Chapter Five

International Tribunals and the Attack on Australian Democracy

Senator Rod Kemp

In 1986 the Australia Act, which severed appeals to the Privy Council, was passed with the support of all parties. It took the Labor Governments five years to overturn the philosophy of this Act.

Arguing against appeals to the Privy Council, Gough Whitlam said:

". . . the High Court of Australia [must be] the final court of appeal for Australia in all matters . . . It is entirely anomalous and archaic for Australian citizens to litigate their differences in another country before judges appointed by the government of that other country."

In 1991 the Hawke Government ratified the First Optional Protocol to the UN International Covenant on Civil and Political Rights (ICCPR), which allowed individual Australians to take complaints to the UN Human Rights Committee.

In February, 1993 the Keating Government further opened the doors for Australians to "litigate their differences" before the UN by recognising the competence of two other UN committees the Committee on the Elimination of Racial Discrimination and the Committee Against Torture to consider complaints from individual Australians.

These decisions were apparently taken without any Cabinet consideration. There was very little public debate. The Liberal State and Territory Governments objected to the decisions.

This paper focuses on the role of UN human rights committees in relation to our legal and constitutional system.

However, the activities of the International Labour Organisation and its plethora of committees such as the Committee on the Freedom of Association, are also relevant to this paper, particularly in view of the heavy reliance of the Keating Government on ILO conventions for recent industrial relations legislation.

This paper argues that, as a result of the Government's decision to involve UN committees in our domestic disputes:

Australia's independence has been compromised; and

our democratic institutions are being undermined.

The paper also contends that the UN committees themselves are ill-suited to taking any role in a sophisticated legal system.

Barely a week goes by where a UN or ILO Committee does not form the basis of a newspaper story. In the last three weeks, the following reports have appeared:

The Attorney-General, Mr Lavarch, has recently announced that he will be bringing in legislation to override Tasmanian laws on homosexuality following the finding by the UN Human Rights Committee that these laws were in breach of an international covenant.

UNESCO's World Heritage Bureau, according to a report in The Australian (5 July, 1994), is going to hear concerns that the Tasmania World Heritage area created in 1989 is in danger. The report said that this may help Senator Faulkner, the Minister for the Environment, stop wilderness logging.

The Australian Chamber of Commerce and Industry announced (The Australian, 14 July, 1994) that it will challenge the Government's industrial relations laws before the ILO Committee on Freedom of Association.

The former Labor Finance Minister, Peter Walsh, summed up the situation in an article earlier this month entitled Free men who bow to the UN. He argued:

"I am not and never have been a monarchist, but find it ironic that so many contemporary Australians determined to protect us from the non-existent threat of English tyranny, fall over each other in a scramble to surrender Australian sovereignty to a ragtag and bobtail of unrepresentative United Nations committees accountable to nobody."

In his first major speech on becoming Leader of the Opposition, Alexander Downer identified the role that the UN was playing in the Australian Constitution and legal system as an important issue.

"We believe that the protection of Australia's national interests is most effectively upheld by Australians throughout our Parliaments, our courts and other bodies, and not through UN or other international committees that are ill-suited to playing any direct role in the Australian legal system and many of which are themselves widely recognised as being in need of reform."

And further:

"Labor will continue to make Australian law accountable to foreign tribunals, we will ensure that Australian law is made in [Australia] and by Australians."

Under the Hawke and Keating Governments, UN conventions often provide the constitutional head of power for the law, the UN committee or bureau monitors performance, and in some cases a UN committee or ILO committee can adjudicate disputes.

There are great ironies in relation to these important legal and constitutional developments.

First, Australia's No.1 republican, Paul Keating has led the way in ceding Australia's independence and sovereignty to United Nations committees.

Second, our politicians who speak most about human rights, such as Senator Evans, have ignored a basic human right of the Australian people by omitting to check whether they want United Nations committees to become actively involved in Australian domestic disputes.

The decisions to involve UN human rights committees in Australian domestic disputes did not require an act of Parliament. As with all treaties, this decision was simply a matter for Executive Government.

Australians know virtually nothing about the procedures of these committees, the quality of the members who will be making rulings on Australian disputes, or the impact their decisions are likely to have on Australian law.

