IX. Individuals

Human Rights—Status and Functioning of the United Nations Human Rights System

The following is the text of the speech made by the Australian Delegation during discussion of the above subjects, and in particular the implementation of the Vienna Declaration issued by the World Conference on Human Rights in 1993 (see *Aust YBIL* 1994, vol 15, p 528), at the 50th Session of the UN Human Rights Commission on 9 February 1994:

> This year, the debate under the joint items 15 and 16 addressing the status of the international covenants and the effective functioning of the treaty system, is especially relevant.
>
> The Vienna Declaration and program of action included important recommendations aimed at speeding up ratification of the major human rights instruments and making the treaty system more effective.
>
> It is now for this Commission and the General Assembly, in concert with the Human Rights Centre, to implement those recommendations.
>
> The World Conference also had before it the interim report of the Independent Expert, Professor Philip Alston, on the long-term effectiveness of the human rights treaty system. Professor Alston's interim report provides a comprehensive overview of the short falls of the treaty system and suggests an achievable strategy to overhaul the system.
>
> Many of Alston's recommendations bear directly on the implementation of the recommendations of the World Conference.
>
> Mr Chairman
>
> The goal of universal adherence to the major human rights instruments, and the importance of the treaty bodies as forums for frank, non-confrontational and constructive dialogue between States parties and the UN human rights machinery are well established.
>
> But it is also true that the treaty system today places substantial reporting burdens on States parties and escalating demands on the finite servicing resources of the Centre for Human Rights. For a middle ranking industrial nation like Australia, fulfilling the reporting obligations under the various human rights instruments represents a major undertaking. For smaller nations the task is correspondingly greater.
>
> Mr Chairman
>
> Australia endorses the conclusion of the Independent Expert in his interim report that "the regime has reached a critical crossroads".
>
> Alston's interim report addresses universality; the role of the treaty system; the high level of overdue reports; duplication in reporting obligations; and means of reducing the reporting burden on States. The final report, expected later this year, will address more substantively the role of advisory services and

public information, and the more radical long-term possibility of reducing the number of monitoring committees.

Soon after this Commission ends, the Third Committee Working Group on Human Rights is scheduled to begin work on part two of its mandate—to "consider other aspects of the implementation of the Vienna Declaration and Program of Action as set out in paragraphs 17 and 18 of Part II of the Declaration".

Paragraph 17 calls, in part, for improved coordination, efficiency and effectiveness of the United Nations human rights organs. The Alston report will provide a sound basis for discussion of this question in the Working Group.

In the meantime, we commend to this Commission the following elements of the interim report as a basis for beginning intergovernmental discussion of a comprehensive strategy to improve the effectiveness of the treaty system.

The first element is the elaboration of a program to achieve universal ratification of the major human rights instruments through:

- identification of the six core treaties (the two Covenants, CEDAW, CERD, CAT and CROC) as a foundation stone of the human rights program,
- stressing, in particular, the desirability of speedy universal ratification of the two Covenants, and
- setting the year 2000 as a target date for universality.

In addressing the second of these points, special attention should be paid to the specific needs and problems of member States with a population of less than two million that have not yet ratified either Covenant.

A second issue is the need to highlight the essentially catalytic and non-confrontational role of the treaty bodies. The primary role in the reporting process belongs to relevant national actors and, ideally, the main role of the treaty bodies should be to monitor domestic monitors. To that end the participation of NGOs and national institutions in the preparation of reports, and the dissemination nationally of completed reports, should be encouraged.

A third issue that needs urgently to be addressed is the high level of overdue reports—over one thousand—that threatens the credibility of the whole treaty system. One way to address the problem of overdue reports is the provision of advisory services and technical assistance to States parties whose reports are well overdue. Another strategy, already adopted in some Committees, and which Australia warmly welcomes, is for Committees to examine the situation in States parties even in the absence of reports.

A fourth area where significant improvements in the treaty system could be achieved is through reducing the duplication of reporting required under the different instruments (including the ILO Conventions) and generally reducing the reporting burden on member States This could be achieved in a number of ways, including by:

- encouraging States to identify where cross-referencing can be used in report writing,
- designating specific national administrative units to coordinate reports to all treaty bodies,
- coordination between the treaty bodies and the ILO to identify overlap between respective instruments and conventions, and

- encouraging Governments and treaty bodies to consider the feasibility of "global" reports and replacing comprehensive periodic reports with specifically tailored reports and thematic rather than article by article reports.

Mr Chairman

Both the treaty bodies and States parties have a responsibility to ensure the reporting process produces comprehensive, frank and relevant reports that are not too burdensome to prepare, are capable of sustaining expert scrutiny, and yet are accessible to the interested public.

Implementation of the proposals outlined above can significantly advance that goal. In the meantime, Committees themselves can contribute to improving the reporting process with some simple improvements in their working methods.

The procedures of the treaty bodies are broadly similar. Yet sometimes the practices and terminology of the Committees are different—and so, potentially confusing. The adoption by all Committees of uniform practices and standard terminology would make the reporting process more transparent and less complex.

Another difficulty for States is the time provided by Committees to prepare full and accurate answers to questions. Sufficient advance notice of questions would contribute to much more effective dialogue. It would also reinforce the underlying philosophy of constructive and non-confrontational dialogue between States parties and the monitoring Committees.

Mr Chairman

The aim of the treaty system should be a process that enables both the international community and the citizens of States parties to monitor effectively the implementation by Governments of their substantive obligations under the major human rights instruments.

In striving to attain that goal, Australia reiterates the concern expressed by the Independent Expert that:

> "Care must be taken to ensure that the integrity of the system, and particularly its ability to safeguard human rights, are not sacrificed to illusory notions of streamlining efficiency."

International Covenant on Civil and Political Rights—Application and Denunciation, and the Work of the Human Rights Committee

During 1994, there was extensive political attention given in Australia to the above Covenant and its effects. In particular, three questions and answers on notice in the Parliament related to the Covenant. The first related to the work of the Human Rights Committee established under the Covenant in handling communications from Australia (House of Representatives, *Debates*, 30 June 1994, p 2568):

> Mr Melham asked the Minister representing the Minister for Foreign Affairs, upon notice, on 1 June 1994:
>
> Did the Human Rights Committee bring to the Government's attention communications from individuals subject to Australian jurisdiction who claim to be victims of a violation by Australia of any of the rights set forth in the International Covenant on Civil and Political Rights; if so, (a) on what dates, (b)

which provision of the Covenant is Australia alleged to be violating and (c) which laws in Australia purport to implement the relevant provisions of the Covenant.

Mr Bilney—The Minister for Foreign Affairs has provided the following answer to the honourable member's question:

The Australian Government has been officially notified of nine complaints under the First Optional Protocol to the International Covenant on Civil and Political Rights.

(a) The nine communications were transmitted to the Australian Government on the following dates:

14 May 1992	7 June 1993
22 September 1992	29 November 1993
29 April 1993	3 December 1993
3 May 1993	14 May 1993
14 May 1993	

(b) Of the nine communications, three have been declared inadmissible by the United Nations Human Rights Committee without reference to the Australian Government. Of the six remaining communications, three concern the criminal justice system, one is in the area of family law, one deals with the treatment of refugee applicants and the final complaint concerns the Tasmanian Criminal Code which makes consensual sexual contact between adult men in private a criminal offence. The Committee has made its final views known in relation to the last communication. The other five communications are still under consideration by the Committee.

The Committee has made it clear that the communication procedure is confidential and that Governments must not make public comment on individual communications while they are still under consideration by the Committee. It is not therefore possible to go into any more detail on the individual complaints.

