



CATHOLIC COMMISSION FOR
**JUSTICE,
DEVELOPMENT
& PEACE**
MELBOURNE

*"What if Socrates had been in a hurry? Instead of strolling about barefoot, chatting to layabouts while cooking up Western civilisation, what if he zoomed about on Nike Tailwinds, gulping Beroccas, a Nokia pressed to his ear, surfing a palm top? Would he have uttered anything worthwhile?" Richard Neville, *The Good Weekend, The Age*, 10 July 1999.*

Occasional Paper No. 7 – September 1999

Broadening the Debate Around Constitutional Reform: Some Ideas for Discussion and Reflection

Introduction

This Occasional Paper aims to stimulate thinking and hopefully broaden the current discussion around constitutional reform. As we celebrate one hundred years since Federation in 2001 and the Great Jubilee in the year 2000 there is much more to consider than whether to retain the monarchy or establish a republic. It is sad to think and a wasted opportunity that a minimalist approach to the issue of constitutional reform has and is preventing us from the core discussion we should be having, namely: addressing honestly what sort of society we are, what sort of society we want to be and have the capacity to be and what mechanisms we need in place to ensure that whatever happens, happens in a manner which includes all, protects the vulnerable and enables all people in Australia to maximise their potential.

Consideration ought to be given to what we value, and how we enable and foster active participation of all citizens, particularly those who are disenfranchised and marginalised.

This paper will commence with a discussion about the work of the Commission, then proceed to discuss some principles founded in Catholic social teaching and universal human rights, and then discuss human rights in a more practical sense, based on what we witness in the work of the Commission in view of the upcoming Great Jubilee and constitutional reform.

The Catholic Commission for Justice, Development and Peace (CCJDP) was established in 1992 by the then Archbishop Frank Little. It had existed prior to this in an informal committee form but it was decided to formalise the work of social justice in the Archdiocese. The CCJDP aims to help educate and give leadership to the Catholic and wider community in the gospel message of justice and in the social teachings of the Church.

The Commission's Charter requires it to work for justice in public local and national structures. It seeks to achieve these ends through research, analysis, working with parish networks, public forums, in schools and in the media. It works on domestic social justice issues, not on overseas ones, and does not take on individual cases as it is more like a public policy research body working towards removal of systemic injustice.

The Commission's role is also to prepare submissions and make representations to government, politicians, public and statutory inquiries and other organisations. It monitors the development and the implementation of social policy as it impacts upon the disadvantaged members of the community. Submissions have ranged from compulsory competitive tendering of human services, freedom of information, through to suicide and self-harm to give a few examples.

The Commission actively seeks to explore ways that social justice can be improved in society and in the performance of mechanisms that have a role in public life. It produces reports, occasional papers on issues and makes public comment through press releases or unsolicited media requests on key issues in addition to its submissions to Inquiries. The Commission through its Executive Officer is represented on the Social Questions Commission of the Victorian Council of Churches and the Inter Church Gambling Task Force.

The work of the Commission has seen us respond on both a local and a national level. On a local level we have been involved in a number of issues including: efforts to preserve the role of the Auditor General in Victoria; expressions of concern about restrictions on the laws of freedom of information and the effect of 'commercial in confidence' provisions associated with the contracting out of public human services to the private sector. The Commission sees these attempts as an attack on the fundamental principles of participatory and responsible and accountable government. We have been actively reviewing the standards of care towards prisoners in Victoria's prison system, releasing a detailed report in October last year. We have been active in relation to recent moves in Victoria to privatise the care of vulnerable young juveniles, resulting in one of the strongest statements from the heads of churches opposing this privatisation in recent years.

On a federal level we have advocated on a range of issues. The key issues have been justice for indigenous Australians including comment on native title; reconciliation; Aboriginal deaths in custody and living conditions; mandatory sentencing and the need for a representative voice for indigenous Australians. A project was undertaken where we have spoken to members of the Aboriginal community all over Victoria about the practical measures necessary for reconciliation to occur. We have spoken to a wide range of Kooris many of whom have never had an opportunity before to put their views. We are launching this report on 12 September 1999. We have also worked on unemployment issuing a report "Opportunities Lost" in conjunction with Catholic Social Services also a report on housing issuing a report "A Voice for the Silent Strugglers". A major area of our work involves the strengthening of Australia's human rights protection mechanisms which has seen us respond to cuts and changes to the Human Rights and Equal Opportunity Commission, ATSIC and limitations upon judicial review and attacks on judicial independence. We operate the only independent national audit on Australia's human rights performance (discussed later in this paper.)