These developments stand in sharp contradiction with the view that in a democracy, the people should be subject to laws enacted by their parliaments and interpreted by their judges.

National Sovereignty

Until recently there was no argument that there has been a "tendency for the United Nations to limit national sovereignty".

As the Joint Parliamentary Committee on Foreign Affairs, then chaired by ALP Senator Chris Schacht, pointed out:

"This evolution, therefore, increasingly demands a reconsideration of the principle of national sovereignty. United Nations conventions, now covering a wide range of activities, inevitably change the character of domestic institutions, affect domestic legislation and extend accountability beyond the usual domestic constituency." [emphasis added]

(Senator Schacht, ironically, moved the resolution at the ALP Hobart Conference in 1991 calling for Australia to become an "independent republic".)

The late Justice Murphy, one of the Labor Party icons and mentor of Senator Evans, had no doubt that foreign tribunals compromised Australian sovereignty and independence.

In 1973 the Queensland Government passed legislation to allow appeals to the Privy Council from the State Supreme Courts. When the matter reached the High Court in 1975 Justice Murphy ruled:

"The establishment by an Australian State of a relationship with another country under which a governmental organ (judicial or otherwise) of that country is to advise the State on the questions and matters referred to in the Act, is quite inconsistent with the integrity of Australia as an independent sovereign nation in the world community. It is not within the legislative competence of the Parliament of any State to compromise or attempt to compromise Australian sovereignty and independence."

Why Involve the UN Committees?

The republican debate, however, has made it very difficult for the Labor Government to concede that UN conventions and the involvement of UN human rights committees limit sovereignty.

Internationalism almost inevitably involves the idea that increasing power must be given to international bodies at the expense of sovereign states.

Most people would not object to a moderate internationalism where national interests are clearly advanced in a tangible way through binding international agreements. Each country trades off its freedom of action to ensure the greater good for its own citizens. The GATT round is an obvious example.

But the internationalism that is espoused by Senator Evans seems to be based more on the belief that Australia should trade off our national sovereignty, our capacity for independent decision making, in the expectation that this will contribute towards building a new world order.

According to Senator Evans, a key aspect of "The New Internationalist Agenda" has been:

"[to] encourage adherence to existing human rights instruments; to ensure the effective operation of monitoring machinery; and to expand the body of human rights treaties in specific areas."

However, he has recognised that this can lead to legal consequences for Australia, saying:

". . . if you are going to have credibility in advancing those universal themes, you have to be prepared to accept the jurisdictional consequences of their application to you."

Justifying the decision to involve UN committees in Australian domestic activities, Senator Evans said:

"Australia's accession to the First Optional Protocol underlines the importance accorded by the Government to the protection of human rights, and our conviction that the human rights performance of Australian governments at all levels should be fully open to international scrutiny."

In other words, we should allow the UN to become involved in our domestic activities, to make rulings on our domestic disputes and to abide by those rulings; all in the hope that other countries will be ultimately prepared to follow our example.

This new internationalist agenda of Senator Evans seems to be based more on faith than a realistic assessment of international relations.

However, lest there is the assumption that Senator Evans has become irretrievably utopian, there is a high degree of political self-interest involved.

By ceding sovereignty to international organisations, the Labor Government has been able to acquire powers over the States.

This is a far quicker way to alter the Constitution than by referendum.

A referendum, of course, requires the involvement of the Australian people in a decision to alter the balance of powers in our federation. A multilateral treaty is simply an executive decision: it doesn't even have to be approved by the Parliament, and often not even approved by Cabinet.

A case study: Avoiding Democracy via Geneva

One dramatic example of how democracy can be avoided by taking the road to Geneva can be seen in the ratification of ILO convention No.158.

The Commonwealth Government on six separate occasions through referenda has tried to acquire wider powers over employment, industrial relations and wage fixing. On all six occasions the Australian public have refused these additional powers.

However, the use of ILO conventions, relying on the High Court's current wide reading of the external affairs power, has provided the Labor Government with powers that the Australian people have rejected.

This has caused a huge shift in the balance of powers between the State and the Federal Governments in the area of industrial relations.

