

## Australia

### *Second periodic report*

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#### **Introduction**

Australia ratified the Covenant on 13 August 1980. Pursuant to article 49, the Covenant became effective for Australia on 13 November 1980.

This report to the Human Rights Committee established under the International Covenant on Civil and Political Rights is submitted by Australia in accordance with the requirements of article 40 of the Covenant. It is a product of a cooperative effort by the federal Government and the six constituent Australian States and the Northern Territory.

Australia has received and considered the guidelines adopted by the Human Rights Committee at its 44th meeting and has prepared its report in accordance with those guidelines. It looks forward to the opportunity to discuss the report and the issues associated with it with the Human Rights Committee.

As the Committee has determined that reports are to be presented every five years, the Australian Government has chosen to present this report as a self-contained document rather than to merely update material provided in its initial report (CCPR/C/14/Add.1). However, the significant changes to law and practice since 1981 are mentioned, where appropriate.

Part one of this report provides information on the political and legal framework in Australia, the legal status of the Covenant in Australia, machinery and remedies available to ensure protection of rights and the dissemination of information about rights. Part two of this report provides a detailed analysis of law and practice in Australia in relation to each of the articles of the Covenant.

#### ***Part One. General***

##### **I. POLITICAL STRUCTURE**

###### ***Federal/State system***

1. Australia is a federation in which legislative, executive and judicial powers are divided between the federal Parliament, executive and judiciary and the corre-

sponding organs of the six constituent Australian States—New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. The structure of each of these political units is based on the United Kingdom Westminster system of government. In each unit there is a Parliament elected by the people, an executive responsible to that Parliament formed by the majority party or parties in Parliament, and an independent judiciary. The federal Government is also responsible for the Australian Territories which are those parts of Australia not comprised in a State.

2. Details of the area and population of Australia, together with statistics from the 1981 Census of Population and Housing, are set out in annex 1 to this report.

###### ***Northern Territory***

3. One of the Territories, the Northern Territory, has in practice a degree of self-government so that it may be regarded, for the purposes of this report, as being in the same position as a State of Australia. Hereafter, references to the States include a reference to the Northern Territory, unless otherwise indicated.

###### ***Other Territories***

4. In addition to the Northern Territory, Australia has nine other Territories. The inhabited Territories are: the Australian Capital Territory (which includes Canberra, the capital city of Australia and seat of the federal Government); and the Jervis Bay Territory (both of which are located on mainland Australia); and four Territories external to the mainland, namely the Australian Antarctic Territory; Norfolk Island; Cocos (Keeling) Islands; and Christmas Island.

5. Of the external Territories, the small Territory of Norfolk Island exercises a degree of self-government and its special position is dealt with in paragraph 17 below.

6. The uninhabited Territories which are all external to the mainland are: the Territory of Ashmore and Cartier Islands; the Coral Sea Islands Territory; and the Territory of Heard Island and McDonald Islands.

## II. LEGAL FRAMEWORK

7. The laws applying in Australia fall into two broad categories:

(a) Legislation in the form of statutes passed by a Parliament or subordinate legislation made by the executive, which is subject to disallowance by Parliament;

(b) Rules derived from decisions of courts of authority, namely:

- (i) The common law proper (that is, laws developed through judicial recognition, independent of any legislative enactment); and
- (ii) Judicial interpretation of legislation.

8. In the Australian legal system every person, whether private citizen or government official, is equally subject to the law. Government must operate through and within the law. In particular, government officials must have legal authority for their actions and are subject to effective legal sanctions if they contravene the law.

### A. Federal/State legislative powers

9. Under the Constitution of the Commonwealth of Australia the Commonwealth (i.e. federal) Parliament and executive are granted specified legislative and executive powers. The States, each of which has its own Constitution, and the Northern Territory, under the Northern Territory (Self-Government) Act 1978, as well as possessing the undefined residue of legislative powers, possess, concurrently with the Commonwealth, most of the legislative powers granted to the Commonwealth. However, pursuant to section 109 of the Constitution, a State law (not, in that context, including a Northern Territory law) which is inconsistent with a valid Commonwealth law, is to the extent of the inconsistency, invalid.

### B. Laws in Australian Territories

10. Under section 122 of the Commonwealth Constitution, the Parliament has plenary power to make laws for any Australian Territories. The laws applying in the Territories are mainly a mixture of federal law and laws made by the Government or Administration of those Territories. As a general rule all Commonwealth laws apply in the Australian Capital Territory and Jervis Bay Territory. Commonwealth laws only apply in other Territories where it is expressly stated that they do so, or by necessary implication.

#### *Northern Territory*

11. Under the Northern Territory (Self-Government) Act 1978 and associated legislation, the Northern Territory has been established with separate political, representative and administrative institutions, with its own powers to levy taxation and with its own system of courts. Accordingly, the Northern Territory is, for the purposes of the Covenant, to be treated as a separate entity, akin to a State (see para. 3). Under the Northern Territory (Self-Government) Act, the Territory's Legislative Assembly has power, with the assent of the

Administrator or the Governor-General (as provided in the Act), to make laws for the peace, order and good government of the Territory.

#### *Australian Capital Territory*

12. The Australian Capital Territory contains the national capital, Canberra. All Commonwealth Acts apply in the Territory without the need for express provisions to this effect. In addition, a number of special Commonwealth Acts have been made for the Territory, for example, the Australian Capital Territory Supreme Court Act 1933. The remaining Territory laws are a mixture of laws derived from New South Wales law (from whose territory the Australian Capital Territory was excised) prior to 1911, and Ordinances "made" by the Governor-General under section 12 of the Seat of Government (Administration) Act 1910. Ordinances must be tabled in the federal Parliament and may be subject to disallowance in that Parliament. Such Ordinances make up the majority of the laws applying in the Territory.

13. The Federal Government was recently unsuccessful in implementing proposals for self-government in the Australian Capital Territory. These proposals would have made the Territory a self-governing body with powers to make laws with respect to specified matters.

#### *Jervis Bay*

14. The Jervis Bay Territory was excised from New South Wales in 1915. The intention, never realized in fact, was to provide Canberra, an inland city, with a seaport. The Jervis Bay Territory is deemed to form part of the Australian Capital Territory (by virtue of the Jervis Bay Territory Acceptance Act 1915), so that the laws in force in the Australian Capital Territory apply also to the Jervis Bay Territory.

#### *Australian Antarctic Territory*

15. Australia accepted the Australian Antarctic Territory as a Territory under its authority on 24 August 1936. Australia is also a party to the Antarctic Treaty of 1959, concluded to ensure the use of the Antarctic for peaceful purposes.

16. By virtue of the Australian Antarctic Territory Act 1954, the laws of the Australian Capital Territory generally apply and the Supreme Court of the Australian Capital Territory has jurisdiction in the Australian Antarctic Territory. Commonwealth laws (other than Australian Capital Territory laws) do not apply unless it is expressly stated that they extend to the Territory. The Governor-General may also make Ordinances for the Territory which are to be tabled in the Australian Parliament and may be subject to disallowance by the Parliament.

#### *Norfolk Island*

17. The Norfolk Island Act 1979 equips the small Territory of Norfolk Island with responsible legislative and executive government to enable it to run its own af-

fairs to the greatest practicable extent. The Act established a framework for Norfolk Island to achieve, over a period of time, internal self-government as a Territory under the authority of the Australian Government.

18. The law in force in Norfolk Island consists of laws and statutes in force in England on 25 July 1828, certain laws enacted by the Governor of Norfolk Island before the Island became an Australian Territory, federal Acts applicable to Norfolk Island and enactments of the Territory. Since August 1979, the Legislative Assembly of Norfolk Island has exercised power, with the assent of the Administrator or the Governor-General, as the case may be, to make laws (called "Acts") for Norfolk Island. The courts of the Territory function in accordance with Australian court procedures.

#### *Christmas Island*

19. The Territory of Christmas Island has a population of approximately 3,000. The government of the Territory of Christmas Island is provided for by the Christmas Island Act 1958 which is the basis of the Territory's administrative, legislative and judicial system. Under the Act, certain of the laws in force in the Colony of Christmas Island immediately before the date of transfer of sovereignty to Australia were continued in force in the Territory, subject to their alteration, amendment or repeal by Ordinances made under the provisions of that Act. These laws comprise the laws of the Colony of Singapore specified in the Christmas Island Order in Council 1957 (Imperial Statutory Instrument 1957, No. 2166). Under the Christmas Island Act, the power to make Ordinances for the peace, order and good government of the Territory is vested in the Australian Governor-General. All Ordinances so made must be tabled in the Australian Parliament and are subject to disallowance in part or in whole by either House of Parliament. Generally, federal legislation does not extend to the Territory unless expressly stated. The Christmas Island Administration (Miscellaneous Amendments) Act 1984 provided for the extension of a number of significant Commonwealth laws to the Territory including the Commonwealth Electoral Act, health legislation and the Social Security Act. The courts of the Territory function in accordance with Australian court procedures.

#### *Cocos (Keeling) Islands*

20. The Territory of the Cocos (Keeling) Islands has a population of approximately 1,800. The Territory was a Non-Self-Governing Territory to which Chapter XI of the Charter of the United Nations applied. The Australian Government has continued to implement policies which promote the political, social, economic and educational advancement of the Cocos Malay people on the Cocos (Keeling) Islands. These policies culminated in an Act of Self-Determination held on 6 April 1984, observed by a United Nations visiting mission. Three options were placed before the Cocos Malay people— independence, free association, and integration as provided for in resolution 1541 (XV) adopted by the United Nations General Assembly in 1960. The Cocos Malay community decided to integrate with Australia.

21. Following the Act of Self-Determination the federal Parliament passed the Cocos (Keeling) Islands Self-Determination (Consequential Amendments) Act 1984 which extended a number of Commonwealth laws to the Territory. The extension of those laws had the effect, amongst other things, of giving the Cocos people full voting rights in federal elections and access to federal social security pensions and benefits. The Territory's administrative, legislative and judicial system remained unchanged.

22. The basis of the Territory's administrative, legislative and judicial system is the Cocos (Keeling) Islands Act 1955. The laws of the Colony of Singapore, in force in the Islands immediately before transfer of sovereignty to Australia on 23 November 1955, were continued in force by the Act. Those laws included some 300 Ordinances. In addition to conferring on the Governor-General the power to make Ordinances for the peace, order and good government of the Territory, the Act also gave to the Governor-General the power to amend or repeal any of the laws continued in force by the Act. The Singapore Ordinances Application Ordinance 1979, made by the Governor-General on 20 December 1979, had the effect of repealing all Singapore Ordinances in force in the Territory and applying the provisions of 95 selected Singapore Ordinances only (as specified in the Schedules to the ordinance) to be laws of the Territory as on and from 27 December 1979. New Ordinances are required to be tabled in the Australian Parliament and are subject to disallowance in part or whole by the Parliament. Commonwealth laws only apply in the Territory where they are expressly stated to do so, or by necessary implication. The courts in the Territory function in accordance with Australian court procedures (although the institutions, customs and usages of the Malay residents are given general protection under section 18 of the Cocos (Keeling) Islands Act).

#### *Uninhabited Territories*

23. The law in the Territory of Ashmore and Cartier Islands is currently the law that was in force in the Northern Territory immediately prior to 1 July 1978. However, the Ashmore and Cartier Islands Acceptance Amendment Act 1985 will have the effect, when brought into operation, of bringing into force in the Territory of Ashmore and Cartier Islands the laws of the Northern Territory as amended from time to time. At the same time it is proposed to exclude the application of a large number of the Northern Territory laws that would otherwise apply in the Territory of Ashmore and Cartier Islands but which are inappropriate to that Territory, leaving a body of regularly updated and relevant law.

24. The laws in force in the Territory of Heard Island and McDonald Islands are the laws in force in the Australian Capital Territory, as amended from time to time, so far as applicable and Acts of the Commonwealth Parliament expressly extended to the Territory. The Coral Sea Islands Act 1969 and the Heard Island and McDonald Islands Act 1953 also provide that the Governor-General may make Ordinances for the peace, order and good government of those Territories. These Ordinances must be tabled in the federal Parliament and are subject to disallowance by that Parliament.

### C. Court structure

25. This section includes a brief outline of the structure of courts in Australia (the competence and impartiality of the Australian judiciary, and the nature of judicial hearings are referred to in the comments on art. 14 in part two of this report).

#### *Privy Council*

26. The Privy Council, located in London, used to be the final court of appeal in the Australian Court system. A general right of appeal by leave was limited in 1968 to matters of State jurisdiction. In 1975 that right was further limited by the abolition of appeals from the High Court so that, in matters of State jurisdiction, an unsuccessful party before a State Supreme Court had to choose between the High Court and the Privy Council in exercising his or her appeal rights. It was generally recognized that that position was unsatisfactory and federal/State discussions were commenced to resolve the constitutional difficulties which stood in the way of a complete abolition of Privy Council appeals. Those discussions led to the passage of the Australia Act 1986 (following the passage of requesting legislation in each State) and to complementary legislation of the United Kingdom Parliament. All residual constitutional links between Australia and the United Kingdom of Great Britain and Northern Ireland, including the avenue of appeal from State courts exercising State jurisdiction to the Privy Council, were abolished by the Australia Act 1986. However, the Act does not affect the role of the Queen in her capacity as Queen of Australia.

#### *High Court*

27. The High Court of Australia, provided for under chapter III of the Commonwealth Constitution, is at the apex of the Australian judicial system. It exercises original jurisdiction in a number of important areas, including interpreting the Constitution and determining legal disputes between Federal and State Governments, litigation between State Governments, claims between citizens from different States and proceedings in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. It also hears appeals from both federal courts and State courts and is the final appeals court for both federal courts and State courts.

#### *Other federal courts*

28. Two other courts have been established under the authority of the Commonwealth Constitution—the Family Court of Australia and the Federal Court of Australia. The Family Court was created in 1976 as a specialized court to deal with matters arising under the federal Family Law Act 1975 (further referred to in part two of this report in relation to arts. 23 and 24). The Court exercises original and appellate jurisdiction throughout mainland Australia except in Western Australia and the Northern Territory. In Western Australia original jurisdiction under the Act is exercised by the Family Court of Western Australia. In the Northern Territory the Supreme Court of the Northern Territory and

the Family Court of Australia exercise concurrent original jurisdiction under the Act. The Family Law Act extends to the Territory of Norfolk Island.

29. The Federal Court was established in 1977 under the Federal Court of Australia Act 1976. The Court has jurisdiction to hear and determine appeals from decisions of persons, authorities or tribunals other than courts (for example, the Administrative Appeals Tribunal). It is also given jurisdiction to deal with some specialized areas of federal law, for example, issues relating to bankruptcy, industrial law and trade practices law. It may hear appeals from the Supreme Court of a Territory and, in some cases, from the Supreme Court of a State exercising federal jurisdiction. The Federal Court may exercise original and appellate jurisdiction in all Australian jurisdictions.

#### *State and Territory courts*

30. Each State and each of the inhabited Territories, other than the Australian Antarctic Territory (see para. 16) and the Jervis Bay Territory (see para. 14), has its own system of courts, consisting of a Supreme Court, in most jurisdictions an intermediate court (generally known as the District Court or County Court) and courts of summary jurisdiction. These courts deal with matters arising under the laws of their particular State (or Territory) and such matters as they have been empowered to deal with by the federal Parliament, such as taxation and most federal criminal matters, for example, the importation of prohibited drugs and offences under the Commonwealth Crimes Act 1914.

31. The Norfolk Island courts have jurisdiction in relation to the Coral Sea Islands Territory. The Supreme Court of the Australian Capital Territory has jurisdiction in regard to the Territory of Heard Island and McDonald Islands and the Australian Antarctic Territory.

32. The Supreme Courts are the highest State and Territory courts and deal with the most important civil litigation and the most serious criminal cases. They also exercise appellate jurisdiction from the lower State courts and a Full Court of a Supreme Court can hear appeals from a decision of the Supreme Court when constituted by a single judge. The intermediate courts, which are presided over by a single judge, decide the great majority of serious criminal offences where a jury is required to decide the facts of a case. They also deal with civil litigation up to certain monetary limits.

33. The courts of summary jurisdiction are presided over by a magistrate and deal with matters summarily, that is, without a jury. They deal with most of the ordinary (summary) offences, such as traffic infringements, minor assaults and street offences. Magistrates also conduct committal proceedings in respect of the more serious offences to determine whether there is a *prima facie* case to be determined by a judge and jury, either in an intermediate court or a Supreme Court. In most jurisdictions, these courts also deal with civil litigation for debt recovery, smaller claims by one citizen against another or against a company, as well as some maintenance, custody and property disputes under jurisdiction conferred by the federal Family Law Act.

*Small Claims Courts*

34. There are also a number of specialized courts and tribunals to deal with small claims. For example, in Queensland, the Small Claims Tribunal can deal with disputes between consumers and traders and between trader and trader up to a limit of \$1,500. In 1985, Tasmania established a Small Claims Division of the Court of Requests. It has jurisdiction in consumer and tenancy matters, and the use made of the Division since its establishment has substantially exceeded expectations. A Small Claims Court exists in the Territory of Christmas Island. The Small Claims Court of the Northern Territory has jurisdiction in the Territory of Ashmore and Cartier Islands.

D. *Bodies other than courts**Industrial bodies*

35. The trade-union system in Australia is dealt with in more detail in part two of this report (in regard to art. 22). Both the Commonwealth and the States have specialized tribunals to deal with industrial matters. These bodies are principally concerned with the making of awards to cover employment in particular industries and the settling of disputes. Among recent developments in this area was the establishment in 1983 of a new Tasmanian Industrial Commission by legislation in that State which completely revised the structure of the State's industrial tribunals. In 1985 the Queensland Government passed the Electricity Authorities Industrial Causes Act 1985 which removed the electricity supply industry from the jurisdiction of the State Industrial Commission and created a separate tribunal to deal with industrial disputes in the electricity supply industry. This and other related Queensland legislation were the subject of two reports by the Human Rights Commission. These are discussed in more detail in regard to articles 4, 8 and 22 in part two of this report.

*Review of administrative decisions*

36. A number of federal and State tribunals and other bodies have been established to deal with review of administrative decisions and actions taken by government officials. Some of these are specialized, for example, federal tribunals dealing with the review of decisions relating to payment of repatriation and social security benefits and State bodies concerned with environment and town planning. There are also bodies with more general jurisdiction for review of a wide range of administrative action.

37. There are a number of avenues under federal and State law for review of administrative action taken by Government officials. Aggrieved persons are able to seek review of the lawfulness of such action in the courts in accordance with established procedures and principles of the common law. A number of specialist administrative tribunals have also been created by statute in all Australian jurisdictions with powers of review of certain administrative decisions.

38. The functions and powers of the tribunals with powers of administrative review in the several jurisdictions vary except in relation to the office of ombudsman which is similar in all jurisdictions.

*Ombudsmen*

39. The Commonwealth and State ombudsmen are empowered to investigate and to report on complaints made to them about certain administrative actions taken by government agencies in their respective jurisdictions. They conduct their investigations in private and usually work in an informal way, although they have formal powers to examine witnesses and to seek access to documents. Ombudsmen may also exercise powers in regard to specialized areas, for example, the Commonwealth Ombudsman has powers under the Complaints (Australian Federal Police) Act 1981.

40. The role of the various ombudsmen is to determine whether there has been any maladministration on the part of the relevant agency that would justify the complaint, or whether the agency has acted improperly or wrongly. Where they find a complaint is established, they may recommend in their reports that remedial action be taken and, in the absence of satisfactory remedial action, may make a further written report to their Minister and Parliament. A special feature of the powers of an ombudsman is that the ombudsman is required to consider whether a rule of law, provision of an enactment or practice upon which a decision is based is unreasonable, unjust, oppressive or discriminatory. Thus the ombudsman can suggest that a decision is objectionable even if the decision is not itself invalid.

*Complaints against police machinery*

41. The federal Complaints (Australian Federal Police) Act 1981 has already been mentioned. During 1985, a new Victorian Police Complaints authority was established to hear complaints against members of the police force in the exercise of their duties. This authority which is independent of the police force takes over investigative functions formerly undertaken by the force itself. In Queensland, complaints against police officers can be made to the Police Complaints Tribunal established by the Police Complaints Tribunal Act 1982-1985. The Tribunal comprises a judge of the Supreme or District Courts as Chairman, a stipendiary magistrate, a representative of the Police Union or a retired police officer and one other person. The Police (Complaints and Disciplinary Proceedings) Act 1985 (South Australia) establishes the Police Complaints Authority as an independent body with jurisdiction to receive and investigate complaints about the conduct of a member of the police force. In 1984 Western Australia amended the Parliamentary Commissioner Act 1971 to empower the ombudsman to investigate any action taken by a member of the Police Department or police force in connection with his or her duties. A reasonable period (not more than 42 days unless the ombudsman agrees) is to be allowed the Commissioner of Police to conduct his own inquiry first.

### *The Administrative Appeals Tribunal*

42. The federal Administrative Appeals Tribunal established by the Administrative Appeals Tribunal Act 1975 is empowered, where jurisdiction is specifically vested in the Tribunal by statute, to review on the merits a decision made in the exercise of a statutory power. An application for review may be made by or on behalf of any person whose interests are affected by a decision made under an enactment for which the Tribunal has jurisdiction. Except in one area, the Tribunal, in reviewing a decision, has the same powers as the person or body which originally made the decision and may, if it considers it appropriate, reverse or vary the original decision. It ordinarily proceeds by way of an oral hearing at which the parties may present submissions and other evidence, and later gives a written decision with reasons. A person entitled to make an application to the Tribunal may request from the decision-maker reasons for the decision which has affected the applicant's interests.

43. The Administrative Appeals Tribunal currently has jurisdiction to review decisions made under approximately 225 Commonwealth Acts. Further extensions to its jurisdiction are made from time to time. The Tribunal also has jurisdiction to entertain appeals against a refusal or failure to grant access to a document under the Freedom of Information Act.

#### *Victoria*

44. In Victoria, an Administrative Appeals Tribunal was established in 1984 to review administrative decisions taken under specific statutes on their merits. The Tribunal parallels the earlier establishment of the federal Administrative Appeals Tribunal. Among the statutes under which the Tribunal will hear appeals is the Victorian Freedom of Information Act 1982.

#### *Freedom of Information Acts*

45. The federal Freedom of Information Act 1982, which came into effect on 1 December 1982, provides for a right of members of the Australian community to gain access to documents in the possession of the Commonwealth Government. The Act applies to most Commonwealth departments and authorities. Some categories of documents are exempt, for example, documents affecting national security or personal privacy. If a department or authority refuses to grant access, or fails to deal with a request within the time allowed by the Act (in which case a deemed refusal exists), then the applicant may seek a review of the decision by the Administrative Appeals Tribunal. An appeal lies to the Federal Court from the Tribunal on a point of law. An applicant may also apply to have an agency's decision reviewed by the ombudsman on the Federal Court under the Administrative Decisions (Judicial Review) Act 1977. As indicated above, similar freedom of information legislation exists in Victoria.

#### *E. Law enforcement and investigation processes*

46. The Australian Federal Police (now incorporating the former Australian Capital Territory police force)

operates in all areas within Commonwealth responsibility. In addition each State has its own police force which enforces State laws as well as having certain powers to arrest persons committing offences under federal laws within that State. Where federal offenders are arrested by State police, subsection 68 (1) of the federal Judiciary Act 1903 provides that the State laws on arrest, custody, bail, trial, etc., apply to those persons.

#### *Director of Public Prosecutions*

47. The federal Director of Public Prosecutions Act 1983 came into force on 5 March 1984 when the Director of Public Prosecutions commenced operations. A similar position of Director of Public Prosecutions has existed in the State of Victoria since 1982. The functions and powers of the Director of Public Prosecutions under the Commonwealth Act are primarily to institute, carry on, or take over proceedings for the summary conviction of persons in respect of Commonwealth offences and prosecutions on indictment for Commonwealth indictable offences. The Act provides that, in relation to matters or classes of matters specified by the Attorney-General, the Director may also be empowered to take civil action in respect of matters connected with, or arising out of, prosecutions instituted or carried on by the Director, or to institute proceedings for the recovery of pecuniary penalties or coordinate or supervise the taking of such proceedings. In 1984 the Queensland Government also established a Director of Prosecutions to undertake responsibility for the control of all criminal prosecutions before superior courts of Queensland.

#### *Prosecution Policy of the Commonwealth*

48. In 1982 a statement on the prosecution policy of the Commonwealth was presented to the Parliament on behalf of the then Attorney-General. As the coming into operation of the Director of Public Prosecutions Act 1983 effected significant changes in the prosecution process, a revised statement was prepared by the Director's office. That statement presented to the Parliament in 1986 provides guidelines for Commonwealth officers in making the various decisions which arise in respect of prosecutions. The document is publicly available. Among the matters addressed are the criteria to be taken into account in a decision to prosecute. Briefly, these criteria are: that the evidence discloses a *prima facie* case (i.e. that if the available evidence is accepted without reservation by a jury it could, acting reasonably, be satisfied of the defendant's guilt beyond reasonable doubt); whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires the prosecution to be pursued (factors which may be taken into account in this regard include whether the offence is serious or trivial, the obscurity of the law and any mitigating circumstances).

49. The statement also provides (in para. 2.18):

A decision whether or not to prosecute must clearly not be influenced by:

(a) The race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;

(b) Personal feelings concerning the offender or the victim;

(c) Possible political advantage or disadvantage to the Government or any political group or party; or

(d) The possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

### *National Crime Authority*

50. The National Crime Authority was established under the National Crime Authority Act 1984. Under this Act the Authority has the function of investigating certain categories of organized crime and official corruption with a view to prosecution where appropriate. However, prosecutions are not conducted by the Authority as these are matters for the Director of Public Prosecutions. Included in the Authority's functions are investigation of serious offences committed on an organized basis (including fraud, illegal drug dealings, violence and bribery) and the collection and analysis of criminal intelligence in cooperation with the Australian Bureau of Criminal Intelligence. Relevant Commonwealth and State Ministers can refer matters relating to criminal activities of the kinds referred to above to the Authority for investigation. The Authority can summon witnesses, compel production of documents by private persons and obtain information from Commonwealth agencies (a judicial warrant is required for access to information held by the Commissioner of Taxation). It may also seek court orders to impound the passport of, or arrest, a witness likely to leave Australia to avoid giving evidence.

51. The Authority's powers are balanced by appropriate safeguards, including: retention of the privilege against self-incrimination by natural persons; recognition of legal professional privilege; a requirement that all hearings be held in private; restrictions on the inclusion in reports of material identifying individuals if to do so would prejudice a person's safety, reputation or fair trial; special avenues of judicial review where a person is aggrieved by actions of the Authority; establishment of a Joint Parliamentary Committee to monitor the performance of the Authority; and inclusion of a "sunset" provision repealing the legislation upon the expiration of five years.

### *Royal Commissions*

52. The federal Royal Commissions Act 1902 provides that the Governor-General may establish a Royal Commission to inquire into and report on any matter that relates to or is connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth. A Royal Commission derives its powers from the Royal Commissions Act—these include the summoning of witnesses, inspection of documents and power to apply for judicial search warrants. Royal Commissions have been established for a variety of purposes for set periods of time. Examples of Royal Commissions established in recent times were the Royal Commission into drug trafficking and the activities of the Nugan Hand Group (the Stewart Royal Commission), the Royal Commission into British Nuclear Tests in Australia (the McClelland Royal Commission), the Royal Commission into security and intelligence agencies (the Hope Royal Commission), the Royal Commission on the use and effects of chemical agents on Australian personnel in Viet Nam (the "Agent

Orange" Royal Commission) and the Commission of inquiry into compensation arising from social security conspiracy prosecutions (the Mitchell Royal Commission). Royal Commissions may also be established under legislation in most other Australian jurisdictions.

### III. LEGAL STATUS OF THE COVENANT

53. In Australia, treaties are not "self-executing". The provisions of treaties to which Australia has become a party do not become part of domestic law by virtue only of the formal acceptance of the treaty by Australia. Thus, the provisions of the Covenant which are not already part of Australian law require legislative implementation before becoming part of the law. However, prior to or without legislative implementation, some of the requirements of the Covenant may be implemented at an administrative level.

### *Australian Bill of Rights*

54. Although the federal Government has power to pass legislation to bring the Covenant into operation as a law throughout Australia, it has not done so. This power arises through the external affairs power in the Constitution (sect. 51 (xxix)). The use of this power to support legislation implementing treaty obligations under the UNESCO Convention concerning the Protection of the World Cultural and National Heritage was recently upheld by the High Court (by a majority of 4 to 3) in *Commonwealth of Australia and others v. Tasmania and others* (1983) 46 A.L.R. 625. The Commonwealth has not passed legislation pursuant to the external affairs power to give the Covenant the force of law in Australia for essentially political reasons. As State Governments have traditionally provided the detailed content in State laws of most of the rights reflected in the Covenant, some States feel that the passage of national legislation in this area is an intrusion into areas of State responsibility.

55. As a compromise, the federal Government attempted during 1985 and 1986 to secure passage through the federal Parliament of an Australian Bill of Rights Bill. The Bill included an Australian Bill of Rights, which was a charter of rights based on the rights and freedoms contained in the Covenant. The Bill of Rights was intended to operate as a guide to the judicial interpretation of Commonwealth and Territory (other than Northern Territory) laws, so that as far as possible laws would be construed in such a way as not to conflict with the Bill of Rights; and, with limited exceptions, the Bill of Rights was to prevail over inconsistent Commonwealth and Territory (other than Northern Territory) laws and the inconsistent law would be inoperative (or repealed).

56. Under the Bill, the new Human Rights and Equal Opportunity Commission (which, as discussed below, is the successor body to the Human Rights Commission) was to be given power to investigate complaints about Government acts or practices which might infringe the Bill of Rights, and to report on Commonwealth, State and Territory laws (or proposed laws) which might infringe the Bill of Rights.

57. The Bill stalled in the Senate (the upper House of the Federal Parliament) after very lengthy debates which created a serious backlog preventing the passage of other legislation. Opposition to the Bill resulted in an extensive campaign of misinformation about the purpose and effect of the legislation. This was unjustified but, unfortunately, widespread. The Government considered that it was not desirable to proceed with such a major human rights initiative in the absence of community understanding of, and support for, the proposal. The Bill has now been before the Parliament for more than a year and has no real prospect of early passage. The Government has, therefore, decided to abandon further action on the Bill so that Parliament's energies can be devoted to clearing the backlog of legislation.

58. In the absence of legislation of the type proposed by the Australian Bill of Rights Bill, the implementation of the Covenant in Australia remains dependent on a mixture of federal and State laws. This is dealt with in more detail below and in regard to individual articles of the Covenant in part two of this report.

#### *Australia's reservations and declarations to the Covenant*

59. It has been the policy of successive federal Governments since 1968 to work towards ratification of the Covenant. In August 1980 ratification was effected. This involved lengthy discussions between the Commonwealth and the States. It was these discussions that led to the formation of the Meeting of Ministers on Human Rights, comprising federal, State and Northern Territory Ministers whose portfolios carry major responsibility for human rights (currently the Attorneys-General). The Meeting provides an opportunity for Ministers of the several jurisdictions to consider together relevant issues in the human rights field. Apart from the preparations for ratification of the Covenant and of this report, the Meeting has provided a forum for discussion of removal of certain of the reservations and declarations made when Australia ratified the Covenant.

60. On 10 December 1984 (Human Rights Day), the federal Government announced that it had taken action to withdraw the majority of the reservations and declarations lodged at the time of ratification of the Covenant. Annex 2 to this report is a copy of the Attorney-General's press release on this matter together with the text of the original reservations and declarations and the instrument of withdrawal (see also CCPR/C/2/Rev.1). Australia maintains three reservations to the Covenant. These are in respect of article 10 (on segregation of prisoners), article 14 (on compensation for miscarriage of justice) and article 20 (on war and racist propaganda).

#### *Australia's policy on implementation of the Covenant*

61. In view of its lack of success in attempting to secure passage of an Australian Bill of Rights, the Australian Government has now decided that the most appropriate way to implement the Covenant would be to rely upon, and supplement where necessary, the existing protection given to civil and political rights in both the State and federal spheres. The standards Australian governments follow in this regard are those provided in the

Covenant. In areas of federal jurisdiction a check on the maintenance of these standards was a major part of the role of the Human Rights Commission. This role has been taken over since the end of 1986 by the Human Rights and Equal Opportunity Commission (discussed further below).

62. The ratification of the Covenant by Australia, together with the regular convening of the Meeting of Ministers on Human Rights, the establishment of the Human Rights and Equal Opportunity Commission and such other human rights protecting mechanisms as may be established in other jurisdictions, will promote continued observance of civil and political rights by both federal and State governments and, in some cases, by private citizens.

63. *Federal system.* A federal State is required by article 50 of the Covenant, in conjunction with article 2, to ensure that its provisions extend equally to all parts of that State. Australia is a federal system in which each jurisdiction has legislative, executive and judicial powers and responsibilities which can be, and are, exercised in different ways. This will be dealt with at points throughout this report. The Australian Government described the means of implementation of the Covenant in the Australian federal system in a statement accompanying the instrument lodged in 1984 withdrawing certain reservations and declarations made on ratification of the Covenant. That statement provides:

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

64. *Developments in Victoria.* In 1985, the Victorian Parliament's Legal and Constitutional Committee referred the question of whether or not a Bill of Rights was desirable in that State to its Human Rights Sub-Committee. The Sub-Committee is consulting widely in the community on this question. Four principal options are being considered for action:

(a) A declaratory Bill with moral and educative value but no legislative force;

(b) A declaratory Bill backed by a parliamentary scrutiny of bills committee to examine new legislation for its consistency with the principles enunciated in the Bill;

(c) A Bill of Rights administered through an executive body such as a human rights commission with power to investigate complaints, conciliate and make recommendations to Government for action;

(d) A judicially enforceable Bill qualified only by expressly overriding provisions in other State legislation.

#### IV. LEGAL EMBODIMENT OF RIGHTS

65. As mentioned above, the States and the Commonwealth (in respect of Territories such as the Australian Capital Territory) provide for the protection of the rights and freedoms in the Covenant through a variety of pieces of legislation. In many instances the enactment of

legislation is not a conscious attempt to implement the Covenant but a recognition of the fundamental nature of these rights and freedoms. In the absence of federal legislation, the protection of these rights becomes primarily a matter of State concern. Some areas of traditional State responsibility are the custody and care of prisoners (art. 10 and, to some extent, art. 7); the rights of assembly and association (arts. 21 and 22); criminal law generally (arts. 6, 9, 10 and 15) and freedom of thought, religion and expression (arts. 18 and 19). Areas in which legislative power rests solely with the Commonwealth include immigration and passport control (arts. 12 and 13) and marriage and divorce (art. 23).

#### *Constitutional guarantees*

66. Whilst the protection afforded to the civil and political rights of Australian citizens does not depend on any formal system of constitutional guarantees, a number of guarantees are expressly provided by the Commonwealth Constitution, as follows:

(a) Any property acquired by the Commonwealth must be acquired on just terms (sect. 51 (xxxii));

(b) All indictable Commonwealth offences are to be tried by jury (sect. 80);

(c) Inter-State trade, commerce and intercourse shall be free (sect. 92);

(d) The Commonwealth shall not make any law to establish any religion or to interfere with religious freedom (sect. 116);

(e) Citizens are not to be subjected to any disability or discrimination in any State by reason of residence in another State (sect. 117); and

(f) All Australians entitled to vote may vote in federal elections (sects. 7, 24 and 41).

67. The guarantees mentioned in sections 51 (xxxii), 80 and 116 of the Constitution only relate to interference by the federal Government with the rights of citizens. There are considerable areas of law dealing with, or capable of affecting, human rights which are within the jurisdiction of the States and Territories. The Constitutions of some States expressly provide guarantees of certain civil and political rights. For example, section 46 of the Constitution Act 1934 (Tasmania) provides a guarantee of freedom of religion.

68. *Work of the Constitutional Commission.* In December 1985, the federal Government established a Constitutional Commission to carry out a systematic revision of the Constitution and to report by 30 June 1988. The revision is to include consideration of the question of more extensive constitutional protection of civil and political rights. The Commission is chaired by Sir Maurice Byers, a former Commonwealth Solicitor-General, and consists of a former Prime Minister, Mr E. G. Whitlam, a former Premier of the State of Victoria, Sir Rupert Hamer, Mr Justice Toohey of the Federal Court of Australia, Professor Leslie Zines of the Australian National University and Professor Enid Campbell of Monash University. It is assisted by five advisory committees drawn from prominent Australians in a variety of fields who are to consult on new proposals to the maximum possible extent with the Australian people.

69. While the civil and political rights embodied in the Covenant are not guaranteed in a formal constitutional sense, a high level of acceptance, protection and observance of those rights in Australia is ensured by a system of representative and responsible government, statute law and the common law, an independent judiciary and the freedom of the press.

70. *Parliament.* The democratic system of government in each of the Australian jurisdictions is, of course, available to interested individuals to bring to notice areas in which human rights and fundamental freedoms are in need of protection or in need of further protection. The particular strength of a Parliament in this context is its ability, because of its responsiveness to changing community values, to adjust rights from time to time in a way that is most appropriate and therefore most effective. Australia has also inherited from the British common law a tradition that stresses the protection of individual rights (particularly individual liberty) against those of the State. Parliament, which is strongly influenced by these political concepts, can be a particularly effective forum in which to seek the protection of such rights, or to seek redress where a right is considered to have been unacceptably infringed.

71. *Common law.* The recognition in Australia of many of the rights and freedoms contained in the Covenant is based on the enunciation of these rights over the centuries by judges in common law and equity sitting in the United Kingdom, the products of whose work Australia has inherited. Thus, for example, the right to personal liberty (art. 9) and many of the procedural rights contained in articles 9 and 14 are provided for in the common law. Subject to some specific improvements, modifications or exceptions contained in legislation, these rights have been enforceable for many years in Australian courts, notwithstanding the absence of legislative backing. These matters are referred to more specifically in part two in the discussion of the particular articles. Thus, the common law system, even without statutory intervention, gives considerable protection to many of the human rights and freedoms recognized in the Covenant.

72. *Statute law.* Other rights and freedoms recognized by the Covenant are contained in specific laws of the Commonwealth and the States (referred to in more detail in part two of the report). For example, the right to marry is implicitly recognized in the federal Marriage Act 1961. Many protections for those charged with criminal offences are recognized in legislation of the States, Territories and Commonwealth, as are the rights to participate in various aspects of public life.

73. *The judiciary.* The role of the judiciary is also important in protecting human rights and fundamental freedoms. The judiciary in Australia is fully independent and jealously preserves this independence. It has a legal tradition oriented towards protecting the rights of individuals—particularly in their relations with the State—and is able to draw upon a highly developed set of legal principles to assist in this respect (particularly, in this context, the principles of evidence and natural justice).

74. *The media.* Finally, the freedom of the media to expose breaches of human rights, and report parliamentary and court decisions relating to human rights matters, is critically important in keeping the public informed of, and therefore responsive to, human rights issues. As explained in greater detail in the comments on articles 17 and 19 in part two of this report, there is in Australia some restriction in the public interest on the operations of the media, but these restrictions do not prevent the reporting of human rights related issues. By any standard, the media in Australia enjoys a very high degree of freedom.

75. The principles described above, especially the independence of the judiciary and the rule of law, ensure that when a question of human rights arises it will normally be considered in a public forum. The possibility of arbitrary deprivation of essential rights by private or governmental bodies is therefore reduced.

#### V. SPECIAL HUMAN RIGHTS MACHINERY

76. It follows from the account in the foregoing paragraphs that, in Australia, responsibility for the protection of human rights is widely shared. It is not only carried by each of the Governments within the federation, but also by various institutions within those entities. These are primarily the Parliaments, the Governments and the Courts, to which some specialized institutions with primary concerns in the human rights field have recently been added.

##### A. *The role of parliamentary committees*

77. Parliaments have an important role in enacting or amending laws that recognize and protect human rights. Parliaments also have a significant role themselves in identifying and exposing executive infringements of human rights. They are, as well, accessible to individuals (through petitions, lobbying, protests, etc.) as a forum to discuss infringements of human rights and remedial action. Joint parliamentary or single House committees exist in the Parliaments of each Australian jurisdiction, other than Western Australia (see below), to examine subordinate legislation during the period in which it may be disallowed. This subordinate legislation is examined, *inter alia*, for any provisions that unduly trespass on rights previously established by law or, in some jurisdictions, personal rights and liberties, and provisions that make rights unduly dependent upon administrative rather than judicial decisions. The committees regularly report to the House or Houses of Parliament to which they are responsible. They also consult with the Ministers responsible for the statutes under which the subordinate legislation has been made, as to the changes that should be made to overcome the problems they have found. In Western Australia, this function in relation to subordinate legislation has been entrusted to a committee constituted outside Parliament—the Legislative Review and Advisory Committee. Legislation, other than subordinate legislation, may also be referred to that Committee by either House of the Western Australian Parliament or by Ministers.

78. The federal Parliament also has a Senate Standing Committee on the Scrutiny of Bills which considers new federal legislation introduced into the Parliament with a view to identifying any provisions of such legislation which unduly trespass on individual rights and civil liberties. Reports of that Committee are tabled in the Parliament.

##### B. *Federal machinery*

###### *Human Rights Commission*

79. In 1981 the federal Government enacted legislation for the establishment of a Human Rights Commission, which operated for a period of five years. The Commission had three major functions: the investigation of complaints of violation of human rights in areas of Commonwealth responsibility, reporting to Government on measures necessary to protect or enhance rights, and community education. The Commission was replaced at the end of 1986 with a new Human Rights and Equal Opportunity Commission. Like the previous Commission, the new Commission is empowered to monitor observance of the Covenant and to make reports, with appropriate recommendations for action, to the federal Government for tabling in the Parliament. Generally, the new Commission operated only in regard to matters of Commonwealth responsibility. The State Governments will continue to be responsible for considering what additional action by them may be appropriate in response to matters raised by the Commission.

80. The previous Commission exercised, and the new Commission now exercises, functions under the federal Racial Discrimination Act 1975 (which provides for a complaints-based mechanism for resolving acts of discrimination in a number of areas on the grounds of race, colour, descent or national or ethnic origin) and the federal Sex Discrimination Act 1984 (which provides a similar mechanism for resolving acts of discrimination on the grounds of sex, marital status or pregnancy). The new Commission will also perform functions previously exercised by the Commonwealth and State Committees on Discrimination in Employment and Occupation which were set up to carry out Australia's obligations under the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (further discussed in para. 145).