(c) The rights set out in the International Covenant on Civil and Political Rights are protected in Australia by a range of constitutional, legal and administrative mechanisms. These include the basic institutions of a liberal democratic society—such as parliaments and an independent judicial system—as well as more specialised legislative and administrative arrangements such as those administered by the federal Human Rights and Equal Opportunity Commission.

The second question and answer related to Australia's obligations under Article 2(3) of the Covenant (House of Representatives, *Debates*, 10 October 1994, p 1615):

Mr Latham asked the Attorney-General, upon notice, on 23 August 1994:

(1) Does Article 2(3) of the International Covenant on Civil and Political Rights, to which Australia is a party, oblige nations to ensure that any person whose rights or freedoms under the Covenant are violated shall have effective remedy.

(2) Do persons in Australia have effective remedies against violations under the Covenant; if so, what are the remedies; if not, when will the Government legislate to provide them.

Mr Lavarch—The answer to the honourable member's question is as follows:

(1) Yes. Article 2(3) states:

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

Australia became a party to the International Covenant on Civil and Political Rights (ICCPR) on 13 August 1980. The ICCPR is a binding international instrument and, by becoming a party to it, Australia made a commitment in international law to the standards it contains.

(2) Yes. Australia when joining the Covenant acted on the view, and continues to act on the view, that Art.2(3) does not require an aggrieved person be able to take action in a court to seek a remedy directly based on the Covenant. Rather, Australia takes the view that its law generally conforms to the Covenant. The ordinary remedies available in the courts, and through administrative mechanisms, provide remedies to individuals that meet the requirement of Art.2(3).

Thus not every matter concerning individual rights or freedoms is properly dealt with at least in the first instance, by resorting to legal remedies through the formal court system. In many cases rights are better preserved by less formal processes often associated with inquiry, conciliation and report. The Human Rights and Equal Opportunity Commission (HREOC), the Administrative Appeals Tribunal, the Federal Court (pursuant to the Administrative Decisions (Judicial Review) Act 1977) and the Ombudsman are some examples of Commonwealth institutions where aggrieved individuals can seek remedies for violation of their civil and political rights.

In addition the First Optional Protocol to the Covenant allows individuals, who believe that their rights under the Covenant have been violated, to complain to the United Nations Human Rights Committee. Australia acceded to the First Optional Protocol on 25 September 1991. This means that the Committee can consider complaints of alleged violations under the Covenant by Australia which occurred on, or after, 25 December 1991. A complainant must exhaust all available domestic remedies before lodging his or her complaint with the Committee.

The third question and answer related to possible denunciation of the Covenant (Senate, *Debates*, 28 November 1994, p 3372):

Senator Abetz asked the Minister representing the Attorney-General upon notice on 1 June 1994:

(1) Can the Australian Government withdraw from or denounce as a matter of law the International Covenant on Civil and Political Rights.

(2) Is there any mechanism whereby the Federal Government could allow for the Covenant not to apply to any specific State of the Commonwealth.

Senator Bolkus—The Attorney-General has provided the following answer to the honourable senator's question:

(1) The Covenant does not contain any express provision relating to denunciation or withdrawal.

Article 56(1) of the Vienna Convention on the Law of Treaties, to which Australia is a party, provides that, in such circumstances, a treaty is not subject to denunciation or withdrawal where:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be influenced by the nature of the treaty.

There is nothing in the travaux to the Covenant to suggest that either of the circumstances referred to in paragraphs (a) and (b) is met in relation to the Covenant. Moreover, by contrast with the Covenant, it is noted that the First Optional Protocol to the ICCPR, which was negotiated simultaneously with the Covenant, expressly provides for a right of withdrawal.

(2) No. Senators should also note that the Covenant has no direct impact on Australian law as it has not been enacted into law by the Parliament.

Human Rights (Sexual Conduct) Act 1994

In consequence of the political reaction in Australia to the decision made by the Human Rights Committee (referred to above), in response to a communication from an Australian, about the right of an individual to privacy of sexual conduct, the Government decided to introduce legislation into the Parliament. The following is the text of a press release issued by the Attorney-General, Mr Michael Lavarch, on 22 August 1994:

The Government will introduce a Human Rights (Sexual Conduct) Bill to ensure that the privacy of sexual conduct between consenting adults is protected from unreasonable legal interference.

Attorney-General Michael Lavarch said today he expected the Bill to be introduced in the Spring sitting of Parliament.

"Laws which say what kind of sex adults may agree to have and with whom, in the privacy of their own homes, are no longer acceptable to most reasonable-minded Australians," he said.

The Bill will ensure that no-one will be charged with a criminal offence for sexual activity in private which involves only consenting adults. The Bill will not affect laws dealing with public acts or acts involving children.

The Government's action addresses the recent finding of the United Nations Human Rights Committee that sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code are an unreasonable interference with privacy. These sections make certain sexual activities between consenting adults in private, and particularly between consenting adult men in private, a criminal offence.

The Committee examined these laws against the standards set out in the International Covenant on Civil and Political Rights and found that they did not meet our international obligations under the Covenant.

> "I believe that the view of the Committee is right and that the Human Rights (Sexual Conduct) Bill is an appropriate and measured response," Mr Lavarch said.
>
> "Australia's efforts to promote observance of human rights internationally will be undermined if we fail to apply fair and consistent standards here."
>
> Mr Lavarch said the Tasmanian Criminal Code provisions also hindered the fight against AIDS by making it more difficult to advise and educate people and driving underground some of those most at risk of infection.
>
> "Clearly, it would have been preferable had the Tasmanian Government met its responsibility to apply internationally acceptable standards of human rights in its laws," Mr Lavarch said.
>
> "When State and Territory Governments fail in this duty, the obligation falls on the Federal Government to act."

The following is the major part of the second reading speech made by the Attorney-General, Mr Michael Lavarch, in explaining the legislation (House of Representatives, *Debates*, 12 October 1994, p 1775):

> In 1948, in response to the destruction and brutality of two world wars, the international community drew up a statement of principle on the protection of fundamental human rights. It was the Universal Declaration of Human Rights. The principles stated in the declaration were set down in response to a period of intense global conflict—as the declaration itself states, in response to the disregard and contempt for human rights which resulted in acts so barbarous they outraged the conscience of the world.
>
> The declaration makes clear that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Australia played an important role in the postwar international diplomacy which led to the creation of the United Nations and the drafting of the declaration. We have remained committed to those fundamental principles. These principles are as central now to our national identity and international reputation as they were when we were able to contribute to their development almost half a century ago.
>
> These basic rights are universal and cannot be limited by national or state boundaries. They are the birthright of every human being and of all Australians. Every level of government in Australia is responsible for ensuring that these rights are protected and promoted. Indeed, there is no more fundamental reason for the existence of governments than to respect and enhance the rights of citizens.
>
> Australia can feel proud of its record on human rights. However, we must also recognise that not all Australians have always enjoyed, or today enjoy, a full range of rights. We know that for many generations the nation's treatment of its indigenous population was less than praiseworthy, that Australian women faced very direct forms of discrimination, that those with a disability were judged not on what they could do but rather on a stereotype of what it was perceived they could not do. Few would deny that many Australians still do not enjoy full equality of opportunity, free to live and advance their lives according to their abilities and judged only on merit. While we have much to be proud of, not everyone is treated with respect and fairness.

