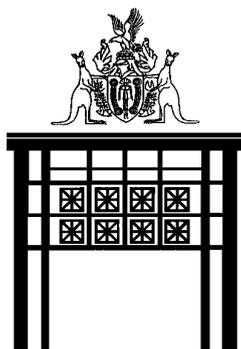


Chapter 1

DISCUSSION PAPER NO. 8

A NORTHERN TERRITORY BILL OF RIGHTS?



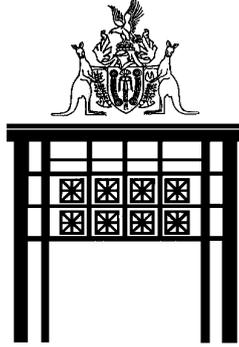
LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

**SESSIONAL COMMITTEE ON
CONSTITUTIONAL DEVELOPMENT**

DISCUSSION PAPER NO. 8

A NORTHERN TERRITORY BILL OF RIGHTS?

MARCH 1995



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

DISCUSSION PAPER NO. 8

A Northern Territory Bill of Rights?

MARCH 1995

A Paper presented for public comment by the
Sessional Committee on Constitutional Development

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A. EXECUTIVE SUMMARY

1. This Paper considers the options for adopting a Bill of Rights in the Northern Territory, as part of its further constitutional development, including the option of an entrenched Bill of Rights in a new Northern Territory constitution. It does not attempt a comprehensive analysis of the various types of rights that might be included in such a Bill of Rights, given the voluminous literature already on this subject. It does, however, look at some of the subjects that might be included in a Northern Territory Bill of Rights, and the possible mechanisms for dealing with those rights.
2. The Committee stresses that it does not advocate that such a Bill of Rights should be included in a new Northern Territory constitution. However the Committee wishes to raise for consideration whether there should be a Northern Territory Bill of Rights, and if so, how it should be administered and enforced, and also the extent to which it should be entrenched (if at all) in a new Northern Territory constitution.
3. The paper will not be considering the question whether a Bill of Rights should be included in the Australian Constitution. No doubt such a national Bill of Rights would have implications for any Northern Territory equivalent, but this is not a relevant consideration to the work of the Committee at this time.
4. The proposals canvassed in this Paper also bear upon the options that relate to constitutionally entrenching Aboriginal rights. However, these options are fully dealt within the Committee's Discussion Papers Number 4 and 6.¹
5. The purpose of this Paper is to stimulate debate and invite comments and suggestions by way of submissions to the Committee on the subject of rights in the Northern Territory generally.
6. Particular issues raised in this Paper on which comment and suggestions are sought include:
 - (a) The Merits or otherwise of adopting a Bill of Rights in the Northern Territory or whether this should be dealt with at the federal level only.
 - (b) Should there be a Bill of Rights at all.
 - (c) Whether a Bill of Rights be:
 - i. entrenched in a new Northern Territory constitution;
 - ii. in the preamble to a new Northern Territory constitution.
 - iii. be incorporated in an organic law (a form of legislation that requires a special majority of Parliament for change).
 - iv. be incorporated in ordinary legislation only.

¹ (a) 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law*, Legislative Assembly of the Northern Territory, Darwin; and

(b) 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin.

- (e) Possible contents of a Northern Territory Bill of Rights that address three major groups of rights:
- i. political and civil rights relating to an individual's right to actively participate in society and government.
 - ii. economic and social rights relating to an individual's right to basic economic independence.
 - iii. community and cultural rights relating to the exercise of rights by an individual or in community with others.
- (f) Possible contents of a Northern Territory Bill of Rights that address specific groups of rights:
- i. The right to life.
 - ii. Torture, cruel, inhuman or degrading treatment or punishment.
 - iii. Slavery.
 - iv. Rights to liberty and security of the person.
 - v. The rights of people detained.
 - vi. Imprisonment for contractual default.
 - vii. Freedom of movement.
 - viii. The right to a fair trial.
 - ix. Retrospective offences and/or penalties.
 - x. The right to privacy.
 - xi. Freedom of thought, conscience and religion.
 - xii. Freedom of expression.
 - xiii. Freedom of assembly.
 - xiv. Freedom of association.
 - xv. The right to participate in public affairs.
 - xvi. Non discrimination and equal protection of the law.
 - xvii. Other rights such as:
 - (a) The right to own property and to fair compensation for the arbitrary deprivation of property.
 - (b) The right to freedom from arbitrary or unreasonable searches, entry and seizures.
 - (c) Equality of the sexes.
 - (d) The rights of the child.
 - (e) The right to petition government.
 - (f) The right to trial by jury.
 - (g) The right to freedom of information.
 - (h) Language and cultural rights of minorities.
 - (i) Administrative rights and natural justice.
 - (j) The right to education.
- (g) Should any Northern Territory Bill of Rights be capable of being enforced by the Courts or by some other mechanism, or should it be left to administrative and parliamentary procedures to review any breaches, or as an aid to legislative interpretation only.
- (h) If the Bill of Rights is to be included in the new Territory constitution, to what extent should it be constitutionally entrenched?

B. INTRODUCTION

1. *Terms of Reference*

- (a) On 28 August 1985, the Legislative Assembly of the Northern Territory of Australia by resolution established the Select Committee on Constitutional Development.

Amendments to the Committee's original terms of reference were made when it was reconstituted on 28 April 1987. On 30 November 1989, the Legislative Assembly further resolved to amend the terms of reference by changing the Committee's status to a sessional committee. On 4 December 1990 and on 27 June 1994, it was again reconstituted with no further change to its terms of reference.

- (b) The original resolutions were passed in conjunction with proposals then being developed in the Northern Territory for a grant of Statehood to the Territory within the Australian federal system. The terms of reference include, as a major aspect of the work of the Committee, a consideration of matters connected with a new State constitution.

The primary terms of reference of the Sessional Committee are as follows:

- "(1)... a committee to be known as the Sessional Committee on Constitutional Development, be established to inquire into, report and make recommendations to the Legislative Assembly on -
- (a) a constitution for the new State and the principles upon which it should be drawn, including -
 - (i) legislative powers;
 - (ii) executive powers;
 - (iii) judicial powers; and
 - (iv) the method to be adopted to have a draft new State constitution approved by or on behalf of the people of the Northern Territory; and
 - (b) the issues, conditions and procedures pertinent to the entry of the Northern Territory into the Federation as a new State; and
 - (c) such other constitutional and legal matters as may be referred to it by -
 - (i) relevant Ministers, or
 - (ii) resolution of the Assembly.
- (2) the Committee undertake a role in promoting the awareness of constitutional issues to the Northern Territory and Australian populations."

2. *Purpose of this Paper*

- (a) This Discussion Paper constitutes the eighth in a series of discussion papers issued by the Committee. It looks at the options for adopting a Bill of Rights in a new Northern Territory constitution. It does not attempt a comprehensive analysis of the various types of rights that might be included in such a Bill of Rights, given the voluminous literature already on this subject. It does, however, look at some of the subjects that might be included in a Northern Territory Bill of Rights, and the possible mechanisms for dealing with those rights.
- (b) The Committee has reviewed a considerable body of literature in assessing the options for the Northern Territory. It has found particular assistance from the Victorian Legal & Constitutional Committee Report,² the Queensland Electoral and Administrative Review Commission Report³ and the Attorney-General's Department (ACT) Issues Paper - 1993⁴ as well as other publications.
- (c) The Committee is not to be taken as necessarily advocating that such a Bill of Rights should be included in a new Northern Territory constitution. This is an issue upon which views will differ and on which Committee members have yet to make up their minds. The Committee invites public comment.
- (d) The Committee wishes to raise for consideration whether there should be such a Northern Territory Bill of Rights, the contents of any such Bill of Rights, how it should be administered and enforced, and also the extent to which it should be entrenched in a new Territory constitution. The options in this regard are discussed below.
- (e) The Committee will not be considering the question whether a Bill of Rights should be included in the Australian Constitution. This is a separate, national issue, upon which the Committee does not need to express any opinion. No doubt such a national Bill of Rights would have implications for any Northern Territory equivalent, but at this stage the Committee is not aware of any such firm proposals at the national level.
- (f) The proposals in this Paper obviously apply to all Territorians, including Aboriginal Territorians. The question whether there should also be any constitutionally entrenched Aboriginal rights is dealt with in the Committee's Discussion Papers Number 4 and 6.⁵

² 1987. *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*, Government Printer, Melbourne.

³ 1993. *Review of the Preservation and Enhancement of Individuals Rights and Freedoms*, The Queensland Electoral and Administrative Review Commission, Brisbane.

⁴ 1993. *A Bill of Rights for the ACT?*, Attorney General's Department, Canberra.

⁵ (a) 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law*, Legislative Assembly of the Northern Territory, Darwin; and

(b) 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin.