##### C. *State machinery*

81. Four States have special anti-discrimination machinery to hear complaints on a number of grounds. The machinery established by the State Acts is similar to that in the federal sphere. Each of those States have entered into cooperative arrangements with the Commonwealth Government, whereby the State bodies can handle complaints from persons in those States under the federal legislation. This "one-stop-shopping" approach eliminates confusion among members of the public, rationalizes existing machinery and enables the Commonwealth to rely on the expertise of the State bodies.

82. *Victoria.* Equal opportunity legislation in Victoria, introduced in 1977, was substantially strengthened

in 1984 and 1985. The Equal Opportunity Act 1984 incorporated the Equal Opportunity (Disabled Persons) Act 1983 to include discrimination on the grounds of physical and mental disability. The legislation also expanded the grounds of discrimination to include discrimination on the basis of a person's status or private life. Status includes the sex, marital status, race or impairment of a person or the status or condition of being a parent, childless or a de facto spouse. Private life is defined as the holding or not of any lawful religious or political belief or view and includes engaging in or refusing to engage in any such lawful activity. The 1985 amendments made machinery changes to strengthen the quasi-judicial functions of the Equal Opportunity Board and the educational functions of the Equal Opportunity Commissioner.

83. *Western Australia.* The Equal Opportunity Act 1984 provides a similar complaints-based mechanism to make remedies available for discrimination on the grounds of sex, marital status, pregnancy, race, religious or political conviction, or involving sexual harassment.

84. *South Australia.* The Equal Opportunity Act 1984 consolidated, improved and extended existing anti-discrimination laws in that State. The Act proscribes discrimination based on sex, sexuality, marital status, pregnancy, race or physical impairment in, for example, the areas of employment, education, the disposition of land, the provision of goods, services and accommodation, and by certain social, sporting and other types of associations.

85. *New South Wales.* The Anti-Discrimination Act 1977 makes unlawful discrimination on the grounds of sex, race, marital status, intellectual impairment, physical impairment and homosexuality in areas of public life, including employment, education, provision of goods and services, accommodation and registered clubs. In the case of complaints, the conciliation process is undertaken by the Anti-Discrimination Board with referral to the Equal Opportunity Tribunal for judicial determination if necessary.

## VI. REMEDIES

86. As indicated above, remedies for individuals are not available directly by reference to the provisions of the Covenant. However, extensive protection is afforded in Australia to civil and political rights by all arms of government, utilizing many different agencies.

87. Formal institutional remedies in Australia, other than those involving Parliament, are of three kinds: (a) traditional remedies available in the courts; (b) judicial or quasi-judicial remedies available in courts or special tribunals; and (c) remedies achieved through institutions using the processes of inquiry, persuasion and publicity.

### *Court remedies*

88. Courts in all jurisdictions have wide powers to hear civil and criminal actions and to make enforceable orders. In criminal matters, the penalties are fines or im-

prisonment or penalties in lieu of imprisonment, such as community service orders (see comments in part two on art. 9). In civil actions, the normal remedies are by way of damages or orders for specific performance or for cessation of the doing of particular acts. These remedies lie to enforce all formally made law in all jurisdictions and to support the rule of law.

89. In the case, specifically, of a government official exceeding his or her legal authority, a person aggrieved may seek a remedy through the courts. The aggrieved person may, for example, bring a civil action in tort or contract against the official or apply for performance of an act by means of a prerogative writ, or for a statement of the aggrieved person's legal position *vis-à-vis* the official by means of an action for a declaration.

### *Prerogative writs*

90. Remedies against unlawful administrative action include processes available to superior courts under prerogative writs and the orders superior courts can make by way of injunction or declaration. These are derived from the British courts which developed them in earlier centuries, characteristically to protect the subject against improper actions by the executive Government, its agencies and its officers.

91. These remedies are exercised by the superior courts, both federal and State, which have inherent jurisdiction to control the exercise of powers by inferior authorities, namely, lower courts, quasi-judicial tribunals and officials. One important means by which this control is exercised is through the issue of prerogative writs. These writs issue only after the applicant has made out his or her case. The prerogative writs still in use are the following:

(a) Writ of *mandamus*: this issues to compel the performance of an act the defendant is under a legal duty to perform;

(b) Writ of *certiorari*: this quashes the decision of a lower court or a tribunal or other body having power to determine questions affecting a person's rights on any one of a number of grounds, such as the tribunal's alleged lack of jurisdiction;

(c) Writ of prohibition: this prohibits the continuance of proceedings in a lower court or a tribunal or other body having power to determine questions affecting a person's rights on the same ground as the writ of *certiorari*;

(d) Writ of habeas corpus: this requires the production of a prisoner to enable an inquiry to be made into the cause for his or her detention. If no cause is shown, the prisoner is released (see also the comments on arts. 7 and 10 in part two); and

(e) Writ of *quo warranto*: this would be more accurately described as an information in the nature of a *quo warranto* and is available (but rarely used) to show the usurpation of an already existing validly created office, but may not be used to attack the validity of the creation of the office itself.

*Injunctions and declarations*

92. Courts may also grant injunctions and declarations in their equitable jurisdiction. Restrictive injunctions order a defendant to refrain from performing an act or series of acts. Mandatory injunctions order a defendant to perform an act or series of acts. Declarations declare the applicant's legal position *vis-à-vis* the defendant.

*Review of administrative action*

93. A range of machinery concerned with administrative action, mostly introduced during the 1970s, provides additional remedies. The role of the Administrative Appeals Tribunal has already been discussed. The Tribunal may affirm or vary a decision, substitute its own decision or remit the matter for reconsideration.

94. Another avenue for review is to the Federal Court of Australia under the Administrative Decisions (Judicial Review) Act 1977. This Act provides a simplified procedure for seeking judicial review in the Federal Court of Australia of administrative action taken under Commonwealth statute, as an alternative to the traditional form of judicial review by means of prerogative writs. Application may be made to the Federal Court for an order of review on one or more of the grounds set out in the Act, for example, where it is alleged that the common law rules of natural justice have been breached in connection with the making of the decision (where a person was denied an opportunity adequately to put his or her case before a decision was made). The Act also provides that, in certain circumstances, a decision maker can be required to give a written statement of reasons for a decision made to a person affected by it. In contrast with the Administrative Appeals Tribunal, the Act provides for review on the basis of error of law and the Federal Court has no power to review a decision on its facts. In summary, the Court may quash a decision, refer the matter back to the decision maker for further consideration, declare the rights of the parties, direct the making of a decision, or order the doing or the refraining from doing of any act or thing, as the Court considers necessary to do justice between the parties.

95. In general, the other specialist administrative tribunals that have been established in the Commonwealth and States are entitled to exercise the same powers as the original decision maker in reviewing decisions committed to their jurisdiction. Some special State tribunals, for example, those administering anti-discrimination or equal opportunity legislation, have powers similar to those of courts.

*Other remedies*

96. Remedies at law are available in most cases where human rights or fundamental freedom are breached, as is apparent from the discussion in part two. However, there are other remedies which concentrate more on the promotion of understanding, discussion and the reconciliation of differences. The importance attached to inquiry and conciliation is evidenced by the provisions included in much recent legislation. The om-

budsman (see paras. 39-40) is one example. If any remedial action recommended is not taken to the ombudsman's satisfaction, the ultimate sanction is by way of publicity of the ombudsman's report. Federal and State anti-discrimination legislation (see paras. 80-85) is another example. This legislation does, however, provide for further (court-type) action if a conciliated settlement cannot be achieved. The new Human Rights and Equal Opportunity Commission and its predecessor, the Human Rights Commission, are further examples. All these bodies work more by attempting to reach outcomes acceptable to both parties, i.e. by conciliation or negotiation of an amicable settlement, than they do by the strict enforcement of a particular law or a particular interpretation of that law. In this way, the provisions of the Covenant are used as an instrument of social development and change.

*Health complaints*

97. In 1986, a Bill establishing a health complaints office for the State of Victoria was distributed for discussion. The purpose of this proposed office is to examine complaints against providers of medical services, whether in the public or private sectors, and to make recommendations for the reform of the health system on the basis of the information obtained in carrying out this investigative function.

## VII. COMMUNITY EDUCATION

98. The federal Government has taken steps to ensure the dissemination of the Covenant throughout the community. The Human Rights Commission (the forerunner to the new Human Rights and Equal Opportunity Commission), when established in 1981, was given a specific statutory charter which included responsibility:

To promote an understanding and acceptance, and the public discussion of human rights in Australia and the external Territories; and

To undertake research and educational programme and other programmes, on behalf of the Commonwealth for the purpose of promoting human rights and to coordinate any such programmes undertaken by any other persons or authorities on behalf of the Commonwealth.

99. An indication of the type of community education work in which the Commission has been involved can be seen from its most recent annual report and, in particular, the list of publications of the Commission contained in that report which is attached as annex 3 to this report. The Commission has also engaged in regular discussions with governmental and non-governmental organizations and has done considerable work in the preparation of human rights teaching kits for schools.

100. The purpose of the information and education activities of the Human Rights Commission was to provide citizens with an understanding of human rights by explaining: what human rights were; why they were important; what rights were "guaranteed" in Australia; how those rights were "guaranteed" or protected; what effect the infringement of human rights had on the community in general and the victims in particular; why persons should be concerned about the protection of their own rights; and why they should be concerned about the protection of the rights of others. This understanding can

then enable citizens to initiate action if they also know: what people can do if the rights of others are infringed; what people can do further to promote understanding and observance of human rights; and where there are further information sources.

101. Commission brochures have been published in a variety of community languages. The Commission has also maintained a library of human rights resource materials, including videotapes which were made available for use by community organizations and schools. Posters and leaflets and a regular newsletter were also published.

#### *Non-governmental organizations*

102. Non-governmental agencies have an important role to play in the protection and promotion of human rights. There are a large number of such groups in Australia. All groups provide a forum for the dissemination of ideas and many operate as lobby groups, putting forward submissions to Governments on matters of particular concern. Some of these agencies have also received funding from Governments to assist in their work.

103. The Human Rights Commission has published a compendium of national human rights organizations in Australia (covering both governmental and non-governmental organizations). The compendium is intended as a source for addresses and contacts for like-minded organizations as well as to provide information about the various human rights organizations in Australia. The Commission also held regular consultations with non-governmental organizations and it is expected that the new Commission will continue this work.

### **Part Two. Information in relation to individual articles of the Covenant**

#### **Article 1**

##### SELF-DETERMINATION

104. For Australia, the principal landmarks in achieving self-government were the institution of responsible government for the six States pursuant to the Imperial Australian Colonies Government Act 1850 (the colonies adopted new Constitutions between 1855 and 1889) and the later federation of the six States in the federal Commonwealth. The Commonwealth of Australia came into being on 1 January 1901 under the authority of the Imperial Commonwealth of Australia Constitution Act 1900. Under the Constitution, which is embodied in the Imperial Act, the Governor-General of Australia, as the representative of the Crown, is able to exercise all the powers of the Crown in Australia. In institutional terms, Australian self-government involved, as indicated in part one, freely elected parliaments, responsible executive Government, an independent judiciary and the rule of law.

#### *Australian Territories*

105. Australia's former Territory of Papua and Trust Territory of New Guinea which had been jointly administered as the Territory of Papua New Guinea became independent of Australia in 1973. Australia completed its obligations under Article 73 *e* of the Charter of the United Nations in relation to the Territory of the Cocos (Keeling) Islands in 1984. The measure of self-government existing in the Northern Territory and Norfolk Island has already been referred to in part one of this report.

106. At the international level, Australia has traditionally been a strong supporter of the right to self-determination. This is evidenced by the action taken by the Australian Government in respect of the Cocos Malay people on the Cocos (Keeling) Islands, which culminated in the Act of Self-Determination held on 6 April 1984 (see para. 20). The United Nations Visiting Mission which observed the voting process was led by Ambassador Coroma of Sierra Leone and its other members were from Fiji, Venezuela and Yugoslavia. The Mission was of the unanimous view that the people of the Cocos (Keeling) Islands had exercised their right to self-determination in accordance with the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples.

#### **Article 2**

##### GIVING EFFECT TO RIGHTS; REMEDIES

#### *System of government*

107. Australia is a federal State in which powers and responsibilities are constitutionally divided between the central (federal) Government and State (and Territory) governments. Thus, article 50 assumes equal importance with article 2 as it provides that the Covenant is to extend to all parts of federal States without limitations or exceptions.

108. Australia intends to honour fully the provisions of the Covenant without distinctions of any kind. The various governments have taken steps to ensure that their law and practice comply with the Covenant. In a federation, implementation of the provisions of the Covenant is a matter of some complexity. In relation to detailed provisions, the Covenant can be subject to differing interpretations and the constituent jurisdictions in Australia may adopt different detailed implementing measures. However, all Australian jurisdictions accept that the provisions of the Covenant extend to all parts of Australia as a federal State. When, in 1984, the Australian Government deposited an instrument withdrawing certain of the reservations and declarations made at the time of ratification of the Covenant, the instrument of withdrawal was accompanied by a statement on behalf of Australia, as follows:

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth,

State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

109. The consultations between the responsible Commonwealth, State and Territory ministers on human rights matters, which commenced in 1968 when the Australian Government decided to work towards ratification of the Covenant on a basis agreed upon with the States, have resulted in the formulation of a Meeting of Ministers on Human Rights (referred to in para. 59). Discussions in this Meeting, and the associated working party of officers, resulted in Australian ratification. The Meeting also provides a venue for consultation about action to be taken as particular issues are identified for consideration.

#### *Paragraph 1*

110. Many matters relevant to article 2 have already been discussed in part one of this report. The requirements of article 2, paragraph 1, are of general application to other parts of the Covenant. Accordingly, aspects of this article are subsumed, where relevant, in the discussion of rights and freedoms in relation to particular articles discussed in this report.

#### *Paragraph 2*

111. As mentioned at paragraph 53 of this report, international treaties to which Australia is a party are not self-executing. Accordingly, their implementation requires legislative and executive action by the Government or Governments within whose jurisdiction the subject-matter of the treaty falls.

#### Human Rights Commission

112. The role of the Human Rights Commission in monitoring the observance by the Commonwealth and its agencies of the provisions of the Covenant has already been mentioned. Since the passage of the Human Rights Commission Act 1981 and the Human Rights and Equal Opportunity Commission Act 1986, persons who consider that their rights under the Covenant have been infringed by acts or practices under Commonwealth law or acts or practices of the Commonwealth Government or its various statutory agencies, or in a Territory have been able to complain about the matter to the Human Rights Commission and since December 1986 to the Human Rights and Equal Opportunity Commission. Like the former Commission, the new Commission has the power to inquire into the complaint, to attempt to settle it by conciliation and, if conciliation is unsuccessful, to report the matter to the Commonwealth Attorney-General, who is required to table such reports in the Commonwealth Parliament.

#### Bill of Rights

113. In 1985, the Government sought to implement the Covenant even more effectively by introducing into Parliament the Australian Bill of Rights Bill. This Bill included, as one of its clauses, a charter of rights and freedoms that was based on the covenant, but which also sought to draw on experience acquired under other international and domestic human rights instruments. Thus,

some of the provisions of the Covenant were recast in the Bill of Rights in a way that was thought to make them more directly relevant to the Australian context.

114. Under the terms of the Australian Bill of Rights Bill, persons who considered that their rights under the Bill of Rights had been infringed by a law of the Commonwealth would have been able, in certain circumstances, to challenge that law in the courts. Commonwealth laws which were found to be inconsistent with the Bill of Rights were to be overridden by it, unless they contained clear words to the contrary. Persons who considered that their rights under the Bill of Rights had been infringed by the acts or practices of Governments at any level would be able to complain to the proposed Human Rights and Equal Opportunity Commission.

#### Human Rights and Equal Opportunity Commission

115. As mentioned in paragraph 57, the Australian Government has decided not to proceed with the Australian Bill of Rights Bill. The Government is determined, however, to ensure that the implementation of the Covenant under the Human Rights Commission Act 1981 is continued. The Human Rights Commission was originally established for five years ending on 9 December 1986. The replacement body, the Human Rights and Equal Opportunity Commission, has similar functions in relation to the Covenant.

116. As mentioned in part one of this report, the new Commission, like the Human Rights Commission, will operate not as a judicial authority but as an investigating body charged with bringing to the attention of the public, and of the federal Government and Parliament, any area of federal responsibility in which there appears to be a departure from the requirements of the Covenant. The departure may be in the provisions of law or in the actions of executive agencies or in the practice of the courts.

#### Conformity with the Covenant

117. The decision to ratify the Covenant has led to successive efforts to identify areas of law and practice which may not be in conformity with the provisions of the Covenant. This has had a significant influence on all Australian jurisdictions. The advantages of a federal State in this respect are that, provided there is adequate consultation between the respective jurisdictions, insights of one jurisdiction can be shared with another. This can promote further searches for laws or practices which are not in conformity with the Covenant. In the preparation of this report all jurisdictions engaged in a cooperative fashion to build a consolidated account of Australian law and practice.

118. The Australian Government's conclusion is that Australia's law and practices very substantially conform to the requirements of the Covenant. As new areas are identified, appropriate action will be taken and there will be consultation with the other jurisdictions. Australia believes that continuing action will be required by all jurisdictions to ensure continued conformity, in changing situations, with the requirements of the Covenant.

Changing perceptions indicate new needs, and there are occasions where protective laws, having served their function, need to be modified if the full spirit in which they were introduced is to be expressed. An example is legislation imposing limitations on the weights which may be lifted by women in certain occupations. Originally seen as protecting women from exploitation, it is now seen by many women as restricting their right to seek employment. That legislation has been reviewed as part of the Government programmes to combat discrimination (discussed in further detail under art. 3).

### Paragraph 3

119. Paragraph 3 of article 2 requires each State party to ensure effective remedies to individuals. Australia believes that not every matter of human rights is properly dealt with, at least in the first instance, by resort to traditional legal sanctions. In many cases, rights are better preserved by less formal processes, often associated with inquiry, conciliation and reporting (see para. 96). Where a matter is capable of precise legislative definition and traditional law enforcement, this course will be followed. However, other methods may appear appropriate in the process of determining new balances between rights and obligations, which is an inherent part of the method by which human rights and freedoms are protected and promoted.

#### (a) Specialized human rights machinery

120. As indicated in part one, there are a wide variety of agencies concerned either with specific areas or generally with protecting and promoting the observance of human rights. Some of the bodies with special concerns in protection of human rights are the federal Human Rights and Equal Opportunity Commission, which has now replaced the former Human Rights Commission; the statutory offices of the federal Race Discrimination Commissioner, formerly known as the Commissioner for Community Relations (under the Racial Discrimination Act 1975) and the Sex Discrimination Commissioner (under the Sex Discrimination Act 1984); anti-discrimination machinery in the States of New South Wales, Victoria, South Australia and Western Australia; and special parliamentary committees of the Commonwealth and State Parliaments, other than the Western Australian Parliament, and the Legislative Review and Advisory Committee of Western Australia.

121. Whilst article 2 of the Covenant links the prohibition of discrimination to the civil and political rights provided for in the Covenant, the State anti-discrimination legislation and the federal Sex Discrimination Act are primarily concerned with the protection of economic, social and cultural rights (for example, in employment and accommodation). The relationship between those Acts and the Covenant can, however, be seen in certain articles of the Covenant, for example, article 25 (c) and article 26, and is discussed in greater detail in regard to those articles.

122. *Racial Discrimination Act.* The federal *Racial Discrimination Act 1975*, as well as protecting certain economic and social rights, provides for two particular

protections which ensure an effective remedy for the denial of rights with which the Covenant is concerned. Section 9 provides:

(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

and section 10 provides:

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

These provisions were included to give effect to article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. A summary of the four principal court decisions on the Racial Discrimination Act is provided in annex 4 to this report.

#### (b) New developments since 1981

##### Federal

123. Some of the major new developments since Australia's first report under article 40 (submitted in November 1981) have included the establishment of the Human Rights and Equal Opportunity Commission (under the Human Rights and Equal Opportunity Act 1986) and the Sex Discrimination Act 1984 in the federal sphere (see also the developments mentioned in regard to art. 3). In the Australian Capital Territory the Sex Discrimination (Miscellaneous Amendments) Ordinance 1986 removed provisions in that Territory's Ordinances which discriminated on the ground of sex or marital status.

##### State

124. In Victoria in 1984 and 1986 human rights protections were strengthened with the passage of amendments to the Equal Opportunity Act (referred to in para. 82), the Mental Health Act 1986 (see para. 215), the Guardianship and Administration Board Act 1986 (see para. 217) and the Intellectually Disabled Persons Services Act 1986 (see para. 217).

125. In Western Australia the Equal Opportunity Act 1984 promotes equality of opportunity and provides remedies for discrimination on the grounds of sex, marital status, pregnancy, race, religious or political conviction, or involving sexual harassment. The updating of the South Australian Equal Opportunity Act 1984 has already been mentioned (see para. 84).

## Article 3

(a) *Anti-discrimination legislation*

## EQUAL RIGHTS OF MEN AND WOMEN

126. The Australian Government recognizes that Australian women do not as yet experience total equality with men or full participation in all aspects of society. It is committed to securing these rights for women in all matters by means of legislative and administrative reforms which recognize the rights of women to participate fully in all aspects of political and economic life, the crucial contribution of women to family life, and the special needs of women who are childbearers. There are also at least three groups of Australian women who have distinct experiences, needs and contributions to make to Australian society. They are the Aboriginal women, migrant women from non-English-speaking backgrounds and women living in remote rural areas.

127. Historically, there were provisions in Australian law which are now regarded as having discriminated against women. Examples in the areas of civil rights were the denial of a woman's right to vote and a married woman's right to public service employment. Examples in other areas were the differential rates of pay between men and women and the restrictions on the rights of married women to own and control property.

128. Progressive reform of the law is increasingly removing the provisions in law that discriminated against women. The enfranchisement of women began relatively early in all Australian jurisdictions and was quickly completed—commencing in 1894 and concluding in 1908. Men and women may be members of Parliament, the executive and the judiciary in all jurisdictions. Women now have the same rights as men to bring or defend actions in courts, and are equally eligible for legal aid. Many more occupations than in the past are open to women, and married women now have the same rights as men and unmarried women in public service employment. In practice, however, women feature less prominently in public life than men. Their numbers in the Parliament, the executive, the judiciary and in the higher levels of the public service, although increasing, are still relatively low. This applies in all jurisdictions—federal and State.

129. The disproportion of women to men in public life—despite the changes in the law—is attributable to the fact that traditional social attitudes which strictly differentiated between the roles of men and women are only slowly changing to acceptance of a much wider range of roles for both men and women. These attitudes are responsible for women in general not having competed as strongly as men in education and employment, and for the discrimination against women in acts and practices that continues to occur. It appears that discrimination against women in employment is still prevalent, though diminishing.

130. Annex 5 to this report contains statistics on the participation of women in Parliament between 1974-1984 and the representation of women in the higher levels of the Australian public service. Annex 1 includes a statistical breakdown of employment of men and women in various categories of employment in Australia.

131. In an effort to overcome discrimination against women in defined areas, a number of the Australian jurisdictions have enacted legislation which, subject to a limited number of exceptions, proscribes discrimination on the ground of sex (and in the related grounds of marital status and pregnancy). The proscription applies in areas such as employment, education, accommodation and the provision of goods and services. Anti-discrimination legislation in New South Wales, Victoria, South Australia and Western Australia also establishes procedures for the conciliation of complaints of discrimination, and provides for civil proceedings if conciliation fails.

*Developments since 1981*

132. In 1984, the federal Parliament passed the Sex Discrimination Act which came into operation on 1 August 1984, the Western Australian Parliament passed the Equal Opportunity Act 1984 and Victoria and South Australia passed new Equal Opportunity Acts designed to consolidate and upgrade their existing anti-discrimination legislation.

*Cooperative arrangements*

133. The federal Government has entered into cooperative arrangements with those States which have anti-discrimination machinery established by legislation (Victoria, New South Wales, South Australia and Western Australia). Under these arrangements complaints of discrimination arising under federal legislation (the Sex Discrimination and Racial Discrimination Acts) and breaches of human rights in the Covenant were handled by the State machinery on behalf of the Human Rights Commission, the Commissioner for Community Relations now retitled the Race Discrimination Commissioner (a statutory officer responsible for handling complaints under the Racial Discrimination Act) and the Sex Discrimination Commissioner (a statutory officer responsible for handling complaints under the Sex Discrimination Act). The replacement of the Human Rights Commission by the Human Rights and Equal Opportunity Commission (see para. 115 above) means that these cooperative arrangements will have to be modified, but transitional provisions have been enacted and arrangements made to enable their continuation in the interim. The cooperative arrangements provide a "one-stop-shopping approach" which means that persons in those four States who wish to lodge complaints under either the federal or State legislation need not themselves work out whether a matter is properly dealt with under federal or State or federal and State legislation but can attend a single office handling both federal and State legislation for advice.

*Relationship between federal and State legislation*

134. Under both the federal Racial Discrimination and Sex Discrimination Acts, provision is made to enable the continued and concurrent operation of State anti-discrimination legislation. However, a complaint

brought under a State anti-discrimination Act cannot also be brought under the federal Acts.

135. Annex 6 to this report contains an outline of federal and State anti-discrimination legislation. The relationship between the federal and State legislation has been briefly referred to above. Unlike the States in regard to their own jurisdictions, the federal Government does not, under the Australian Constitution, have authority to enact legislation applying throughout Australia to deal with all aspects of discrimination between women and men. The Sex Discrimination Act 1984 relies for its constitutional basis on a number of heads of legislative power provided for in the Australian Constitution. A description of the application of the Act in reliance on these powers is provided in section 9 of the Act. The powers relied on include those relating to foreign, trading or financial corporations, trade and commerce, banking (other than State banking), the Commonwealth's powers in regard to its own employees and the external affairs power (in reliance on the United Nations Convention on the Elimination of All Forms of Discrimination against Women, which Australia ratified in July 1983). This amalgam of powers means that the Act may not apply to some instances of discrimination against women but it does apply to most.

(b) *Other recent developments*

136. A number of legislative changes have been made since the presentation of Australia's initial report (in November 1981) which have remedied existing inequalities and enhanced the position of Australian women. These changes include: the Sex Discrimination Act 1984 (federal), the Public Service Reform Act 1984 (federal) and the Equal Opportunity Act 1984 (Western Australia)—in relation to access to public service employment (art. 25); the Domicile Act 1982 (federal) and similar State Acts which, *inter alia*, abolished the rule by which a married woman had at all times the domicile of her husband; the Australian Citizenship Amendment Act 1984 which removed a number of discriminatory provisions in the Australian Citizenship Act; and the Affirmative Action (Equal Employment Opportunity for Women) Act 1986 which requires the implementation of equal employment opportunity programmes by all higher education institutions and private sector organizations which employ 100 or more staff (see para. 142 below).

*Government service*

137. Men and women in the federal and State civil services (referred to in Australia as the "public service") now obtain equal pay for work of equal value. Equal entitlements are available under the federal Public Service Superannuation scheme. Maternity leave is available for women in the public services of the several jurisdictions. A portion of this leave is fully paid and the woman is guaranteed a position without loss of seniority on her return to work.

138. There are, in some jurisdictions, special legislation and agencies concerned with ensuring equal opportunity for women in public service employment. The Equal Opportunity Bureau in the Australian Public Ser-

vice Board is responsible for improving the employment and training opportunities within the service for women and the three groups designated in the Public Service Act, namely Aboriginals and Torres Strait Islanders, people with disabilities and people from non-English-speaking backgrounds. New equal employment opportunity provisions of the Public Service Act (introduced in the Public Service Reform Act 1984) require federal government departments to prepare equal employment opportunity programmes for women and the three designated groups. These programmes are designed to ensure that appropriate action is taken to eliminate any unjustified discrimination in employment matters. They also incorporate measures to enable women and members of the designated groups to compete for promotion and transfer and to pursue careers in the Australian public service as effectively as others, consistent with the merit-based system of selection.

139. The South Australian Government Management and Employment Act 1985 requires the principle of non-discrimination on the ground of sex, sexuality, marital status, pregnancy, race, physical impairment or any other ground to be observed in personnel management in the public sector. The Tasmanian State Service Act 1984, which represents a major restructuring of the Tasmanian Government workforce, includes provisions designed to protect employment opportunities for women in the Tasmanian service. The obligation to prepare and implement equal opportunity management plans in New South Wales public sector employment was gradually phased in in that State as a result of amendments in 1980 to the Anti-Discrimination Act. The Western Australian Equal Opportunity Act 1984 makes similar provision in regard to public employment in that State.

*Defence Force*

140. It is the Australian Government's policy (reflected in the exemption provided by section 43 of the Sex Discrimination Act 1984) that, while women may be employed on active service both within Australia and overseas, they are not to be involved in combat or combat-related duties or in certain circumstances in relation to those duties. This policy necessarily restricts the number of women who may be employed in the Defence Force and the range of jobs open to them. It also means that women do not participate in training courses with a direct combat orientation. However, with the passage of the Sex Discrimination Act, the Government undertook a review of the types of positions available to women in the Defence Force. As a result of this review, 17,000 more positions were opened to women on the basis of merit in competition with men.

*Non-government employment*

141. The conditions of work of women employed outside the federal and State public services are largely governed by federal and State industrial awards. There is an increasing trend to awards away from separate provisions for males and females. Although discriminatory provisions still exist in a number of awards, covering, for example, provision of amenities, the principle of equal pay for work of equal value has been adopted by all

Commonwealth and State tribunals. Since 1979, federal awards have contained provisions for unpaid maternity leave for up to 12 months including a compulsory period of six weeks after confinement, with a guarantee of return to work without loss of seniority after the period taken.

142. The federal Affirmative Action (Equal Employment Opportunity for Women) Act 1986 applies to all private sector organizations which employ 100 or more staff. The legislation will be phased in over several years. It requires those bodies to report their progress in the implementation of equal employment opportunities to the director of Affirmative Action. In the private sector, organizations employing 1,000 or more employees will be required to commence their programmes on 1 February 1987. Employers with between 500 and 999 employees commence their programmes on 1 February 1988, and employers with between 100 and 499 employees will commence on 1 February 1989. Under the programme the employer will issue a policy statement and give appropriate staff members responsibility for the programme. Consultations will be held with trade unions where they have members in the workplace and with employees, particularly women employees. A statistical analysis of the workforce will be produced to develop a profile of the workforce by job classifications and sex. A review of all personnel policies and practices will be undertaken to ensure that these are not disadvantaging women. Finally, employers will set objectives and forward estimates and will monitor and evaluate these annually. The setting of objectives and forward estimates is an essential part of an affirmative action programme. No quotas are set and employers will not be obliged to take any action incompatible with the merit principle.

#### (c) *Other treaty obligations*

143. Australia is also a party to a number of international instruments which deal, *inter alia*, with discrimination against women. These include: the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Political Rights of Women; and a number of ILO Conventions including, in particular, Convention No. 111, the Discrimination (Employment and Occupation) Convention, 1958.

144. Australia ratified the Convention on the Elimination of All Forms of Discrimination against Women in 1983 after detailed discussions with State and Territory Governments in the forum of the Meeting of Ministers on Human Rights (see para. 59). Australia has made two reservations to the Convention: one as to the employment of women in the Defence force in combat and combat-related duties and one as to the provision of paid maternity leave (only some Australian jurisdictions currently provide paid maternity leave).

145. Prior to the enactment of the Human Rights and Equal Opportunity Commission Act 1986, complaints of discrimination within the meaning of ILO Convention No. 111 were dealt with by the National and State Committees on Discrimination in Employment and Occupation. These Committees were set up in 1973,

soon after ratification of the Convention. Their purpose was to investigate complaints of discrimination in employment and occupation and to attempt by conciliation to remove discriminatory practices found. The committees also had available powers of publicity and, in this respect, operated similarly to ombudsmen.

146. As part of its "one-stop-shopping approach" to human rights, the functions of the Committees are to be absorbed into the new Human Rights and Equal Opportunity Commission. ILO Convention No. 111 is attached as a Schedule to the Human Rights and Equal Opportunity Commission Act 1986 and becomes one of the international instruments in respect of which the Commission will have jurisdiction to inquire into complaints.

### Article 4

#### DEROGATIONS IN EMERGENCIES

147. Since ratification of the Covenant there have not been any emergencies of the type described in article 4 occurring in Australia. Consequently, there has been no need to consider the adoption of any of the measures provided for in article 4.

148. Australia has no general legislation authorizing either the federal or State Governments to take extreme measures, such as superseding the civil power, in times of emergency. There are, however, a number of pieces of federal and State legislation of relevance and these are described below.

#### *Constitutional framework*

149. There are three provisions of the Australian Constitution which provide a general framework within which laws may be passed or action taken by the federal Government in emergency situations. The first of these is section 51 (vi) which provides that the federal (Commonwealth) Parliament has power to make laws for the peace, order and good government of the Commonwealth with respect to:

The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

The two other constitutional provisions are section 61, which provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth,

and section 119 which provides:

The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

150. It can be seen from these provisions that the federal Government has power to deal with emergency situations which may affect its own areas of responsibility, including maintenance of federal laws, as well as power to protect the States from invasion and civil disorder. An important limitation on the capacity of State

Governments to deal with emergency situations is that the responsibility for Australia's defence and for the establishment and maintenance of Australia's Defence Force are matters falling within federal responsibility. Section 114 of the Constitution provides that "a State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force . . .". No such consent has been given. The restriction thus placed on State Governments means they would rely upon the Australian Defence Force in time of emergency such as war. For other emergencies, such as natural disasters, State legislation exists to provide for necessary emergency powers.

#### *Types of emergency*

151. In the discussion of federal and State legislation in this area, it is useful to consider this legislation and powers exercisable under it by reference to the types of emergency which can exist, namely, wartime, civil disorder, strikes in essential services, and natural disasters.

##### *(a) Wartime*

152. There has been extensive legislative follow-up in wartime of the authority in the opening part of section 51 (vi) of the Constitution, permitting legislation for the defence of Australia. However, the High Court of Australia has made it clear that, even in times of war (or the threat or aftermath of war), this provision does not empower the enactment of legislation contrary to the other provisions of the Constitution (for example, sect. 116 which prohibits the Commonwealth from interfering with religious freedom) or the enactment of legislation that restricts civil rights, unless that legislation is genuinely incidental or conducive to the prosecution of the war. Although the ambit of the defence power expands in times of war or emergency, it is doubtful, therefore, whether legislation in breach of the provisions of the Covenant and, in particular, of the articles specified in paragraph 2 of article 4, would be constitutional. Even were they to be constitutional, it is doubtful whether such legislation would be passed.

153. There has been no legislative follow-up of the second part of section 51 (vi), permitting the use of the Defence Force to execute and maintain the laws of the Commonwealth. Again, it is doubtful that legislation in breach of the provisions of the covenant, particularly the articles specified in paragraph 2 of article 4, would be constitutional. Even if constitutional, such legislation would be unlikely to be passed.

##### *(b) Insurrection and civil disorder*

154. Procedures for authorizing the use of the Defence Force in response to an application by a State under section 119 of the Constitution, for protection against civil disorder, are contained in section 51 of the Commonwealth Defence Act 1903. Section 51 provides:

Where the Governor of a State has proclaimed that domestic violence exists therein, the Governor-General, upon the application of the Executive Government of the State, may, by proclamation, declare that domestic violence exists in that State, and may call out the Perma-

nent Forces (other than Reserve Forces) and in the event of their numbers being insufficient may also call out such of the Reserve Forces and the Citizen Forces as may be necessary for the protection of that State, and the services of the Forces so called out may be utilized accordingly for the protection of that State against domestic violence:

Provided always that the Reserve Forces or the Citizen Forces shall not be called out or utilized in connection with an industrial dispute.

This provision is supplemented by Australian Military Regulations and Air Force Regulations.

155. The use of the Defence Force in aid of the civil power is only justified in the most exceptional circumstances and must be in accordance with the basic principle that the civil law is supreme. The Defence Force can only be called out after a request from the civil authorities. It is called out only to assist those authorities in the restoration and maintenance of law and order and the protection of persons and property. The civil power remains paramount and the civil law supreme. Members of the Defence Forces have only ordinary civilian powers, i.e. less than those of members of the police force.

##### *(c) Strikes in essential services*

156. A number of States have legislation to deal with strikes in essential services, for example, in electricity or water supplies or in prisons. Such legislation generally provides a capacity for a specified minister or government official to issue directions to facilitate resumption of the service. This legislation is dealt with in more detail in regard to articles 8 and 22 below.

##### *(d) Natural disasters*

157. There is legislation in most States to deal with the development of general states of emergency resulting from fire, flood, storm and other causes. This legislation authorizes the executive to take action to restore services, but in no case is there to be any suspension of the ordinary law. The action possible under the legislation is often of a facilitative kind. For example, under the Queensland State Transport Act 1938-1981, it is possible for the Governor in Council to declare a state of emergency for a period not exceeding three months where the peace, welfare, order, good government or public safety of the State or part of it is likely to be imperilled by fire, flood or storm, tempest, act of God or by reason of any other cause or circumstance. Once this declaration is made, provision can be made for the supply of food and other essential services to cope with the emergency.

#### *Derogations*

158. In 1985 the federal Government received representations from a number of individuals querying whether a state of emergency declared in Queensland as a result of a strike by electricity supply workers in the south-east of that State should have resulted in action by the federal Government to notify the United Nations pursuant to the obligations in article 4, paragraph 3, of the Covenant. The concern expressed was that the instrument proclaiming the state of emergency authorized a possible infringement of article 8 of the Covenant (discussed further in regard to art. 8, below). However, as the Queensland situation was confined to that State, it

was not an emergency threatening “the life of the nation” within the terms of article 4, paragraph 3.

## Article 5

### ACTIVITIES INCONSISTENT WITH THE COVENANT

#### Paragraph 1

159. In ratifying the Covenant, Australia accepted the obligation contained in paragraph 1 of article 5. Australia’s policy on implementation of the Covenant (see paras. 61 and 62) is a policy committed to the continued observance of the civil and political rights of the Covenant. As the content of this report demonstrates, the Australian Government does not interpret any provision of the Covenant as implying any right to derogate from the rights and freedoms recognized in the Covenant beyond those limitations that are expressly declared in the Covenant itself.

160. It has not been considered necessary to enact legislation aimed specifically at groups or individuals who might undertake destructive and restrictive action against the rights and freedoms recognized in the Covenant. It is considered that the sanctions for the breaches of domestic law and the special human rights machinery (discussed in part one) provide an adequate safeguard, having regard to Australia’s domestic situation, against this sort of activity. As mentioned in the comments on articles 19 and 20, Australia, as a democratic society, encourages the free exchange and expression of ideas and recognizes the existence of conflicts of ideas. It would not, therefore, consider the mere exchange and expression of ideas as activity in breach of the provisions of this article. In this regard, attention is also drawn to Australia’s reservation to article 20 of the Covenant.

#### Paragraph 2

161. Australia fully accepts the obligation imposed by this paragraph.

## Article 6

### RIGHT TO LIFE

#### Paragraph 1

162. The inherent right to life recognized in paragraph 1 of this article is protected by both the civil and criminal law throughout Australia.

#### (a) Criminal law

163. The Criminal Codes of Queensland, Western Australia, Tasmania and the Northern Territory embody the major aspects of the criminal law in those jurisdictions. In the other jurisdictions legislation in the area of criminal law is recognized as being incomplete, as it presupposes the continuing existence of as much of the common law as is not inconsistent with that legislation.

#### Murder

164. Homicide constitutes the crime of murder in all Australian jurisdictions if committed with an intention to kill or inflict grievous bodily harm, or (except in the Northern Territory) if it occurs where the offender had a reckless disregard of either of those consequences or if it is within the scope of the felony murder rule in Victoria and South Australia or the equivalent rules in the other jurisdictions. Briefly, under the felony murder rule, a killing, which would not otherwise have amounted to murder, is categorized as murder if it occurs incidentally to the commission of a felony or attempted felony, a dangerous and unlawful act or a dangerous act done in the prosecution of an unlawful purpose. Attempts to murder, or encouraging or assisting a murder also constitute criminal acts. Threats to commit murder constitute a criminal offence under statute in some jurisdictions (for example the Northern Territory) and, depending on the nature of the threat, also under common law.

165. There are a number of defences to a charge of murder. These include: using such force as was reasonable in the circumstances in self-defence, defence of another or defence of property; using such force as was reasonable in the circumstances to prevent the commission of a felony or in the exercise of a lawful power of arrest; lacking the requisite mental element for murder—as where, at the time of the incident, the offender was in a state of automatism, insane or under the age of criminal responsibility (variously, depending upon the jurisdiction, 7 or 8 or 10 years of age); and killing by misadventure or misfortune (where the offender’s conduct is without culpable negligence).

#### Manslaughter/negligent driving

166. A killing which is not murder may still be unlawful if it amounts to manslaughter or culpable driving. Manslaughter may be voluntary or involuntary. The categories of voluntary manslaughter are (in all jurisdictions) killing under provocation, (in some jurisdictions) infanticide, and (in the non-code States<sup>1</sup>) the use of excessive force in self-defence, in defence of another person, in defence of property, in the exercise of a lawful power of arrest or in the prevention of a felony. The categories of involuntary manslaughter are killing by a blow not meant or reasonably likely to cause grievous bodily harm or death, or killing by criminal negligence. All Australian jurisdictions make special provision for less severe penalties for deaths caused by negligent (or, in some jurisdictions, “dangerous”) driving of motor vehicles than for the offences of manslaughter.

#### Abortion

167. The criminal law in all Australian jurisdictions also protects to a considerable degree the life of a foetus. The following provision, taken from the Crimes Act 1958 of the State of Victoria (sect. 65), is typical of the non-code States:

<sup>1</sup> States where criminal law consists of legislation and common law (i.e. States other than Queensland, Western Australia, Tasmania and the Northern Territory, which have a Criminal Code).

Whosoever . . . with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with the like intent, shall be guilty of an indictable offence, and shall be liable to imprisonment for a term of not more than fifteen years.

168. The Supreme Court of Victoria held, in *R. v. Davidson* (1969) V.L.R.667, that the use of an instrument with intent to procure a miscarriage was unlawful on therapeutic grounds unless the accused honestly believed on reasonable grounds that the act was:

(a) Necessary to preserve the woman from serious danger to her life, or to preserve her physical or mental health (not being merely the normal dangers of pregnancy and childbirth which the continuance of the pregnancy would entail);

(b) In the circumstances, not out of proportion to the danger to be averted.

169. In South Australia and the Northern Territory certain other conditions under which an abortion may be lawfully carried out are specified by legislation (see sect. 82A of the South Australian Criminal Law Consolidation Act 1935-1981 and sect. 174 of the Northern Territory Criminal Code). These conditions include, in particular, the situation where there is a substantial risk that, if the pregnancy were not terminated and a child were born to the pregnant woman, the child would suffer such physical or mental disabilities as to be seriously handicapped. In Queensland and Western Australia abortions may only be carried out if necessary to preserve the mother's life. In Tasmania an abortion may only be carried out where the operation is "reasonable" having regard to the mother's state of mind and the circumstances of the case.