This work has engaged the Commission in monitoring human rights and has highlighted a number of areas where the systems in place could be strengthened to alleviate injustice and inequity and where the current mechanisms for protection of human rights in Australia are inadequate. There appears to be limited public awareness and discussion on such matters. At a recent forum on Constitutional reform attended by the writer, a participant argued, "If it isn't broke, don't change it." The writer would argue as that such a comment is unhelpful. Firstly, it accepts a "near enough is good enough" approach, when, as a society, we should be endeavouring to progress, redress wrongs and inequities where the system may negatively impact upon people. Second, we should be striving to *improve* society. This may or may not involve a significant overhaul of the current constitution but we should, at least be prepared to look at the experience of others who may fall outside our own comfort

zones and may have different circumstances to our own. For instance, many homeless people do not vote, a fundamental political right. This is because they have no fixed address and therefore they are not on the electoral roll. They may not want to vote or they may be so marginalised and feel so powerless that they do not see the point. Could more be done to prevent such disenfranchisement? Some young people at the last federal election expressed an unwillingness to vote because they thought that politicians did not care.¹ How can we encourage young voters to see the worth of their vote?

What this paper seeks to do is promote further public discussion about such issues as social inclusion, participatory and accountable democracy, the role of government and its relationship to its citizenry, and the place of human rights and dignity in Australian society today.

The Constitutional Preamble

In January 1998 the Commission prepared a statement for consideration by the Constitutional Convention delegates. This was released publicly on 25 January 1998 and was designed to promote and stimulate public debate on the broader issues. It stated:

STATEMENT OF VALUES IN THE AUSTRALIAN CONSTITUTION

Considerations:

In any forums considering or discussing possible alteration to the current Constitution, thought be given to framing a new preamble or statement reflecting national aspirations.

The current preamble does not provide any reference to Australian identity, core values or Australianness.

In recognition of the fact that:

- * It is both for Parliament to legislate to the specific content of any proposed Bill of Rights: and
- * It is for the law and the courts to declare and interpret new and existing rights

The proposal focuses on the values as philosophical underpinnings rather than on rights and responsibilities per se.

¹ Media Release of the Catholic Commission for Justice Development and Peace, 21 November 1998 from Victorian Youth Forum, "Youth Meeting the Challenge –The Meeting That Had to Happen."

A Starting Point for the Statement of Values:

- * Declaration and recognition of the unique position of indigenous Australians as the original inhabitants of Australia.**
 - * The inclusion of all Australian People under the safety, security and welfare mechanism of society in a non-discriminatory manner.**
 - * Equality of all people in Australia under the law.**
 - * Recognition and respect for the diversity of gender, race, cultures and religion in Australia.**
 - * Tolerance of and respect for the diversity of gender, race, cultures and religions in Australia.**
- Freedom and liberty to practice and pursue cultural and religious practices and beliefs in Australia.**
 - Recognition of the special needs for the protection of the disadvantaged of the national community.**
 - Recognition that respect and protection for the land and the environment is vital to society's long-term viability.**
 - Commitment to peace, order and good government for the benefit of all Australians for the common good.**
 - Recognition of a role of responsibility towards neighbours and resources in the region.**

On Wednesday 11 August 1999 a final draft of the proposed preamble to the Constitution which is to be placed before the Australian public at a referendum on 9 November 1999 was released. Although not perfect, it overcame some major concerns. The Commission had with the first draft preamble which it viewed as non inclusive and which failed to recognise Aboriginal Australians and their ongoing role in our culture history and relationship with the land. Although a preamble is important the government has decided that it will remain an aspirational document only and so will have minimal legal effect on the practical protection of human rights and dignity of Australians and their rights as citizens vis a vis the State.

A Vision to Reflect Upon in Light of Current Constitutional Reform.

In his work surrounding the history of freedom in the Church and State Lord Acton stated:

"It [the Church] is not only an institution but a system of ideas in which all true principles of policy are rooted, and the guardian of that true liberty which is the privilege of Christian nations. The Church has to remind princes of their duties and nations of their rights, and to keep alive the spirit of personal

dignity and independence without which the political and religious character of men (and I add women) are alike degraded."²

This comment would imply that the Church has a very special role in bringing to light ideas and principles in the current constitutional discussion. Pope John XIII³ states;

" The common good is best safeguarded where personal rights and duties are guaranteed. The chief concerns of civil authorities must be to ensure that these rights are recognised, respected, coordinated, defended and promoted."

The Gospels, the various papal encyclicals and theological learnings can provide useful information on God's vision for the world which can inform how society lives, and which we can create by being active rather than passive spectators.

The social teachings state that we are all made in the image of God, and so women and men have a pre-eminent place in the social order. That human dignity is to be recognised and protected only in community with others.⁴

The curious thing is that there is often general agreement about the values which should underpin society for "the common good", but the point of contention or disagreement often comes in how these values are to be applied in the real world in the practical sense.