3. *Discussion and Information Papers*

The Committee has prepared and issued a number of papers and an interim report arising from its terms of reference, as follows -

- * *A Discussion Paper on a Proposed New State Constitution for the Northern Territory*, plus an illustrated booklet of the same name.
- * *A Discussion Paper on Representation in a Territory Constitutional Convention*.
- * Discussion Paper No. 3, *Citizens' Initiated Referendums*.
- * Discussion Paper No. 4, *Recognition of Aboriginal Customary Law*.
- * Discussion Paper No. 5, *The Merits or Otherwise of Bringing an NT Constitution into Force Before Statehood*.
- * Discussion Paper No. 6, *Aboriginal Rights and Issues - Options for Entrenchment*.
- * Discussion Paper No. 7, *An Australian Republic? Implications for the Northern Territory*.
- * Information Paper No. 1, *Options for a Grant of Statehood*.
- * Information Paper No. 2, *Entrenchment of a New State Constitution*.
- * Interim Report No. 1, *A Northern Territory Constitutional Convention*.

4. *Relevant Issues Raised in Previous Committee Papers*

- (a) In the Committee's *Discussion Paper on A Proposed New State Constitution for the Northern Territory*,⁶ for ease of reference called the *Discussion Paper*, the question was raised whether the new State constitution should contain any provisions dealing with human rights.⁷

⁶ 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development, Legislative Assembly of the Northern Territory, Darwin.

⁷ 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Discussion Paper on A Proposed New Constitution for the Northern Territory*, Legislative Assembly of the Northern Territory, Darwin: 95 - 96.

ITEM T. HUMAN RIGHTS

- "1. The question arises as to whether the new State constitution should contain any provisions dealing with human rights - for example, freedom of speech, freedom of religion, freedom of assembly etc. *The Universal Declaration of Human Rights*, as adopted by the United Nations in 1948, conveniently summarises the main human rights of interest and is contained in Part X below.
2. No Australian constitution contains any comprehensive provisions of this nature. The Commonwealth Constitution contains some limited provisions which could be described as coming within this category, but the courts have in most cases given them a fairly limited application. The constitution of Tasmania contains a provision dealing with religious freedom. The constitutions of other States are silent on any matters pertaining to the citizen's rights.
3. By way of contrast the Constitution of the USA and the constitutions of the States of the USA contain comprehensive bills of rights. The constitutions of many countries have similar guarantees of civil and political rights, of the nature contained in the *International Covenant on Civil and Political Rights*. Relevant extracts from the Constitution of USA and Canada are also attached in Part X below by way of example.

- (b) Since the publication of the Committee's Discussion Paper in 1987, the Constitutional Commission's Final Report⁸ delivered to the Commonwealth Government in 1988, recommended that a new Chapter be added to the Australian Constitution on rights and freedoms of a comprehensive kind. Subsequently, in the 1988 National Referenda, a limited number of constitutional proposals of a human rights nature were put to the Australian people in conjunction with other proposals, but the referenda failed.
- (c) Neither the Commonwealth nor the States have since embarked upon a course of attempting to include a bill of rights in their respective constitutions.
- (d) The *Discussion Paper* outlined arguments for and against a Bill of Rights.⁹

-
- 4. The constitutions of some countries go further and provide for other rights of the nature contained in the *International Covenant on Economic, Social and Cultural Rights*. However, not all of these countries have an independent Judiciary, and the real value of some of these statements of rights is questionable.
 - 5. The question whether Australia should have legally enforceable guarantees of civil and political rights has been hotly debated in recent years. Australia is a signatory to the International Covenant on Civil and Political Rights and various other international human rights instruments, and has legislated to implement in part these instruments in the *Human Rights and Equal Opportunity Commission Act 1986*, the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*. However, attempts to pass a comprehensive *Human Rights Act* in the Commonwealth Parliament have not succeeded. As a consequence, generally speaking it is not possible to found a cause of action or a defence in an Australian court based solely on an internationally recognized human right.
 - 6. The *Constitutional Commission's Advisory Committee on Individual and Democratic Rights*, in its 1987 Report, has recommended that the Commonwealth Constitution be amended to expand and entrench specified human rights. These include rights relating to trial by jury and the criminal process, freedom of religion, movement, expression and assembly, equality before the law, acquisition of property on just terms, voting and citizenship rights and other matters, not limited in operation to matters over which the Commonwealth has jurisdiction. The report proposes the insertion of a new preamble in the Constitution.⁸

⁸ 1988. *Final Report of the Constitutional Commission*, Vols 1 and 2, Australian Government Printing Service, Canberra.

⁹ 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Discussion Paper on A Proposed New Constitution for the Northern Territory*. Legislative Assembly of the Northern Territory, Darwin: 96-97.

ITEM T. HUMAN RIGHTS:

- "7. There are arguments for and against the adoption of an enforceable statement of human rights in the new State constitution. Those arguments for such a proposal rely both on moral arguments and on the view that this is a desirable form of "check" against possible abuses by government or against undesirable legislation. Those arguments against the proposal stress the undesirability of the legislature abdicating its authority in these matters to the courts, the costs and delays potentially arising, the alleged adequacy of the common law as supplemented by legislation where found necessary or desirable in particular cases, and the fact that by prescribing some rights it may in some cases unduly limit other rights.
- 8. An enforceable statement of human rights entrenched in the new State constitution might or might not be expressed to be subject to express change in specific matters by later ordinary legislation.
- 9. An alternative may be to include in the new State constitution a preamble setting out basic human rights or goals for the new State and its citizens, that preamble not giving rise of itself to enforceable legal rights but merely acting as an aid to the interpretation of new State legislation and its administration."

- (e) It will be observed that the Committee did not make any recommendations on this subject in its *Discussion Paper* at that time, but left it open for public comment.
- (f) There were a considerable number of people and organisations that responded to the Committee's invitation to comment on the *Discussion Paper* concerning the question of a possible Territory Bill of Rights. Several commentators were totally opposed to the idea, preferring to leave the matter to the common law and ordinary legislation. Some others felt it was a matter which should be dealt with at a federal level only. A majority of the commentators favoured a Territory Bill of Rights, either in a preamble to the constitution or in the Territory constitution proper. Certain commentators stressed the need for the protection of particular rights. For example, the Council of Government Schools Organisation sought provisions as to the right to education. Mr R G Kimber advocated freedom of the press, freedom of information and freedom of access to land. The Women's Advisory Committee placed emphasis on provisions against sex discrimination. Other commentators stressed freedom of religion (including aspects of Aboriginal religion, such as sacred sites). A number of commentators felt that it was a matter in which the Territory should take a lead, notwithstanding the absence of any comprehensive statement of rights at a federal level or elsewhere in Australia.
- (g) A list of those persons or organisations that commented on this aspect of the Committee's *Discussion Paper* is attached to this Paper as Appendix 1.
- (h) In addition to matters dealing specifically with human rights, the Committee has already dealt with a number of related issues in its *Discussion Paper*. In part, these concerned the strong belief in the need for a representative and democratic parliamentary system in the Northern Territory; in part these concerned the recommendations designed to ensure the independence of the Territory judiciary.
- (i) In the case of the Parliament, it is of some relevance to note that the Committee tentatively advocated a fully representative unicameral legislature, directly elected by adult Territory residents to single member electorates by a system of secret ballots, for a term of a minimum of 3 years (subject to limited exceptions) with a maximum of 4 years.¹⁰ Ministers would be drawn from elected members only. The Committee therefore envisaged a constitutionally entrenched form of democracy on Westminster lines.
- (j) The Committee also envisaged that Judges of the Supreme Court of the Territory would be given constitutional guarantees of independence, such that they could only be removed from office by the Governor upon an address in the Parliament for proven misbehaviour or incapacity¹¹. The independence of the judiciary is of course of great importance to the effectiveness of any constitutionally entrenched Bill of Rights.

¹⁰ 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Discussion Paper on A Proposed New Constitution for the Northern Territory*, Legislative Assembly of the Northern Territory, Darwin: 28.

¹¹ 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Discussion Paper on A Proposed New Constitution for the Northern Territory*, Legislative Assembly of the Northern Territory, Darwin: 78, 81.

- (k) The subject of human rights was also briefly raised in the Committee's illustrated book on a proposed new State Constitution for the Northern Territory.¹²
- (l) Apart from matters specific to the Aboriginal people of the Territory, the Committee has not since had cause to discuss a possible Northern Territory Bill of Rights. It is, however, an issue that must be addressed in greater detail, hence this Paper.
- (m) To assist in deliberations, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the USA *Bill of Rights* and the Canadian *Charter of Rights and Freedoms*, as well as the relevant provisions in New Zealand, the European Community, Papua New Guinea and South Africa, are set out in Appendices 2-9 of this Paper. These are examples of provisions that might be drawn upon if the Northern Territory was to proceed with its own Bill of Rights.

¹² 1988. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Proposals for a new State Constitution for the Northern Territory - Have your Say!*, Legislative Assembly of the Northern Territory, Darwin.

C. BACKGROUND AND PRESENT POSITION

1. Statements of human rights have a long history. In Australia, it is possible to look back to the English inheritance in the *Magna Carta* and the *Bill of Rights* 1688, neither of which have an entrenched constitutional status and both of which have limited contemporary application in Australia.

The United Kingdom, unlike other countries such as France and USA, never adopted a Bill of Rights worded in more contemporary terms. As a consequence, Australia never inherited a similar document as part of its legal system.