170. The right to life of the unborn child is not given absolute protection in Australia. However, the Australian Government does not interpret this article as requiring such absolute protection. Further, the Government is of the view that the laws in force in Australia in this regard are not inconsistent with the requirements of article 6, paragraph 1.

#### Suicide

171. Attempting to commit suicide is an offence in the Northern Territory but not in the other States. South Australia amended its laws in this regard in 1983. Following the proclamation of certain parts of the Crimes (Mental Disorder) Amendment Act 1983 in August 1984, New South Wales has abrogated the rule of law that suicide is a crime. The survivor of a suicide pact is no longer guilty of murder or manslaughter but may be charged with aiding or abetting a suicide, which is an offence.

#### Aboriginal customary law

172. For tribal Aboriginals, Australian criminal law runs parallel to Aboriginal customary law. This may mean that an Aborigine convicted of a criminal offence under Australian law may be punished again for the offence under tribal law. It also entails the difficulty that some of the penalties applied under customary law themselves constitute criminal offences (for example, spear-

ing through the thigh). Courts are usually aware of these problems and attempt to make an appropriate accommodation to the situation when sentencing a convicted Aborigine.

173. The question whether it would be desirable to apply Aboriginal customary law, either in whole or in part, in particular areas, or only to Aborigines living in tribal conditions, has been under review by the Australian Law Reform Commission. The Commission presented its report entitled *The Recognition of Aboriginal Customary Laws* to the federal Government in 1986.

174. In its report the Law Reform Commission concluded (in para. 447) that tribal killings or executions (and related life-threatening assaults) "cannot be justified, let alone authorized. It follows that a customary law defence should not be available in such cases". In its summary report, the Commission summarized the reasons for this view (in para. 91) as follows:

A customary law defence would involve endorsing tribal killings, and would deprive persons, including Aboriginal victims of offences, of legal protection. The defence therefore raises serious problems of equal protection under the law.

Aboriginal customary laws can be taken into account sufficiently in the general criminal law and through the exercise of sentencing and other procedural discretions.

It is doubtful whether a customary law defence is necessary. It is relatively rare for cases of direct conflict between the general legal system and Aboriginal customary laws to come before the courts, and even rarer for defendants to be severely punished in those cases where a customary law defence would apply. It is undesirable to create a controversial defence to deal with a small number of cases.

A customary law defence carries the danger of exposing Aboriginal customary laws to close analysis, definition and testing in order to establish the defence. In this way it is intrusive and endangers Aboriginal control over their law and traditions.

175. The Commission supported the creation of a partial defence which would operate to reduce liability from murder to manslaughter, if the accused could establish on the balance of probabilities that he or she had done the act which caused the death in the well-founded belief that the customary laws of the accused's community required the act to be done by the accused. The Commission summarized the advantages of such a defence (in para. 92 of its summary report):

It would not deprive victims of legal protection or the right of redress. Therefore it does not raise questions of equal protection before the law in the way that a complete defence would do.

It would not involve condoning or endorsing pay-back killings or wounding.

It would none the less represent a direct acknowledgement of conflicts that can occur between the general legal system and Aboriginal customary laws.

It would allow the jury, as representatives of the whole community, a role in mitigating the degree of culpability, and thus operate as an adjunct to sentencing discretions.

It would allow judges to take customary laws into account in sentencing in those jurisdictions (in particular, Western Australia, Northern Territory, South Australia, Queensland) where sentencing discretions are not available in murder cases.

#### Penalties

176. In Australia, the only sentence that can be imposed in relation to murder is a sentence of life imprisonment. The Victorian Law Reform Commission in its report on homicide law has recently recommended to the

Victorian Government that a person convicted of murder should not receive a mandatory life sentence but that a life sentence should be the maximum penalty and that a judge be empowered to fix a non-parole period. The Commission has argued that the mandatory sentence may be inappropriate in some circumstances.

177. A person serving a life sentence may be released from imprisonment on licence (or, in some jurisdictions, on parole). However, the general practice is not to consider persons serving a life sentence for release until a minimum of 7 to 10 years of the sentence has been served. In the Northern Territory there is no minimum period for a life sentence prisoner to serve before becoming eligible for release on licence.

178. In the case of manslaughter, abortion or associated offences, although maximum penalties are prescribed for these in each jurisdiction, it is generally left to the discretion of the judge to impose a lesser sentence. The maximum statutory penalty in the case of culpable driving is a relatively short term of imprisonment (variously five or seven years, depending on the jurisdiction) or a fine, or both. In addition, the offender may also be either temporarily suspended from driving or permanently disqualified.

#### Emergency medical treatment

179. Critically ill people are protected by the rigorous training and codes of conduct to which medical practitioners in Australia are subject and the standards of care expected from medical practitioners by the common law. Protection is also available through legislation such as that authorizing an emergency medical operation where there is insufficient time to obtain the relevant consent, or a blood transfusion for a child in critical need of it, even though the child's parents do not consent.

180. In Queensland under the Voluntary Aid in Emergency Act 1973 special provision is made to protect medical practitioners and nurses from liability for acts or omissions at an accident scene, or whilst under transportation to a hospital, where the act is done or omitted in good faith, without gross negligence and without expectation of fee or reward. This Act is designed to give protection to professional medical workers from being sued for breach of their normal high duty of care and, thus, to encourage them to render assistance in emergency situations.

#### (b) Civil (non-criminal) law

181. A wrongful act or omission causing death can give rise to an action for damages in tort or form the grounds for an application for compensation under legislation in all Australian jurisdictions.

182. If the death arose out of or in the course of the deceased's employment, compensation may be sought from the deceased's employer under the workers' compensation legislation in all Australian jurisdictions. However, in the Territory of Norfolk Island, compensation may only be sought in an action for damages in tort or for the breach of a duty imposed by other legislation.

183. If the death is caused by the wrongful act, neglect or default of another, irrespective of whether such amounted in law to a crime, legislation throughout Australia allows the personal representative of the deceased to bring an action for damages for loss of economic or material advantage on behalf of those members of the deceased person's family who sustained that damage by reason of the death. Additionally, all Australian jurisdictions provide that most causes of action survive for the benefit of the deceased's estate. These include any actions which the deceased would have had against the person responsible for inflicting the injuries of which he or she died.

#### AIDS

184. In the last couple of years the spread of AIDS and AIDS-related diseases has been of considerable concern in all Australian jurisdictions. One particular concern has been that the spread of AIDS through blood transfusions could result in successful actions for compensation against blood banks which may result in the inability of such an important public service to continue to function. In Australia this service is performed mainly by the Red Cross Society. A variety of legislation has been passed in all jurisdictions to deal with this and related problems. Special donor declaration forms are now required before donations of blood are accepted for therapeutic use. Legislation such as the Notifiable Diseases Amendment Act 1985 in the Northern Territory provides a defence to an action taken against a hospital or other body at whose premises blood or blood products supplied by the Red Cross Society were administered to a patient or against a medical practitioner (or authorized agent of a practitioner) who administered such blood products if: the container of blood or blood products carried certification that the testing of the contents for AIDS was negative; or the Society complied with certain specified requirements in respect of the taking of blood and its testing, processing and handling.

185. In addition, the federal Government has established a National Advisory Committee on AIDS. That Committee is currently considering a wide range of issues relevant to the federal and State Governments' attempts to reduce the spread of AIDS and AIDS-related diseases in Australia.

#### Paragraphs 2 and 6

#### Capital punishment

186. The death penalty has been abolished in Australia by the following legislation:

*Queensland:* Criminal Code Amendment Act 1922;

*New South Wales:* Crimes (Amendment) Act 1955, Crimes (Death Penalty Abolition) Amendment Act 1985 and Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985;

*Tasmania:* Criminal Code Act 1968;

*Victoria:* Crimes (Capital Offences) Act 1975;

*South Australia:* Statutes Amendment (Capital Punishment Abolition) Act 1976;

*Western Australia:* Acts Amendment (Abolition of Capital Punishment) Act 1984;

*Commonwealth:* Death Penalty Abolition Act 1973.

187. The last execution occurred in 1967 when Ronald Ryan was executed in Pentridge Prison, Melbourne (Victoria), following his conviction for murdering a prison officer while escaping from custody.

188. Though the States and the Commonwealth have abolished the death penalty, it was considered that there was a theoretical possibility that certain capital offences under statutes of the United Kingdom which formed part of the law of the emergent States might still exist to some extent.

189. The Commonwealth has recently examined the applicability of the death penalty to offences against laws in force in any part of Australia, particularly offences against Imperial Acts which remain in force. The conclusion reached by the Commonwealth is that the death penalty has no application to any offence against a law in any part of Australia. The Commonwealth has taken the view that the death penalty applying by virtue of imperial laws was abolished by the Death Penalty Abolition Act 1973 (Commonwealth) in the exercise of the Commonwealth's external affairs power.

### Paragraph 3

#### Genocide

190. Australia became a party to the Convention on the Prevention and Punishment of the Crime of Genocide in July 1949. The Genocide Convention Act 1949 was passed to approve ratification of the Convention. That Act also extended the application of the Convention to all the territories for the conduct of whose foreign relations Australia was then responsible. However, although the provisions of the Convention as such have not been incorporated into Australian law, the actions referred to in article III of that Convention constitute criminal offences throughout Australia. A deprivation of life constituting genocide is punishable as murder (or wilful murder) in all jurisdictions.

## Article 7

### TORTURE, SCIENTIFIC EXPERIMENTATION, ETC.

191. Torture and other cruel, inhuman, or degrading treatment or punishment are not tolerated in Australia and constitute a criminal offence and a civil wrong in all Australian jurisdictions. Australia is also a signatory of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The question of ratification of that Convention is currently under discussion between the Commonwealth and State Governments.<sup>2</sup>

<sup>2</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was ratified by Australia on 8 August 1989.

### (a) General provisions

#### Criminal law

192. Any use of force against a person, save in exceptional circumstances, is (provided the requisite degree of intention or criminal negligence is proved) a criminal offence, usually, at the least, amounting to assault. The exceptional circumstances include the use of force:

(a) In self-defence, defence of another, or the defence of property, where no more force than is necessary is used;

(b) In the prevention of crime, or the effecting of a lawful arrest, where no more force is used than is necessary;

(c) In the course of the lawful correction of a child by its parents, teacher or person *in loco parentis*, provided no more force is used than is reasonable under the circumstances; and

(d) Where such use of force can be consented to, as in a professional boxing contest.

#### Compensation for criminal injuries

193. The laws of a number of jurisdictions provide for a system of compensation for criminal injuries. For example, under chapter LXV-A of the Queensland Criminal Code, provision is made for the award of compensation to those persons who suffer injury, whether physical or mental, as a result of criminal activity. The amount of such compensation is primarily recoverable from the criminal offender but, in practice, is generally met by means of an *ex gratia* payment by the Crown. By law the sums awarded parallel the level of damages awarded under workers' compensation legislation. At present this is in excess of \$47,000 for the most serious injuries. Psychological or mental injuries are subject to an upper limit of \$20,000. In Tasmania, a person suffering injury as a result of criminal conduct may claim compensation for criminal injuries under the *Criminal Injuries Compensation Act 1976*. There is also a power vested in lower and Supreme Courts to award compensation in the course of criminal trial.

194. In the Territories of Christmas Island and the Cocos (Keeling) Islands the court before which a person is convicted of any crime may order that person to pay compensation to anyone injured in respect of their person, character or property by that crime. Compensation may also be paid from public funds in those territories to the spouse, parent or child of any person who is killed in endeavouring to arrest or keep in custody an accused person. In the Territory of Norfolk Island a court may, in addition to any penalty imposed on a convicted person, order the offender to make reparation to a person, by way of money payment or otherwise, in respect of a loss suffered by the person as a direct result of the offence.

#### Civil (non-criminal) law

195. A victim of the unlawful use of force may bring an action in tort for damages against the transgressor or some other person vicariously liable for the trans-

gressor (such as an employer, including the Government).

(b) *Particular cases*

*Children*

196. Parents, or persons having the custody of children, have a legal duty to care for their children or the children in their custody. They commit a criminal offence if they neglect them or omit to act to prevent injury to them. One difficulty, however, is that offences of this kind against children may remain undetected because of reluctance or inability of the children concerned to reveal injuries or because those persons who become aware of cases of child abuse do not wish to become involved. Sometimes this may be because they consider this to involve problems of respect of privacy and the integrity of the family unit. This problem has been addressed in recent action taken in regard to child abuse. This matter is dealt with further in regard to article 24.

*Corporal punishment in schools*

197. The law relating to punishment in schools varies in different jurisdictions and in private and government schools. With the exception of Victorian government schools, where corporal punishment is prohibited, it is generally lawful for moderate and reasonable corporal punishment to be administered for serious school offences by means of a light cane or a strap on the hands.

198. Regulations applicable to government schools in Queensland, South Australia, Tasmania and Western Australia closely proscribe the use of corporal punishment—restricting the persons by whom and the reasons for which it can be administered, and stipulating the lawful forms of punishment.

199. In Victoria, a regulation under the Education Act 1958 completely prohibits the use in government schools of any corporal punishment, which is broadly defined to include actions causing physical discomfort and throwing missiles. In New South Wales, section 243 of the Community Welfare Act 1982 prohibits the punishment of persons subject to control in institutions, or on remand, by “being struck, cuffed, shaken or subjected to any other form of physical violence”, but this is not applicable to children in government or private schools.

200. In all jurisdictions, children subjected to excessive or otherwise unlawful corporal punishment have a civil right of action for damages against the teacher or school. Teachers who administer unlawful corporal punishment are also liable to be prosecuted for assault.

*Police officers*

201. Police officers are not only bound by the rules of common law, but their obligations and duties as police officers are further elaborated in the relevant code of conduct applicable to them. An allegation of ill-treatment or brutality on the part of a police officer could render an officer liable to two types of charges: one un-

der the police rules, regulations, or orders, and another arising in the ordinary courts of law. Allegations of ill-treatment or brutality by police officers can also be dealt with under legislation providing for complaints against police procedures referred to in part one of this report.

202. Two of the available common-law remedies that have particular relevance to complaints against the police are claims for damages for malicious prosecution and for false imprisonment.

203. Evidence obtained through oppression is inadmissible. Oppression is generally understood as “something which tends to sap, or has sapped, that free will which must exist before a confession is voluntary” (*R. v. Priestly* (1965) 51 Cr App R.I.). The courts in all Australian jurisdictions also have a wide discretion in criminal cases to omit from consideration any evidence if the circumstances in which it was obtained would render its reception into evidence unfair to the accused. This discretion was enunciated by the High Court in the case of *Bunning v. Cross*. It requires the judge hearing a particular case in which a question of the admissibility of unlawfully or unfairly obtained evidence arises to weigh up

... two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law ((1978) 141 C.L.R. 54 at 74 (Atkin and Stephen JJ)).

204. In the Australian Capital Territory the Children’s Services Ordinance 1986 (not yet in force at the time of writing) will apply a similar test when evidence is tendered in criminal proceedings against a child which was obtained in contravention of the special rules which will apply to criminal investigations involving *inter alia* the questioning of child suspects.

*Aborigines and traditional laws*

205. The Australian Law Reform Commission’s report entitled *The Recognition of Aboriginal Customary Laws* (Report No. 31), presented in 1986, examined the question of recognition of Aboriginal customary laws. Some of the traditional laws enforced by Aboriginal communities may involve punishments which are generally regarded as unacceptable and cruel. The Commission’s report was prepared under a term of reference to ensure basic human rights to all Australians. The Commission noted that some of the more rigorous and severe punishments previously practised by Aboriginal communities had disappeared. However, current punishments enforced by communities do include thigh spearing, forms of corporal punishment, initiation or putting young offenders “through the law”, exile to an outstation or another community and public “shaming” or “growling”.

206. The Commission made the following general comments on the human rights aspects of these traditional laws (in para. 192 of its report):

The provisions of the International Covenant on Civil and Political Rights should be ‘read as a whole’ so as to be consistent with each other rather than to conflict.

In this process of interpretation, clear and specific provisions of the Covenant prevail over general and vaguer provisions. For example the

provisions of article 6 with respect to the right to life and the death penalty are precise and specific. The toleration of tribal killing is inconsistent with article 6, however much such killings may be, or have been, an aspect of the 'culture' of an ethnic minority.

On the other hand, the Covenant was intended to apply to a wide range of economic, social and cultural environments. It is an attempt to establish minimum standards, not uniformity of treatment. It is not to be interpreted by reference to the standards and practices of one part only of the international community. Decisions of regional courts or bodies—such as the European Court of Human Rights—even on similarly worded provisions, cannot simply be assumed to apply to the Covenant.

In particular, terms in the Covenant which imply a measure of cultural relativity may have to be applied by reference to the cultural community within which the case arose (including, by virtue of art. 27, a minority ethnic or cultural group). A good example is the notion of "degrading" treatment (art. 7). What would be degrading in one community or culture might not be degrading, indeed, might be fully accepted in another. This is not to say that such terms lack meaning, or that the Covenant establishes no standards at all. Some terms and concepts (e.g. the death penalty: art. 6) contain no element of relativity at all. Others enact, or imply, a world-wide standard of protection inherent in the individual person as such: for example, the prohibition of torture or slavery. But not all the Covenant's provisions are of this kind. It is a mistake, for example, to assume that the protection given by article 23 to 'the family' extends only to the nuclear family upon which Western society is supposedly founded. In communities where different family structures exist, it is those structures which article 23 protects.

For these reasons, and others, each case must be considered in its own context and in relation to the most precise or 'directly applicable' Covenant provision. Whether the Covenant has been violated depends not merely on the terms of the local law but on the method and circumstances in which it has been applied.

207. The issues raised in the report are detailed and complex, especially in relation to creating the appropriate interaction between Aboriginal customary laws and the general law. Generally the Commission's view was that, while the general law did not and should not condone or sanction "unlawful" (in the general law sense) punishments, courts should take account of the traditional law basis of the unlawful action in determining the existence of a criminal intent and in sentencing. In many instances this already occurs.

#### *Prison officers and prisons*

208. Prison officers are, like police officers, subject to the rules of common law and criminal laws, as well as to internal disciplinary procedures.

209. The treatment of prisoners varies in different jurisdictions. Solitary confinement, albeit for strictly circumscribed periods of time, is retained as a form of punishment in most jurisdictions, as are restricted diets. Whipping as a form of punishment has been abolished in all States but Western Australia. The punishment of whipping was removed from the Queensland Criminal Code as from 29 March 1986. Although corporal punishment is still possible under the Western Australian Criminal Code, it is no longer used and there are no regulations under the Prison Act facilitating its infliction. The last whipping was carried out in that State in 1943 for the offence of rape. The last birching was in 1962 for unlawful carnal knowledge of a girl under 16 years of age.

210. The position in the Territories is that, technically, the punishment of whipping is available under the Penal Code of Singapore which remains in force in the

Territories of Christmas Island and of the Cocos (Keeling) Islands and under the Crimes Act 1900 of New South Wales in its application to the Territory of Norfolk Island. The punishment has not been imposed, however, since the Territories came under Australian jurisdiction.

211. Generally the treatment of prisoners accords with the Standard Minimum Rules for the Treatment of Prisoners (discussed further in regard to art. 10). Provision is made in each jurisdiction for the remission for good behaviour of sentences of imprisonment and for such alternatives as parole or probation, community-based rehabilitation (requiring community service) and bonds.

#### *Mental patients*

212. All Australian jurisdictions have regulations which provide for admission into care, treatment, review and discharge of persons who are mentally ill. The details of the legislation vary in different jurisdictions. In some jurisdictions, applications for the admission of a mental patient into care is subject to a judicial hearing. For example, in the Australian Capital Territory, involuntary admission to mental hospitals is, except in emergencies, only possible by order of a magistrate. In other jurisdictions, patients are admitted upon medical certificate.

213. Mental health legislation makes it an offence to ill-treat or wilfully neglect a mental patient. Negligence in the treatment or care of a patient can also give rise to civil liability, not only by reason of the injury which is done to the patient but by reason of any injury sustained by third parties.

214. Because of the difficulty persons in mental institutions have in seeking recourse to the usual legal remedies, mental health legislation in the several jurisdictions contains provisions designed to assist in other ways. There is provision in most jurisdictions for institutions to be visited frequently by an Official Visitor (or equivalent) who must be available to receive complaints and who has a wide discretion to make inquiries, examinations and inspections. The legislation also typically requires that full records of patient treatment are kept. Patients' letters to certain officials (for example, Members of Parliament or the judiciary, the Mental Health authorities, the Official Visitor or Chief Medical Officer) must be forwarded, unopened, to those officials. Mental health legislation also contains provisions for periodic review of patients' progress and for their release.

215. Victoria substantially reformed its Mental Health legislation in 1986. The new Mental Health Act 1986 defines the circumstances under which a person may be involuntarily detained in a mental institution. To be so detained:

- (a) The person must appear to be mentally ill;
- (b) The degree of illness must be such as to require immediate treatment;
- (c) Admission must be for the person's health and safety or that of members of the public;
- (d) The person must have refused or be unable to consent to voluntary treatment;

(e) The person must not be capable of receiving treatment in a manner less restrictive of that person's freedom of decision and action.

The Act excludes from the concept of mental illness a political, religious or sexual belief or preference or the fact that the person engages in any immoral or illegal conduct, is intellectually disabled or takes drugs. Decisions about people deemed to be mentally ill are subject to review by a newly constituted Mental Health Review Board. Psychosurgery is prohibited without the endorsement of a new Psychosurgery Review Board. Appeals from decisions of these Boards can be heard by the Victorian Administrative Appeals Tribunal.

216. In Queensland, under the Mental Health Services Act 1974-1984, detailed provision is made for the regular review of all patients whether admitted informally or through the regular admission procedures. All persons charged with criminal offences whose mental capability to stand trial is in question are assessed by the Mental Health Tribunal comprising a Supreme Court judge and two psychiatrists. Only if a person is mentally capable do they stand trial. All mentally ill persons who are not charged are subject to regular examination until fit to be discharged.

#### *Persons with disabilities*

217. The new Victorian Guardianship and Administration Board Act 1986 provides for the appointment of a guardian for people with disabilities who are by reason of such disability unable to make reasonable decisions about themselves. Guardians are to be appointed by a Guardianship Board. The Board will not make such an appointment until it is satisfied that no less restrictive means of meeting the person's need is available. The Act also establishes the position of Public Advocate which is one of general advocacy on behalf of disabled people. The Advocate will also have responsibility for investigating complaints or allegations of abuse or exploitation of persons with a disability. The Victorian Intellectually Disabled Persons' Services Act 1986 establishes clear principles on which the delivery of support services to the intellectually disabled are to be based, seeks to assist and encourage intellectually disabled people to achieve their maximum potential, and aims at promoting and fostering greater participation and involvement of intellectually disabled people in the life of the community.

#### *Medical or scientific experimentation*

218. Experimentation in the sense envisaged by the article—the trying out of new or unproved methods without consent—is not lawful in Australia. However, it is accepted in Australia that there is an essential role for human experimentation in the improvement of human health. Ultimately all new interventions aimed at the cure of ill-health or the maintenance of good health must be tried on humans before they can be accepted for general usage. However, it is also recognized that the human subjects of such experimentation must freely consent to participation without coercion or inducement and in the full knowledge of what is involved.

219. Except in an emergency, the consent of the patient, or those in law qualified to give such consent, is a necessary prerequisite for the giving of any treatment or the performance of any operation on the patient by a medical practitioner. This prerequisite applies to all patients, whether mentally ill or not, and whether in custody or not.

220. The therapeutic treatment of the mentally ill is largely left to the discretion of the medical practitioner responsible for the treatment. The use of drugs, however, is regulated by poisons legislation in each jurisdiction. The use of mechanical restraints and seclusion is regulated in some jurisdictions; and in some jurisdictions, certain types of therapy may not be carried out without the prior consent of, *inter alia*, the patient's closest relative.

221. Medical practitioners are subject to the same high standard of care in treating mental illness as in treating other illness. If this standard is not met and the patient is adversely affected, the medical practitioner may be liable to criminal charges as well as civil proceedings.

222. Australia fully supports the Helsinki Declaration, adopted by the 18th World Medical Assembly, Helsinki, 1964, revised by the 29th World Medical Assembly, Tokyo, 1975, and also the *Proposed International Guidelines for Biomedical Research Involving Human Subjects* published by the Council for International Organizations of Medical Sciences in 1982. In recognition of these, the National Health and Medical Research Council has issued a statement on human experimentation and associated supplementary notes. Briefly stated, these guidelines call for human experimentation involving only those subjects who have freely consented to participate in the full knowledge of what is involved and knowing that their individual rights and welfare are fully protected. The statement also requires researchers involved in human experimentation to be fully competent in, and aware of, all areas of their research field and further requires them to follow research protocols which are approved by the relevant institutional ethics committees. This statement does not have the force of law, rather it is intended primarily as a guide on ethical matters bearing on human experimentation for research workers and administrators of institutions in which research on humans is undertaken in Australia.

223. The Senate Select Committee on the Human Embryo Experimentation Bill 1985 presented its report on embryo experimentation to the Commonwealth Parliament in October 1986. The majority report recommended that:

(a) The same principles underlying the Declaration of Helsinki 1965 should apply to embryo experimentation;

(b) The embryo of the human species should be regarded as if it were a human subject for the purposes of biomedical ethics;

(c) Therapeutic experimentation on the embryo but not destructive experimentation should be allowed;

(d) The property rights of the gamete donors were exhausted upon fertilization, when an embryo came into

being. At that point guardianship arose in the intending social parents;

(e) A national body to license experimentation (consistent with the general principles above) should be established.

The report is under consideration by the federal Government.

## Article 8

### SLAVERY, SERVITUDE, FORCED OR COMPULSORY LABOUR

#### (a) *Slavery and servitude*

224. Slavery and the slave trade are prohibited in Australia under the provisions of the English Slavery Abolition Act 1833, which remains in force throughout Australia. Australia has also ratified the Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. Australia has notified the United Nations, pursuant to the relevant United Nations resolution, that it considers its laws and practices to be in accordance with the requirements of these conventions. Australia is also party to several United Nations conventions concerning the traffic in persons.

225. In addition, the criminal and civil law in Australia protects persons from activities that are associated with slavery and servitude. For example, abduction is prohibited throughout Australia by a variety of provisions on criminal offences such as the abduction of a woman (and, in some jurisdictions, any person) for sexual purposes, child stealing, kidnapping and hijacking. Any physical force applied to a person without consent, or the threat of such force, is a criminal offence and also gives rise to a civil remedy in damages.

226. The total or partial restraint of a person, intentionally and without lawful excuse, is also unlawful. The remedy of habeas corpus would be available at the instance of the restrained person or a friend or relative, as well as a claim for damages under the civil law action of trespass or false imprisonment.

#### (b) *Forced or compulsory labour*

227. Although there are no laws in Australia that specifically make the exaction of forced or compulsory labour punishable as an offence, the civil and criminal laws do provide some sanctions which may be relevant, for example, for assault, unlawful arrest and false imprisonment. Australia is a party to both ILO Convention No. 29 (Forced Labour Convention, 1930) and ILO Convention No. 105 (Abolition of Forced Labour Convention, 1957).

228. *Contract law.* Contracts for services and contracts of service are freely entered into in Australia on normal contractual principles and may be terminated in accordance with the terms of the contract—generally by notice on either side. In an action for breach of such a contract, a court will generally not award specific per-

formance. Any clause in a contract which could be viewed as involving elements of servitude or forced labour would very likely be held to be contrary to public policy and therefore unenforceable.

229. *Employment.* The terms and conditions of most forms of employment are regulated throughout Australia by industrial laws and awards, the terms of which differ in detail in the various jurisdictions. Industrial laws cover such matters as safety measures, hours of work and workers' compensation. Industrial awards cover such issues as the classification of work and minimum wages. The protection of children and young persons in this regard is dealt with in more detail in regard to article 24.

230. *Employment of illegal immigrants.* It is an offence under the federal Migration Act 1958 for an illegal immigrant (termed in the Act "a prohibited non-citizen") to work without the written permission of an authorized officer of the Department of Immigration and Ethnic Affairs. Illegal immigrants are not as a general rule given permission to work, although exceptional circumstances may give rise to the issue of such permission. Should evidence of exploitation or under-award payment of illegal immigrants emerge when they are located, the matter may be referred to the appropriate authorities.

#### *Prisoners*

231. In most Australian jurisdictions, persons convicted of criminal offences or common-law misdemeanours may be sentenced to imprisonment with hard labour for any part of their sentence. Where such work or service is exacted from a person as a consequence of his or her conviction, it is carried out under the supervision and control of a public authority, usually acting under the relevant Prisons Act. Imprisonment with hard labour was abolished in the Northern Territory with the introduction of the Criminal Code on 1 January 1984. Under the Prisons (Correctional Services) Act, prisoners may be required to carry out work as directed by the Director of Correctional Services.

232. A number of alternatives to full-time imprisonment are now in operation throughout Australia. The various schemes include weekend and periodic detention, attendance orders (involving some compulsory education), work release orders and community service orders. Of these, only the community service order is relevant in the context of this article. Almost all jurisdictions have made provision for the scheme. For example, in 1983 the Community Service Orders Act came into operation in the Territory of Norfolk Island. Under this Act the court may make a community service order in respect of a convicted person only with that person's consent. The number of hours of community service that may be imposed in any case is proportionate to the term of imprisonment that could be imposed on the offender.

233. Under a community service scheme, a convicted person may, as an alternative to imprisonment, be directed to report from time to time to perform unpaid work in the community—generally on Saturdays (a non-

working day for most Australians). This is considered to be in conformity with the requirements of this article.

#### *Military service*

234. The service which can be required of any person who has volunteered or, in times of a threat to national security, has been required to serve in the military forces, under the provisions of the Commonwealth Defence Act 1903 (which has Australia-wide application), is necessarily of a purely military character. However, it may include such service in aid of the civil authorities as the Defence Forces are constitutionally authorized to perform. There is currently no compulsory military service in Australia (by virtue of the National Service Termination Act 1973).

235. Persons in the military service may be ordered to assist in emergency situations falling short of the call-out referred to in the comments on article 4. Such compulsory but non-military work is only resorted to in the circumstances envisaged in paragraph 3(c)(iii) of this article and, accordingly, is not inconsistent with the requirements of the article.

#### *Service in emergencies and work which is part of normal civil obligations*

236. As already indicated in regard to article 4, most jurisdictions have enacted legislation to deal with emergency situations. Some more recent legislation enacted in Queensland, following a strike amongst electricity supply workers in the south-east of that State, has been of concern to the federal Government and to a considerable number of Australians, particularly those concerned in the trade-union movement.

237. The impact of the Queensland laws on trade unions in that State is dealt with in more detail in regard to article 22. In regard to article 8, the Electricity (Continuity of Supply) Act 1985 provides a power to direct any person whatsoever to perform work under pain of a penalty not exceeding \$1,000, in the case of Electricity Commission or Electricity Board employees, but with no sanction laid down in the Act for disobedience in the case of other persons. The power is not limited to a state of emergency or in any other way, except that it must be necessary work to provide, maintain, or restore a supply of electricity.

238. Shortly after passage of the Queensland Act, the federal Attorney-General referred it to the Human Rights Commission for report. The Commission (in its Report No. 12) expressed the view (in para. 26) that the Act "placed workers in the Electricity Commission and any Electricity Board in Queensland in a position where they can be coerced to work against their will, and be subject to a penalty if they refuse . . . any person employed in one capacity . . . could be required to perform in another area . . . and there is no suggestion of the arrangements being part of a broad community service scheme". The Commission was also of the view that the wording of the Act was so broad that on one possible construction it could be thought to apply to persons other than employees, which would amount to "authorizing forced labour," (para. 24 of its report). However, no

sanction is provided in the Act for disobedience of a direction by a person other than an employee, so it is not clear that any penalty exists.

239. The Commission's report was forwarded to the Queensland Government. That Government advises that it does not consider the Act to be in conflict with the Covenant.

### Article 9

#### ARREST AND DETENTION, ETC.

240. Liberty and security of person are safeguarded, in each of the Australian jurisdictions, by the common law. Some protective intervention is allowed in certain areas, particularly in regard to child welfare, mental health and drug and alcohol abuse. Safeguards are built into the relevant legislation with the aim of controlling abuses.

#### (a) *Deprivation of liberty*

##### *Arrest*

241. An arrest of a person can occur with or without a warrant. Arrest without warrant is the more usual case. Under common law the purpose of an arrest is to bring the person before a court to be dealt with in accordance with law. The major exception to this, contained in legislation, is the arrest of suspected illegal immigrants to be held in custody pending deportation (discussed further below).

242. Police officers in all jurisdictions are authorized by legislation to arrest persons without a warrant if they find a person committing an offence or if they have reasonable grounds for believing that person to have committed any offence (but, in some jurisdictions, only if it is an indictable offence and, in others, such as the Australian Capital Territory, only if it is considered that proceeding by summons against that person would not be effective). In some jurisdictions, the police may also arrest without a warrant if they have reasonable grounds for believing a person to be about to commit an offence. Under the common law (modified by legislation in some jurisdictions) ordinary citizens may arrest persons they find committing a felony or breach of the peace, persons they reasonably suspect of having committed a felony (provided there has, in fact, been a felony committed) or to prevent a person from committing a felony. In New South Wales under the Crime (Powers of Arrest) Amendment Act 1985, a constable can also arrest, without a warrant, a person whom he suspects of being "a prisoner unlawfully at large". The person arrested is to be taken before a magistrate.

243. There are also a number of cases where persons can be detained in circumstances where an arrest has not occurred. These are outlined below.

##### *Child welfare*

244. Child welfare legislation in each of the jurisdictions empowers police officers or other authorized

persons, without a warrant, to take certain children into custody (for example, a child appearing or suspected to be "neglected" or "uncontrollable").

245. The period within which a child so taken into custody must be brought before a court for a hearing is referred to in the legislation by such terms as "as soon as practicable". In some jurisdictions, a maximum period is prescribed. For example, in the Australian Capital Territory, the Children's Service Ordinance 1986 will provide for a maximum period of 48 hours. The authorities will be obliged to notify the Youth Advocate of the detention as soon as is practicable and the Advocate will be able to direct the child's release. The court hearing the matter has a number of options open to it for dealing with the child in his or her best interests—ranging from admonishing and discharging the child to committing the child to an institution.

#### *Mental health*

246. In all jurisdictions, persons may be compulsorily admitted for a limited period to a detention centre for observation and assessment (for example, by the order of a magistrate on the application of a relative, or at the instance of the police). Detention in a mental institution, however, requires a court order in some jurisdictions (to be sought "as soon as convenient" after a medical recommendation for detention is received) or, in other jurisdictions, at least two independent medical recommendations for detention. Various mechanisms are prescribed for the discharge of patients. Some of these utilize detention for a prescribed term, followed by a formal review (for example, before a Mental Health Tribunal). Others utilize a system of regular periodic review. In each jurisdiction, application for discharge may be made to the authority prescribed or to the Supreme Court.

247. In the Australian Capital Territory a comprehensive review resulted in the Mental Health Ordinance 1983, which replaced turn-of-the-century statutes. In New South Wales the Crimes (Mental Disorder) Amendment Act 1983 affects the way in which forensic patients are dealt with by a court. Basically, the scheme of the Act is that persons who are found "unfit to plead" and placed in custody will have their fitness to plead regularly reviewed, and generally not serve longer in custody than if they had been found guilty of the offence. The situation in Queensland in this regard is discussed in paragraph 216.

#### *Alcohol and drugs*

248. Legislation also exists in all jurisdictions empowering the detention of persons addicted to drugs or alcohol. Detention is generally pursuant to a court order (as, where a magistrate so orders, in the case of a person repeatedly convicted of criminal offences involving drunkenness, or pursuant to the application of a relative). The order can provide that the person either be put in the care of another person or committed to a treatment centre, in each case for a prescribed period. In some jurisdictions, application for treatment, supported by medical certification, may be made to treatment centres where

designated medical officers have authority to detain the addicted person for a prescribed period if they consider it necessary in the interests of the addicted person's health or safety, or for the protection of other persons. The person detained may in all cases seek a discharge of the detention order.

249. An example of this type of legislation is the South Australian Public Intoxication Act 1984 which provides that persons in a public place under the influence of a drug or alcohol may be apprehended. The police or authorized officer must either take the person home, to an approved caring body, a police station or a sobering-up centre. A person must be released from the police station or centre as soon as he is capable of taking care of himself. In the case of a police station this must be within 10 hours of apprehension and, in the case of a centre, 18 hours.

#### *Illegal immigrants*

250. The federal Migration Act 1985 empowers officers (being immigration, police and customs officers) to arrest without a warrant a person reasonably supposed to be an illegal immigrant (termed in the Act "a prohibited non-citizen") and to take that person into custody. A person so arrested is required by the Act to be taken before a prescribed authority (in practice this would be a magistrate) within 48 hours of arrest or as soon as practicable thereafter. If the magistrate is satisfied there are reasonable grounds for supposing the arrested person to be an illegal immigrant, he may authorize a further period of custody to allow the Minister for Immigration and Ethnic Affairs to consider whether to make an order for deportation. The initial period of custody authorized by the magistrate should not exceed seven days, or such longer period as the person may consent to. The magistrate may extend the period of custody from time to time.

251. It is not a matter of policy that all illegal immigrants located are invariably arrested and placed in custody. The circumstances of each particular case are taken into account in determining the custody issue. A range of factors may need to be considered including those related to the situation of the individual and his family, if any, and perhaps the record of the individual's past behaviour or dealings with the authorities. As a general rule women in advanced stages of pregnancy, single teenagers and the minor dependent children of illegal immigrants are not placed in custody.

252. Under sections 36 and 36A of the Migration Act certain persons may be held in custody until the departure from Australia of the vessel on which they arrived. Where they arrived by aircraft, they may be held in custody until the carrier is able to remove them, generally within five days.

#### *Review of the Migration Act by the Human Rights Commission*

253. In its report on the Migration Act (Report No. 13), released in 1985, the Commission reviewed the human rights aspects of the Migration Act 1958 and its administration. In relation to the arrest of suspected illegal immigrants, the Commission made recommendations

concerning the provision of interpreter services and legal assistance at the time of arrest, and the notification of family or friends of the whereabouts of arrested persons. In so recommending, the Commission acknowledged the efforts made by the Department of Immigration and Ethnic Affairs to ensure that interpreter and other services were available to arrested persons.

254. With respect to the detention of suspected illegal immigrants, the Commission noted that the policy stated in the Residence Control Manual of the Department of Immigration and Ethnic Affairs was not consistently observed in practice, particularly in New South Wales where the Commission noted that the practice was under review. The Commission recommended consistent adherence to the practice of informing detainees, in a language they understood, of their right to be taken before a prescribed authority within 48 hours of arrest and every seven days thereafter, and of affording detainees all facilities to present their case at such hearings. In particular, the Commission recommended that, consistent with the spirit if not the letter of article 9 of the Covenant, bail should be available for detainees. Amendments to the Act to incorporate bail provisions for illegal immigrants are currently under consideration.

255. The Human Rights Commission also considered that sections 36 and 36A of the Act might infringe article 9 by depriving persons of their liberty without formal process of law. Accordingly, the Commission recommended that a minimum period of detention should be enforced, and that, after a short period (for example, one week), there should be a process by which continued detention pursuant to those provisions was reviewed and, if possible, a conditional form of release provided.

#### (b) *Reasons for arrest*

##### *At the time of arrest*

256. Under the common law, an arrest (whether by a police officer or an ordinary citizen and with or without a warrant) is unlawful unless reasonable efforts are made to communicate to the person the grounds upon which the person is being arrested. This need not be done in technical language. However, the grounds need not be communicated if the person arrested ought, by reason of the circumstances in which the arrest occurs (for example, in the course of committing the offence), to know the substance of the offence for which he or she is being arrested, or if the person arrested, by his or her behaviour, makes it impracticable for the communication to take place. In one view, this rule may have been qualified in certain jurisdictions by the legislative requirement that notice of the reason for the arrest must be given "if practicable". The better view, taking into account the reluctance of courts, when interpreting legislation, to read down common law rights, appears to be that the words "if practicable" should be read narrowly as the corollary of the situation, in the common law rule, of the person arrested making it impracticable for the communication to take place.

257. The consequences of an unlawful arrest mean that the officer who made the arrest may be liable to dis-

ciplinary proceedings or civil action for damages. Action may also be taken under complaints against the police legislation and evidence obtained subsequent to the arrest may be held inadmissible in a court.

##### *Prompt information on charges*

258. The process of arrest is normally followed by the formal charging of the person arrested at a police station where the person is advised of the nature of the charge or charges. In the case where a person is not arrested but proceeded against by summons, the prescribed court documents that must issue before the matter can be brought to court (information, complaint, summons, etc.) must specify the offence or offences with which the person is charged. This necessarily involves referring to the basic details of the offence, but not such information as the name of persons having supplied information leading to the arrest. The accused is served with a copy of such documents.

259. Both police and the courts make considerable use of interpreters where accused persons are unable to understand or to communicate effectively in the English language. The use of interpreters and other aspects of the criminal process are dealt with in more detail in regard to article 14.

#### (c) *Action after arrest*

##### *Prompt appearance before a judicial officer*

260. The common law principle that an arrest becomes unlawful if there is an unreasonable delay in taking the suspect before a justice or magistrate to be dealt with according to law applies, as such, in some jurisdictions and has been incorporated by legislation in others. Some of this legislation sets time-limits within which this action is to occur and in others, where no time-limit is set, the requirement to avoid unreasonable delay applies.

261. In practice, persons are generally brought to court within 24 hours, unless a public holiday intervenes between the day of arrest and the resumption of court hearings. Bail laws in all jurisdictions enable release of a person pending the hearing of the charge against the person by a court.

262. Two types of bail are generally available—bail determined by an authorized police officer and bail granted by a court. The accused person may be required to enter into a recognisance, with or without surety or sureties, and to comply with such conditions as would ensure his or her appearance at court at the time and place specified. If the applicant is refused bail by a police officer, he or she may apply for bail again when appearing before the court, or may so apply at any time before the Supreme Court. Bail provisions are discussed in more detail below.

##### *Entitlement to trial within a reasonable time*

263. Where the accused pleads guilty to a charge, there is normally no delay in the court disposing of the matter. Where the accused defends the charge, delays of

some months (i.e. beyond the time needed by the accused to prepare his defence) may occur before the case is heard because of the heavy case-loads in the courts. However, once the complaint or indictment is filed the matter takes its place in the list of cases awaiting hearing. The hearing may thereafter only be delayed, at the instance of the prosecution or defence, by the exercise of judicial discretion.

