obviously meaningless when applied to States. While it was true that States could incur international responsibility for failing to take appropriate action against acts committed by their subjects against a foreign State (that principle had been established in the *Alabama* case over 100 years previously), the world community had not accepted the international criminal responsibility of States as being part of customary international law. In his opinion, the convention should not in any way interfere with the customary rules on the international responsibility of States, particularly at a time when the International Law Commission was examining that subject as a whole.

At the 56th meeting of the Committee, Dr De Stoop said of the fifth preambular paragraph of draft resolution A/C.6/37/L.9 as follows (A/C.6/37/SR.56, p 13):

> That paragraph was contrary to customary international law in that it sought to endow mercenaries with an international legal personality. States alone could commit the breaches of international law mentioned in that paragraph and did so only in so far as they supported or encouraged the activities of mercenaries.

The fifth preambular paragraph read:

> *Recognizing* that the activities of mercenaries are contrary to fundamental principles of international law, such as non-interference in the internal affairs of States, territorial integrity and independence, and seriously impede the process of self-determination of peoples struggling against

colonialism, racism and *apartheid,* and all forms of foreign domination.

On 17 November 1981 the Minister for Foreign Affairs, Mr Street, said in part in answer to a question (HR Deb 1981, Vol 125, 2985):

> The Australian Government has consistently condemned the cruel and barbaric practice of piracy . . .

Individuals. Aliens. Immigration. Basic principles of Australian policy.

On 18 May 1983 the Minister for Immigration and Ethnic Affairs, Mr West, informed Parliament of the Australian Government's immigration policy. The statement commenced (HR Deb 1983, Vol 131, 662):

> The Government has reaffirmed the nine principles underlying migration policy. In summary these are:
>
> 1. The Australian Government alone decides who can enter Australia.
> 2. Migrants must provide some benefit to Australia, although this will not always be a major consideration in the case of refugees and family members.
> 3. The migrant intake should not jeopardise social cohesiveness and harmony in the Australian community.
> 4. Immigration policy and selection is non-discriminatory.
> 5. Applicants are considered as individuals or individual family units, not as community groups.
> 6. Suitability standards for migrants reflect Australian law and social customs.
> 7. Migrants must intend to settle permanently.
> 8. Settlement in closed enclaves is not encouraged.
> 9. Migrants should integrate into Australia's multicultural society but are given the opportunity to preserve and disseminate their ethnic heritage.

For a further statement on Australia's immigration and ethnic affairs policy, see Mr West's statement in HR Deb 1983, Vol 133, 1 November 1983, 2101-2107.

Individuals. Aliens. Deportation. Criminal deportation policy.

For Ministerial statements on individual deportations orders, see HR Deb 1982, Vol 126, 518-520, 538-540; Vol 129, 2347. For statistics and costs of deportations for 1972 to 1981, see HR Deb 1982, Vol 127, 2511; Vol 130, 2928-2929.

On 4 May 1983 the Minister for Immigration and Ethnic Affairs, Mr West, announced the Government's criminal deportation policy in the House of Representatives (HR Deb 1983, Vol 131, 166-169):

> *POLICY ON CRIMINAL DEPORTATION*
>
> Introduction
>
> The Australian Government, on behalf of the Australian community, has the right to decide who will be accepted for permanent residence in Australia and, ultimately, for absorption into full membership of the community by way of Australian citizenship. Parliament vests in the Minister for Immigration and Ethnic Affairs the discretion to determine whether resident non-Australian citizens who have been convicted in Australia of certain major criminal conduct are to be removed from Australia by deportation. In exercising that discretion the Minister is

exercising the right of the Australian community to be protected and to choose who will be permitted to remain a permanent resident.

A person who has come within the criminal deportation liability has a right to a decision on his or her case as soon as possible after sentencing and a right to appeal to the Administrative Appeals Tribunal against a decision that he or she be deported. It is the policy of the Australian Labor Government that recommendations of the Administrative Appeals Tribunal should be overturned by the Minister only in exceptional circumstances and only when strong evidence is produced to justify the decision. Furthermore, it is the policy of the Government that, when the Minister decides to deport a person contrary to a recommendation of the Tribunal, the Minister will table in the Parliament at the first opportunity a statement of his reasons for doing so.

The Government recognizes Australia's obligations under international law, particularly the International Convenant on Civil and Political Rights. It has taken into consideration views expressed by the Human Rights Commission. However, the Government is mindful of the need to balance a number of very important factors, especially:

the need for community protection against criminal behaviour;

the requirement to take into consideration the legitimate human rights of an individual;

the need to protect the rights of other persons, including the family of the person concerned; and

the need to avoid discrimination when making deportation decisions.

GUIDELINES FOR DEPORTATION

The purpose of deporting a person who has been convicted of a criminal offence in Australia is to protect the safety and welfare of the Australian community and to exercise a choice on behalf of the community that the benefit accruing to the community as a whole by his or her removal outweighs the hardship to the persons concerned and his or her family. The greater the potential effect on the community or the greater the potential damage to the community the lower is the acceptable level of risk that the person concerned will commit further offences.

Deportation of a person convicted of crime may be appropriate when a person:

constitutes a threat because there is a risk he or she will commit further offences if allowed to remain;

or

has committed a crime so offensive to Australian community standards that the community rebels against having within it a person who has committed such an offence;

or

has not established sufficient ties with Australia to have become a full member of the community and, by reason of his or her conduct, is unsuitable for permanent residence in Australia.

Examples of serious offences which may render non-Australian citizens liable to deportation include:

production, importation, distribution, trafficking or commercial deal-

ing in heroin or other hard addictive drugs or involvement in other illicit drugs on a significantly large scale — persons who embark upon drug-related crime for financial gain show a callous disregard for insidious effects on the health and welfare of Australia's young people; this does not necessarily apply to persons who use hard drugs for their own consumption and who were not involved in the above illegal actions;
organised criminal activity, whether within Australia only or internationally;
serious sexual assaults, whether or not accompanied by other violence, especially where there has been more than one sexual offence;
armed robbery;
violence against the person;
terrorist activity and assassination;
kidnapping;
blackmail;
extortion.

Crimes against children, because of their vulnerability, take on a special significance, especially inducement to drugs, sexual assaults, violence, kidnapping and crimes taking unfair advantage of children.

Social ties developed after the liability for deportation arose, especially after the liability had been brought to the notice of the offender, can be discounted according to circumstances — for instance, marriage or the immigration to Australia of further family members.

Australia does not have an obligation to provide sanctuary for people who have broken the laws of another country. In any case, it is neither feasible nor proper for the Australian Government to consider the propriety of the operation of criminal codes in other countries nor, even if it had the resources to obtain sufficient information, to attempt to anticipate the likely outcome of any charges overseas. Thus the possibility of further criminal sanctions in the country in which a potential deportee expects to live if deported are generally not relevant to the main issue of protecting the Australian community and may not be persuasive when making a decision on deportation, but the option will be there.

Civil or military hostilities are more likely to affect the timing of a deportation than to constitute a reason that the offender shold continue to live permanently in Australia.

Judgments that job opportunities and the overall environment of the country to which a person would be deported are not as favourable to them as in Australia, however compassionately viewed, would not be persuasive against the removal of a person who is at risk to the Australian community.

Cogent and substantiated evidence of any claim of likely persecution in the country to which a person is to be deported would need to be produced. In the absence of such evidence it is very difficult to give any weight to the unsubstantiated claim.

I turn now to the broad criteria under which deportation cases will eventually be considered, most certainly with respect to final decisions after perhaps appeal to the Administrative Appeals Tribunal. The most important

broad criteria on which judgments will be based are the nature of the crime; the possibility of recidivism; the contribution that the person has made to the community or may reasonably be expected to make in the future and the family and/or social ties that already exist. In particular the following factors will be taken into account when making a decision on whether a deportation order should be issued:

the nature of the offence as outlined in paragraph 9 and the length of sentence imposed by the court;
the person's previous general record and conduct;
the risk of further offences;
the extent of rehabilitation already achieved, the prospect of further rehabilitation and positive contribution to the community the person may reasonably be expected to make;
the length of lawful residence in Australia, the strength of family, social, business and other ties in Australia;
the degree of hardship which would be caused to lawful residents of Australia, especially Australian citizens, known to be affected adversely by deportation or conversely the extent of support for deportation from persons directly affected;
any unreasonable hardships the offender would suffer;
ties with other countries;
the relevant obligations of the Commonwealth of Australia under international treaties ratified by the Australian Government;
the likelihood that deportation of the offender would prevent or inhibit the commission of like offences by other persons.

This list is not exhaustive; if relevant, other factors that come to notice will be taken into account in individual cases.

CLAIMS FOR REFUGEE STATUS

The cases of persons who seek recognition as ''Convention'' refugees pursuant to the Convention and Protocol Relating to the Status of Refugees are considered individually by the Minister. Advice in these cases is usually drawn from the Determination of Refugee Status — DORS — Committee. The Committee investigates and recommends to the Minister whether the person concerned should be recognized as a refugee for the purpose of the Convention and Protocol and whether he or she is entitled to the protection of the Convention.

DEPORTATION ACTION

It is for the appropriate State authorities, or in the case of Commonwealth prisoners, the Governor-General, to decide such questions as the conditions under which a prisoner is to serve a sentence, the extent of remission of any part of a sentence or the release of a potential deportee on licence or on parole or for the purpose of deportation.

Whenever possible, departure from Australia will be arranged to coincide with a deportee's release from prison. A deportee may be held in custody pursuant to the Migration Act 1958 pending finalisation of the deportation arrangements.

On 26 May 1983 the Minister for Immigration and Ethnic Affairs, Mr West,

presented the Migration Amendment Bill 1983, the purpose of which was to reform the Migration Act 1958 to remove the discrimination between aliens and other immigrants contained in the criminal deportation provisions. See the full second reading speech at HR Deb 1983, Vol 131, 1085-1087.

On 24 August 1983 the report of the Human Rights Commission on "The Deportation of Convicted Aliens and Immigrants" was presented to Parliament: PP. No. 146/1983. Following is Chapter II of the Report on why human rights factors should be taken into account in deportation decisions:

> 6. Human rights must be observed when deportation decisions are being taken. There are a number of reasons for this.
>
> 7. First, Australia is bound in international law by the International Covenant on Civil and Political Rights (ICCPR) and the Convention for the Elimination of All Forms of Racial Discrimination (the Racial Discrimination Convention) which contain rules affecting these decisions. Like the parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, described in the *East African Asians* case, Australia has:
>
> > . . . agreed to restrict the free exercise of (its) . . . powers under general international law, including the power to control the entry . . . of aliens, to the extent and within the limits of the obligations . . . assumed under this treaty.[1]
>
> For the purposes of this report, the most relevant international instruments are the ICCPR, the Declaration of the Rights of the Child (the Declaration) and the Racial Discrimination Convention.
>
> 8. Second, the Executive Government should exercise its powers in accordance with Australia's international obligations: see *Phansopkar's* case.[2] This point is particularly relevant where the legislation does not define the basis on which decisions are to be taken, as in the case of sections 12 and 13 of the Migration Act.
>
> 9. Third, the Commonwealth Parliament having enacted the *Human Rights Commission Act 1981* and the *Racial Discrimination Act 1975,* ways are laid down in Australia's domestic law for implementation of a range of international human rights instruments ratified or supported by Australia. The Human Rights Commission Act binds the Commonwealth, and the Racial Discrimination Act binds both the Commonwealth and the States. The Human Rights Commission Act envisages that the administration of Commonwealth law, as well as the law itself, will be adjusted in conformity with Australia's international obligations as identified by the Commission: preamble and section 9. Just as the traditional right of the States Parties to the ICCPR — including Australia — to exclude aliens has been modified by international treaty law, so too is it envisaged that Australia's domestic laws relating to deportation will be modified in accordance with its international obligations. The unfettered right of the Executive Government to deport aliens is in the process of modification. One of the objects of this report is to advise how this modification should take place.

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1 (1973) 3 EHRR 76 at page 79.
2 (1976) IQB 606 at page 626.

10. Additionally, there is a growing body of opinion, reflected in decisions in several Australian courts and Tribunals, that humanitarian considerations should be taken into account in deportation decisions. This body of opinion is consistent with the proposition that human rights considerations should also be taken into account because of the close links between humanitarian and human rights concepts.[3]

11. Though it is probably accurate to say that the trend of judicial opinion has moved away from the view that the Minister has an absolutely unfettered discretion in making decisions under sections 12 and 13 of the Migration Act, it certainly cannot be said that as the law now stands, he is required to do more than take humanitarian considerations into account when considering all relevant circumstances for and against a proposed deportation. Putting it at its highest, taking sections 12 and 13 of the Migration Act as they now stand, and ignoring for the moment the Human Rights Commission Act, the Minister is not required to give any special weighting to humanitarian considerations. Where the evidence requires it, he may not be able to ignore them, but he need not prefer humanitarian considerations or human rights factors as against other criteria and policy considerations. The result could be that in a particular case a lawful decision to deport made under section 12 or section 13 of the Migration Act and which survived the various appellate processes available to deportees nevertheless could be inconsistent with or contrary to human rights following an inquiry into a complaint made under the Human Rights Commission Act. The purpose of this report is to make recommendations directed at changing the law so that all deportation decisions lawfully made are consistent with human rights.

The Report concluded, in part (p.15):

44. In Chapter III the Commission identified a number of human rights which in its view need to be taken into account when decisions are being made under sections 12 and 13 of the Migration Act about the deportation of aliens and immigrants. The most relevant provisions in the ICCPR are contained in Articles 7, 17, 23, 24 and 26. The most important provisions in the Declaration are Principles 1, 2 and 6. In addition, sections 9 and 10 of the Racial Discrimination Act have a significant bearing on the way human rights are to be taken into account where racial and ethnic factors are involved.

45. The findings of the Commission are summarised in the form of recommendations in Chapter VI. Their effect is to indicate that the power to deport provided by sections 12 and 13 is, pursuant to the Human Rights Commission Act and the Racial Discrimination Act, subject to some important restrictions related to the human rights of the individuals involved. The Commission considers it would be desirable to amend the Migration Act to include a requirement that in the exercise of the power to deport conferred by sections 12 and 13 the Minister should at all times respect the human rights of the individuals concerned.

3 A note of the main European cases appears in Appendix 2 and of the main High Court, Federal Court and Administrative Appeals Tribunal cases in Appendix 3.

Individuals. Aliens. Deportation. Relevance of the International Covenant on Civil and Political Rights.

On 21 October 1983 the Federal Court of Australia (Smithers J) handed down a judgment in *Sezdirmezoglu v. Acting Minister for Immigration and Ethnic Affairs (No. 2):* 51 ALR 575. A deportation order had been made against the applicant who was living in a *de facto* relationship with an Australian citizen who was pregnant with his child. The applicant contended that in these circumstances it was beyond the power of the Commonwealth officer to make the deportation order. Counsel for the applicant —

> contended that Australia, having acceded to the International Covenant for Civil and Political Rights (the covenant), the provisions of the covenant are binding on the Acting Minister for Immigration and Ethnic Affairs in this case in the sense that he is restrained from making an order for deportation which would invade, or fail to protect, the family situation.
>
> The Human Rights Commission Act 1981 indicates that it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with the provisions of the covenant and certain other international declarations, but of course such a recital stops short of enacting that the provisions of the covenant are part of the law of Australia, and in fact those provisions are not part of the law of Australia.
>
> The Migration Act 1958 is law in Australia on the subject of immigration. In that Act Parliament lays down, *inter alia*, the conditions according to which persons may be admitted to Australia and may be deported therefrom. It is to those provisions that regard must be had.
>
> So far as the deportation of a prohibited immigrant is concerned, the Minister has a discretion, the width of which has been described in various decisions such as *Minister for Immigration & Ethnic Affairs v Tagle* (1983) 48 ALR 566 and *Akpan v Minister for Immigration & Ethnic Affairs* (unreported decisions of Sheppard J dated 7 April 1983). That discretion itself must be exercised according to law one provision of which is that the Minister must consider all circumstances relevant to the position of the person with whose desire to remain in Australia he is concerned. I do not say that he must apply the principles laid down in the covenant. However, the declaration of Parliament in the Human Rights Commission Act 1981 that it is desirable that the conduct of persons administering the laws of Australia should conform with the provisions of the covenant may supply a ground for contending that the Minister should at least take into account the principles expressed therein.
>
> So far as I can see in this case, save that the order of the Acting Minister as previously made and at present under reconsideration may cause a separation, it appears that he has in an indirect way taken into consideration the provisions of the covenant. It is apparent that the Acting Minister is appraised of and considers it his duty to have regard to the *de facto* relationship between these two parties and that he recognizes that it is his duty to take that into account with all other matters which bear upon the desirability or otherwise from the point of view of Australia that the applicant be deported or that some privileges arising out of the *de facto*

relationship be extended to him. The duty, however, is no more than a duty to take all relevant considerations concerning the prohibited immigrant in relation to the interests of Australia into account.