2. The founders of the Australian Constitution, acting in accordance with this English inheritance, considered it unnecessary to frame a comprehensive statement of rights in the new Constitution. However, selected provisions of relevance were included in the Australian Constitution.¹³
3. In the past, the tendency of the High Court has been to give these few provisions in the Constitution a narrow, technical reading. There have, however, been recent indications on that Court of a more expansive approach to their interpretation.
4. The Australian Government has been active in recent decades in becoming a party to a wide range of United Nations Covenants and Conventions on human rights. An example is the *International Covenant on Civil and Political Rights*, a copy of which is at Appendix 2. In a number of cases it has domestically implemented these, in whole or part, by federal legislation, for example, the *Human Rights and Equal Opportunity Commission Act, 1986*. Such legislation, insofar as it is proportionate to and gives effect to the international instruments in question, will be valid under the external affairs powers (s51(xxix)) of the Australian Constitution. It will prevail over any inconsistent State or Territory legislation.
5. More recently, the Australian Government has acceded to the *Optional Protocol to the International Covenant on Civil and Political Rights*¹⁴ and to some other international human rights instruments, giving individual Australians a remedy of last resort to international bodies set up under those instruments.

¹³ . Provisions for the federal Parliament to be directly elected by the people (ss7 and 24).
 . The right to vote (s41).
 . Freedom from compulsory acquisition of property under Commonwealth laws otherwise than on just terms, s51(xxxi).
 . Security of tenure for federal Judges (s72).
 . Trial by jury for Commonwealth indictable offences (s80).
 . No discrimination or preferences among the States in trade, commerce, and revenue (ss51(ii), (iii), 88, 90, 92, 99).
 . Freedom of religion at the federal level (s116).
 . No disability or discrimination between residents of different States (s117).
 . No alteration of the Constitution without a national referendum of voters (s128).

¹⁴ see Appendix 2.

6. There have been a number of attempts in recent years to introduce a Bill of Rights at a federal level in Australia by way of ordinary legislation, the last being the Bowen Bill of 1985. None were enacted.
7. Reference has already been made to proposed constitutional changes put to the people by national referendum in 1988 as part of a wider set of proposals. All these proposals failed to secure the necessary majorities.
8. Since 1988, support has slowly gathered for constitutional change on the subject of rights at the federal level. The Federal Government has not, at the time of writing, committed itself to any firm proposals. However, it is a matter now on the agenda for public discussion, particularly since the 1991 *Constitutional Centenary Conference* in Sydney.
9. At a State level, a proposal was made by the Queensland Nicklin Government in 1959 to enact a Bill of Rights in that State. It never proceeded to a vote.
10. In 1987, the Legal and Constitutional Committee of the Victorian Parliament produced a report advocating the enactment in the Victorian Constitution of a non-enforceable Declaration of Rights and Freedoms, with investigation and report mechanisms by a permanent Parliamentary Committee.¹⁵ A Bill incorporating a Charter of Rights and Freedoms was introduced, but was criticised by the Opposition as having no teeth. It subsequently lapsed. However, in 1992, the *Parliamentary Committees Act* was amended to specifically vest in the *Scrutiny of Acts and Regulations Committee* the function of scrutinising every Bill that affects rights or freedoms.
11. More recently, the Queensland Electoral and Administrative Review Commission has advocated a constitutionally entrenched Bill of Rights in that State.¹⁶
12. In an Issues Paper¹⁷ issued by the Attorney-General's Department (ACT) in late 1993 submissions were invited on a range of options, being firstly an entrenched Bill of Rights either through Commonwealth legislation for the ACT or by an ACT enactment entrenched by referendum (a position facilitated by section 26 of the *Australian Capital Territory (Self-Government) Act* 1988), or secondly a non-entrenched Bill of Rights on the New Zealand model, or thirdly an Assembly Declaration of Rights and Freedoms, with an Assembly Committee to scrutinise legislation for compliance with the Declaration. The other option was the status quo. In 1994, a bill in the form of an exposure draft for an ACT Bill of Rights was circulated.
13. New Zealand now has a statutory Bill of Rights - see Item D below and Appendix 3.
14. The failure to introduce a constitutional Bill of Rights in Australia may in part be responsible for developments in the High Court, both in giving a wider interpretation to the few existing

¹⁵ 1987. *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*, Government Printer, Melbourne.

¹⁶ 1993. *Review of the Preservation and Enhancement of Individuals Rights and Freedoms*, The Queensland Electoral and Administrative Review Commission, Brisbane.

¹⁷ 1993. *A Bill of Rights for the ACT?*, Attorney General's Department, Canberra.

express provisions of relevance (see above) and also in deciding that certain rights are to be implied in the Australian Constitution. Thus, the High Court by a majority has recently enunciated an implied right of freedom of communication in political matters in the *Australian Capital Television*¹⁸ and the *Nationwide News*¹⁹ cases and in the following cases; *Theophanous*²⁰ *Stephens v WA Newspapers*²¹ and *Cunliffe*,²² the exact scope of which is still somewhat uncertain. It appears that there may also be an implied doctrine of the underlying equality of all people under law; see *Leeth's*²³ case.

15. The High Court has also been active in developing the common law, such as in the *Mabo*²⁴ case as to recognition of native title and in a variety of cases extending the concept of natural justice in administrative law.
16. There have been frequent calls for Australian courts to make increased reference to international human rights principles - for example the Bangalore Principles of 1988.²⁵ Increasingly, Australian courts are making reference to these principles in their judgments, whilst not regarding themselves as bound thereby except in so far as Australian legislation so provides.
17. The territories of the Commonwealth (which at present include the Northern Territory) and their residents were previously thought not to have the benefit of any of the express guarantees in the Australia Constitution. For example, there is High Court authority for the proposition that the constitutional guarantee of acquisition of property only on just terms²⁶ does not apply to an acquisition pursuant to laws made for a territory.²⁷ However, more recent dicta of at least one member of the High Court has thrown some doubt on this position.²⁸ The result is one of some uncertainty in territories.
18. This position may change should the Northern Territory become a new State. Absent any valid terms or conditions to the contrary as part of the creation of that new State, there seems to be no reason why all the guarantees in the Australian Constitution applicable to a State or a State resident should not apply equally to a new State or a new State resident. Arguably, it is

¹⁸ *Australian Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

¹⁹ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

²⁰ *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1.

²¹ *Stephens v West Australian Newspapers Ltd* (1994) 124 ALR 80.

²² *Cunliffe v Commonwealth* (1994) 124 ALR 120.

²³ *Leeth v Commonwealth* (1992) 174 CLR 455.

²⁴ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

²⁵ 1988. Human Rights Unit. *Developing Human Rights Jurisprudence: The Domestic Application of International Rights Norms*, Commonwealth Secretariat, London.

²⁶ s51(xxxi) - The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

²⁷ *Teori Tau v Commonwealth* (1969) 119 CLR 564.

²⁸ *Gaudron J in Capital Duplicators Pty Ltd v ACT* (1992) 177 CLR 248.

not constitutionally possible to exclude the application of those guarantees to a new State and its residents.²⁹

19. However, the limited scope of such express constitutional guarantees, even if given a wider interpretation, offers little comfort to those who advocate that a comprehensive Bill of Rights should be adopted and be applicable to the Territory.
20. It should be noted that the Committee is considering whether the Northern Territory should adopt its own, home grown constitution even before it becomes a new State.³⁰ This would include the question whether as a Territory it should have a Bill of Rights in that constitution.
21. The Committee points out that under the present *Northern Territory (Self-Government) Act 1978*, establishing the self-governing Northern Territory, there are some limited provisions of relevance to human rights. This includes the provisions for:
 - the representative direct election of members of the Legislative Assembly of the Northern Territory;³¹
 - freedom of trade, commerce and intercourse between the Northern Territory and the States;³² and
 - the requirement that Territory laws for the acquisition of property provide for just terms.³³However, these provisions can be overridden by a later ordinary Commonwealth statute.
22. The Legislative Assembly of the Northern Territory has also legislated on matters concerning human rights. For example, the *Anti-Discrimination Act* contains provisions similar to those in the States. Such legislation is supplemental to the common law, and operates in tandem with a variety of Commonwealth legislation, such as *the Human Rights and Equal Opportunity Commission Act 1986* and the *Racial Discrimination Act 1975*. None of this federal or Territory legislation has an entrenched constitutional status.
23. There is no domestic legal obligation on a State or Territory to bring its legislation into conformity with internationally accepted minimum standards of human rights. However, if the Australian Government has entered into international agreements or has incurred international obligations in these matters, it can provide the necessary constitutional capacity under the

²⁹ 1988. Toohey, J. 'New States and the Constitution: An Overview', in Loveday and McNab (eds), *Australia's Seventh State*, North Australia Research Unit and the Law Society of the Northern Territory, Darwin: 8-9.

³⁰ 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *The Merits or Otherwise of bringing an NT Constitution into Force before Statehood*, Legislative Assembly of the Northern Territory, Darwin.

³¹ see Part III of the *Northern Territory (Self-Government) Act* .

³² s49 Trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

³³ s50 (1) The power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.

(2) Subject to section 79, the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51 (xxxi) of the Constitution would apply, shall not be made otherwise than on just terms".

external affairs power for the Commonwealth Parliament to enact legislation to implement same, with the resultant capacity to override any inconsistent State or Territory legislation.

