Date Introduced: 10 March 1981
House: Senate
Presented by: Senator the Hon. Peter Durack, Attorney-General

Short Digest of Bill

Purpose

To establish a Human Rights Commission with the major function of ensuring that Commonwealth and Territory laws, acts and practices conform with the provisions of the International Covenant on Civil and Political Rights.

Background

The International Covenant on Civil and Political Rights was adopted by the U.N. in 1966 and came into force on 23 March 1976. Australia became a signatory on 18 December 1972 under the then Labor Government. In August 1981 Australia ratified the Covenant, subject to reservations and declarations, the most significant of which was that as Australia is a federation with powers distributed between the Commonwealth and the States, implementation will be by whichever authorities have jurisdiction, and where both Commonwealth and State aspects exist, implementation will be a matter for the constitutionally appropriate authorities; for these purposes the Northern Territory is to be treated as if it was a State.

Article 2 of the Covenant commits each party to respect and ensure to all its citizens, the rights guaranteed in the Covenant without distinction of any kind; as well, each party is required to take all necessary steps to give effect to these rights where they are not already guaranteed. In response to this latter obligation, the Government has, in this Bill, opted for a Human Rights Commission with the essential function of monitoring rather than adjudicating on the consistency of laws and practices with the Covenant.

A wide range of rights is covered by the Covenant. Among the more important are the inherent right to life; freedom from cruel and degrading treatment; freedom from arbitrary arrest and detention; right to trial within a
reasonable time; liberty of movement; equality before the law; the presumption of innocence; freedom of thought, conscience and religion and freedom of expression and peaceful assembly.

The Labour Government introduced the Human Rights Bill 1973 in the Senate on 21 November 1973. That Bill sought to create under Australian law, the rights and freedoms contained in the Covenant in language very similar to that of the Covenant. As well it established a Human Rights Commissioner whose prime function was to investigate infringements of those rights and freedoms. He also had the power to institute court proceedings against persons whom he believed had infringed the legislation. A similar right rested with a person affected by such infringement. The 1973 Bill was the subject of some controversy and the then Attorney-General invited submissions on its provisions. Debate in the Senate was adjourned after the Second Reading Speech and the Bill lapsed at the prorogation of Parliament in February 1974 and was never restored to the Notice Paper.

A Human Rights Commission Bill was introduced by the then Attorney-General Mr. Ellicott on 1 June 1977. Following the Second Reading Speech, debate was adjourned and was never resumed. However, in his speech opening the 31st Parliament, the Governor-General declared that it was the Government's intention to carry out a continuing program of law reform, particularly with a view to protecting civil liberties and enhancing individual rights and it would, in consultation with the States, reintroduce legislation to establish a Human Rights Commission.

In 1979 a Human Rights Commission Bill, in similar terms, was introduced in the Senate and passed with amendments. It was passed by the House of Representative with the amendment, moved by Mr Simon, related to the rights of the child before birth; and lapsed when Parliament was dissolved for the election in 1980 without the disagreement between the Houses on this amendment having been resolved.

This Bill is similar in terms to that passed by the Senate in 1979. An alteration has been made which includes a reference to certain International Declarations including the Declaration of the Rights of the Child proclaimed by the United Nations General Assembly in 1959; the preamble to this Declaration states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before and after birth". The inclusion of these Declarations is intended to avoid any repetition of the deadlock over the Simon amendment.
In August 1979 the Human Rights Bureau was established by Ministerial directive within the Attorney-General's Department. Its functions are: to inquire and report on matters referred by the Attorney-General; to promote discussion of human rights; to discuss co-operative ventures with the States and liaise with them on preparation of a report under Article 40 of the Covenant to the United Nations (for transmission to the Human Rights Committee) on implementation of the Covenant.

Main Provisions

Clause 3 defines the terms used in the Bill. "Human rights" means the rights and freedoms set out in the Covenant; in a Declaration (as well as the Declaration of the Rights of the Child, there are also the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons); or in any "relevant" international instrument meaning an international instrument to which Australia is a party, or a declaration adopted by Australia, if the instrument or declaration is declared by the Minister after consulting relevant State Ministers (clause 31).

"Enactment" means a Commonwealth Act, a Territory Ordinance (other than the Northern Territory) and subordinate legislation made under Acts and Ordinances.