### Bail

264. Legislation in all jurisdictions generally creates a presumption in favour of bail except for serious offences, such as armed robbery, drug trafficking or failure to appear in accordance with a bail undertaking. Persons charged with these offences will not automatically be refused bail, but will find it more difficult to secure their release.

265. All States except Tasmania have passed comprehensive bail legislation in recent years to update and consolidate existing bail laws. The legislation generally lists the factors relevant in the exercise of a discretion by a bail authority to grant bail, the conditions which may be imposed on a grant of bail and the procedures to be followed by police and the courts in the determination of bail.

266. The relevant factors in making a determination as to the grant of bail to an accused person generally include such matters as: the probability of the accused appearing to face the charges, taking account of the person's community ties, previous history and the circumstances of the offence; the interests of the accused, in regard to the period he or she may have to spend in custody, and the accused's need to be free for any lawful purpose; and the protection and welfare of the community, including the likelihood of the person interfering with the evidence, witnesses or jurors or the likelihood that the accused will or will not commit an offence while at liberty on bail.

267. The codification and expansion of the conditions which may be imposed in relation to the grant of bail, as found in the new legislative schemes, were in part a result of concern that a bail system based on purely financial conditions was inequitable, particularly in regard to low income groups within the community. As a consequence of the downgrading of financial means as a factor and the use of money or surety as a bail condition, the legislative schemes now create a punishable offence if the accused fails to appear to answer the charge.

268. Among other recent developments in this area, the South Australian Statutes Amendment (Children's Bail) Act 1986 enables children under the age of 18 years on the day of alleged commission of an offence to be eligible for bail.

269. A refusal of bail by a police officer or magistrate is subject to appeal to a higher court. The provisions of the Imperial habeas corpus Act 1679 (or its equivalent) in all Australian jurisdictions, as well as supplementary legislation (in Bail Acts) in most jurisdictions, provide that a person must be released on bail, or

discharged altogether, if not brought to trial within a certain period.

270. Although legislation in all Australian States reflects the view that, as a general rule, persons awaiting trial should not be detained in custody, provision is made for such detention in cases where the alleged offender is thought to pose a danger to others or where there is some likelihood that he or she may abscond before trial unless detained in custody or where there is a risk of interference with witnesses. These exceptions should not produce a situation where a large proportion of prisoners are in fact detained in custody awaiting trial. However, in practice the remand population of prisons has crept up over the years. Figures collected by the Australian Institute of Criminology show that the proportion of persons remanded in custody in the prison population is usually of the order of 15 per cent nationally, with some jurisdictions showing a figure of almost 25 per cent. A study conducted by the Institute, *The Outcomes of Remand in Custody Orders* (J. Walker, 1985), has shown that less than 50 per cent of those persons who are remanded in custody in fact receive custodial sentences on the completion of their trial.

### (d) Review of detention

271. For a person deprived of liberty, the writ of habeas corpus, to which reference has been made earlier in this report, is available to challenge the lawfulness of the detention. The writ can be sought to establish that a person is wrongly detained, for example, in a jail or a police station on a purported criminal charge, or where a parent or guardian is unlawfully holding a child under restraint, or where a person is detained in a mental hospital. A relative, guardian or friend may apply to a court on the detained person's behalf. Unless the detention is shown to be lawful, the person detained will be released forthwith from detention.

272. The writ may also be used where bail is being unreasonably obstructed, or where the amount of security demanded is so excessive that it amounts, in effect, to a refusal to grant bail. (See *R. v. Rochford*; *Ex parte Harvey* (1967) 15 F.L.R.149.)

### (e) Right to compensation

273. Persons unlawfully arrested or detained have an enforceable right of action under common law for damages. Such actions will lie against the person occasioning the arrest or detention. The type of action that might lie depends on the facts and evidence and could include common law actions for false imprisonment or malicious prosecution. Sometimes an action for defamation will be available.

## Article 10

### PRISONERS' RIGHTS, ETC.

274. While Australian jurisdictions accept the principles and objectives set out in article 10, Australia has

maintained its reservation to this article in relation to paragraphs 2 and 3. This reservation provides:

In relation to paragraph 2 (a) the principle of segregation is accepted as an objective to be achieved progressively. In relation to paragraphs 2 (b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned.

275. The reasons for this reservation are based on changing views about the best methods of punishing criminal offences, and the difficulty, including cost, in a country which in many areas is sparsely populated, of achieving the segregation arrangements envisaged. For these reasons, in some detailed respects, law or practice may not be fully consistent with the provisions of this article. For example, in New South Wales there are still some circumstances under which accused persons awaiting trial are not kept in remand centres, but with convicted persons. This is undesirable but is unavoidable at present.

(a) *Treatment of detainees*

276. In 1984 Australia withdrew its reservation to paragraph 1 of this article concerning laws and arrangements for the preservation of custodial discipline in penal establishments.

277. As already discussed in comments on articles 7 and 9, persons cannot be deprived of their liberty in Australia except in accordance with the law. A deprivation of liberty can occur:

(a) Following arrest for an offence, where the arrested person is held in custody until brought before a court;

(b) Following commitment to a penal institution, which can only be pursuant to a court order;

(c) Following the arrest of a person who is not lawfully in the country, with a view to the taking of deportation proceedings;

(d) Where a person is committed to an institution other than a penal institution, for example, a mental institution. (The circumstances in which such deprivations of liberty can occur are outlined in comments under art. 9.)

*Deprivation of liberty following arrest*

278. The rules governing the treatment by police officers of persons in their custody are a mixture of statute, common law and Police Commissioners' instructions. Mistreatment of a person in custody may constitute a criminal offence, such as assault, and the ordinary criminal law and a civil action in damages would be available. As mentioned in part one, mechanisms also exist whereby complaints against the police may be investigated by an independent authority (the Ombudsman or a specialist independent tribunal) which can recommend appropriate action. Internal police disciplinary action may also be taken. There is no such legislation in regard to the external territories.

279. Mistreatment of a person in custody for the purpose of gathering evidence (for example, obtaining a

confession) will render evidence so obtained liable to the exercise by the court hearing the matter, of its discretion to exclude evidence which is unlawfully or improperly obtained.

*Prisons*

280. Commitment to a penal institution can only be made pursuant to a court order. Federal and State Ministers are familiar with the requirements of the Standard Minimum Rules for the Treatment of Prisoners. However, it is noted that these Rules do not recognize a number of modern developments in sentencing and treatment of offenders. With these limitations in mind the Australian Institute of Criminology has developed a set of guidelines to supplement the Standard Minimum Rules in their application to Australian prisons. At the May 1986 meeting of Correctional Ministers it was resolved to update the guidelines, and a special meeting of administrators was held in November 1986 for that purpose. It is expected that a comprehensive document of Australian practice will emanate from that meeting. Ministers have also been examining the draft body of principles for the protection of all persons under any form of detention or imprisonment which is being developed in the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. This is being done with the object of implementing the principles in Australia, where they are not already in operation as a matter of practice.

281. The establishment, maintenance and administration of prisons in Australia are matters within the responsibility of State Governments. The federal Government does not run any prisons except on Christmas Island where a prison exists for the detention of short-term prisoners. There are, however, a number of remand centres where prisoners awaiting sentence may be housed. In the Australian Capital Territory, the Remand Centres Ordinance 1976 and regulations are based on the Standard Minimum Rules for the Treatment of Prisoners.

282. Persons sentenced for offences against federal laws are housed in State prisons in accordance with section 120 of the Australian Constitution, which provides:

Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

Section 68 of the federal Judiciary Act 1903 provides, *inter alia*, that where a person is charged with an offence against a Commonwealth law committed in a particular State or Territory, the laws of that State or Territory in respect of matters such as arrest, custody and bail shall be applicable to that person.

283. The State prison systems also house offenders convicted of offences in Australian Territories where the size of the population in such a Territory is not sufficiently large to justify a separate prison system. For example, all Norfolk Island prisoners are detained in New South Wales prisons.

284. As the federal Government does not operate prisons, Commonwealth and most Territory prisoners are detained in State prisons. The Human Rights Commission has recently published a study of the human rights of Commonwealth prisoners (Occasional Paper No. 12). The study surveys law, practice and opinion related to the rights of prisoners in the United States of America and the United Kingdom of Great Britain and Northern Ireland as well as in Australia. The Commission's intention is to promote discussion of the issues among those concerned—prisoner groups, prison administrators, civil liberties groups and others concerned with the problems—with the object of identifying ways in which existing arrangements could be improved.

285. In all Australian jurisdictions except the Commonwealth (see para. 281) and Norfolk Island (see para. 283), prisons legislation provides for the establishment, maintenance and administration of institutions where persons are detained. The legislation provides generally for the well-being and protection of detainees. For example, it makes provision for the adequate nourishment and exercise of prisoners, their medical treatment, religious worship and their recreational, educational and vocational activities. Medical officers are available to make periodic inspections of the prison and to report to the officer in charge of the prison on matters of health and hygiene. Provision is made for relatives and friends to visit prisoners and for prisoners to communicate with other persons. Prison Visitors (or their equivalent), appointed under legislation, carry out inspections of prisons at frequent intervals, make reports to the Minister at their own discretion or as required and inquire into complaints by prisoners.

286. Mistreatment of a person in custody by a police officer or mistreatment of a prisoner by a prison officer would constitute a criminal offence in most cases, and a civil action in damages might also lie. Prisoners may complain of maltreatment to the Ombudsman, Official Visitor (or equivalent), the officer in charge of the prison or the responsible Minister, each of whom has discretion to institute an investigation of the complaint.

287. Prison offences are specified in legislation, and are generally dealt with, in the presence of the prisoner, by either the Controller of Prisons or a magistrate. A wide range of punishments is available for prisoners offending against prison rules. These are designed to maintain order and discipline and to protect other prisoners and those employed in prisons. The punishments include the withdrawal of privileges, and in most jurisdictions, in special circumstances, such measures as solitary confinement or restricted diet.

288. In New South Wales there is no punishment of prisoners offending against prison rules by the use of solitary confinement or restricted diet. The New South Wales Prisons (Amendment) Act 1985, *inter alia*, repealed the requirement that prisoners' diets be prescribed under the Act and enabled segregation of a prisoner to occur at the written request of the prisoner. However, the punishments of withdrawal of privileges, solitary confinement and restricted diet still exist, for example, on Christmas Island and the Cocos (Keeling) Islands. Whipping is also an available punishment. However, none of

these punishments have been imposed since the Territories came under the control of the Commonwealth.

289. All Australian prison systems provide a full range of medical, dental, pharmaceutical and psychiatric services. Basic medical and dental care is provided free of charge. Larger prisons have full-time medical staff and hospitals within those prisons. In more remote areas medical services are provided by local doctors on a contract basis. Prisoners may also be transferred to public hospitals. In Victoria a special security ward has been established in a public hospital for this purpose.

290. In relation to the treatment of persons detained in mental institutions, the Committee is referred to the comments on article 7 (see paras. 212-216 above). It might be added that some jurisdictions impose specific criminal penalties, in addition to the usual criminal and civil law sanctions, for the neglect or ill-treatment of mental patients.

#### *Detention of prohibited non-citizens*

291. Under the provisions of the Migration Act 1958, illegal immigrants (termed in the Act "prohibited non-citizens") may be arrested and placed in custody. The majority of persons arrested are detained in federal immigration detention centres although provision exists for their custody in other places. Illegal immigrants with a record of criminal convictions are not as a rule held in detention centres. Single juvenile illegal immigrants are not placed in custody as a matter of course. Detention is considered in such cases as a last resort if there is no other means of ensuring the person's availability for removal from Australia.

292. Conditions for detainees at Villawood Detention Centre in New South Wales were the subject of an inquiry and report by the Human Rights Commission in August 1983 (Report No. 6). The report made a number of recommendations in relation to matters of privacy, access to legal advice, contact with visitors, communication with the outside world, general conditions of detention, welfare needs, religious observances, medical services, and children at the centre. Of the 44 recommendations made, 38 have been implemented in respect to Villawood and to the other detention centres in so far as they are applicable to those places. The remaining recommendations have either been met in part or overtaken by other developments in the operation of the centres. The Human Rights Commission's report on the Migration Act 1958 has already been referred to at paragraphs 253 to 255. In that report the Commission recommended that reforms and improvements under way at the Villawood and Maribyrnong Detention Centres and the action recommended in its report on the Villawood Centre be continued to completion as quickly as possible.

#### *Inter-State transfer of prisoners*

293. A scheme agreed between the Commonwealth, the States and the Northern Territory permits the inter-State transfer of Commonwealth State and Northern Territory prisoners. All jurisdictions have passed, and brought into effect, legislation implementing the scheme but further work is being done through the Standing

Committee of Attorneys-General to improve its operation.

(b) *Segregation of prisoners*

*Segregation of accused from convicted persons*

294. In all jurisdictions, accused persons awaiting trial are, as far as practicable, kept separate from convicted prisoners, in separate remand centres. Australia's reservation to article 10 recognizes that the segregation of accused from convicted persons is desirable but to be achieved progressively. The exceptions occur in the sparsely settled regions of Australia which cover large areas where the cost of housing persons on remand and prisoners separately would not be justified in current circumstances.

295. In some instances segregation is possible but within the same prison facility. For example, in Tasmania, while the principle of segregation is recognized, the cost of housing persons on remand separately is such as to prevent separate facilities. On average, Tasmania has about 300 prisoners, with perhaps 20 being held on remand. Efforts are made within existing facilities to ensure that these groups are segregated to the maximum extent possible.

296. The practice in all jurisdictions is, so far as possible, to keep accused persons separate from convicted persons and to allow them private communication with friends and legal advisers as far as possible. Accused persons are not required to work or wear prison dress.

297. *Illegal immigrants.* Illegal immigrants placed in custody are normally held in purpose-built immigration detention centres. There are three such centres. Consequently, in those localities without a centre, initial custody for an illegal immigrant may require detention in a police lock-up, remand centre or prison facility. It is not the policy to place illegal immigrants in prison where a detention centre is available or if such custody is otherwise avoidable. In any event periods of custody in those places are kept to a minimum and, where feasible, detainees are moved to a detention centre at the earliest opportunity.

(c) *Juvenile offenders*

*Segregation of children from adults*

298. In most cases child offenders are dealt with by Children's Courts and, if institutionalized, are sent to special detention homes or training institutions. Children accused of certain serious indictable offences, however, may be (and usually are) tried in the same manner as adults and may be sentenced to terms of imprisonment.

299. Among recent developments, the Northern Territory Juvenile Justice Act 1983 provides, *inter alia*, for establishment of a Juvenile Court, the punishment of juvenile offenders and the transfer of juvenile offenders between the Territory and the States. The intention of the Act, as expressed in its preamble, is "that juveniles be

dealt with in the criminal law system in a manner consistent with their age and level of maturity (including their being dealt with, where appropriate, by means of admonition and counselling) and to extend to juveniles the same rights and protection before the law as apply to adults in similar circumstances".

300. The Children's Protection and Young Offenders Act 1979 (South Australia) does not allow a court to sentence a child to a term of imprisonment. However a child can ask to be transferred to a prison or can be sent there if uncontrollable elsewhere. As in other States, there is no requirement that children be segregated from adults. Generally, the view is held that it is not always desirable to separate juvenile from other offenders in all circumstances, for example, where segregation might in effect entail solitary confinement or living in conditions less amenable than those of the general prison population.

301. For this reason, Australia included the following in its instrument of ratification:

In relation to paragraphs 2 (b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned.

The further requirements of paragraphs 2 (b) and 3 of this article, relating to special provisions for child offenders, are met in all Australian jurisdictions, as referred to in the comments on article 14, paragraph 4.

(d) *Rehabilitation*

302. One of the primary aims of the penitentiary system in Australia is rehabilitation. As referred to in the comments on articles 7 and 8, legislative provision is made in all Australian jurisdictions for probation and parole, in a number of States, for community service orders and, in some jurisdictions, for work release programmes. Education and training facilities are also provided in prisons.

303. Victoria has recently introduced a new Penalties and Sentences Act 1985. The main features of this Act are to consolidate into one Act all provisions likely to be of importance in passing a sentence, to introduce new sentencing options, including community-based orders and suspended sentences, and to rationalize the rules related to the serving of concurrent sentences. The Act is aimed at providing courts with flexibility in sentencing options so that the most appropriate sentence from the point of view of the State and the individual can be imposed. Victoria has also initiated an inquiry into sentencing practice to facilitate the making of the best sentencing decisions possible.

304. The Victorian Community Welfare Services (Pre-Release) Programme Act 1983 provides for a community-based pre-release programme to improve re-integration of prisoners in the community during the final portion of their prison sentences. The Victorian Prison Industries Commission Act 1983 establishes the Victorian Prison Industries Commission to manage sites and farms, to provide work and to set prisoners and trainees to work.

305. Queensland conducts an extensive community service order programme as well as a release to work programme. Action to establish attendance centres as a sentencing option is continuing. In Western Australia the Prisons Act provides that the Director of Prisons may grant leave of absence, during the three months prior to either release or eligibility for parole, for the purpose of seeking or engaging in gainful employment.

#### *Australian Institute of Criminology*

306. The Institute provides statistical information about Australian prisoners and persons undergoing community-based correction programmes. It conducts annual censuses of the prison population on 30 June each year; the fifth such census was conducted on 30 June 1986. The Institute has also commenced a series of censuses of the community-based corrections population; the first such census of approximately 35,000 persons was held on 30 June 1985.

307. Also of interest is legislation such as the Queensland Criminal Law (Rehabilitation of Offenders) Act 1986 which provides, *inter alia*, that any person or authority assessing a person's fitness to be admitted to a profession, occupation, etc., must disregard any conviction forming part of such person's criminal history in respect of which a rehabilitation period has expired and not been revived. The rehabilitation period is generally 10 years from the date of the recording of a conviction and may be revived if the person commits another serious offence or by order of a Court.

### **Article 11**

#### IMPRISONMENT FOR FAILURE TO FULFIL A CONTRACTUAL OBLIGATION

308. All Australian jurisdictions comply with the requirements of this article. Under Australian law, no person can be imprisoned except by order of a court. Failure to fulfil a contractual obligation results only in the possibility of obtaining an order of a court for specific performance of the contract or for damages. Imprisonment could only follow failure to comply with an order of the court, i.e. there is no imprisonment for failure to fulfil a contractual obligation. In the event of the failure of a person to comply with an order of the court, the court will exercise its discretion as to the sanction to be applied to the defaulting person.

### **Article 12**

#### FREEDOM OF MOVEMENT

309. It is considered that Australian law and practice are in conformity with this article. Although there is no absolute right to liberty of movement within or from or into Australia, such limitations as do exist are few and are considered consistent with paragraph 3 of this article. Those limitations are outlined below.

#### 1. *Freedom of movement in Australia*

310. Australia does not have any laws to regulate the general movement of citizens or non-citizens within its territory. However, there are specific controls on entry to some areas of the country. Briefly these controls relate to:

- (a) Entry to some Australian external territories;
- (b) Entry to Aboriginal lands;
- (c) Entry to land set aside for defence purposes; and
- (d) Entry to certain national parks.

Private owners of land also have a general right to regulate entry onto their land and, if necessary, can prevent unauthorized entry by means of an action in trespass.

311. In Australia, land is either privately owned or is land vested in the Crown. Private ownership may be subject to certain rights reserved to the Crown (for example, the right to the minerals of the land) and the legislation of various kinds allowing entry to the land by government authorities in the public interest (for example, in relation to public health). The land vested in the Crown is normally dedicated to a specific purpose and the Crown reserves the right to control access to such land in accordance with the purpose to which the land is dedicated.

312. In regard to freedom of movement between the States, the Constitution of Australia provides in section 92 that "... trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free". This guarantee has been judicially interpreted to include the free movement of persons as well as goods. The word "intercourse" has been interpreted to include all migration or movement of persons from one State to another, including ordinary members of the public as well as business people. This freedom was upheld even during wartime conditions. It does not, however, apply to trade, commerce or intercourse with the Territories (including the Northern Territory). A separate, but similar, guarantee of freedom of movement between the States and the States and the Northern Territory is provided for in section 49 of the Northern Territory (Self-Government) Act.

- (a) *External Territories*

#### *Cocos (Keeling) Islands*

313. On 19 November 1986 legislation was passed by the federal Parliament to apply the Migration Act 1958 to the Territory. When proclaimed, this reform will place the Territory in the same position in respect of immigration as any part of mainland Australia and Christmas Island, and will remove legislative control over movement between the Territory and other areas of Australia. The legislation will be brought into effect when arrangements have been made to enable the Territory to function as a port of entry into Australia.

*Norfolk Island*

314. Entry to and residence in the Territory of Norfolk Island is controlled by the Immigration Act 1980 of the Territory of Norfolk Island. Under the Act, which is administered by the Norfolk Island Government, there are four categories of entry permit. Under a Visitor's Permit a stay in the Territory of a maximum of 120 days is possible. Temporary entry permits may be granted for a period of up to one year, and may be granted subject to conditions as to employment. General entry permits may be granted for periods of up to five years and six months and may also be granted subject to conditions. Declarations of residency entitle a person to reside permanently in the Territory, and these are subject to no restrictions.

315. No distinction is drawn in the Norfolk Island legislation between Australian citizens and residents and others. The reasons for the control on entry to Norfolk Island are the preservation of the small, sensitive environment and the protection of the cultural heritage of the Pitcairn Islanders resident in the Territory.

(b) *Aboriginal land*

316. There are in general no specific restrictions in Australian laws on the freedom of movement of Aboriginal Australians. Aboriginals live as ordinary members of urban and rural communities, on the fringes of provincial towns and cities and in their own communities.

317. Where freehold title has been acquired by Aboriginal interests through purchase on the open market by agencies such as the Aboriginal Development Commission, visitor entry rights are subject to the same laws of trespass which apply to the community at large. However, certain statutory schemes have granted freehold title to significant areas of land, particularly in South Australia and the Northern Territory, to Aboriginal bodies which hold that title in trust for the Aboriginal traditional owners. Other than these traditional owners and certain categories of exemptions (for example, the police, medical practitioners, members of (or candidates for) Parliament, certain public officials and Aboriginals with traditional interests which do not amount to ownership), all persons (Aboriginal and non-Aboriginal) are required to seek formal permission to enter onto those lands from the traditional owners or the relevant Land Council administering the lands.

318. Similar restrictions apply where land has been leased to, or reserved for the exclusive benefit of, particular Aboriginal communities or organizations. Freedom of entry is confined to members of the particular community or exempt group, with all others being required to seek permission from the community or the relevant State government authority.

319. Pursuant to the Queensland Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982-1984 and the Aborigines and Torres Strait Islanders (Land Holding) Act 1985, Aboriginal reserves in Queensland are vested by deed of grant in trust under the control of elected Aboriginal and Torres Strait Islander Councils. These Councils have the right to control access to such lands similar to the rights which a private

owner of land possesses. Victoria will soon enact legislation granting title in land to Aboriginal communities currently occupying land. In South Australia, the Pitjantjatjara Land Rights Act, 1981 and the Maralinga Tjarutja Land Rights Act, 1984 vest freehold title in the traditional owners. Under these Acts a person (not being a traditional owner) who enters the land without the permission of the body in which the land is vested commits an offence.

320. The federal Racial Discrimination Act 1975 makes it unlawful for a person to do any act involving racial discrimination which has the purpose or effect of impairing the enjoyment, on an equal footing, of any human right in any field of public life (subsection 9(1), which includes any right set out in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. Subsection 9 (1) of that Act and the right to "freedom of movement" onto Aboriginal lands (under article 5 of that Convention) arose for consideration by the High Court in *Gerhardy v. Brown* (1985) 57 A.L.R. 472.

321. That case arose from the charging of Mr Brown with an offence under the South Australian Pitjantjatjara Land Rights Act 1981 of illegal entry upon Aboriginal land. That Act vests, in the traditional owners of the land, freehold title to a large area of land in South Australia. Section 19 of the Act provides that a person who is not a traditional owner and who enters upon the land without the written permission of the Pitjantjatjara body corporate is guilty of an offence. The High Court found that section 19 was a "special measure" within the meaning of the exceptions in the Racial Discrimination Act 1975 and, therefore, not subject to the prohibitions contained in part II of that Act. The validity of the "permit system" was also upheld. The case is discussed further in annex 4 to this report.

(c) *Defence restrictions*

322. There are also controls over entry onto specified land and sea areas and into air space set aside for defence purposes, as well as controls over access to defence establishments, facilities and other properties. These restrictions are imposed by law in the interests of preserving national security.

(d) *National parks*

323. Access to national parks is generally open to the public but may be limited or even prohibited in certain areas in order to serve the purpose for which the park was created, for example, in areas of specific historical or ecological significance. For instance, the Fraser Island Public Access Act 1985 (Queensland) is designed to control public access to a delicate national park area by means of permits for camping and control over environmentally harmful activities of people and vehicles on the island. The Act was examined by the Human Rights Commission which concluded that, given the environmental fragility of Fraser Island, it would seem reasonable that some system of control should be placed over the movement of vehicles and people on the island in order to avoid harm to the environment. Such control

mechanisms are a well recognized means of controlling access to areas of ecological significance. Tasmanian legislation makes provision for a prohibition on entry to certain areas of land the subject of forestry operations. This is not a general prohibition, and can only be applied in relation to specific areas by special order of the Minister responsible.

## 2. *Movement out of Australia*

324. The right of persons to move out of Australia is governed by the Passports Act 1938 (federal) in the case of citizens, by way of controls over the issue of passports, and by the Migration Act 1958 (federal) in the case of non-citizens. In the case of refugees, Australia is a party to the 1951 Convention relating to the Status of Refugees which contains certain obligations concerning travel of refugees.

### *Passports*

325. In Australia a person, who is able to establish his or her Australian citizenship and identity, is entitled to an Australian passport except in limited circumstances provided by the Passports Act (sects. 7A-7D). These circumstances are:

(a) Where the applicant is a person under 18 years of age (however, sect. 7A provides for a number of exceptions, including where the consent of the person having custody of guardianship of the minor is obtained);

(b) Where there is reason to believe that there is in force a warrant issued in Australia for the arrest of the person who is an applicant for a passport; or where the applicant is required, by order of a court made in pursuance of an Australian law, or under a condition of parole or of a recognizance, surety or bail bond to remain in Australia or to refrain from obtaining an Australian passport;

(c) Where there is reason to believe the person who is an applicant for a passport owes money to the Commonwealth in respect of:

- (i) Expenses incurred by the Commonwealth on behalf of the person in a foreign country;
- (ii) Moneys lent to the person by the Commonwealth at a time when the person was outside Australia; or
- (iii) Expenses incurred by the Commonwealth in, or in connection with, effecting the return of a person to Australia from a foreign country;

(d) Where the Minister:

- (i) Has formed the opinion that, if an Australian passport were issued to a person, that person would be likely to engage in conduct that:
  - (a) Might prejudice the security of Australia or of a foreign country;
  - (b) Might endanger the health or physical safety of other persons, whether in Australia or in a foreign country; or
  - (c) Might interfere with the rights and freedoms of other persons, as set out in the Interna-

tional Covenant on Civil and Political Rights, whether in Australia or in a foreign country;

- (ii) Considers that, in the circumstances, action to prevent that person engaging in such conduct should be taken by way of not issuing an Australian passport to that person.

326. All these circumstances are subject to the overriding discretion of the Minister to direct that a passport be issued notwithstanding that conditions sufficient to deny issue exist. Decisions to refuse to issue passports are subject to review by the Administrative Appeals Tribunal. The Minister may also cancel a passport for the reasons outlined above. A decision to cancel a passport may also be reviewed by the Tribunal.

### *Migration Act*

327. The Migration Act 1958 contains no power to prevent a person from leaving Australia. The only immigration requirement for a passenger departing from Australia is that the passenger complete, sign and furnish a passenger card, as prescribed in Migration Regulation 4(2). Nevertheless, it is necessary for Immigration Inspectors to see and interview a number of departing passengers. Such persons include:

(a) A person suspected of taking a child out of Australia without the consent of the other parent;

(b) A non-citizen resident departing temporarily without a visa or return endorsement;

(c) A person admitted temporarily to Australia who has remained beyond the authorized period of stay;

(d) An Australian citizen whose travel document has expired;

(e) A seaman who has been signed off his vessel in Australia without approval.

## 3. *Right to enter Australia*

328. Under the Migration Act 1958, non-citizen permanent residents who have left Australia and wish to resume residence are required to have prior authority to return. This authority is granted in the form of a return endorsement.

329. *Human Rights Commission.* In its review of the Migration Act 1958, the Human Rights Commission noted that article 12, paragraph 4, of the Covenant protected permanent residents of a country who were nevertheless non-citizens, as well as citizens. Accordingly, the Commission recommended that, in the granting or cancellation of return endorsements, a non-citizen whose period of permanent residence had reached a nominated period, for example, three or five years, should, by virtue of that fact, be considered to have satisfied any assessments regarding his or her true country of residence. The Commission also recommended that a permanent resident be entitled to return to Australia with his or her Australian citizen spouse regardless of time spent outside Australia.

4. *Other matters*

330. *Departure taxes.* International travellers who are 12 years of age or over are required by law to pay a departure tax before leaving Australia. Departure tax is levied as a revenue-raising item. It is not levied with the intention of preventing or deterring departures from Australia. The amount of the tax (currently \$20) is small when compared to other costs associated with international travel. The Departure Fee Act 1980 of the Territory of Norfolk Island imposes a fee of \$10 on persons leaving the Territory. There are a number of exceptions to the fee relating to, for example, persons leaving the Territory for a short period, persons in transit through the Territory, and persons leaving the Territory for medical or educational purposes.

331. *Torres Strait Treaty.* The Torres Strait Treaty establishes the maritime boundaries between Papua New Guinea and Australia and provides for an equitable distribution of fisheries and seabed resources. A feature of the Treaty is the establishment of a Protected Zone to protect the way of life and livelihood of the traditional inhabitants of the Torres Strait area. The Treaty establishes a Joint Advisory Council, on which the local inhabitants are represented. The Council keeps the Treaty under review and reports to the Foreign Ministers of Australia and Papua New Guinea. The Treaty provides for the Papua New Guinean traditional inhabitants of the Torres Strait area to have access to Australian territory without the normal immigration controls, in the area of the Protected Zone.

## Article 13

## EXPULSION OF ALIENS

332. Only the Commonwealth Government may order the expulsion from Australia of a non-citizen lawfully in Australia. Existing Commonwealth arrangements comply with the requirements of the article and Australia's continuing policy will be to provide some forum of review before expelling non-citizens lawfully in Australia.

333. Non-citizens or immigrants lawfully in Australia may be expelled only in the situations provided for in sections 12 and 14 of the Migration Act 1958. Section 12 refers to the situations where a non-citizen or immigrant has committed a criminal offence in Australia and section 14 authorizes the deportation of a non-citizen or immigrant on the basis that it is undesirable for him or her to remain in Australia.

334. If a deportation order is signed by the Minister under section 12 of the Migration Act, the non-citizen or immigrant may seek a review of the Minister's decision by the Administrative Appeals Tribunal. Persons who are the subject of deportation orders under section 12 of the Migration Act are invariably informed of their right to seek a review by the Tribunal. To date, all persons seeking review have been represented by counsel in the review hearings. A non-citizen or immigrant who is lawfully in Australia and who is being considered for deportation on the basis of undesirability, must, under sec-

tion 14 of the Migration Act, be advised of this prior to the making of the order and may request that the case be considered by a Commissioner. A Commissioner is a person appointed by the Governor-General who has been a judge of a federal or State court or a barrister or solicitor of not less than five years standing. No deportation order has been made under section 14 for a considerable time.

335. In addition, non-citizens and immigrants lawfully within Australia are entitled to challenge the validity of the deportation order in either the Federal Court or the High Court of Australia.

336. Australia's policy is that the non-citizen or immigrant whose deportation is being considered is to be given adequate opportunity to make whatever representation he or she considers necessary, prior to the deportation decision being made. There is an extensive process of review available to persons in respect of whom deportation orders are signed, which enables them to make representations directly to the Minister, whether or not they seek review through the Administrative Appeals Tribunal.

337. *Human Rights Commission.* In its review of the Migration Act 1958 the Human Rights Commission stated its acceptance, in human rights terms, of the legitimacy of the inclusion in that Act of a power to deport non-citizens, subject to procedures for review. The Human Rights Commission noted that amendments to the Migration Act in 1983 and to the Australian Citizenship Act in 1984 had mitigated (in important respects) the severity of the earlier law. Non-citizens convicted of serious offences may no longer be deported if the offence was committed after more than 10 years as a permanent resident, and there is no power to deport citizens. The Australian Citizenship Act no longer allows a person whose citizenship was obtained by fraud or who commits a serious offence and is convicted after obtaining citizenship to have the grant of citizenship withdrawn where withdrawal would render the person stateless. In such cases deportation would not be available under section 12 of the Migration Act. Further, the power to deport a non-citizen contained in section 14 has been restricted to non-citizens who, it appears to the Minister, are or may be a threat to security and who have not spent 10 years in Australia as permanent residents.

338. *Torres Strait Treaty.* Reference was made in the comment on article 12 to the Torres Strait Treaty. It is relevant to note in connection with article 13 that Papua New Guineans who, as traditional inhabitants of the Torres Strait area, have access without the normal immigration controls to Australian territory would, if they move beyond the area "in or in the vicinity of the Protected Zone" or, cease to perform traditional activities, but remain in an area of Australian jurisdiction, become subject to normal entry requirements under the Migration Act. As such, they would have available to them the same administrative and review procedures as usually apply to persons not lawfully within Australian territory. The Treaty also makes special provision to deal with offences relating to fishing in and in the vicinity of the Protected Zone. For example, a traditional inhabitant, who is suspected by the country of which he or she is not

a citizen of committing an offence against that country's fisheries laws, while in the course of traditional fishing, will be tried in the country of his or her citizenship.

#### Article 14

FAIR TRIAL, CRIMINAL PROCESS, ETC.

##### *Background*

339. An outline of the court structure has already been provided in part one of this report. The Commonwealth Constitution provides for a strict separation of powers between the federal judiciary, the legislative and the executive arms of Government. The High Court has interpreted the vesting of federal judicial power by section 71 of the Constitution in courts to mean that courts alone can exercise federal judicial power. This does not mean that judges cannot be appointed to non-judicial bodies such as tribunals. Judges are appointed to tribunals, law reform commissions, Royal Commissions and special inquiries under special arrangements. Under these arrangements they often do not sit on the courts to which they were appointed while performing the other task, but their judicial salaries are continued and no additional salary is paid for the other task.

340. The separation of powers provided for in the Commonwealth Constitution extends only to federal courts or in respect of courts exercising federal jurisdiction. Commonwealth tribunals, such as the Administrative Appeals Tribunal, do not exercise judicial power. That Tribunal, for example, exercises the same powers as the original decision maker in reviewing the decision, unlike a court which is generally able to make any order it thinks fit. This position may be contrasted with that which applies, for example, in New South Wales, where the powers of tribunals may be a mixture of judicial and administrative powers.

341. In Australia the determination of a criminal charge is a matter for the courts. However, a distinction should be drawn between criminal proceedings and disciplinary proceedings. The latter may be considered by special disciplinary bodies. However, those bodies are governed by principles of fairness such as the requirements of natural justice and a number of remedies involving access to courts are available in respect of decisions by such bodies which are alleged to have been made improperly or unfairly.

##### *Paragraph 1 — Right to a fair hearing; equality before the courts and tribunals*

342. In all Australian jurisdictions, all persons are equal before courts and tribunals. There are some procedural restrictions which may prevent certain persons, for example, children and persons of unsound mind, from pursuing a right of action in a court personally. However, actions may be brought on behalf of such persons by next of kin or guardians or special provision may be made. For example, under the federal Family Law Act, a court may order separate legal representation for a child involved in custody or other proceedings under the Act and make any orders necessary to secure it.

The child also has a right to apply for separate legal representation in such matters. In a few instances provision is made by legislation for an advocacy role for certain bodies or persons to pursue actions directly or indirectly on behalf of others. For example, under the Sex Discrimination Act, an action in the Federal Court to enforce a determination made by the Human Rights Commission following a complaint of discrimination may be instituted by either the Commission or a complainant. All persons against whom criminal or civil proceedings are commenced have the right to have the matter heard in accordance with the requirements of paragraph 1 of this article.

343. The right to a fair hearing is guaranteed by ensuring the independence and competence of the judiciary, through the rules of evidence, by provision of legal representation and interpreter services and through the remedies available where allegations of unfairness are made about the manner in which a case is heard.

##### *Independence and competence of the judiciary*

344. Except in relation to the appointment of some special magistrates, who may not have legal qualifications, appointments as magistrates and judges are subject to professional qualifications and appropriate experience. Age limitations may also apply; for example, judges now appointed are subject to a retirement age which varies from 65 to 72 years.

##### *Removal from office of judges or magistrates*

345. The Federal Constitution provides in section 72 for the dismissal of federally appointed judges by the Governor-General only in limited circumstances of proven misbehaviour or proven incapacity, on an address by both Houses of Parliament. The Constitutions of the States make similar provision for the dismissal of State appointed judges on these grounds. A variety of provisions cover the circumstances of dismissal of magistrates. For example, in the Australian Capital Territory, the Governor-General may (a) remove a magistrate from office on the ground of proved misbehaviour or incapacity on address by both Houses of the federal Parliament; or (b) suspend a magistrate on the ground of misbehaviour or incapacity. Unless Parliament then agrees to removal of the magistrate from office, the suspension is to be cancelled. Special magistrates in the Territory hold office during the Governor-General's pleasure.

346. The removal of judges from office has been a matter of some controversy in Australia in 1985 and 1986. The New South Wales Government is currently considering legislation to establish a special body to hear complaints against judges. The Commonwealth passed legislation (the Parliamentary Commission of Inquiry Act 1986) to establish a special Commission to determine whether a particular judge, previously acquitted of criminal charges, had nevertheless been guilty of misbehaviour. That Commission was subsequently abandoned due to the judge's terminal illness.

347. *Bias.* If a person acting in a judicial capacity has a bias which renders, or reasonably appears to render, him or her less than impartial, an appeal would be

available against a decision made by that judge. A conviction so made by that judge may also be quashed or any order made set aside.

#### Proceedings in courts

##### Rules of evidence

348. Courts in Australia are bound by the rules of evidence. This is a very large body of law and some elements are addressed below in regard to article 14, paragraph 3. In some instances these rules are contained in the common law but a considerable amount is contained in legislation. An interim report suggesting a reform to Commonwealth evidence laws was presented to the federal Government by the Law Reform Commission in 1985. That report is currently under consideration. The Commission identified one of the purposes of detailed rules of evidence (in para. 57 of its report) as lending to a trial the appearance of proceedings controlled by the law and not by the individual trial judge's discretion and thus reducing the scope for subjective decisions. This is not to say that these laws operate to remove all discretions. One important discretion already referred to (in para. 203) relates to the admissibility of evidence which has been improperly or unfairly obtained.

##### Public hearings

349. Except where express provision is made to the contrary, all courts are open courts. Consequently court proceedings are held in such a place and under such circumstances that it would be plain to an interested member of the public that he or she had a right of free access hereto.

350. Proceedings of the Family Court of Australia and certain State and Territorial Children's Courts are closed to the public. As mentioned in the comments on article 17, consideration is being given to providing that proceedings of the Family Court be public, with a discretion vested in the judge to close the court if this appears necessary in the interests of the parties. Even where courts are open, the presiding judge or magistrate has a discretion in the interests of justice to exclude persons, other than the counsel or solicitor engaged in the case, from the court. Some hearings before Tribunals may also be *in camera*.

351. The decisions of Supreme Courts and most federal courts are published in law reports. Some tribunals also publish their findings in similar reports. Where proceedings are open to the public, the press may also publish details of the proceedings. Publication of the proceedings of open courts may be subject to a discretion vested in the judge or magistrate to forbid publication of evidence absolutely or subject to conditions, if publication is likely to prejudice the administration of justice. The court also has discretion to prohibit the publication of the names of parties or witnesses in the interests of the administration of justice. In Queensland, for example, the Children's Services Act prohibits the publication of evidence where a child is an accused or a witness in a case. Publication is only possible by express order of a court.

##### Contempt of court

352. Some publications may constitute contempt of court. For example, this concept would cover comments on proceedings that are published so as to create a real risk of prejudice to one of the parties to a hearing which is pending. It also covers publication of matters likely to prejudice the mind of a court by putting it in possession of information which it ought not to have had, and which would embarrass it in the task of deciding the case fairly and free from prejudice. The Law Reform Commission is currently considering a reference made to it by the federal Attorney-General on the laws of contempt.

##### Paragraph 2 — Presumption of innocence

353. It is a fundamental precept of the Australian system of administration of justice that an accused person is presumed innocent until proven guilty. The prosecution in criminal trials must prove its case "beyond reasonable doubt". In civil cases the standard is "on the balance of probabilities". However, the burden of proving all matters in a criminal case does not in all cases rest on the prosecution. The evidentiary burden of proof may be shifted to the accused under certain limited circumstances (for example, to establish the defence of provocation) where it would be extremely difficult for the prosecution to prove facts known to the accused. The burden of proof on the accused in these circumstances is the civil standard of proof, namely, on the balance of probabilities.

354. The Tasmanian Law Reform Commission is at present considering Tasmanian statutory provisions that shift the evidentiary burden of proof to the accused under certain limited circumstances. The Senate Standing Committee on Constitutional and Legal Affairs of the Commonwealth Parliament has also presented a report on *The Burden of Proof in Criminal Proceedings*.

##### Paragraph 3 (a) — Procedural guarantees

##### Prompt information on the nature and cause of charges

355. Where a person is arrested, the common law and, in some instances, legislation require information about the reasons for arrest to be given at the time of arrest. If a person is not arrested, but proceeded against by summons, all jurisdictions require that the nature and cause of a charge are to be included in the documents necessary to enable the court to commence hearing a matter. Legislation in some jurisdictions stipulates that the documents give the accused reasonable information of the nature of the charge or "state shortly the matter of the complaint" and in others, provide for prescribed forms to be completed. These forms invariably require a brief reference to the nature of the complaint. The detail required does not extend to divulging the name of any person as a result of whose information charges have been laid. The accused is entitled to a copy of these documents.

356. The accused must also be informed of the identity of the prosecution witnesses and the nature of the evidence. If available material evidence is withheld, a conviction can be quashed by an appeal court.