24. Conversely, there is no objection to a State or Territory legislating on human rights, providing it does not do so inconsistently with the Australian Constitution or with valid Commonwealth legislation. This capacity extends to the inclusion of human rights provisions in a State (including a new State) constitution. Whether such new State constitutional provisions would override any inconsistent Commonwealth legislation in its operation in that new State, relying on section 106³⁴ of the Australian Constitution, is uncertain.
25. In the context of a home grown Northern Territory constitution adopted prior to any grant of Statehood, and assuming that the Commonwealth was prepared to give that constitution legal force pursuant to Commonwealth legislation, the same reasoning applies as in the previous paragraph, namely, there is no lack of capacity in the Northern Territory to adopt its own constitution with a Bill of Rights. It would be subject to the Australian Constitution and to any inconsistent Commonwealth legislation.
26. The question for consideration is therefore whether the Northern Territory, as a new State or otherwise, should adopt a Bill of Rights in its own, home grown constitution, and if so, in what form?

³⁴ s106 - The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

D. POSITION IN SELECTED OTHER COUNTRIES

1. UNITED STATES OF AMERICA

- (a) The original USA Constitution did not contain a Bill of Rights. However the first 9 amendments inserted the Bill of Rights, effective in 1791. Subsequently, the 13th Amendment as to abolition of slavery was added in 1865, the 14th Amendment as to due process and equal protection of the laws was added in 1868, the 15th Amendment as to the right to vote without regard to race, etc was added in 1870, the 19th Amendment as to the right to vote without regard to sex was added in 1919, the 24th Amendment as to the right to vote irrespective of failure to pay a tax was added in 1964 and the 26th Amendment as to the right to vote of persons over 18 years of age was added in 1971. A copy of these provisions is set out in Appendix 4.
- (b) Other proposed amendments, not yet ratified, include those dealing with child labour and as to the equal rights of the sexes.
- (c) The USA Constitution emerged during a period of conflict, when the sentiment in favour of provisions designed to secure a measure of freedom was very strong, not only from the former colonial rulers, but also from USA governments of the future. The scenario was very different from that now applying in the Northern Territory. However, the underlying primary rationale is basically the same, in that the purpose of having entrenched rights was and is to secure the fundamental rights of the citizen against undue encroachment by government.
- (d) It is said that for the first 150 years of the operation of the USA Bill of Rights, these provisions were given little force and effect by the USA courts. This position has changed in the last 50 years with a more "activist" Supreme Court. This is no doubt a result of a number of factors, including the more pervasive intrusion of contemporary government into virtually all aspects of society and life, the development worldwide of human rights jurisprudence and increasing concerns about the erosion of individual rights.
- (e) Considerable controversy has surrounded the role of the USA Supreme Court in interpreting some of the provisions of the Bill of Rights, particularly those concerning rights of free speech and freedom of the press, the right to bear arms, provisions as to search and arrest and freedom of religion. In part, these concerns stem from the particular formulation of some rights considered appropriate over 200 years ago, but now of questionable value. In part, they stem from the entrenched nature of the rights, giving the Supreme Court a wide and virtually unchallengeable discretion (except in a political sense) in matters concerning their interpretation, a matter perhaps not assisted by the manner of appointment of members of the Court. The limited correlation with internationally accepted contemporary standards of human rights means that the Supreme Court has not always drawn great assistance from the developing international human rights jurisprudence. The absence of a provision guiding the courts in balancing the various rights and the lack of any provision indicating that the rights may to some extent be qualified in the wider public interest

has limited the degree of flexibility available. Notwithstanding the controversy, the Court enjoys a high reputation.

- (f) Arguably, the USA Bill of Rights, while having had a profound affect on constitutional law in that country and while in many cases securing individual rights, has by some standards failed to ensure the kind of tolerant, moderate and open society that might be considered desirable in Australia. While it is difficult to argue by analogy from one country to another, it indicates the limitations of a constitutionally entrenched statement of rights. A Bill of Rights, no matter how carefully drawn, should not be seen as a panacea for all the ills of society. It is but one instrument among many.
- (g) All USA State constitutions as distinct from the national Constitution contain a series of protections of specified rights for individuals. Most of the constitutions of the original States contained such provisions and the federal Bill of Rights was to a certain extent patterned on them. Interestingly, the Bills of Rights in State constitutions usually appear at the beginning of the constitutions in question, rather than at the end as in the federal Bill of Rights. This structural difference has been said to be significant. The last two States to be admitted into the Union, Alaska and Hawaii, included a Bill of Rights in their new State constitutions.
- (h) These State Bills of Rights were largely ignored until the 1970's when courts started to utilise their provisions in deciding cases. Many of these Bills of Rights contain provisions going further than the federal Bill of Rights. For example, they sometimes protect rights against private intrusion and not just against governments. This has led to somewhat of a rebirth of State constitutional law. It is complicated by the fact that the USA Supreme Court does not have a general appellate jurisdiction in State matters. By way of comparison, the Australian High Court does.
- (i) Some USA territories also have a constitutional Bill of Rights of their own, such as the Commonwealth of Puerto Rico (the residents of which recently voted against admission as a new State) and American Samoa.

2. CANADA

- (a) Initially, the Imperial *British North America Act* of 1867 had no provisions equivalent to a Bill of Rights. In 1960, Canada adopted a Bill of Rights by ordinary federal legislation, applicable only federally. It has only a limited effect. It provides that every federal law, unless expressly declaring otherwise, is to be interpreted consistently with that Bill of Rights.
- (b) In 1982, the *British North America Act* was patriated to Canada and became the *Constitution Act 1982* of Canada. It incorporated a *Charter of Rights and Freedoms (The Charter)*, applicable both at a federal and provincial level, a copy of which is also set out at Appendix 5. It was introduced alongside the statutory Bill of Rights, and presumably overrode that Bill of Rights to the extent of any inconsistency. Two aspects of the Bill of Rights were said to survive, namely, the provision for due

process, extending to protection of property, and the guarantee of a fair hearing in the determination of rights and obligations.

- (c) *The Charter* incorporates not only traditional individual human rights, but also mobility rights and language rights. It is an enforceable document. It provides that it does not abrogate or derogate from Aboriginal rights, but subject to the guarantee of equality based on gender. Most of the rights are subject to a right of express exceptions by statute, which can only be operative for a maximum of 5 years. It is subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In other respects, *The Charter* is constitutionally entrenched, involving a complicated amendment procedure.
- (d) *The Charter* has precipitated a great volume of litigation (mostly concerning criminal matters) and has generated considerable controversy. It has been widely excluded in Quebec by Provincial statutes.
- (e) Canadian Provinces have been active in the area of civil liberties longer than the federal Canadian Government. Provincial anti-discrimination legislation has existed for many years. In 1962, Ontario consolidated this into a *Human Rights Code*, administered by a Human Rights Commission. All Provinces followed suit, and these continue notwithstanding the adoption of *The Charter*. The Codes have a wider application than *The Charter*, extending to private individuals and firms in certain cases. The informal procedure under the Codes has no counterpart in *The Charter*.
- (f) A number of Provinces also have statutory Bills of Right, commencing with Saskatchewan in 1947. Quebec adopted one in 1975. These Provincial Bills of Rights have lost most of their importance since the introduction of *The Charter*, although in some cases they are broader in scope than *The Charter*.
- (g) The Yukon Territory adopted a statutory *Human Rights Act* in 1987. In the case of the Northwest Territories, the Commission for Constitutional Development for the Northwest Territories of Canada, recommended that the "New Western Territory" should reaffirm the rights and freedoms that are set out in *The Charter*.³⁵

3. NEW ZEALAND

- (a) The present Bill of Rights found its origins in a Government White Paper of 1985,³⁶ That Paper followed to some extent the design of the Canadian *Charter of Rights and Freedoms*, and also of the *International Covenant on Civil and Political Rights*. In its draft form it incorporated recognition of Maori rights under the *Treaty of Waitangi*, but this provision has not survived. The Paper proposed that it be enacted as an ordinary Act of Parliament, but with a statement that it was the supreme law of New Zealand such that it overrode any inconsistent law. It was to be

³⁵ 1992. *Working Toward a Common Future*, Commission for Constitutional Development, Yellowknife, Northwest Territories, Canada: 12.

³⁶ 1985. *A Bill of Rights for New Zealand*, Government Printer, Wellington, New Zealand.

entrenched to the extent that any amendment was to require a 75% majority of the members of the Parliament or a majority of electors at a poll.

- (b) The New Zealand *Bill of Rights Act*³⁷ was subsequently enacted in 1990. It omits any statement as being the supreme law and is not constitutionally entrenched. It operates merely as a statement of preferred interpretation in relation to public legislation and public actions. It cannot override other inconsistent legislation, either expressly or by implication.
- (d) Notwithstanding its limitations, it is clear that it constitutes a major break with tradition. There are signs that the New Zealand courts may be prepared to give the Bill some significant practical effect notwithstanding these limitations.