Just prior to the last election, the Keating Government was facing a major challenge to the industrial relations system with the election of the Kennett Government in Victoria. In order to protect the power and privilege of the trade unions in the Victorian industrial relations system, the Federal Government decided it would legislate.

Using the Kennett industrial relations reforms as a pretext, the Keating Government went beyond providing an escape route for unions in the Victorian system, further ratified ILO Conventions and legislated to impose minimum standards on all workplaces.

In one area, termination of employment, the Commonwealth did not at the time have the support of an ILO convention. It therefore proceeded to ratify ILO convention No. 158 on the termination of employment in the hope that it would provide partial support for the wide ranging legislation that it had in mind.

This convention, it should be noted, was entered into for the purpose of empowering the Commonwealth to make domestic laws. It may, therefore, amount to a non bona fides exercise of the external affairs power.

The significance of ILO convention No. 158 is that it allowed the Commonwealth Government for the first time to prescribe conditions relating to the termination of employment of all Australian workers and not only those covered by Federal awards. As a result, workers covered by State awards, and workers outside the award systems, are now covered by Federal industrial laws.

(ILO convention 158 has been ratified only by some seventeen other countries. Of the major industrial countries, only France and Sweden have ratified this convention. The countries that Australia has followed include Cameroon, Cyprus, Gabon, Malawi, Niger, Slovenia, Uganda, Venezuela, the Yemen Republic, Yugoslavia, Zaire and Zambia.)

In the past, normal practice had been for State and Federal Governments to bring the laws into line with the convention before it was ratified. The Commonwealth Government was then able to assure the ILO that domestic law and practice was consistent with the convention.

Rather than the convention being a reflection of current legal practice, the Commonwealth Government was determined to use ILO convention No. 158 as a constitutional battering ram.

In itself, this abuse of the ILO system is bad enough. The secretive and undemocratic way in which these significant changes were effected is equally worrying.

In December, 1992 the Government decided it was going to ratify this convention. On February 8, 1993, hours before the dissolution of the House of Representatives, the Governor-General approved its ratification. No media release was issued. This was done in a way calculated to minimise public debate. Why inform the people of this controversial decision, particularly while an election was underway?

Ratification of ILO convention No. 158 was opposed by most States (including apparently the Labor State of Queensland) and the Northern Territory. Only South Australia and the ACT

supported the Commonwealth position. The Australian Chamber of Commerce and Industry also opposed ratification.

In a sense, Labor placed its union mates in a "no lose" position. If Hewson had won the election, this ILO convention could have formed the basis of complaints to the ILO against aspects of Hewson's industrial relations legislation.

On the other hand, a re-elected federal Labor Government would use this ILO Convention to help sideline the industrial relations policies of the Kennett Government. This is precisely what happened.

Last year Laurie Brereton introduced radical industrial relations legislation which used this ILO convention, along with a number of other treaties, to radically change our industrial relations system.

But the story doesn't end there. The section of the 1993 Industrial Relations Reform Bill dealing with the retrenchment of workers (based on the ILO convention No. 158) caused massive employer resistance. A new bill was brought in in May, 1994 which made some changes on the retrenchment provisions. The Government claimed that this bill, despite some major changes to the 1993 Act, was also consistent with the ILO convention No. 158.

Or was it?

A complaint to an ILO Committee could be lodged on behalf of an individual.

Where successful, such a complaint to that foreign committee based in Geneva could require the Government to intervene either directly in the dispute or pass amending legislation.

As J T Ludeke (formerly Deputy President of the Australian Conciliation and Arbitration Commission) has pointed out:

"The present Government has been highly innovative, and important elements of industrial law are now based directly on ILO conventions and recommendations. In these circumstances there is little doubt that in accepting these obligations, this Government has also accepted the obligation `to secure . . . the effective observance' of the conventions on which it relies and the other conventions which Australia has ratified.

"And that means accepting the rulings of the appropriate ILO agency established for the purpose of adjudicating on complaints about the way governments give effect to Conventions."

Impact of UN human rights committees

Although J T Ludeke was referring to an ILO committee, his arguments apply with equal force to UN committees and their role in the Australian legal system.

In recent months Senator Evans and Michael Lavarch have strenuously attempted to play down the significance of UN human rights committees in the Australian legal system. They recognise that most Australians, if given a chance, would not share the Labor Government's enthusiasm for foreign tribunals.