The situation for Mrs Drokos, of course, is a very difficult one indeed from all points of view and it is noted that she is an Australian citizen. But it is going too far to suggest that as a separation between these parties might possibly arise if the order as previously made were carried into effect, the possibility of that separation makes it unlawful for the Minister to make the order. The existence of the family and respect for what I call the rights thereof do not take effect to prohibit the exercise of all lawful acts which may work in a hostile manner towards the family. The family is still subject to law and not the reverse. This is made clear in the covenant itself: see Articles 9(1), 10(1), 13 and 17(1). If one reads, for example, Art 13 it states:-

> "An alien lawfully in the territory of a state party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

The principle that the law of the land as made by the law-making bodies of Australia shall operate, notwithstanding any general provisions which appear in the covenant, seems to be supported by a number of decisions — indeed those decisions which Mr Little himself submitted — and I refer in particular to *R* v *Home Secretary; Ex parte Bhajan Singh* [1976] 1 QB 198; *R* v *Home Secretary; Ex parte Phansopkar* [1976] 1 QB 606; *R* v *Chief Immigration officer; Ex parte Salamat Bibi* [1976] 1 WLR 979. Reference may also be made to *Re Simsek* (1982) 40 ALR 61.

To my mind it is perfectly clear that nothing in the Human Rights Commission Act 1981 or the covenant, so far as it is called in aid in that Act, is effective to modify in any way the powers of the Minister under ss 16 and 18 of the Migration Act. The only way in which the Act is relevant is that it makes clear that it is the desire of Parliament that the conduct of the Minister in performing his duties shall conform with the provisions of the covenant, and the fact that the covenant refers to the entitlement of the family to be protected, but it is a right for the family to be protected in the context of the law of the country concerned and, of course, subject to those qualifications which are to be found in the covenant itself. (51 ALH 575, at 576-578)

The Court gave no relief on this ground of the order to review.

Individuals. Citizenship. Attributes of citizenship. Allegiance.

On 6 May 1982 the Minister for Immigration and Ethnic Affairs, Mr MacPhee, announced a major review of the Australian Citizenship Act 1948 (HR Deb 1982, Vol 127, 2355-2365). He said in part:

> The most important feature of citizenship is that it makes an individual an institutional member of the nation. This brings certain rights and

responsibilities to participate in the nation's affairs, including government, through the right to vote and the right to stand for election. Citizenship also means that the State will afford the citizen the maximum possible protection when outside the country of citizenship. Citizenship also carries a clear sense of belonging to, and identification with, the nation, its people, its values and its institutions. This is very much a personal thing. Naturally, the intensity of identification or commitment varies from individual to individual. To some people citizenship means little more than the convenience of an Australian passport and the right to return without formality after an overseas visit. For many new settlers it is a solemn undertaking involving a major change in their obligations and sense of identity.

Acquiring Australian citizenship should not require suppression of one's cultural heritage or identity. Rather, the act of becoming a citizen is— symbolically and actually — a process of bring one's own gift of language, culture and traditions to enrich the already diverse fabric of Australian society. Our vision of our multicultural society shares, with our concept of citizenship, a strong emphasis on building a cohesive and harmonious society which is all the more tolerant and outward-looking because of the diversity of its origins. To debate whether citizenship is a right or a privilege can be futile. It should be a right providing a person meets whatever requirements are specified. In another sense it is a privilege bestowed by the Australian community. Citizenship should be seen as a mutual arrangement between the individual and the nation. Each makes a commitment to the other and derives benefits from so doing. Whatever the perspective, the same requirements should apply to all potential citizens without favour or discrimination.

From the current review there has emerged general agreement on the following five matters: Firstly, it is desirable for the entire community to be aware of the benefits and the obligations attaching to citizenship; secondly, the meaning and value of citizenship should be enhanced; thirdly, there should be no discrimination within eligibility criteria for citizenship; fourthly, the provisions of the Citizenship Act should be as objective as possible and subjectivity should be minimised; and, fifthly, the administrative simplicity of the current Act should be preserved. In recent years citizenship has been the subject of considerable discussion within the community and the major parties have devoted time, thought and effort in developing policies on citizenship. The Government is committed to a policy of enhancing the status of citizenship and encouraging those who are qualified for citizenship, but have not yet applied, to become Australian citizens. There are an estimated 1.2 million such persons in Australia. Citizenship is the symbol of a common national identity and commitment to the nation. A common national identity should be the tie that binds a multicultural Australia together.

On 21 October 1982 the report of the Human Rights Commission on the *Australian Citizen Act 1948* was presented to Parliament (PP No. 265/ 1982). The Commission observed, on the nature of citizenship, as follows:

3. Citizenship is one of the fundamental elements in the life of a nation and

the Act has an important bearing on everyone's civil and political rights. A number of the complaints to the Commission have been from people concerned with aspects of citizenship, such as liability to deportation. While citizenship is regarded in international law as one area which falls completely within the discretion of a State, that very fact leads to the possibility of capricious action by the State toward those who are its citizens or who wish to have that status and emphasises the need for adequate protection in the law itself.

On 7 December 1983 the Minister for Immigration and Ethnic Affairs, Mr West, presented the Australian Citizenship Amendment Bill 1983 to Parliament. Part of his second reading speech (HR Deb 1983, Vol 134, 3366-3369) is as follows:

> The Australian Citizenship Act provides the basis for the citizenship of all Australians, regardless of their origin, or their cultural and linguistic background. The Act provides for the acquisition of Australian citizenship by birth in Australia, by descent through birth of a child to an Australian parent living overseas, and by grant to persons who have come to Australia to settle. It also provides the basis for the loss, renunciation and deprivation of Australian citizenship in certain circumstances.
>
> The Government is committed to ensuring that the Act reflects the national identity of all Australians; that it does not discriminate between persons on the basis of their sex, marital status and present or previous nationality; that it provides for review by the Administrative Appeals Tribunal of decisions to deny or deprive persons of citizenship under the Act; and that it is thoroughly Australian in character. The purpose of this Bill is to give effect to those commitments.
>
> It is important to appreciate that Australian citizenship did not exist prior to 26 January 1949. Before that time all persons living in Australia were either British subjects or aliens. The current Act still retains many transitional provisions which reflect this historical fact and which provide for British subject status to be given automatically to Australian citizens and the citizens of 46 other Commonwealth countries. Many people genuinely wish to become Australian citizens and assume the associated rights and responsibilities as soon as possible after entering Australia. On the other hand, an estimated 1.2 million non-citizen residents who have lived here for more than the present minimum residential period of three years have not applied to become citizens. The Government wishes to encourage both groups of people to become citizens. We believe that the package of measures contained in this Bill will assist those who wish to become citizens as soon as possible after settling in Australia as well as removing what many people see as the disincentives to acquiring citizenship contained in the present Act.
>
> The present Act allows the automatic acquisition of Australian citizenship by British subjects resident in or with close connections with Australia in 1949, when the Australian Citizenship Act came into force. It was, at the time, entirely reasonable that British subjects, including those aliens who had been naturalised, should automatically be granted the new Australian citizenship under the new Act. With the passing of 34 years since those

transitional provisions were enacted, they are now irrelevant and the amendments will seek their repeal.

There are historical reasons for the status of British subjects in the Act. When Australian citizenship was first created, it was one of many initiated by Commonwealth countries under an all-embracing British subject nationality. The common code concept of uniting all Commonwealth countries under the umbrella of British nationality is no longer valid. All other Commonwealth countries, including Britain itself, have abandoned this notion. Australia is now the only country in the world to continue to use the concept of British subject status in preference to its own nationality.

The amendments will provide for the repeal of the definition of British subject status from the Australian Citizenship Act at a date to be proclaimed following an examination of the implications for the operation of other Commonwealth and State legislation which at present depends upon the Citizenship Act definition. Let me emphasize that the changes to the Act relating to British subject status derive from the need to provide equal rights for all groups, and have regard to developments overseas and the changes which have occurred in Australian society since 1949. We do not seek to prejudice the position of British settlers. Rather, we see it as fitting that Australian citizenship should have a unique status in Australia and be the basis in future of citizenship rights and privileges.

The declaration of allegience made at the time that Australian citizenship is granted is, quite properly, regarded as of singular importance by many people. It incorporates three separate elements: The renunciation of former allegiance, a commitment to observe the laws of Australia and the declaration of new allegiance to Australia. There has already been considerable community discussion on this issue. There was strong support at the national consultations for wording which is distinctly Australian in character, which expresses full commitment to Australia, its laws and the Constitution, and which avoids the requirements to swear allegiance to a sovereign resident elsewhere. The report on the consultations makes it clear that these views were shared by people from a variety of backgrounds including holders of imperial awards and persons who expressed in other ways a wish to maintain a link with Britain. The honourable member for Balaclava (Mr MacPhee), as Minister for Immigration and Ethnic Affairs, drew attention in May 1982 to the confusion caused to many new settlers by this aspect of the existing oath and to the resistance of many people to taking such an oath.

The Government has given careful consideration to whether it is desirable to have one form of allegiance which would avoid the public division of people which occurs now at citizenship ceremonies with persons separated into two groups wishing to take either the oath or affirmation. This has been criticised for serving to accentuate people's differences of belief at a time when we should be emphasizing their common commitment to their new nation. On the other hand, we recognize that many people wish to swear an oath before God when giving allegiance to their new nation. So we propose to adopt a new pledge of Australian citizenship to be made by all new citizens in either of two forms. The proposed wording for the first form is:

> I renounce any current citizenship and allegiance to any State other than Australia. I pledge that I will faithfully uphold the Constitution, obey the laws of Australia and fulfil my duties as an Australian citizen.

The second form of allegiance pledge proposed is:

> I renounce any current citizenship and allegiance to any State other than Australia. I swear by Almighty God that I will faithfully uphold the Constitution, obey the laws of Australia and fulfil my duties as an Australian citizen.

The present renunciation of allegiance is ambiguous and does not make it clear whether people are being asked to renounce their previous nationality, their present language and culture, or all three. I believe it is important that the future wording of the renunciation makes it clear that it is only allegiance as a citizen to one's former state or country that is being renounced.

As a result of recent statements I have made in this House and elsewhere about the desirability of having a more Australian form of allegiance, some members of the Opposition have sought to make this a divisive public issue. They have been supported by a minority in the community which does not appear to accept the reality that Australia is now a multicultural community and also an independent nation. People will simply be asked to swear allegiance to Australia and its laws and Constitution. The two forms of the pledge, both religious and non-religious, that I have proposed will allow all people, whatever their views or religion, to make a full commitment of allegiance to Australia. Neither form differentiates between Australia on the basis on their attitudes to the monarchy. While there may be legitimate differences of views on this issue, they should not, in the Government's view, be invoked in an Australian citizenship ceremony.

Individuals. Citizenship. Australia and Papua New Guinea.

On 20 August 1981 the Minister for Immigration and Ethnic Affairs, Mr MacPhee, provided the following written answer (HR Deb 1981, Vol 124, 663):

> (1) Prior to Independence persons born in Papua acquired Australian citizenship by birth while persons born in New Guinea became Australian protected persons.
>
> (2) Changes in Australia's citizenship legislation consequent upon Papua New Guinea independence were affected by regulations made under the provisions of the Papua New Guinea Independence Act and the Australian Citizenship Act. These regulations came into force upon Independence on 16 September 1975 and generally provided among other things that:
>
> Birth in Papua or New Guinea no longer confers the status of Australian citizen or an Australian protected person respectively.
>
> Australian citizens, however their citizenship was acquired, and Australian protected persons who automatically became Papua New Guinea citizens on 16 September 1975 ceased to be Australian citizens or protected persons on that date.
>
> Australian citizens and Australian protected persons who did not automatically acquire Papua New Guinea citizenship on 16 September 1975 retain their existing status.

Individuals. Citizenship. Australia and the Territory of Christmas Island.

On 7 September 1982 the Minister for Immigration and Ethnic Affairs, Mr Hodges, provided the following written answer (Sen Deb 1982, Vol 95, 665):

> Persons born on Christmas Island on or after 1 October 1958 are Australian citizens. The Christmas Island Amendment Act 1980 which came into effect on 17 December 1980 provides that persons who were ordinarily resident on Christmas Island immediately before the transfer of the Island to Australia on 1 October 1958, who are now ordinarily resident on the Island, in Australia or an external Territory may make a declaration that they wish to acquire Australian citizenship. Forty-six persons have taken advantage of this amendment to acquire Australian citizenship.
>
> Additionally, when the Migration Act was extended to Christmas Island on 23 January 1981, a number of persons temporarily living on the Island were subsequently granted resident status and became eligible for the grant of Australian citizenship. Three hundred and nine such persons have applied.

Individuals. Citizenship. Dual nationality. Problems associated with the Soviet Union, Yugoslavia, Greece and Czechoslovakia.

On 26 March 1981 the Minister for Foreign Affairs, Mr Street, wrote in part in answer to a question about dual citizenship laws enacted by the Soviet Union and implications arising for Australian citizens who might be affected (HR Deb 1981. Vol 121, 1076-1077):

> The new law appears to be largely a consolidation of existing legislation and it is unlikely that any person who did not previously possess Soviet citizenship will have acquired it as a result of the law. On the other hand some people may be learning for the first time that the Soviet Union regards them, and always has regarded them as Soviet citizens regardless of the fact that they themselves and the Australian Government regard them as Australians.
>
> No one will cease to be an Australian citizen as a result of the new Soviet law, and nothing in the law can affect the responsibility which the Australian Government accepts for the welfare of its own citizens. This responsibility is one which the Government will not shirk. In practice, this means that all Australians, including those who may also be regarded by the USSR as Soviet citizens, will continue when in Australia to enjoy the full protection of Australian law, and when abroad will be given all possible assistance by Australian diplomatic missions and consular posts. This is not to deny that there are dangers and difficulties in situations involving dual nationality and real limitations on the assistance which a country can give to one of its citizens who is in another country which also claims him or her as its citizen. In this regard I must stress the importance of clarifying citizenship before embarking on a visit to the Soviet Union. The honourable member will be aware of the Government's concern about dual nationality and will recall a statement by the former Minister for Foreign Affairs Mr Peacock on 17 October 1979 on the Report of the Joint Parliamentary Committee on Foreign Affairs and Defence on 'Dual Nationality'. In that statement Mr Peacock said that Australia should initiate relevant action in

the United Nations and should give high priority to negotiating bilateral agreements to overcome dual nationality problems, even though there are formidable difficulties of a political, legal and practical nature. We are in fact now considering this possibility in some detail. On 21 November 1979, the Australian representative on the Sixth Committee of the 34th Session of the United Nations General Assembly raised the question of dual nationality, and made a request that the International Law Commission give appropriate priority to including dual nationality in its program. The delegation to the Sixth Committee reported that many other delegations privately expressed interest in the statement made by Australia on dual nationality.

I mentioned that the study about which the honourable Member asked had been completed. The results of that study have been summarised in an information paper, which has been distributed to enquirers on request. The text of that information paper is as follows:

'A new Soviet Citizenship Law came into force on 1 July 1979. A number of Australian citizens have expressed concern about the implications of this law for Australians with origins in the Soviet Union or the Baltic States.

The Australian Government formally sought clarification from the Soviet authorities of some aspects of the law and consulted other countries which have citizens who might also be affected by Soviet citizenship legislation. The notes which follow are based upon a study of the law itself and of the information provided by the Soviet authorities and other countries in response to the requests made by the Government. The notes deal particularly with the concerns expressed by some Australian citizens that as a result of the new law they might have acquired Soviet citizenship or might have lost their Australian citizenship, with the position of Australian citizens with Soviet antecedents who travel in the Soviet Union and with the position of those Australians with origins in the Baltic States.

On the question of what effect the Soviet legislation might have on Australian citizenship, the Minister for Foreign Affairs has already assured Parliament that nobody will lose Australian citizenship through the operation of a law of another country under the laws of that country, whether he or she is residing in Australia or elsewhere. In short, no one will cease to be an Australian citizen as a result of the new Soviet law.

Similarly, the Soviet law cannot affect the responsibility which the Australian Government accepts for the welfare of its own citizens or its determination to discharge that responsibility. Limits on the Government's freedom of action in this regard do, however, exist and are outlined in the paragraphs which follow...

It is a sovereign right of countries to make their own laws concerning who they will or will not regard as their own citizens. These laws need not be consistent with the laws of other countries and are not necessarily recognised by other countries. It follows that what has been said about retention of Australian citizenship reflects Australian law and need not be accepted by the Soviet authorities. This is an important point for Australians of Soviet origin travelling to the Soviet Union. The new Soviet law

> explicitly states that the USSR does not recognise dual nationality. Australian citizens who also possess Soviet citizenship are therefore regarded by the USSR as possessing only Soviet citizenship and this of course is most important when those people are in the Soviet Union. The Soviet authorities have made clear that they attach no legal significance to the issue of Soviet visas to Soviet citizens travelling on Australian passports and that they will continue to regard such persons as Soviet citizens. This is not a new provision, but is an explicit statement of what has previously been Soviet policy...
>
> Intending travellers should heed the advice given in Parliament by the Minister for Foreign Affairs that problems of dual nationality cannot be overcome by citizens simply asserting that they do not accept their other citizenship and that it is for the individual to ascertain in advance the consequences of coming within the jurisdiction of another country which claims his or her citizenship whether the individual, or the Australian Government, recognises that claim or not. Australian Consular Officers can in such circumstances give advice but they may not be able to assist when the jurisdiction of another country is being asserted. They will of course take all the steps open to them.

On 8 September 1983 the Minister for Foreign Affairs, Mr Hayden, wrote in part in answer to a question about negotiations for bilateral agreements on dual nationality (HR Deb 1983, Vol 132. 641):

> Discussions were initiated with Yugoslavia but were discontinued following a unilateral decision by Yugoslavia to exempt genuinely short-term, dual national, visitors from their military obligations for the terms of their visas. A similar unilateral decision by Greece removed the urgency of a bilateral agreement with Greece. Five other countries have indicated their general interest in discussing the problems of dual nationality with a view to concluding bilateral agreements. The Government is following up these expressions of interest in the hope that sufficient common ground can be identified to warrant the commencement of negotiations with the countries concerned.