The fundamental question which emerges for society in struggling to ensure human rights and dignity of citizens particularly of the most disadvantaged, is this: how can we link the social, religious, political and economic dimensions of life to ensure a more socially just, inclusive framework which accords respect for human rights and dignity and enables all humanity to reach their maximum potential and enable full participation? On the matter of full participation, Rosemary Neill in *The Weekend Australian* on 17 July 1999 revealed that almost half the Australian voters polled by Newspoll feel they don't know enough to vote in Novembers referendum. About 29% were not aware a referendum is being held then. Of the 71% of voters aware of the ballot almost half did not know it was to be about the republic. What is unfortunate is that even in a discussion about the republic or monarchy, Malcolm Turnbull (the head of the Australian Republican Movement) expressed concern about use of the word republic in a referendum question. As one writer to the editor of *The Age*⁵ stated, "there is no public debate, only a plethora of PR statements." *The Australian* in its editorial has also stated, "There is a perception that Mr Howard wishes to deprive the constitutional debate of oxygen."⁶ The assumption that Australians are incapable of informed, rational decisions and that it is better to withhold information rather than provide information is patronising and prevents overall community education and full

² *Historical Essays and Studies*, 1907, *Essays on Church and State*, Hollis and Carter, London, 1952, 84. Lord Acton, a liberal historian and moralist was concerned about ensuring appropriate moral limitations on the State whether the form be authoritarian, democratic or socialist. He is well known for his statement, "Power tends to corrupt, absolute power corrupts absolutely."

³ Encyclical *Pacem et Terris* (Peace on Earth), 11 April 1963

⁴ *Peace on Earth*, 11 April 1963

⁵ Letter to the Editor from Lawrence Reilly of Doncaster, *The Age*, 3 August

⁶ *The Australian*, 3 August 1999

discussion. It is an important feature of a true democracy that citizens are informed and can discuss matters concerning government and politics freely and openly.⁷

The body of Catholic social teachings note not just the inherent dignity of the human person⁸ but express principles surrounding political and economic rights including inalienable political-socio rights (such as voting and migration) and socio-economic rights (such as food, shelter, work, education). In addition, there is to be a preferential love to be shown to the economically and socially disadvantaged who, as a consequence of their status, suffer oppression and powerlessness.⁹ The teachings stress the role of the community and neighbourhood in promoting the common good making it possible for all men, women and children to achieve their maximum potential¹⁰. Concepts such as subsidiarity require that responsibilities and decisions be attended to not just at an individual level, but by mediating structures of families, neighbourhoods, community groups, small business and corporations. Local and federal governments should foster and participate in this.¹¹ The teachings note that larger governments have a role when greater coordination and regulation are necessary for the common good. There are messages of distributive justice and the importance of political participation of peoples in decision making as this is recognised as the best way to ensure the dignity and liberty of people is considered.¹²

Pope John Paul II has stated that the year 2000, the Great Jubilee, is about reflection, examination of conscience, and, primarily, social justice in addressing the condition of the poor and dispossessed, as outlined in the Book of Deuteronomy and in the Gospel of St Luke. Just as Jesus translated the metaphor of the Jubilee into terms appropriate for his day, so the social message of the Kingdom of God can be translated in terms relevant for our times eg to care for the oppressed and the poor, the restoration of lands to ancestral people and to restore the covenant relationship with God.

Recent Developments in Australia

For Australia, the message of the Jubilee in 2000 is specifically important in light of the anniversary of Federation in 2001, the history of dispossession of indigenous Australians and the call for reconciliation. The year 2000 is not just about the Y2K bug, whether we remain a monarchy or become a republic and it is not just the turn of the century. It could be about issues which are more central and transcending namely, what sort of society we are, what sort of society we want to be, and what sort of mechanisms and changes are necessary to enable us to become a better society. The Church can assist by drawing on its traditions and teachings to contribute to the discussion.

It is significant that Australia is currently discussing constitutional change. One of the issues which emerges constantly in the work of the Commission is how inadequately protected the human rights of Australian citizens in fact are, and that the current

⁷ *Lange v The Australian Broadcasting Corporation* (1997) 145 ALR, 96

⁸ *Pacem et Terris*, 11 April 1963

⁹ *Octogesima Adviens (Call to Action)*, 1971

¹⁰ *Justice in the World*, Synod of Bishops Second General Assembly, 30 November 1971

¹¹ *Mater et Magistra (The Reconstruction of the Social Order)*, 1931

¹² *Pius XII, Christmas message 1944*

mechanisms are problematical particularly for those who are on the margins of society but who are nonetheless on Australian shores. One third of children in Australia live in households with a gross income of less than \$31,000 and two thirds with an income of \$52,000. The 1998 United Nations Development Report¹³ states that one in eight Australians live below the poverty line. It noted "Poverty is the greatest threat to political stability, social cohesion and the environmental health of the planet." People who live in affluent suburbs are often cloistered from the life of poverty as the poor are increasingly becoming concentrated in particular suburbs which the wealthy never need enter. Australia comes 15th amongst industrialised countries in terms of human development judged according to wealth, education health and the rights to economic social and cultural freedom. The 1999 U.N. Report revealed Australia's performance had not improved.¹⁴ In Australia there is much discussion about burgeoning economic growth but little discussion of the actual distribution of this wealth. This UN Report implies that work is needed in this area. In addition, there is much other research to suggest that the gap between the rich and poor is widening.¹⁵ So often citizen's rights can be ignored or overridden by some other expediency.