4. PAPUA NEW GUINEA

- (a) Prior to independence, the legislature enacted a *Human Rights Ordinance 1971*, enforceable as an ordinary statute in the Supreme Court.
- (b) The Constitution of independent Papua New Guinea (PNG), proclaimed in 1975, was prepared in a manner that in some ways is similar to that proposed by this Sessional Committee for the Northern Territory.³⁸ The PNG Constitution evolved from a motion of the House of Assembly to establish a Constitutional Planning Committee in 1972. Its task was to recommend a constitution for full internal self-government with a view to eventual independence. The Committee engaged in widespread public consultation and produced a Final Report in two parts in 1974.³⁹
- (c) That Final Report advocated a comprehensive constitutional *Declaration of Fundamental Rights and Freedoms*, preferring such a statement to counter arguments that this is a matter best left to the legislature and the courts. It was to be constitutionally entrenched, but subject to exceptions reasonably justifiable in a democratic society.
- (d) Following receipt of the Final Report, the House of Assembly resolved itself into a Constituent Assembly for the purpose of establishing and adopting the Constitution of Papua New Guinea as part of the transition to independence.
- (e) The PNG Constitution contains an enforceable statement of *Basic Rights* — see Appendix 6 to this Paper. A prohibition on slavery is also contained in section 253.⁴⁰ The provisions are entrenched and require a special procedure for amendment,

³⁷ see Appendix 3.

³⁸ see 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Options for a Grant of Statehood*, Legislative Assembly of the Northern Territory, Darwin.

³⁹ 1974. *Final Report of the Constitutional Planning Committee - Parts 1 and 2*, Government Printer, Port Moresby, Papua New Guinea.

⁴⁰ s253 - Slavery, and the slave trade in all their forms, and all similar institutions and practices, are strictly prohibited.

involving two separate Parliamentary resolutions at least 2 months apart, and requiring a 2/3rds or 3/4's absolute majority vote, plus publication and opportunities for debate. The suggested qualification as to laws that are reasonably justifiable in a democratic society is preserved for certain qualified rights.

- (f) In addition, the PNG Constitution contains a statement of *Basic Social Obligations* and a statement of *National Goals and Directive Principles* relating to economic, social and cultural goals for the nation, basically in a non-justiciable form.⁴¹ These statements, together with the United Nations Charter, the *Universal Declaration of Human Rights* — see Appendix 7 — and other international human rights instruments and judgments, reports and opinions thereon and a variety of other source materials, may be taken into account in determining whether or not a matter is reasonably justifiable in a democratic society.⁴²
- (g) These provisions and other related provisions in the PNG Constitution are complicated and lengthy, and it is not clear whether the high principles upon which they are based have been fully translated into practice.

5. UNITED KINGDOM

- (a) Traditionally, the United Kingdom has not espoused the cause of an entrenched written constitution, relying instead on the principle of the supremacy of Parliament and on ordinary statutes passed by that Parliament and a range of unwritten conventions supplementing the common law which for present purposes includes equitable rules. It is now firmly established that an ordinary statute can override the common law, there being no fundamental natural law principles that are beyond Parliamentary reach. Subject to changes resulting from entry into the European Community, there have been no real developments in the form of a comprehensive constitutional statement of rights since the *Bill of Rights* in 1688.
- (b) It is widely considered that this Century has seen a significant transfer of real power away from the legislature and towards the executive, with an accompanying erosion of Parliamentary authority through the party system. This has led to concerns in the United Kingdom and elsewhere that the traditional rights and freedoms of the citizen are perhaps no longer protected as much as they should be and that the rights of the citizen have come to depend too much on the exercise of executive discretions. The courts of the common law world have endeavoured to develop that common law to meet this new challenge, particularly in the area of administrative law. However, this approach clearly has its limitations. It has been supplemented by particular legislative reforms from time to time, although instigation of these reforms is now largely dependant on the will of the executive.
- (c) There has been a developing view that these traditional rights and freedoms are not sufficient of themselves to protect basic rights. This debate has received some impetus from the entry of the United Kingdom into the European Community, most of

⁴¹ see Appendix 6.

⁴² see Papua New Guinea Constitution, section 39 in Appendix 6.

the members of which are a party to the *European Convention on Human Rights* of 1950. A copy of this Convention is set out at Appendix 8 to this Paper.

- (d) That Convention incorporates a detailed statement of rights and establishes the machinery for their enforcement. There is a right for any person or group who claims to be a victim of a violation of the rights by a national contracting party that has recognised the competence of the Commission to petition the European Commission of Human Rights. This right extends to the United Kingdom. The Commission can only deal with the matter after all domestic remedies are exhausted and within a period of 6 months from the final decision. The Commission reports with its recommendations to the Committee of Ministers. There is also a European Court of Human Rights, but only the national contracting parties or the Commission can bring a case before that Court. Its jurisdiction has been accepted by the United Kingdom. The Court can only deal with the matter if the Commission's settlement attempts have not succeeded. The Court can make binding, final decisions. European Community States also have access to the European Court of Justice in human rights and other matters.
- (e) In a number of cases originating from the United Kingdom, it has been found that the law or practice of that country does not meet the standards set by the Convention.
- (f) United Kingdom courts have not accepted that the Convention is part of the domestic law of that country, and as a result the Convention cannot found a cause of action in those courts. It is clear that the Convention and the decisions under it are having a profound affect on the law of that country.
- (g) The *Maastricht Treaty* of 1992 affirmed the resolve of the members of the European Union to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law. It provides in *Article F2* that the Union shall respect fundamental rights, as guaranteed by the European Convention of 1950 and as they result from the constitutional traditions common to the member states, as general principles of community law.
- (h) A number of draft Bills of Rights have been put forward in the United Kingdom, based on the European Convention and designed to give them the force of domestic law. None have yet come into force.

6. SOUTH AFRICA

- (a) As a result of plans for the abolition of apartheid, the Republic of South Africa has had cause to consider the need for an entrenched constitutional Bill of Rights. In the South African Law Commission's *Interim Report into Group and Human Rights* of 1991, it concluded that the advantages and necessity of such a Bill far outweighed the alleged disadvantages and dangers. It was envisaged that the process of negotiations should go hand in hand with the formulation of such a Bill and the elimination from the statute book of existing inconsistent provisions.
- (b) As a consequence, the negotiation of a Bill of Rights became critical to the constitutional settlement that followed.
- (c) The new South African Constitution was introduced by an Act in 1993, in force from 1994, and repealing the whole of the previous constitution. It is expressed to be a transitional document, in that it establishes both Houses of Parliament as a Constituent Assembly to draft and adopt a future new constitution. This must conform to the *Constitutional Principles* in Schedule 4 to the 1993 new South African Constitution — see Appendix 9.
- (d) The 1993 new South African Constitution also entrenches a broad statement of enforceable fundamental rights, effective immediately.⁴³ These may be limited by provisions that are reasonable and justifiable in an open and democratic society based on freedom and equality, and in some cases providing they are necessary. They may also be qualified under certain conditions by a state of emergency and suspension and by a process of interpretation which promotes the values that underlie an open and democratic society based on freedom and equality, having regard to international law and comparable foreign case law. These provisions may only be amended at a joint sitting of both Houses by a 2/3rds absolute majority of the total number of members of both Houses.
- (e) No amendment of the *Constitutional Principles* and the requirement to comply with same is permissible.
- (f) The 1993 new South African Constitution provides for the establishment of a Constitutional Court which must certify that a future new constitution does so conform. The *Constitutional Principles* specify that South Africa is to have a democratic system of government committed to achieving equality between men and women and people of all races. Everyone is to enjoy all universally accepted fundamental rights, freedoms and civil liberties, which are to be protected by entrenched and justiciable provisions in the future new Constitution. These entrenched and justiciable provisions are to be drafted after due consideration to the fundamental rights in the 1993 new South African Constitution. The legal system is to ensure equality of all before the law and an equitable legal process, including laws, programs or activities that have as their object the amelioration of the conditions of the disadvantaged, including those on the grounds of race, colour and gender. There is to be a qualified, independent and impartial judiciary. A variety of other provisions relate to the democratic process.

⁴³ see Chapter 3 - Fundamental Rights in Appendix 9.