This bill is about basic freedoms—the right of adult Australians to make their own choices about sexual practices within the privacy of their own homes. This has been a controversial subject matter. In the public debate which has preceded the parliament's consideration of this bill a variety of arguments have been advanced. It has been claimed that Australia is being dictated to by foreign law-making bodies and that our national sovereignty has been diminished. Others assert that the real issue is the rights of state governments and that the Commonwealth should not contemplate such a law. Some allege the law will render inoperative laws dealing with incest or the regulation of the sex industry. I will address each of these issues.

First of all, the bill does not represent the outcome of some process of abdication of national sovereignty. On the contrary, the fact that our national parliament is now debating this bill itself puts lie to that claim. One of the basic decisions made at Federation, indeed a reason for federation, was that the Australian people should speak with one voice internationally. That is why this parliament was given the power to act in relation to external affairs and why the pursuit of Australia's international interests is an executive function of the national government.

Participation by Australia in bilateral and multilateral agreements is a free sovereign choice by this nation. It is a long process, which involves consultation within Australia and generally prolonged negotiation at the international level. The consultation process takes place in accordance with principles agreed between the Commonwealth and the states. It involves consultation at all levels including heads of government, the Standing Committee on Treaties comprising senior Commonwealth and state officials, and directly through relevant functional areas. For human rights, the Standing Committee of Attorneys-General plays a consultative role.

It was the Liberal-National government of Malcolm Fraser which accepted the standards set out in the International Covenant on Civil and Political Rights in 1980. It did so after a long period of discussion with the Australian states. It is article 17 of that covenant on which this bill is founded.

Australia acceded to the optional protocol to the covenant in 1991. This followed a decade of consultation with the states and territories, including discussions by ministers on human rights and later by attorneys-general. The majority of jurisdictions, including Tasmania, did not object to Australia's becoming a party to the optional protocol. It was this optional protocol process which highlighted the inconsistency of particular sections of the criminal code of Tasmania with the protection from arbitrary interference with privacy detailed in article 17 of the international covenant.

The government fully recognises the importance of such consultations, particularly in areas of shared responsibility between the Commonwealth and the states and territories such as human rights. But a right to consultation does not mean a right of veto, nor does it mean that the national parliament and national government can walk away from the fact that internationally it is these institutions that represent Australia.

There has also been misrepresentation of the impact the ratification of a treaty has on domestic law. The fact is that treaties are not directly and automatically incorporated into Australian law. They cannot alone impose obligations on individuals or create rights in domestic law. This means that the

rights prescribed in the International Covenant on Civil and Political Rights only become part of Australian law through the passage of legislation by an Australian parliament and through the decisions of Australian courts.

Obviously this bill and this debate are evidence of that very point. Before joining a treaty, consideration is given to whether legislation is necessary; if so, whether existing federal or state legislation is adequate and, if not, whether the treaty should be implemented by legislation at Commonwealth or state/ territory level. Often no change of law is called for, or the Commonwealth relies on state and territory laws to carry out the provisions of treaties.

The essential point is that Australian law is made by Australian parliaments and Australian courts, not by the action of entering into a treaty. This same fundamental point is true of the views of the United Nations Human Rights Committee.

It has been argued that the ability of Australian citizens to take a complaint to the Human Rights Committee is a transfer of judicial power to a foreign body similar to when there were appeals to the Privy Council and Australian law was being determined outside this country. Such an argument is totally flawed. It is, of course, the case that up to 1986, when some appeals from the Australian superior courts were permitted to the Privy Council, the law of this country was directly affected by such decisions.

The recourse to the Human Rights Committee permitted under the first optional protocol to the International Covenant on Civil and Political Rights bears no resemblance to Privy Council appeals. The Human Rights Committee is not a court. It does not make binding decisions. It has no power of enforcement. Its decisions do not oblige any action from Australia to change our laws or alter our practices. While the government does believe that the views expressed by the committee have weight and should be regarded seriously, this committee cannot alter Australian law. By allowing complaints to the Human Rights Committee Australia affords its citizens an avenue to explore whether our good record on human rights is being maintained. It displays our confidence in our capacity to meet the same standards which Australia contends internationally should be met by all nations.

Human rights in Australia is a shared responsibility of all governments and of each of the parliaments of the Commonwealth, states and territories. The Commonwealth Parliament has enacted legislation to provide civil remedies to those Australians who may experience discrimination on the grounds of sex, race and disability.

All of this legislation, together with the Human Rights and Equal Opportunity Commission Act, is based on international treaties to which Australia is a party—that is, the Commonwealth parliament is relying on the external affairs power in the constitution. This same power is the basis for this bill. This bill is an extension of the Commonwealth's human rights regime, and yet it appears that the use of the external affairs power is, to those opposite, the vehicle for the clash of so-called principles—respect for human rights and support for states rights.

The government believes that there can be no such clash, as only individuals and not governments enjoy rights. Governments exist to protect rights, not to enjoy them at the expense of the individual. The power to legislate for external affairs was granted to the Commonwealth parliament by the Australian

constitution at Federation. The constitution also provides that if a Commonwealth and state law are inconsistent then the state law is inoperative to the extent of the inconsistency. The High Court was created and empowered by the constitution to determine such questions. These basic provisions have all been part of the workings of the Australian federation since its creation.

The High Court long ago recognised the power of the Commonwealth to make laws to give effect to Australia's international obligations. As long ago as 1936, in the decision of *R v. Burgess, ex-parte Henry*, Chief Justice Latham said:

> "The Commonwealth Parliament has been given power to legislate to give effect to international obligations binding the Commonwealth or to protect national rights internationally obtained by the Commonwealth whenever legislation was necessary or deemed to be desirable for this purpose."

He also said:

> "[The] possible subjects of international agreement are infinitely various. It is, in my opinion, impossible to say *a priori* that any subject is necessarily such that it could never properly be dealt with by an international agreement."

These principles have been further developed by the High Court. This is not something new or extraordinary that has been invented by the court in recent times.

The Commonwealth has used the external affairs power to reinforce Australian sovereignty. Some examples are the maritime boundary agreements with France, the Solomon Islands, Papua New Guinea and Indonesia. Most recently we have taken steps to ensure that Australia benefits from the right to a 200 nautical mile exclusive economic zone recognised in the United Nations Convention on the Law of the Sea. There were no complaints about treaties eroding our sovereignty or overriding the states in these cases.

The human rights legislation I referred to earlier, the Sex Discrimination Act, the Racial Discrimination Act and the Disability Discrimination Act, all have the same potential impact on state laws as this bill. A state criminal law which is inconsistent with any of this legislation will, by operation of section 109 of the constitution, be rendered ineffective to the extent of the inconsistency.

The implication of the views now expressed by many in the opposition is that Commonwealth laws should be read down so that state laws are not affected. This is to return to the notion rejected by the High Court in the landmark *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* case of 1920.

In the state of Tasmania sections 122 (a) and (c) of the criminal code mean that the private sexual activity of consenting adults, whether heterosexual or homosexual, can be a criminal offence. Section 123 of the code goes on to make all other "indecent practices" between men a criminal offence. The effect of these two sections together is that adult homosexual men in Tasmania are committing an offence if they participate in virtually any sort of sexual conduct together in the privacy of their own homes. These Tasmanian laws apply to acts in private as well as in public. They draw no distinction between conduct involving children and conduct involving only adults. Consent of the parties is irrelevant.

In December 1991 the United Nations Human Rights Committee was asked by an individual Tasmanian citizen to examine these provisions and to provide a view on whether they were consistent with article 17 of the International Covenant on Civil and Political Rights. The committee is the body established under the covenant to administer the covenant and to monitor compliance with its provisions. The committee formed the view that sections 122(a) and (c) and 123 of the Tasmanian criminal code are an arbitrary interference with privacy and placed Australia in breach of article 17 of the covenant.