They have argued that the findings of these UN committees are only advisory and have no legal impact. Further, they state that UN treaties and the findings of the committees can be put into effect only by legislative action of the Parliament.

Michael Lavarch has argued that there is a great difference between the impact of Privy Council decisions and the findings of UN human rights committees:

". . . understand that the decision which is made by the UN committee absolutely has no impact on Australian law and of course that is the great difference between the Privy Council decision which did impact on Australia law and the decision of this body which has no impact on Australian law."

One of Michael Lavarch's predecessors as Attorney-General, the late Lionel Murphy, did not give the same importance to this distinction. In the case referred to above (where the Queensland Parliament passed legislation to allow further appeals to the Privy Council from the State

Supreme Courts), the Queensland Government argued that the Privy Council was not a court and its decisions were advisory, rather than judicial. Justice Murphy responded to this argument by saying:

"Even if it were not strictly a court, the system of reference is potentially embarrassing to the courts of Australia and use of it would tend to undermine the judicial structures provided for in the Judicature Chapter [of the Constitution]."

The arguments of Senator Evans and Michael Lavarch can be regarded as dissembling on a grand scale.

The Government wants us to believe it was very important to take these decisions to allow UN committees to become involved in Australian disputes. But at the same time we shouldn't worry too much because they have no impact.

In fact, the decision to enable Australians to take complaints to UN committees has significant legal and constitutional effects.

First, it provides an alternative plane of law to which individuals can turn to support claims which may be untenable under domestic law. In other words, individuals can now challenge, in an international forum, legislation they could not have been able to challenge under domestic law.

This is precisely the action that Mr Toonen took in relation to the homosexual laws in Tasmania. It is also the basis of the action by the Australian Chamber of Commerce to appeal to the ILO Committee of Freedom of Association over the Government's new industrial relations changes.

Second, these conventions can impact on the Australian legal system without any legislation. The fact that courts know that their judgments can be criticised by UN committees provides a powerful incentive to make judgments which they believe meet the terms of those conventions.

Justice Brennan, recognising the significant influence of the First Optional Protocol to the ICCPR in Mabo v Queensland, stated:

"The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law."

Justice Kirby, the President of the NSW Court of Appeal, has stated:

"Several of the trailblazing decisions [of the High Court in 1992] were influenced by the fact that what Australian courts decide can now be scrutinised (and criticised) by the UN body [the United Nations Human Rights Committee]."

The recent Teoh case is another example of how UN conventions can be imported into Australia through judicial decisions. In this case the deportation order against a Malaysian national was overturned because it did not take into account Australia's obligation under the International Convention on the Rights of the Child.

Third, legislatures will be pressured to take into account treaty obligations in passing laws, or face criticism of UN committees and international embarrassment if they act contrary to treaty obligations.

Previously, the only way State laws could be challenged on the basis of a treaty would be under the implementing legislation in Australian courts.

However, the ratification of the Optional Protocol to the ICCPR requires the State Parliament to look to the international covenant and its jurisprudence. State legislation can now be challenged in an international forum as inconsistent with international obligations.

Fourth, rulings of UN committees can have constitutional significance. A finding could constitute a matter relating to external affairs under section 51 (xxix) of the Constitution.

For example, the finding by the UN Human Rights Committee in the Toonen case is providing legislative justification for Commonwealth action. The Attorney-General has given notice of a bill which will invalidate legislation dealing with sexual conduct which places Australia in breach of its international obligations under article 17 (arbitrary interference with privacy) of the ICCPR.

Hence there is no doubt that these UN and ILO committees now have a significant constitutional impact in our legal system.

In view of the comments by Michael Lavarch on the Privy Council, it is instructive to assess the relative impact on our legal and constitutional system of the Privy Council and UN and ILO committees. The following thoughts may be of some relevance in this assessment.

The Privy Council pre-1986 and the UN Human Rights Committee post-1991 do have different roles in our legal system. But it does not follow from this that UN committees will have a lesser impact on our system.

The Privy Council was concerned with the implementation of Australian domestic law legislative and common law. UN human rights committees are concerned with the implementation of international conventions in Australia many of these conventions of course have never been incorporated into Australian legislation.

