HUMAN RIGHTS AND INTERNATIONAL LAW

Address by
the Attorney-General, Senator the Hon. Gareth Evans QC,
to the International Law Association (Australian Branch),
Sydney, 12 April, 1984

Twelve months ago, the nature of Australia's international obligations, and their implications for domestic law, were very much in the spotlight. The Tasmanian Dam affair was in every sense a baptism of fire for a new Federal Labor Government, not to mention its Attorney-General: the first taste of State intransigence, the first test of a clear electoral mandate, and almost the first legislation to pass both Houses of Parliament.

Most particularly it was the first flexing for some time of the Commonwealth's external affairs power muscle Certainly the exercise had been planned well ahead, certainly Labor policy in a number of areas assumed the viability of legislative strategies based on the implementation of treaty obligations, and certainly the landmark Koowarta decision in 1982 appeared to have opened the way.

But, for all that, the 4-3 majority decision in the Tasmanian Dam case was greeted with considerable relief in Government ranks. Had the decision gone the other way, not only would the tragedy of the proposed Gordon-below-Franklin damming have been fully realised but a very significant limitation would have been set on some crucial areas of the Government's legislative program, above all those concerned with human rights.

In the event, the decision established the proposition - previously asserted by 3 of the 4 majority Judges in Koowarta - that the s.51(29) external affairs power

enables the Commonwealth to legislate to give effect to any genuine external obligation. In the Dam case the obligation arose out of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage.

What does that mean for human rights legislation? It means a number of things. Already we have the Sex Discrimination Act which, while capable of being supported by reference to a miscellany of other constitutional heads of power, derives a sure foundation and its most comprehensive coverage from the U.N. Convention on the Elimination of All Forms of Discrimination Against Women, ratified in July last year.

That Act, of course, makes unlawful discrimination on the grounds of sex, marital status and pregnancy in the areas of employment, education, the provisions of goods, services and facilities, in the disposal of land, in the activities of certain clubs and in the administration of Commonwealth laws and programs.

Already on the books, too, is the Racial Discrimination Act, a legacy of the Whitlam-Murphy years based on the International Convention on the Elimination of All Forms of Racial Discrimination. A review of the Racial Discrimination Act is one of the three elements in the human rights legislation package which I announced in October last year and which has been in the hands of a Human Rights Task Force comprising Departmental officers and outside consultants.

Apart from addressing specific issues, such as the problem of incitement to racial hatred and what should be the legislative solution to it, the review is examining the best way to apply and enforce anti-discrimination measures, and the relationship between the Racial Discrimination Act and Aboriginal land rights legislation.

The second element in the package is the revamping of the Human Rights Commission. What is envisaged here is a pretty thoroughgoing rewrite of the Human Rights Commission Act. I have been indicating over quite a long period the Labor Party's intention that the Commission be substantially overhauled - not because of any lack of confidence in its personnel, but because of weaknesses in the Fraser Government's legislation which gave it birth. The task force I mentioned earlier will be conducting a wide ranging review of the structure and role of the Commission, and of the operation of human rights legislation at the national level.

We propose to upgrade the role and status of the Commission, increase the resources available to it, and broaden its jurisdiction to cover the general oversight of human rights issues - whether those issues are raised by a national Bill of Rights, or arise out of the operation of the existing Racial Discrimination Act, the Sex Discrimination Act or such other similar legislation as may be subsequently introduced (for example, that relating to privacy protection, or discrimination on the grounds of physical or mental disability).

By no means least, but quite possibly last, is the proposed Bill of Rights - a generalised set of guarantees, with appropriate accompanying enforcement mechanisms, based squarely on the language (though with a few less loopholes!) of the International Covenant on Civil and Political Rights.

The Australian Bill of Rights has, as was announced recently, been approved in principle by the Government, although its introduction has now been deferred. Its details will be the subject of further consultations with

the States and other interested organisations, including the Law Council of Australia, and it will be introduced into the Parliament after work has been completed on the rest of the human rights package to which I have referred, and at a time - probably not the latter part of this year - when some rational and dispassionate debate on its merits can reasonably be assured.

You now have the skeleton of my - and this Government's - proposals for human rights legislation. One important element not yet mentioned is the role of the States.