The Australian Human Rights Commissioner, Mr Brian Burdekin, in his report on the Tasmanian provisions, also found that they placed Australia in breach of its international obligations. Mr Burdekin rejected the Tasmanian government's arguments that the laws were a reasonable and proportionate response to a perceived threat to moral standards. He said that the fact the laws are not enforced clearly suggests they are not necessary for the protection of moral standards.

He noted that no other jurisdiction has comparable laws and that discrimination on the grounds of homosexuality is unlawful in three out of the six states as well as both territories. He also found they were not a reasonable or proportionate response to HIV-AIDS, particularly when the Tasmanian government itself had endorsed the national HIV-AIDS strategy which calls for such laws to be repealed because they deter people from seeking medical advice and assistance. As the Human Rights Commissioner put it:

The moral fabric of Tasmania is not more fragile than in other parts of Australia, nor does it require greater levels of protection.

Laws such as these Tasmanian provisions are simply no longer acceptable to modern Australian society. Similar provisions have been repealed in all other Australian jurisdictions. Such laws are oppressive. They are unjust. They do not meet the standards accepted by most Australians. In the face of such a clear-cut case, the present Tasmanian government has refused to reconsider these provisions. It has, therefore, become necessary for the Commonwealth to act.

The Human Rights (Sexual Conduct) Bill translates one important element of our obligations under an international agreement into binding domestic Australian law. Paragraph I of article 17 of the International Covenant on Civil and Political Rights states:

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

Most Australians probably take it for granted that they live in a society in which they are free to pursue their private lives and, in particular, their private sexual lives free of unjustified government intrusion. That is the right enshrined in article 17—the right to be free from unjustified and unnecessary government interference in your everyday private life.

The bill provides that sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a state or a territory, to any arbitrary interference with privacy. This guarantee is to operate throughout Australia, including in the external territories. The bill offers protection to all Australians.

Article 17 of the international covenant does not provide that the right to be free from interference with privacy is absolute or unlimited. The article explicitly

recognises that in some circumstances it is legitimate to intrude into the privacy of individuals. The article provides that no-one will be subjected to any "arbitrary interference" with privacy.

The key word in this test is "arbitrary". The term "arbitrary" guarantees that where laws do intrude on people's privacy the laws must be justified, necessary and reasonable in the circumstances. In order to meet this test, a law must have a legitimate purpose and be a proportional means to achieve that purpose. All such laws must pay due regard to the rights and dignity of the individual. The Human Rights (Sexual Conduct) Bill recognises and incorporates these limits. The bill deals only with sexual conduct in private between consenting adults.

It is appropriate and fully justifiable to have laws which regulate sexual conduct in public, sexual conduct involving children and sexual conduct to which a person does not consent. Expressly, the bill does not affect these laws. Such laws exist throughout Australia and are acceptable because they rest on an appropriate balance between the right to privacy in one's sexual conduct and the interests of the community at large. Indeed, such laws exist in Tasmania quite apart from sections 122 and 123 of the criminal code and deal in a much more balanced and appropriate way with sexual conduct which impacts unacceptably on the community.

The age of consent for sexual activity varies across the states and territories and also varies depending on whether heterosexual or male homosexual activity is involved. The government recognises that there is not a consensus across Australia on the question of an appropriate age of consent. The bill does not prevent states and territories from setting the age of consent below 18 years of age. The bill deals with sexual conduct involving those of or above the age of 18. It is generally recognised across Australia that by the age of 18 people are expected to be mature enough to make a range of decisions for themselves and to take responsibility for themselves and their actions.

Laws which seek to regulate the private consensual conduct of those over 18 will not be affected unless they are an arbitrary interference with privacy within the meaning of article 17...

Convention on Elimination of All Forms of Racial Discrimination—Racial Hatred Bill

The Government in 1994 decided to introduce legislation into the Parliament to strengthen sanctions against some forms of expression of racial discrimination. The following are extracts from the second reading speech of the Attorney-General, Mr Michael Lavarch, in explaining the legislation (House of Representatives, *Debates*, 15 November 1994, p 3336):

Next year will mark the 20th anniversary of the passage of the Racial Discrimination Act. The act was the first specific Commonwealth law on human rights. It was based on the fundamental belief that all Australians irrespective of race, colour or national or ethnic origin are entitled to fair treatment. In this country, we take pride in the community's consensus that everyone should be able to advance through life on their own efforts and abilities; that it is wrong to judge anyone on the colour of their skin or the sound of their accent.

Be it under a law, or in employment, or the provision of services, or access to facilities and accommodation, discrimination based on racial prejudice and intolerance is addressed by the Racial Discrimination Act. The law provides a

remedy to those who have experienced discrimination. It exists because, even with general community tolerance, we know racism exists. And racism leads to discrimination.

The Racial Discrimination Act does not eliminate racist attitudes. It does not try to, for a law cannot change what people think. But it does target behaviour—behaviour that causes an individual to suffer discrimination. The parliament is now being asked to pass a new law dealing with racism in Australia. It too targets behaviour—behaviour which affects not only the individual but the community as a whole.

The Racial Hatred Bill is about the protection of groups and individuals from threats of violence and the incitement of racial hatred, which leads inevitably to violence. It enables the Human Rights and Equal Opportunity Commission to conciliate complaints of racial abuse. This bill is controversial. It has generated much comment and raises difficult issues for the parliament to consider. It calls for a careful decision on principle.

I wish to address the issues most consistently raised in the public debate and then examine the provisions of the bill in detail. The bill is intended to close a gap in the legal protection available to the victims of extreme racist behaviour. No Australian should live in fear because of his or her race, colour or national or ethnic origin. The legislation will provide a safety net for racial harmony in Australia, as both a warning to those who might attack the principle of tolerance and an assurance to their potential victims.

Three major inquiries have found gaps in the protection provided by the Racial Discrimination Act. The National Inquiry into Racist Violence, the Australian Law Reform Commission Report into Multiculturalism and the Law, and the Royal Commission into Aboriginal Deaths in Custody all argued in favour of an extension of Australia's human rights regime to explicitly protect the victims of extreme racism.

The 1992 report of the national inquiry into racist violence found that, while state and territory criminal law punishes the perpetrators of violence, it largely is inadequate to deal with conduct that is a pre-condition of racial violence. The report documented 60 such incidents. The Law Reform Commission report and the royal commission also dealt extensively with examples of extreme racist behaviour.

Since then there has been an upsurge in the activities of extremist racist groups which have resulted in harassment and intimidation of individuals. As well, public gatherings of ethnic communities have been disrupted, sometimes violently. In Sydney, police are investigating seven arson attacks on synagogues in less than four years. In Melbourne, there have been reports of teenage gangs targeting Australians of Asian background. While these incidents are not everyday occurrences, they tear at the fabric of our society and cause immense concern to many of our citizens.

Racism is often a by-product of ignorance, and education is an essential part of any response. The Human Rights and Equal Opportunity Commission has a number of programs which target racism in schools, reinforced by a variety of programs run by educational authorities. The commission also provides resources to help employers deal with racism in the workplace. The commission will also be conducting a public education program to promote this legislation upon its passage.

Racism should be responded to by education and by confronting the expression of racist ideas. But legislation is not mutually exclusive of these responses. It is not a choice between legislation or education. Rather, it is, in the government's view, a case of using both.

There is no doubt that the Racial Discrimination Act has been a powerful influence on the rejection of racist attitudes over the past two decades. It has forced many people to confront racist views and have them debunked. It can be compared to the contribution of the Sex Discrimination Act over the past 10 years to improving the way women are treated in our society.