357. Information in other languages. Where a person is not arrested but is proceeded against by summons, the documents served on that person will be in English. This is because English is the language of the courts. Where a person is arrested and the officer making the arrest becomes aware that the person does not understand English, then it would be normal practice for translation services to be provided by a friend or relative or at the police station. An accused person who has difficulties with the English language may have to arrange for the services of an interpreter or have such services arranged (see also the comments on para. 3 (f) of this article, in paras. 376-378 below). Interpreter services are available in Australia through the Telephone Interpreter Service. Most police stations and courts also have lists of persons able to perform such services.

#### Paragraph 3 (b)

358. *Preparation of defence.* In Australia, an accused person must be given adequate opportunity to prepare his or her defence. If the trial is due to take place before the accused has had sufficient opportunity to prepare a defence, the courts have power to adjourn the hearing to a later date and almost invariably do so—refusing to do so only when they consider the interests of justice would not be served by such adjournment.

359. *Right to communicate with counsel.* The right of a person charged with a criminal offence, who is in custody without bail, to communicate with his or her counsel for the purpose of preparing a defence, is recognized throughout Australia. The right to communicate with counsel is subject to regulation by law in some jurisdictions. For example, in the Northern Territory, visits to a prisoner by his or her legal representative may be made at reasonable times and with the consent of the Director of Correctional Services.

#### Paragraph 3 (c) — Right to trial without unreasonable delay

360. There is normally no delay in a court disposing of the matter when a person pleads guilty to a criminal charge. Delays (variable in the different jurisdictions) do occur in bringing defended matters to trial. The length of time involved depends on the availability of courts, magistrates and judges, as well as on the circumstances of the case, for example, the time required by the defence to prepare its case or the time it takes to have counsel available.

361. In the more remote areas of Australia, a special problem of delay before trial may arise where a court may not always be immediately available to hear charges. Language difficulties may also sometimes present a barrier to the prompt commencement of proceedings. However, every effort is made to keep such delays to a minimum. In the Northern Territory, for example, circuit magistrates' courts travel to larger towns in outlying areas twice a month and at least once a month to the remoter areas. Whenever necessary, a special court can be convened consisting of one or two justices.

#### Paragraph 3 (d)

##### Trial in the presence of the accused

362. A trial will not proceed, unless in exceptional circumstances, without the presence of the accused. Where the accused creates such a disturbance in court that it is impossible to proceed with the trial, the accused may be removed, but the trial will not proceed without the accused's legal representative being present. The accused is also entitled to access to a transcript of the proceedings, including any proceedings conducted during his or her absence.

363. *Ex parte proceedings.* In summary matters where a summons has been served and the defendant does not appear, courts have a discretion to proceed *ex parte* to hear and determine the case in the absence of the defendant. In some jurisdictions a defendant may opt to enter a plea of guilty by post in respect of minor traffic offences and the proceedings can then be determined in the absence of the defendant. The court would in such instances be required to have regard to any matters addressed in the defendant's statement.

##### Right to defend a charge and to be advised of the right to legal assistance

364. The entitlement of any person to defend a charge, either in person or through counsel, is recognized throughout Australia. Where an accused person is unrepresented, in particular, in serious criminal offences, the court will normally advise that the person may seek legal representation and legal aid, if applicable, for that purpose.

##### Right to legal assistance

365. Generally, each accused person has the right to be represented by counsel at a trial. In *McInness v. R.* (1979) 27 A.L.R. 449, the High Court considered that a person did have a right to be represented by counsel, but this right was qualified at least to the extent that the interests of the Crown, of witnesses and jurors and of the administration of justice needed to be taken into account. Accordingly, a trial judge has a discretion to order a trial to proceed where the accused is unrepresented but has expressed a wish to be represented, provided no miscarriage of justice occurs. The exercise of this discretion is subject to review on appeal. The appeal court would be concerned to ensure that no miscarriage of justice had occurred. The court would make an assessment of the chances of the accused gaining acquittal had he or she been represented.

366. Australia interprets the right to have legal assistance of a defendant's own choosing to be read subject to the requirement of reasonableness so that, for example, the accused cannot insist on the presence of a particular counsel if that counsel is unavailable.

##### Right to legal aid

367. Legal aid for persons charged with criminal offences in Australia is provided mainly through federal and State schemes. In addition, a person committed for

trial for a federal offence may apply to a judge of the High Court or a State Supreme Court for the appointment of counsel for his or her defence. If the judge certifies to the Attorney-General that the accused person is without adequate means to provide such a defence and that it is desirable in the interests of justice, the Attorney-General may make arrangements for the defence of the accused person or refer the matter to the relevant legal aid body. This provision has been judicially interpreted to the effect that it gives rise to an obligation to make arrangements when a certificate has been made.

#### Legal aid schemes

368. Some years ago the Australian Government proposed a new scheme under which both federal, State and Australian Capital Territory legal aid would be provided in each State and the Australian Capital Territory through a single independent Commission established by State or Australian Capital Territory legislation. Consistent with that scheme, Legal Aid Commissions have commenced operations in Western Australia, South Australia, Victoria, Queensland and the Australian Capital Territory. New South Wales has a Commission in operation but it has not as yet absorbed the Australian Legal Aid Office in that State.

369. The Australian Legal Aid Office provided, and where it continues to operate, continues to provide, legal aid to persons for whom the Australian Government has a special responsibility, and to other persons only in matters arising under federal law. State Public Solicitors' or Defenders' offices and State Legal Assistance Schemes generally provide aid only in matters arising under State Law.

370. There is no right to legal aid under legislation of the Territories of Christmas Island and the Cocos (Keeling) Islands. However, provision of legal aid in the external territories is under examination. Legal aid is available to the residents of Norfolk Island from the Australian Legal Aid Office in New South Wales.

371. The Federal Government also funds Aboriginal Legal Aid Services in each State. Although Aboriginals retain the right to seek assistance from other legal aid agencies or private practitioners, the Aboriginal Legal Aid Services provide a specialist service to meet the particular needs of Aboriginals.

372. *Non-statutory schemes.* The federal Attorney-General may also provide financial assistance for legal costs and related expenses in "public interest" cases involving questions arising under a law of the Commonwealth, and "test" cases, for the purpose of resolving an important question arising under Commonwealth law that, in the opinion of the Attorney-General, affects the rights of a section of the public which is, or a group of persons who are, for the most part, socially or economically disadvantaged. Aid is provided subject to criteria of hardship and reasonableness. In addition, the Attorney-General may also provide financial assistance for legal costs and related expenses, under a scheme known as the "special circumstances scheme", where the Attorney-General is satisfied that there are special

circumstances that justify the provision of such assistance. There is no means test for this scheme, but in essence the Attorney-General must be satisfied that in the circumstances there is a moral obligation on the Commonwealth to provide assistance.

373. The various legal aid schemes have their own criteria for determining eligibility for legal aid. In general, a person committed for trial on a criminal charge who does not have sufficient means to pay for legal representation is able to obtain legal assistance. Legal aid schemes in Australia generally employ means-testing procedures and may also require a contribution from a person assisted, to the extent of that person's capacity to pay for it. Australia considers that means-tested legal aid is in the best public interest. Further, in all jurisdictions legal aid is not as fully available in respect of non-indictable offences (less serious offences) as it is in regard to indictable offences. Primary considerations are the merits of the case and the availability of funds.

#### Paragraph 3 (e)

374. *Securing attendance of witnesses.* The rule in all jurisdictions is that an accused person or that person's legal representative is entitled to cross-examine any other party who gives evidence. The accused may secure the attendance of any compellable witness by the issue of a subpoena or summons which compels the person on whom it is served to attend the court. This rule applies both to the prosecution and the defence. Some potential witnesses, such as children and mentally incapacitated persons, may not be competent witnesses and are thus not compellable. There are also some residual exceptions in relation to spouses. Otherwise, the general rule is that anyone is a competent and compellable witness in any case. If the witness so compelled fails to attend, the court may issue a warrant to bring that witness to the trial.

375. *Claims to privilege.* Certain information may be protected from disclosure by a claim to privilege. There are a limited number of categories of privilege, for example, "Crown" privilege and some protection for communications between legal adviser and client. A claim of privilege may be made by both the prosecution and the defence. The court will consider whether a claim for privilege is established but a successful claim of privilege does not affect the right to compel the attendance of a witness. One important area, the privilege against self-incrimination, is addressed below in regard to paragraph 3 (g) of this article.

#### Paragraph 3 (f) — Court interpreters

376. In Australian courts evidence is given in English. However, where a person in a criminal trial has an insufficient command of the English language the trial judge has a discretion to permit the accused to have the assistance of an interpreter. A witness is not entitled as of right, however, to give evidence through an interpreter. It is for the trial judge to determine at his discretion whether to allow the use of an interpreter.

377. The practice is that, if interpreters are required in criminal cases, their attendance is arranged without

cost to the defendant and almost always permitted by the court. In cases where there is a problem of communication, courts go to considerable lengths to ensure that accused persons understand the nature of the charge and evidence against them. Permission to use an interpreter is given by the courts as a matter of course. If an accused person arranges his or her own interpreter, that is also permitted as a matter of course.

378. The Standing Committee of Attorneys-General has recently formulated national guidelines on the availability of interpreters in court. These are under discussion with a number of courts and other bodies. Consideration is being given to the inclusion of a statutory right entitling an accused person to the assistance of an interpreter during a trial and/or in proceedings preliminary to that trial.

#### Paragraph 3 (g)

##### Testimony by the accused

379. In some Australian jurisdictions the accused is not a competent witness for the prosecution. In others the accused is competent but not compellable. In most jurisdictions the accused is competent but not compellable to give evidence as a witness for himself or herself or a co-accused. Thus, an accused person is not required to give evidence at his or her own trial and will not be guilty of contempt of court if he or she chooses not to give evidence. In some Australian jurisdictions there is also a statutory prohibition on judicial comment on an accused person's failure to give evidence.

380. In some jurisdictions the accused may opt to make an unsworn statement or, for example, in New South Wales, to give both sworn and unsworn testimony. One consequence of such a course is that, while the unsworn statement forms part of the evidence, the accused is not liable to cross-examination. In some jurisdictions the trial judge is able to comment on the failure of the accused to give sworn evidence.

381. The options available to an accused are, therefore, to remain silent, to make an unsworn statement or to give evidence on oath. Where an accused chooses to give evidence on oath there are rules of evidence law which limit the scope of permissible cross-examination, for example, as to the accused's credibility.

##### Police questioning

382. A person also has a right to remain silent in response to police questioning respecting an offence he or she may have committed. If the person chooses not to do so then evidence of statements made may be tendered in evidence in later proceedings. Police Commissioners' Instructions commonly provide that police are to warn suspects of the possibility of their statements being tendered in evidence at later proceedings. There are some legislative requirements to answer certain questions from police but these relate to such matters as the provision of names and addresses of persons present at the scene of traffic accidents.

383. A confession to a crime, by an accused person, is only admissible if it is voluntary. A confession made

in consequence of a threat or inducement held out by a person in authority may be held by the court to be involuntary and, therefore, inadmissible.

##### Self-incrimination

384. In Australia the common law privilege against self-incrimination extends beyond the protection provided in the Covenant for a person accused of a crime to other witnesses who can thus give evidence without fear of being forced to answer questions which will incriminate them. The Commonwealth's Law Reform Commission in its report on *Evidence* (published in 1985) was of the view (para. 852) that the privilege warranted the categorization of a human right, but noted that there was only arguable support in the Covenant for treating the privilege this way.

385. Some legislation exists in Australia to compel the giving of evidence but this is made subject to certain safeguards. For example, in its report, the Law Reform Commission notes (para. 861) that a certification procedure exists in the Australian Capital Territory Court of Petty Sessions. Under this procedure, where a witness objects to an incriminating question, the court may consider whether the witness should be compelled to answer. If the court decides the witness should be so compelled, the witness is advised that, if he or she answers all questions put, a certificate will be given so that the evidence given will not subsequently be admissible in evidence against the witness. The Commission noted that the certification procedures were used approximately 25 times per annum. However, it noted that the witnesses usually called to give evidence were minor figures in the alleged offences and tended to be asked to give formal non-contentious evidence. It also noted that the certification procedure did not cover derivative use of evidence so obtained.

#### Paragraph 4 — Juveniles

386. The approach to the treatment of juvenile criminal offenders throughout Australia is protective and rehabilitative rather than punitive. The following comments are confined to the position of children charged with criminal offences; neglected and uncontrollable children are referred to in the comments on article 24.

387. *Age of criminal responsibility.* The age of criminal responsibility varies between 7 and 10 years of age in the different jurisdictions. There is also a special common-law rule (also incorporated in legislation in some States) regarding the criminal capacity of children over the age of criminal responsibility but who have not attained the age of 14 years. This is a rebuttable presumption that the child did not know his or her act was wrong.

388. *Questioning in the presence of a witness.* Police Commissioners' Instructions normally require the police to interrogate children suspected of having committed a criminal offence in the presence of an adult third person or with the consent of such a person. For example, the Australian Federal Police Instructions state that questioning of a child under 16 should not occur until an adult witness is present. If a parent or guard-

ian is not available, a senior member of the police with no involvement in the inquiry may be the independent witness.

389. In New South Wales, a statement made by a child in the absence of such a third party without good cause is, *prima facie*, inadmissible as evidence. A similar provision is proposed in the Australian Capital Territory. In the Northern Territory interrogation of juveniles is governed by section 25 of the Juvenile Justice Act which requires the presence of such a third party when interrogating juveniles for serious offences.

390. *Segregation of offenders.* During remand without bail, children are generally segregated from the adults also in custody on remand. The detention is generally for a prescribed maximum period (usually 14 days where the child is in a Children's Shelter and 28 days where he or she is in the care of a fit person). The terms of Australia's reservation to article 10 of the Covenant should be noted (see para. 274).

391. *Prosecution.* The topic of child welfare generally, and child offenders in particular, has been the subject of considerable discussion in Australia over the last few years. An initiative recently adopted by South Australia was the establishment of Children's Screening Panels. These panels consider matters involving breaches of law by children and determine whether or not a child offender should be brought to court. In the Australian Capital Territory, the Children's Service Ordinance 1986 will comprehensively reform the law relating to child offenders, establishing an Office of Youth Advocate to monitor cases, and adopting a policy of pre-trial diversion from formal procedures whenever this is consistent with protection of children's legal rights.

#### Children's courts

392. These courts are charged with having particular regard to a child's welfare. They exist in each jurisdiction except the Territories of the Cocos (Keeling) Islands and Norfolk Island. The Court of Petty Sessions Ordinance 1960 of the Territory of Norfolk Island does, however, provide that the Court of Petty Sessions is not open to the public when hearing cases dealing with children. These courts are generally separately located from the other courts and determine all complaints against children relating to summary offences. They may also hear and determine, in a summary manner, charges against children of indictable offences other than homicide, rape or offences punishable by penal servitude for life. This is a less formal way of dealing with indictable offences (which normally require the person charged to go through two hearings—a committal hearing before a magistrate, and trial before judge and jury—if a *prima facie* case is established at the committal hearing). A Children's Court may, however, refer such an indictable offence to be tried according to law (i.e. in the ordinary courts) and, in some jurisdictions, a child may elect to be tried according to law.

393. Children's courts have available to them a very wide range of powers to deal with convicted child offenders. These range from dismissing the charge, admonishing the child and discharging him or her uncondi-

tionally, discharging him or her on a recognizance to be of good behaviour or commitment into the care of a willing person, the Minister or a rehabilitative institution.

#### Paragraph 5 — Appeal rights

394. The right to have a conviction and sentence reviewed by a higher tribunal according to law is provided for by legislation in all Australian jurisdictions. Prerogative writs (discussed in part one of this report) are also available. In some cases an appeal is subject to the leave of the higher court. The necessity to seek leave is a means of ensuring that an appeal is made on proper grounds and, in practice, leave is never refused if a properly based appeal is made within the prescribed time.

#### Paragraph 6 — Compensation for miscarriage of justice

395. Australia has maintained the following reservation in respect of this paragraph:

Australia makes the reservation that the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provisions.

Administrative procedures are available in all jurisdictions to provide compensation for miscarriage of justice in the circumstances envisaged in paragraph 6 of this article.

#### Paragraph 7 — Double jeopardy

396. Australian law recognizes the rule against double jeopardy which is the foundation of the pleas of *autrefois acquit* and *autrefois convict*. The most recent statement on this arose in the case of *Davern v. Messel* (1984) 53 A.L.R. 1, where two principles on the limitations of the rule were laid down by the majority of the High Court:

(a) Where the accused has been convicted and has himself or herself invoked the appellate procedure the rule against double jeopardy has no application; and

(b) The rule against double jeopardy does not prevent a higher court from correcting an error into which a lower court has fallen in quashing a conviction.

### Article 15

#### RETROACTIVE LAWS

##### *Retrospective criminal laws*

397. The general rule in all Australian jurisdictions is that legislation that results in a change in the law does not apply to past facts or events, thereby affecting previously existing rights, privileges, obligations or liabilities, unless the contrary intention appears in that legislation. Unless Parliament expressly so provides, no charges can be laid in relation to a criminal offence that did not constitute a criminal offence at the time it was performed. Such retrospective criminal legislation would be contrary to Australian political traditions. Courts generally assume that legislation is not intended to operate retrospectively but this presumption can be overturned by a

clear indication in the legislation of parliamentary intention to the contrary.

### *Effect of alterations in penalties*

398. Some difficulties have arisen in the past in applying the presumption against retroactivity where a person is charged with an offence but, before the charge is heard, the penalty for the offence is increased by legislation. The question whether the penalty applicable at the date of conviction should be imposed has been considered by the courts and a variety of decisions have resulted. In one case, *Samuels v. Sangaila* (1977) 16 S.A.S.R. 397, the Full Court of the South Australian Supreme Court took the view that there was a presumption against retroactivity where the increased penalty would subject the accused retrospectively to an increased penalty. That could not be done without clear legislative intention. However, the Court indicated that, where an Act reduced a penalty, no such adverse effect would occur and the presumption of retroactivity would not be attracted.

399. In 1984, the Commonwealth Government amended the Acts Interpretation Act 1901 to insert a new section, 45A, which provides:

(1) Where an Act increases the penalty or maximum penalty for an offence, the penalty or maximum penalty as increased applies only to offences committed after the commencement of the provision of the Act increasing the penalty or maximum penalty.

(2) Where an Act reduces the penalty or maximum penalty for an offence, the penalty or maximum penalty as reduced extends to offences committed before the commencement of the provision of the Act reducing the penalty or maximum penalty, but the reduction does not affect any penalty imposed before that commencement.

400. Similar changes have been made in a number of jurisdictions. For example, provision is made in the New South Wales Interpretation Act 1897 and the Victorian Interpretation of Legislation Act 1984 that, where a penalty is increased, that penalty applies only to offences committed after the enactment of that alteration. Where the penalty is reduced, that penalty applies to offences committed before that enactment, as well as prospectively. Those Acts also provide that the repeal in whole or in part of an Act, unless the contrary intention appears, shall not "affect any penalty, forfeiture or punishment incurred in respect of an offence committed" against that Act or provision.

## Article 16

### RECOGNITION BEFORE THE LAW

401. Australian laws recognize the legal status of individuals and their capacity to exercise rights and enter into contractual obligations. However, a person's legal capacity to act may be restricted for such reasons as minority or incapacity. Where persons are unable to administer their own property or affairs, legislation in all jurisdictions enables appointment of trustees or guardians.

402. Certain limitations on the capacity of married women to deal with property were removed in the Australian Capital Territory by the Married Person's Property Ordinance 1986. Most jurisdictions have also en-

acted legislation to remove legal disabilities of children born out of wedlock.

## Article 17

### PRIVACY, DEFAMATION

#### (a) *Right to privacy*

403. There is no general right to privacy in Australian law. However, in all Australian jurisdictions a variety of remedies are available under the common law and statute which protect the right to some extent. These include remedies for assault and false imprisonment (already discussed in regard to arts. 6 and 7), actions for trespass onto land (already mentioned in regard to art. 12) and remedies for nuisance.

#### *Legislative powers*

404. The Commonwealth Constitution does not contain a specific head of legislative power to enable enactment of legislation throughout Australia to provide general protection for privacy. However, the Constitution provides that the Commonwealth is able to legislate for matters such as communications (being postal, telegraphic, telephonic and like services) and census and statistics, which are areas raising particularly important privacy issues. The Commonwealth is also concerned with the regulation of its own employees, including federal law enforcement agencies. Other areas concerning privacy fall within the responsibility of each jurisdiction and the Commonwealth's concerns in regard to these arise only in respect of its own areas of responsibility, such as the Australian Capital Territory.

#### *Special machinery*

405. The Commonwealth and a number of States have established special machinery to monitor privacy matters. The New South Wales Privacy Committee, established in 1975, makes reports and recommendations to Government and receives complaints from private individuals. A considerable number of these complaints have been resolved by the Committee's use of its persuasive powers. The Committee has also issued numerous papers and guidelines on various policy issues. In Queensland, the Privacy Committee Act 1984 established a Privacy Committee to act as a source of investigation into and advice to the Attorney-General on issues of privacy. The Victorian Government has also endorsed the establishment of a Committee on Privacy to advise it. The Commonwealth's Human Rights and Equal Opportunity Commission can investigate complaints of breaches of the Covenant in areas of Commonwealth jurisdiction.

406. The Commonwealth also proposes the introduction of special legislation to deal with privacy of information and data protection. Complaints of breaches of privacy in these areas will be able to be investigated by a new body, the Data Protection Agency. These proposals are discussed in further detail below.

*Law Reform Commission reports*

407. In 1976 the Commonwealth's Law Reform Commission received a reference from the federal Attorney-General to inquire into and report upon, *inter alia*, the extent to which undue intrusions into, or interferences with, privacy arise or are capable of arising under Commonwealth or Territory laws or procedures adopted to give effect to these laws. The Law Reform Commission Act 1973 requires the Commission to ensure that its proposals are consistent with the Covenant. The Attorney-General's reference drew particular attention to the requirements of article 17.

408. The Commission produced a major report on *Privacy* in 1983 (Report No. 22). Prior to that it had produced a number of reports of relevance to the reference, in particular, Report No. 11 on *Unfair Publication: Defamation and Privacy* and Report No. 12 on *Privacy and the Census*.

409. In the summary of recommendations in its report on privacy the Commission identifies the central aspects of privacy claims as:

That the person of the individual should be respected, i.e., it should not be interfered with without consent;

That the individual should be able to exercise a measure of control over relationships with others. This means that:

A person should be able to exert an appropriate measure of control on the extent to which his correspondence, communications and activities are available to others in the community; and

He should be able to control the extent to which information about him is available to others in the community... But privacy protection should not ignore other legitimate interests...

410. In paragraph 75 of its report, the Commission identified a number of interests competing with privacy, including: freedom of expression; freedom of information; protection of revenue; prevention and detection of crime and apprehension of offenders; protection of economic, trade and State secrets; respect for confidential relationships; protection of financial, property and staff management interests; maintenance of national security and an effective defence capability; protection of diplomatic relations; and protection of significant managerial interests, for example, the need for effective conduct of audits, examinations and efficiency reviews. The protection of privacy requires a proper balance to be struck between these competing interests.

411. There are a number of ways in which Government agencies can interfere with the privacy of individuals. Governments collect and store information about individuals. Criminal investigation processes may provide scope for a considerable intrusion into personal privacy. Courts and tribunals may require persons to attend before them to answer questions and provide information. Governments, however, may also be required to take action to assist individuals in the protection of their privacy or reputation from intrusion or attack by other individuals.

*Monitoring of communications*

412. The interception of communications over the telephone system is prohibited under the Commonwealth

Telecommunications (Interception) Act 1979, unless permitted by warrant issued by a prescribed authority in the interests of national security or in circumstances concerning the commission of narcotics offences. The authorities to which warrants are issued must report to the responsible Minister on the assistance derived from each warrant.

413. Most jurisdictions now also have legislation which prohibits the monitoring of personal conversations by means of a listening device, unless the person using the listening device is a party to the conversation or a duly authorized person acting in the public interest. Most jurisdictions require commercial and inquiry agents to be licensed.

*Powers of search*

414. A considerable amount of the law on search remains common law, although significant statutory extensions have taken place. Searches without warrant can occur in the following ways: by consent, under the common law as a search incidental to a valid arrest, or under specific statutory power. Typically these statutory powers require at least a reasonable suspicion that unlawfully obtained goods or weapons will be present on the person or on the property searched. Increasingly Parliaments seek to limit statutory powers of search without warrant to situations where consent is obtained or where circumstances of urgency exist.

415. Searches with warrant can also be under common law or statutory provision. For example, section 10 of the Commonwealth Crimes Act 1914 provides:

If a Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in any house, vessel or place:

(a) Anything with respect to which any offence against any law of the Commonwealth or of a Territory has been, or is suspected on reasonable grounds to have been, committed;

(b) Anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or

(c) Anything as to which there is reasonable ground for believing that it is intended to be used for the purpose of committing any such offence,

he may grant a search warrant authorizing any constable named therein, with such assistance as he thinks necessary, to enter at any time any house, vessel, or place named or described in the warrant, if necessary by force, and to seize any such thing which he may find in the house, vessel, or place.

416. Among recent developments, the New South Wales Search Warrants Act 1985 abolishes the common law power to issue search warrants and, *inter alia*, makes provision for applications for, issue and execution of, search warrants, in particular, for indictable offences, firearms and narcotics offences and stolen or unlawfully obtained property.

417. Legislation may also provide for powers of entry and inspection by persons other than police officers, for example, health and safety inspectors, licensing inspectors or quarantine officers.

### *Other criminal investigation processes*

418. Powers of arrest have already been discussed in regard to article 9. The extent of police powers to take fingerprints and photographs of suspects or accused persons varies between jurisdictions. Among recent developments, the Tasmanian Criminal Process (Identification and Search Procedures) Amendment Act 1985 provides that, where, in certain circumstances, such records have been obtained from a person who is subsequently not convicted of the offence for which he or she was charged, the records must be destroyed within seven days and the person given written notice of the destruction.

419. Other practices such as identification parades are often regulated by Police Commissioners' Instructions rather than by specific statutory provision. However, most jurisdictions have statutory provisions to cover matters such as blood alcohol level testing for motorists and, in some instances, involuntary medical examinations of arrested persons.

### *Prisons*

420. As discussed in regard to article 10, the maintenance of Australian prisons is almost exclusively the responsibility of the State Governments. Within the prison system the need to preserve discipline means the degree of privacy afforded to prisoners may not be great. For example, overcrowding may result in shared cells. Prisoners' correspondence may also be opened. However, some jurisdictions provide exceptions to this. For example, under the Northern Territory Prison (Correctional Services) Act 1980, the officer in charge of the prison may not open letters addressed to the office of the Minister, the Ombudsman, the Director or the prisoner's legal representative.

421. The Human Rights Commission has published *A Study of Human Rights and Commonwealth Prisoners* by Professor Gordon Hawkins. The purpose of this paper is to provide a basis for discussion of the rights of prisoners with a view to suggesting improvements.

### *Right to medical treatment*

422. The relevance of article 17 to the question of the right to require or refuse certain types of medical treatment was considered by the Human Rights Commission in its Report No. 11 (*Human Rights of the Terminally Ill: the Right of Terminally Ill Patients to have Access to Heroin for Pain-killing Purposes*) and in Occasional Paper No. 10 (*Legal and ethical aspects of the management of new-borns with severe disabilities*). In Report No. 11 the Commission argued that article 17 could be interpreted as affording a right to an individual to his or her own choice of medical treatment and that the State's concerns to control use of heroin might not justify a complete prohibition on its medical use, even for patients at home. Occasional Paper No. 10 was not an expression of Commission views but rather a discussion of issues. In regard to article 17, the paper raised the issue of the right to refuse medical treatment and the

family's right to have a major role in any decision-making process regarding life-sustaining treatment.

### *Family*

423. There is no general rule of law that grants the family, as a distinct entity, freedom from arbitrary or unlawful interference. As in the case of all private individuals, intrusion into the lives of members of the family requires lawful justification. Thus, it is unlawful for anyone to remove a child from the custody of a parent except in the execution of a proper court order or other lawful authority (for example, under the child welfare legislation referred to in arts. 9 and 24). To do so would amount to one of a number of criminal offences and would entitle the parent to seek an appropriate court order to have the custody of the child restored. As referred to in the comments on article 6, a physical assault on a member of a family (as in the case of any individual) entitles that member to perform acts of self-defence and allows other persons, including other members of the family, to assist.

424. The Commonwealth Family Law Act 1975 requires the marriage counsellors attached to the Family Court to keep confidential any information disclosed to them by either party to a marriage, and for the proceedings before the court to be closed. The latter provision is under review. The Government is considering a proposal of a Joint Select Committee of the Commonwealth Parliament to have such hearings open to the public, but with a discretion vested in the presiding judge to close the Court.

425. A number of criminal and civil remedies exist in regard to invasions of privacy of the home. The civil remedy of trespass serves to prevent a person entering upon another's property without lawful justification. The civil law remedy of nuisance gives further protection over enjoyment of land by curtailing the emission of noise, smoke and other nuisances from adjoining properties. Criminal offences such as offensive behaviour, breach of the peace or offences against environmental laws may also be relevant. In all States it is also unlawful to demand payment for unsolicited goods and services.

### *Correspondence*

426. By virtue of the criminal offences, including the offences of tampering with, stealing or wrongfully detaining the mail, under the federal Postal Services Act 1975 interference with the mail is a rare event. Indeed, the Australian Postal Commission ("Australia Post") established by that Act, is required under subsection 7 (4) of the Act to comply with the provisions of any convention to the extent that it imposes obligations on Australia in relation to matters within the functions of the Commission. The Postal Service Regulations enable officers of "Australia Post" to open mail in a limited number of circumstances, for example, for repacking if damaged or if there is a reasonable belief that it contains a thing in contravention of another Act such as the Customs Act 1901. Mail can also be opened at the request of Customs officers.

427. Police may obtain a search warrant under the Commonwealth Crimes Act 1914 authorizing entry to a place and seizure of a postal article where, for example, there are reasonable grounds for believing that the article will afford evidence as to the commission of an offence against a law of the Commonwealth or of a Territory. Warrants to intercept postal communications may also be issued in the interests of national security.

428. As mentioned above, prisoners' correspondence may be subject to inspection in the interests of maintaining prison security. The correspondence of persons in mental institutions may also be inspected in accordance with legislative provisions and, in some jurisdictions, institutional rules.

#### (b) *Defamation and similar matters*

429. The honour and reputation of a person are substantially protected by the civil and criminal actions for defamation. Certain exceptions apply to the protection offered by defamation laws. These include exceptions for fair and accurate reports of certain public proceedings (which include parliamentary or court proceedings) or fair comment on matters of public interest. The laws of defamation are complex and vary in detail between the various jurisdictions. A recent attempt to simplify and unify these laws by the Standing Committee of Attorneys-General of Australia failed for lack of agreement.

#### *Media*

430. Privacy is also protected to some extent in Australia by certain voluntarily imposed media restraints. For example, the Statement of Principles of the Australian Press Council indicates support, *inter alia*, for "due respect for private rights and sensitivities", an obligation "to ensure the truth and exactness of the statements", and requires that "news obtained by dishonest or unfair means or the publication of which would involve a breach of confidence should not be published".

431. Similarly, each member of the Australian Journalists' Association adheres to a Code of Ethics which requires him or her to "respect all confidences received . . . in the course of his calling" and to "use only fair and honest methods to obtain news, pictures and documents". The Press Council has established a procedure whereby persons may complain against a newspaper or periodicals and seek a remedy against the publication concerned. Complaints concerning commercial and public broadcasting may be made to the Australian Broadcasting Tribunal, further referred to in the comments on article 19.

#### (c) *Privacy of information*

432. The Government's concerns in this area can be seen from its formal adherence in December 1984 to the Guidelines on the Protection of Privacy and Transborder Flows of Personal Data of the Organization for Economic Cooperation and Development. The decision to adhere to the Guidelines was taken following extensive

consultation with State Governments. The Australian Government has accepted that it should take the Guidelines into account when preparing any domestic legislation which would affect an individual's privacy or which may restrict transborder data flows.

433. The federal Government has recently introduced into the Parliament the Privacy Bill and the Privacy (Consequential Amendments) Bill. The legislation is based upon recommendations made by the Law Reform Commission in its report on privacy. The legislation is designed to regulate the collection, storage, use and disclosure of personal information by Commonwealth Government departments and agencies and contains provisions for access to, and correction of, information.

#### *Privacy Bill*

434. This Bill will protect the privacy of individuals in relation to their dealings with Commonwealth departments and agencies by establishing rules of conduct for the handling of records of personal information by Commonwealth departments and agencies. These rules of conduct, known as information privacy principles, will regulate the collection and retention and the provisions of, access to, correction, use and disclosure of personal information about individuals.

435. "Personal information" is defined in the Bill to mean information or an opinion, whether true or not, and whether recorded in a material form or not, about a natural person whose identity is apparent or can reasonably be ascertained from the information or opinion. However, the information privacy principles regulate handling of personal information in or to be included in a record or publication. Certain agencies will be excluded from the operation of the information privacy principles on the grounds of public interest, such as security and intelligence organizations and certain agencies which operate in competition with private sector organizations.

436. Non-compliance with the information privacy principles will be deemed to be an interference with privacy. Commonwealth departments and agencies will be required to avoid doing acts that amount to interference with privacy. However, an interference with privacy will not give rise to any criminal penalty or civil liability in damages.

437. The Bill will leave open such rights as would normally be available to restrain an interference with privacy by other civil proceedings, for example, by the grant of an injunction. In the case of a denial of access to, or refusal to correct, personal affairs documents, there are the existing remedies under the Freedom of Information Act, including recourse to the Administrative Appeals Tribunal.

#### *Proposed data protection agency*

438. The Australia Card Bill 1986 (discussed in paras. 442-446 below) will establish a data protection agency to carry out functions under both the Privacy Bill and the Australia Card Bill. Under the Privacy Bill an in-

dividual alleging an interference with privacy will be able to make a complaint to the data protection agency. The agency will inquire into complaints, attempt conciliation and, where that fails or is not appropriate, report to the relevant Minister on instances of what it concludes are interferences with privacy. The agency will be able to recommend payment of compensation to persons aggrieved by interferences with privacy, and other remedial action and, in certain circumstances, require record-keepers to note on the record the agency's views on correction where the agency disagrees with them.

439. Under the Privacy Bill the data protection agency will also have the functions of publishing guidelines on compliance with the information privacy principles, promoting understanding and acceptance of them, providing advice to departments and agencies (where requested by the Minister), examining proposed legislation for conformity with the principles, monitoring privacy-invasive developments in the States and overseas and reporting, where appropriate, to the Minister. On the application of a department or agency it will also be able to determine, where it thinks fit, that in exceptional cases a breach of the information privacy principles is substantially more in the public interest than enforcing compliance with the principles, in which case the breach of the principles will not amount to an interference with privacy.

#### *Freedom of Information Act*

440. The Commonwealth's Freedom of Information (FOI) Act has already been discussed in part one of this report. Considerable protection of privacy has already been afforded to citizens by the right provided by that Act to gain access to, and to seek correction of, records of personal information held by Commonwealth departments and agencies. The privacy protection measures of this Act will be enhanced by amendments to be made by the Privacy (Consequential Amendments) Bill. These amendments are:

(a) The introduction of "reverse FOI" in the case of personal affairs documents (i.e., where reasonably practicable, departments will have to consult the subject of a personal affairs document before giving access to an applicant under FOI);

(b) A personal affairs document will no longer be exempt from access by a record-subject just because it is covered by a general secrecy provision.

#### *Reform of the law of breach of confidence*

441. The common law of confidence in Australia provides protection of privacy for individuals in some circumstances. This protection will be extended by the inclusion, in the proposed privacy legislation, of amendments to the law which were recommended by the Law Reform Commission to remove perceived deficiencies in that law. The confidentiality of personal information will be able to be enforced by the information-subject. The duty of confidence will extend to any person who receives personal information knowing it to be confidential. Remedies by way of injunction and damages will be

available for all breaches of confidence relating to the personal information.

#### *Australia Card Bill*

442. A further government initiative which has focused public attention on privacy issues is the proposal for a national identification system called the Australia Card. The Australia Card legislation was introduced into the Parliament in late October 1986. Difficulties arose when the Senate refused to pass the Bill and the Government proposed to reintroduce the legislation in 1987. The objectives of the Australia Card Bill 1986 were to establish a national system of identification which will:

(a) Facilitate the administration and enforcement of taxation laws through better identification of taxpayers and the sources of their income;

(b) Reduce fraud and overpayments in the areas of social security and health services; and

(c) Help to prevent illegal immigrants and visitors to Australia working in breach of their conditions of entry.

443. The Australia Card Bill will establish an Australia card register, which will contain basic information to enable the issue to each person of an Australia card. It is proposed that, in most cases, the card will carry a photograph, a personal identification number and limited additional information. A new Australia card authority will also be established to administer the programme.

444. The Government is aware that the Australia card programme could be perceived as a threat to privacy. Substantial privacy protection measures were included in the Australia Card Bill. These measures include limits on the information that could be kept in the Australia card register or entered on a person's Australia card. An individual was to be given a right of access to the register free of charge (unless more than one request was made within a period of 12 months) and could request an amendment of the register if it was incorrect.

445. The Government does not propose that there be a requirement on card holders to carry an Australia card at any or all times. However, an Australia card will be required to be produced in a strictly limited range of circumstances to be set out in the Australia Card Bill. These circumstances were set out in the 1986 Bill and relate primarily to undertaking financial transactions and employment (and most of these are at the initiation of the first transaction). Any demands or requests for production of an Australia card outside the permissible uses outlined in the legislation would be a criminal offence.

446. The Australia Card Bill 1986 proposed that the data protection agency should have a dual role in relation to the Australia card programme. It would be the external review agency for disputes concerning administrative decisions taken by the Australia card authority and would also handle privacy complaints arising under the Australia card programme. The agency would also provide advice, issue guidelines and make recommendations to Government on various issues which would arise not only through the introduction of the Australia card but also through the increasing effect of computer technology on the collection and use of personal data. The 1986

Bill is being reconsidered by the Government with a view to its reintroduction into the Parliament in 1987.

### Article 18

#### FREEDOM OF THOUGHT, CONSCIENCE; RELIGIOUS OR MORAL EDUCATION

447. In Australia freedom of thought, conscience and religion are matters left largely to individuals. Little legislation exists to impose restrictions on the exercise of such freedoms. Nor is there any coercion to change or renounce any view or belief.

448. Legislation which exists in regard to the matters addressed in this article is mainly concerned with religion and is outlined hereunder. The Commonwealth Constitution does not contain a specified head of legislative power to enable the federal Government to legislate directly on the subject of religion or belief. Indeed section 116 of the Constitution provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The power to legislate on matters of religion and belief is not so limited in the States. Section 116 is directed only to the Commonwealth and does not inhibit any State legislative or any administrative action.

449. In Tasmania, the Constitution Act 1934 provides for the following guarantee of freedom of conscience and religion (in sect. 46):

(1) Freedom of conscience and free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

(2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.

450. The Victorian Equal Opportunity Act 1984 provides that it is unlawful to discriminate against a person in a number of areas, such as employment, education, provision of goods or services or accommodation, by reason of the private life of that person. "Private life" in relation to a person is defined as being:

(a) The holding or not holding of any lawful religious or political belief or view by the person; or

(b) Engaging in or refusing or failing to engage in any lawful religious or political activities by the person.

The Western Australian Equal Opportunity Act 1984 also enables complaints of discrimination to be made, *inter alia*, on the ground of religious or political conviction.

#### (a) Freedom of religion

451. There have been three major decisions of the High Court of Australia dealing with freedom of religion.

452. *Adelaide Company of Jehovah's Witnesses Inc. v. the Commonwealth* (1943) 67 C.L.R. 116 dealt with a declaration by the federal Government during the

Second World War that a number of organizations, including the Adelaide Jehovah's Witnesses, were proscribed organizations prejudicial to the defence of the Commonwealth. Commonwealth agents occupied the Adelaide premises of the church confiscating records and excluding church members from the building. The High Court took the view that section 116 of the Constitution did not prevent the Government from making laws prohibiting the advocacy of doctrines or principles which, though advocated in pursuance of religious convictions, were prejudicial to the prosecution of a war in which the Commonwealth was engaged.

453. In *Attorney-General for Victoria; ex rel. Black v. the Commonwealth* (1981) 55 A.L.J.R. 155, the Attorney-General for Victoria at the relation of 27 persons, together with a number of persons suing individually, sought declarations that a number of federal Acts were beyond Commonwealth power and therefore invalid. These were mainly Acts under which the Commonwealth provides financial assistance to the States for education. One of the arguments advanced was that that legislation, in so far as it resulted in benefits for schools conducted by or on behalf of religious bodies, infringed the "establishment clause" in section 116 of the Constitution. The High Court rejected that argument and interpreted section 116 as prohibiting the Commonwealth from making any law "for conferring on a particular religion or religious body the position of a State (or national) religion or church". The particular laws under challenge were directed to the advancement of education and did not have the purpose or effect of setting up any religion or religious body as a State religion or a State church. One of the effects of this case is the recognition that the State may be involved with religious authorities, at least in pursuit of a "secular purpose".

454. The concept of "religion" was considered by the High Court in 1983 in the case of *The Church of the New Faith v. the Commissioner for Payroll Tax* (1982-1983) 154 C.L.R. 120. That case arose out of a claim by the Church of the New Faith that it was a religion and thus qualified for certain taxation exemptions under the law of the State of Victoria. Special leave to appeal to the High Court was sought in order to argue the question whether scientology was a religion. The High Court decided it was a religion.

455. The Court decided that the test of religion should not be confined to theistic religions. In three separate judgements members of the Court identified characteristics or criteria by which a "religion" could be identified. In doing so the members of the Court were conscious of the difficulty in defining religion. In a joint judgement, Acting Chief Justice Mason and Justice Brennan stated:

Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of the definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. . . . The absence of a definition which is universally satisfying points to a . . . fundamental difficulty affecting the adoption of a definition for legal purposes. A definition cannot be adopted merely because it would satisfy the majority of the community or because it corresponds with a concept currently accepted by that majority. The development of the law towards complete religious liberty and religious equality . . . would be subverted and the guarantees in s.116 of the Constitution would lose their character as a bastion of

freedom if religion were so defined as to exclude from its ambit religions out of the main streams of religious thought. Though religious freedom and religious equality are beneficial to all true religions, minority religions—not well established and accepted—stand in need of special protection . . . It is more accurate to say the protection is required for the adherents of religions, not for the religions themselves . . . it would be contradictory of the law to protect at once the tenets of different religions which are incompatible . . . Protection is accorded to preserve the dignity and freedom of each man so that he may adhere to any religion of his choosing or to none. The freedom of religion being equally conferred on all, the variety of religious beliefs which are within the area of legal immunity is not restricted.