The Commission

Clause 6 establishes the Commission as a statutory authority with the normal legal characteristics. Clause 7 provides for its membership which shall consist of a Chairman, Deputy-Chairman and between 5 and 9 other members appointed by the Governor-General; in particular, a person may not be appointed as Chairman unless he is or was a judge or is a barrister or solicitor of the High Court, another federal court or the Supreme Court of a State or Territory. Clause 20 provides that members may be appointed for up to 5 years (7 years in the previous draft) but may be reappointed. Clause 25 outlines the usual grounds for termination of appointment by the Governor-General, including misbehaviour or physical or mental incapacity. Clause 26 is a new clause and requires disclosure by members of their precuriary interests. Clause 27 places all staff of the Commission under the Public Service Act 1922. Clause 28 outlines the requirements for meetings of the Commission which may be convened at any time by the Minister or the Chairman. Clause 29 requires the Commission to report annually to the Minister on its operations as soon as practicable after 30 June of each year. As well, clause 30 provides that the Minister shall lay the Report before each House of Parliament within 15 days of receiving it.
Functions

The Commission's functions are set down in clause 9; they include:

- examination of enactments and proposed enactments for their consistency with the Covenant, Declarations and relevant international instruments, and to report to the Minister on such examination;

- inquiring into any act or practice that may be inconsistent with the Covenant, a Declaration or a relevant international instrument, attempting to effect a settlement and reporting to the Minister on those attempts;

- reporting to the Minister as to the laws that should be made or action to be taken by the Commonwealth on human rights matters;

- at the Minister's request, reporting to him on action which needs to be taken by Australia to comply with the Covenant, the Declarations or any other relevant international instrument;

- promotion of an understanding and acceptance of human rights in Australia; and

- undertaking and co-ordinating of research and educational programs for the promotion of human rights in Australia.

Sub-clause 9(2) provides that any positive legislative discrimination in favour of particular groups of persons e.g., Aborigines, shall not be regarded as offending the Covenant.

Powers and Duties

Clause 10 outlines the powers and duties of the Commission. It is given the power to report at any time to the Minister on matters arising during the performance of its functions and has a duty to do so if requested by the Minister. In respect of acts or practices, the Commission must inquire and report to the Minister (a) at his request, (b) upon receipt of a written complaint that an act or practice is inconsistent with the human rights, or (c) when it appears to the Commission to be desirable to do so. The Commission has a discretion not to act under (b) where it feels that the complaint is frivolous, vexatious or not in good faith; that the subject matter is trivial; that the
act or practice, if established, would not be inconsistent with any human right; that some other remedy is reasonably available to the complainant; the complaint would be more effectively dealt with by another authority e.g., Ombudsman.

In the previous Bill an additional reason was that the complainant did not have a sufficient interest in the complaint but this has been dropped (clause 10(4)(f) in previous Bill).

The Commission may decide not to hold an inquiry in response to a complaint if it is more than 12 months since the act was done. If the Commission decides not to hold an inquiry, the complainant must be told at once and given reasons; equally, where it holds an inquiry it shall, after reporting to the Minister, immediately supply the complainant with a copy of its findings and recommendations.

Clause 11 provides that the Minister may arrange for joint action with the States or the Northern Territory for joint performance of functions relating to the promotion of the observance of human rights or for one jurisdiction to perform functions for the other.

Holding of Inquiries

Clause 12 gives the Commission the power to inquire in such manner as it thinks fit and in doing so, it is not bound by the rules of evidence. Clause 14 ensures that where the Commission has found an act or practice inconsistent with human rights, then, before reporting to the Minister, it must give the person concerned reasonable opportunity to appear before the Commission or to make written submissions. Clause 15 gives the Commission power to require persons to produce relevant information or to give evidence; however, the Attorney-General is permitted to certify that the disclosure of information would be contrary to the public interest for a number of specified reasons. However, apart from those enumerated reasons relating to security, defence, international relations, intergovernmental communications and Cabinet deliberations, the Attorney-General’s certificate may be overruled by the Chairman of the Commission.

Reports

Clause 16 relates to reports on examination of enactments and inquiries into acts or practices. Where the Commission finds an enactment or proposed enactment to be contrary to human rights, it may recommend correcting amendments in its report to the Minister. In respect of acts and practices found to be contrary to human rights, the
Commission must inform the person concerned and the Minister of its findings and recommendations for the prevention of a repetition and in the case of the Minister also, to report on the person's compliance with its recommendations.

Miscellaneous

Clause 32 provides for certain offences. A person commits an offence if he hinders the work of the Commission or refuses to employ, dismisses or threatens to dismiss, prejudices or threatens to prejudice, any person in his employment, or intimidates, coerces or penalises any person who complains or proposes to complain to the Commission, furnishes documents or information to the Commission or gives or proposes to give evidence to the Commission. The penalty for such an offence is a fine of $500.

Clause 33 provides the normal protection for Commissioners and their staff, in the performance of their functions and acting in good faith, against civil actions for damages; a person giving evidence or providing information to the Commission is similarly protected.

Clause 34 makes it an offence for present or past members or staff of the Commission to disclose information obtained about a person, except in the performance of their functions; similarly it is an offence to disclose such information to a court, except where it is required by the Act e.g., in relation to an offence under the Act. The penalty for such an offence is a fine of $1,000 and/or imprisonment for up to 3 months.

For further information, if required, contact:

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