Currently, there is minimal voice for many citizens by virtue of their poverty, economic, social, educational and cultural experience.¹⁶ Any discussions about

¹³ *Human Development Report 1998*, Oxford University Press, Oxford, 1998

¹⁴ *The Human Development Report 1999: Globalisation with a Human Face*, United Nations, 1999

¹⁵ *Australian Poverty: Then and Now*", Edited by Ruth Fincher and John Nieuwenhuysen, Melbourne University Press, 1998

¹⁶ Unemployment as a source of poverty is also of human rights concern given the *International Convention on Social, Cultural and Economic Rights* which notes the importance of work in giving dignity. The value of work is reinforced in the *Rerum Novarum* Encyclical by Pope Leo XI. There are some people who don't want to work. Research has shown this makes up only a very minor proportion of the total number of people who are unemployed. Mr Tony Abbott the Federal Minister for Employment's recent reported comments on unemployment that welfare creates unemployment and suggestions that those on welfare are lazy and committed to a lifestyle of luxury were most unhelpful as they ignored the limited job vacancies for the number of unemployed and further stigmatised and blamed individuals for structural shortcomings. The most recent Australian Bureau of Statistics figures note that the national estimated number of job vacancies is only 73,000 yet there are nearly 770,000 people unemployed. The current use of the terminology of "mutual obligation" by government is misleading. The prior obligation resides with the community, as represented by its government to provide the conditions for broad participation. It is divisive and mischievous to blame unemployed people for the lack of available jobs.

CSS agencies and research from CSS and the CCJDP indicate that the majority of people on welfare payments do not live overly happy, healthy and affluent lifestyles. The vast majority are more than willing to find work but are frustrated by the requirements for experience, limitations based on age and limited job availability. (See Report "*Opportunities Lost*" MCSS and CCJDP)

Unemployment and a life on welfare is not a luxury. On the contrary, as Pope John Paul II has stated, "*Unemployment is particularly painful when it affects young people who after appropriate cultural, technical and professional preparation fail to find work and see their sincere wish to work and their readiness to take on their own responsibility for the economic and social development of the community sadly frustrated.*"

It is unfortunate, that, rather than admit that current trends of constant downsizing by corporations and reductions in the public sector contribute to unemployment, instead we witness the fostering of a climate of resentment with the labelling of unemployed people as 'dole bludgers' and the increasing tendency to shift responsibility for structural deficiencies to individuals blaming those who are victims of an economy that is failing them. More recently "mutual obligation" mantra has been used to argue persons in receipt of disability pensions should also have an obligation. See *The Age*, 28 August 1999 and *The Weekend Australian*, 28-29 August 1999

constitutional reform should seek to actively engage these people by overcoming their exclusion and improving their circumstances.

The Australian Constitution has served us well but the fact remains that it is a document which largely governs relationships between the State and Commonwealth governments rather than the relationship of citizens with their government. We see developing across State, Territory and Commonwealth borders a minimalist understanding of democracy which sees an election as the permission to do anything, which sees a move away from the notions of the common good towards an increasingly individualistic and market driven political ideology or agenda. Father Frank Brennan has stated, "Australians will continue to suffer some lack of protection of their rights while the executive government is insufficiently accountable to Parliament and not sufficiently susceptible to review by the courts."¹⁷ We now encounter more and more arguments for the market to act as the sole or main regulatory force. In the United Kingdom, their Treasury commented that: "The Treasury accepts the analysis that everything is tradable and ultimately has a price and that all that is need is the sensible allocation of property rights."¹⁸ Closer to home, in Victoria, there are abundant statements from the Treasury and the Department of Infrastructure to similar effect.¹⁹ In a decent and humane society not everything is tradable. Market forces can, if left alone, aggravate inequality, increase unemployment due to savings made from downsizing, exclude and create poverty, and minimise opportunity for the vulnerable, such as those without a high standard of education, persons with a disability, low income families and so on.

Overseas we have recently seen major constitutional change. In Britain late last year, and in Canada in 1982. Geoffrey Robertson QC has expressed the view that now with Britain's incorporation of the European Convention on Human Rights the courts will have "better principles and procedures for identifying and remedying abuses of power perpetrated against citizens by government departments."²⁰ Australia is now the only nation left in the western world that relies largely on the common law for the protection of human rights rather than enshrined constitutional protections.

Our counterpart in Dublin, Ireland has been actively seeking constitutional reform to protect social and economic rights in Ireland. Laurence Ryan, Bishop of Kildare and Leighlin and President of the Irish Commission for Justice and Peace has stated²¹:

"Catholic tradition has never treated rights and duties as divisible. Its understanding of the human person is holistic and leads naturally to a comprehensive and integrated approach to rights. The classic Catholic statement of all this is still *Pacem in Terris* (1963), noteworthy for the inclusiveness of its treatment of rights. For those of the Catholic tradition, this inclusiveness provides a cogent justification to press for a sufficiently

¹⁷ *Legislating Liberty*, Frank Brennan, University of Queensland Press, Queensland, 1998

¹⁸ *The Tablet*, 19 October 1996, p 1389

¹⁹ Speech by the Victorian Treasurer, Mr Alan Stockdale, 1996 – 1997 Budget Paper No.1, 11 September 1999, Victorian Government Purchasing board Supply Policies and Guidelines, Business Plan and Procurement Positioning Analysis and On-line Purchasing Project.