This bill has been mainly criticised on the grounds that it limits free expression and that to enact such legislation undermines one of the most fundamental principles of our democratic society. Yet few of these critics would argue that free expression should be absolute and unfettered. Throughout Australia, at all levels of government, free expression has had some limits placed on it when there is a countervailing public interest.

Laws dealing with defamation, copyright, obscenity, incitement, official secrecy, contempt of court and parliament, censorship and consumer protection all qualify what can be expressed. These laws recognise the need to legislate where words can cause serious economic damage, prejudice a fair trial or unfairly damage a person's reputation. In this bill, free speech has been balanced against the rights of Australians to live free of fear and racial harassment. Surely the promotion of racial hatred and its inevitable link to violence is as damaging to our community as issuing a misleading prospectus, or breaching the Trade Practices Act.

The bill places no new limits on genuine public debate. Australians must be free to speak their minds, to criticise actions and policies of others and to share a joke. The bill does not prohibit people from expressing ideas or having beliefs, no matter how unpopular the views may be to many other people. The law has no application to private conversations. Nothing which is said or done reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for an academic, artistic or scientific purpose or any other purpose in the public interest will be prohibited by the law.

It is worthy of note that New South Wales has had similar legislation for five years and yet no-one has seriously argued that free speech has been curtailed there. Nor has it been unduly limited in any other Australian jurisdictions where similar legislation exists.

But perhaps most noteworthy are the experiences in other liberal democracies throughout the world that ban racial hatred and violence. Free speech is a constitutional right in Canada and many European countries, yet the highest courts in these countries have held provisions which ban racist hatred and violence in public to be reasonable and necessary. In fact, in 1989 the Canadian Supreme Court upheld Canada's anti-hate legislation. Recently the Australian High Court has established the existence within the constitution of an implied guarantee of free expression. The High Court decisions have been closely examined and the government is fully convinced that the bill does not infringe on the principles developed by the court.

Clearly then, while these are important issues, the Commonwealth parliament is not the first Australian legislature to grapple with them. Criminal laws dealing with the incitement of racial hatred operate in New South Wales,

Western Australia, Queensland and the Australian Capital Territory. Civil provisions are also in place in each of these jurisdictions except Western Australia. New Zealand has had laws of this nature since 1971. Along with Canada, Great Britain and a number of the states of the United States also have specific laws on racial hatred...

Let me now detail the provisions of the bill and where appropriate make comparisons with the New South Wales legislation. I believe a fair assessment is that, while the New South Wales law is a perfectly workable model, the bill before the House overcomes some deficiencies in the New South Wales act and is consistent with the Commonwealth's own human rights regime.

In outline, the bill amends the Crimes Act 1914 to provide for three criminal offences and amends the Racial Discrimination Act 1975 to provide for a civil prohibition. The criminal provisions do not attempt to replicate the general criminal law which deals with physical violence and damage to property. Rather the provisions centre on the precursors of actual violence; that is, the incitement of racial hatred and threats made to a person or persons or property because of race, colour or national or ethnic origin.

The bill seeks to close a gap in the operation of the current laws by protecting people confronted by situations likely to lead to fear and racist violence. The three criminal provisions to be inserted in the Crimes Act 1914 are set out in clause 4 of the bill. The first two offences deal respectively with threats, done because of race, colour or national or ethnic origin, against people and property, while the third prohibits acts done, otherwise than in private, with the intention of inciting racial hatred. I shall speak about each provision in turn...

The term "incitement" is to be regarded as referring to a conscious and motivated act—hence the inclusion of a subjective test as an element of the offence. The travaux preparatoires to the Convention on the Elimination of All Forms of Racial Discrimination refer to "incitement" in the sense of provocation. The travaux also refer to "provocation to violence" against any race or group of persons of another colour or ethnic origin.

The travaux do not define "racial hatred" but it may be inferred by analogy to article 1 of the convention that the term "racial hatred" simply means hatred based on race, colour, descent or national or ethnic origin. Thus, the United Kingdom Public Order Act 1986 states that "racial hatred" means hatred against a group of persons defined by reference to colour, race, nationality—including citizenship—or ethnic or national origins. As used in proposed section 60, "hatred" carries its ordinary meaning indicating intense dislike or enmity...

The bill also provides for a civil regime by the amendment of the Racial Discrimination Act. Section 18C will be inserted in the act to make it unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

A number of initial points need to be made. First, the provision is civil and not criminal in effect. That is, the process will be initiated by the victim of alleged unlawful behaviour via a complaint to the Human Rights and Equal Opportunity Commission and not by police investigations. Secondly, like all complaints

under Commonwealth human rights laws, the commission will endeavour to resolve the matter by private and confidential conciliation. Only if conciliation cannot resolve the matter is there a public hearing and a determination by the commission. The commission can immediately dismiss frivolous or vexatious complaints.

The format of the civil provision is similar to the model used in other Commonwealth human rights legislation such as the Sex Discrimination Act. It is:

- based upon the availability of a remedy in specified circumstances,
- judged against the objective criteria of what is reasonably likely in all the circumstances to give rise to a valid complaint, and
- limited and targeted through the use of exemptions.

The requirement that the behaviour complained about should "offend, insult, humiliate or intimidate" is the same as that used to establish sexual harassment in the Sex Discrimination Act. The commission is familiar with the scope of such language and has applied it in a way that deals with serious incidents only.

The bill requires an objective test to be applied by the commission so that community standards of behaviour rather than the subjective views of the complainant are taken into account. The exemptions are broad and cover acts done:

- in the performance, exhibition or distribution of an artistic work,
- in the course of discussion or debate for an academic, artistic or scientific purpose or other purpose in the public interest, and
- in making or publishing a report or comment on a matter in the public interest...

Criminal Legislation with Extra-Territorial Effect—Child Sex Tourism

During 1993, the Government decided to introduce legislation into the Parliament which would override the normal common law rule that criminal penalties cannot apply to acts committed outside the country, so as to penalise participation by Australians in sexual acts against minors in other countries. (This was referred to in the *Aust YBIL* 1994, vol 15, p 421 in the chapter dealing with Jurisdiction.) The following is the first part of the second reading speech made by the Minister for Justice, Mr Duncan Kerr, in explaining the Crimes (Child Sex Tourism) Amendment Bill (House of Representatives, *Debates*, 3 May 1994, p 73):

The principal aim of this legislation is to provide a real and enforceable deterrent to the sexual abuse of children outside Australia by Australian citizens and residents. It is unfortunate that a minority of Australian citizens and residents are now known internationally as major offenders in several Asian countries. They exploit the vulnerability of children in foreign countries where laws against child sexual abuse may not be as strict, or as consistently enforced, as in Australia.

The bill aims to ensure that cowardly crimes committed against children outside Australia which are not prosecuted in the country in which they were committed can be prosecuted effectively in Australia. The bill also focuses on the activities of those who promote, organise and profit from child sex tourism.

Provided they operate from Australia, or have a relevant link with Australia, they too will be able to be prosecuted for their contribution to the abuse of foreign children.

Some may wonder why the Australian parliament should enact laws to protect foreign children from sexual abuse and ask why the foreign country should not protect its own children. It is true that the primary responsibility for protecting children from sexual exploitation rests, as it should, with the countries where the children are exploited. The Asian countries which I have visited are indeed taking measures to do so but are confronted by social and economic factors which make their task difficult. They welcome any assistance in curbing the trade in children's bodies that other governments can give. Some other countries have already enacted, or plan to enact, legislation similar to that which is now before the House.