On 8 November 1983 the Minister for Foreign Affairs, Mr Hayden, wrote in part in answer to a question (HR Deb 1983, Vol 133, 2454):

> In looking at any question of citizenship, it is necessary to note that every country has the right to make laws dealing with the citizenship status of its own citizens, wherever they live. Accordingly, the Australian Government does not question the right of the Czechoslovak Government to enact laws affecting persons who are regarded as Czechoslovak citizens under Czechoslovak law. The Australian Government would, however, be concerned about any punitive, arbitrary or coercive effects such laws might have on Australian citizens of Czechoslovak origin.

Individuals. Discrimination. Women. Convention on the Elimination of All Forms of Discrimination Against Women.

On 2 June 1983 the Minister for Education and Youth Affairs, Senator Susan

Ryan, presented the Sex Discrimination Bill 1983 to Parliament. Part of her second reading speech was as follows (Sen Deb 1983, Vol 98, 1185):

> The objects of the Bill are to give effect to certain provisions of the U.N. Convention on the Elimination of All Forms of Discrimination Against Women which the Government plans to ratify in the near future, to eliminate discrimination on the ground of sex, marital status or pregnancy in the areas of employment, education, accommodation, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs, and discrimination involving sexual harassment in the workplace and in educational institutions; and to promote recognition and acceptance within the community of the principle of the equality of men and women.
>
> The need for such a law is now widely understood and accepted. Throughout Australia women experience discrimination on the basis of their sex and their marital status. In three States there are avenues for redress of infringements of women's rights. In other States and in the range of areas which are the responsibility of the Commonwealth there is no remedy. The result is economic and social disadvantage and a significant impediment to the exercise by Australians of fundamental rights and freedoms.

On 14 July 1983 Senator Ryan and others made a joint statement announcing Australia's intention to ratify the Convention (Comm Rec 1983, 1032).

The Convention was ratified for Australia on 28 July 1983, subject to the reservations and declarations that follow, and the Convention entered into force for Australia on 27 August 1983: Aust TS 1983 No 9.

> The instrument of ratification of the Convention on the Elimination of All Forms of Discrimination against Women deposited by the Government of Australia with the Secretary-General contained the following reservation:
>
> > *THE GOVERNMENT OF AUSTRALIA* states that maternity leave with pay is provided in respect of most women employed by the Commonwealth Government and the Governments of New South Wales and Victoria. Unpaid maternity leave is provided in respect of all other women employed in the State of New South Wales and elsewhere to women employed under Federal and some State industrial awards. Social Security benefits subject to income tests are available to women who are sole parents.
> >
> > *THE GOVERNMENT OF AUSTRALIA* advises that it is not at present in a position to take the measures required by Article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits throughout Australia.
> >
> > *THE GOVERNMENT OF AUSTRALIA* advises that it does not accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat and combat-related duties. The Government of Australia is reviewing this policy so as to more closely define 'combat' and 'combat-related duties'.

Australia made the following statement at the time of depositing its instrument of ratification:

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

Individuals. Discrimination. Race. International Convention on the Elimination of All Forms of Racial Discrimination.

On 13 July 1981 Australia submitted its Third Periodic Report under Article 9 of the International Convention on the Elimination of All Forms of racial Discrimination (see CERD/C/63/Add.3). The Report was considered by the Committee on the Elimination of Racial Discrimination on 4 and 5 March 1982 (see CERD/C/SR.555 and 556). Australia's Fourth Periodic report was submitted on 30 March 1983 (see CERD/C/88/Add.3).

On 29 July 1983 Australia submitted a National Report to the United Nations as a pre-sessional document for the Second World Conference to Combat Racism and Racial Discrimination held in Geneva from 1 to 12 August 1983 (see A/CONF.119/NR.25)

On 18 May 1982 the Minister for Foreign Affairs, Mr Street, provided the following written answer to a question (Sen Deb 1982, Vol 94, 2070–2071):

> (1) The Government is currently not in favour of making a declaration under Article 14 of the Convention on the Elimination of All Forms of Racial Discrimination. The Government considers that Section 6 of the Commonwealth Racial Discrimination Act 1975, which binds the Crown in right of both the Commonwealth and each of the States, provides adequate redress for complaints involving racial discrimination through its investigative, settlement and other procedures. Against this background, and taking account of the optional nature of Article 14 declarations, the Government does not intend at present to make such a declaration but is keeping the matter under consideration.
>
> (2) The Government is also keeping the question of Australia's reservation in respect of Article 4 (a) of the Convention under review.
>
> The Government's current view is that conciliation and mediation augmented by civil remedies, rather than the use of criminal sanctions, are the best means of dealing with racial discrimination and its associated tensions and prejudices. The Racial Discrimination Act does proscribe acts of incitement and assisting or promoting racial discrimination whether by financial assistance or otherwise, as well as providing a comprehensive range of civil remedies. This specific legislation reflects the Government's firm commitment to eliminate racial discrimination. Many acts involving violence or incitement to violence are also punishable under existing criminal law. Legislation strictly of the kind referred to in Article 4 (a) has thus not yet been passed and is not in immediate prospect. The Government therefore considers that the reservation lodged in relation to Article 4 (a) should be retained.

Individuals. Discrimination. Race. Apartheid in South Africa. Australian opposition. Sporting contacts with South Africa.

On 23 September 1981 the Attorney-General, Senator Durack, said in answer to a question about Australia's opposition to the apartheid policies of the Government of South Africa (Sen Deb 1981, Vol 91, 893–894):

> Certainly Australia's objections to South African policies relate not only to the long-standing racial prejudices and practices in that country but also to a number of other specific legal discriminations, which I propose to mention. In broad terms, Australia's objection to the South African Government's policies are based on our total rejection of the policy of apartheid which has enshrined racism in the South African Constitution. Of course, this discriminatory and exploitative system represents a basic affront to the dignity of man and his fundamental human rights.
>
> I should like to list some examples of the discrimination practised against black and coloured people in South Africa and the legal authority for that discrimination. These examples do not cover social attitudes or examples of petty discrimination. For instance there is a denial of suffrage. The South African Constitution provides that only white people have the right to vote for members of parliament. There is a denial of freedom of movement and compulsory relocation. The so-called pass laws and influx control regulations require black and coloured people to have specific authority to enter designated areas for employment purposes and render them liable to deportation to so-called homelands. There is a denial of freedom of association. Blacks may not form political parties. A series of laws, including the Terrorism Act, provide the legal authority.
>
> Freedom to live in areas other than those designated by the Government is denied. The Group Areas Act gives legal authority for most areas to be designated as white areas. Black and coloured people may not purchase houses in these areas. In regard to the denial of freedom to marry, the Mixed Marriages Act and the Immorality Act forbid marriage or cohabitation between people from different racial groups. There is also denial of freedom to work, in that the job reservation regulations under the Industrial Conciliation Act still forbid employment of black people in certain specified occupations, particularly in the mining industry.
>
> Those examples, coupled with the enshrining of the policy of apartheid in the Constitution, give a very clear picture of the sorts of legal discriminations and violations of human rights that exist in the legal structure of South Africa.

On 1 December 1981 Australia's Permanent Representative to the United Nations in New York, Mr Anderson, said in the course of debate in the General Assembly (A/36/PV.78, p 41):

> Each year for many years past this Assembly has been required to consider the policies of *apartheid* of the Government of South Africa. It is essential, therefore, that we should not allow our consideration of this important item to degenerate into a matter of routine. For the issues at stake involve basic Charter principles and have consequences which extend far beyond the confines of South Africa itself.

> In the first place, the *apartheid* system violates the human rights of the great majority of the people of South Africa in ways which are abhorrent to men and women everywhere. The preamble to our Charter affirms the faith of the peoples of the United Nations in fundamental human rights and in the dignity and worth of the human person. Articles 1 (3) and 55 of the Charter call for international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. These basic provisions of the Charter are violated daily in South Africa.
>
> The Australian Government has repeatedly affirmed and reaffirmed, within this Assembly and outside it, its strong and continuing opposition to *apartheid* and to all of its repugnant manifestations as a crime against the conscience and dignity of mankind.

On 5 October 1983 the Prime Minister, Mr Hawke, said in answer to a question, in part (HR Deb 1983, Vol 133, 1354):

> I am pleased to be able to say that while there are not a great number of issues, I guess, on which there is identity of position between government and opposition, over more than a decade a firm anti-apartheid policy has characterised the foreign policy of successive Australian governments. This Government remains — as I know the Leader of the Opposition and members on the other side of the House do — unreservedly opposed to the abhorrent policy of apartheid. For example, the Foreign Minister, Mr Hayden, when addressing the Thirty-eight Session of the United Nations General Assembly yesterday, emphasised the utter rejection of what he described as the repugnant system of apartheid which, as he said, despite minor cosmetic change, continues without meaningful modification in South Africa.
>
> In the sporting area this government is firmly committed to the Gleneagles agreement. The existing ban on South African teams and representative individual sportsmen and sportswomen remains in force. We shall continue as a government to urge upon Australian sporting associations the undesirability of their having sporting contact with South Africa. The Government is currently reviewing the policy on sporting contacts in order to establish clear and consistent guidelines.

Following completion of the review, the Minister for Foreign Affairs, Mr Bill Hayden, issued the following statement, in part, on 26 October 1983 (Comm Rec 1983, 1789–1781):

> The Government has significantly strengthened its policy on sporting contacts with South Africa. From now on, all individual amateur South African sportsmen and women domiciled in South Africa would be considered as representatives of South Africa unless there was definite proof to the contrary. As representatives they would not be allowed entry to Australia. This means that several categories of sportsmen and women who would have previously been eligible to compete in Australia will now be banned from entry.
>
> The Minister for Foreign Affairs, the Hon. Bill Hayden, said that this action was in line with the Government's total rejection of apartheid. South

Africa was the only country which based its social and political system on an institutionalised form of racial discrimination. The inequities of apartheid pervaded all aspects of that society. The Government believed that non-racial sport could not be played or organised in a society based on apartheid.

Mr Hayden said that the Government, after carefully reviewing the question of sporting contacts had also decided:

- no South African sporting teams would be allowed entry to Australia
- Australian sportsmen and women would be discouraged from competing in South Africa
- 'third country' contacts, in which Australians compete against South Africans in other countries, would be opposed
- the Government would seek to persuade Australian sports bodies to bring pressure to bear to have South Africa expelled from international sports federations and competitions
- the Government would seek to persuade other governments to discourage South African participation in sporting competitions in their country.

Mr Hayden said that toughening of the policy on amateurs was because amateur sports contestants competing overseas normally did so either directly or indirectly under the auspices and at the expense of their country or national sporting bodies. In these circumstances they were clearly representatives.

The Government had decided that in the case of individual professional sportsmen or women, they would be assumed to be non-representative unless there was proof to the contrary. Genuine individual professional sportsmen and women normally do not rely on the support of a national body for their participation in overseas competition.

Mr Hayden said that the existing bans on entry to Australia of West Indian, Sri Lankan and English cricketers who had taken part in 'rebel' tours of South Africa would be lifted. The Government considered it was not the responsibility of Australia to take action against the nationals of other countries over their sporting contacts with South Africa.

Individuals. Extradition. Australian practice.

On 1 April 1981 the Department of Foreign Affairs published the following note on extradition in *Backgrounder* (pp 3–4):

> Extradition, as it applies between nations, is in general terms the formal surrender by one country to another of an individual accused or convicted of an offence in that other country. Offences to which extradition applies are offences of a serious nature, such as murder, and these are listed in the agreement governing extradition between the countries concerned — assuming that such an agreement has been concluded. Extradition is a term also used domestically in Australia to refer to the return of a person from one State to the State where the offence was committed.
>
> In the international context, extradition to or from Australia is primarily the responsibility of the Commonwealth Attorney-General's Department. The Department of Foreign Affairs, however, is involved since the question

of negotiating extradition agreements is a facet of Australia's international relations; and in implementing an extradition agreement, diplomatic channels are used for transmitting a formal extradition request.

Extradition should not be confused with deportation, which is the expulsion by a country of a non-national for reasons specified in migration legislation. Furthermore, a deportee generally does not face criminal charges in the country to which he or she is sent.

Essential elements in extradition are the holding of a person in custody, and the transfer of the custody of that person to the authorities of another country for his trial for an alleged criminal offence. In countries like Australia, with a common law system, a person can contest retention in custody by way of the writ of habeas corpus.

Commonwealth Countries

Following a meeting between Commonwealth Law Ministers in London in 1966, a new scheme was adopted to deal with extradition between Commonwealth countries. The London scheme, as it is known, does not require the conclusion of extradition treaties between Commonwealth countries. Instead, extradition is based upon standard and reciprocal legislation on the subject in each participating country. In Australia this is the Extradition (Commonwealth Countries) Act 1966. Most Commonwealth countries have now introduced legislation modelled on the London scheme.

Non-Commonwealth Countries

The basis of Australia's extradition arrangements with non-Commonwealth countries is the bilateral extradition treaty. The Extradition (Foreign States) Act 1966, permits extradition to countries with which Australia has an extradition treaty — or to which the Act has been applied on the basis of reciprocity. The Act has only been applied to one country in the latter situation, since it is (Australian) policy to rely on treaties wherever possible. The Act is applied to a foreign country by means of regulation. At present Australia has some 45 such treaties.

Multilateral Arrangements

The emergence of crimes which the international community regards as deserving punishment has resulted in the list of generally accepted extradition crimes being extended from time to time. A topical example is the hijacking of aircraft, the prevalence of which resulted in the 1970 The Hague Convention on Unlawful Seizure of Aircraft. This Convention declared unlawful seizure of aircraft to be an international crime. One difficulty arises in this respect from the fact that the domestic legislation of some countries prohibits the extradition of their nationals. In these cases the requesting country can usually seek the prosecution of the offender in the courts of the country of which he is a national and where he has sought refuge.

Individuals. Passports. Nature of a passport.

On 27 May 1982 Interim Report No 2, entitled "Passports" of the Royal Commission of Inquiry into Drug Trafficking was presented to Parliament (PP

No 119/1982). It began by considering the nature of a passport, as follows (PP 4–7):

> The best known form of passport originally was a document issued by the sovereign of a country to a person well regarded by the sovereign in order to facilitate travel by that person in places beyond the sovereign's dominions. It called upon the persons in control of those places to give, as a favour to the sovereign, what assistance they could to the traveller. Only a minority of travellers would be favoured with such a document.
>
> There is evidence that passports were used in ancient Greek and Roman times. Daniel C. Turack (1970) 31 Ohio State L.J. 247 has claimed that a form of passport was used in India and Persia two thousand years ago. The word passport is a combination of the French words 'passer' meaning to pass, and 'port' a port or gate.
>
> There were already in medieval times in England controls upon aliens entering the kingdom and a licence had to be obtained for this purpose. A passport held by some aliens could be accepted for this purpose but in other cases a special visa which in time came to be stamped on the passport might be required.
>
> By the beginning of the twentieth century, a passport was a well recognised and frequently used document. In *Rex v Brailsford* (1905) 2 KB 730 the Court of Criminal Appeal in England upheld the conviction of persons charged with a common law conspiracy to obtain a passport for the use of a third person. Lord Alverstone CJ, in giving the judgment of the Court, said:
>
> > It would be well to consider what a passport really is... Passports have been known and recognised as official documents for more that three centuries and in the event of war breaking out, become documents which may be necessary for the protection of the bearer, if the subject of a neutral State, as against the officials of the belligerents, and in time of peace in some countries they are required to be carried by all travellers.'
>
> The first World War caused considerable restrictions upon travel to be imposed. In his *Australian Citizenship Law,* Michael Pryles writes:
>
> > 'The impetus for international conferences on passports following the First World War was the obligation contained in article 23 of the Covenant of the League of Nations which enshrined the principle of freedom of communications and transit. In 1920 a Conference on Passports at Paris proposed uniform requirements which included inter alia that they contain 32 pages and be drawn up in two languages. This form, as developed at further conferences, has remained the standard for most national passports to this day. A second Passport Conference convened by the Council of the League of Nations was held at Geneva in 1926 and further refined the uniform passport requirements. Following the establishment of the United Nations a Committee of Experts convened by the Council of the United Nations met in Geneva in 1947. Australia was represented. The meeting was of the view that conditions did not exist for the general abolition of passports and

> supported the use of the uniform type of passport recommended by the 1920 and 1926 Conferences. It was thought that these passports should be valid for five years. However the meeting felt that bilateral and multilateral agreements abolishing passport requirements between nationals of the signatory States was feasible and should be encouraged. At the 1963 United Nations Conference on International Travel and Tourism at Rome, where Australia was represented, the regime of the passport was again supported because it was the most suitable international travel document. Detailed specifications and recommendations for passports further refined the uniform or standardised passport first recommended in 1920.'[1]

A passport has become an essential document for international travel. There has been some relaxation of this requirement, e.g. countries in the European Economic Community allow nationals of other member countries to enter and leave without a passport — an idenitity card is all that is required. In spite of such exceptions the traveller normally will not get far without a passport. Although there is no positive prohibition upon an Australian adult leaving Australia without a passport no carrier will accept him without one. Unless he has a passport he will almost certainly be refused admission into the country of destination; not unnaturally the carrier wants his journey to terminate at that country.