²⁰ *The Justice Game*, Geoffrey Robertson, Chatto & Windus, London, 1998, p. 383

²¹ *Re-Righting the Constitution – The case for New Social and Economic Rights; Housing, Health, Nutrition, Adequate Standard of Living*, Irish Commission for Justice and Peace, A Commission of the Irish Catholic Bishop's Conference, September 1998

adequate constitutional protection for "the means necessary for the development of life" (*Pacem in Terris*, n,11) The case we have made out for including in the Constitution the rights to health, adequate housing, adequate nutrition and an adequate standard of living is thus rooted in our faith as well as in our citizenship and our common humanity."

The Case for a more Active Dialogue on Human Rights

One observation is that the discussion or dialogue about citizens and their human rights remains relegated to the fringes rather than being a central concern in Australia. The principles of human rights have long been accepted by the United Nations and we recently celebrated 50 years since the Universal Declaration which contains the principles of universality, interdependence, indivisibility and the inter-relation of human rights. Australia has agreed to be bound by the signing and ratifying of UN Conventions. These human rights conventions have gained increased precedence in Europe, due to the Council of Europe, and were reiterated in Copenhagen in 1995 at the Summit on Social Development. Many nations such as Ireland setting targets for the alleviation of poverty since the Summit. Australia however appears to be moving away from incorporating such considerations in its approach to policy-making. In recent years, Australia has been criticised for refusing to have standard human rights clauses in its trade agreements. Europe continues to give these measures precedence and also allows judicial scrutiny of their human rights conduct through the European Court of Human Rights.

In Australia, unlike many other nations of the world, human rights are seen as something for third world nations rather than of domestic relevance. There is much in Australia that works well. This is also deserving of more discussion so that we as a nation can delineate what we value and do well so that we can preserve and protect such successes. But for this to occur a discussion must be entered into. A glance through newspapers in England, France, the Netherlands and India (to name a few) finds dialogue about human rights and responsibilities; these receive much attention and underpin the discussion of a range of issues including trade and commerce. Compare this to Australian newspapers, where such discussions are scarce. Our own domestic discussion and exploration of the topic is often constrained by the limitations of language. For instance, we abbreviate human rights principles and concepts to talk of "a fair go", but the meaning of these words is always assumed rather than defined, and often the debate about their meaning is halted before a true definition is found and all of the permutations can be examined, considered, explained or argued.

The undiscovered or often unarticulated territory of human rights and human rights language should be investigated rather than assumed. Education, discussion, debate and understanding about the importance of human rights ought to be more prominent in our schools, universities, homes, newspapers and in political commentary. Currently such talk of the human rights of one group or another is often dismissed as "whinging" or on the "fringe". Recently at the launch of the CCJDP's 1999 National Human Rights Register, Sir Ronald Wilson, a former High Court Judge stated,

"I long for the day when the climate surrounding human rights will be such that members of the community and governments unconsciously consider

human rights as an essential way of life so that we do not have to commit so much energy to the struggle to attain them and have them protected."

Because of the CCJDP Charter, often it is exposed to considerations about how society treats its most vulnerable. The old adage that you tell a civilised society by the way it treats its most disadvantaged comes into play here.

Rather than changing the circumstances of the disadvantaged and according a dignified option, we see often a culture of blame, or of the deserving versus the undeserving poor, develop. The founder of St Vincent de Paul, Frederic Ozanam once wrote, "The poor man is a unique person of God's fashioning with an inalienable right to respect. You must not be content with tiding the poor over a poverty crisis; you must study their condition and often injustices which brought about such poverty, with the aim of long term improvement".²²

In July 1999, the Annual Report of Amnesty International was released. It noted that Australia is no longer at the forefront of human rights reform as it once was, but is in fact allowing policies which undermine the human rights of some of the most vulnerable people including children and young persons, asylum seekers, Aboriginal people and prisoners.

Malcolm Fraser, the former Prime Minister of Australia and current head of Care Australia once stated, "Flexibility in pursuit of the nation's interests must never be allowed to degenerate into expediency." The current concern is that, in Australia's effort to become a world leader in trade and to pursue economic growth, other facets of life are relegated to optional extras. One of these facets is the manner in which Australia respects the dignity and human rights of its entire people particularly those who are disadvantaged.