Access to the UN human rights committees is less restricted than access to the Privy Council, where the case must already have been heard by an Australian court and special leave given by the Privy Council for an appeal. The access to the UN Human Rights Committee is open to all individuals who have exhausted domestic remedies. In the Toonen case there was no prior court action involved.

The National Action Plan (on the observance of human rights) tabled by Senator Evans in Geneva in February, 1994 indicates that the Government will seek to inform all Australian citizens regarding the availability and nature of the complaint mechanisms to the United Nations.

A ruling by a UN human rights committee, based on a complaint from an individual, about an alleged breach of a treaty which has never been passed by the Australian parliament, can have significant constitutional effects. This is demonstrated by the fact that Attorney-General Lavarch is now taking action in the federal Parliament to overturn a State criminal law.

The fact that UN committees are not required to follow judicial procedures or judicial reasoning gives further weight to the argument that these decisions may well have a more detrimental impact on our system than the Privy Council ever had.

The argument is sometimes put that the decisions by UN committees are only advisory.

Michael Lavarch tried to have it both ways in a TV debate. I quote from the Lateline transcript:

"Michael Lavarch: Well, at the end of the day, all of these decisions are advisory decisions and it's up to Australian governments and Australian parliaments to make a decision about Australian law.

Kerry O'Brien: But you can't pick and choose, surely.

Michael Lavarch: No, we can't pick and choose and we'll act consistently, obviously."

But as Senator Evans stated categorically, "Once we subscribe to a treaty, we abide by its requirements in every detail." And as I mentioned earlier, Senator Evans said "we have to be prepared to accept the jurisdictional consequences".

An adverse finding by a committee shows that Australia is in breach of its legal international obligations. The domestic and international pressures make it very difficult to ignore these findings.

Mr Keating can hardly argue that the first ruling of a committee was so important that it is now necessary to override State criminal law, but any subsequent ruling of the committee is so unimportant that it can be ignored.

Indeed, the Government now has to face some major dilemmas as a result of Mr Keating's and Senator Evans' new internationalist agenda.

The decision by the Federal Government to involve UN committees in Australian domestic disputes will inevitably over time undermine our own legal institutions. Acceptance of a UN decision, which is critical of a High Court judgment or against an Australian Government, inevitably diminishes the importance of our own system.

On the other hand, an individual or group who win their case before a UN committee are hardly going to let the issue rest if the Government attempts to ignore the committee's view. Justice Murphy saw this danger in relation to the 1973 attempt by Queensland to allow the Privy Council to give advisory opinions:

"The existence of two ultimate courts of appeal on any question would be not only incongruous but mischievous. Any difference of opinion between the Privy Council and the High Court on non-inter se questions would naturally be exploited by litigants."

UN Human Rights Committees

We can be reasonably sure that in taking the decision to allow UN committees to sit in judgment on domestic human rights issues, Messrs Keating, Hawke and Senator Evans did not inform the Labor Caucus about the procedures and composition of these committees.

These committees are unsuited to playing any role in a sophisticated legal system like Australia's.

Indeed, the UN human rights committees do not meet the standards of judicial process and independence required for a small claims tribunal, let alone bodies whose views may affect constitutional arrangements in Australia.

Justice Evatt, who is a member of the UN Human Rights Committee, and I have had a continuing debate over the last year on the activities of these committees. We have had a frank exchange of submissions on this matter to the Joint Standing Committee on Foreign Affairs, Defence and Trade.

A book published as recently as 1990 made this observation on the UN Human Rights Committee:

"Inevitably, however, independence is relative and varies with the backgrounds of the members and the practices of their governments. It is not unique to this body that some experts seem to have been in closer contact with the authorities of their own countries than other members, if they have not acted directly under instructions; others have at the same time as their Committee membership been serving their governments in an official capacity."

Another study observed:

"The Committee is composed of independent experts but, as in other bodies of international experts, some are not independent but in fact subject to substantial control by their governments."

As with the UN Human Rights Committee, attention has been drawn to issues of impartiality and independence in relation to the UN Racial Discrimination Committee.