. . . There can be no acceptable discrimination between institutions which take their character from religions which the majority of the community recognizes as religious and institutions that take their character from religions which lack that general recognition (pp. 130-132).

However, they also noted (pp. 135-136):

. . . But the area of legal immunity marked out by the concept of religion cannot extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them . . . Conduct in which a person engages in giving effect to his faith in the supernatural is religious, but it is excluded from the area of legal immunity marked out by the concept of religion if it offends against the ordinary laws, i.e. if it offends against laws which do not discriminate against religion generally or against particular religions or against conduct of a kind which is characteristic only of a religion.

456. In *Grace Bible Church v. Reedman* (1984) 54 A.L.R. 571, the Supreme Court of South Australia considered an appeal against a conviction under the South Australian Education Act for an offence of operating an unregistered non-government school. The appellant claimed that the requirement for registration interfered with the right to freedom of religious worship and expression. In dismissing the appeal the Court held, *inter alia*, that the common law had never contained a fundamental guarantee of the inalienable right of religious freedom and expression. Such a right had not been created in South Australia and, even if it had, such a right could have been invaded by Act of Parliament of the State.

457. As already indicated in the High Court decisions referred to above, the freedom to manifest one's religion or belief is subject to any restriction which may arise under the ordinary laws of Australia. However, no laws exist specifically to prevent the exercise of an individual's right to freedom of religion. From time to time concerns have been expressed that the activities of certain religious sects may infringe the rights and freedoms of other members of the community. The Australian Government takes the attitude that it is not appropriate to legislate to restrict the activities of religious sects. However, to the extent that such activities would breach existing laws, in particular, criminal laws, then such matters should be dealt with as breaches of the law are normally dealt with, namely, by the courts.

458. The practice of religious belief is in fact facilitated by a number of statutory enactments. The income of a religious institution is exempt from the payment of income tax. Several jurisdictions have a special statutory offence of disturbing persons lawfully assembled for religious worship. In some jurisdictions, privilege is conferred on a confession made by a person to a clergyman. Provision is also made for clergymen to officiate at wed-

dings and for the funding of church schools. The Defence Act makes provision for regulations for the exemption from military duties of a combatant (or non-combatant) nature, of a person whose conscientious beliefs (which do not have to be of a religious character) do not allow him to engage in such duties.

459. There are numerous other provisions concerning religious beliefs and practices. These include exemption from jury service for ministers of religion and members of religious orders, provision for conscientious objection (including on religious grounds) to trade-union membership, the exemption from the federal Sex Discrimination Act 1984 of certain religious acts or practices, measures to protect Aboriginal sacred sites, recognition of religious obligations in special slaughtering rites, special arrangements to allow postal or pre-poll voting where religious beliefs or membership of a religious order prevent attendance at a polling booth, sales tax exemptions on religious goods and other tax exemptions for religious bodies and the alternative use of an affirmation, if preferred, to swearing an oath on the Bible when giving evidence in court and other proceedings. In the Territories of Christmas Island and the Cocos (Keeling) Islands, the Muslims Ordinance provides the framework within which the Muslim populations may practise their religion.

#### *Human Rights and Equal Opportunity Commission*

460. Neither the Human Rights Commission nor the Human Rights and Equal Opportunity Commission have, to date, presented any reports to the federal Government dealing exclusively with freedom of religion, thought or conscience. However, one Human Rights Commission report, on the Villawood Immigration Detention Centre, did raise a concern that limitations imposed on detainees' religious observances, because staff were lacking to supervise particular religious ceremonies, should be overcome. The particular recommendation of the Human Rights Commission in its report on conditions for detainees at Villawood Immigration Detention Centre required that adequate provision be made for religious observances and visitation. The recommendation has been implemented by instituting arrangements for the availability of rooms for religious services for individual detainees or groups, and for visits by ministers of religions to detainees on request.

#### *Recent developments*

461. In May 1984 the New South Wales Anti-Discrimination Board released a report on religious discrimination. It covered religious freedom in Australia, assessed State and federal legislation, addressed the status of minority religions in Australia and concluded that religious discrimination should be made unlawful in New South Wales. The report has raised considerable public interest.

462. Discrimination on the ground of religion in employment in the federal civil service is dealt with in the Public Service Act. That Act was amended by the Public Service Reform Act 1984, *inter alia*, to require that the powers in respect of appointments, transfers and

promotions in the civil service shall be exercised in accordance with procedures that preclude discrimination on various grounds including religion.

463. The Victorian Equal Opportunity Commissioner has recently initiated consultations with religious groups in the community. The purpose of these is to determine whether and in what way the needs of these groups can be accommodated in relation to the organization of work. Two aspects of this consultation relate to the current lack of flexibility existing for people of certain religions to take leave to pursue religious holidays and the dietary difficulties faced by workers without ready access to food of their choosing.

#### (b) *Religious education*

464. Education in Australia is provided in all jurisdictions by government and non-government schools. All schools are required to comply with certain educational standards which are laid down by the responsible Department of Education in the particular jurisdiction. A high percentage of non-government schools are run by churches or religious communities. These schools are recognized as playing an important role in the education of children in Australia. The federal Government provides funds to the States to assist in education in both government and non-government schools.

465. The right of parents to bring their children up in their own faith has been recognized in the Australian education system. For example, the New South Wales Public Instruction Act 1880 provides for children to receive non-sectarian secular instruction which includes general religious teaching. "Secular instruction" is defined in the Act as follows:

In all schools under this Act the teaching shall be strictly non-sectarian but the words 'secular instruction' shall be held to include general religious teaching (GRT) as distinguished from dogmatical or polemical theology . . .

The Public Instruction Act also allows for special religious instruction (SRI) to be provided by authorized members of accredited religious groups for children whose parents want them to receive it. Parents who do not wish their children to receive religious education or instruction have a right to withdraw their children from SRI classes and from GRT. Under the provisions of the Education Act 1964-1984 it is provided that ministers of religion and other approved representatives are entitled to attend State schools during school hours to instruct children of their denomination for a period of not more than one hour each week.

#### (c) *Limitations*

466. Some limitations do exist on the freedom of persons to exercise their beliefs fully. These limitations are considered to be consistent with the requirements of the article. However, since Australia's first report under the Covenant, the Victorian Psychological Practices (Scientology) Act 1982 has amended the Psychological Practices Act 1965 to allow the Church of Scientology to operate without the restrictions previously imposed.

467. It was noted in Australia's 1981 report that, in the interests of preserving the impartiality of the forces (in the interests of order), military personnel may not take part in religious meetings, demonstrations or processions other than religious or funeral services when in uniform. The legislation underlying the content of this statement has been repealed. However, some minor restrictions on participation in political activities remain.

468. Most jurisdictions also have legislation to provide that if a parent refuses (usually on religious grounds) to give consent to a child receiving a blood transfusion, and two or more legally qualified medical practitioners believe that a blood transfusion is necessary to save the child's life, a legally qualified medical practitioner who performs the transfusion upon the child will be deemed for all purposes to have performed the transfusion with the authority of the person legally entitled to authorize the transfusion.

469. Prisons provide for religious services to be carried out and for prisoners to have regular contact with a clergyman if required. However, by the nature of the institution, it may not be possible for certain prisoners to practise all aspects of their religion (for example, as to dress and diet).

### Article 19

#### FREEDOM OF OPINION AND EXPRESSION

470. In Australia, everyone has the right to hold opinions without interference. While, generally, everyone in Australia also has the right to freedom of expression and to seek, receive and impart information and ideas as they wish, the effective use of freedom of expression is affected to some extent by existing laws and practices. However, the extent to which laws and practices might restrict freedom of expression is a matter which itself is subject to monitoring. The Human Rights and Equal Opportunity Commission, in areas of federal responsibility, can receive complaints of violations of article 19 of the Covenant. In two States (Victoria and Western Australia), legislation exists to enable the bringing of complaints of discrimination on the ground of holding, or not holding, any lawful religious or political belief or view or engaging in, or refusing or failing to engage in, any lawful religious or political activities.

471. *Defamation.* A major restriction on the right of freedom of expression is the law of defamation. Defamation laws exist in Australia to protect persons against publications (and utterances) which unjustly diminish the reputation of the person concerned. Except to the limited extent to which criminal libel still exists, defamation actions are civil actions brought at the instance of the persons aggrieved. There is currently no law to restrict the defamation of groups of persons. The federal Government is considering the extent to which the dissemination of racist propaganda should be a matter dealt with by amendment to the federal Racial Discrimination Act 1975.

472. As discussed in greater detail in the comments on article 21, freedom of expression may also be af-

fectured by the laws of various Australian jurisdictions regulating public assemblies and behaviour in public places.

(a) *Regulation of broadcasting*

473. Broadcasting in Australia is a federal Government responsibility. There are currently three sectors of broadcasting in Australia:

(a) The national sector comprising stations operated by the Australian Broadcasting Corporation (the ABC) which provide nationwide non-commercial radio and television services and the Special Broadcasting Service (SBS) which provides multilingual and multicultural radio and television services (the Government has recently announced plans to amalgamate the ABC and SBS);

(b) The commercial sector comprising radio and television stations operated by licensees with a view to making a profit;

(c) The public sector comprising radio stations operated by non-profit organizations and licensed to serve a defined or special interest section of the population.

474. Regulation of commercial and public broadcasting in Australia is effected under the Broadcasting Act (formerly known as the Broadcasting and Television Act) which provides the framework for commercial and public radio and television broadcasting in Australia. Under that Act, the Minister for Communications has responsibilities for policy and planning in relation to types of services and the establishment of individual stations. The Act places strict limitations on ownership to prevent the domination of radio or television by one person. However, this does not necessarily result in diversity of opinions expressed through these types of media. To the extent that the mass media are privately controlled, it is a matter for the proprietors to decide what views should be expressed through those media. On the other hand, the development of public broadcasting has fulfilled the need for greater diversity in broadcasting. Greater opportunities now exist for the broadcasting of material of minority interest, including programmes in various ethnic (including Aboriginal and Torres Strait Islander) languages.

475. The Australian Broadcasting Tribunal is responsible under the Broadcasting Act for administration and regulation of licensed services. The principal objective of the licensing system is to ensure that the limited number of broadcasting frequencies available is utilized effectively in the public interest. The Tribunal holds inquiries into applications for renewal of broadcasting licences and will consider submissions from interested members of the public in this regard.

476. The Broadcasting Act and standards made by the Tribunal under the Act are also concerned with the content of broadcast programmes. They contain a number of restrictions in this regard, for example, to promote higher quality programmes, programmes specifically for children and the use of Australian artists and materials. The ABC, as the national broadcaster, is required by the Act to provide adequate and comprehensive programmes

and, in the interests of the community, to take measures conducive to the full development of suitable broadcasting and television programmes. The ABC has a policy of political neutrality and, therefore, its services broadcast a wide spectrum of views.

477. *Communications.* The federal Wireless Telegraphy Act 1905, referred to in Australia's initial report has now been repealed. The Radiocommunications Act 1983 replaces the former Act to deal with those services (in the main, for communications rather than broadcasting purposes) not licensed under the Broadcasting Act. The Radiocommunications Act is concerned with matters such as licensing of radiocommunications transmitters and receivers, the settlement of disputes relating to interference with radiocommunications, standards for devices and radio-frequency planning. The objective of this legislation is to ensure efficient and economic use of the available frequencies with minimum interference between services. Restrictions imposed on radiocommunications under the Act are primarily for the purpose of preventing radio interference to legitimate users of the radio-frequency spectrum. Such restrictions would not normally relate to the content of such radiocommunications. Nevertheless, on the matter of content, the Act does specify that a holder of a licence shall not operate the transmitter in such a way as would be likely to cause persons to be seriously alarmed or affronted or for the purposes of harassing a person. A person who, for the purposes of harassing another person, does anything likely to interfere substantially with, disrupt or disturb radiocommunications is guilty of an offence.

(b) *Broadcasting of political matter*

*Human Rights Commission*

478. The Broadcasting Act imposes some requirements in relation to broadcasting of political matter. The most obvious of these requirements to Australian audiences is that political statements must be clearly attributed to their authors. The federal Human Rights Commission considered three particular restrictions on broadcasting of political material in its Report No. 16, entitled *Freedom of Expression and section 116 of the Broadcasting and Television Act 1942*, which was presented to Government in 1985. The three restrictions were:

(a) The "election blackout" provisions to prevent televising of election material for a short period before the date of elections;

(b) The prohibition on dramatization of current political matter or political matter which was current at any time during the five preceding years;

(c) The requirement in the Act that a licensee who broadcasts election matter provide reasonable opportunities for broadcasting of election matter to all political parties contesting the particular election, provided that these parties were represented in the Parliament (for which the election is to be held) at the time of that Parliament's last meeting before the election period.

479. Prior to completion of the Commission's report, the election black-out provisions were revised so that statements not in the nature of electoral advertisements could be broadcast. The Commission recommended changes to the provision dealing with dramatization of political matter but the Government had decided to repeal that section following a recommendation to that effect by the Joint Select Committee on Electoral Reform. The amendment has now been made. On the third matter, the Commission recommended that all registered political parties with validly nominated candidates standing for election should have the benefit of the "reasonable opportunities" rule. The Human Rights Commission also found that, due to the competing demands for limited broadcasting time and the wide range of interests which broadcasting stations must serve, to give equal time to all political parties would not be practicable. The Commission considered that the "reasonable opportunities" rule, provided it was sensibly applied, struck an appropriate balance. The Commission also considered that the requirement that political parties should pay for their broadcasts was not an impediment to their freedom of expression, provided that the charges were not unreasonable. The Government has this matter under consideration and will await the report of the Joint Select Committee on Electoral Reform. Part of that Committee's terms of reference include an inquiry into the provision of free radio time for political messages during election campaigns.

(c) *Copyright*

480. The federal Copyright Act 1968 grants copyright protection to authors of original literary, dramatic, musical and artistic works, to producers of sound recordings and cinematographic films, to broadcasters and to publishers. Australia adheres to both the Berne and Universal Copyright Conventions. Protection under the Copyright Act conforms with the requirements of these Conventions and is extended to nationals of other countries which adhere to these Conventions. The Act has Australia-wide operation and enables the creator of an article or other work, such as a book, film or sound recording, to control the reproduction, publication, broadcast or performance of his or her creation, thereby enabling the creator to exact a recompense, which is the primary purpose of the Act. The Act contains exemptions in respect of research, study, critical review, reporting of news, libraries and education.

(d) *Censorship*

481. Films and some publications, in particular pornographic publications, may be controlled, where considered necessary, by reference to the considerations referred to in article 19, paragraph 3 (b), of the Covenant. Censorship can be a matter for individual Governments to decide in respect of material produced within the particular jurisdiction. The federal Government, through the Attorney-General, is responsible for the Film Censorship Board and the Films Board of Review.

482. The censorship classification of cinema films and videotapes in Australia is carried out on behalf of

State and Territory Governments by the Commonwealth Film Censorship Board located in Sydney, with assistance from deputy censors located in departmental regional censorship offices. The regional censorship offices of the Attorney-General's Department work in close cooperation with customs officers in implementing regulation 4A of the Customs (Prohibited Imports) Regulations in relation to prohibited publications. They are also appointed as literature classifying officers on behalf of the New South Wales and Northern Territory Governments. Their classification decisions are gazetted regularly. Other State literature censorship authorities which operate their own independent classification systems have regard to these decisions. In 1984-1985, 402 books were released and none was prohibited; 2,816 magazines were released and 654 were prohibited. The Films Board of Review is established to hear appeals against decisions on the classification of films made by the Film Censorship Board.

483. Since 4 June 1984 amendments to the Australian Capital Territory Classification of Publications Ordinance 1983 have required the compulsory classification of videotapes for sale or hire in the Australian Capital Territory. The categories of classification are "G", "PG", "M" and "R", as for cinema films, with "X" classification for stronger sexual or violent material (the symbols stand for, respectively, General, Parental Guidance, Mature, Restricted, and an extra-restricted category). Adults have the right to choose from a wide range of materials for viewing in the privacy of their own homes. However, the display, sale and hire of videotapes with "R" or "X" classifications are regulated for the protection of minors and to prevent offence to members of the public who do not wish to be exposed to such material.

484. The Senate Select Committee on Video Material, established on 17 October 1984, presented its report to the Senate on 28 March 1985. Pending the findings of a Joint Select Parliamentary Committee which is continuing the work of the Senate inquiry, the Senate Committee has recommended that a moratorium be placed on the sale and hire of "X" rated videos in the Australian Capital Territory and the Customs Regulations be amended to prevent the importation of this material.

485. Commonwealth, State and Northern Territory Ministers responsible for censorship met in September and October 1984 in response to widespread community concern about permissible levels of violence in "M", "R" and "X" classified films. Ministers endorsed revised classification guidelines designed to place a stricter limit on the violence permissible in "M" and "R" categories. Most Ministers agreed to have their Governments consider a new restricted classification to replace the "X" classification. Queensland, New South Wales, Victoria and South Australia have now introduced video classification legislation similar to the Australian Capital Territory model ordinance but have restricted material which may be classified and offered for sale or hire to the "G", "PG", "M" and "R" categories.

486. In Tasmania, the Classification of Publications Act 1984 provides for the establishment of the Publications Review Board, and a system of classifying publica-

tions in order to limit the availability of certain objectionable publications within Tasmania.

(e) *Civil servants*

487. All Australian jurisdictions require their civil servants to keep confidential information relating to their work, duties and responsibilities. Some jurisdictions also impose restrictions on public comment by civil servants. Information in the possession of the federal Government can be requested by members of the public under the provisions of the Freedom of Information Act 1982. The Act provides for access (and for rights of correction) to a wide range of information including information about the operations of federal departments and public authorities and documentary information held by those bodies. Access is subject to exceptions, for example, to protect essential public interests or the privacy and business affairs of the person who is the subject of the information held.

488. The Freedom of Information Act in Victoria, which closely resembles the Commonwealth Act, has been comprehensively reviewed after its first three years of operation. Amendments to clarify the meaning of the legislation and overcome anomalies which have emerged in practice will be introduced late in 1986.

489. The Tasmanian Government has indicated it does not view freedom of information legislation as appropriate at this time, given the cost associated with the operation of such legislation and the perceived desirability of alternative areas of administrative law reform. The Queensland Government is opposed to freedom of information legislation. It sees such legislation as derogating from the role of Parliament and Executive Government operating according to the rule of law in a free democratic parliamentary democracy.

490. The Australian Security Intelligence Organization Act 1979 provides a capacity for the Organization established by that Act to furnish security assessments to the federal Government, for example, in regard to civil servants whose job requires access to classified information. If an adverse or qualified assessment is made, the person who is the subject of that assessment is notified. The person then has a right to seek review of that assessment by a statutory body known as the Security Appeals Tribunal, also established by that Act.

(f) *Parliamentary privilege*

491. Parliament's freedom of speech derives from article 9 of the Bill of Rights 1689, an Imperial Act still in force in Australia. Article 9 provides:

That the freedom of speech, and debates or proceedings in Parliament, ought not be impeached or questioned in any court or place out of Parliament.

In the federal Parliament this privilege applies by reason of the operation of section 49 of the Constitution, which provides for the powers, privileges and immunities of the Commonwealth Parliament to be those of the House of Commons in 1901 (the date of Federation) until otherwise declared by the Parliament.

492. Recent judgements in the New South Wales Supreme Court have departed from traditional interpretations of article 9 to enable evidence of matters raised in Parliament to be used in courts. In response to this approach the President of the Senate introduced the Parliamentary Privilege Bill 1986 in October 1986. That Bill is intended to declare the powers, privileges and immunities of each House of the Parliament and of the members and committees of each House.

(g) *Other matters*

*Contempt of court*

493. Contempt of court is basically concerned with the powers of a court to deal with matters such as maintenance of order in a courtroom, attempts to influence participants in a case (including by publication of material), public denigration of judges and intentional disobedience of court orders. In a recent decision of the High Court in *Gallagher v. Durack* (1983) 152 C.L.R. 238, a majority of the Court explained the relationship between contempt of court and freedom of expression as follows (p. 243):

The law endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed. The other principle is that "it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon courts of justice which, if continued, are likely to impair their authority". . . . The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges. However, in many cases, the good sense of the community will be a sufficient safeguard against the scandalous disparagement of a court or judge, and the summary remedy of fine or imprisonment "is applied only where the court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable".

494. The Commonwealth's Law Reform Commission has a current reference on the law and procedures relating to contempt of court applied by federal and Territory courts and by State courts exercising federal jurisdiction. The terms of reference draw particular attention to the requirements of articles 19 and 14 of the Covenant.

*Juries*

495. Recent legislation in Victoria, the Juries (Amendment) Act 1985, creates three offences concerning the publication of the deliberations of a jury. The offences are:

(a) Publishing to the public "any statement made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of the jury";

(b) Soliciting or obtaining the disclosure by a juror of those statements, opinions, etc.;

(c) The disclosure by a juror of those statements, opinions, etc. if the juror has reason to believe that any

part of that information "is likely to be or will be published to the public".

This legislation was introduced because the Victorian Government believed that the prohibitions would protect jurors from harassment by disappointed litigants. It was concerned that the publication of jury deliberations might lead to unacceptable pressure being placed upon jurors to justify themselves and to the end of freedom of speech in the jury room.

### Article 20

#### WAR PROPAGANDA; INCITEMENT TO NATIONAL, RACIAL OR RELIGIOUS HATRED

496. Australia has maintained its reservation to article 20. The reservation provides:

Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interests of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters.

497. The difficulties that the federal and State Governments see with article 20, which gave rise to Australia's reservation, were primarily related to the concern that, if full effect were given to article 20, the rights of freedom of expression (art. 19), freedom of assembly (art. 21) and freedom of association (art. 22) guaranteed in the Covenant would be unduly circumscribed. This concern is similar to that underlying the Australian reservation to article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination. The federal and State Governments are concerned to adhere firmly to their established tradition of freedom of expression. Where there is a clear necessity to restrict this right in the public interest or, perhaps, for reasons of international diplomacy, the federal Government will act, and has acted, to prohibit or suppress propaganda. For example, during the Second World War, the federal Government prohibited propaganda by enemy aliens and subjected some forms of communication to censorship. Generally, however, the view is taken that the repugnant nature of the types of arguments to which article 20 is addressed becomes more readily apparent if free and open debate on the issues is allowed.

#### *Propaganda for war*

498. There is no general prohibition in Australia on propaganda for war. The Australian Government has some difficulty with the vagueness of the term "propaganda for war" used in article 20. As indicated above, the Government would only be prepared to prohibit propaganda of this nature if a clear need for such action arose.

499. A number of actions, however, which could fall within the concept of "propaganda for war" are currently prohibited. For example, the Crimes (Foreign Incursions and Recruitment) Act 1978 prohibits the recruitment and training within Australia of persons proposing to engage in hostile activities in foreign countries and prohibits Australian citizens and longer-term

residents from engaging in such activities. The Act is currently under review with a view to strengthening its provisions.

500. Also of relevance are the crimes of treachery and sedition under the federal Crimes Act 1914. Legislation of some relevance in prohibiting certain types of related propaganda is the Diplomatic and Consular Missions Act 1978 which empowers a court to grant an injunction restraining false claims to diplomatic or consular status and to issue a warrant to remove flags, insignia, etc., associated with such false claims.

501. *Information offices.* Australia has accepted several information offices (for example, the South West Africa People's Organization (SWAPO), the African National Congress of South Africa (ANC), the Front de libération nationale kanak et socialiste (FLNKS), and the Palestine Liberation Organization (PLO)). It is stipulated that their purpose is the dissemination of information only. The offices must not advocate violence as a means of achieving their objectives. They do not have any privileged status. They are subject to Australian law and do not receive any financial assistance from the Australian Government. Confirmation that these terms are acceptable is required before the establishment of an information office will be supported.

#### *Incitement*

502. While there is no general prohibition on incitement to discrimination, hostility or violence by advocating national, racial or religious hatred, there are some restrictions on incitement.

503. Section 7A of the federal Crimes Act 1914 provides that it is an offence for any person to:

(a) Incite to, urge, aid or encourage; or

(b) Print or publish any writing which incites to, urges, aids or encourages,

the commission of offences against any law of the Commonwealth or of a Territory or the carrying on of any operations for or by the commission of such offences. The Crimes Act also creates offences of sedition, including counselling, advising or attempting to procure the carrying out of a seditious enterprise. "Seditious enterprise" is defined by sections 24A and 24B of the Act to include enterprises carried out for the purpose of promoting "feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth". (Exceptions exist for certain actions done in good faith.)

504. Provision also exists in the Crimes Act (sects. 30A-30B) to enable the federal Attorney-General to apply to the Federal Court for a declaration that a body of persons is an unlawful association. Such bodies include organizations which by propaganda advocate or encourage the overthrow by force or violence of the established Government of the Commonwealth or of a State or of any other civilized country or of organized Government. It is an offence (sect. 30C) for any person by speech or writing, *inter alia*, to advocate or encourage the over-

throw by force or violence of such Government. It is also an offence (sect. 28) for a person, by violence or by threats or intimidation of any kind, to hinder or interfere with the free exercise or performance, by any other person, of any political right or duty.

505. In addition to the federal Crimes Act, various State and Territory legislation also provides for offences of incitement to violence. There are also a number of more specialized offences in some jurisdictions. Under chapter XXI of the Queensland Criminal Code it is an offence to disturb any gathering for religious worship or obstruct, assault, etc. any minister of religion while performing the duties of his office. Similarly, in South Australia, sections 257 and 258 of the Criminal Law Consolidation Act make unlawful acts which interrupt religious worship or which wilfully disturb a person officiating at any congregation.

506. It is an offence under paragraph 505 (c) of the Penal Code of the Colony of Singapore in its application to the Territories of Christmas Island and of the Cocos (Keeling) Islands to make public or circulate any statement, rumour or report with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community of persons. It is a defence if the person making the statement, etc., has reasonable grounds for believing the statement, etc., to be true, and makes it without any intention to incite discrimination.

507. *Incitement to racial discrimination.* The Racial Discrimination Act 1975 makes unlawful acts of discrimination based on race, colour, descent or national or ethnic origin, that have the purpose or effect of impairing the equal enjoyment of human rights or fundamental freedoms in all fields of public life. The Act does not prohibit the advocacy of national or racial hatred. The federal Government is currently conducting a review of the Act and is considering whether there should be any prohibition upon racist propaganda, and if so, what form that prohibition should take. Many alternatives are being assessed as the issues raised in this area are very complex. Proposals involving the prohibition of racist utterances require, in particular, a careful balancing between the right to freedom of expression on the one hand, and the right of every person in Australia to live free from racist abuse and defamation on the other.

508. *Human Rights Commission.* The Human Rights Commission has published one report and three occasional papers on the various aspects of racial hatred. The occasional papers (Nos. 1, 2 and 3) covered the issues involved, the international experience, and the proceedings of a public conference on the issue. The report, entitled *Proposal for Amendments to the Racial Discrimination Act to Cover Incitement to Racial Hatred and Racial Defamation* (Report No. 7), recommended the inclusion in the Act of provisions outlawing incitement to racial hatred and racial defamation. The recommendations were framed in order to deal only with significant violations of minorities' rights. The Commission, as it confined its concerns to the Racial Discrimination Act, did not make any recommendations concerning incitement to hatred of religious groups, but noted the operation of article 20 on this issue. The Com-

mission's report and occasional papers are being considered in regard to the federal Government's current review of the Racial Discrimination Act.

## Article 21

### PEACEFUL ASSEMBLY

509. In all Australian jurisdictions, except Norfolk Island, legislation exists to regulate and control assemblies, particularly assemblies in public places. This legislation, described below, is principally aimed at providing a means for the maintenance of public order and protecting the rights and freedoms of persons not taking part in a particular assembly, for example, ensuring to such persons an adequate right of access to and from public property. There is no right of peaceful assembly provided for in the Commonwealth Constitution. All persons in Australia are free to organize and participate in assemblies except to the extent to which a law may restrict this. Within the area not restricted by law there are very few remedies available to persons who claim that their right of peaceful assembly has been violated. Such remedies as do exist are described below.

510. All assemblies, whether held in public or in private places, are subject, in the interests of public order, to the general controls that are available under the criminal law (and, in the non-code jurisdictions, also the common law) to deal with situations where it is apprehended that riotous behaviour or a breach of the peace will otherwise occur. Some of these statutory offences are the offences of offensive behaviour, using indecent language and obstructing the police. However, the mere expression of political views or offence to the canons of good taste is not considered to amount to offensive behaviour (*Ball v. McIntyre* (1966) 9 F.L.R. 237). The disobedience of a police officer's command to cease a lawful activity would not constitute obstruction (*Forbutt v. Blake* (1981) 51 F.L.R. 465). The relevant common law offences are the offences of affray, rout and riot.

511. *Human Rights Commission.* The federal Human Rights Commission published an occasional paper (No. 8): *The Right of Peaceful Assembly in the A.C.T.* While that paper is primarily addressed to consideration of the law as it applies in the Australian Capital Territory ("the A.C.T."), the paper contains an analysis of other legislation and relevant case-law. The Commission proposed a further inquiry into the application of State laws to public assemblies held in Commonwealth places in the States. Any further action on this matter has now become the responsibility of the Human Rights and Equal Opportunity Commission.

### Federal legislation

512. The Public Order (Protection of Persons and Property) Act 1971 applies in regard to public assemblies in the Australian Capital Territory and elsewhere on Commonwealth premises and protected premises. Section 6 of the Act makes it an offence to take part in an assembly in the Territory or on Commonwealth premises "in a way that gives rise to a reasonable apprehen-

sion that the assembly will be carried on in a manner involving unlawful physical violence to persons or unlawful damage to property". A similar provision (sect. 15) covers assemblies in relation to protected premises or a protected person (diplomatic and consular premises and personnel; international organizations and certain personnel). There are also offences created by the Act to deal with actual violence or damage and with possession of weapons, etc., while taking part in an assembly. The federal Crimes Act 1914 also contains a number of offences which may be relevant including incitement to the commission of an offence (sect. 7A), attempts to commit offences (sect. 7), conspiracy (sect. 86) and trespass on prohibited Commonwealth land (sect. 89).

513. In the Australian Capital Territory, legislation dealing specifically with public assemblies was first introduced in 1982 (the Public Assemblies Ordinance). The Ordinance introduced a system of authorized assemblies similar to that in New South Wales and South Australia (see below). Special provision was made to prevent disturbances of processions on certain public holidays. In 1983 the Government, believing these provisions to be too restrictive, repealed the Ordinance. The preparation of new legislation to regulate assemblies is now under way. The Human Rights Commission's occasional paper is being considered as part of this project.

#### *State legislation*

514. The Public Assemblies Act 1972 (South Australia) and Public Assemblies Act 1979 (New South Wales) both provide a scheme whereby the organizer of a proposed assembly in any public place is required to give written notice seven days in advance to the Commissioner of Police (New South Wales) or four days in advance to the Chief Secretary, Commissioner of Police or Clerk of the local authority (South Australia). Failure to give notice is not an offence. However, participants in an assembly which is not "authorized" lose the limited immunity those Acts confer on participants in "approved" assemblies, namely, in regard to offences such as obstruction.

515. Under the New South Wales Act, the Commissioner may, after receiving the required notice, apply to the Supreme Court for an order prohibiting the assembly. The Commissioner must first invite and consider representations from the organizer of the proposed assembly. A single judge of the Supreme Court can then hear the matter. No appeal lies from the judge's decision. Such an order was granted by the Supreme Court to prohibit a proposed assembly of Women against Rape planned to coincide with the official 1983 Anzac Day parade. Despite the order the demonstration took place. A number of the women were subsequently arrested and charged with "causing serious affront or alarm" contrary to section 5 of the Offences in Public Places Act 1979 (N.S.W.). However, the court dismissed the matters because of insufficient evidence of the offences charged.

516. Under the South Australian Act each of the persons on whom notice may be served may lodge objections with the person serving notice. The objections must be lodged at least two days before the date of the

proposed assembly and be published either in a State newspaper or in such a manner that they will come to the attention of proposed participants in the assembly. The objection must specify the grounds upon which the assembly would "unduly" prejudice the public interest". Any intending participants may apply to the court for a review.

517. In Queensland, the Police District Superintendent of Traffic may prohibit processions upon roads if "in his opinion, such procession will occasion a breach of the peace in or cause obstruction to traffic upon such a road or if for any other reason whatsoever it is, in the opinion of the District Superintendent, desirable that such a procession should not be held" (Traffic Regulations, R.124(3)).

#### *Common law*

518. At common law, an unlawful assembly is one in which three or more persons gather together with intent to commit a crime or to carry out any purpose, which may be lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of the assembly reasonable grounds to apprehend a breach of the peace. This rule has been incorporated in legislation in most of the Australian jurisdictions. The offence and the related offences, however, are now rarely used, the controls referred to above being preferred.

#### *Private land*

519. Assemblies on private land, if objected to by the owner or occupier, will usually constitute trespass. This gives rise to a civil remedy at the instance of the owner or occupier. Specific criminal offences have also been enacted in some of the Australian jurisdictions further to protect the rights of an owner of property whose property is being used for an assembly against his or her wishes. As indicated above, the federal Government has also legislated in relation to trespass on Commonwealth premises and land.

#### *Territories*

520. Under the Minor Offences Ordinance of the Colony of Singapore in its application to the Territories of Christmas Island and of the Cocos (Keeling) Islands the Commissioner of Police may, subject to the approval of the Governor-General, make general rules for the conduct of all assemblies and processions on public roads, public places or places of public resort, and also general rules for the issuing of permits. No rules have been made in either Territory under this provision.

#### *Remedies*

521. No specific remedies are provided for, should a lawful assembly be improperly interfered with or otherwise prevented. However, depending upon the circumstances of the interference, actions for assault, false imprisonment etc., may be available. If the interference was

caused by the police, all jurisdictions have provisions for the hearing of complaints by an independent tribunal or an ombudsman. The Human Rights and Equal Opportunity Commission is empowered to investigate complaints against action taken by Commonwealth agencies under Commonwealth laws or in the Territories should those actions or laws infringe upon the right granted by this article.

## Article 22

### FREEDOM OF ASSOCIATION

522. There are few restrictions in Australia on the freedom of association. Except for associations proscribed as unlawful associations, which are further referred to in paragraph 525 below, such legislation as exists is usually concerned with regulating the forms of association at the same time as legal status (for example, to deal with property) or other benefits (for example, income tax exemptions) are applied to them.

#### (a) *Associations other than trade unions*

523. There are a variety of ways in which associations can operate in Australia. They can be incorporated or unincorporated. Incorporated associations are granted many benefits. For example, they can act as legal persons, sue and be sued, can hold property and can undertake commercial transactions. They have to submit to certain regulations, for example, to make public their objects, to submit audited accounts and to maintain registers of shareholders and proprietors. For smaller groups, such as community organizations or clubs, the benefits of incorporation may not be seen as outweighing the informality and flexibility of maintaining the group as an unincorporated association. In some jurisdictions, clubs can be registered. This would usually occur for larger clubs which operate from their own premises and which hold a liquor licence.

524. *Anti-discrimination legislation.* Most anti-discrimination legislation specifically applies to membership of clubs. The extent of the application is variable. For example, the Victorian Equal Opportunity Act 1984 applies to social, recreation, sporting or community service clubs or community service organizations which are in direct occupation of Crown land or directly or indirectly in receipt of financial assistance from the State Government or a municipality. Certain exemptions are included, for example, single sex clubs operating principally for the preservation of a minority culture. The Western Australian Equal Opportunity Act 1984 and the federal Sex Discrimination Act 1984 contain similar provisions to cover clubs of not less than 30 persons where the association provides and maintains its facilities, in whole or in part, from the funds of the association and sells or supplies liquor for consumption on its premises. Exceptions exist for single sex clubs and certain non-profit-making organizations.

525. *Unlawful associations.* Certain associations are unlawful under Australian law. For example, section 30A of the Commonwealth Crimes Act 1914 provides that associations which by their Constitution or propa-

ganda advocate or encourage the overthrow, by force or violence, of the Constitution or established government of the Commonwealth or States, or are associated with associations having such a purpose, or advocate or encourage the doing of a seditious act, are unlawful. Membership of, or assistance provided to, such an association generally constitutes a criminal offence under the Act. Some Australian jurisdictions also have legislation which makes it an offence to consort habitually with reputed criminals ("thieves" in some jurisdictions), known prostitutes or persons who have been convicted of having no lawful means of support. The purpose behind this legislation is to prevent crime by discouraging criminal associations. Such legislation is considered to be necessary in the interests of public safety and order and the rights and freedoms of others.

#### (b) *Right to form trade unions*

526. The right to form and join trade unions and associations exists in Australia. Trade unions, registered or unregistered, are not unlawful merely because they operate in restraint of trade. There are no substantive or formal conditions which must be fulfilled by workers' or employers' organizations when they are being established. However, there are, of necessity, some conditions which must be satisfied if an association decides to register under the trade-union legislation. Under Commonwealth legislation, the registration requirements include, in addition to formal requirements, conditions stipulating the minimum size of the association to be registered and its membership composition. An association must, for example, comprise either employers only or employees only in a particular industry, to be eligible for registration.

527. The view is taken that, as registration is voluntary, the impact of the legislation is regulatory and not restrictive of the right to freedom of association as provided for in the article. It is added that freedom of association in Australia is demonstrated not only by the absence of any legal restrictions on the citizen's right to associate with others for any lawful object, but also by the recognition given to trade unions as an important force in Australian society. Their right to existence and freedom to organize in the interests of their members is accepted by the Australian community. This acceptance is evidenced by the organizational strength of the trade-union movement, the members of which comprise more than half of the Australian workforce.

528. Australia is a party to both ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organize), and ILO Convention No. 98 (Right to Organize and Collective Bargaining). Convention No. 87 is the basic instrument for international protection of freedom of association and effect is given to it in Australia by a combination of customary law and practice, and legislation. The relevant legislation at the Commonwealth level is the Conciliation and Arbitration Act 1904. This applies to a major part of the employment sector. There is also State legislation, normally in the form of a Trade-Union Act or an Industrial Arbitration Act. Registration pursuant to the Commonwealth or State legislation gives certain advantages to

organizations of workers or employers. Registration also brings with it certain requirements which, if not complied with, may lead to penalties, including, in the most serious cases, the loss of advantages by cancellation of registration.

529. *Cancellation of the registration of the Builders Labourers' Federation.* The unusual step of deregulation of a trade union occurred when, on 14 April 1986, the federal Government cancelled the registration of the Australian Building Construction Employees' and Builders Labourers' Federation (BLF) as a registered organization under the Conciliation and Arbitration Act 1904. This step was taken after the full bench of the Commonwealth Conciliation and Arbitration Commission determined, after a 56-day hearing held pursuant to the Building Industry Act 1985, that BLF had breached undertakings given to the Commission and had acted contrary to the principles of arbitration. The federal Parliament enacted the Builders Labourers' Federation (Cancellation of Registration) Act 1986 which provided for the immediate deregistration of BLF. As a consequence of deregistration, existing awards applying to BLF or its members are deprived of effect. BLF cannot participate in proceedings before the Australian Conciliation and Arbitration Commission or be party to an award made by the Commission. However, to protect the jobs and conditions of individual members of BLF, the Builders Labourers' Federation (Cancellation of Registration—Consequential Provisions) Act 1986 provided for the making of regulations to allocate work covered by BLF prior to deregistration to other registered organizations if those organizations consented to such allocation. The latter Act prohibits reregistration of BLF for a period of five years after deregulation. It also requires a declaration from the Conciliation and Arbitration Commission that it is satisfied that the reregistered organization will not engage in conduct inimical to the principles of the arbitration system. The deregistration of BLF was considered by the federal Government to be a last resort "essential to preserve the future of the building industry, to establish rational industrial relations behaviour in that industry, to protect the national wage-fixing principles and to preserve the authority of the Conciliation and Arbitration Commission" (Second Reading Speech by the Minister for Employment and Industrial Relations, 8 April 1986).

530. *Resignation from unions.* Most trade-union rules provide for a minimum period of notice of resignation by members, partly to ensure financial stability of the union and partly to prevent hasty resignations by members over particular decisions by the union. In Queensland, the Industrial Conciliation and Arbitration Act Amendment Act 1985 provides for the resignation from a union by a union member to be effective immediately upon the member so notifying the union in writing. In a report on this legislation (Report No. 14), the Human Rights Commission considered that that provision could lead to an erosion of the financial position of unions, damage to union solidarity and make unions less able to work for and protect the interests of workers generally.

531. *Preference to unionists.* Some industrial awards give preference in employment to unionists in

certain branches of an industry. Such awards are not considered to be in breach of the provisions of article 22. In some cases the legislation may provide for conscientious objection. However, no one is compelled to work in a particular industry; and such arrangements are only given effect after careful inquiry and for the better protection of the interests of the workers in that industry.

532. *Territories.* In the Territories of Christmas Island and of the Cocos (Keeling) Islands, trade unions are regulated by the Trade Unions Ordinance of the Colony of Singapore in its application to those Territories. The Ordinance provides for the registration of unions and sets out their rights and liabilities. In the Territory of Christmas Island a system of arbitration has also been established under the Industrial Relations Ordinance 1976. There is no trade-union legislation in the Territory of Norfolk Island.

## Article 23

### FAMILY RIGHTS; MARRIAGE, ETC.

533. In Australia, the family is a fundamental social unit and its importance is given implicit and explicit recognition. The major pieces of federal legislation dealing with the family are the Marriage Act 1961, the Family Law Act 1975 and various pieces of social welfare legislation. The protection of families is, of course, also a matter within the concern of State and Territory Governments, in particular in regard to activities by those Governments in the area of community welfare. Before turning to the specific matters addressed in article 23, it may be helpful to outline general government programmes designed for the protection of families.

#### (a) *Social security and welfare*

534. The Australian social security system provides a wide range of pensions, benefits and allowances. Some are directed specifically to families. Others, although available more broadly, also assist families and are paid to families at higher rates. Some of the range of benefits, pensions and allowances payable include family allowance, which is payable to parents or guardians in respect of all children under 16. The allowance is also payable in respect of dependent full-time students aged 16 to 24 inclusive, subject to an income test, unless the student is receiving an allowance under a prescribed educational scheme. To be eligible, the claimant and the children must have been born in Australia or intend to remain permanently. A special addition to family allowance is payable in cases of multiple births (three children or more) until the children reach six years of age. Handicapped child's allowance is payable to a parent or guardian of a handicapped child. It is free of income test if the child's handicap is severe. Double orphan's pension is payable to the guardians of children whose parents are dead or if their whereabouts are unknown. Family allowance, handicapped child's allowance and double orphan's pension are non-taxable.