E. MERITS OR OTHERWISE OF A BILL OF RIGHTS IN A NORTHERN TERRITORY CONSTITUTION

1. There are a variety of arguments that have been advanced for and against a Bill of Rights and these are discussed below. In the end, it is a matter of personal assessment, having regard to these arguments. It is not a matter upon which the Committee has any fixed views at this stage. It is anxious to assess the prevailing feeling in the Territory community on the matter.
2. There is the secondary, but important, question of whether it is appropriate to have a Bill of Rights in a new Northern Territory constitution, irrespective of whether there is a comparable document at either the federal or any of the State levels in Australia. On this point, the Committee refers to the experience in USA and Canada, discussed above, indicating that Bills of Rights are not always confined to the national constitutional levels. In the absence of any national Bill of Rights and any existing firm proposals for a Bill of Rights elsewhere in Australia, the Committee does not see this as a reason why the Territory should not "go-it alone", if this is what is decided as being best for all Territorians. If the object is to ensure that the Territory operates in the future under a free and democratic system of government with a guarantee of equal rights for all Territorians, then there may be good arguments for acting in these circumstances. Any alleged deficiencies in the protection of rights elsewhere in Australia does not provide a reason for not proceeding in the Territory unless the Territory would itself be clearly disadvantaged thereby.
3. A decision on whether the Territory should adopt its own Bill of Rights will in part be influenced by the nature of the rights contained in that Bill and the manner of their enforcement and the degree of entrenchment. No doubt some people would be concerned if the Territory should, contemporaneously with the adoption of a new constitution, thereupon move into a new system of government with a rigidly entrenched and enforceable Bill of Rights, which is very difficult to change later. The consequences of such an action may (to some extent at least) be difficult to predict, with limited opportunities for correction of any mistakes. Other people may be concerned if the Territory was to adopt a statement of rights which was not enforceable by Court at the instigation of the individual, which could be easily changed and which had little influence upon existing or future laws and practices. This may be seen as too weak. There is also likely to be debate over particular categories of rights, and whether they should be included in a Bill of Rights, for example, as to the rights of unborn children as against the rights of women. A decision either way may affect some peoples' attitudes to the whole Bill of Rights.
4. The possible content of a Northern Territory Bill of Rights is dealt with in Item F below, the possible methods of enforcement of a Northern Territory Bill of Rights are dealt with in Item G below, whilst possible forms of entrenchment are also dealt with in Item G below.
5. Putting these three issues aside for the moment, it is possible to briefly summarise the main arguments for and against a Bill of Rights. The arguments for and against include :

(a) Parliamentary supremacy and the relationship with the judiciary

- (i) One of the main arguments against an entrenched Bill of Rights is that the democratically elected Parliament, chosen by and representing the people, should make any decisions on the matter of rights, and not be fettered by constitutional restraints of a rights nature on the scope of the Parliament's legislative power. The opposite of this argument is that fundamental rights are not adequately protected by a vote in Parliament and should be guaranteed by the constitution.
- (ii) Under prevailing English constitutional theory, Parliament is said to be supreme and can make any law it chooses in respect of the particular jurisdiction which it represents. This theory is mitigated in many countries by the forces of constitutionalism; that is, where there is a written, entrenched constitution which incorporates limitations on what would otherwise be regarded as a supreme form of legislative power. But subject to those restraints, the view is often taken that ultimate power in a democratic system should be vested in the elected representatives of the people through the Parliament.
- (iii) The fact is that most countries of the World now have written constitutions, and the greater majority of these contain statements of rights. Australia is one of the few countries that has a written constitution without a comprehensive statement of rights. Nevertheless, the Australian Constitution already contains a number of significant restraints on the federal Parliament's grant of legislative power, some of which relate to the federal system, others of which relate to democratic and other rights, either expressed or implied.⁴⁴ They are already enforced by the courts. In this sense, a comprehensive Bill of Rights, if inserted into the Australian Constitution, would only be an extension of the constitutional restraints that already exist, although depending on the content of the Bill of Rights, it could be a considerable extension.
- (iv) The Legislative Assembly of the Northern Territory at present is similarly restrained by certain provisions in the *Northern Territory (Self-Government) Act 1978*, by the subordinate nature of that legislature to the federal Parliament and Government, and to some extent by the Australian Constitution. Again, there is no comprehensive Bill of Rights applicable to the

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- . Provisions for the federal Parliament to be directly elected by the people (ss7 and 24).
- . The right to vote (s41).
- . Freedom from compulsory acquisition of property under Commonwealth laws otherwise than on just terms, s51(xxxi).
- . Security of tenure for federal Judges (s72).
- . Trial by jury for Commonwealth indictable offences (s80).
- . No discrimination or preferences among the States in trade, commerce, and revenue (ss51(ii), (iii), 88, 90, 92, 99).
- . Freedom of religion at the federal level (s116).
- . No disability or discrimination between residents of different States (s117).
- . No alteration of the Constitution without a national referendum of voters (s128).

Northern Territory, but the adoption of such a Bill in an entrenched form would only be an extension of these present restraints.

- (v) The practical operation of the theory of the supremacy of Parliament has to accommodate the doctrine of the separation of powers between the legislature, the executive and the judiciary. This doctrine postulates that each of these three arms will confine itself to a particular type of governmental function and will not encroach unduly on the others. The tension between them contributes to the checks and balances in the overall system of government and itself is said to guarantee a measure of freedom and democracy. This doctrine has never been fully applied in the Australian federal sphere, and does not apply at all at a State level. However, there remains a strong attachment to the notion that there should be an independent judiciary to check on the excesses of the legislature and the executive by way of judicial rulings in particular cases, particularly within the framework of a written constitution.
- (vi) The practical operation of the theory of the supremacy of Parliament has also been undermined in recent times by the great extension of the powers of executive government, a process assisted by the two-party system and other factors. This has been associated with the great expansion in the range of functions performed by governments. It is also a fact that substantial control can be exercised by the executive government over the legislative program in a Westminster type of system. This capacity is usually greater in a unicameral system. While significant elements of accountability of the executive government to the legislature remain in such a system, it is now not uncommon for concerns to be expressed about the excessive width of the powers and discretions now exercised by executive governments, largely free of legal restraint and oversight. The potential for the abuse of power and the infringement of rights and freedoms has become apparent, as indicated by a number of recent cases involving high officials.
- (vii) It is not surprising in such a scenario that there should be increasing support for entrenched statements of certain minimum standards in the form of an enforceable Bill of Rights.
- (viii) Such a Bill of Rights would obviously result in a change in the balance of power between the legislature (and also the executive) on the one hand, and the judiciary on the other hand. This is because it would be the judiciary that would have to interpret and apply the Bill of Rights in particular cases. The concern often expressed is that the Judges are not elected and are not well equipped to deal with broad policy issues, are not accountable in the same way as politicians, and should not have the ability to make decisions binding on the other two arms of government on such generalised issues as fundamental rights. It is sometimes viewed as being anti-democratic.
- (ix) A response to this view was provided by His Honour Justice Toohey in his address to the 1992 Darwin conference on *Constitutional Change in the*

1990s.⁴⁵ In that paper, he asserted that judicial review under a written constitution is not anti-democratic, but in fact an essential element in the maintenance of democracy and the rule of law. Majoritarianism through elected representatives may not necessarily equate with democracy. The entrenchment of fundamental principles, enforced by an independent judiciary, does not, in his view, entirely prevent the destruction or diminution of a society's liberal-democratic character, but it can place hurdles in the path of regressive change and provide a means both of protection against misuse of legislative and executive power and in the promotion of fundamental rights and freedoms.

- (x) The public debate following that address has tended to concentrate on the development by the High Court of implied constitutional rights, a matter of considerable controversy based on their alleged arbitrary nature. This is a separate matter from the question of the adoption of a written statement of rights. A question of judicial discretion remains in the latter case, but that discretion is not as uncontrolled as it may be for implied rights. The degree of judicial discretion in interpreting an express statement of rights may be reduced over time with the developing national and international human rights jurisprudence in any event and the consequent build up of case precedents.
- (xi) The Committee is anxious to ascertain the strength of feeling in the Northern Territory in support of an enforceable Bill of Rights in a new Territory constitution, or whether it is felt that the safeguards provided through the common law, plus a single chamber Parliament and its elected members, the Parliament being vested with very wide powers largely free of express constitutional restraints as to fundamental rights, is sufficient to continue to guarantee the rights and freedoms we have inherited in the Territory.

(b) Politicisation of the judiciary

- (i) It is argued that because of the generalised nature of statements of rights, which if given enforceable constitutional status can result in a shift in power to the courts in matters of their interpretation and application, there is much greater potential for the courts to become involved in policy and political issues than previously. This in turn might impair the standing of courts and their reputation for impartiality. An enforceable Bill of Rights would increase the potential for the court to be drawn into political controversy. It might also lead to more controversy over judicial appointments.
- (ii) In contrast to this view is the school of thought that says that all judicial acts are, to some extent at least, value laden, and that it is quite appropriate for courts within proper judicial limits to be involved in making value judgments in applying the law to particular cases, providing they have proper regard to legal

⁴⁵ 1994. Toohey, J. 'A Government of Laws, and Not of Men?' in R. Gray et al, *Constitutional Change in the 1990s*, North Australian Research Unit, Australian National University and the Sessional Committee on Constitutional Development, Legislative Assembly of the Northern Territory, Darwin: 12-25.

precedents and that their decisions are based on published, reasoned arguments.

- (iii) There are indications that the High Court in particular has in recent times come under more public scrutiny because of the controversial nature of some of its decisions. The former Chief Justice has rejected the view that the work of the Court should be confined to non-controversial issues or that it should not be subject to public scrutiny.

(c) Workload

A concern often expressed is whether the courts would be able to deal adequately with the increased workload resulting from an entrenched Bill of Rights. This might be a particular concern with the High Court if there was a federal Bill of Rights, given its present heavy load. In the case of an entrenched Northern Territory Bill of Rights, there would also be an increase in the workload for the Northern Territory Supreme Court, but the exact extent of this increase is difficult to quantify. This would include some increase in appellate work in that Court.