"Because a Committee member serves on a part-time, honorary basis, usually he must simultaneously maintain a separate profession. Only rarely do these dual roles create conflicts; judges, university professors, retired diplomats, or diplomats dealing only with bilateral relations are unlikely to receive directives from their authorities with respect to their work on the Committee. However, for a minority of members, primarily those belonging to the permanent missions of States Parties at New York or Geneva, such conflicts can be significant. They may find themselves in the awkward position of having to disregard their superiors' directives while at the Committee table. Clearly, it is incompatible with the Member's solemn oath of impartiality

if his attitude is dictated by a member of his country's permanent mission. Nevertheless, it seems that not all States Parties attach the same importance to these proprieties."

Justice Evatt concedes that "in the past some members of the committees from the eastern bloc were not permitted to act freely and independently of their governments".

Justice Evatt says that she would:

". . . personally prefer that members of the foreign service not be nominated to these committees, because of the potential for a conflict of interest to arise. But I do not think this has been a significant obstacle to the work of the committees."

In fact, nearly half of the 46 members of these three UN human rights committees to which Australians can take complaints have been former ambassadors and diplomats.

These committees are pre-eminently a UN old boys club. There are only five women out of the 46 members of the committees. The average age of members of the committees is about 60.

It is also worth noting that many members of these committees are nominated by governments which have very poor human rights records. Some 19 out of the 46 members of the three committees come from countries that are classified by Freedom House as either being not free or only partly free.

Another feature of these committees is that some of the members who will be making rulings on Australian human rights disputes are nominated by governments which do not allow complaints from their own citizens to go to these committees (see Appendix A).

For example, one of the members of the UN Committee on the Elimination of Racial Discrimination is Mr Carlos Hevia, who was nominated by the Government of Cuba. Castro has not allowed complaints from Cubans to go to this committee although Mr Hevia can rule on Australian disputes.

Carlos Hevia has been a member of the Cuban diplomatic corps, foreign affairs bureaucrat and general apparatchik since the Revolution. He was "Political Director for Africa and Asia" in the Ministry of Foreign Affairs, "took part in official special missions in Asia, Africa, Latin America and the Middle East" (where, in at least two of these regions, Cuba has interfered politically and militarily for years) and has served as the Cuban Ambassador to the UN.

It is not clear what particular human rights expertise Senator Evans or Mr Keating thinks that Carlos Hevia can bring to human rights disputes in Australia. Indeed, I have asked Senator Evans this question on a number of occasions and I have never received a satisfactory answer.

Judicial Process

The committees do not meet Australian standards of judicial process. The proceedings are not in public and there is no cross examination of witnesses.

And further, there is no automatic right of appearance for a defendant where a Government whose laws are under question is a State government.

The Tasmanian Government had to rely on the Commonwealth Government (which was supporting the complainant) to put their case to the Committee.

"Although the Commonwealth included some representations of Tasmanian views in its general submission, the Commonwealth submission substantially accepted Mr Toonen's complaint, leaving the Committee to make a decision on the basis of the views of one side only, while the Tasmanian Government, whose laws were the subject of the complaint, had no standing to represent its case. This procedure, although consistent with the fact that international law only recognises sovereign nations, does not seem to accord with Australian notions of natural justice."

One of the criticisms which has been made of the UN Human Rights Committee is that because it is not a court of law, it does not give reasoned legal opinions.

As Anne Twomey, constitutional lawyer with the Parliamentary Research Service, has pointed out:

"The Committee's view on the Toonen complaint is a good example. The Committee stated its view that `sex' includes `sexual orientation' without giving any reason. It is extremely difficult for countries to interpret a treaty, if they are not aware of the reasoning by which a conclusion is reached. The reasoning, if revealed, may be relevant to the interpretation of other terms and provisions in the treaty, but unless it is made clear by the Committee, the Committee's reasons can only be a matter of speculation."
Senator Evans has conceded that determinations of the UN committees are "perhaps less meticulously argued than we might think ideal".
It is of concern that our High Court pays close attention to the findings of a committee whose procedures are simply not up to Australian legal standards.