It is true that Australia's human rights record is better than many developing countries and some developed nations but this should not mean that we rest on our laurels and ignore preventable discrimination and human rights infringements within our boundaries. Australia, with its wealth and its richness in the diversity of all its people, has great scope to set an example for the rest of the world in the way it formulates public policy, the way it includes all its citizens in the life and future of the country and the manner in which it treats its most disadvantaged. The fear is that through complacency, or the expediency Mr Fraser refers to, our record is slipping and opportunities will be lost. Pope John Paul II in 1987²³ emphasised that economic development must respect all the economic, social, political and civil rights of every human being in every part of the global community. On 10 December 1998 the Australian Bishops reiterated the Church's fundamental commitment to human rights as outlined in the United Nations Universal Declaration of Human Rights and other international human rights conventions.²⁴

On 17 May 1999 in Melbourne, the Catholic Commission for Justice, Development and Peace launched its second National Human Rights Register. This register is the

²² *The Hidden Faces of Poverty: A Report From the Society of St Vincent de Paul*, June 1999, 4

²³ *Sollicitudo Rei Socialis (On Social Concerns)*, 1988

²⁴ "A Milestone for the Family", Australian Catholic Bishops Pastoral Letter to Mark the 50th Anniversary of the United Nations Declaration on Human Rights, 10 December 1998

only independent audit on Australia's human rights performance that exists within Australia. Non government organisations (NGOs) all around the country contribute information sheets on both positive and negative developments in the human rights area in Australia and these are posted in the register. NGOs have continuous contact with persons on Australian shores and assist them in times of need. These people are often not in a position to speak out and raise community awareness of the issues that affect them. NGOs are well positioned to bring their stories to the attention of the Australian people. Many of the entries reflected experiences which had not been discussed in the public arena before. The Register is a useful information source for governments to see the impact of their policies on the grass roots community. Often the impact of government policies can have unintended human rights implications, and it is important that the government be informed of these in order that they can take remedial action. This is why full copies of the Register are forwarded to the relevant ministers each year.

An analysis of responses in the 1999 register revealed that 13.3% of the human rights developments were positive and 82% were negative with 5.3% being either positive or negative. In the 1997-1998 Register, 9% of the human rights developments were positive, 89% were negative and 2% were either positive or negative. There appears to have been a very marginal improvement in the two-year period. But an 82% negative human rights developments recorded for 1999, still reflects a very significant retreat from justice and human rights in Australia in the period from 1 May 1998 until 1 May 1999. Some areas covered in the 1999 register from people working at the coalface were the impact of policies and changes in laws affecting migrants, refugees and asylum seekers and persons with a disability. Other cases included: concern over the harshness of mandatory sentencing laws in the Northern Territory and Western Australia; the still high deaths in custody rates for both indigenous and non-indigenous Australians; prison standards; racial discrimination; the rights to receive and impart information, inadequate housing and social protection of children. Many of these cases involved infringements of international human rights law by Australia.

A full copy of the National Human Rights Register for 1999 has now been sent, not only to key members of the government, but to those bodies accorded the responsibility of monitoring and scrutinising Australia's human rights compliance. These include the HREOC, the United Nation's Human Rights Committee in Geneva, The United Nations Committee on the Elimination of All Forms of Racial Discrimination, the United Nation's High Commissioner, the United Nations Commissioner on Refugees and Committee on the rights of the Child, Amnesty International's South East Asian team in London, the Vatican and others to assist them in their work.

NGOs also raised concerns about two Bills currently before Parliament, the *Human Rights Legislation Bill (Number 1 & 2)*. Apart from other measures affecting the jurisdiction and operation of the Human Rights Commission, the second Bill leaves a discretion in the hands of the Attorney General as to whether the Human Rights and Equal Opportunity Commission (HREOC) may intervene, in Federal and High Court matters. It is probable, in light of past history, that in the few cases where the HREOC intervenes, the cases involve some action by the government, which affects human rights of citizens. There is a clear conflict of interest in leaving such decisions to a representative of the government when cases may involve challenging that

government's policy. It should be left to the HREOC to determine whether intervention is required on the basis of their brief to protect and advocate for human rights.

The proposed legislation is designed to curtail appeals against deportation by political refugees and will limit judicial review of tribunal decisions to "exceptional circumstances". This is of additional concern in light of other register entries, for instance;

- curtailing legal aid to asylum seekers;
- preventing HREOC from contacting detained refugees (fortunately disapproved of by the Federal Court but now the government has indicated it may legislate to override this decision);
- the proposed limiting of powers of the Ombudsman to help boat people in detention centres.

Readers of *The Australian* and *The Age* will recall two high profile cases concerning asylum seekers, highlighting the dangers of preventing both a free flow of information and scrutiny of the actions and process adopted by bureaucratic decision-makers. One case saw a decision to deport a Somali man even though he faced a threat of being executed or tortured upon his return. In a more recent case, a Chinese woman while eight months pregnant was returned to China with the consequence that her child would be aborted due to China's policy limiting family numbers. It is critical that governments and their decision-makers be subjected to close scrutiny to avert such consequences of their decision-making. In a further case in the register a young 15 year-old female refugee has allegedly been denied a guardianship order, despite her young age, which has seen her have difficulty accessing programs and shelter.