I make no apology for the view that the Commonwealth Government and Parliament have a special responsibility to ensure that international obligations we have assumed or are in the process of assuming under the various treaties and conventions are given effect throughout Australia. In such an area as individual rights and freedoms this responsibility is also a trust - it would in my view be completely unacceptable for the basic rights of some Australians to be protected while others are left vulnerable.

This, however, is not to say that the Commonwealth should occupy the whole field. There is ample scope for the States to enact human rights legislation, both in their own right and to reinforce or complement Commonwealth action. The Government's policy is that federal measures should not infringe upon constructive developments which have been taking place in some States in the human rights field and which are consistent with our international obligations.

It is important for the Commonwealth - both as the national Government and as Australia's international face - to be the standard bearer in human rights matters, to be able to fill in the vacuums in State law, where they

exist, and to supplement the weaknesses in that law where these are manifest. But it is neither necessary nor desirable for the Commonwealth to try and cover the whole field itself.

As I have indicated, the springboard for the Australian Bill of Rights will be the International Covenant on Civil and Political Rights or ICCPR. At the same time as we have been developing a legislative charter of rights following closely the ICCPR model and terminology, we have also been attending to two other important matters concerning the Covenant.

First, there is the lamentable litany of reservations and declarations attached to Australia's ratification of the Covenant in August 1980. Objections were made to 13 separate articles out of the 53 in the Covenant, more than twice the average amongst Western European countries.

At the time I described it as a matter of national shame that we should have ratified the Covenant in so shoddy a fashion, and I see no reason to change that view. Accordingly, I have instituted a wholesale review of Australia's reservations and declarations to the ICCPR, with a view to the speedy removal of all but those in respect of which there are compelling reasons to justify retention.

In reviewing the necessity and desirability of Australia's reservations and declarations to the Covenant, it is important to recall two fundamental principles. One relates to the general rules of the observance and interpretation of treaties, and the other relates to the rules for determining what, in international law, is a reservation. These questions are crucial to a proper understanding of the scope of Australia's obligations, how they should be performed, and for determining when, in the light of Australian law and practice, reservations may be necessary.

Australia's treaty practice is governed by the 1969 Vienna Convention on the Law of Treaties. This was acceded to by Australia in 1974 and has been in force since 21 January 1980. As you will be well aware, it lays down rules for the observance and interpretation of treaties, and these are binding on Australia.

Article 26 requires as a cardinal principle that every treaty be performed by the parties in good faith, and Article 31 states the general rule of interpretation, paragraph 1 of which, you will recall, is as follows:

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

These rules are relevant to Australia's observance of the Covenant in several ways. One of the objects of the Covenant as expressed in its preamble is to promote the universal respect for, and observance of, human rights and freedoms. In pursuing this objective in good faith, States Parties to the Covenant which have not made a declaration under Article 41 (I shall come back to the question of Australia making such a declaration) cannot be acted against by other parties for non-compliance or non-observance or for the varying manner in which they choose to observe their obligations.

Rather the parties take note of differences of interpretation and encourage one another, through the Human Rights Committee, to adopt a more uniform method of reporting and implelentation, as part of the promotion of universal respect for human rights.

Where there is doubt, therefore, about the manner in which Australia is implementing its obligations, or whether its laws and practices conform to the requirements of the Covenant, it is not necessary to take the over-cautious

measure of formally notifying the United Nations Secretariat of these doubts in a legal instrument such as that which contained Australia's reservations and declarations on ratification.

Rather, these doubts, views and practices are quite appropriate for inclusion in the periodic report to the Human Rights Committee and for statements, explanations and arguments to be made before the Committee by Government representatives, and this is in fact what the Government did in October 1982 in its appearance before the Committee.

An exception is where there is a clear and demonstrably justifiable difference between Australian laws and practice and the obligations of the Covenant. These are properly the subject of reservations.

As you will again no doubt be aware, Article 2(1)(d) of the Vienna Convention defines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".

Two important features of this definition are, first, that the nomenclature used in describing the statement is not conclusive of its actual classification as a reservation, and, secondly, that the test is whether the statement purports to <u>exclude</u> or <u>modify</u> the legal effect of the treaty.

A statement in which a State Party merely seeks to <u>interpret</u> the treaty or part of it in a particular manner and to indicate its perception of its obligations under the treaty is an <u>interpretative declaration</u>. Unless the

State making the declaration purports to make its acceptance of the treaty subject to acquiescence in its interpretation, the statement cannot be regarded as a reservation.