Universal Standards

One of the main justifications for the establishment of the UN human rights committees is to promote universal standards of human rights.
However, one of the features of the Toonen case is that the committee appeared to adopt a "cultural relativity attitude" to the rights contained in the covenant.
The decision seems to relate only to Australia and Australian circumstances:
"In its consideration of the Australian complaint, the Human Rights Committee took into account the fact that homosexual acts are not criminal offences in other Australian States or Territories, and that there was a lack of consensus on the matter in Tasmania itself.
"If a similar complaint was brought to the Committee from a country which had strong religious and cultural beliefs about homosexuality, and where laws prohibiting homosexual acts were enforced throughout the country and were generally accepted and approved of by the population, it is possible that the Committee would consider laws criminalising homosexual acts to be `reasonable' in the circumstances."

Obligations to Report to Committees

These committees have an important role in monitoring the human rights performance of member countries.
Australia is required to report periodically to the UN human rights bodies. These reports provide an opportunity for committee members to question countries about domestic human rights developments.
The "development of reporting systems lies at the very heart of the international system for the promotion and protection of respect for human rights". It "enhances international accountability" and provides "states parties with a valuable opportunity to review policies and programs".
Last year Australia tabled its Ninth Periodic Report of the Government of Australia Under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination.
Australia was questioned on the absence of anti-discrimination legislation in the Northern Territory and Tasmania, the "deplorable" land rights situation of indigenous people, and police activities in Redfern.
"Committee members expressed regret that reports had not frankly admitted difficulties encountered in securing compliance of the various Australian States with the convention on the elimination of racial discrimination".
Presumably Carlos Hevia of Cuba was one of those expressing concern about Australia's alleged lack of conformity with the convention.
Other members of the committee such as Songu Shuhua of China, Yuri Rechetov of the Russian Federation and Ion Diaconu of Romania must have been pleased that they did not live in such a

country as Australia which, according to the Report filed by our own Government, suffers from "entrenched and institutional racism and discrimination".

The Crisis with the UN Committee system

Just as Australia has become actively involved with UN human rights committees, the whole system itself has been described as in a "crisis situation".

Professor Philip Alston of the Australian National University, in a study prepared for the United Nations on ways to enhance the effective operations of bodies established under UN human rights instruments, points out that "there appears to be a consistent recognition of the need for sustained reform".

Among other things, Alston points out that the reporting duties of member states have become too onerous, there is inadequate personnel and financial resources and lack of co-ordination between the various UN committees.

Problems are emerging of various UN human rights committees ruling on similar issues. This can produce conflicting interpretations of what the various articles may mean.

"In the longer term, it seems inevitable that instances of normative inconsistency will multiply and significant problems will result. Among the possible worst case consequences, mention may be made of the emergence of significant confusion as to the `correct' interpretation of a given right . . .."

Australians may find UN committees giving differing interpretations on what the actual UN conventions and covenants mean. This also has potential for constitutional problems, given the fact that a UN committee ruling may provide in effect a head of power for further Commonwealth intrusion into State activities.

Last month I asked Senator Evans this question:

"Do you think you could look once again at the procedures of these committees, the method of appointment of people to these committees, and the processes by which they conduct their hearings, and see whether there is, in your view, any room for reform?"

Senator Evans replied:

"I have already looked at these procedural questions and my judgment at the moment, for better or worse, whether you like it or not, is that it is working perfectly well in terms of priorities for reform of different organs within the UN system and it is not likely to rank high on my agenda for the foreseeable future given priorities elsewhere within that system."

Despite the strong arguments for reforming the UN committee system, they are not a priority for Senator Evans.

Conclusion

There is some indication that UN conventions have greater significance in countries such as Australia in which the rule of law is deeply embedded and there is a tradition of seeking to abide by international obligations.

An article in the American current affairs journal, Commentary, looked at the issue of how international agreements such as UN human rights conventions can impact on national sovereignty. It argued that international commitments can have a very different significance for the United States than for other countries.

"A recent study reports that after the EC adopted a general directive on comparable-worth regulation, only Britain felt obliged to implement it in a systematic way, even though the substance of the policy was more distasteful to Prime Minister Thatcher's government than to any other involved. France, Italy and many other countries are notoriously adept at manoeuvring around legal commitments they deem inconvenient. The United States will find it even harder than Britain to do so. For we have a system that is most ill- suited for evading or containing

awkward policy commitments which come with some momentum of prestige such as `law', or even `international law'."