Section 11C (1) of the *Migration Act* 1958 (Commonwealth) prohibits a carrier from bringing to Australia a person, not the subject of exemption, who does not have a visa. It is assumed by section 11A (3) that the visa will be noted in the passport or other document of identity held by the intending entrant.

The significance of possessing a passport was underlined in the case of *Joyce v Director of Public Prosecutions* [1946] AC 347. Joyce (Lord Haw-Haw), an American citizen, in 1933 applied for and obtained a British passport describing himself as a British subject by birth and stating that he required it for the purpose of holidaying abroad on the continent of Europe. At that time he had resided in British territory for about 24 years. He was issued with the passport and on its expiration he obtained renewals on 24 September 1938 and 24 August 1939, each for a period of one year, again describing himself as a British subject. After the outbreak of war between Great Britain and Germany, and whilst the renewed passport was still valid, he broadcast from enemy territory talks in English which were hostile to Great Britain. The passport was not found in his possession when he was arrested but the facts relating to its issue and renewal were proved at his trial for high treason. The House of Lords held that he was rightly convicted because an alien abroad holding a British passport enjoyed the protection of the Crown and if he was adhering to the King's enemies, he was guilty of treason so long as he had not renounced that protection.

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1. Michael Pryles, *Australian Citizenship Law*, The Law Book Company Ltd., Sydney, 1981, p 129.

Lord Jowitt, Lord Chancellor, cited part of the passage quoted above from *Brailsford's* case and went on to discuss the nature of a passport further:

> 'By its terms it requests in the name of His Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. It is, I think, true that the possession of a passport by a British subject does not increase the sovereign's duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification. But the possession of a passport by one who is not a British subject gives him rights and imposes upon the sovereign obligations which would otherwise not be given or imposed. It is immaterial that he has obtained it by misrepresentation and that he is not in a law a British subject. By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects.'

In international law then, the issuing government has rights and duties to protect and to aid its national to whom it has issued the passport. Other governments are entitled to act on the assumption that the bearer of the passport is well regarded by the issuing government and that he should be afforded assistance and protection. It should be noted that a passport remains — according to English law — the property of the Crown. In *Re Suwalsky, Suwalsky, etc v Official Receiver* (1928) B & C.R. 142, it was held that a passport issued to a person who afterwards becomes bankrupt is the property of the Crown and not of the bankrupt. Like provision is made by section 6A of the *Passports Act* 1938 (Commonwealth).

The author of the article 'The Right to a Passport' in volume 48 of the Australian Law Journal wrote:

> 'Literally, the word 'passport' means a licence to pass a port or city gate or haven; or in other words a licence to pass safely from one place or one country to another place or country.
>
> Modern text-books on international law and on the law of nationality stress, in addition to matters referred to by Lord Alverstone CJ supra the following important characteristics:
>
> (1) The passport is a document of identity of the holder. A statement to this effect is actually made in the definition of 'passport' in section 2 of the New Zealand Passport Act 1946.
>
> (2) It embodies a request to foreign governments to grant the bearer safe and free passage, and all lawful aid and protection while within their territorial jurisdiction. Such request in the standard Australian passport is in these terms: 'I, the Governor-General of the Comonwealth of Australia, being the representative in Australia of Her Majesty Queen Elizabeth the Second, request all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him or her every assistance and protection of which he or she may stand in need'.
>
> (3) The passport is prima facie evidence of the nationality of the

> bearer, as identified therein (see Sandier, *Evidence Before International Tribunals* (1939) at pp 154–155, and cf *Joyce v Director of Public Prosecutions* [1946] AC 347).

In essence, then, the passport facilitates freedom of passage from one country to another for its holder, properly identified as a national of the country which issued that document.'[2]

The author went on to examine the law relating to the issue of passports and concluded that under Australian law there is no absolute right to a passport. This seems to be a correct conclusion when one examines the provisions of the Australian legislation — as the Commission does in Chapter 2 (ii).

There has been recent agitation of the view that essential human rights include a right to travel and an associated right to obtain a passport. The Commission mentions this matter only to observe that the issue clearly falls outside its terms of reference. The Commission's concern is to examine how it can be ensured that valid Australian passports are properly issued and how their forgery or falsification can be made as difficult as possible.

There is no satisfactory definition of a passport in international law, whether customary or conventional. Turack in his *The Passport in International Law* examines municipal law definitions proposed by jurists in seeking to formulate a definition of universal application. He cites a large number of definitions. The important elements are identity, nationality and its connection with travel. 'It is largely an identity and travel document issued to the State's own nationals.' (Weis). 'Un document délivré par les autorités publiques compétentes certifiant l'identité et la nationalité de son titulaire et lui permetant de franchir les frontières de son Etat d'origine'. (Borella). 'Fundamentally an identity document for travel purposes'. (O'Connell). 'A document which serves to identify the holder and to provide evidence of his nationality.' (Campbell and Whitmore). Turack concludes:

> 'The document can be the authorization required to leave the issuing state, although developing international humanitarian law is attempting to eliminate any restrictiveness which might be attached to the use of the document in leaving the state. Since a passport can be issued to a non national as well as a national, the definition must of necessity, be broad enough to include both categories. International comity recognizes that the bearer of a legal passport will be readmitted to the issuing state if the passport is valid.
>
> Any definition must also acknowledge the official character of the document. As the passport always contains a description of the bearer and a reference to his nationality, international customary and conventional law recognizes that these statements are essential for international recognition of the document.
>
> Consequently, we may say that a passport is recognized in international law as an official document delivered to an individual for the primary purposes of enabling the bearer to offer some proof of his

2. 'The Right to a Passport', Australian Law Journal 48, p.61.

identity and nationality, and assisting the bearer's entry into, sojourn, and exit from sovereign states or territories subject to their control, or such other entities as have been granted international personality.'[3]

It appears to the Commission that this is a good workable definition. The document pre-supposes travel by the holder beyond the country of his origin and for this purpose identifies him personally and describes his nationality.

For the Government's response to the recommendations of the Royal Commission in its Interim Report No 2, see HR Dep 1982, Vol 130, 8 December 1982, 3080–3083 (Minister for Foreign Affairs).

On 24 February 1983 the Department of Foreign Affairs published a "Manual of Australian Passport Issue", extracts from which are as follows:

1.1 Purpose of the Manual

1.1.1 This Manual has been prepared for the guidance of officers of the Department of Foreign Affairs and of the Australian Postal Commission (Australia Post) who deal with members of the public seeking information leading to the issue to them of Passports or other travel documents. It is also for use by officers of the Department of Foreign Affairs, particularly those stationed abroad, who issue travel documents and provide other services related to the issue of Australian travel documents.

1.1.2 Instructions in this Manual are intended to assist officers to deal properly with matters regarding Australian travel documents in compliance with the Passports Act and Passport Regulations in force at the time.

...

1.4 What is a Passport?

1.4.1 A Passport is a document issued from official sources and used by a citizen as evidence of identity, principally for the purpose of travel. It may take various forms.

1.4.2 An Australian Passport, issued in the name of the Governor-General to facilitate travel abroad, remains always the property of the Australian Government.

1.5 Entitlement to an Australian Passport

1.5.1 Under Australian law, there is no absolute right to a Passport. That being so, the Minister for Foreign Affairs may properly exercise his discretion to deny a Passport to some citizens for reasons set out in Sections 7A to 7E of the Passports Act. These could be summarised as follows:

(1) An unmarried person under the age of 18 without the consent of each person entitled to custody to guardianship (7A).

(2) A person against whom a warrant for arrest or a Court order has been issued requiring the person to remain in Australia or to refrain from obtaining an Australian Passport (7B). Similar denial should apply in the case of a person under a condition of parole or of a recognisance, surety or bail bond to remain in Australia.

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3. Daniel C Turack, *The Passport in International Law,* DC Heath and Company, Lexington, 1972, p21.

(3) A person who owes money to the Commonwealth in respect of moneys lent or expenses incurred when the person was outside Australia (7C).

(4) A person who is already in possession of an Australian Passport (7D).

(5) A person considered likely to engage in activity outside Australia which would prejudice the security of, or disrupt public order in, another country (7E).

1.5.2 An Australian Passport may be cancelled on the order of the Minister for Foreign Affairs for reasons set out in the Passports Act and regulations.

1.5.3 There are severe penalties for Passport abuse and these too are set out in the Passports Act and Regulations.

1.6 Travel Documents Other Than Passports

1.6.1 Travel documents other than Passports include:

Certificates of Identity
Documents of Identity
Titres de Voyage

These documents are issued, in certain circumstances, for travel abroad and are described in detail in Part 2 of this Manual.

1.7 Authority to issue Passports

1.7.1 Passports are issued by the Department of Foreign Affairs under the authority of the Minister for Foreign Affairs, who has responsibility for administering the Passports Act and Regulations.

...

2.1 Types of Travel Documents

2.1.1 The Australian government issues several kind of Passports. These, together with certain other kinds of travel documents which are not decribed as Passports, are all considered to be Passports for the purposes of certain Sections of the Passports Act. They are:

Passports (ordinary)
Businessman's Passports
Official Passports
Diplomatic Passports
Certificates of Identity
Documents of Identity
Titres de Voyage

2.2 Purpose of Issue

2.2.1 The purpose of issuing travel documents is to enable their bearers to travel abroad with adequate identification. Some governments will not recognise travel documents other than Passports. Some governments make certain restrictions on some documents such as Documents of Identity.

...

2.4 Passports (ordinary)

2.4.1 This is the basic type of Passport which may be issued to all Australian citizens except those who are entitled to special types of

Passports. Essential requirements for their issue are set out in Section 3 of this Manual.

...

2.5 Businessman's Passports

2.5.1 This is a Passort (ordinary) which has 48 pages instead of the normal 32. Its serial number is prefixed with a 'B'. This type of Passport may be issued on request to businessmen who can show substantial filling of their Passport pages with numerous visa endorsements and entry and departure stamps, Australian and foreign.

2.5.2 This type of Passport is issued to reduce the inconvenience to regular travellers of having to replace Passports (and visas endorsed in them) at frequent intervals.

...

2.6 Official Passports

2.6.1 Official Passports are issued to Australian citizens (and to some non-Australian citizens, but at present only British Subjects) who are travelling on official business on behalf of, and at the expense of the Commonwealth, State, Territory or Local Government authority. In some circumstances Official Passports may be issued to the spouses of those holding Official Passports, provided the cost of the spouse's fares is also being met from Government revenue.

...

2.7 Diplomatic Passports

2.7.1 These are available for issue only to strictly limited and specified categories of persons. Any application for a Diplomatic Passport for any person outside those categories must be referred to the Department of Foreign Affairs in Canberra.

...

2.8 Certificates of Identity

2.8.1 This type of document is issued only in Australia or its Territories, under Passport Regulation 9. It is issued to an alien who intends to leave Australia or one of its Territories, but who cannot obtain a Passport of the previous country of that alien's nationality by reason either of having been or having become stateless or who cannot obtain a Passport from a consular representative representing the country of that nationality.

2.8.2 An alien may be "unable" to obtain a Passport of that alien's nationality, that is to say a national Passport, for such reasons as:

(1) there is no consular representative in Australia able to issue a national travel document in a reasonable time:

(2) a consular representative to whom an application is made places excessive or unreasonable obstacles in the way of the applicant:

(3) the applicant may have a genuine fear that, by an approach to a consular representative of that alien's nationality, serious adverse consequences may follow.

...

2.8.4 Stateless persons are those who do not hold citizenship of another country. Refugees are stateless persons. Responsibility lies on such an applicant to furnish proof of statelessness. Passport officers are responsible for giving applicants information as to how such proof might be obtained.
2.8.5 The following summary sets out the categories of aliens who may be granted Certificates of Identity and the evidence on which individuals may be included in those categories:

Categories

(1) All stateless persons

(2) All refugees who entered Australia under one of the refugee programs, including the Special Humanitarian Program (SHP)

(3) Holders of Hong Kong certificates of identity which have expired while the holders are in Australia

(4) Refugees in terms of the 1951 Convention on Refugees who entered Australia on a United Nations document

(5) Aliens who have genuine reasons for not applying for Passports to their consular representative

(6) Aliens who claim that since arriving in Australia they have become refugees or have applied for refugee status

(7) Aliens who claim to have been unable to obtain Passports from their consular representatives within a reasonable time and after reasonable effort.

Evidence Required

The Department of Immigration and Ethnic Affairs can provide evidence on the basis of the document used to enter Australia.

The applicant must produce evidence from the Department of Immigration and Ethnic Affairs.

Production of the expired Certificate of Identity.

Production of the United Nations document, obtainable from the office of the United Nations High Commissioner for Refugees.

The applicant should furnish evidence from the Department of Immigration and Ethnic Affairs about the document used to enter Australia. The applicant must satisfy the authorised officer of the genuineness and seriousness of the claims made.

The applicant should be referred either to the Department of Immigration and Ethnic Affairs or the United Nations High Commissioner for Refugees from which ever refugee status has been sought.

The applicant should furnish adequate evidence to the authorised officer to substantiate the claim made.

2.8.6 A Certificate of Identity will not be issued to:

(1) An alien who intends to return to that alien's country of origin or whose proposed travel includes that country.

(2) An alien who has voluntarily reacquired the previous nationality of that alien or acquired another nationality.

(3) An alien who is trying to evade responsibility for national service to that alien's own country.

(4) An alien who is a fugitive from justice — referrence of such cases to the Department of Foreign Affairs, Canberra, may be appropriate.

(5) An alien who holds a valid national travel document, but who seeks an alternative document because an existing Passport held is not acceptable in certain countries.

2.8.7 A Certificate of Identity does not itself confer on the holder any right to return to Australia. This is stated on page 1 of the Certificate. Any re-entry authority must be applied for and, when granted, must be stamped separately in the Certificate.

...

2.9 Documents of Identity

2.9.1 Documents of Identity are issued to British Subjects, and to Australian citizens, in cases in which it is considered by an authorised Officer either unnecessary or undesirable to issue an Australian Passport (Passport Regulation 10).

2.9.2 A Document of Identity does not request the competent authorities to afford the bearer protection and freedom of passage. Some countries do not consider it a Passport for the purpose of entry unless it is endorsed with a visa. Some countries do not accept it as a valid travel document at all. Applicants who have the alternative of applying for a Passport should have these circumstances explained to them.

2.9.3 Categories of persons [to whom] Documents of Identity may be issued are summarised as follows:

(1) An Australian citizen whose travel the Minister believes should be restricted.

(2) Unmarried children under the age of 18 years who require a travel document for a specific journey and where it is not possible or desirable to issue a Passport. N.B. normal consent requirements apply.

(3) British Subjects who are being deported from Australia and Australian Citizens being repatriated or deported to Australia.

(4) Australian citizens travelling to Australian Territories, i.e. Norfolk Island, Christmas Island and Cocos (Keeling) Islands.

(5) British Subjects who are permanent residents in Australia, who require emergency travel documents and who cannot obtain British travel documents. Generally, such a document will only be issued for a one way journey to the applicant's homeland when the applicant would require a re-entry visa for return to Australia.

(6) Australian citizens not considered fit and proper persons to hold Australians Passports.

(7) Australian citizens who already hold or are included in other valid documents but require identification for short periods of specified travel.

...

2.10 Titres de Voyage (United Nations (Refugee) Travel Documents)

2.10.1 A document of this class, generally referred to as a Convention

Travel Document (CTD), is issued in accordance with Article 28 of the United Nations Convention and Protocol relating to the Status of Refugees. 2.10.2 Convention Travel Documents are issued to persons recognised as being refugees within the meaning of the Convention. Applicants for a CTD must provide evidence of their Convention refugee status by production of a CTD issued by another country or a statement of acceptance as such issued by the Department of Immigration and Ethnic Affairs.

For categories of persons in Australia to whom diplomatic passports may be issued, see the written answer of the Minister for Foreign Affairs on 4 October 1983 in Sen Deb 1983, Vol 99 1070–1071. They include the following:

(ix) An Ambassador, High Commissioner or other Head of a Diplomatic or Consular Mission of Australia

(x) An Officer of the Australian Public Service who is the leader of a delegation on behalf of the Australian Government or its sole representative, attending an international conference or undertaking formal bilateral or multilateral negotiations

(xi) A member of Her Majesty's Australian diplomatic service (not including 'a member of the administrative and technical staff' or 'a member of the service staff' or 'a private servant' as defined in the Viennna Convention on Diplomatic Relations)

(xii) A member of the staff of any Australian Government Department or instrumentality assigned to a diplomatic mission overseas and notified to the Receiving Country as holding a recognised diplomatic rank

(xiii) An Australian Government diplomatic courier.

Individuals. Passports. Discretion of Foreign Minister to withhold.

On 29 November 1983 the Deputy Prime Minister, Mr Bowen, provided the following written answer, in part (HR Deb 1983, Vol 134, 3023):

> The Government is fully aware of the need to ensure that, as far as possible, persons involved in alleged illegal activities are not allowed to leave Australia and thereby escape possible criminal proceedings or cause heavy extradition costs to be incurred. The Minister for Foreign Affairs has discretion to withhold the issue of a passport to any Australian citizen but this power would be exercised only in exceptional circumstances. The return to the practice of withholding the passports of persons merely suspected of offences would be incompatible with the Government's commitment to individual rights and civil liberties.
>
> Where charges for breaches of Commonwealth law have been laid against persons named or referred to in either the Costigan Report or the McCabe-Lafranchi Report, bail conditions have included provisions designed to prevent those charged from leaving Australia.

Individuals. Passports. People entering from New Zealand.