Apart from the fact that Australia is gaining an unenviable reputation in the world press on this issue, we also have international obligations to protect children, whatever their nationality. Australia ratified the Convention on the Rights of the Child on 17 December 1990, and this imposes an obligation to protect children, at both the national and the international level, from sexual exploitation and abuse. Australia played a key role in the development of the Convention on the Rights of the Child and the Australian government is committed to pursuing the aims of that convention. The Human Rights and Equal Opportunity Commissioner, Mr Brian Burdekin, has been asked to prepare a draft protocol to the convention specifically addressing the problems of child prostitution and other forms of abuse and sexual exploitation of children.

As I indicated in my address to the First World Congress on Family Law and Children's Rights in Sydney on 4 July 1993, it is clear from the recent World Conference on Human Rights in Vienna that children's rights are high on the international agenda. That conference highlighted the need to develop effective and independent international machinery to ensure that abuses of children's rights are identified and that tangible measures are taken to remedy those abuses.

The bill aims to achieve these ends by creating sexual offences, relating to conduct outside Australia, which will be punishable in Australia, and offences of encouraging or benefiting from child sex tourism which may be committed in or out of Australia and will be punishable in Australia provided there is a relevant link with this country. All these offences will have substantial penalties, ranging from 10 to 17 years imprisonment, or correspondingly high pecuniary penalties if a company is involved.

The bill should send a clear message to child sex abusers and those who profit from their activities that the government and the community condemn their behaviour and do not intend to tolerate it. The bill has the support of all Australian jurisdictions through the Standing Committee of Attorneys-General. State and territory jurisdictions not only support the Commonwealth measures but will enact any necessary or desirable supplementary legislation to close any perceived gaps and to ensure that the measures are effective.

The bill creates prescribed sexual offences committed overseas against children under the age of 16 and aggravated sexual offences where children are under 12 years. The prescribed sexual offences are:

(1) engaging in sexual intercourse, maximum penalty, 14 years imprisonment—17 years for the aggravated offence;

(2) inducing children to have sexual intercourse with others in the person's presence, 14 years imprisonment—17 years for the aggravated offence;

(3) committing an act of indecency on, or in the presence of, a child in the prohibited age ranges, 10 years imprisonment—12 years for the aggravated offence;

(4) submitting to an act of indecency committed by, or in the presence of, a child in the prohibited age ranges, 10 years imprisonment—12 years for the aggravated offence;

(5) inducing children to commit, submit to or participate in, or be present while a third person commits, acts of indecency in the presence of the person, but which are not committed by or on him or her, 10 years imprisonment—12 years for the aggravated offence;

(6) inducing children in the prohibited age ranges to be present while others engage in sexual intercourse in the presence of the person, 10 years imprisonment—12 years for the aggravated offence; and,

(7) engaging in sexual intercourse in the presence of a child in the prohibited age ranges with the intention of deriving gratification from the presence of the child, 10 years imprisonment—12 years for the aggravated offence.

There are further offences of encouraging or benefiting from child sex tourism, carrying a maximum penalty of 10 years imprisonment. There are some aspects of the bill that I draw to your attention. The intention has been to strike the correct balance between the need to minimise the enforcement difficulties that always arise where overseas evidence is required, and which are exacerbated when child witnesses are involved, and the need to ensure that the rights of the defendant receive a similar degree of protection as would apply if the offence had been committed in Australia.

The legislation must be more than mere window-dressing. I am concerned to see that it is practically enforceable, as it must be if it is to have the deterrent effect for which I have aimed. However, while I am determined to achieve this, I will not do so by compromising the defendant's right to the protection of the usual rules of evidence and procedure—to the traditional rights, privileges and defences which would have applied if the conduct alleged had occurred within an Australian jurisdiction and not in a foreign country.

There will inevitably be some differences in the procedural and evidentiary framework of these offences from that which applies to similar state and territory offences. These are needed to accommodate the international aspect of the enforcement process, but there are none which do not already occur in Australia in an age of increasing internationalisation of many offences, and none which will operate unfairly to the defendant...

International Child Abduction—1980 Convention

The Foreign Minister, Senator Gareth Evans, was asked a question on notice in the House of Representatives about Australian acceptance of accessions to the 1980 Convention on the Civil Aspects of International Child Abduction by countries which were not at the time members of The Hague Conference on

Private International Law. The Minister provided the following reply (House of Representatives, *Debates*, 28 June 1994, p 2179):

> The following accessions have been accepted by Australia on the dates indicated:
>
> Belize—28 December 1989
>
> Burkina Faso—27 January 1993
>
> Ecuador—27 January 1993
>
> Hungary—7 December 1987
>
> Mauritius—15 October 1993
>
> Mexico—27 March 1992
>
> Monaco—15 October 1993
>
> New Zealand—27 March 1992
>
> Poland—15 October 1993
>
> Romania—15 October 1993

Extradition—List of Australian Bilateral Arrangements

On 11 October 1994, the Attorney-General, Mr Michael Lavarch, provided in the House of Representatives, in answer to a question on notice, the following statement of Australia's bilateral extradition arrangements (House of Representatives, *Debates*, 11 October 1994, p 1724):

> Australia is able to grant extradition to countries to which the Extradition Act 1988 applies. Application of the Extradition Act to a country gives legal force to extradition arrangements concluded by Australia with another country. These arrangements are of different kinds, with bilateral treaties being only one example. Thus the Extradition Act may be applied to give effect to bilateral extradition treaties, various "less than treaty status arrangements", British extradition treaties dating from the late nineteenth and early twentieth centuries inherited by Australia, and extradition obligations arising under multilateral conventions. A special extradition relationship exists with New Zealand: the Extradition Act requires the endorsement of New Zealand arrest warrants rather than the more involved extradition process that all other countries are required to follow in seeking extradition from Australia.
>
> As far as Commonwealth countries are concerned, extradition is available between Commonwealth countries by virtue of the Commonwealth Scheme for the Rendition of Fugitive Offenders, the London Extradition Scheme. The London Scheme is a "less than treaty status" arrangement.
>
> A number of multilateral conventions to which Australia is a party require parties to either prosecute or extradite persons found in their territory for convention offences. These conventions deal with matters such as safety of aircraft, protection of diplomats, suppression of drug trafficking, genocide, torture and protection of hostages. To this end Australia has applied the Extradition Act to those countries who are parties to these multilateral conventions to which Australia is also a party to allow for extradition in relation to specified convention offences. Convention offences include aircraft hijacking, drug, torture and genocide offences.

It should be noted that some countries will surrender fugitives without previous arrangements being established.

Listed below are Australia's bilateral extradition treaties and arrangements and their dates of entry into force since Australia has had its own extradition laws: the Extradition (Commonwealth Countries) Act 1966 and the Extradition (Foreign States) Act 1966, both of which commenced in 1967. The 1966 Extradition Acts were repealed on 1 December 1988 when the Extradition Act 1988 was proclaimed. Also listed below are those bilateral extradition treaties entered into by the United Kingdom to which Australia has succeeded.

Countries with which Australia has signed bilateral extradition treaties. The date opposite a country is the date on which the treaty entered into force.