The Commonwealth, State and Territory governments and their governing and administrative bodies are obliged to safeguard and promote the common good, as well as the good of society's component parts. This is the very nature of the social contract between citizen and state. The alternative is for society to become fractured and to splinter into antagonistic segments.²⁵

The state has a positive and active role to play in society, including in the economy, to promote and ensure that all people are dealt with fairly and have equal opportunities in life. State intervention in the economy is necessary to prevent exploitation of the weak by the strong and unscrupulous and to secure the good of all members of the community in important areas such as education, health, protection under the law, shelter and the provision of basic services.²⁶

Further to these obligations are the standards that Australia, binding the States and Territories, has agreed to as a "nation state" by way of international human rights conventions and declarations. Sir Ronald Wilson, a former High Court judge has pointed out that not only did Australia agree to be bound by these international

²⁵ Australian Catholic Bishops, *Common Wealth for the Common Good*, 1992 and *Peace on Earth*, Pope John XXIII April 11, 1973 n 53-66

²⁶ *Christianity and Social Progress*, Pope John XXIII, 1963 n 53 and extracted from the Adelaide Diocesan Justice and Peace Commission in their 1997 pamphlet, "Make Your Vote Count for Social Justice"

instruments by the act of signing and ratifying them, but that in many cases it had a role in their drafting. Australia receives accolades and support at the time of ratifying these instruments. But such gestures are meaningless and hollow, merely "window dressing" if Australia has no intention of taking them seriously on its own shores and sees its role as pointing the finger at other nation's human rights performance.

On two recent occasions the Australian government has dismissed the recommendations of two United Nation's Committees set up to monitor the compliance with conventions by "nation states". These involved the treatment of asylum seekers and concern over the passage of legislation which has a discriminating affect on Aboriginals. In order for these committees to have jurisdiction to undertake such scrutiny, "nation states" such as Australia have signed an additional protocol giving the UN committees such jurisdiction. Australia having initially agreed to the jurisdiction and competence, now seeks to render findings critical of their performance irrelevant to their policy making. It is this disregard which is perhaps the most alarming recent development in the human rights field. It marks a certain degree of defensiveness and blind adherence to one view, that is, the politically expedient one or the "we know best" denominator. The government should consider the importance of the role of these committees in applying the basic minimum standards agreed to by a great number of nations around the world, and take on board suggestions which might promote better human rights outcomes.

Some Models for Consideration and Discussion

A) The Canadian Example

In Canada, like Australia a nation with Westminster origins, as a result of the *Charter and Rights and Freedoms* (1982), government public policy is vetted internally by advisors and bureaucrats to check for any intrusions on the human rights of citizens. This is often done in consultation with NGOs who, because of their experience in the field can anticipate likely problems that might emerge in the practical operation of the proposal in its application. Then the legislation or policy goes through a process of examination to see if it can be amended to minimise any negative impacts that the proposal might have on human rights. Parliament has a role in evaluating Bills in terms of their impact upon human rights. In addition, individuals whose rights are infringed can go to court. The Charter also contains a constitutional statement of enduring values and issues of reasonableness can come into play. This discussion allows for influences of the community member, academics, media and political representatives in how they view responsibilities, rights and the role of government.

Dr Janet L. Hiebert, in commenting on the Canadian Charter of Rights and Freedoms and its relevance to the current debate in Australia states, "The Charter offers an alternative way of thinking... Instead of generating a contest of political and judicial wills, the Charter envisages an ongoing multi layered constitutional conversation with Parliament and between Parliaments and courts on the scope and meaning of fundamental human rights and the importance and justification of legislative objectives when these conflict with rights. A conversation inspired approach is beneficial not only to avoid concerns that judicial review may unduly thwart the will of elected representatives and contribute to institutional stalemates, but also because

of its potential to facilitate a more balanced and thoughtful societal rights debate than may otherwise arise where rights are codified and constitutionally entrenched."²⁸ The Canadian Court has recognised its Charter as "a new yardstick of reconciliation between the individual, the community and their respective rights" and noted that the court was "the guardian of the constitution"²⁹ as is the case of the High Court in Australia.

In Australia, the Human Right and Equal Opportunity Commission (HREOC) is required to examine the impact of government legislation on human rights. Sometimes its concerns are taken on board, but often they are ignored due to other departmental or governmental exigencies. Perhaps in adopting the dual approach used in Canada where there is an internal consideration of the impact of legislation and the external check and balance by the HREOC, we could find mechanisms to safeguard human rights and ensure good and well thought out public policy. This process would better educate bureaucrats and ministers of their international and domestic human rights standards and would reverse some of the unintended implications of legislation and policy on human rights.

B) Peter Breen's Proposal

Australia could implement the United Nations Universal Declaration of Human Rights into local law. Peter Breen³⁰ has argued that a Bill of Rights or Citizen's Charter would be a force for unity in Australia making politicians and judges more accountable and generating a new level of respect between government and their people which is sadly needed in view of the significant distrust and suspicion of politicians in Australia. He notes that an Australian Rights Survey³¹ conducted by the Australian National University found that of those surveyed 72% of citizens were in favour of some form of Bill of Rights. This survey found that of those surveyed 43% of citizens believed that their rights were not well protected whilst 79% of legislators believed that rights were well protected. This result in the writer's view reveals the possible reason why there is significant inertia on a political level to consider the possibilities that constitutional reform might hold for citizens. Unless there is a political imperative the politicians are unlikely to generate a discussion for broader constitutional reform.