On 16 February 1982 the Minister for Foreign Affairs, Mr Street, wrote in answer to a question whether passports were required for all people entering Australia from New Zealand, with the intention of keeping out undesirables (HR Deb 1982, Vol 126, 151):

> Yes. Since 1 July 1981, all persons seeking to enter Australia have been required to produce a passport on arrival.

Individuals. Passports. "Hutt River Province" of Western Australia.

On 27 May 1982 the Minister for Foreign Affairs, Mr Street, provided the following information concerning the use of Hutt River passports by individual travellers (Sen Deb 1982, Vol 94, 2605) (the "Hutt River Province" being a name given to a property in Western Australia by its owner, Mr Casley):

> I am aware of the claim that a Hutt River 'diplomatic passport' was used by a television producer to get through Customs and Immigration in Beirut. I am unaware how many of these documents have been issued by Mr Casley or to whom they have been issued. They are not of course genuine passports. A genuine passport is a document issued by a sovereign state to a person who is a subject of that state. It is the accepted international means of identification and evidence of nationality and of the holder's right as a subject to the protection of the state which issued it as well as the preparedness of that state to extend protection. Since the self-styled Hutt River Province is not a state (in international law) clearly the documents printed and distributed by Mr Casley do not meet these criteria.
>
> The use of Hutt River Province 'passports' would facilitate the movements of terrorists and drug runners only as long as other countries are prepared to accept them as valid travel documents. I do not believe the abuse of these 'passports' should have any impact on Australia's relations with the Middle East region.
>
> In 1976, my Department advised all overseas posts that any inquiries from governments regarding the activities of Mr Casley should be advised that the Australian Government does not recognize the Hutt River Province and any assertions to the contrary are false.
>
> The Australian Government will take whatever steps are necessary to protect its international status and role in combating international terrorism and drug running.

Individuals. Passports. Norfolk Island.

On 27 November 1981 the Minister for Immigration and Ethnic affairs, Mr Macphee, provided the following written answer (Sen Deb 1981, Vol 92, 2809):

> In accordance with the wishes of the Norfolk Island authorities the Migration Act which controls entry to Australia does not extend to the territory of Norfolk Island. As a result, to maintain the security of Australia's entry controls, it is essential to have some form of identity check on travellers from Norfolk Island.
>
> Australian citizens do not require a visa or any other form of formal authority to visit Norfolk Island and the passport requirements cannot be said to be any significant hindrance to free movement. The requirement of a passport is a small inconvenience when considered in relation to the importance of maintaining proper protection of Australian society from those who might wish to enter Australia anonymously for illegal purposes.

Individuals. Visas. Grounds for withholding. Visitors from the Democratic People's Republic of Korea, the Soviet Union. Fretilin members.

On 14 September 1983 the Minister for Immigration and Ethnic Affairs, Mr West, said in part in answer to a question (HR Deb 1983, Vol 132, 751):

> The Government's policy on visitor entry is that, if there is no perceived

threat of terrorism, no perceived threat to the security of Australia, no perceived threat of public disorder, and unless there is some matter of particular concern to the Department of Foreign Affairs and to the Government, we should not, on political grounds, debar visitors from entering Australia.

On 18 November 1981 the Minister for Immigration and Ethnic Affairs, Mr MacPhee, wrote in answer to a question (HR Deb 1981, Vol 125, 3123):

> Refusal of a visitor visa application is only made after careful consideration of all the factors involved and in the interests of the Australian community.
>
> Applications for visas for Democratic People's Republic of Korea delegations have been considered in the context of our overall relationship with the Democratic People's Republic of Korea. In this regard the central factor remains that diplomatic relations have been interrupted for some years. The Government has made it clear to the Democratic People's Republic of Korea the circumstances in which it will consider restoring relations. Meanwhile, proposals for official delegations from the Democratic People's Republic of Korea seeking to visit Australia are considered case by case.
>
> Applications from USSR nationals are, of course, currently considered in the context of the current Government restrictions on contacts with the Soviet Union which were imposed following the Soviet invasion of Afghanistan. In this respect I rely on the advice of the Minister for Foreign Affairs.

On 13 October 1982 the Minister for Foreign Affairs, Mr Street, wrote in part in explanation of the refusal to grant visas to two distinguished scientists from the Soviet Union (Sen Deb 1982, Vol 96, 14126):

> The unacceptability of the Soviet Union's international behaviour, as exemplified by its invasion of Afghanistan and its support for the suppression of the aspirations of the Polish people, undermines the stability and confidence essential to the promotion of international scientific understanding and communication. By firmly opposing such behaviour, Australia hopes to contribute to more stable circumstances in which international cooperation may flourish.

On 13 October 1982 the Minister for Immigration and Ethnic Affairs, Mr Hodges, provided the following written answer to a question concerning the refusal to issue a visa to Mr Jose Ramos Horta, representative of Fretilin at the United Nations (Sen Deb 1982, Vol 96, 1424):

> I can confirm that Mr Ramos Horta applied for a visitor's visa at the Australian Consulate-General in New York. The stated purpose of his visit was to give oral evidence before the Senate Standing Committee on Foreign Affairs and Defence concerning its inquiry into East Timor. Mr Ramos Horta has already provided a written submission.
>
> Mr Ramos Horta is a representative of Fretilin and his visit would have been identified as one by a prominent Fretilin personality. The Government does not recognize Fretilin. It recognizes East Timor as an integral part of Indonesia.
>
> The Government decided therefore that, in accordance with its long-

standing policy on the entry of Fretilin representatives, a visa for Mr Ramos Horta should be denied. He has been refused entry on two previous occasions.

The Government is not prepared to reconsider this matter.

On 27 October 1982 Senator Dame Margaret Guilfoyle, the Minister representing the Minister for Foreign affairs in the Senate, said in part in answer to a question (Sen Deb 1982, Vol 96, 1854):

> Mr Ramos Horta applied at our Consulate-General in New York for a visa to visit Australia. I can confirm that a visa was refused in accordance with long-standing Government policy. Mr Ramos Horta is a representative of Fretilin, which is dedicated to gaining independence for East Timor, which the Australian Government regards as a province of Indonesia.

On 19 October 1982 the Minister for Immigration and Ethnic Affairs, Mr Hodges, provided an identical written answer; See Sen Deb 1982, Vol 96, 1592. On 29, June 1983 the Minister, Mr West, announced that visitors visas were issued to two Fretilin members (Comm Rec 1983).. the Minister said:

> They will be coming as private persons without any special entry conditions being imposed.

Individuals. Refugees. Establishment of Special Humanitarian Program. On 18 November 1981 the Minister for Immigration and Ethnic Affairs, Mr MacPhee, announced the establishment of a Special Humanitarian Program (HR Deb 1981, Vol 125, 3067-3068). Part of his statement is as follows:

> I am pleased to be able to inform the House of a decision taken by the Government to establish a new program for the entry of members of minority groups fleeing substantial discrimination or avoiding significant violation of human rights in their homelands. This program has been developed within the broad philosophy of the Government's refugee policy. It will enable Australia to provide a humanitarian response, outside formal refugee programs, in instances of substantial discrimination or human rights violations against oppressed minorities anywhere in the world by governments irrespective of their political persuasion. The program was foreshadowed by the Government at the time of the last election. Oppressive regimes and governments whose policies have little regard for basic human rights inevitably cause an outflow across national borders of members of minority groups at risk. We are becoming increasingly aware of the plight of such people, whose numbers are increasing also. Often, these displaced persons are unable to satisfy the internationally accepted criteria defining refugees. Yet, their relatives or compatriots in Australia, recognizing the plight of these people, have asked the Government to provide some means of assistance.
>
> The Special Humanitarian Program will focus on the individual members of oppressed minorities. Those accepted will generally be able to demonstrate a personal claim on Australia by virtue of having close relatives settled here, close former ties with us or, for a small number, a strong and well established community here which is well organized and able and willing to provide all necessary settlement support. Those eligible for consideration under the Special Humanitarian Program will generally be

living in temporary asylum outside their own countries, be unable to return there for fear of substantial discrimination and have no comparable claim to another country's settlement resources. In considering who should be eligible for the SHP, the views of the United Nations High Commissioner for Refugees will be taken into account. Needless to say our heads of missions in the countries concerned also will play an important part in the acceptance of persons under the program. Many such people have formerly been debarred from admission to Australia as they are unable to meet either normal migrant selection criteria or the eligibility requirements of existing refugee programs. Whilst our refugee programs and other resettlement commitments must act as something of a brake on our ability to respond to the needs of displaced oppressed minorities we will be able to provide, through the sympathetic consideration that the SHP will permit, places for people formerly unable to come here. The Government would naturally expect that those entering under the SHP would contribute to the development of a socially cohesive, multicultural Australia.

As the program is addressed to quasi-refugees with close relatives or ties in Australia, it will not represent a significant burden to the taxpayer. Sponsors of the successful applicants will undertake to provide all necessary settlement support. Applicants will need also to satisfy normal character and security requirements and medical standards consistent with humanitarian considerations and any legislative requirements.

On 16 March 1982 the Minister for Immigration and Ethnic Affairs, Mr MacPhee, announced the Government's refugee policy following an extensive review. Part of his statement was as follows (HR Deb 1982, Vol 126, 991-996):

> The guiding principles of the review were those embodied in the Government's stated refugee policy of May 1977, in particular that:
>
> Australia fully recognizes its humanitarian commitment and responsibility to admit refugees for resettlement;
>
> The decision to accept refugees must always remain with the Australian Government;
>
> Special assistance will often need to be provided for the resettlement of refugees in Australia.
>
> The purpose of the review was to ensure that Australia's response to refugee situations was appropriate to the needs of the people caught up in those situations. Another important consideration was the need to reassure the Australian community that people being brought to Australia for resettlement as refugees under generous arrangements are indeed refugees.
>
> . . . the Government's primary concern is to maintain the humanitarian focus and integrity of Australia's obligations accepted by our commitment to the United Nations Convention on Refugees. In other words, in order to be humane to those most in need we must apply the definition of refugee carefully and arrange priorities accordingly. In that way we are also fair to others who seek to migrate in the appropriate manner.
>
> The grant of refugee status and the special and generous entitlements that flow from it are means of ensuring that people exposed to or who risk persecution may be offered sanctuary and protection. This is a proper and

humanitarian response from a nation such as Australia where the values of human dignity and compassion are strongly held . . .

The High Commissioner for Refugees estimates the number of displaced persons as being approximately 10 million. A high proportion of these people are not, however, refugees within the accepted definition of that term set out under the United Nations Convention. That definition is as follows:

> A person who owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

The phrases 'is outside the country of his nationality' and 'well founded fear of persecution' constitute the key elements of the definition. As may be readily appreciated there are difficulties in defining absolutely the conditions and circumstances which bring about a situation in which a person may be validly judged as being within the terms of the definition. However common sense and humanity usually point to the salient factors. Thus a threat to life or freedom on account of race, religion, nationality, political opinions or membership of a particular social group is categorically persecution.

Many, perhaps most, people who become caught up in a mass movement can make only slight claims to having suffered persecution. Many people who voluntarily leave their country to take up residence elsewhere are motivated by a variety of different factors — economic reasons, the desire for change, family considerations or other reasons of a personal nature. In some cases the reasons for leaving may also include a dislike or abhorrence of the political systems of ideology operating in their homeland. In some cases people may face some form of discrimination in their daily lives. Motivations to leave are often complex but, unless these motivating factors are accompanied by a well-founded fear of persecution for reasons of race, religion, nationality or membership of a particular social group, or political opinion, refugee status should not apply.

We have a solemn humanitarian obligation to ensure that our limited program places are reserved for the genuine refugees. We must exclude those people whose claims for refugee status are suspect. This is a most difficult task. But it is one that must be carried out if we are to fulfil our undertakings under the United Nations Convention, maintain the Australian community's support for the Government's policies and ensure that persons who should be subject to review under immigration policy are not able to circumvent those policies being accorded refugee status incorrectly.

Against this background, the Government has decided, after consultation with other governments, both those of first asylum countries and of resettlement countries, major community groups within Australia and the United Nations High Commissioner for Refugees, that Australia will:

> Tighten refugee selection criteria and procedures for all programs with the particular objective of excluding from refugee entry those

persons who do not meet the criteria allowed for in the United Nations Convention;

under this revised procedure refugee determination will be made according to the application of these criteria on an individual basis;

despite these changes, persons who cannot meet the refugee criteria may be eligible for entry under special humanitarian programs or migration criteria.

These arrangements will be brought into effect as soon as possible. Selection assessments will be made by Australian officials who will be operating under criteria which is quite consistent with the United Nations Convention definition. These new procedures will replace the former practice of relying on mandate status accorded by UNHCR. While in no way derogating from the helpful role played by UNHCR in assisting us with determinations in the past it is entirely appropriate that Australia should now employ its own procedures.

The decision to do this brings our practice into line with arrangements provided for under the Convention itself. This arrangement will ensure that determinations of status are made responsibly and with compassion. As in the past, our refugee officials will continue to work closely with the High Commissioner for Refugees whose role will continue to be an integral and important element in the development of the Government's refugee policy. Where persons have been classified as refugees, Australia will continue to give priority consideration to those refugees with family in Australia. This again is also in accordance with international practice.

The decisions I have announced today will be of significant benefit to genuine refugees who wish to resettle in Australia. It will mean that Australian resettlement opportunities will be available only to those most in need and whose claims are legitimate. Those not satisfying refugee or special humanitarian criteria must compete for migration to Australia with one million other migrant seekers annually.

I have been dealing primarily with the processing of refugees overseas. The same definition and criteria are used for persons claiming refugee status in Australia and in the application of that policy within Australia similar considerations apply to those I have mentioned. Thus, it should not be easier or harder to be accepted in Australia as a refugee than it is outside Australia and persons who arrive illegally or on visitor's visas ought not to be able to stay permanently in Australia unless they are refugees or otherwise produce the most compelling compassionate reasons. That indeed is the law of Australia agreed upon unanimously by the present Parliament. Just as persons cannot circumvent Australian immigration law and policy outside Australia, they cannot do so inside Australia. People without refugee status or the special humanitarian criteria announced by me in this House on 18 November last cannot gain preference over other applicants for migration. Similarly, persons who come to Australia either illegally or as a temporary entrant cannot stay in preference to others in a similar situation simply because they do not wish to return home. If they were able to do this we would have no control at all over our immigration policy. Indeed, with over a million visitors coming to Australia each year we would have no

policy if every tourist, stowaway or deserter were allowed to stay on some pretext, thereby circumventing migration interviews, health checks and security clearances.

Random settlement by persons not going through immigration procedures overseas could cause enormous dislocation to our labour market and to our internal stability and security. The whole point of our immigration policy is to meet Australia's requirements. For this reason the Government established a Department of Refugee Status Committee to examine all claims in Australia for refugee status. That Committee contains senior officials from all relevant departments and has an observer from the UNHCR. It is swamped with applications, mostly from persons who have only very slim claims to refugee status. That Committee makes recommendations to me and such is its professionalism that I can recall rejecting its advice on only rare occasions . . .

Our immigration policy is non-discriminatory on the grounds of race: our refugee policy is likewise. The refugee criteria are universally applied in order to ensure that the concept of refugee status is not diluted to the ultimate detriment of genuine refugees.

Individuals. Refugees. Rescue of refugees at sea. Resettlement.

On 22 June 1981 the Acting Minister for Immigration and Ethnic Affairs, Senator Durack, announced that Australia had accepted responsibility for the resettlement of about 100 refugees rescued at sea by an Australian naval vessel in waters east of Ho Chi Minh City. He said (Comm Rec 1981, 721):

> The provision of guarantees for refugee groups such as these is an accepted international practice. Under these arrangements the country bearing the flag of the vessel involved offers a guarantee for the resettlement of all refugees in the group not resettled by other governments. This means that countries which may be asked to provide transit facilities will not be left with the problem.

Individuals. Refugees. Definition of "refugee child" in legislation.

On 19 November 1981 the Minister for National Development and Energy, Senator Carrick, introduced the Social Services Amendment Bill 1981 into the Senate (Sen Deb 1981, Vol 92, 2370). He explained the purpose of the Bill:

> The existing legislation defines 'refugee child' in terms of a child granted refugee status by the Australian Government. There are, however, children who are admitted into Australia as refugees who do not have the formal status of refugee granted to them. The Government intends these children to fall within the class of children in respect of whom double orphans' pensions are payable. In addition, there are children admitted into Australia otherwise than as refugees, under special humanitarian programs, whom the Government considers should be regarded as within the class of children in respect of whom double orphans' pensions should be payable. I am sure that honourable senators will share the Government's concern that the double orphans' pensions provisions be extended in respect of those groups of children who come to Australia whose parents are outside Australia or the whereabouts of whose parents are unknown.

Individuals. Refugees. Illegal immigrants distinguished.

On 20 November 1981 the Minister for Immigration and Ethnic Affairs, Mr Macphee, announced to Parliament that criminal charges were being laid against certain persons who had organised a boat of fare-paying passengers who had sought to enter Australia as refugees, and that the passengers concerned were being deported (HR Deb 1981, Vol 125, 2192–2194). He said in part:

> None of the group has any claim on Australia to protection under the United Nations Convention and Protocol relating to the status of refugees. It is established international practice not to grant asylum to a person who has already established close links or residence with another country as all in this group have done. Their situation is no different from that of anyone who, while legally resident in another country, enters Australia illegally. They may well be seeking a better future for themselves and their families, but they do not deserve special consideration over thousands of other people with similar back-grounds who apply to settle legally in Australia each year: nor should they be advantaged over the thousands of genuine refugees from Indo-China and other troubled areas who, unlike this group, have not yet been granted the opportunity to settle permanently in a country of resettlement.