Argentina	15 February 1990
Austria	6 February 1975 and amended by Protocol of 1 February 1987
Belgium	19 November 1986
Ecuador	1 August 1990
Finland	23 June 1985 and amended by Protocol of 14 February 1986
France	23 November 1989
Germany	1 August 1990
Greece	5 July 1991
Ireland	29 March 1989
Israel	3 January 1976
Italy	9 May 1976 and amended by Protocol of 1 August 1990
South Korea	16 January 1991
Luxembourg	12 August 1988
Mexico	27 March 1991
Monaco	1 August 1990
Netherlands	1 February 1988
Norway	2 March 1987
Philippines	18 January 1991
Portugal	29 August 1988
Spain	5 May 1988
Sweden	10 March 1974 and amended by Protocols of 6 October 1985 and 10 June 1989
Switzerland	1 January 1991
United States	8 May 1976 and amended by a Protocol of 21 December 1992
Venezuela	19 December 1993

Commonwealth London Scheme Countries. The date opposite a country, colony, territory or protectorate is the date on which Australian extradition laws were applied to that country, colony, territory or protectorate.

Anguilla	1 December 1988
Antigua and Barbuda	3 May 1985
Bahamas	3 May 1985
Bangladesh	28 November 1975
Barbados	1 May 1967
Belize	3 May 1985
Bermuda	1 December 1988
Botswana	1 May 1967

British Antarctic Territory	1 December 1988
British Indian Ocean Territories	1 December 1988
British Virgin Islands	1 December 1988
Brunei Darussalam	3 May 1985
Canada	1 May 1967
Cayman Islands	1 December 1988
Cook Islands	27 May 1992
Cyprus	1 May 1967
Dominica	3 May 1985
Falkland Islands	1 December 1988
Gambia	1 May 1967
Gibraltar	1 December 1988
Ghana	1 May 1967
Grenada	3 May 1985
Guyana	1 May 1967
Hong Kong	1 May 1967
India	1 May 1967
Jamaica	1 May 1967
Kenya	1 May 1967
Kiribati	17 December 1970
Lesotho	1 May 1967
Malawi	1 May 1967
Malaysia	1 May 1967
Maldives	3 May 1985
Malta	1 May 1967
Mauritius	1 May 1967
Montserrat	1 December 1988
Namibia	27 May 1992
Nauru	17 December 1970
Nigeria	1 May 1967
Pakistan	27 May 1992 (on Pakistan's readmission to the Commonwealth)
Papua New Guinea	28 November 1975
Pitcairn, Henderson, Ducie and Oeno Islands	1 December 1988
St Christopher and Nevis	3 May 1985
St Helena	1 December 1988
St Helena Dependencies	1 December 1988
St Lucia	3 May 1985
St Vincent and the Grenadines	3 May 1985
Seychelles	3 May 1985
Sierra Leone	1 May 1967
Singapore	1 May 1967
Solomon Islands	17 December 1970
South Georgia and South Sandwich Islands	1 December 1988
Sri Lanka	1 May 1967
Swaziland	17 December 1970
Tanzania	1 May 1967
The Sovereign Base areas of Akrotiri and Dhekelia	1 December 1988

Tonga	17 December 1970
Trinidad and Tobago	1 May 1967
Turks and Caicos Islands	1 December 1988
Tuvalu	17 December 1970
Uganda	1 May 1967
United Kingdom	1 May 1967
Vanuatu	3 May 1985
Western Samoa	17 December 1970
Zambia	1 May 1967
Zimbabwe	3 May 1985

Countries to which the Australian extradition laws have been applied generally without a treaty. The date opposite a country is the date on which Australia applied its extradition laws to that country.

Brazil	31 July 1974—amended on 22 September 1983 and 3 May 1985
Fiji	23 May 1991 (Fiji previously came under Commonwealth London Scheme arrangements)
Denmark	3 May 1985
Iceland	1 December 1988
Japan	3 May 1985
Marshall Islands	30 June 1993
South Africa	3 May 1985

Countries with which Australia has succeeded to extradition treaties entered by the United Kingdom. These treaties were entered by the United Kingdom during the late nineteenth and early twentieth centuries. It is not certain whether all countries listed below consider themselves as having treaty relations with Australia in respect of extradition treaties entered by the United Kingdom. Doubts as to the status of treaties also arise in relation to those states that have ceased to exist such as in the case of the former Czechoslovakia.

Albania	Haiti	Poland
Bolivia	Hungary	Romania
Chile	Iraq	San Marino
Colombia	Liberia	Thailand
Cuba	Nicaragua	Uruguay
Czechoslovakia	Panama	Yugoslovia
El Salvador	Paraguay	
Guatemala	Peru	

All extradition treaties, arrangements and other extradition mechanisms between Australia and other countries operate subject to Australia's Extradition Act 1988. The Extradition Act creates a mechanism for the processing of extradition requests in Australia. The Act sets out the matters which Australian courts have to consider before ruling on a person's eligibility for extradition. The Act also sets out the matters which the Attorney-General must consider in deciding whether a person is to be surrendered to another country. The Act contains all the internationally accepted human rights safeguards which are now a part of modern extradition law.

Extradition—Implementation of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

On 17 November 1994, the Parliamentary Secretary to the Attorney-General, Mr Duncan, made the second reading speech in the House of Representatives Main Committee explaining the Crimes and Other Legislation Amendment Bill which, among other things, makes provision for extradition of alleged offenders under the above Convention. The following is an extract from his speech (House of Representatives, *Debates*, 17 November 1994, p 3785):

> Amendments to the Extradition Act 1988 made by this bill will ensure that Australia can fulfil its international obligations under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the related Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf. Australia's accession to the convention and protocol took effect on 20 May 1993. The convention and protocol are designed to prevent and suppress maritime terrorism and they list offences in relation to acts likely to endanger the safe navigation of a ship or the safety of a fixed platform. Those offences are extraditable within the terms of the convention and protocol.
>
> As extradition will not be granted for political offences under the Extradition Act, it is necessary to put beyond doubt that the convention and protocol offences are outside the definition of "political offence" in that act. The amendment therefore excludes those offences from the definition of "political offence" for the purposes of the Extradition Act. The "political offence" definition has been limited in this way for a number of other multilateral conventions to which Australia is a party.

Admission of Foreign Evidence—Implementation of The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents

On 2 March 1994, the Parliamentary Secretary to the Attorney-General, Mr Duncan, gave the second reading speech in the House of Representatives explaining the Foreign Evidence Bill. The following is the first part of that speech (House of Representatives, *Debates*, 2 March 1994, p 1659):

> This bill has three purposes. First, it provides new procedures for enabling authenticated foreign testimony to be admissible, subject to appropriate safeguards, in certain criminal and civil proceedings. Secondly, it includes provisions to implement the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. And finally it re-enacts, with minor changes, parts IIIB and IIIC of the Evidence Act 1905. The new procedures for enabling foreign testimony to be used are in parts 3 and 4 of the bill.
>
> Part 3 makes foreign testimony and exhibits authenticated in a prescribed manner provided to Australia pursuant to requests made by or on behalf of the Attorney-General admissible in evidence, subject to specific exclusions in the interests of justice. The part will apply in any court conducting criminal proceedings in relation to Commonwealth offences and related civil proceedings. Related civil proceedings cover civil proceedings arising from the same subject matter from which the relevant criminal proceeding arose. They include proceedings under the Proceeds of Crime Act 1987, the Customs Act 1901 or

proceedings for the recovery of tax, or of any duty, levy or charge payable to the Commonwealth.

To provide national uniformity, the states and territories may request the Commonwealth to apply the part, by regulations, to criminal proceedings or related civil proceedings in their courts for offences against the law of that jurisdiction. To ensure that traditional evidentiary safeguards are not undermined, the legitimate rights of the accused will be protected by way of the court having a wide discretion to refuse to admit foreign material. The court will be required to take certain specified matters into account when exercising its discretion, but will not be limited to those matters. There are also other safeguards, such as the requirements of authentication by the foreign country and certification by the Attorney-General and the non-admissibility of certain material.