535. There are two benefits payable to sole parents: class A widow's pension and supporting parent's benefit. Class A widow's pension is payable to a widow (and certain others) who has at least one dependent child. Supporting parent's benefit is payable to people (other than women qualified for widow's pension) who are supporting children on their own.

536. These and other pensions and benefits—age, invalid, wife's, carer's and (other categories of) widow's pensions and unemployment, sickness and special benefits—have family related components. Married rates are higher for married pensioner and beneficiary couples and additional payments are available in respect of children. Additional pension/benefit for children is payable to pensioners and beneficiaries with one or more dependent children in recognition of the additional costs of maintaining children. In addition, mother's/guardian's allowance is payable to single pensioners and beneficiaries with children.

537. With the exception of the invalid pension and the allowances mentioned in paragraph 534, basic pension and benefit payments are taxable. However, the level of income at which income tax becomes payable is currently such that pensioners and beneficiaries with little or no private income do not pay tax. Special income-tested tax rebates are available for pensioners and beneficiaries. Additional allowances are not taxable. Payment of pensions and benefits are exempted from the federal Sex Discrimination Act 1984.

538. The Territory of Norfolk Island is not covered by the Australian system but has its own social security system.

(b) *Employment and income support*

539. Income support to low-income families with children not receiving social security or similar payments has been available since May 1983 in the form of a Family Income Supplement. This is a non-taxable, income-tested allowance which is tied to the level of additional pension/benefit for children. The Government also provides social security payments to "bread-winners" who are unable to obtain employment, with a view to providing a basic level of security below which no one can involuntarily fall. The provision of unemployment benefits is not the only programme available. The Government also operates labour force programmes to assist disadvantaged job-seekers, such as long-term unemployed, retrenched workers, migrants, Aboriginals and disabled persons, through job creation schemes, training and retraining. The federal Department of Employment and Industrial Relations is also responsible for the operation of the Commonwealth Employment Service which operates on a national basis. This Service assists job-seekers to gain suitable employment through the provision of occupational information, employment counselling services and innovative community-based employment programmes which focus particularly on the groups of disadvantaged job-seekers mentioned above.

(c) *Health services*

540. The primary responsibility for the provision of such services rests with State, Territory and local government authorities. However, the federal Government provides special assistance for a wide range of medical and health services, usually on a cost-sharing basis with State and Territory Governments. In addition, the federal Department of Aboriginal Affairs provides funds for a number of Aboriginal Medical Services and health care units. A number of schemes such as the Northern Territory Aerial Medical Service and the Royal Flying Doctor Service operate to ensure the provision of adequate health care in rural areas.

541. Under the Medicare scheme all Australian residents and certain visitors are entitled to receive refunds for 85 per cent of medical services supplied unless the particular doctor "bulk-bills" Medicare direct. In such a case the patient does not pay for the service and the doctor accepts the 85 per cent Medicare payment as full payment. The Medicare scheme is funded in part through a levy of all taxable incomes with exemptions for certain low income earners. The types of services covered by the Medicare programme are all services by legally qualified medical practitioners, certain medical services by approved dentists in hospitals and optometrical consultations by participating optometrists. Public hospital out-patient treatment and in-patient accommodation in a shared ward with treatment by a doctor employed by the hospital is available free of charge. It is also possible for persons to take out insurance with private medical funds to cover situations not covered by the Medicare scheme, for example, treatment as a private patient in a public hospital (i.e. where patients elect to be treated by their own doctor), dental charges, etc.

(d) *Special groups*

542. The matters outlined above relate to Government programmes to assist families by financial means. The Government recognizes that other forms of assistance or protection may also be required by families.

(i) *Refugees*

543. The Federal Department of Immigration and Ethnic Affairs operates refugee and special humanitarian programmes under which refugees and displaced persons and their families are accepted from every continent. In recent years a high number of Indo-Chinese refugees have been accepted for settlement in Australia under these programmes. The Department is also concerned to keep families of new settlers together through its Family Reunion Programme.

(ii) *Aborigines and Torres Strait Islanders*

544. The social factors affecting Aboriginal families are largely dependent in Australia on geographic location and the extent to which the persons involved follow traditional Aboriginal life-styles and customs. A significant proportion of Aboriginal and Torres Strait Island people now live in urban areas, mainly in the south-

east of Australia. These Aboriginal families are subject to the same kind of social factors as other urban-dwelling Australians in relation to marriage and care and education of children. While all Aboriginal people are subject to the same laws with regard to marriage and the care of children as other Australians, in the remote areas the Aboriginal family exists to a greater extent within customary kinship systems, which may include arranged and polygamous marriages. The protection of the family and education of children within this context is an integral part of Aboriginal culture and customary law. In accordance with its policy of self-management for Aborigines, the federal Government does not interfere in the practice of such customs.

545. The Australian Law Reform Commission, in its report on *The Recognition of Aboriginal Customary Laws* (Report No. 31), recommended two important changes which dealt with the protection afforded to the Aboriginal family. First, the Commission recommended the recognition of traditional Aboriginal marriages for specific purposes, by the adoption of a "functional" recognition approach. That approach was recommended because the Commission believed that the approach of treating a traditional marriage as a marriage under the general law had the potential to distort Aboriginal marriage customs and traditions. Secondly, it recommended the adoption of an Aboriginal child placement principle, to prevent the continuation of what the Commission perceived as excessive intervention by Governments in the past arrangements for the care of Aboriginal children. In regard to Aboriginal children in need of foster care or adoption, the principle would encourage the placement of Aboriginal children with a member of the child's extended family, a member of the child's community or another Aboriginal family.

546. The Commission's final report was tabled in Parliament in June 1986. At the time of writing, the federal Government is considering and developing a response to the Commission's report. This response will be formulated in the light of proposed consultations with Aboriginal people and communities.

547. The Australian Government is particularly concerned that there be provision of assistance to Aboriginal mothers. This is reflected in the allocation of resources within Aboriginal health programmes. This includes a general requirement for all nursing staff and Aboriginal health workers posted to remote areas to have midwifery training, the operation of regular clinics for mothers and infants, educational and promotional programmes and, at the discretion of medical staff, evacuation of pregnant women to hospitals for delivery.

### (iii) *Migrants and ethnic families*

548. The reuniting of families is an important objective of migration policy. Close family (i.e. spouse, fiancé(e), dependent children of Australian residents) are accepted for migration with a minimum of formalities. Provision also exists for concessional points to be given to more extended family members (brothers, sisters, non-dependent children, nephews, nieces), although there is no specific entitlement to migration. In 1981 about 12 per cent of the total Australian population comprised

persons born in non-English-speaking countries and a further 8 per cent were born in Australia but with one or both parents born in a non-English-speaking country.

549. A major stimulus to improvements in the general standard of services to migrant and ethnic groups occurred with the Australian Government's acceptance in full of the *Report of a Review of Post-Arrival Programmes and Services* (the "Galbally Report") which was published in April 1978 in English and nine other languages (discussed in more detail below in relation to art. 27). Arrangements were further enhanced following a major evaluation of programmes and services for migrants conducted by the Australian Institute of Multicultural Affairs in 1982. This evaluation foreshadowed a further comprehensive review in 1986. In December 1985 the Minister for Immigration and Ethnic Affairs announced a review of migrant and multicultural programmes and services to set directions for services and programmes for immigrants over the next decade. The review has two stages. Stage one is to set out principles and strategies for future service provision. Stage two is to evaluate key programmes and services in the light of those strategies and principles. The report of stage one of the review was submitted to the Minister in August 1986.

### (iv) *Domestic violence*

550. Some families unfortunately require protection from violence or threats of violence from a member of the family and assistance from the police and social welfare agencies. The problem of domestic violence has recently received considerable attention, particularly from the Australian Law Reform Commission, which presented recommendations on proposals for law reform in this area in a report published in 1986.

551. On 1 October 1986, in response to the Commission's report, the Domestic Violence Ordinance 1986 and the Domestic Violence (Miscellaneous Amendments) Ordinance 1986 came into force in the Australian Capital Territory. The new legislation is similar to legislation currently operating in New South Wales, South Australia, Western Australia, Tasmania and Queensland. It will enable victim spouses (spouse is defined to include former spouses, de facto spouses and former de facto spouses) to seek a protection order where the respondent has committed, or has threatened to commit, a prescribed domestic violence offence. These include all offences against the person contained in the Crimes Act 1900 of New South Wales in its application to the Territory. Protection orders will also be available where the respondent has engaged in conduct of such an offensive or harassing nature that the spouse fears for his or her safety or the safety of any child involved. Where it is appropriate the police may apply for a protection order. Where this is done, the victim spouse becomes a party to the proceedings. The protection order may contain a number of prohibitions or restrictions on the respondent's conduct, including prohibiting him or her from being on premises on which the spouse or child lives or works or which either frequents. The court may also recommend that either or both of the parties seek counselling. The legislation also makes provision for the granting of immediate and, if necessary, *ex parte* interim

protection orders pending the making of the final order where the court is satisfied that it is necessary to ensure the safety of the spouse or child. Time-limits are placed on the operation of all orders and provision is made for parties to apply to have the order varied or revoked.

552. Special provision is made for the granting of police bail in relation to domestic violence offences according to specific criteria and allowing for the imposition of strict conditions. The breach of a protection order or an interim protection order is a criminal offence and renders a respondent, who has been served personally with a copy of the order or to whom the order has been explained by the court, liable to immediate arrest. The legislation also clarifies certain police powers of arrest and of entry onto premises.

553. In 1985, the Women's Policy coordination Unit of the Victorian Department of Premier and Cabinet produced a report in 1985 on criminal assault in the home. The report makes a number of recommendations for legislative change to meet the problem of domestic violence. These are being considered with a view to introducing appropriate legislation early in 1987.

554. In Tasmania, the Justices Act 1959 was amended in 1985 to provide for the issue of domestic restraint orders. These are designed as an adjunct to the existing criminal law, and to provide immediate protection for persons suffering domestic violence. These provisions have been in operation for a year now, and a review is at present under way of the effectiveness of these orders and of any changes which may be desirable in their operation. In addition, the Tasmanian Child Protection Amendment Act 1986 provides for crisis intervention by State agencies in instances of the physical, sexual or emotional abuse of a child. As such it represents a broadening of the powers available under the Principal Act of 1974.

555. The Australian Institute of Criminology convened a National Conference on Violence in the Family, held in two parts. The first part, on spouse abuse, took place in November 1985; the second part, on child abuse, took place in February 1986. Proceedings of each of these conferences are in the course of being published.

556. Apart from special domestic violence legislation, criminal sanctions for the mistreatment of spouses, de facto spouses and the children of a relationship are contained in the criminal law of each State and Territory. Legislation concerning the care of parentless, neglected or uncontrollable children is also normally a matter for the States and Territories which provide facilities for child care where parental care is not available or is inadequate.

(v) *Accommodation difficulties*

557. In addition to the above legislation, Governments also provide assistance to privately run youth and women's refuges. In particular, the federal Crisis Accommodation Programme, introduced in July 1984, provides capital funding through State and Territory Governments for short-term emergency accommodation for

families unable to live in their normal home. The federal/State-funded Supported Accommodation Assistance Programme also provides a range of supported accommodation and related support services to assist men, women, young people and their dependants, who are either permanently homeless or temporarily homeless as a result of crisis, and who need such assistance to move towards independent living where possible and appropriate. These programmes are in addition to other programmes of assistance in housing and accommodation.

*Paragraph 1*

558. The principle outlined in this paragraph is explicitly referred to in both the federal Family Law Act 1975 (sect. 43) and relevant State legislation (for example, sect. 28 of the Western Australian Family Law Act 1975-1979). In a further step towards recognizing the principle in a positive way, the federal Family Law Act created the Institute of Family Studies, which has the function of encouraging coordinated research into the factors affecting marital and family stability in Australia, with the object of promoting the protection of the family as the natural and fundamental group unit in society. The family structure is also implicitly recognized and encouraged in many government policies.

*Human Rights Commission reports*

559. The Human Rights Commission identified a number of situations in which protection of the family by the State should, in its view, lead to changes in existing arrangements. There has been a particular focus on the rights of illegal immigrants (known as "prohibited non-citizens") with families. The Commission expressed the view that, after residence in Australia for a considerable period, good conduct and the establishment of family ties, the balance of rights might shift in favour of the prohibited non-citizen and his or her family to the point where deportation should not be effected. Family rights are also relevant to the way in which such persons are arrested and detained prior to deportation.

560. The Commission also focused on the rights of the Australian-born children of illegal immigrants, who had become Australian citizens but had left Australia when their parents were deported. To deal with the situation, the Government has legislated (as the United Kingdom Government has) to provide that the children of illegal immigrants born in Australia do not obtain Australian citizenship unless that would render them stateless (see paras. 624-625 below).

*Paragraph 2*

(a) *Right to marry*

561. The right to marry and procedures for marriage are regulated in Australia by the federal Marriage Act 1961. The rights and obligations of parties to a marriage and the provisions applicable to the dissolution of a marriage are dealt with in the federal Family Law Act 1975 (discussed below) which extends to all parts of Australia other than the Territories of Christmas Island and the Cocos (Keeling) Islands. The law governing marriage

and divorce in these two Territories is contained in the Christian Marriage Ordinance, the Divorce Ordinance and the Married Women and Children (Maintenance) Ordinance of the Colony of Singapore which are continued in their application to those Territories.

562. Under the Marriage Act, marriages may be celebrated by a minister of religion registered as an authorized celebrant, by a district registrar or by other persons authorized by the Attorney-General as marriage celebrants. Notice of the intended marriage must be given to the celebrant at least one calendar month before the marriage, but this can be at any time within three calendar months prior to marriage. The marriage celebrant must transmit an official certificate of the marriage for registration to a district registrar in the State in which the marriage took place. From 20 June 1973, the minimum age at which a person may marry without parental consent was reduced from 21 to 18 years. However, the minimum age at which people are legally free to marry remains 18 for males and 16 for females. Males between the ages of 16 and 18 may marry with parental or guardian's consent and an order from a judge or magistrate. The marriage of a female between 16 and 18 requires the consent of her parents or guardians only. In exceptional circumstances, a judge or magistrate may make an order authorizing a male of 16 or a female of 14 years of age to marry another person of marriageable age. The marriageable age in the Territories of Christmas Island and the Cocos (Keeling) Islands is established by the Christian Marriage Ordinance and the Civil Marriage Ordinance of the Colony of Singapore in their application to those Territories. Both Ordinances provide that the marriageable age is 16 years for both males and females who are married in accordance with the provisions of those Ordinances. No legal age is prescribed for Muslims whose marriages are registered under the Muslims Ordinance of the Colony of Singapore in its application to the two Territories.

563. Thus, under Australian law, all men and women of marriageable age have the right, subject to meeting the requirements of legal capacity to enter into marriage, to marry and found a family. As mentioned, marriages celebrated in Australia must conform with the requirements of the Marriage Act. In relation to the capacity of a person to contract a marriage, the Marriage Act (sect. 23) provides that the impediments to a valid marriage are: (a) a prior subsisting marriage; (b) the existence of a prohibited relationship; (c) the lack of real consent by reason that it was obtained by duress or fraud; and (d) lack of marriageable age, i.e. 18 years for males, 16 years for females.

#### Aboriginal traditional marriages

564. The Law Reform Commission's report No. 31 on the recognition of Aboriginal customary laws has recommended functional recognition of Aboriginal traditional marriages. This involves comparing traditional marriages with federal Marriage Act marriages for various purposes, to determine whether particular consequences of recognition of that union as a marriage would produce results which are appropriate and consistent with Aboriginal perceptions of marriage. This case-by-case method would, it is claimed, reduce distortion and

leave Aboriginal customary laws free to maintain flexibility and development.

565. The Commission's major recommendations, which are currently under consideration by the federal Government, were that:

(a) Traditional marriages should be recognized notwithstanding that the relationship is actually or potentially polygamous;

(b) There should be no minimum age requirements for traditional marriages;

(c) Registration of traditional marriages should not be required, but Aboriginal communities should be given power to operate a register, constituting *prima facie* evidence of marriage, should they so wish;

(d) Children of a traditional marriage should be recognized as legitimate or nuptial children for all purposes of Australian law;

(e) Traditional marriages should be recognized for the purposes of adoption. Thus the consent of both parents should be required for the adoption of a child of a traditional marriage and persons who are traditionally married should be qualified, in the same way as persons married under the Marriage Act 1961, to adopt children under State and Territory law. Traditional marriage should also be recognized for the purposes of State and Territory legislation where marriage is a qualification for child custody or fostering;

(f) The law should not be changed to impose on Aboriginal spouses legal obligations of mutual maintenance, and additional obligations to maintain their children, during their relationship. The extension of maintenance obligations to traditional spouses would not reflect Aboriginal perceptions of the role of husbands and wives in maintaining their domestic economy, nor would maintenance legislation be effective.

The Commission did not believe there was any justification for imposing a new maintenance regime on parties to traditional marriages during the marriages. The Commission also considered its recommendations should apply to mixed marriages (i.e. between an Aborigine and a non-Aborigine) which are recognized as traditional marriages by the community in question.

566. The Commission's report also noted that traditional marriages of girls below the legally permitted age still occurred in some Aboriginal communities, although the age at which girls married seemed to be increasing. Recognition of a marriage where a girl was below the age of 14 or 16 might be thought to violate the principle behind the legal restriction that young people should, in their own interests, be prevented from marrying below a certain age. The Commission recommended that the best approach would be to recognize the marriage as it existed, irrespective of the age of the parties, in conformity with the relevant customary rules and practices. In each context, what is recognized is the actual, existing relationship between the parties.

#### Right of prisoners to marry

567. Generally, in all jurisdictions, prisoners are able to marry subject to appropriate permission from prison authorities. Requests are examined on a case-by-

case approach which enables the authorities to take into account the needs of the prisoner and discipline in the prison system. For example, prisoners in Queensland are able to marry subject to appropriate permissions from prison authorities.

(b) Right to found a family

568. The Government provides special forms of social welfare assistance, as already mentioned, to assist families with children. Special health services are also available to pregnant women and a school rubella immunization programme was introduced in 1970-1971 to provide vaccination for all females. A survey carried out by the Australian Bureau of Statistics in 1983 showed that 70 per cent of the Australian female population aged 15 to 34 had obtained immunization against rubella. Rates were higher among Australian-born than among overseas-born women.

569. *Family planning.* The Government has provided funds for family planning at the national and international levels since 1973, and in 1974 established its Family Planning Programme in the federal Department of Health. Under the Programme, funds are provided to non-government State and Territory family planning associations and natural family planning organizations for education, information and training programmes at community and professional levels. All medical family planning services attract health insurance benefits. Under Medicare, a system of health programme grants provides that clinic services are in effect available free of charge. Oral contraceptives, the most popular form of contraceptive used by young women, attract pharmaceutical benefits, and other contraceptives are exempt from sales tax. The objectives of the Programme are to promote the health of women and their children and to enable couples to determine the number and spacing of their children. In Australia, the need to restrict population growth is not an issue.

Artificial insemination and *in vitro* fertilization

570. A number of States and the Australian Capital Territory now have *in vitro* fertilization programmes. The federal Government and a number of State Governments have also enacted legislation relating to the parentage of children conceived as a result of artificial insemination by donor (AID) or *in vitro* fertilization (IVF) procedures. The federal legislation (sect. 5A of the Family Law Act) operates only in the context of that Act. The State and Territorial legislation operates generally to deal with parentage for all purposes. Broadly speaking, the State legislation deems the husband or de facto spouse of a woman who gives birth as a result of AID or IVF with donor sperm to be the child's father for all purposes, provided that he consented to the fertilization procedure. These States, except New South Wales, and the Australian Capital Territory, also deal with maternity. In South Australia, a woman giving birth to a child as a result of IVF with a donor ovum is presumed, for all purposes, to be the mother of the child. In Victoria and Western Australia, the presumption is restricted to a married woman who has undertaken the procedure with her husband's consent. The Status of Children Amend-

ment Act 1985 (Tasmania) contains provisions relating to the parentage of children conceived as a result of AID or IVF procedures.

571. Legislation in Queensland to regulate artificial insemination and *in vitro* fertilization is under active consideration following the receipt of a detailed report from a Committee chaired by Mr Justice Demack of the Supreme Court.

572. The federal Government is currently considering a report from the Family Law Council, *Creating Children: A Uniform Approach to the Law and Practice of Reproductive Technology in Australia*. The Senate Standing Committee on Constitutional and Legal Affairs, in the federal Parliament, has also recently presented a report on its inquiry into "national uniformity in laws relating to *in vitro* fertilization and the status of children deriving therefrom and the role of the Commonwealth in achieving such uniformity".

Paragraph 3

573. Section 23 of the federal Marriage Act 1961 provides that a marriage is void if the consent of either of the parties is not a real consent because it was obtained by duress or fraud. Tribal marriages among Aborigines, which in some cases may not be by free and full consent of the intending spouses, are not recognized for the purposes of the Marriage Act. They are, however, recognized for certain purposes in the Northern Territory—for example, in such matters as claims against the estate of a deceased spouse, and the status of children.

574. *Aboriginal customary law.* As noted above, the Law Reform Commission's report on *The Recognition of Aboriginal Customary Laws* dealt with the issue of lack of consent in some traditional marriage practices. The Commission concluded that a relationship should not be recognized for legal purposes as a traditional marriage under the Commission's proposals if one of the parties had never consented to the relationship.

Paragraph 4

575. Under the federal Marriage Act, the marriageable age is not the same for males and females. In other respects, however, the rights and responsibilities of spouses when entering into marriage are equal.

Domicile of spouses

576. The federal Family Law Act 1975 and the Marriage Act 1961 provide that in ascertaining the domicile of a party to a marriage for the purposes of those Acts, the domicile of a woman who is, or has at any time been, married shall be determined as if she had never been married. Action has also been taken in all jurisdictions by the passage of uniform Domicile Acts to make the domicile of a married woman independent of that of her spouse.

Maintenance of children

577. The Family Law Act provides that parties to a marriage are liable, according to their respective finan-

cial resources, to maintain the children of the marriage under the age of 18 years. Both parties are also guardians of these children and have joint custody. However, either parent may apply at any time for sole guardianship of, custody of, or for access to, a child of the marriage. The Act also provides that a party to a subsisting, dissolved or annulled marriage may claim maintenance from the other spouse if he or she is unable to support himself or herself adequately, whether by reason of having the care and control of a child of the marriage aged under 18 years, or by reason of age or physical or mental incapacity for appropriate employment, or for any other adequate reason. Both parties have equal rights to take proceedings with respect to matrimonial property. The Family Court is required to distribute matrimonial property between the spouses in an equitable way.

#### Proceedings under the Family Law Act

578. The Family Law Act established a Family Court designed to provide a specialized jurisdiction within which matrimonial causes may be heard and settled. Associated with the Court is a staff of counsellors under the Principal Director of Court Counselling. The Family Court of Western Australia has its own staff of counsellors. It is the intention of the Family Law Act that a marriage should not be dissolved before counselling has taken place either through the court counsellors or through the many approved non-government marriage counselling organizations that act as the agents of the federal Government. When a case reaches the Court itself, the Act requires the Court to have regard to the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children. The Family Court of Western Australia operates in the same way in Western Australia as the Family Court of Australia in the other jurisdictions.

579. Except in Western Australia, proceedings under the Family Law Act may be brought in the Family Court of Australia or a relevant Supreme Court or, for some proceedings, in a relevant court of summary jurisdiction. In Western Australia, the Family Court of Western Australia exercises original jurisdiction under the Act. In the Northern Territory, the Family Court and the Supreme Court of the Northern Territory exercise concurrent jurisdiction under the Act.

580. The Family Law Act does not extend to the Territories of Christmas Island and of the Cocos (Keeling) Islands. Provision is made for maintenance in those territories under the Married Women and Children (Maintenance) Ordinance of the Colony of Singapore which enables a court to order a person to make maintenance payments in respect of a legitimate child who is unable to maintain himself or herself, and also in respect of a wife who is unable to support herself.

581. *Children not of a marriage.* Parental rights and responsibilities relating to the children not of a marriage are regulated by State and Territorial laws which apply principles similar to those under the Family Law Act.

582. *Dissolution of marriage.* The Family Law Act provides that a decree *nisi* of divorce does not become absolute unless the court has made an order declaring its satisfaction either that there are no children of the marriage under 18 or, where there are such children, that proper arrangements have been made for their welfare or that the circumstances are such that the decree should become absolute in the absence of proper arrangements.

### Article 24

#### RIGHTS OF THE CHILD

583. Laws concerning assistance to and protection of children are matters for which both the federal and State Governments have responsibility. The federal Government's concerns are mainly in regard to federal matters such as social security, citizenship, marriage and divorce, federal responsibilities in Australian Territories and funding to States and Territories in regard to matters such as health and education. In the States, administration of health and education services, child welfare legislation, controls on child employment and criminal laws are matters of relevance in regard to this article.

#### (a) *Discrimination*

##### *Anti-discrimination legislation*

584. Federal anti-discrimination legislation—the Racial Discrimination Act 1975 and the Sex Discrimination Act 1984—deals with discrimination in various areas of public life on the ground of race, colour, descent or national or ethnic origin and sex, marital status or pregnancy, respectively. These Acts and the various pieces of State anti-discrimination legislation have already been referred to in this report. In New South Wales, Victoria, Western Australia and South Australia, anti-discrimination legislation operates concurrently with the federal legislation. In some cases this legislation also extends to discrimination on the ground of disability, sexual preference, religious or political beliefs. All anti-discrimination legislation applies to children as well as adults.

585. In areas of federal responsibility, the Human Rights and Equal Opportunity Commission, in addition to its responsibilities under federal anti-discrimination legislation, can also handle complaints of violations of the Covenant, of ILO Convention No. 111, the United Nations Declaration of the Rights of the Child and the United Nations Declarations on the Rights of Mentally Retarded Persons and on the Rights of Disabled Persons.

586. Under their various legislative responsibilities the federal and State human rights and anti-discrimination bodies have considered particular matters of concern in regard to the rights of children. For example, the Human Rights Commission, the forerunner of the present Human Rights and Equal Opportunity Commission, considered the child's rights to citizenship and nationality (discussed further in paras. 624-625 below). Complaints regarding access by female children to

school sports facilities and competitions have also been matters of interest to anti-discrimination bodies.

(b) *Child welfare*

587. All Australian jurisdictions recognize the special needs of children for care and protection, particularly where that care or protection is not able to be provided by families. The particular problems of families and the ways in which Governments have acted to provide financial and other assistance is already outlined in the discussion in regard to article 23. There are also legislation and programmes designed specifically for the assistance and protection of children.

588. Criminal sanctions are imposed in all jurisdictions on people who mistreat children, whether that mistreatment takes the form of actual physical abuse, abandonment of young children or failure to provide children with the necessities of life. Some jurisdictions also have specific legislation to prohibit the making of pornography involving children. In addition, in each jurisdiction, child welfare agencies exist whose task it is to act in the best interests of a child to preserve the welfare of that child.

589. *South Australia.* Among new developments in child welfare, amendments were made in 1983 in South Australia to the Community Welfare Act. These amendments include the establishment of a Children's Interest Bureau to increase public and departmental awareness of matters affecting the welfare of children and they provide for the reduction, from three months to four weeks, of the period in which a guardian (or child, if over the age of 15 years) can seek an application for the child to be placed under the temporary guardianship of the Minister and the widening of the range of people required to report matters of suspected child abuse.

590. In 1982, amendments to the Children's Protection and Young Offenders Act 1979 established a third alternative for Screening Panels taking decisions on allegations against a child: these could be dealt with by a Children's Court or a Children's Aid Panel, but a Screening Panel can now recommend that a child be cautioned by a member of the police force against committing any further offences.

591. *Queensland.* In Queensland, the Family and Community Development Bill 1985 was tabled in the Parliament for public debate and discussion. Following the receipt of comments on the draft Bill, action is now proceeding to prepare new legislation to replace the existing statutory provisions.

592. *Victoria.* In Victoria the report of the Review into Child Welfare Practice and Legislation was completed and submitted to the State Government in December 1984. It recommends, among other things, that a charter of children's rights be established by statute. This recommendation has been referred to the Parliamentary Legal and Constitutional Committee for consideration as part of its reference on human rights. Legislation to implement the report will be introduced late in 1986. Initial changes have already been made to facilitate the judicial

resolution of the status of children judged to need care and protection.

593. *Northern Territory.* In 1984 the Northern Territory Community Welfare Act was introduced. Features of the Act include provisions relating to custody of children in need of care or who have suffered maltreatment. The Act establishes Child Protection Teams, whose functions, among other things, are to examine cases of known or suspected maltreatment of children. The Act also establishes a separate Family Matters Court, distinct from the juvenile or summary courts, specifically to deal with matters arising under the Act. The Act also makes provision for Aboriginal child welfare with an emphasis on Aboriginal involvement in welfare situations.

594. *Australian Capital Territory.* In the Australian Capital Territory the Children's Services Ordinance 1986 is expected to come into operation in 1987. The Ordinance is based upon recommendations made to Government by the Law Reform Commission in its report on child welfare.

*Education*

595. Legislation in all jurisdictions except Christmas Island requires children between prescribed ages to attend either a government school or an educational institution approved by the appropriate Department of Education or educational authority. While education in government schools is free, additional support may be provided through education systems to disadvantaged groups to meet associated expenses such as transport costs. Some exemptions from school attendance, mainly in the 13- to 14-year-old age bracket, may be granted in the best interests of a child. Secondary education is free in government schools and financial assistance may also be available, where appropriate, for associated expenses. Australia also has a range of post-secondary institutions (universities, colleges of advanced education and technical and further education institutions).

*Employment*

596. Although there is no general prohibition on employment of children before or after school hours, at weekends or during school holidays, some restrictions do exist. For example, in Queensland, the Factories and Shops Act prevents employment of children under the school-leaving age in factories. In Western Australia, the Child Welfare Act prohibits and restricts street trading by children. In South Australia, the Education Act provides that a child shall not be employed during any part of a day or night in any labour or occupation that is such as to render the child unfit to attend school, or to obtain the proper benefit from the instruction provided.

597. There is also no general legislation to govern the type of employment or hours of employment undertaken by young persons at school-leaving age (generally 15 years). Some specific measures exist in industrial awards and there is some State legislation. For example, the South Australian Dangerous Substances Act restricts a permit for dispensing liquefied petroleum gas to per-

sons aged 18 years and above and the Queensland Mines Regulation Act 1964 restricts employment in mines.

598. There is extensive regulation of the employment of children in the Territories of Christmas Island and the Cocos (Keeling) Islands, where the employment of children under the age of 12 is prohibited. The employment of children between the ages of 12 and 14 on vessels and underground is also prohibited, as is the employment of children under injurious conditions, on machinery in motion and in proximity to live apparatus which is not effectively insulated. Minimum rates of pay are also set.

(c) *Child care services*

599. The federal Government also plays a substantial role in the provision of child care services. Its role was only minor until 1972, when the Children's Services Programme and the enabling Child Care Act were introduced. The early years of this programme focused on the development of pre-school services and the associated capital costs. Since 1976, with the establishment of the Office of Child Care within the Department of Community Services, there has been a gradual re-orientation of the programme towards other services for children.

600. The basic responsibility for the regulation, licensing and provision of family and child welfare and early education services still lies with State Governments, which are responsible for numerous welfare and support services. There are also a number of non-government charitable organizations which provide direct assistance to disadvantaged families. The federal Government, however, provides a significant contribution towards costs and has tended to concentrate on supplementing the activities of the States for particular groups of children and for particular services which it considers to be of national importance.

*Children's Services Programme*

601. Programmes funded under the Children's Services Programme are:

- (a) Centre-based services for children providing full-day and regular part-time care;
- (b) Family day care, providing supervised care for small numbers of children over a flexible range of hours in the homes of care givers;
- (c) Fee relief payments to enable families to meet the cost of centre-based or family day care services;
- (d) Occasional care for families needing short periods of child care;
- (e) Outside school hours care for school aged children and vacation care programmes during school holidays;
- (f) Special services for Aboriginal, ethnic and disabled children;
- (g) Field staff, playgroups, mobile services, research and advisory services;
- (h) Work-related child care;
- (i) Multifunctional and neighbourhood centres.

602. Under the Children's Services Programme, the federal Government provides capital and operational assistance for services for children and their families. Priority of access for day care services is given to children with an immediate requirement for child care, that is:

- (a) Children whose parent(s) are working or actively seeking work;
- (b) Children at risk of serious abuse or neglect, where child care is an appropriate response;
- (c) Children whose parent(s) need respite because of continuing disability or incapacity of the parent or child.

603. In assessing priorities between the groups, access is provided on the basis of the benefit of child care to the child and the family and the alternative arrangements reasonably available to achieve the benefit. Children of certain families such as Aboriginal, ethnic, isolated, low income, and single parent families are given special consideration. The federal Government aims to establish 20,000 new child care places by the end of the 1987/1988 financial year.

604. The Family Support Service Scheme (FSSS) was introduced in 1978 under the Children's Services Programme as a pilot programme to encourage the development of innovative services such as family aid or homemaker services, family or financial counselling services, parent education services and support, advice and referral services. In January 1986 the Government announced that FSSS would become ongoing and that negotiations with the States and Territories would be held with a view to a new cost-shared programme. Broad agreement on the focus of a new programme was obtained at a meeting of the Council of Welfare Ministers in April 1986.

(d) *Adoption*

605. Between 1964 and 1968 Adoption Acts were passed in all States, based on a model bill which was approved by the Standing Committee of Attorneys-General. However, from the outset, there existed variations on the model bill and these variations have increased since that time.

606. The Acts introduced into Australian adoption law the principle, already established in the law relating to custody disputes, that "the welfare and interests of the child concerned shall be the paramount consideration". The adopted child is regarded as having been born in wedlock to the adoptive parents; that is, it legally ceases to be a child of its previous parents. Uniform principles for registration of adoption and the assumption of jurisdictional recognition of inter-State and overseas adoption orders were also adopted.

607. While adoption legislation in States and Territories varies in the broad area of the regulations of the arrangement of adoptions and the making of adoption orders, States and Territories have nevertheless established common provisions which ensure that: (1) applications for adoptions are not held in open court but *in camera* and are to include only parties or their representatives, while all reports and records of proceedings are closed to inspection unless the court otherwise orders; and (2) the

publication of the identity of any of the parties involved in an application for adoption is prohibited.

608. The Adoption of Children Act 1968 (Tasmania) and the Australian Capital Territory Adoption of Children Ordinance 1965 are currently under review. In the course of the review of the Territory Ordinance consideration will be given to matters raised by the Human Rights Commission in its consideration of the Ordinance and in its discussion paper on "Rights of relinquishing mothers to have access to information concerning their adopted children".

609. In Victoria, the new Adoption Act 1984 re-enacts the law in that State on adoption and makes a number of significant new additions. Adopted persons who have attained the age of 18 years may apply for copies of their original birth certificate. Natural parents can also apply for information about the adopted person, subject to certain conditions such as agreement in writing of the adopted person. If the adopted person is a minor, agreement of the adoptive parents is sought. An appeal is available to the county court in cases where information is not disclosed, for example, because agreement is not given. The disclosure of information is subject to a requirement to attend counselling.

610. The Act also establishes an Adoption Information Service to advise on the Act and to provide counselling and other services. The categories of persons eligible to adopt are extended to cover couples in recognized Aboriginal tribal marriages.

611. In New South Wales, the Adoption of Children (De Facto Relationships) Amendment Act 1984 amends the Adoption of Children Act 1965 to enable adoptions by couples in bona fide de facto relationships.

#### (e) *Immigration*

612. Non-citizen permanent resident children, who do not enter with, or join, parents or close adult relatives, are offered special protection by the Immigration (Guardianship of Children) Act 1946. Under the provisions of that Act they become wards of the Minister after arrival in Australia, if arrangements for care by relatives break down irretrievably. Wards who are refugees may receive a maintenance allowance from the Department of Immigration and Ethnic Affairs while in full-time education until they are 18 years of age, providing they are not in receipt of other education allowances. Responsibility for the day-to-day care of wards of the Minister is delegated to State child welfare authorities.

613. Agreements between the Commonwealth and all States (except Tasmania) and the Northern Territory provide for the joint funding of specialist caseworkers to provide welfare support to refugee minors without parents in Australia and to their care givers. It is hoped to reduce the incidence of breakdown in arrangements for the care of minors by their relatives through this programme of early intervention.

#### (f) *Child safety*

614. Consumer protection legislation in Australia is also concerned with the physical well-being of children.

For example, under the federal Trade Practices Act, 1984, the Attorney-General has the power to declare mandatory consumer product safety and information standards and to ban unsafe goods. Wherever possible, standards developed by the Standards Association of Australia are used as the basis for mandatory standards declared under the Trade Practices Act. Among the mandatory safety and information standards declared, there have been a number in the field of child-related products: flammability requirements for children's night garments, child-restraining devices for use in motor vehicles and pedal bicycles and reflectors for pedal bicycles.

#### (g) *Family law*

615. The federal Family Law Act 1975 has already been discussed in relation to article 23. That Act requires a court hearing proceedings under the Act relating to the custody, guardianship or welfare of, or access to, a child of a marriage to regard the welfare of the child as the paramount consideration. In any proceedings under the Family Law Act where the welfare of a child under 18 years of age is relevant, the court may require the parties to the proceedings to attend a conference with a court counsellor or welfare officer, to discuss the welfare of the child and to endeavour to resolve any differences.

616. The Family Law Court, or a court exercising jurisdiction under the Family Law Act, may order separate legal representation for a child involved in custody and other proceedings under the Act and make any orders necessary to secure it. The child also has a right to apply for separate legal representation in such matters.

617. Section 73 of the Family Law Act provides that parties to a marriage are liable, according to their respective financial resources, to maintain the children of the marriage under the age of 18. A right exists under State legislation to seek maintenance for children not of a marriage.

#### *Children born out of wedlock*

618. Action has been taken in most jurisdictions by special legislation to remove the legal consequences of illegitimacy which formerly disadvantaged children born out of wedlock. The position in regard to children, and parents of children, born as a result of artificial insemination by donor or *in vitro* fertilization procedures is discussed in relation to article 23.

619. In Western Australia, various statutes have been amended to abolish the principal disadvantages of illegitimacy, for example, in regard to intestate estates, dispositions by will, conveyances and testator's family maintenance. No action has been taken in the Territory of Norfolk Island to remove the legal consequences of illegitimacy. Limited action has been taken in the Territories of Christmas Island and of the Cocos (Keeling) Islands where the Legitimacy Ordinance of the Colony of Singapore in its application to those Territories reverses the previous common law position and establishes the right of an illegitimate child to succeed on the intestacy of its mother, provided that no legitimate issue have survived her.

(h) *Financial matters*

620. The financial interests of children prior to reaching their age of majority (at 18) may be protected by the exercise of power by the courts and through the activities of the Public Trust Offices which exist in the various Australian jurisdictions. Moreover, if parents die intestate, or have failed to make adequate testamentary arrangements for their children, provision exists to enable such children to claim against their deceased parents' estate.

*Paragraph 2*

## Registration of births

621. Matters relating to the registration of births in Australia are governed by the laws of the States and Territories. All States and Territories require registration of births, but the time within which this must be done varies. In Queensland, South Australia, Tasmania, Victoria and Western Australia, registration is required within two months. In New South Wales and the Australian Capital Territory, the time allowed is one month, and in the Northern Territory, registration is required within 21 days. In the Territories of Christmas Island, the Cocos (Keeling) Islands and Norfolk Island, the periods for registration are 7, 14 and 28 days, respectively.

## Name

622. All States and Territories require information as to the child's name to be provided as part of the particulars to be furnished for registration of a birth. In South Australia, Queensland, Tasmania, the Australian Capital Territory, the Northern Territory and the Territories of Christmas Island, the Cocos (Keeling) Islands and Norfolk Island, there is no requirement that a first or "given" name be entered into the register at the time of registration. Where no name other than a surname has been entered at the time of registration, a "given" name conferred after registration may be added to the register at a later date. Provision also exists in most Australian jurisdictions for changes to occur in the registered name of a child in the appropriate circumstances. Common law (to the extent that this has not been replaced by statute) also permits a change of name to occur by reputation and repute. In Western Australia, however, such a change of name cannot lawfully occur.

623. A recent decision of the New South Wales Equal Opportunity Tribunal in *Ms L. v. Registrar of Births, Deaths and Marriages* has led to a review of the administrative practice of registering children's names according to their father's name. In New South Wales the practice existed of registering the surname of a child as that of the father in the case of parents married to each other with different surnames, on his request, in the absence of the consent of the mother. If the mother alone attempted to register the child's name with her surname the Registrar would not proceed with registration, and would substitute the father's application. The Tribunal found this practice was a service to which the Anti-Discrimination Act applied and that it discriminated against the mother on the grounds of sex and marital status. The Tribunal observed that registration of the

child's name in the event of disagreement between the parents could be resolved by the registration of the application received first.

*Paragraph 3 – Citizenship*

624. Children born in Australia prior to 20 August 1986 generally acquired Australian citizenship by virtue of birth in Australia. Children born in Australia on or after 20 August 1986 acquire Australian citizenship by virtue of birth in Australia: (i) if at least one parent of the child was either an Australian citizen or a permanent resident at the time of the child's birth; or (ii) if (i) does not apply, the child has been ordinarily resident in Australia throughout the 10-year period commencing on the day on which the child was born.

625. The Australian Citizenship Act 1948 was recently amended to provide for the acquisition of Australian citizenship by children born in Australia who do not acquire any citizenship by birth and who would otherwise be stateless. Children born overseas of an Australian citizen parent can acquire Australian citizenship by descent by registration for citizenship. The Australian Citizenship Act 1948 also empowers the Minister to grant citizenship to children and enables children under the age of 16 to be included in a certificate of Australian citizenship granted to their responsible parent.

**Article 25**

PARTICIPATION IN PUBLIC AFFAIRS: VOTING;  
ACCESS TO PUBLIC SERVICE, ETC.

*Relevance of anti-discrimination legislation*

626. The federal Sex Discrimination Act 1984 covers discrimination in the administration of federal laws and programmes. The federal Racial Discrimination Act 1975 provides (in sect. 9) that it is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. Section 10 of that Act deals with the right to equality before the law. The other matters addressed in this article, to the extent to which they relate to discrimination in employment, are covered by existing federal and State anti-discrimination legislation and anti-discrimination provisions in legislation dealing with civil service employment. This legislation is discussed in more detail in various parts of this report (in particular in relation to arts. 3 and 26 and in part one).