Individuals. Refugees. Persons outside definition of "refugee".

On 9 June 1981 the Minister for Immigration and Ethnic Affairs Mr Macphee, wrote in answer to two questions about Timorese and Lebanese refugees (Sen Deb 1981, Vol 90, 2914-2915, 3014):

> People from East Timor being resettled in Australia are not refugees and are not considered so by the Australian Government. The United Nations Convention definition of a refugee which is used as a guideline in Government decisions on designation requires that a refugee must be outside his/her country and unable or unwilling to return for fear of persecution. Timorese leaving Indonesia have automatic right to Portuguese nationality and are readily accorded this status by the Portuguese authorities on request. As a consequence, they have a country which is willing to accept them. There is also the issue of return to Indonesia. As all Timorese leaving Indonesia do so legally under normal exit arrangements, the possibility of return to Indonesia is always available to them.
>
> Timorese accepted for resettlement in Australia enter under three separate programs: the group of 625 whose admission was agreed between the Australian and Indonesian Governments in 1978, the special humanitarian program for those outside East Timor on or before 30 September 1980, and normal family reunion migration.
>
> None of these groups is able to meet the terms of the internationally accepted refugee definitions, but nevertheless Australia has relaxed normal entry rules for the first two groups and other Timorese programs in recent years in recognition of there humanitarian claims on our resettlement resources.
>
> In referring to the Lebanese in Lebanon as refugees the question misinterprets the situation in Lebanon and the likely status of Lebanese presently displaced in that country. The United Nations Convention on the

Status of Refugees requires that people seeking refugee status be outside their country and be unwilling or unable to return for fear of persecution. People displaced by civil strife and fighting are not necessarily refugees within the meaning of the Convention definition. It is also unlikely that those persons who have left Lebanon recently because of civil conflict could meet the Convention requirements for status.

Individuals. Refugees. Determination of Refugee Status Committee.
The following is an extract from an article published by the Department of Foreign Affairs in the *Australian Foreign Affairs Record* (May 1982, pp. 266–268) by Dr Guy S. Goodwin- Gill, Legal Adviser to the Representative of the United Nations High Commissioner for Refugees in Australia.

Legal protection

With the first direct arrivals of Indochinese by small boat in the Northern Territory in 1976 and succeeding years, Australia recognised that, like so many other countries, it was now becoming a country of first refuge. In 1977, the Minister for Immigration and Ethnic Affairs announced the creation of an inter-departmental committee to consider applications for refugee status by persons in Australia and to make appropriate recommendations. UNHCR was involved in preliminary discussions on procedural guidelines and was accorded observer status on what became known as the Determination of Refugee Status (DORS) Committee. The Committee's first task was to deal with a substantial backlog of Indochinese applications, while at the same time developing its jurisprudence on the interpretation of the refugee definition accepted by Australia on its ratification of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. Attendance at Committee meetings remains a principal function of the UNHCR Legal Adviser (or the Representative, in his absence), as does the giving of advice to prospective applicants, who are informed of their right to contact the UNHCR Office in Sydney.

In the DORS Committee itself, UNHCR is invited to present its views on each individual case, a function which derives from the Office's supervisory role in the implementation of the 1951 Convention and the 1967 Protocol. In its exercise of protection, UNHCR will thus be concerned, (1) to offer an assessment of the applicant's credibility in the light of the claim and of conditions known to exist in his or her country of origin; (2) to provide information on the treatment of similar cases or similar legal points in other jurisdiction; (3) to represent the international community's interest by providing its interpretation of fundamental concepts such as 'well-founded fear' and persecution; and (4) to promote a liberal application of humanitarian instruments (which includes giving the benefit of the doubt in appropriate cases), as well as a generous policy of asylum. In recent months, the Committee has expressed its concern at possible abuse of its procedure by those seeking to remain in Australia at any cost, and also at the delay faced by many applicants, in obtaining a decision. Again, in association with UNHCR, the Committee and its Secretariat within the Department of Immigration and Ethnic Affairs have grappled with both problems and are now developing appropriate solutions. The relationship

between UNHCR and the DORS Committee since its inception has been particularly effective, and the Committee must now be reckoned one of the most satisfactory national instruments of protection operating in any of the States parties to the Convention and Protocol.

Those recommended for refugee status and approved by the Minister will, in the majority of cases, also be accepted for residence in Australia, thus completing an effective and generous link between status and asylum. With the attainment of protection, and the benefits of Australian law on a non-discriminatory basis, the refugee's immediate needs are met. But UNHCR Australia may still be called upon to assist for example, with obtaining family reunion or in securing the issue of a passport which States parties to that instrument undertake to issue to those they accept as refugees. In many cases, however, the process of protection will be completed by assimilation and naturalization in Australia, the new national community, and UNHCR's role is at an end.

For statistics on applications that went before the Committee in the year ended 30 June 1982, see Sen Deb 1982, Vol 96, 1323–1324. For statements on individual applications, see HR Deb 1981, Vol 122, 1444–1445 (Miss Gasinskaya, Soviet citizen); HR Deb 1981, Vol 125, 2727–2728 and Comm Rec 1981, 1419, 1422 and 1446 (Mr Viscreanu, Romanian citizen); Comm Rec 1982, 21 (Mr "Pete Smith", South African citizen); and HR Deb 1982, Vol 130, 2940 and 3070 (Mr Michael Friedrich, citizen of the Federal Republic of Germany).

On 10 September 1981 the Minister for Immigration and Ethnic Affairs, Mr Macphee, wrote in answer to a question (HR Deb 1981, Vol 124, 1265–1267):

The Determination of Refugee Status (DORS) Committee comprises representatives from the Departments of Foreign Affairs, Attorney-General, Immigration and Ethnic Affairs (Chair) and Prime Minister and Cabinet. As membership is by Department, individual representatives will vary from time to time. In each Department there are two or more officers with experience in refugee matters who rotate their attendance at Committee meetings. The Australian representative of the United Nations High Commissioner for Refugees (UNHCR), attends each meeting of the DORS Committee as an observer with the right of comment and advice on cases.

The DORS Committee meets as required by its caseload. This is usually every two or three weeks.

The time for consideration naturally varies from case to case. On average, the Committee would devote thirty minutes to discussion on each case, with an additional period being spent on preparatory research by members.

Individuals. Refugees. Development of international law.

On 16 February 1982 the report of the Senate Standing Committee on Foreign Affairs and Defence entitled "Indochinese Refugee Resettlement - Australia's involvement" was presented to Parliament. The Committee considered briefly the place of the refugee in international law, and observed in part (PP. No. 364/1982, pp. 11–12):

There is an urgent requirement for acceptable international laws to meet the humanitarian and political consequences of massive movements of

refugees. There are inadequacies in existing international laws relating to refugees and legislation needs to be developed to cover, for example, the following:

- large scale influxes of refugees;
- admission of refugees (asylum or temporary refuge);
- voluntary repatriation;
- safe haven zones;
- family reunions;
- durable solutions (integration or resettlement); and
- rescue at sea and piracy.

Other refugee matters requiring consideration and resolution are the distinction between a refugee and a displaced person, the phenomenon of economic refugees and refugee situations arising from armed conflicts and natural disasters. It could be necessary to find a new definition of a refugee; the 1951 Convention relating to the Status of Refugees may be too limiting as it defines a refugee in terms of fear of persecution. New definitions and principles are also needed to ensure that the management of refugee situations is universally acceptable.

The refugee receiving countries of South East Asia are not signatories to the 1951 Convention nor to the 1967 Protocol to it. Therefore, it cannot be assumed that their attitudes to a continuing outflow of refugees will guarantee their concurrence to remaining as countries of first asylum. On occasions they have refused landing rights to refugee boats, turned refugees back at the border, repatriated refugees, admitted them only as illegal immigrants or temporarily on the basis that resettlement elsewhere is guaranteed. The unpredictability of the situation has ramifications for Australia as a continuing target for first asylum, as well as resettlement. This uncertainty emphatically demonstrates Australia's need to participate in international efforts to find solutions and to join in establishing a legal regime which will effectively minimise the severity of refugee situations. Australia has continued to draw international attention to the problems of refugees. It has sought to make existing law more appropriate and its initiative on temporary refuge prompted international efforts to examine ways of overcoming the effects of massive influxes of refugees.

The Committee concludes that the shortcomings in existing international laws relating to the refugees are being demonstrated to Australia by the Indochinese problem. Whether the problem be regional or global it is imperative that Australia continues to participate effectively in international attempts to develop realistic and comprehensive laws to contain and minimise the dramatic impact of massive refugee flows. Most refugee issues present problems for developing countries; Australia's willingness and ability to respond with constructive contributions to solutions have an important bearing on its relations with Third World countries, individually and collectively.

For Australia's comments on the study by Special Rapporteur Prince Sadruddin Aga Khan on human rights and massive exoduses (E/CN.4/1503), see E/CN.4/1983/33, Annex I. See also Australia's statement on the subject made to the 39th

Session of the United Nations Commission on Human Rights held in Geneva in 1983: PP No 398/1983, pp 60-62.

Individuals. Asylum. Diplomatic and territorial asylum.

On 16 December 1981 the Department of Foreign Affairs published the following note in *Backgrounder*, pp 1-2:

> Asylum is the protection that a state grants to an alien, either by allowing him to remain in its territory (territorial asylum) or by giving him protection in a limited number of places under its jurisdiction but outside its territory (extraterritorial asylum). Diplomatic asylum is the most common form of the latter.
>
> There is as yet no internationally agreed definition of asylum; neither is there any universal treaty on the subject, although a number of treaties on asylum have been concluded by states of Latin America. A diplomatic conference was convened in 1976 — by the United Nations — to conclude a convention on territorial asylum, but the first session in Geneva in 1977 did not complete the work of the conference and, because of dissatisfaction with the outcome of the session, the conference was adjourned sine die. An Australian initiative to convene a similar conference on diplomatic asylum came to nothing.
>
> Australian practice is guided by the following working definitions:
>
> - *Extraterritorial asylum* is the protection which a state grants to a person outside its own territory, particularly in its diplomatic missions (diplomatic asylum in the strict sense); in its consulates; aboard state ships in the territorial waters of another state (naval asylum); or on board the aircraft of a state or on its military installations on foreign territory.
> - *Diplomatic asylum* is divided into *temporary protection,* where a person in immediate danger from lawless elements is admitted into diplomatic premises and leaves when the danger is over, and *permanent asylum,* where a person is permanently removed from the jurisdiction of the territorial state which he is in. (This involves readiness to provide permanent shelter in the diplomatic premises if safe conduct cannot be obtained for the person out of the territorial state.)
> - *Territorial asylum* is the protection which a state grants on its territory to a person who comes to seek it. At the time of seeking territorial asylum, the applicant is normally already inside that territory, even if only on a temporary basis.
> - *Refugee status* is the protection granted to a person to whom the 1951 United Nations Convention relating to the Status of Refugees applies — a person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and, because of that fear, is unwilling or unable to return to that country.
> - A *defector* is an asylum applicant who is able and willing to reveal — to another government — intelligence which is of value to that other government. Thus, for example, members of a visiting sporting team who seek asylum are typically not defectors.
>
> In Australian practice, a distinction is made between decisions on

applications for territorial or diplomatic asylum, and decisions on applications for refugee status. While Australia's working definitions of eligibility for territorial asylum and for refugee status are similar, it is to be noted that, while refugees are in effect granted asylum, not all persons granted asylum would necessarily meet the criteria for refugee status. This is because refugee status is governed by an international treaty (to which Australia is a signatory) whereas there is no agreed international instrument governing territorial asylum. Australia considers that it is the sovereign discretion of any state to choose when and in what manner it will grant asylum within its territory.

It should be noted that, by definition, territorial asylum and refugee status can only be granted once the person seeking it comes into the territory of the state granting it.

In May 1982 the Department of Foreign Affairs published an article on "Refugees and international law" in *Australian Foreign Affairs Record (pp. 259–263), part of which is as follows:*

Political asylum

The term 'political asylum' is not a legal one in the sense of its usage in international instruments or even the writings of jurists. It is, rather, symptomatic of the popular conception of asylum being granted primarily to protect persons from political persecution. As has been seen from the foregoing, neither asylum nor refugee status is so limited. From its usage in Australian policy 'political asylum' is understood in Australia as encompassing both territorial and extra-territorial (diplomatic) asylum and is the responsibility of the Minister for Foreign Affairs. The determination of refugee status is the responsiblity of the Minister for Immigration and Ethnic Affairs.

Diplomatic asylum

The concept of diplomatic asylum is an extremely controversial one with few States prepared even to admit that it exists in customary international law. Australia is one of the few that maintains that it does. Oddly enough, there are a large number of international treaties dealing with it, but these are limited to Latin America, where the political instability of successive regimes in various countries was a breeding ground for such a concept. Briefly put, diplomatic asylum is the protection granted by a State to non-nationals coming to seek it in the State's diplomatic premises abroad. The protection, it should be noted, would stem from the inviolability of diplomatic premises (as set out in the Vienna Convention on Diplomatic Relations) rather than on the now outmoded concept of the extra-territoriality of such premises. The protection granted may either be temporary (such as in the case of a person fleeing a mob) or permanent (when the State granting asylum must assume responsibility for permanently removing the asylee from the jurisdiction of the receiving State.

An Australian initiative was launched in the United Nations in 1975 to convene a Conference on Diplomatic Asylum, parallel to that on territorial asylum. However, through a combination of opposition and disinterest, the initiative came to nothing. It must be stressed that, while supporting the

existence of the right of a State to grant diplomatic asylum, Australia regards it as a form of protection which is to be resorted to in only the most serious and clear cases. To date, none of our diplomatic missions has granted diplomatic asylum. Paradoxically, a number of States which argue against the existence of the concept in international law, have in practice granted it in a limited number of serious situations, the most recent being in Chile and Iran.

Individuals. Indigenous populations. ILO Conventions.

On 19 May 1982 the Minister for Foreign Affairs, Mr Street, provided the following written answer (Sen Deb 1982, Vol 94, 2205):

> The question of an international legal regime to protect indigenous populations has been raised on a number of occasions in multilateral fora over recent years. The most significant development has been the adoption by the 38th Session of the United Nations Commission on Human Rights in March 1982 of a proposal of the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to set up a working group to examine the rights of indigenous peoples and to draft a set of standards to protect those rights. This United Nations' initiative followed several international non-Government organisation conferences relating to indigenous peoples. The most notable of these was the Third General Assembly of the World Council for Indigenous Peoples (WCIP) held in Canberra from 27 April to 2 May 1981 which agreed on a charter of rights for indigenous peoples. . . .
>
> The Government's position in support of measures to protect the rights of indigenous peoples, demonstrated specifically by our support for the Commission on Human Rights initiative to set up the working group, remains unequivocal. The Government recognises the special vulnerability of indigenous peoples to violations of fundamental human rights and wishes to see effective international standards developed which deal with the particular needs and aspirations of indigenous peoples in every part of the world. The Government regards close consultation with representatives of indigenous peoples themselves as crucial to the drafting of such standards.

On 13 September 1983 the Minister representing the Minister for Foreign Affairs in the Senate, Senator Evans, said in answer to a question (Sen Deb 1983, Vol 99, 590–591):

> The Australian Government believes that the rights of indigenous populations deserve greater international attention. Australia was instrumental in the establishment of the United Nations working group on indigenous populations in 1982 and has participated, as an active observer, in the group's first two annual sessions. . . .
>
> It goes without saying that indigenous populations in many countries have historically been subject to disposition and dispersal. The drafting of an internationally accepted set of standards to protect indigenous rights, which is the principal task of this working group, should make a major contribution to promoting indigenous welfare on a global basis.

On 25 February 1981 the Minister for Industrial Relations, Mr Peacock, provided the following written answer to a question about progress towards

ratification of ILO Convention No. 107 — Indigenous and Tribal Populations (HR Deb 1981, Vol 121, 219);

> The Queensland Government has not refused to agree to ratification of Convention No. 107.
>
> I am advised that the Premier of Queensland replied to the Prime Minister's letter of 12 April 1976 on the 'ownership of land' aspects of the Convention on 18 May 1977. In that correspondence, the Premier indicated that the position presently obtaining in Queensland accorded with the spirit of the Convention and that the Queensland Government had no objection to the Commonwealth Government proceeding to ratification of the convention.

On 19 May 1982 the Minister for Foreign Affairs, Mr Street, wrote in answer to the question whether the United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities had on 10 September 1980 invited Australia to consider ratifying ILO Convention No 107 (Sen Deb 1982, Vol 94, 2205):

> Yes, pursuant to paragrah III(I) of Sub-Commission resolution 8 (XXXIII). The Government has been examining the provisions of the convention and has not as yet responded formally to the Sub-Commission's request. The Government however continues to have doubts about the convention and considers that it reflects a number of outmoded concepts. For example, the convention's emphasis on 'integration' does not accord with the Government's current policy of recognising the fundamental rights of aboriginals to retain their identity and traditional lifestyle if desired. On this point, we understand that the ILO is looking at the possible need to redefine the objectives of ILO Convention No. 107, replacing the present emphasis on integration by the principle of respect for the indigenous population's identity and wishes. This would be consistent with the Australian Government position in respect of this convention.