Applying these rules to the Australian "reservations and declarations", only a few of the statements can properly be regarded as reservations. In respect of the remaining statements, they could appropriately, and without any diminished effect, be removed and placed in our periodic reports submitted to the Human Rights Committee where they could adequately be explained and augmented by other materials and reasoning, if necessary.

Finally, the present Australian Government generally favours adherence to multilateral treaties or conventions without reservations. This is a practice which we have not only sought to follow ourselves but which we have also said we hope would be followed by other Governments. This policy is all the more important in relation to the foundation of human rights treaties such as the ICCPR which embody fundamental principles to which Australia is firmly committed.

Based on that kind of approach, I have advised the States of the Government's intention to remove all but three of the reservations and declarations. Of these three, two (relating to the accommodation of prisoners) will be removed in part and the third (relating to the prohibition of propaganda for war and advocacy of racial hatred) will be further considered in conjunction with the development of the Bill of Rights and the examination of possible legislative prohibitions of racist propaganda.

Of most interest to this gathering is that the reservation or declaration relating to Australia's federal constitutional system is to be removed. The formulation is long, complicated and ambiguous and has given rise to

vigorous questioning, both at the national and at the international level, of Australia's good faith in implementing its obligations under the Covenant.

The only significant negative response to the Government's proposals has come - as might have been expected - from Queensland, and I anticipate the final withdrawal of the declarations and reservations to be accomplished later this year.

Very close and sympathetic consideration is also being given to Australia acceding to the Optional Protocol to the International Covenant. As you will be aware, accession to the Protocol involves the State Party recognising the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.

Important procedural safeguards exist to minimise abuse of this individual complaints mechanism. First, all communications are referred to the government of the state party for comment before the Committee examines them; and secondly, the Committee must satisfy itself that domestic remedies have been exhausted before it proceeds.

My own view - and this is shared by Bill Hayden - is that accession to the Optional Protocol would enhance Australia's international human rights reputation by demonstrating readiness to submit our human rights performance to further international scrutiny. Australia's record of adherence to the ICCPR is good and we should be on firm ground in allowing ourselves to be examined under the Protocol. As at the end of 1983, some 31 states including a number of influential Western Europeans had become party to the Protocol. Australia would thus be in good company in acceding.

Accession to the Optional Protocol would represent a logical extension of the Government's efforts to strengthen the human rights safeguards available to individuals in Australia. The improvement of domestic remedies in the ways I have outlined will, of course, reduce the number of cases likely to be considered by the Committee, but it seems to me to be perfectly acceptable that recourse be available to an international procedure for those who believe their grievances have not been properly resolved domestically.

A companion proposal to the Optional Protocol concerns the making by Australia of a declaration under Article 41 of the ICCPR. Under Article 41 a state party to the ICCPR may declare that it recognises the competence of the Human Rights Committee to receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under the Covenant. Communications under Article 41 may be received and considered only if submitted by a state party which has made a declaration recognising in regard to itself the competence of the Committee.

Similar procedural safeguards apply as with individual complaints. Before a communication can be referred to the Committee an attempt must have been made between the state parties to resolve the matter and all available domestic remedies must have been invoked and exhausted. The ICCPR does not provide for the imposition of sanctions, but merely allows a report to be made to the state parties concerned.

Only 14 of the 75 state parties to the ICCPR have made the declaration under Article 41 as compared with the 29 that have ratified the Optional Protocol. 5 nations - the United Kingdom, Austria, New Zealand, West Germany and Sri Lanka - have made the declaration but not ratified the Protocol.

The procedure has never, I understand, been invoked against any of the States which have made the declaration. My own view - and once again it accords with the Foreign Minister's - is that by making a declaration under Article 41 Australia would be making a clear public commitment concerning the ICCPR and our willingness to allow our human rights record to be scrutinised by other countries. This would merely give formal legal expression to what is already this Government's position in relation to the ICCPR.

Australia's role in the international sphere serves in all these various ways to sharpen our focus on human rights. Concern about human rights is now, irreversibly, a key item on the international agenda.

I hope it is clear from all that I have said this evening that the Hawke Labor Government is committed to playing its own active part, internationally and domestically, in securing the better protection of human rights everywhere.

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