(d) Entrenched values

- (i) Because Bills of Rights are heavily based on contemporary values, there is a concern that entrenchment may result in the adoption of values which may change with time, but which will continue unchanged in the law. The common example cited is the USA right to keep and bear arms.
- (ii) To some extent this question can be addressed by provisions for review or constitutional change. However, too much flexibility defeats the arguments in favour of constitutional entrenchment. In addition, changing interpretations by the courts can to some extent also accommodate widely accepted changes in values. Some flexibility may be achieved by giving courts, in interpreting a particular statement of rights, the capacity to have regard to the developing human rights jurisprudence in comparable jurisdictions for this purpose.

(e) Access to courts

It might be argued that the insertion of a Bill of Rights in a Northern Territory constitution could be counter productive, to the extent that only those persons who can afford access to the courts will be able to derive any benefit. There are, however, methods of minimising any such limitations on access. In any event, it is an argument that assumes that only those parties to a case before the Courts involving the Bill of Rights will benefit, whereas clearly the affect of a binding judicial determination can have considerable consequences for the community at large.

(f) Community standards

Arguably, the adoption of a Bill of Rights can have an educative effect on the community by making people more aware of both their rights and the rights of others,

and may encourage their promotion and the improvement of community standards generally. The opposite view is that it may tend to promote minority or sectarian views or encourage what might be thought to be undesirable attitudes or conduct. This is a controversial matter, upon which the Committee expresses no opinion at this time, but would welcome submissions.

(g) Protection of the disadvantaged and minorities

- (i) One of the principle arguments for a Bill of Rights is that in a majoritarian democracy, the rights of smaller groups can sometimes fail to receive the attention they deserve and in fact they may sometimes be discriminated against by weight of decisions favouring the majority. On one view, this might be considered to be an acceptable result in that it tends to preserve the majority position and the social, religious, political and cultural values on which that majority position is based. However it has to be asked whether this is a legitimate form of justification in a diverse and multicultural Northern Territory community. The recent experiences of violence overseas, in so far as they have resulted from the inability of majorities to accept a proper role for minorities, must be considered in this context.
- (ii) The extent to which this issue is presently a concern in the Northern Territory, other than perhaps for Aboriginal Territorians — a matter for separate consideration by the Committee — is difficult to assess.⁴⁶ The Committee would welcome comments from all sections of the Territory community.

(h) The Need for a Northern Territory Bill of Rights

- (i) On one view, there is no real need for a Bill of Rights in the Northern Territory, on the assumption that the Northern Territory is already a free and tolerant society. Arguably, the rights of Territorians are already adequately protected by the legislation of both the federal and Territory Parliaments, supplementing the common law, and by the democratic forces operating on and within society generally on politicians, administrators and law enforcement officers in observing proper limits.
- (ii) The difficulty with this argument is that it fails to take into account, not only any current deficiencies in law and administration, (even if few in number), but more importantly, the possibility of future aberrant action by law-makers or in matters of administration, unchecked by any (or few) constitutional limitations on government setting minimum standards of a fundamental nature.

(i) Conclusion

⁴⁶ For further information in respect of possible entrenchment of Aboriginal rights, see

- (a) 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law*, Legislative Assembly of the Northern Territory, Darwin; and
- (b) 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin.

- (i) The Committee has not yet decided to adopt any of these arguments, or any other arguments for that matter, either for or against a Bill of Rights in the Northern Territory. It would welcome public comment and discussion on any arguments of relevance either way. A Bill of Rights, at least in a firmly entrenched form, would be likely to result in considerable changes in Territory law and practice. Much more emphasis would be placed on the courts in the protection of rights, and much would depend upon the response of the courts, and the capacity of the Judges to effectively interpret and apply the Bill of Rights. The resultant limitations on the capacity of the legislature and the Government to carry out their respective tasks must be taken into account. The need for flexibility for the Territory to respond appropriately to the rapidly changing national and international scene is of no small importance in this regard. But so is the need to retain the fundamental values of our system of government, not to be lightly thrown away in the pursuit of some transient objective or under the political pressures of the moment. It is ultimately a question of getting the right balance.
- (ii) The Committee suggests that careful thought must be given to the other three issues already mentioned before a decision on the merits is taken — these three matters are the nature of the rights to be included, the manner of their enforcement and the degree of entrenchment. These are discussed in Items (F) and (G) below.

F. POSSIBLE CONTENT OF A NORTHERN TERRITORY BILL OF RIGHTS

1. Introduction

- (a) In very broad terms, there are said to be three groups of rights:⁴⁷
- (i) political and civil rights -
Political rights are those that relate to an individual's right of active participation in society and government. Civil rights are those that relate to an individual's right to protection and freedom.
 - (ii) economic and social rights -
These rights relate to basic economic independence, including an individual's right to work and receive equal pay for equal work, and an individual's right to an adequate standard of living and freedom of family structure.
 - (iii) community and cultural rights -
These rights may be exercised individually or in community with others and include cultural and artistic rights, environmental rights and rights that relate to indigenous peoples.
- (b) There is no fixed concept of rights, although internationally accepted statements of minimum standards of certain fundamental rights provide a guide.⁴⁸ There is much controversy in the community about the content and scope of rights and the relationship between different rights.
- (c) Notwithstanding the confusion and the debate in this area, a survey of various national constitutions indicates that the type of rights most commonly given constitutional status are those in the first group, namely political and civil rights. These rights are designed to secure certain basic individual rights and freedoms in an open and democratic society and are more likely to be amenable to judicial methods of enforcement. They are particularly directed at securing these rights and freedoms against undue encroachment by government. They encompass the rights to freedom of speech and public debate, freedom to hold and practice a religion or belief, freedom from arbitrary search, arrest or imprisonment and other matters, commonly taken for granted in Australia but not necessarily fully protected by Australian law. It is difficult to conceive of how a Bill of Rights could be adopted within Australia if it did not, to some extent at least, incorporate that group of rights.
- (d) If a Bill of Rights is to be included at all in a new Northern Territory constitution, then arguably what might be considered to be the most fundamental of these civil and political rights should be included in that Bill of Rights in so far as they are relevant in the position of the Northern Territory. Some examples of particular categories of civil and political rights that might be so included are discussed below.

⁴⁷ 1993. *Report on the Review of the Preservation and Enhancement of Industrial Rights and Freedoms*, The Queensland Electoral and Administrative Review Commission, Brisbane: 17-18.

⁴⁸ see for example, Appendices 2 and 7.

- (e) There is a question whether a Bill of Rights in a new Northern Territory constitution should go further. In this respect, the Committee has discussed elsewhere the matter of entrenchment of Aboriginal rights including as to self determination.⁴⁹ The other rights in groups — paragraph 1(a) (ii) and (iii) above could be considered for inclusion, although the case for their inclusion is generally much less compelling. The onus is on those who would assert that any of these other rights should be included to clearly demonstrate that their inclusion is necessary or desirable, that their inclusion would be likely to achieve the desired outcomes, that they would be likely to receive community acceptance and that they would not unduly limit the possibility of detailed political solutions in the future implemented where necessary by specific legislation and tailored to meet the particular needs of the Territory at that time.
- (f) One view is that a Northern Territory Bill of Rights, if one is to be adopted, should not go beyond the most fundamental of those civil and political rights that are generally accepted throughout the world. This would avoid creating the impression that it is able to provide the solutions to a wide range of community, social and economic concerns by a simple constitutional statement. It would, to some extent at least, also avoid the incorporation of particular rights the subject of considerable controversy. To do otherwise may condemn the whole exercise to failure from the start. It may be considered to be more important initially to establish certain minimum standards in matters of clear fundamental importance in a free and democratic society. Other matters might be considered later by way of amendment.
- (g) The following is a discussion of those heads of civil and political rights to be found in the *International Covenant on Civil and Political Rights* (ICCPR)⁵⁰ that could possibly be of relevance to a Northern Territory Bill of Rights. These are not exhaustive of the rights that could be considered for inclusion. Some rights are not discussed because they are primarily a Commonwealth responsibility — for example marriage. The Committee welcomes comments and suggestions on these and any other rights considered appropriate to the Northern Territory.

⁴⁹ For further information in respect of possible entrenchment of Aboriginal rights, see

- (a) 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law*, Legislative Assembly of the Northern Territory, Darwin; and
- (b) 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin.

⁵⁰ see Appendix 2.

2. *Right to Life*

- (a) The ICCPR provides in *Article 6.1* that every human being has the inherent right to life, to be protected by law, and that no one is to be arbitrarily deprived of life.⁵¹
- (b) In broad terms the right to life is already recognised in particular ways in the common law as supplemented by legislation. Various rights and remedies exist in that law designed around the upholding of this principle, although the principle itself is not part of the law. As pointed out in the Issues Paper of the ACT Attorney-General's Department on a Bill of Rights for the ACT most of the debate is concerned with particular issues at the boundaries of life, such as abortion, the use of reproductive technology, euthanasia and capital punishment.⁵² It is not appropriate in this Paper to enter into a detailed discussion of these particular issues, although readers are referred to the helpful discussion in that Issues Paper⁵³ and in the Queensland Electoral and Administrative Review Commission Report.⁵⁴
- (c) As to the current legal position in the Northern Territory on the legality of abortion, see the Northern Territory *Criminal Code*, sections 172-174.⁵⁵ As to termination of

⁵¹ see also the Universal Declaration on Human Rights, Article 3, USA Constitution, 14th Amendment, Canadian Charter of Rights and Freedoms, section 7, New Zealand Bill of Rights Act, section 8, PNG Constitution, section 35 and note the National Goals and Directive Principles, Item 5, Basic Rights paragraph (a), European Convention on Human Rights, Article 2, Constitution of the Republic of South Africa, section 9.