*Subparagraphs (a) and (b)*

627. *Participation in public affairs.* Australian citizens can take part in public affairs by various means. The principal means is by voting at periodic elections to choose representatives to the federal or State Parliaments and in various Territory and local government elections.

Citizens may also seek appointment to various non-elected public offices, depending, of course, on whether they meet eligibility requirements for these offices. Vacancies in a number of public offices are advertised in the national press and, for others, appointments may be made without advertisement of vacancies, for example, appointments to judicial offices. Citizens and non-citizens alike may also present petitions to Parliament. Particularly in recent times, the growth of the numbers of professional lobbyists and lobby groups has provided another means for interested individuals and groups to make their views known to Governments.

628. *Political parties.* Voters are able to choose between different candidates or different programmes (often these are programmes of particular political parties). Once elected, representatives are not subject to the control of their electors. However, representatives need to pay attention to the wishes and needs of electors if only to facilitate re-election. There are a number of major and minor political parties operating at federal and State levels and at the local government level. Election to Parliament does not depend on membership of a particular party. Political parties are able to and do advocate the reform of the Constitution, the amendment of existing laws and the adoption of new laws. There are no provisions for the representation of particular minorities in federal or State Parliaments.

629. *Aborigines and public affairs.* There are now in excess of 1,000 incorporated Aboriginal organizations, a great majority of which are based on local communities for the provision of a wide range of services such as housing, health programmes and community government. A number of national Aboriginal organizations, both statutory and community-based, have evolved in the 1980s and play an important role in the provision of advice and as a medium for policy consultation for both federal and State Governments. Furthermore, a number of Aboriginal Land Councils and Trusts have been established under federal and State legislation to hold title to and administer Aboriginal land.

630. Aboriginal involvement in shaping Australia's history, particularly in the performing arts and in sport is increasing. However, just as significant is the growing number of talented Aborigines who are taking on responsibilities in fields such as education, law, health administration, public administration and politics. At the community level, thousands of Aborigines are becoming more involved in the planning, development and delivery of services to the Aboriginal and the wider community.

631. *Disqualification of candidates for election.* Prior to the 1983 amendments to the Commonwealth Electoral Act 1918, the requirement that a candidate for election to federal Parliament be an elector or a person qualified to be an elector prevented persons, who had been convicted and were under sentence for an offence with a maximum punishment of imprisonment for one year or longer, from standing for office. As a result of the 1983 amendments, the disqualification from the franchise has been restricted to those under sentence for an offence with a maximum punishment of imprisonment for five years or longer. However, section 44 of the

Constitution continues to disqualify from membership of the federal Parliament persons convicted of an offence for which the maximum penalty is imprisonment for one year or longer. A member of one House of a Parliament cannot stand for election to another House while retaining membership of the first House. Holders of public office must resign their offices if seeking election to the federal Parliament.

632. *Territories.* There are no restrictions on bankrupts or convicted persons from taking part in elections for the Christmas Island Assembly. A person who has been convicted of an offence punishable by imprisonment for one year or more is not eligible for office in the Cocos (Keeling) Islands Council. A person who has been convicted and sentenced to a term of imprisonment of one year or more, or who is an undischarged bankrupt, is disqualified from membership of the Legislative Assembly of Norfolk Island.

633. *Voting rights.* It is an essential requirement of any democratic federal system that, as far as possible, all those who are eligible to vote are able to do so. The Australian federal system is composed of two main levels of government—Commonwealth and State. In addition, there is government at the local level which operates under legislation enacted by the State (or the Northern Territory). At each level, governments are elected in periodic elections held by secret ballot and within legislatively determined time-limits. The position in regard to Australia's Territories is discussed in part one of this report.

634. *Australian Electoral Commission.* The Australian Electoral Commission established on 21 February 1984 is responsible for Commonwealth electoral and referendum administration. The Commission's primary functions include:

(a) Maintaining Commonwealth electoral rolls and enforcing the law on compulsory enrolment;

(b) Conducting elections for Senators and Members of the House of Representatives and referendums on proposed laws to alter the Australian Constitution, and enforcing the law on compulsory voting;

(c) Promoting public awareness of electoral and parliamentary matters, for example, by conducting education and information programmes;

(d) Providing information and advice on electoral matters to the Parliament, government departments and authorities of the Commonwealth;

(e) Conducting and promoting research into electoral matters;

(f) Publishing material on matters that relate to its function;

(g) Conducting elections for officials of trade unions and other industrial organizations registered under the provisions of the Conciliation and Arbitration Act;

(h) Considering and reporting to the Minister on electoral matters referred to it by the Minister and such other electoral matters as the Commission thinks fit.

635. *Franchise.* For federal and State elections, the general rule is that voting is compulsory for all Australian citizens. There are three basic qualifying condi-

tions for eligibility to vote in elections to the federal and State Parliaments: age, nationality and residence. Generally, all Australian citizens who are normally resident in a relevant electoral division and who are at least 18 years of age are both entitled and obliged to enrol and to vote. The entitlement of British subjects to enrol as voters, which was referred to in Australia's initial report, has been removed. In May 1981 it was announced that the federal and State Governments had agreed that Australian citizenship should be the appropriate nationality qualification for the franchise, except that no person then currently enrolled as an elector should be disenfranchised. Legislation has been enacted subsequently in most jurisdictions so that British subjects, other than Australian citizens, who were not enrolled as voters at the time the legislation was enacted would not be able to enrol and to vote unless or until they became Australian citizens. The position in the Territory of Norfolk Island is different from that in other jurisdictions. Norfolk Island residents are not entitled to vote in elections for the federal Parliament. In May 1978 the federal Government announced that no decision should be taken on the matter of federal parliamentary representation until consultations had been held with the Norfolk Island Legislative Assembly. The Assembly has not sought to initiate such consultations. The Norfolk Island Legislative Assembly has provided a form of representative government for the Territory since 1979. The qualifications for the franchise in elections for the Assembly are age and residence in the Territory for a minimum period. Norfolk Island residents are not liable under federal laws to taxation on income derived on the island and the Territory has its own social security scheme.

636. *Local government franchise.* For local governments, Local Government Acts (enacted by State Parliaments) provide for periodic elections and the voting rights of electors. The electoral schemes vary in the different jurisdictions. In South Australia all residents are entitled to vote in local government elections irrespective of whether or not they are Australian citizens. In such elections persons eligible to vote are also eligible to stand for elections. (In a large number of jurisdictions voting is compulsory and on the same franchise as for the relevant State.)

637. *Aborigines.* Since the 1983 amendments to the Commonwealth Electoral Act, Aborigines, like all adult eligible Australians, are compelled to enrol and vote in federal elections. The Australian Electoral Commission's Aboriginal Electoral Information Service utilizes special teaching programmes and community networks to ensure that Aborigines are able to fulfil their duties and exercise their rights as Australian citizens.

638. *Prisoners.* Some limitations on the rights of prisoners to vote were noted in Australia's initial report. In regard to federal elections, the Commonwealth Electoral Act was amended in 1984 to provide that any elector who, by reason of imprisonment, is precluded from attending at a polling booth to vote has the right to apply for a postal vote. Alternatively, prisoners may apply to be registered as general postal voters. Thus, apart from the disqualification from enrolment of persons convicted and under sentence for an offence punishable by imprisonment for five years or longer, there is no federal legis-

lative impediment to prisoners exercising their right to vote. The Parliamentary Joint Select Committee on Electoral Reform is considering amendments to the Act to deal with prisoners' difficulties in meeting residential requirements for voting or maintaining enrolment at their jail addresses when they are moved from jail to jail. Arrangements are made by prison authorities to enable prisoners to exercise their right to vote, normally by postal vote.

639. *Disqualification of voters.* The following persons are disqualified from enrolment and voting in federal elections: persons of unsound mind; persons who have been sentenced for an offence with a maximum penalty of imprisonment for five years or longer; persons convicted of treason or treachery and not pardoned; holders of temporary entry permits; and prohibited non-citizens. Special enrolment provisions are available for Members of Parliament, overseas electors, itinerant electors, 17-year-olds, persons stationed in the Antarctic, and those who want "silent enrolment".

640. *Postal voting.* Those who have problems in attending a polling booth on polling day, for example, because they live in a remote area, or because of religious convictions, may make special arrangements by applying for a postal vote. Postal voting facilities are available to a federal elector who:

(a) Throughout the hours of polling on polling day, will not be within the State or Territory for which he or she is enrolled;

(b) Throughout the hours of polling on polling day, will not be within 8 kilometres by the nearest practicable route of any polling booth open in the State or Territory for which he or she is enrolled for the purposes of an election;

(c) Throughout the hours of polling on polling day, will be travelling under conditions which will preclude him or her from voting at any polling booth in the State or Territory for which he or she is enrolled;

(d) Is seriously ill or infirm, and by reason of such illness or infirmity will be precluded from attending at any polling booth to vote, or, in the case of a woman, will be precluded, by approaching maternity, from attending at any polling booth to vote;

(e) Is, at a place other than a hospital, caring for a person who is seriously ill or infirm or approaching maternity and by reason of caring for the person will be precluded from attending at any polling booth to vote;

(f) Throughout the hours of polling on polling day, will be a patient in a hospital and be unable to vote at that hospital on that day, or have his or her vote taken by a mobile polling team prior to polling day;

(g) Is, by reason of his or her membership of a religious order or by religious beliefs:

(i) Precluded from attending a polling booth; or

(ii) Precluded from voting throughout the hours of polling on polling day or throughout the greater part of those hours; or

(h) Is, by reason of:

(i) Serving a sentence of imprisonment; or

- (ii) Being otherwise in lawful custody or detention, precluded from attending at any polling booth to vote.

641. Absentee voting is available on polling day for those people outside the division but within the State for which they are enrolled. Special mobile polling facilities are provided for some nursing homes, hospitals and remote areas of the country. In some States there is an exemption from voting in favour of people whose religious convictions would preclude them from so doing. The question of an exemption at the federal level is being considered by the federal Parliament's Joint Select Committee on Electoral Reform.

642. *Language difficulties.* Non-English-speaking persons may experience some difficulties in enrolment and voting. The Australian Electoral Commission attempts to alleviate this by printing pamphlets and posters for general distribution in several of the most common ethnic languages in Australia. In addition, the Australian Electoral Commission arranges for the broadcast through the ethnic media of short but informative messages concerning the electoral rights and duties of citizens, and how those rights can be exercised. Specific media activities directed at ethnic groups (for example, poster campaigns) are pursued during election periods.

643. *Size of electorates.* Australia accepts the general concept of universal and equal suffrage. In Australia's initial report (paras. 420-422) reference was made to the fact that some rural electorates contained smaller numbers of persons than some urban electorates and to the following declaration which was included in Australia's instrument of ratification:

The reference in paragraph (b) of article 25 to "universal and equal suffrage" is accepted without prejudice to laws which provide that factors such as regional interests may be taken into account in defining electoral divisions . . .

This declaration has since been withdrawn (see para. 60 above) and progress has been made towards a greater degree of equality in voting value, as measured by the size of electorates.

#### *Federal electorates*

644. Section 24 of the federal Constitution provides that the number of members of the House of Representatives chosen in each of the States "shall be in proportion to the respective numbers of their people". Section 7 of the Constitution requires equal representation in the Senate of each of the existing States regardless of population. The Commonwealth Electoral Act 1918 contains provisions designed to ensure that (within each State or Territory) electoral divisions for the federal House of Representatives will be approximately equal in enrolment. The basis for each electoral redistribution is a quota of electors, determined by dividing the total enrolment of the State or Territory by the number of members of the House of Representatives to be chosen therein. A redistribution may not create divisions which deviate from the relevant quota by more than 10 per cent, and must endeavour to ensure that each division within each State and the Australian Capital Territory will have an equal number of electors three years and six months after

the implementation of the redistribution. Subject to these paramount requirements, due considerations must be given, in relation to each electoral division, to:

- (a) Community of interests within the electoral division, including economic, social and regional interests;
- (b) Means of communication and travel within the electoral division;
- (c) The trend of population changes within the State or Territory;
- (d) The physical features and area of the electoral division; and
- (e) The boundaries of existing divisions in the State or Territory.

645. The timing of federal redistributions is determined according to a formula set out in the Commonwealth Electoral Act 1918, and is independent of political control. Redistributions must be effected at least every seven years, whenever there is a level of malapportionment (specified as more than one third of the electoral divisions in a State deviating by more than 10 per cent from the State average for a period of more than two months) or whenever there is a change in the number of members of the House of Representatives to be chosen in a State. Redistributions are conducted by an independent body chaired by a Federal Court judge and are not subject to any governmental or parliamentary veto. There are extensive opportunities accorded to members of the public to make suggestions and comments regarding possible boundaries and to mount objections to widely promulgated initial proposals.

#### *State electorates*

646. The principle that electorates should not vary by more than 10 per cent from the average number of electors in each electorate is now embodied in the legislation governing several State electoral systems. In other States there are far greater variations in the number of electors in electorates for one or both Houses of the legislature. These variations arise because of zoning systems which distinguish between metropolitan and non-metropolitan areas and, in one State, because the electorates themselves, as defined in the State Constitution, are unequal. The large variations in some States in the number of electors in electorates are the subject of lively debate in Australia. One of the issues in the debate concerns the consistency of relevant State electoral laws with the right to universal and equal suffrage guaranteed by this article. This issue is the subject of an inquiry by the Human Rights and Equal Opportunity Commission following a complaint made to the Commission by the Australian Democrats (a political party which at the time of writing this report had no seats in the House of Representatives but representation in the Senate).

#### *Periodic elections*

647. These are provided for by legislation in each Australian jurisdiction for each type of election as are elections by secret ballot. The periods within which elections for either House of a legislature must be held vary

from every three to every six years. The federal Parliament and the Parliaments of Queensland and Western Australia are elected for three years. The Parliaments of New South Wales, Victoria, South Australia, Tasmania and the Northern Territory are elected for four years. The free expression of the will of the electors is also protected by detailed provisions in the legislation of all jurisdictions for election polling, scrutineering and procedures. Offences are created for abuse of the system—particularly for breaches or neglect of official duty, bribery and undue influence.

*Subparagraph (c)—Access to public service*

648. It is assumed that the expression “public service” in subparagraph (c) of this article is intended to refer to public employment. In Australia the expression “public service” may be ambiguous—it is often used to refer only to what in other countries may be referred to as the civil service, or employment in government departments or authorities. Australia’s initial report noted that access to public services in Australia, such as social security services, was provided by both federal and State Governments on the basis of need. There may also be a difference in opportunities for access to a variety of cultural, recreational and educational services in Australia but this is largely due to lack of proximity to those services by people in rural and more remote areas.

649. Access to public service employment in Australia is available to all Australian citizens (and in some jurisdictions to non-citizens) on terms of equality without any of the distinctions mentioned in article 2. Permanent appointment to the federal public service is open to all Australian citizens, subject to their satisfying legislative requirements relating to medical fitness, character and, for a range of positions, educational qualifications. Selections for appointment from eligible applicants are made using a system of open competition by merit. The position is the same in the States, except that Australian citizenship is there not usually a critical entry requirement.

650. Promotion within the federal public service is based on assessment of relative efficiency. Vacant positions are usually advertised so that any officer of the service may apply for promotion. Vacant positions are often open, but need not be open, to persons outside the public service. The guidelines for “lateral recruits” into the non-executive level of the federal public service, for example, provide that persons from outside the public service may be appointed only if there is no one within the service as capable as the applicant for the relevant position. This is because the public service is considered to be a career service. An appeal against promotion on the grounds of greater efficiency lies to a Promotions Appeal Committee which is constituted independently of the original selection process to ensure impartiality. The Parliament has recently passed legislation to streamline public service promotions by limiting the appeal processes for promotions to more senior positions.

651. Under the Australian Security Intelligence Organization Act 1979, where an adverse or qualified security assessment is made in regard to the employment of a person in the federal civil service, that person has a

right to have that assessment reviewed by the Security Appeals Tribunal established by that Act.

652. The federal Public Service Act 1922 precludes discrimination in procedures for appointment, promotion and transfer in the federal public service on the grounds of political affiliation, race, colour, ethnic origin, religion, sex, sexual preference, marital status, pregnancy, age or mental or physical disability. Complaints of discrimination on these grounds are dealt with by the Merit Protection and Review Agency, which was established in 1984 to replace the Grievance and Appeals Bureau within the Australian Public Service Board. The Public Service Act also imposes on federal Government departments and agencies an obligation to have programmes which ensure that both people of non-English-speaking backgrounds and people of Aboriginal and Torres Strait Islander descent are given equal employment opportunities.

653. Federal and State anti-discrimination legislation also covers discrimination in regard to appointments to or employment in the civil services of the Commonwealth and in those States with such legislation (New South Wales, Victoria, South Australia and Western Australia). In South Australia, the Government Management and Employment Act 1985 requires the principle of non-discrimination on the ground of sex, sexuality, marital status, pregnancy, race, physical impairment or any other ground to be observed in personnel management in the public sector. Under the Tasmanian State Service Act 1984, employment within the Tasmanian State Service is based solely on the merit principle. All employment practices undertaken by the State Government are on the basis of equal employment opportunity. The Public Service Act of the Northern Territory provides that there should be no discrimination in the employment of persons in the public service.

## Article 26

### EQUAL PROTECTION OF THE LAW

654. The guarantee of equality enshrined in the phrase “equal protection of the law” is interpreted as allowing some discrimination if this can be justified on proper grounds. Further, some measures may be unequal in their current application but are designed to redress past inequalities and to ensure future equality. The discussion in other parts of this report has mentioned a number of special provisions applying to certain groups. For example, in regard to article 3, a number of affirmative action measures were noted. State and federal human rights and equal opportunity bodies also monitor the operation of laws to ensure they do not have an unjustifiable discriminatory impact.

655. Section 26 of the federal Sex Discrimination Act 1984 makes it unlawful for a person “who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth programme, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth programme, to discriminate against another person, on the ground of the other person’s sex,

marital status or pregnancy, in the performance of that function, the exercise of that power or the fulfilment of that responsibility'. The existence of this provision gave rise to an extensive review of possibly inconsistent laws. A number of laws were changed and some given temporary exemption to enable further action. A few provisions have been permanently exempted from the operation of the Act. These are mainly concerned with social welfare arrangements.

### *Racial Discrimination Act*

656. The right to equality before the law in regard to the prohibition on racial discrimination is conferred by section 10 of the Racial Discrimination Act 1975. Section 10 provides:

(1) If, by reason of, or of a provision of, a law of Australia or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour, or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in article 5 of the Convention.

657. The above provision does not apply to special measures to which paragraph 4 of article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination applies. These are special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection to ensure equal enjoyment or exercise of human rights and fundamental freedoms. Such measures are not to lead to the maintenance of separate rights for different racial groups. The operation of these provisions was the subject of consideration by the High Court in *Gerhardy v. Brown*. The main issues and findings in that case are outlined in annex 4 to this report.

658. By the operation of the principle that a Parliament cannot bind its successors, later federal legislation which is inconsistent with the Sex Discrimination Act and Racial Discrimination Act will be valid. However, the possibility of the enactment of such laws will to an extent be monitored by the Human Rights and Equal Opportunity Commission, which has the function of examining international instruments and federal laws to ensure that they contain nothing inconsistent with any human rights.

## **Article 27**

### **MINORITY RIGHTS**

659. Australia has a population composed of people drawn from many countries, in addition to the Aborigines and Torres Strait Islanders who were already present when the first European settlers arrived in 1788. All Australian Governments are conscious of the need to recognize, support and protect minorities. In particular, for many years Australian Governments have actively

pursued policies which encourage ethnic communities to participate fully in the mainstream of Australian life. The resultant policies have tended to be divided into two main streams: those relating to the Aboriginal people and those relating to other ethnic minorities.

660. The basic position in Australia is that all persons and groups have full rights to pursue their own interests, provided these are consistent with the law. In general, laws are such that the minorities specified in the article can meet together to pursue activities related to their cultures, religions and languages.

661. The protection of the rights contained in this article is provided for under the general human rights machinery which exists in Australia, the most fundamental being the prohibition on racial discrimination. Increasingly, Governments in Australia have taken special measures to provide for the needs of ethnic minorities. These measures are contained in both legislation and administrative programmes. An outline of these measures appears below.

### *Ethnic minorities*

#### *(a) Aborigines*

662. As mentioned above, policies on ethnic minorities generally have developed in two streams: policies and legislation concerned with Australian Aboriginal people and those concerned with other ethnic minorities. Throughout Australia Aborigines live a variety of lifestyles: as ordinary members of general urban or rural communities, on the fringes of towns or cities or in remote communities following a traditional lifestyle. There are different needs and problems facing Aboriginal people in each of these groupings. Government policies recognize these special needs in all jurisdictions by recognizing a basic right for Aborigines to retain, modify or develop their own cultures, customs, traditions and lifestyles in their own way.

#### *Aboriginal cultural heritage*

663. The federal Government has taken a number of significant measures which provide protection for Aboriginal cultural heritage in the following ways:

(a) The Australian Heritage Commission Act has special provisions to protect places associated with Aboriginal history, culture or beliefs. Some 3,000 individual Aboriginal sites are now included on the Register of the National Estate. The Commission consults closely with Aboriginal bodies concerned with sites. Three of the five Australian areas on the World Heritage List are of great Aboriginal significance: Kakadu National Park, Willandra Lakes Region and the Western Tasmania Wilderness National Parks;

(b) The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 provides a means for the Commonwealth to protect significant Aboriginal areas and objects. The Act complements existing State and Territory laws and is used only as a last resort where those laws do not provide effective protection of such areas and objects from injury or desecration. The Act also en-

ables the Minister for Aboriginal Affairs to make declarations setting out what can or cannot be done in respect of those areas and objects. High penalties are provided for the breach of such declarations;

(c) The Museum of Australia Act provides that one of the Museum's three major components shall be a Gallery of Aboriginal Australia;

(d) The Aboriginal Arts Board plays a significant role in helping to conserve Aboriginal culture;

(e) The export of certain important Aboriginal materials is prohibited under the Customs (Prohibited Exports) Regulations;

(f) The Protection of Movable Cultural Heritage Act 1986 provides for the protection from export of objects which constitute the movable cultural heritage of Australia. This will include objects listed on a control list relating to members of the Aboriginal race of Australia and descendants of the indigenous inhabitants of the Torres Strait Islands.

664. The Australian Government is also currently investigating ways of involving Aboriginal people in the care and maintenance of collections of Aboriginal cultural material, both in the major museums and in Aboriginal holding places. This is seen as providing a basis for a more positive approach to the return of cultural material to communities. The legislation to establish the Museum of Australia is capable of facilitating the return of material relating to Aboriginals from the national collection to Aboriginal communities. The Act also provides for Aboriginals to be involved in the development and maintenance of the Museum's planned Gallery of Aboriginal Australia.

665. The federal Government also aims to finance programmes which develop Aboriginal self-sufficiency and which represent initiatives that Aboriginals themselves believe will enhance their dignity, self-respect and self-reliance. It also aims to promote cross-cultural understanding between Aboriginals and non-Aboriginals. These objectives are maintained in the funding of Aboriginal art and cultural activities. For example, the Aboriginal Arts Board (an all-Aboriginal body which operates as part of the Australia Council) has stated its broad objectives in the following terms:

To the Board, Aboriginal culture is not simply a remnant of the past, it is a living force, with its own dynamism and momentum. The Board aims to make this living force a part of the experience of all Aboriginals and a source of pride for all Australians.

Some protection of Aboriginal culture and designs is available through the Aboriginal Artists Agency Ltd., a non-profit company funded by the Aboriginal Arts Board. The Agency's role has expanded from the protection of Aboriginal tribal arts to copyright, publishing, promotional and entrepreneurial activities.

666. The States have had legislation in place since the 1970s which provides for the identification, registration and in some cases management of Aboriginal sites. There have been no major changes to such legislation in recent years although Western Australia does have amendments under consideration. In Victoria recent legislative amendments have already led to skeletal material being returned to the control of the museum, and the total restriction on the sale of Aboriginal artefacts and cul-

tural material. Victoria is also considering further measures for the protection of the Aboriginal cultural heritage in that State.

667. In the Northern Territory, the Aboriginal Sacred Sites Act 1978 protects Aboriginal sacred sites. A significant number of sites have now been registered under the Act. There is also special legislation dealing with protection of Aboriginal artefacts. Under the Aboriginal Relics Preservation Act 1967-1976, provision is made to protect Aboriginal sites throughout Queensland. Any unauthorized interference with such sites and relics thereon is an offence. In Tasmania, the Aboriginal Relics Act 1975 provides protection for Aboriginal sites, artefacts and human remains. That Act is administered by the Director of the National Parks and Wildlife Service. The Act includes provisions enabling the Director to deal with artefacts and remains in a way which is approved by the Minister and an Advisory Council which includes representatives of the Aboriginal community.

668. In New South Wales the National Parks Act 1984 deals with Aboriginal artefacts and the use of Aboriginal areas within a series of by-laws. New South Wales has enacted the Land Rights Act 1983, pursuant to the Keen Committee report. This report also recommended new legislation to cover Aboriginal heritage and a working party is investigating these recommendations.

#### *Aboriginal studies*

669. Alongside the growing interest in Australia in the preservation and diffusion of Aboriginal culture there is increasing acknowledgement that Aboriginal science and technology is of value. Bodies such as the Australian Institute of Aboriginal Studies, the National Parks and Wildlife Service and the Commonwealth Scientific and Industrial Research Organization have begun to investigate traditional Aboriginal knowledge and expertise in areas such as the use of fire (for regeneration of flora), concepts of sickness and health, and knowledge about plants and the processing of food. Application of Aboriginal scientific knowledge is occurring through the incorporation of Aboriginal techniques into environment conservation practice in Northern Territory National Parks. Traditional healers are being used in the delivery of health services in a number of tradition-oriented Aboriginal communities. Aboriginal knowledge of, and classifications for, flora and fauna is also being incorporated into the curricula of various Northern Territory schools.

670. The Australian Institute of Aboriginal Studies is constituted by Act of Parliament to promote Aboriginal studies, to publish or assist in the publication of the results of Aboriginal studies, to encourage and assist cooperation among universities, museums and other institutions concerned with Aboriginal studies. It also assists these institutions in training research workers in fields relevant to Aboriginal studies.

#### *Broadcasting*

671. There have been a number of significant developments in Aboriginal broadcasting. In various parts of Australia, radio programmes are provided for and by Aboriginals in their own languages and in English. A

number of public radio stations have provided broadcasting time so that Aboriginals can present their own programmes. The Aboriginal Media Association, as well as Aboriginal organizations using community broadcasting facilities, are assisted by the federal Government to undertake special workshop training in radio broadcasting techniques. An Aboriginal television company, *Imparja Television*, was recently awarded the Central Australian commercial television licence.

672. The Australian Broadcasting Corporation (ABC) has a role, as a national broadcasting organization, in providing training for Aboriginal people in broadcasting skills both for careers in the ABC, and for broadcasting within the Aboriginal broadcasting organizations. With the advent of the satellite, and its potential to transmit television and radio to remote areas, the ABC is consulting with those Aboriginal communities on the impact of Western media on their cultures, and what control those communities should have on access of the media to those remote Aboriginal and Islander communities.

### Education

673. The federal Government's policies in Aboriginal education seek to ensure that full educational opportunities are available to all persons of Aboriginal and Torres Strait Islander descent and that they receive an education in harmony with their cultural values and chosen life-style which enables them to acquire the skills they desire. As most young Aboriginal children attend government primary schools, the major proportion of federal funding for this age group is made available to State Departments of Education to provide special educational support services designed to meet the distinct needs of Aboriginal students. Direct grants are also made available to Aboriginal and other independent schools.

674. A particular feature of the support services is the funding of Aboriginal teaching assistant positions in most States and Territories. This has enabled Aboriginal adults to enter paraprofessional roles undertaking such responsibilities as home-school liaison, teaching of Aboriginal studies and assisting in general teaching. Considerable emphasis is being given to funding programmes aimed at increasing the numbers of Aboriginal teachers who, in addition to usual teaching skills, will bring to Aboriginal and non-Aboriginal students a unique Aboriginal socio-cultural contribution to education philosophy and practice.

675. Government assistance is also available for Aboriginal students undertaking secondary school studies through programmes which provide financial assistance in the form of various allowances to enable Aboriginal students to take full advantage of the educational opportunities available to the wider community. Funds are available to provide academic and social support for Aboriginal students in tertiary institutions as well as financial assistance for other post-secondary school studies.

676. State programmes aimed at improving education services to Aboriginal primary school students include provision of advisory staff, in-service teacher edu-

cation and curriculum development services in areas of language development, Aboriginal studies and bilingual materials in Aboriginal languages. The Northern Territory Bilingual Education Programme commenced by the federal Government in 1973 is being continued by the Northern Territory Government. It has introduced an assessment and accreditation programme aimed at placing the programme on a firmer footing. Continuing developments in bilingual education in government and Aboriginal independent schools have also occurred in Queensland, Western Australia and South Australia. The aims of such programmes involve maintenance of Aboriginal children's languages and cultures through programmes which include them as initial and continuing segments of the school curriculum as well as ensuring that Aboriginal children obtain the skills they will require to operate without disadvantage in the wider Australian community.

677. There are also difficulties in providing education services to isolated Aboriginal communities, particularly those family groups or clans which have moved away from larger communities to return to their traditional lands. In the Northern Territory the Department of Education has responded to requests for education services from such communities by providing a 'homeland centre education programme'. This involves provision of a basic curriculum taught by a literate member of the Aboriginal family group with support from a visiting teacher and utilizing special programmed materials and instruction tapes. The provision of appropriate educational services to children of Aboriginal communities living on the fringes of country towns presents a challenge to education authorities. While special programmes and approaches are being introduced, with Aboriginal people being involved to an increasing degree, many students and schools have yet to be reached by these services. This is an area which will continue to receive close attention from Governments and education authorities.

678. The federal Government's Law Reform Commission, in its report on *The Recognition of Aboriginal Customary Laws* (Report No. 31), included the following observations on article 27:

Aborigines may be taken to be members of an ethnic minority (or perhaps a number of such minorities): under article 27 they may not be denied the right 'to enjoy their own culture'. However, it is not clear to what extent article 27 imposes positive duties, as opposed to mere requirements of abstention, upon States parties. Under the Covenant, members of minority groups, in common with the other citizens, have individual rights to family life, to freedom of religion and association. Article 27 could be interpreted as merely precluding the State from interfering in the exercise of such rights by individuals 'in community with other members of their group'. But this minimal interpretation of article 27 does not seem satisfactory. It would make article 27 into a redundant commentary on the other provisions. The view that article 27 imposes substantive obligations has been adopted by the Human Rights Committee in a decision on a communication from a Canadian Indian under the Optional Protocol to the Covenant. (Para. 175 of the report.)

The Commission concluded that the scope of article 27 in regard to recognition of customary laws was as follows:

The present position is that Australia is not precluded by its international obligations from an extensive recognition of Aboriginal customary laws (subject to protection of the 'human rights of individual Aborigines') . . . However the only international obligation with respect to the granting of such recognition at present is article 27 of the

International Covenant on Civil and Political Rights, which imposes only limited obligations in this context. (Para. 178 of the report.)

(b) *Other ethnic groups*

679. Government policy in all jurisdictions is to recognize the multicultural nature of Australian society and the existence within that society of many ethnic, religious and linguistic groups. The objective of this policy is a society with a high level of acceptance of different races and groups which offers security, well-being and equality of opportunity to all its members. Recognition and support is given to individuals or groups to preserve and develop their culture, languages, traditions and customs.

680. A major stimulus to improvements in the general standard of services to migrant and ethnic groups occurred with the federal Government's acceptance in full of the *Report of a Review of Post-Arrival Programmes and Services* (the "Galbally Report"), which was published in April 1978 in English and nine other languages. The Galbally measures were evaluated in 1982 by the Australian Institute of Multicultural Affairs, which recommended a continuation of the main thrust of migrant programmes and services on principles established by Galbally. In December 1985 the Minister for Immigration and Ethnic Affairs announced a Review of Migrant and Multicultural Programmes and Services (ROMAMPAS) to set directions for post-arrival services and programmes for immigrants over the next decade. The Review is designed to guide the federal Government in the development of its role and policies to assist overseas-born Australians and their families to achieve equitable participation in Australian society, and to refine the provision of programmes and services in line with this broad goal.

681. In 1978, after consideration of the Galbally Report, the federal Government formally accepted the following guidelines and principles in relation to programmes and services for migrants:

(a) All members of Australian society must have equal opportunity to realize their full potential and must have equal access to programmes and services;

(b) Every person should be able to maintain his or her culture without prejudice or disadvantage and should be encouraged to understand and embrace other cultures;

(c) Needs of migrants should, in general, be met by programmes and services available to the whole community, but special services and programmes are necessary, at present, to ensure equality of access and provision;

(d) Services and programmes should be designed and operated in full consultation with clients, and self-help should be encouraged as much as possible, with a view to helping migrants to become self-reliant quickly.

682. In July 1985 the federal Government decided that each Minister whose portfolio had a significant impact on migrants should provide a statement on the adoption of measures to ensure access and equity in service delivery to migrants, together with measures planned to be adopted in the following year. In April 1986 the Minister for Immigration and Ethnic Affairs tabled in Parliament an overview of action taken and required to implement the Government's access and equity policy, based

on the statements received from Government departments. The statements revealed the need for a coherent, service-wide strategy, to achieve access and equity objectives. Accordingly, the Government will adopt measures requiring all relevant departments and authorities to take steps to improve the effectiveness of their activities, and ensure that these are coordinated and monitored within the framework of progressive administrative reform.

683. In the future, the Department of Immigration and Ethnic Affairs will issue federal departments and authorities with a statement of guidelines, which will require them to:

(a) Review at regular intervals, monitor and evaluate all services and programmes to ensure that they respond to the diverse linguistic and cultural needs in our society;

(b) Establish appropriate data collection systems;

(c) Deliver services and implement programmes in languages other than English, when that is necessary to provide effective service;

(d) Develop personnel practices which sensitize staff to cultural factors;

(e) Provide opportunities for participation by members of the ethnic communities in policy formulation and programme delivery;

(f) Develop appropriate programmes;

(g) Provide for legislative and administrative change where it is necessary to achieve access and equity objectives.

The Department of Immigration and Ethnic Affairs will assist Departments to develop three-year plans to give effect to these guidelines to the extent practicable, given current resource constraints. These plans, the first of which was due by 30 September 1986, for the triennium commencing 1 July 1987, will include groups to be targeted, proposed standards of service, and procedures and means of monitoring and evaluating performance. The needs of migrant women and their access to services and programmes will be specifically identified in these plans.

684. Departments and authorities will be required to integrate access and equity plans into their corporate planning and their financial programme budgeting. The plans will identify what goals and objectives could be achieved and achievements put in place using existing resources within each relevant portfolio. Those departments which are key providers of services to migrants will be given priority attention.

685. *National Population Council.* The ethnic community has an input into immigration policy through its representatives on the National Population Council. Membership of the Council is drawn from a diverse range of community interests, including not only ethnic groups, but also voluntary organizations, trade unions, universities, industry and commerce. The Council's terms of reference are to advise the Minister for Immigration and Ethnic Affairs on, *inter alia*, the size and composition of the migrant intake, migration law and its application, citizenship laws, policy and practice, and post-arrival policies and programmes for migrants.

686. *Office of Multicultural and Ethnic Affairs.* In 1986 an Office of Multicultural and Ethnic Affairs was established within the Department of the Prime Minister and Cabinet. The new Office, which will come into being in January 1987, will have the responsibility of ensuring that relevant advice is available to the Government for day-to-day consideration. It will thus overtake and enhance some of the present functions of the Australian Institute of Multicultural Affairs (AIMA), which will cease to exist after the Office is set up. In transferring functions to the new Office, and through a review of the present advisory structures, the Government is committed to ensuring that the programme developed by AIMA is strengthened through the new arrangements. It is proposed that former AIMA Council members will be represented on an advisory body reporting directly to the Minister for Immigration and Ethnic Affairs.

687. *States.* Through the Ethnic Affairs Commission Act 1982, the Victorian Government has established a new Commission designed to promote the needs of all ethnic groups and monitor the development of government services for ethnic communities. Improved interpreter and translation services are being provided. Migrants will be protected against discrimination in employment, training and services of the law, and education services for migrants are being improved. Both New South Wales and South Australia also have Ethnic Affairs Commissions performing similar roles.

688. *Ethnic media.* Special programmes have been initiated by the federal Government designed to strengthen the place of ethnic minorities in all cultural areas, with those often seen to have the greatest impact being the initiation of ethnic radio and television services. Broadcasting in Australia is a federal responsibility and the Special Broadcasting Service (SBS) was established as a statutory authority to provide multicultural radio and television services. In addition to broadcasting, many newspapers and over 100 periodicals are published in Australia partly or wholly in languages other than English and are editorially and financially independent of the Government.

689. *Cultural heritage.* Cultural agreements entered into between Australia and foreign Governments provide a further means of promotion of mutual understanding and the maintenance of ethnic cultures. By early 1981, cultural agreements were current with the Governments of China, France, Greece, India, Indonesia, Italy, Japan, Malaysia, the Philippines, the Republic of Korea, Romania, Singapore, Thailand, the Union of Soviet Socialist Republics and Yugoslavia. Further agreements are under negotiation.

690. *Australia Council.* The Australia Council has also developed closer links with ethnic communities and works to ensure that ethnic arts receive an equitable proportion of funding for cultural activities. The Council's Community Arts Board discusses with ethnic communities and artists working in the field their perceived needs and exchanges information about new initiatives, developments and publicity. A directory of ethnic arts has been published. An Ethnic Artists' Service has been established and the Australia Council's Crafts Board, in conjunction with the Ethnic Affairs Commission of New

South Wales, works towards development of opportunities for ethnic women to practise traditional crafts in a way which will result in rewarding employment and social contact. The Theatre Board of Australia also has a programme to provide professional service assistance to amateur ethnic dance groups.

691. *Languages.* Support is given in many jurisdictions to foster the use of ethnic community languages. English is the common language for social communication, and members of the community not fluent in English are encouraged to learn English. Special programmes of assistance are available for both children of school age and adults. It is recognized, however, that there will always be groups in the community who will not be able to communicate in English or whose English will not be fluent enough to enable them to function without some assistance. These groups include new arrivals, the elderly, and others. Interpreter services are therefore provided by most jurisdictions to assist migrants who have language difficulties in communicating their needs and in obtaining access to services. There is a Commonwealth funded and operated Telephone Interpreter Service in Australia, covering most urban and regional centres where people whose first language is not English live, as well as a Translation Service to deal with written documents required for settlement. There are also active programmes of support for ethnic radio, multicultural television, ethnic newspapers, the use of universal signs and ethnic schools.

#### *Education*

692. Various government-funded schemes operate to assist schools to meet the language needs of children from ethnic minorities:

(a) Community-run ethnic schools engaged in teaching language and culture to ethnic children on a part-time basis are eligible for an annual federal government subsidy for each child. The report of a major review of ethnic schools is being considered at present by the Schools Commission and may lead to different funding arrangements in the future;

(b) The federal Government via the Schools Commission's Multicultural Education Programme provides funds for government and non-government schools which are coordinated at State level by State and Territory committees drawn from all school sectors (government, Catholic, independent and ethnic schools). Funds under the Programme are available for activities such as language teaching and inter-cultural studies.

693. There have also been additional burdens placed on Governments, in particular the State and Territory education systems, by the arrival of large numbers of refugees and their children. Special programmes exist to assist these families. In particular, the federal Government has made funds available for transitional services to help refugee children adjust to life in Australian schools. The funds have been allocated for a number of purposes, including the salaries of specialist language teachers and teachers' aides, assistance with teaching and learning materials and emergency classroom accommodation. The number of Indochinese refugees entering Australia has resulted in some areas in increased facili-

ties for people of Vietnamese and Chinese-speaking backgrounds.

694. *Relations between police and immigrant communities.* In New South Wales the following measures have recently been introduced to help maintain relations between immigrant groups and the police:

(a) With regard to police training, there is a multicultural component in all training programmes for the police especially in the initial training at the Police Academy. Courses are conducted for senior police and seminars are held regularly. The police force conducts community education programmes with ethnic groups regarding the role and working of the police, and holds community consultative committees to provide a forum in which members of the community, leaders of specific ethnic groups, etc., may provide information to the police;

(b) There is now a pilot scheme under which a community relations section, including civilians, has been set up at Cabramatta in Sydney to deal with the specific problems of the Indochinese refugee communities of the area;

(c) The creation of the positions of police district community relations officers specifically to liaise with the community and government departments;

(d) The lowering of the height requirement for police recruits, which encourages people of other ethnic origins to join the police force.

695. *Malay ethnic minority.* There is a Malay ethnic minority in the Territory of the Cocos (Keeling) Islands. Section 18 of the Cocos (Keeling) Islands Act 1955 provides that the institutions, customs and usages of the Malay residents of the Territory shall, subject to any law in force in the Territory from time to time, be permitted to continue in existence.

#### *Religious and linguistic minorities*

696. Freedom of religion in Australia is discussed in detail in relation to article 18. Unlike linguistic minorities which are identified with the different Aboriginal and other ethnic groups existing in Australia, religious minorities are not necessarily so closely identified with these ethnic groups. As Australia does not have a particular recognized "State Church" or religion, it may well be inaccurate to think in terms of the existence of real religious minorities in this country. All religions are capable of existence and ethnic and religious communities are free to practise their religious beliefs. There is no restraint on any use of ethnic languages, including languages used by religious groups in their places of worship. There are few restrictions (as indicated in relation to art. 21) on the right to assemble and such restrictions as do exist are considered not to impede the peaceful meeting for lawful purposes of members of groups which are the subject of article 27. As indicated above, Governments have instituted a number of programmes to assist groups to maintain their own languages.

## ANNEX

### Reference documents submitted with the present report\*

1. Area of States and Territories. Population of States and Territories. Australian Bureau of Statistics. *Summary Characteristics of Persons and Dwellings.*
2. Press release by the Federal Attorney-General, Senator Gareth Evans Q.C., 10 December 1984. *International Covenant on Civil and Political Rights—Removal of Reservations and Declarations.* Text of Australia's original reservations and declarations regarding the International Covenant on Civil and Political Rights. Copy of the instrument withdrawing certain reservations and declarations (see also CCPR/C/2/Rev.1).
3. List of reports and occasional papers of the national Human Rights Commission.
4. Significant Racial Discrimination Act cases.
5. Table of participation of women in Parliament between 1974 and 1984; table of representation of women in the higher levels of the Australian public service.
6. Table outlining the operation of federal and State anti-discrimination legislation.

\* These documents, in English only, have been provided by the Australian Government and are kept in the files of the Secretariat.