On 25 August 1982 the Minister for Employment and Industrial Relations replied to a similar question in substantially identical terms, and added (Sen Deb 1982, Vol 95, 517):

> As things stand, the Government feels that there are other international Conventions to which Australia is already a party, viz. the Convention on the Elimination of All Forms of Racial Discrimination, and the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which better serve the interests of Australian Aboriginals. Moreover, in the United Nations context, Australia has also been active in the field on indigenous peoples affairs. Most recently, at the 38th Session of the United Nations Commission on Human Rights, our delegation firmly supported a decision to set up a Working Group. This Group has been charged with drafting a set of international standards to protect the rights of indigenous peoples. We will following closely the activities of the Working Group.

On 18 November 1981 the Minister for Industrial Relations, Mr Viner, wrote in answer to a question about ILO Convention No 65 — Penal Sanctions (Indigenous Workers), 1939 (HR Deb 1981, Vol 125, 3106-3107):

> Convention No. 65 — Penal Sanctions (Indigenous Workers) 1936, applies to all contracts by which a worker belonging to or assimilated to the

indigenous population of a dependent territory of a Member of the Organisation (ILO) or belonging to or assimilated to the dependent indigenous population of the home territory of a Member of the Organisation, enters the service of any public authority, individual, company or association, whether non-indigenous or indigenous, for remuneration in cash or in any other form whatsoever.

Each State and the Northern Territory has indicated in the following manner on the dates shown that in their view the Aboriginal population of their State or Territory does not constitute a dependent indigenous population for the purposes of International Labour Organisation Convention No. 65 — Penal Sanctions (Indigenous Workers) 1939.

State or Territory	Date	Method
New South Wales	2 August 1977	Letter
Victoria	9 July 1969	Telephone
Queensland	20 June 1977	Letter
South Australia	26 May 1977	Letter
Western Australia	9 October 1979	Letter
Tasmania	13 May 1977	Letter
Northern Territory	26 May 1977	Letter
	3 June 1977	Letter

On 18 August 1982 the Minister for Employment and Industrial Relations wrote in answer to a question about the Convention (Sen Deb 1982, Vol. 95, 235):

> . . . the existence of obligations which might be applicable to Australia under the Convention depends on there being a 'dependent indigenous population' in Australia within the meaning of that term as used in the Convention. A more recent review by the then Department of Industrial Relations has shown that there is agreement in both State and Commonwealth jurisdictions that while Aboriginals are 'indigenous' they do not as a group constitute a 'dependent indigenous population' within the meaning of the Convention as opined by the appropriate supervisory body within the International Labour Organisation.
>
> Given the above, the question of penal sanctions in Australia does not arise.

The 'Definition of Indigenous Populations' comprised Chapter V of the Study of the Problem of Discrimination against Indigenous Populations: Final Report (Supplementary Part) submitted by Special Rapporteur Mr Jose R. Martinez Cobo to the Sub-Commission on Prevention of Discrimination against Indigenous Populations of the United Nations Commission on Human Rights (E/CN.4/Sub.2/1982/2/Add.6(20 June 1982)). Paragraphs that deal with the definitions of Australian Aboriginals are as follows: 41 to 44 (ancestry), 234 (group consciousness). 245 (accepted by the indigenous community), 263 to 271 (legal definitions), 329 (change in status from indigenous to non-indigenous), and 358 to 359 (change in status from non-indigenous to indigenous).

Individuals. Human rights. Establishment of an Australian Human Rights Commission.

On 10 March 1981 the Attorney-General, Senator Durack, presented the Human Rights Commission Bill 1981 to Parliament, and explained the purpose of the Bill as follows (Sen Deb 1981, Vol 88, 422-424):

> The purpose of this Bill is to establish a Commonwealth Human Rights Commission. The Commission will promote the observance of human rights throughout Australia within the limits of Commonwealth power. In co-operation with the States on human rights matters the Commission will assist the Government in discharging its international obligations in the cause of human rights. Our intention to introduce this legislation was foreshadowed in the Government's policy speech prior to the last election. The most recent attempt by this Government to have Parliament approve a human rights commission foundered because of a lack of agreement between the Senate and the other House on what became known as the Simon amendment, and was related to the rights of the child before as well as after birth. The Government has arrived at a formula, included in this Bill, which it believes will be acceptable to both those who voted for and those who voted against the amendments made by the other House. I shall return to this matter in a moment.
>
> Since the Human Rights Commission Bill 1979 was debated in the Senate, several events have transpired which only add to the need for effective human rights machinery in Australia. In August of last year, Australia ratified the International Covenant on Civil and Political Rights. To date 65 countries have become parties to this covenant, many of which have established their own special forms of machinery to promote and protect human rights. The measure now before us, and the Commission that would be established under it, will help Australia to discharge the obligations it has assumed under the covenant.
>
> Last August, as well, the Government established the Human Rights Bureau as an interim measure pending creation of a human rights commission. Recently, the Bureau has begun to receive representations from the public in the form of complaints, requests for assistance, and requests for information in the general field of human rights. The Bureau has also made significant progress in establishing links with non-government organisations in the human rights field. It is apparent, however, that there is a need for more effective machinery to promote human rights in Australia than is available through the Bureau, and it is the object of the Bill to provide this machinery. The Commission will not be a large undertaking. Its emphasis will be on quality. Its annual cost is currently estimated at about $850,000 to which will be added the cost of the Office of the Commissioner for Community Relations — estimated at $350,000 in 1980-81.
>
> The main provisions of the Bill are the same as those in the Bill approved by the Senate in November 1979. As such, they have already been the subject of considerable discussion and debate. I intend in this speech, therefore, to refer to and explain only those changes from the 1979 Bill that are found in the present measure. The only change of significance is that the

charter of the Commission has been extended to three additional international instruments. As with the previous Bill, the International Covenant on Civil and Political Rights will be the primary point of reference for the Commission. However, in response to the concern expressed by many members in both Houses during the debate on the Simon amendment about the rights of both children and handicapped persons, the Commission will also be required to have regard, in areas of Commonwealth responsibility, for the rights of these groups as recognised in three international declarations, each of which has been supported by Australia. The three declarations are the Declaration of the Rights of the Child, 1959; the Declaration of the Rights of the Mentally Retarded, 1971; and the Declaration on the Rights of the Disabled, 1975.

The Declaration of the Rights of the Child recognises that the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth. The declaration calls upon men and women everywhere, on voluntary organisations and on governments to strive for the observance of the rights of the child which it proclaims. The rights include the right to special protection to enable the child to develop fully; the right to enjoy the benefits of social security, including adequate pre-natal and post-natal care; and the rights to education and to protection from cruelty and exploitation.

Similarly, the two declarations concerned with the rights of physically and intellectually handicapped call for national and international action to protect the rights they declare. The rights of the intellectually handicapped include the right to be accorded as far as possible the same rights as other persons, the right to economic security and a decent standard of living; and the right to protection from exploitation, abuse, and degrading treatment. The rights of the physically handicapped include the right to the same civil and political rights as other persons; the right to respect for their human dignity; the right to measures to enable them to become as self-reliant as possible; and the rights to medical and other treatment and to economic and social security and a decent level of living.

The three declarations I have just been describing do not represent commitments in international law, as does the Covenant on Civil and Political Rights. But they express important aspirations, and we are proposing that the Commission should monitor, and report on, the way in which Commonwealth departments and agencies, and activities generally in the Australian Capital Territory, are conforming with them. The three declarations are defined in clause 3 of the Bill, and are included in the definition of 'human rights' in the same clause. There are consequential amendments, chiefly in clause 31, which envisage the declaration of further international instruments as part of the Commission's charter.

During debate on the 1979 Bill and in the ensuing months, comments have been made about certain aspects of the 1979 Bill that are repeated in the present Bill. Because they are apparently the source of some concern, I should like to discuss three of those criticisms. The first is that the scope of the proposed Commission would extend only to laws of the Commonwealth and the Territories — except the Northern Territory — and actions or

procedures under such laws. The Commission's mandate will not extend to State or Northern Territory laws or actions or procedures of State and Northern Territory authorities. However, clause 11 of the Bill provides for a range of co-operative arrangements to be entered into with the States and it is my expectation that this mechanism will be fully used.

The ministerial meeting on human rights will continue to exercise a role at top policy level in considering issues which require consultation between the various levels of government and in promoting generally the cause of human rights in Australia. Accordingly, this Bill manifests the Government's continuing commitment to co-operative federalism, which is already developing well in the human rights field. The second criticism levelled at the 1979 Bill is that the proposed Commission would incorporate the Office of the Commissioner for Community Relations. Non-government organisations in the human rights field have particularly voiced this concern. It is motivated by a fear that the work done by the Commissioner for Community Relations will somehow be interrupted or curtailed. My hope and expectation in fact is quite the opposite. Let me emphasise, as I did when the previous Bill was before the Senate, that the Commissioner for Community Relations will continue to carry out the complaint-handling and conciliation functions associated with administration of the Racial Discrimination Act. Further, the added resources of the Commission will be available to assist as required in the important task of combating racial discrimination, and there will be recourse, as there was not previously, to the Meeting of Ministers on Human Rights on racial discrimination matters.

The Government is confident, therefore, that establishing the Commission will not make less effective the role of the Commissioner for Community Relations in dealing with complaints of racial discrimination. Thirdly, there have been criticisms that the Human Rights Commission is being given inadequate powers — that it has no machinery for enforcement of its findings. That criticism represents a misunderstanding of the essential purpose of the Commission. The purpose of the Commission is to promote discussion and understanding of human rights in the community generally and to recommend to the Government and to Parliament changes in law or practice required to bring that law and practice into line with human rights as defined by the International Covenant or other human rights instruments. For its job, the Commission has been given adequate powers to obtain papers, to call witnesses, to conduct hearings and to make reports. A survey of institutions with similar functions in Australia and overseas shows that the Commission is as well, or better, endowed with powers than other bodies having similar functions.

What the critics of the Commission suggest is that it should have some kind of court-like powers of enforcement. In the view of the Government, this may be a possible step for the future, but it is not the next step, which is the establishment of the Commission. It is only when the Parliament has laid down laws relating to human rights in a particular area — for example relating to racial discrimination — that the normal law enforcement machinery should be considered. Even there, the clear cut and authoritative decisions of the courts may not be the correct way to proceed, at any rate in

the early stages of the operation of the law. The promotion of human rights in this country will be achieved more through education, through finding new balances of interests and through conciliation than through firm measures of enforcement. In closing, I should like to refer to the final paragraph of my second reading speech for the 1979 Bill. The thoughts and hopes expressed are as current and important today as they were then. I said:

> Human rights are about the protection of individuals. I believe, and the Government believes, that in an area of social change in which governments exercise wide powers and corporations and large institutions greatly influence the lives of individuals, it is important to have an agency that is active in the protection and promotion of the rights of individuals. We see in the world around us too many occasions where the rights of individuals are cruelly violated. The purpose of the Human Rights Commission, and of the machinery associated with it, is to help Australia maintain its excellent record in the protection of human rights, and progressively to develop a better and more comprehensive recognition and observance of the rights of every individual in our community, regardless of financial standing and whatever his or her race, sex, religion or status.
>
> I commend the Bill to the Senate.

The Bill became the Human Rights Commission Act 1981 (Act No 24 of 1981) and commenced on 10 December 1981: Commonwealth of Australia Gazette No G49, p 2.

In its first Report, presented to Parliament on 16 December 1982, the Human Rights Commission considered the nature of human rights, as follows (PP No 443/1982, pp 1-3):

> For the Commission, human rights are relatively well defined. They are the rights and freedoms described in the four international human rights instruments annexed as schedules to the Human Rights Commission Act 1981.[1] They cover also the rights enshrined in Part II of the Racial Discrimination Act 1975,[2] which in its turn is based on the International Convention on the Elimination of All Forms of Racial Discrimination.
>
> The first of the international human rights instruments annexed to the Human Rights Commission Act, the International Covenant on Civil and Political Rights (ICCPR), involves the Commission in a broad range of civil and political rights. These are set out in Parts I, II and II of the ICCPR and include the rights of all people to:
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> - privacy;
> - marriage and family;
> - their own language, culture and religion;
> - participation in public affairs;
> - freedom of expression, movement, association and assembly;
> - protection of their inherent right to life;
> - liberty and security of person

1. No. 24 of 1981.
2. No. 52 of 1975 as amended.

- freedom from degrading treatment or punishment; and
- equal treatment with others under the law.

Under the second human rights instrument annexed to the Act, the Declaration of the Rights of the Child, the Commission is concerned with the rights of children. The Declaration proclaims that all children have a right to:

- a name and nationality;
- opportunities to develop fully in conditions of freedom and dignity;
- adequate care, affection and security, including pre-natal and post-natal care;
- education;
- special treatment, education and care if handicapped; and
- protection against cruelty and neglect.

The third instrument annexed to the Act is the Declaration on the Rights of Mentally Retarded Persons. The Declaration proclaims that all intellectually disadvantaged people have a right to:

- proper medical care and therapy;
- economic security;
- education, training and work and trade union membership;
- a qualified guardian; and
- review of procedures which may deny them these rights.

The final international human rights instrument annexed to the Act is the Declaration on the Rights of Disabled Persons. The Declaration proclaims that all disabled persons have a right to:

- respect;
- family and social life;
- economic security;
- education, training, employment and trade union membership; and
- protection from discriminatory treatment.

Under the Racial Discrimination Act, it is made unlawful to discriminate on grounds of race. Race is defined as including colour, descent and national or ethnic origin. Part II of the Act makes it unlawful to discriminate on grounds of race in:

- doing any act which involves such discrimination;
- refusing access to places and facilities;
- transactions in land or providing accommodation;
- refusing to provide goods and services;
- restricting entry to trade unions;
- employing, or dismissing a person;
- public advertisements; and
- inciting the doing of an unlawful act.

While the Commission thus has a fairly clearly defined, if somewhat diffuse, group of rights and freedoms with which to work, it operates in a much wider field. Human rights nowadays range across all concerns — from the rights of the unborn child through rights to employment, education, welfare and the rights of the aged. Thus the Commission is at work in a complex, changing, kaleidoscope field. Its task is to clarify for the Government any particular human rights issues related to its charter which it

believes requires some change in law or practice. These issues, once identified, will be forthrightly exposed to the Government and, pursuant to section 30 of the Human Rights Commission Act, to the Parliament. Similarly, it will bring to the attention of the Government and Parliament, through its reports on the administration of the Racial Discrimination Act, situations where unlawful racial discrimination has been identified, and its observations on those situations.

Human rights are a subject of continuing debate. In many cases, they relate to matters of political sensitivity and affect the fundamental rights and liberties of individuals and entrenched interests. The Commission is accordingly always likely to be involved in some form of controversy. Accepting a particular human right as a basis for action is likely to require action, or a change in a pattern of action, by a holder of power — governmental or proprietary. As such, claims of human rights tend to include some challenge to existing arrangements and to evoke resistance. The position is exacerbated by the fact that it is usually the less privileged — the economically weak, those suffering from disabilities and the generally unorganised members of the community — who most require recognition and protection of their rights.

This particular aspect of human rights action is common to all societies, including Australia. Australian society is probably more willing, and better geared than most, to increase the enjoyment of human rights by the less influential. However, the protection of human rights in Australia involves problems peculiar to us which need to be understood if effective progress is to be made in the improvement of human rights.

The peculiar problems are:

- a federal constitution which lacks entrenched rights;
- the existence of eight sovereign political entities; and
- the interrelationship of the two Houses of Federal Parliament.

Each of these means that the promotion of human rights has dimensions of complexity not existing in many other countries. It is partly because of these added dimensions of difficulty that the Commission has an important role. Its reports to the Government proposing changes in law or practice will be framed having in mind the fact that Australian has no Bill of Rights; the existence of many governments with plenary powers whose approach to human rights may not always be the same; and the undoubted difficulty of obtaining agreement to legislation embodying human rights proposals. Consistent with its statutory charter, the Commission sees itself as a moderator in the process of finding acceptable and viable options that would improve the observance of human rights.

The International and Local Setting

Though international concern with human rights is by no means a mid twentieth century innovation, there is no doubt that since the Second World War, there has been a growing impetus towards their recognition and enforcement in international and domestic law. Looking back, three stages in this process can now be recognised. The first was the adoption by the United Nations General Assembly, in December 1948, of the Universal

Declaration of Human Rights. The Universal Declaration did not create international law on human rights binding nation States; rather, it was a general declaration defining the human rights which ought to be respected. It was a goal for nations to achieve.

The second stage in this process of the recognition of human rights in international law was the making of major Covenants on human rights. Covenants are international agreements of an especially solemn kind which are binding on the countries that ratify them. The two Covenants associated with the Universal Declaration are the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (ICCPR), and with the Optional Protocol to the ICCPR they form the International Bill of Rights. The two Covenants were adopted by the General Assembly of the United Nations in December 1966 and became operative in 1976. The ICCPR, which is annexed to the Human Rights Commission Act, did not come into force until 1976 when the required number of thirty-five ratifications or acceptances was obtained. Australia ratified this Convention in 1980. Together with the three Declarations referred to earlier, the Convention provides the norms towards which the Human Rights Commission seeks to adjust and modify Australian laws and practices.

The other principal part of the Commission's charter is another international instrument, that adopted by the General Assembly of the United Nations on 21 December 1965. It is the International Convention on the Elimination of All Forms of Racial Discrimination, which ultimately came into force in January 1969, although it was not ratified by Australia so as to bind this country until 1975. It is annexed to the Racial Discrimination Act, which is also administered by the Commission.