The same argument applies to Australia. Other countries may be able to sign UN convention after convention without significant domestic impact. This paper has argued that foreign tribunals and foreign treaties are having a major impact on Australian democracy and our federation.

Yet the constitutional problem Mr Keating continues to raise is the need for Australia to become a republic and the alleged problems the constitutional monarchy may have for Australia.

Australia's major constitutional problem lies elsewhere the expansive use of the external affairs power, the ruthless use of ILO and UN treaties to override States, and the ceding of sovereignty to foreign committees.

To use an Australian metaphor, Mr Keating is asking us to worry whether the chop might burn on the barbecue, while the house behind is being consumed in flames.

Mr Keating and Senator Evans have led the charge at scoffing at the affection our forebears held towards Britain. But there is no doubt the Australians of yesteryear would find great amusement at the assumption by Mr Keating, Senator Evans and others that our laws are sometimes better made and adjudicated at the UN.

The current generation of Australians do not want their laws made in London or at the UN.

Appendix A

UN Human Rights Committee

(The Hawke Government decided that Australians could take complaints to this Committee in September, 1991.)

Kurt Herndl Austria
Elizabeth Evatt Australia
Julio P Vallejo Ecuador
F J Aguillor Urbina Costa Rica
Omran El Shafei *Egypt* *
Anreaas Mavrommatis Cyprus
Christine Chanet France
Tamas Ban Hungary
Nisuke Ando Japan *
Fausto Pocar Italy
Waleed Sadi *Jordan* *
Laurel Francis Jamaica
Birame N'Diaye *Senegal*
Rajsoomer Lallah Mauritius
Bertil Wennergren Sweden
Rosalyn Higgins UK *
Vojin Dimitrijevic *Yugoslavia* *
Marco Tulio Bruni Celli *Venezuela*

* Countries that have not signed and ratified the First Optional Protocol, which allows their citizens to take complaints to the UN Human Rights Committee.
Italics: countries designated by Freedom House as either not free or only partly free.
Members of the Committee on Human Rights are elected by secret ballot from a list of persons nominated by Governments which have ratified the International Convention on Civil and Political Rights.

Appendix B

UN Committee on the Elimination of Racial Discrimination

(The Keating Government decided Australians could take complaints to this Committee in February, 1993.)
M J Yutzis Argentina *
Hamzat Ahmadu *Nigeria* *
Ivan Garvalov Bulgaria
Andrew Chigovera *Zimbabwe* *
Songu Shuhua *China* *
Mahmoud Aboul-Nasr *Egypt* *
Valencia Rodriguez Ecuador
Michael P Banton UK *
Shanti Sadiq Ali *India* *
Carlos L Hevia *Cuba* *
T Van Boven Netherlands
Agha Shahi *Pakistan* *
E Ferrero Costa *Peru*
Ion Diaconu *Romania* *
Michael E Sherifis Cyprus
Regis de Gouttes France
Yuri A Rechetov *Russian Fed.*
Rudiger Wolfram Germany *

* Countries that have not ratified Article 14 allowing complaints from their own citizens to the Committee.
Italics: countries designated by Freedom House as either not free or only partly free.
Members of the CERD Committee are elected by secret ballot from a list of persons nominated by countries which have ratified the International Convention on the Elimination of All Forms of Racial Discrimination.

UN Committee Against Torture

(The Keating Government decided Australians could take complaints to this Committee in February, 1993.)
Alexis D Mouelle *Cameroon* *
Julia Iliopoulos-Strangas Greece
Mukunda Regmi Nepal *
Bent Sorensen Denmark
Alexander M Yakovlev *Russian Fed*
Ricardo G Laverdra Argentina

Peter T Burns Canada
Fawzi El Ibrashi *Egypt* *
Hassib Ben Ammar *Tunisia*
Hugo Lorenzo Uruguay

* Countries that have not ratified Article 22 allowing complaints from their own citizens to the Committee.

Italics: countries designated by Freedom House as either not free or only partly free.
Members of the Committee Against Torture are elected by countries which have ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Each country may nominate one person from among its own nationals.