C) Father Frank Brennan's Proposal

Father Frank Brennan³² has argued for some constitutional reform and the legislating of a Commonwealth Charter of Espoused Rights and Freedoms which could be a precursor to a Statutory Bill of Rights. He argues it would act as a benchmark against which a Senate Committee for rights and Freedoms would scrutinise proposed legislation and could be modelled on the current more confined Scrutiny of Bills

²⁸ "Why Must a Bill of Rights be a Contest of Political Wills? / The Canadian Alternative" Dr Janet L. Hiebert, Public Law Review Vol 10, 1999.

²⁹ *Law Society of Upper Canada v Skapinter* (1984) 1SCR 357 at 366

³⁰ *Advance Australia Fair: Reforming the Legal System with a Rights and Responsibilities Code*

³¹ *Citizen and Elite Attitudes Towards an Australian Bill of Rights: Rethinking Human Rights*, Brian Galligan and Ian McCallister, Edited by Brian Galligan and Charles Sampford, Federation Press, Sydney, 1997, 144-153

³² *Legislating Liberty: A Bill of Rights for Australia*, Frank Brennan, Queensland University Press, Queensland, 1998, 167 -187

Committee. He notes constitutional reform is needed, particularly for provisions such as section 25 of the Constitution which sanctions discriminatory laws affecting persons of a particular race. He provides a proposal for such a non-discriminatory guarantee which is not infringed by measures to overcome disadvantage. In the writer's view, the protection of the rights of indigenous Australians in the Constitution is long overdue.

Brennan's concern over a constitutionally entrenched Bill of Rights relates to his experience of the United States jurisprudence which he sees can be captive and a monopoly of judges. He therefore suggests a balance with elected representatives as custodians of the common good.

The concern with this model would relate to the often politically partisan conclusions reached by Senate Committees where often minority and majority decisions fall along party political lines even where issues may have an element of conscience involved. The aim of the protection of the citizen's interests may be lost. It may not provide the guarantee of an effective check and balance of executive power and would have to allow for court censure when individual's rights are infringed and they are deserving of a remedy at law.

These models are at least a starting point for discussion and with more community stimulation, discussion and thought some more options will hopefully emerge for consideration.

Conclusion

Australia's reluctance to undergo self examination and reconsider the way it approaches its citizens is not in keeping with a nation that wants to progress, improve and develop into the next millenium. There is a need for us to consider how we can keep our governments accountable to their citizens including the most vulnerable ones. We must at least have a discussion on how this can best be done, whether through constitutional reform or some other mechanism which governments will adhere to and citizens will learn from and respect. With or without constitutional reform it must be remembered that the existence of a legal right does not guarantee a person's remedy when they are wronged. Accessibility, cost, remoteness and the availability of legal aid for the impecunious and the working poor must be provided if such human rights are to be meaningful.

It is hoped that this paper can in some small way provoke Australians into some sort of reflection and analysis of some of these issues. This paper only seeks to raise certain issues and questions and does not provide the answers other than to suggest that a broader dialogue about our society is needed. Much more research is needed as to which approaches Australia might adopt to improve its treatment of all its citizens.

Australia as it heads into the new millenium needs to ask the question: what are we doing to create the structures that enable individuals to live with dignity in an increasingly complex technology and market driven society? The solutions may reside in a number of forms. They may be educative, legislative, community based, constitutional or bureaucratic measures, but at the very least the current discussions ought to be broadened to be more inclusive and challenging as we commence the 21st

century. One thing is certain, the Constitution of Australia ought to be seen by the people of Australia as their document not merely the document of government.

It would be very significant, if, to mark the Jubilee year in 2000 and the new millenium, Australia could undertake to make human rights a central concern for all good policy-making rather than just an optional extra. Efforts by citizens, families, communities, government, businesses and institutions alike could enable us to have the debate about what we value as citizens, what are the essential components of a civilised and just society and how we can find mechanisms that enable these components to be implemented. The philosopher, Baruch Spinoza (1632-1677) said many centuries ago "I have striven not to laugh at human actions, not to weep at them, nor to hate them, but to understand them" ³³ I would add and to improve on them so that we can be a stronger more respectful and compassionate society.

Questions for community, legal and political discussion:

1. What are the values which ought to underpin a "good society"?
2. What is the best method to improve the protection of human rights of citizens?
 - a) The current system?
 - b) A Charter of Rights and Freedoms and in what form?
 - c) A Bill of Rights and in what form?
 - d) An untried model designed for Australia? In what form?
 - e) Improved Education?
 - f) More forums for community discussion?
 - g) Other?

This paper was written by Liz Curran, the Executive Officer of the Catholic Commission for Justice, Development and Peace (Melbourne Archdiocese).

³³ *Tractus Theologico-politicus*