The third stage of this process is the establishment of domestic measures and machinery for the implementation of the instruments. The *Racial Discrimination Act* 1975 and the *Human Rights Commission Act* 1981 are measures associated with the implementation of Australia's obligations in international law in respect of the recognition of human rights.

Individuals. Human rights. Right to development.

On 8 December 1983 the Minister for Foreign Affairs, Mr Hayden, provided the following written answer to a question about international arbitration for individuals and groups alleging violation of human rights by their national officials and others (HR Deb 1983, Vol 133, 2360):

> The Government is not aware of any proposals for international arbitration of human rights complaints by groups or individuals. The European Convention on Human Rights does however provide a form of arbitration for individual claims, although this has no effect on countries not party to that Convention. Both the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination contain provisions (which I understand have never been invoked) for the establishment of ad hoc 'Conciliation Commissions' which apply as between states but do not offer recourse to individuals or groups directly.

> There are procedures available to individuals and groups to pursue human rights complaints through international channels which do not involve arbitrtion. For example there are the mechanisms established under the Optional Protocol to the International Covenant on Civil and Political Rights, the provisions of Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination and the confidential 'communications' procedures operating within the United Nations Commission on Human Rights.
>
> The Government strongly supports the principle that states should observe conscientiously their international human rights obligations. Against this background, the Government is currently reviewing Australia's position with regard to the Optional Protocol to the ICCPR and the Article 14 procedures under the International Convention on the Elimination of All Forms of Racial Discrimination.

For the previous Government's attitude to the Optional Protocol and Article 14, see Sen Deb 1982, Vol 94, 172-173, and 1321.

Australia's report to the United Nations Economic and Social Council on the measures it had adopted and the progress in achieving, progressively, observance of the rights recognised in articles 10 to 12 of part III of the International Covenant on Economic, Social and Cultural Rights is contained in E/1980/6/Add.22 (28 January 1981).

Australia's initial report to the Human Rights Committee submitted under Article 40 of the International Covenant on Civil and Political Rights is contained in CCPR/C/14/Add.1 (11 December 1981). The report was considered by the Committee on 25, 26 and 28 October 1982 (CCPR/CSR.401-403, 407-408). Consideration of Australia's report was summarised in the Report of the Human Rights Committee to the 38th Session of the United Nations General Assembly (GAOR., 38th Session, Supplement No 40 (A/38/40) (1983), paras, 135 to 177.

Individuals. Human rights. Right to development.

On 8 December 1983 the report of the Australian Delegation to the 39th Session of the United Nations Commission on Human Rights held in Geneva in 1983 was presented to Parliament (PP No. 398/1983). Australia's statement on the right to development (pp 33-35) was partly as follows:

> The Australian delegation has placed on record at earlier sessions of the Commission its appreciation of the genuine concerns which have motivated the emergence of the right to development as one of the focal points of our combined efforts to enhance the enjoyment of human rights in every corner of the planet. There can be no question that the overriding aim of development, as of our work in the field of human rights, is to ensure to every living person a life of freedom and dignity, based upon physical well-being and freedom from want. Nor can there be any question that the resources and skills available to a state in accordance with its level of development influence in important ways its capacity to implement effectively and comprehensively its obligations in respect of human rights.
>
> As far as Australia is concerned, we are working for changes in the international economic environment which will promote development and

allow developing countries greater scope to improve the lives of their citizens. In so doing we are acting in accordance with our obligations under Article 11 of the Covenant on Economic, Social and Cultural Rights, which in relation to the rights of everyone to an adequate standard of living provides that:

> ". . . States Parties will take appropriate steps to ensure realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent."

We recognise that the capacity of a state to implement certain rights, and not only economic and social rights, may be inhibited by a lack of development. But it is important to note that the basic obligations of states with regard to human rights are not in themselves qualified by levels or stages of development. All of us, as sovereign and equal members of the United Nations, are bound by the same obligations under the Charter and, in many cases, by specific international human rights instruments as well. These obligations constitute the foundation of our work in this body, and they will not be altered by the present efforts we are making to bring a broader perspective to and to expand our understanding of the inter-relationship between human rights and development. Nor in our view, will that relationship be illuminated if our discussions are confined merely to restating the positions we have taken on structural and technical issues of international economic development in other, more appropriate, United Nations forums.

Two years ago, in recognition of the fact that there was a need to examine the question of the right to development in more detail than is possible in the regrettably hurried proceedings of the annual sessions of the Commission on Human Rights, we decided to establish a Working Group of fifteen governmental experts to examine the scope and content of the right to development. We have before us at this session the second report of that Working Group, contained in document E/CN.4/1983/11. I should like to express the strong support of the Australian Delegation for the endeavours of the Working Group and our appreciation for the manner in which it has sought to implement its demanding mandate. The current report, notably that part of it contained in Annex IV, demonstrates clearly the dimensions of the task which has been entrusted to the Working Group, and the distance which may yet need to be traversed before we can find and codify a consensus on the scope and content of the right to development, and its implications for states.

Such a consensus, Mr Chairman, is crucial. The interpretation and implementation of human rights standards needs to allow for the very great diversity of cultures and political systems in the world, as well as the differences which exist between countries in their various stages of development. It depends for its effectiveness upon the free acceptance of common standards and mutual responsibilities. Without such acceptance, the articulation of new rights would be merely rhetorical and might serve only to undermine the framework of universally accepted human rights standards which has been established over many years, largely through the work of this Commission.

A consensus is also necessary if we are to maintain and strengthen what is perhaps the unique feature of the work of the United Nations in the field of human rights. This lies in the capacity to transcend, in certain respects, the traditional limitations of state-to-state relations and to address humanitarian problems at the most basic level, as they affect individuals. The use and development of that capacity calls for great sensitivity and, more especially, for a long view both of the purposes of the United Nations and of the interests of our respective states. It implies a degree of international co-operation and trust which recalls us to the ideals expressed in the Charter. However frequently these ideals may be neglected or subordinated to particular political objectives, they remain at the core of our work for human rights, predictated as it is upon our common humanity and the equal intrinsic value of every human being.

It is an awareness of this fact, as much as of any conceptual difficulty, which gives my delegation reason for pause when we hear the right to development referred to as a collective right or a right of peoples. Insofar as we define our objectives in collective terms, we must ensure that the fundamental rights of individuals are not thereby submerged or overridden. The ultimate purpose of development must be the well-being of every individual; and a right to development as a human right can only attach to the individual.

This is not to say that the right to development may not have certain collective aspects. In common with some other human rights, it may well be that it can be best enjoyed and its exercise best guaranteed by joint or collective action. But this should not obscure the fact that it is individuals who shall be the possessors and beneficiaries of any human right. In particular, any suggestion that a human right could be possessed or exercised by States would in the view of my delegation be nonsensical.

It is generally accepted that all human rights are inter-dependent and indivisible. We are convinced that the right to development can continue to be a most useful stimulus in our consideration of the best means of ensuring respect for human rights. We believe that, as eventually defined, it may well find a proper place amongst the human rights standards accepted by United Nations members. In that sense, it could be exercised and implemented on the same basis as all other human rights. As with those rights, its exercise could not be used to justify the denial of other rights or categories of rights.

Individuals. Human rights. Prisoners.

On 30 November 1983 the Attorney-General, Senator Evans, provided the following written answer to a question concerning the Convention on the Transfer of Sentenced Persons (Sen Deb 1983, Vol 101, 3078):

> Australia would be prepared to give positive consideration to the question of accession to the convention when it enters into force. However, it would first be necessary for agreement to be reached with the Australian States, because in Australia the prison system is in the hands of the States rather than the Federal Government. The absence of federal prisons in Australia means that repatriated prisoners would have to be housed in State prisons,

and foreigners currently imprisoned in State prisons would become entitled to apply for transfers out of Australia under the terms of the convention. The Attorney-General in his answer to a question without notice from Senator Kilgariff on 6 October 1983 (see page 1236 of the Senate *Hansard*) commented on the present position as regards consultations with the States on this matter.

Subject to the successful completion of consultations with the States, Australia would be prepared to consider entering into prisoner transfer agreements, either bilateral or multilateral, with countries in which Australian citizens are imprisoned. It may turn out to be true that the best way of doing this with countries which find the terms of the Council of Europe Convention acceptable would be to encourage their accession to it, when once Australia had also decided that it should accede to it.

For an earlier written answer on the civil disabilities of prisoners, see Sen Deb 1981, Vol 89, 29 April 1981, 1531. On 6 May 1981 Senator Dame Margaret Guilfoyle, the Minister representing the Minister for Foreign Affairs in the Senate, said in answer to a question (Sen Deb 1981, Vol 89, 1648-1649):

The Government has noted Press reports of an Amnesty International report containing allegations of torture of political prisoners in Iraq. The Government views with concern such allegations which, if substantiated, would represent violations of obligations under several articles of the International Covenant on Civil and Political Rights.

Individuals. Human rights. Children. United Nations Declaration on the Rights of the Child.

On 18 August 1982 the Attorney-General, Senator Durack, wrote in part in answer to a question (Sen Deb 1982, Vol 95, 253):

The United Nations Declaration on the Rights of the Child was proclaimed by the General Assembly on 20 November 1959 (resolution 1386(XIV)). Australia voted in favour of the resolution.

On 27 November 1981 he wrote in answer to an earlier question on the Declaration (Sen Deb 1981, Vol 92, 2802):

The United Nations Declaration on the Rights of the Child, while not a binding international instrument, represents a standard against which actions can be measured, and is an important statement of general principles. Australia recognizes these principles.

Individuals. Human rights. Religious belief. United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief.

On 9 November 1981 Australia's representative on the Third Committee of the General Assembly, Ms Wells, is reported as having said (A/C.3/36/SR.43, 13):

78. *Miss WELLS* (Australia), explaining her delegation's position, said that Australia had been pleased to join in the adoption by consensus of the draft declaration contained in document A/C.3/36/L.45. It unreservedly upheld the principles of the declaration in all the legislation and practices applied in the various jurisdictions of the country, and it felt that the declaration just adopted came within the context of the obligations imposed by article 18 of the International Covenant on Civil and Political Rights.

> 79. Australia was a country of Christian origin, a fact reflected in certain observances, such as the observance of Sunday as a day of rest. However, the rights of all those who practised any other religion or held non-Christian beliefs were equally respected.

On 10 March 1982 the Minister for Foreign Affairs, Mr Street, wrote in answer to a question (HR Deb 1982, Vol 126, 849-850):

> At the 36th Session of the United Nations General Assembly (UNGA 36), Australia co-sponsored Resolution36/55 by which the draft Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief was adopted without vote.

And asked whether Australia had proposed the insertion of a clause guaranteeing freedom from religious belief as well as freedom of religion, he wrote (ibid):

> No, since the question did not arise in these terms in the course of negotiations in relation to the Declaration. Several delegations were, however, insistent on the inclusion of appropriate wording to protect those with atheist views before agreeing to adopt the draft Declaration at UNGA 36. Article One of the draft Declaration thus extends 'the right to freedom of thought, conscience and religion' of every person to 'freedom to have a religion or whatever belief of his choice'. The Government therefore considers that the Declaration provides adequate protection for those who hold beliefs of the kind referred to in the question, as well as those who hold religious beliefs.

Individuals. Human rights. Observance and violations of human rights. Domestic jurisdiction.

On 17 March 1982 the Minister for Foreign Affairs, Mr Street, provided the following written answer to a question asking whether it was 'an inflexible rule of Government never to protest about apparent human rights violations in overseas countries' (Sen Deb 1982, Vol 93, 918-919):

> No, the Government does not of course apply an inflexible rule. Australia has made representations concerning human rights to a variety of countries across the broad political and geographical spectrum and will continue to do so should the circumstances justify such approaches. Recent subjects for such representations include the situation of Baha'is in Iran and human rights violations under martial law in Poland. Australia's commitment to upholding and promoting human rights, both in multilateral fora and through direct bilateral representations to countries involved, is unshakable.
>
> As there is no such inflexible 'rule', the question of exceptions does not arise. I should mention, however, that some factors influencing the Government's decision to make representations include the nature and gravity of alleged violations involved, the status of evidence introduced to establish the validity of the allegations and an assessment of the likely effectiveness of the representations (and the related concern about possible counterproductive results). Domestic concern expressed in Australia about the human rights violations in individual countries is naturally also a factor which the Government takes into account in making decisions whether or not to make representations. In short, Australia's approach to human rights is neither arbitary nor capricious.

At the 39th Session of the United Nations Commission on Human Rights held in Geneva in 1983, Australia's representative, Mr Hutton, said on the subject of human rights violations throughout the world (PP No 398/1983, pp 50-51):

> Australia does not take the view that the protection of human rights can be divorced or viewed in isolation from the conditions prevailing in any country, nor from the constraints, in terms of resources, infrastructure and personnel, under which a government may unavoidably be operating. But such constraints do not qualify the *obligations* to which all governments are subject with regard to the protection of human rights. These remain paramount; and governments should be judged, and should judge themselves, by the determination with which they pursue the full observance of those obligations.
>
> Because governments are the principal bearers of the duties which derive from human rights, we cannot deal with the question of violation of human rights without, where necessary, examining the activities of governments. No government is likely to welcome the exposure to external security and the criticism of activities taking place within its jurisdiction which may be prejudicial to respect for human rights, and for which it may be partly or wholly responsible. It is all too easy, when faced with the prospect of such exposure, to seek to invalidate or frustrate the efforts of the international community by procedural or other means. It is also not unusual, although a good deal less frequent than it used to be, to hear it said that United Nations examination of the situation of human rights within a particular state is precluded by article 2(7) of the Charter. Australia has *never* accepted that that argument has validity in respect of human rights. May I merely note, further to this point, that the voting record on resolutions adopted by the General Assembly and other U.N. bodies over recent years demonstrates clearly that few, if indeed any, of the countries represented in this body can claim to have maintained consistently that serious violations of human rights taking place within national jurisdiction are *not* a matter for consideration and action by appropriate international bodies.
>
> On the contrary, under Articles 55 and 56 of the Charter our nations share a responsibility to take joint and separate action in order to promote the universal observance of human rights and fundamental freedoms. In exercising this solemn responsibility, the Australian delegation places particular importance upon preparing action which we take in the Commissioin in such a manner that it can have the best chance of having a positive and concrete humanitarian impact. Any question involving the violation of human rights is sensitive for those under whose jurisdiction it arises. Where attention to such violations is accompanied by statements which are clearly political in nature its effect can be undermined and even negated. In the same light, a self-righteous approach, or one which devotes itself to enlarging upon the real or imagined achievements of certain countries does not help to promote the atmosphere of mutual responsibility and co-operation in which the realities surrounding violations of human rights can be acknowledged and dealt with. There are other forums in the UN in which political and propaganda objectives can be pursued. At the Commission on Human Rights we should pursue two objectives: firstly, to

strengthen the internationally-accepted framework for protection and promotion of human rights which provides the essential foundation for our work; and, secondly, to enhance the effectiveness in humanitarian terms of our efforts to remedy the situation of those whose rights are denied them.

Individuals. Human rights. Violations. Soviet Union. Helsinki Accords.

On 14 May 1981 the Minister for Foreign Affairs, Mr Street, wrote in answer to a question (HR Deb 1981, Vol 122, 2506):

> Australia is not a party to the Helsinki Final Accords. Nevertheless we have in this case and others expressed our abhorrence of the denial of fundamental civil and political rights as officially practised in many parts of the world. The Government has conveyed these views officially to the Soviet authorities on many occasions and has called on them to abide by the human rights principles embodied in United Nations instruments and the 1975 Helsinki Final Accords.

On 25 August 1983 the Senate passed the following motion (Sen Deb 1983, Vol 99, 264):

> That the Senate requests the Australian Government to convey to the Government of the USSR its deep concern at the repeated harassment of the 'Ukrainian Public Group to Promote the Implementation of the Helsinki Accords'.

The Attorney-General, Senator Evans, said after expressing the Government's support for the motion (ibid 267):

> The Australian Embassy in Moscow has instructions to monitor closely developments in the human rights area and to keep the Government informed on a regular basis. It is an unfortunate fact that the provisions of the Soviet penal code, in particular those relating to so-called anti-Soviet agitation and propaganda, are formulated in such a way as to allow the conviction and sentencing of individuals such as those participating in the Helsinki watch groups. Official representations on behalf of such individuals or groups thus invariably are met with the argument, that Senator Lajovic mentioned, that their treatment is in accordance with Soviet law, that it is an internal affair of the Soviet Union and that Australia has no standing in the matter. Together with other Western nations, however, Australia will continue to urge the Soviet Union to abide by the human rights principles embodied in the United Nations Charter and the Helsinki Final Act. If information coming to our attention indicates that further action on our part may be warranted, we will give very careful consideration to what steps might be usefully taken in that respect.

Individuals. Human rights. Violations. Iran.

On 24 August 1983 the Minister for Foreign Affairs, Mr Hayden, provided the following written answer, in part, to a question about human rights violations in Iran (Sen Deb 1983, Vol 99, 217-218):

> The Australian Government has on several occasions made known to the Iranian authorities its concern at the lack of respect for human rights in Iran. The Government has made unilateral approaches to Iranian officials both in Canberra and Tehran. It has taken part in joint action with other concerned missions in Tehran. The government has also been active in the appropriate

international fora, such as the United Nations Commission on Human Rights, to register its concern over human rights in Iran. In all cases where other countries fail to respect human rights, the Government will continue to take appropriate action in all these fields as circumstances warrant.