Under the present law, documentary foreign material available pursuant to mutual assistance treaties or arrangements frequently cannot be admitted into evidence unless witnesses are made available to give oral testimony in conformity with the traditional rules of evidence. Currently, only a small proportion of the material received from foreign countries is admissible as evidence without a foreign witness giving oral testimony in Australia. It is costly and cumbersome to make a foreign witness available in Australia. Implementation of the part is expected to reduce the need for foreign witnesses to be made available, thereby lowering the overall cost of obtaining foreign evidence and improving the capacity of the courts to have regard to all relevant material received from foreign countries pursuant to requests by or on behalf of the Attorney-General. Implementation of the part will improve the effectiveness of mutual assistance in criminal matters arrangements and thereby assist in complex prosecutions involving foreign evidence. A resolution passed by the National Complex White Collar Crime Conference in Melbourne in June 1992 called for action to overcome such deficiencies. Part 3 meets the concerns expressed in the resolution, whilst continuing to protect the legitimate rights of the accused.

Part 4 of the bill sets out a similar scheme, adapted to meet the specific needs of the Australian Securities Commission in civil proceedings arising from the Corporations Law and the ASC law where the ASC is a litigant. The part will facilitate the admissibility of foreign evidence in such proceedings. The globalisation of capital markets in the past few years has required business regulatory agencies such as the ASC to liaise and offer assistance to each other in carrying out their regulatory functions. This will often result in requests by the ASC to foreign agencies for information, testimony and documents where the ASC is involved in civil proceedings. Part 4 provides the ASC with the statutory framework to ensure that so far as practicable foreign material is successfully admitted in civil proceedings in which the ASC is a party.

The bill contains provisions, in part 5, implementing the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, so that Australia can accede to the convention. The convention abolishes the requirement, imposed by many countries, for legalisation of foreign public documents. Legalisation is a system for authenticating an official document by certificates. Often a chain of certificates is required, and where the document is used in another country, frequently the final certificate is given, upon payment of a fee, by an official of a foreign embassy or consulate of the country where the

document is to be used. The convention provides for the issue by a convention country of a single certificate which is sufficient evidence to authenticate the signature or seal on the original document.

While the convention is concerned specifically only to abolish legalisation by a diplomatic or consular official of the country in which the public document is to be produced, the effect of the convention is also to render unnecessary previous certificates in a legalisation chain. After accession Australian residents sending foreign public documents to countries which normally require legalisation, but which are parties to the convention, will be able to obtain a certificate from an Australian authority, rather than having to get the documents legalised by foreign diplomatic or consular officials...

Mercenaries—Recruitment in Australia

On 19 October 1994, the Foreign Minister, Senator Gareth Evans, answered a question on notice in the House of Representatives, part of which related to the implementation of the Crimes (Foreign Incursions and Recruitment) Act of 1978 which is intended (*inter alia*) to inhibit recruitment of mercenaries in Australia for foreign purposes. The following are the relevant question and answer (House of Representatives, *Debates*, 19 October 1994, p 2432):

(6) Is Australia a signatory to any international treaty or agreement concerning matters dealt with in the Crimes (Foreign Incursions and Recruitment) Act 1978; if so, what are the details?

(6) There are no international agreements to which Australia is a party concerning matters dealt with in the Crimes (Foreign Incursions and Recruitment) Act 1978. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries has not yet entered force (and is unlikely to do so for some years). Furthermore the Australian Government has not yet finalised its position on signing the Convention although the issue is under active consideration.

On 5 December 1994, the Attorney-General, Mr Michael Lavarch, answered a further question on notice on the same Act, the relevant parts of which are as follows (House of Representatives, *Debates*, 5 December 1994, p 3946):

(7) Has any prosecution been launched under (a) the Act or (b) any legislation affecting the participation of Australian citizens in overseas military or military-style operations; if so, what are the details and results in each case?

(7)(a) I am advised that prosecutions have been launched under the Crimes (Foreign Incursions and Recruitment) Act 1978 as follows:

Jure Maric and 18 others were charged with offences against section 7 in September 1978 in respect of a training camp on the NSW south coast and 13 were committed for trial. Maric was convicted on two counts and sentenced to 4 years imprisonment; 9 persons were acquitted and a *nolle prosequi* was entered in respect of the remaining 3 persons when the jury could not agree on a verdict.

Committal proceedings were instituted against six people in respect of a plan to overthrow the Comoros Islands government in 1982. One person was convicted of an offence against section 8 for recruiting activities and sentenced to 2 years imprisonment; two others were each convicted of an offence against paragraph 7(1)(f) for receiving money and sentenced to 18 months

imprisonment. The other three were committed for trial for offences against paragraph 7(1)(a) of doing preparatory acts but a *nolle prosequi* was entered because of the lack of evidence.

A person was charged with 5 offences against paragraph 7(1)(e) for supplying firearms to the Irish National Liberation Army in 1981–83. Because of a technical deficiency in the Act, which has since been amended, there was no offence against that paragraph. The Attorney-General of the day withheld his consent to the prosecution under the Act and the person was subsequently convicted of smuggling offences against the Customs Act.

A person was charged with offences against paragraph 7(1)(e) and paragraph 9(1)(a) of recruiting in relation to operations in Irian Jaya in 1984. He was convicted of the offence against paragraph 9(1)(a) and sentenced to imprisonment for 12 months.

Peter Drummond was convicted of an offence against paragraph 7(1)(e) in respect of a plan to overthrow the Seychelles Islands government in 1986 and sentenced to 18 months imprisonment.

In April 1985, 4 persons were charged with offences against section 6 in relation to an attempt to smuggle arms to white settlers in New Caledonia for use against pro-Independence Kanaks but the Commonwealth Director of Public Prosecutions considered it unlikely that suitable evidence to sustain the charges could be obtained and did not recommend that the Attorney-General consent to the prosecutions.

A person was charged with an offence against section 7 in connection with his receipt of a package containing weapons and an alleged plot to assassinate President Corazon Aquino of the Philippines in August 1989. The matter was struck out by consent of both parties in the magistrate's court before the consent of the then Attorney-General to prosecute was sought.

Thomas Agaky-Wanda was convicted of 3 offences against section 7 in connection with the purchase and keeping of rifles and ammunition to send to separatists in West Irian in 1989–1990. He was sentenced to 9 months imprisonment, subject to release after serving 3 months on his entering into a recognisance of $500 for the balance of the sentence.

(b) I know of no prosecutions under any other legislation affecting the participation of Australian citizens in overseas military or military style operations.

Marriages Overseas—End of Provision for these Marriages under Australian Law

The following is the text of a press release issued by the Attorney-General, Mr Michael Lavarch, on 5 October 1994:

From 1 January, 1995, Australians would no longer be able to have a marriage performed under the Australian Marriage Act in an Australian Mission overseas, the Attorney-General, Michael Lavarch, announced today.

This is in line with the practice of many other countries which no longer perform consular marriages overseas.

"Australia's liberal recognition of overseas marriages, modern communications and transport have negated the need for consular marriages," Mr Lavarch said.

"Australians will continue to be able to marry overseas, according to the laws of the country in which the marriage takes place.

"Any marriage that is valid in the country in which it takes place is recognised in Australia, subject to the same exceptions as apply to Australian marriages—at the time of the ceremony the parties must be unmarried, over 18, not very closely related and their consent to the marriage must be free and genuine," Mr Lavarch said.

Australians intending to marry overseas should always make certain that the marriage will be recognised in Australia.