⁵² 1993. *A Bill of Rights for the ACT?*, ACT Attorney-General's Department, Canberra.

⁵³ 1993. *A Bill of Rights for the ACT?*, ACT Attorney-General's Department, Canberra: 8-14.

⁵⁴ 1993. *Report on the Review of the Preservation and Enhancement of Individuals Rights and Freedoms*, The Queensland Electoral and Administrative Review Commission, Brisbane: 101-139.

⁵⁵ Sections 172-174:

s172. PROCURING ABORTION

Subject to section 174, any person who, with the intention of procuring the miscarriage of a woman or girl, whether or not the woman or girl is pregnant, administers to her, or causes to be taken by her, a poison or other noxious thing, or uses an instrument or other means is guilty of a crime and is liable to imprisonment for 7 years.

s173. SUPPLYING DRUGS, & c., TO CAUSE ABORTION

Subject to section 174, any person who unlawfully supplies or obtains a poison or other noxious thing, or instrument or other thing, knowing that it is intended to be used or employed with the intention of procuring the miscarriage of a woman or girl, whether or not the woman or girl is pregnant, is guilty of a crime and is liable to imprisonment for 7 years.

s174. MEDICAL TERMINATION OF PREGNANCY

(1) It is lawful -

- (a) for a medical practitioner who is a gynaecologist or obstetrician to give medical treatment with the intention of procuring the miscarriage of a woman or girl who, he has reasonable cause to believe after medically examining her, has been pregnant for not more than 14 weeks if the medical treatment is given in hospital and the medical practitioner and another medical practitioner are of the opinion, formed in good faith after medical examination of the woman or girl by them, that -
 - (i) the continuance of the pregnancy would involve greater risk to her life or greater risk of injury to her physical or mental health than if the pregnancy were terminated; or

life sustaining measures, see the Northern Territory *Natural Death Act* of 1988. As to capital punishment, see the *Death Penalty Abolition Act* 1973 of the Commonwealth. Capital punishment does not currently exist in the Northern Territory as a lawful penalty.

- (d) A guarantee in a Northern Territory Bill of Rights of a right to life may not alter the law in respect of the particular issues in the last subparagraph. Thus, for example, the inherent right to life in *Article 6* of the ICCPR also provides that no one is to be arbitrarily deprived of life. Capital punishment, if authorised by law, is still contemplated as a possibility in that Article on certain conditions.

3. *Torture, cruel, inhuman or degrading treatment or punishment*

- (a) The ICCPR provides in *Article 7* that no one shall be subjected to torture or to cruel, inhuman, degrading treatment or punishment, including medical or scientific experimentation without the person's free consent.⁵⁶

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- (ii) there is a substantial risk that, if the pregnancy were not terminated and the child were to be born, the child would have or suffer from such physical or mental abnormalities as to be seriously handicapped;
 - (b) for a medical practitioner to give medical treatment with the intention of procuring the miscarriage of a woman or girl who, he has reasonable cause to believe after medically examining her, has been pregnant for not more than 23 weeks if the medical practitioner is of the opinion, formed in good faith after his medical examination of her, that termination of the pregnancy is immediately necessary to prevent grave injury to her physical or mental health; or
 - (c) for a medical practitioner to give medical treatment with the intention of procuring the miscarriage of a woman or girl if the treatment is given in good faith for the purpose only of preserving her life.
- (2) No person is under a duty, whether by contract or otherwise, to procure or to assist in procuring the miscarriage of a woman or girl or to dispose of or to assist in disposing of an aborted foetus if he has a conscientious objection thereto, but, in any legal proceedings, the burden of proving such a conscientious objection shall rest upon the person claiming to have it.
 - (3) Nothing in this section relieves a medical practitioner from his liability, in carrying out medical treatment or performing an operation with the intention of procuring the miscarriage of a woman or girl, to carry out or perform it -
 - (a) if the consent of a person is required by law to the carrying out of the medical treatment or the performance of the operation - with that consent;
 - (b) with professional care; and
 - (c) otherwise according to law.
 - (4) A medical practitioner shall be deemed to have met his liability under subsection (3)(a) in carrying out the medical treatment or performing the operation if he carries it out or performs it -
 - (a) except where the woman or girl is incapable in law (otherwise than by being an infant) of giving the consent - with the consent of the woman or girl; and
 - (b) if the girl is under the age of 16 years or is otherwise incapable in law of giving the consent - with the consent of each person having authority in law, apart from this subsection, to give the consent.

⁵⁶ see also Universal Declaration of Human Rights, Article 5, Canadian Charter of Rights and Freedoms, section 12, New Zealand Bill of Rights Act, sections 9 and 10, PNG Constitution, section 36, European Convention on Human Rights Article 3, Constitution of the Republic of South Africa, section 11(2).

- (b) The legal position on the matter of torture in Australia is covered by the *Crimes (Torture) Act 1988* of the Commonwealth. However there is no constitutional guarantee against torture and no prohibition of other forms of treatment or punishment which might not constitute torture, but which might otherwise be cruel, inhuman or degrading.
- (c) It might be thought that any such guarantee in a new Northern Territory constitution could conflict with certain forms of traditional Aboriginal punishment, such as spearing. At the moment, it is clear that the law in the Northern Territory does not recognise the legality of such forms of punishment, although the courts may take into account the fact of Aboriginal traditional punishments. The Committee has addressed this matter and has expressed the view that if Aboriginal customary law is to be recognised as a source of law in the Northern Territory, there would be merit in a provision that it should only be such a source in so far as that law is consistent with international human rights norms.⁵⁷

⁵⁷ 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law*, Legislative Assembly of the Northern Territory, Darwin: 44-45.

**"3. General Constitutional Recognition
Should there be any exceptions**

- (d) The Committee refers to the first of the five factors mentioned in paragraph (b), that is, whether there should be any exceptions to the types of customary law to be recognised. In this regard, the diversity and complexity of Aboriginal customary law has already been noted in this paper. Also noted is the fact that it is based on ideas and concepts radically different from "Western" ideas and concepts. The tendency to judge whether certain aspects of customary law are appropriate for recognition in the wider legal system, viewed from the perspective of a different cultural and legal background, has to be kept in mind to avoid any prejudicial judgment. On the other hand, there are an emerging set of international standards by which to judge the validity of any law, standards which are increasingly transcending particular cultural or legal derivations. These standards are becoming evident in the developing jurisprudence of human rights.
- (e) In most cases, there will be no clash between indigenous customary law and these wider international standards. This is in part because the relevant international instruments give some prominence to cultural and indigenous rights. This is recognised, for example, in Article 27 of the International Covenant on Civil and Political Rights, guaranteeing to members of ethnic, religious or linguistic minorities the right, in community with other members, to enjoy their own culture, to profess and practice their own religion, and to use their own language.
- (f) However, all such indigenous rights have to balance against other fundamental rights and to any reasonable restrictions arising therefrom. There may be isolated examples where insistence upon the full application of existing indigenous rights under customary law could lead to an infringement of individual human rights. For example, certain forms of traditional punishment, such as spearing, may be seen as offending against the individual's right not to be subject to "cruel, inhuman or degrading treatment or punishment" (ICCPR, Article 7).
- (g) These are very difficult issues, involving contemporary notions and values. It is a matter discussed in the Australian Law Reform Commission's Report, Vol I @ paragraphs 179-193, where the Commission, while accepting a need for adherence to international human rights norms, stressed the need to determine the application of those norms in the context of the particular society and not in the abstract or by reference to "western" expectations.
- (h) Subject to this last-mentioned consideration, the Committee sees merit in a provision that would only recognise customary law as a source of law (if in fact it is to be so recognised) in so far as that law was consistent with international human rights norms or, as expressed in Papua New Guinea, the general principles of humanity (see also ILO Convention No 169, discussed in Item C.4 above). The inter-relationship between the two would of course be a matter to be worked out by the appropriate judicial institutions".

4. *Slavery*

- (a) The ICCPR, in *Article 8*, prohibits slavery and all forms of slave trade. No one is to be held in servitude. With specified exceptions, no one may be required to perform forced or compulsory labour.⁵⁸
- (b) Although Australia is a party to various international agreements on slavery, there is no Australian legislation specifically prohibiting same. The power of the federal Parliament to make laws relating to various welfare benefits is expressly stated not to authorise any form of civil conscription in dental and medical services,⁵⁹ but otherwise there are no constitutional guarantees. The Northern Territory *Criminal Code* makes it an offence to deprive someone of their liberty against their will.⁶⁰
- (c) There would not seem to be strong objections to a general prohibition on slavery, servitude and forced labour, providing there are appropriate exceptions such as contained in *Article 8* of the ICCPR.

5. *Rights to Liberty and Security of Person*

- (a) The ICCPR states in *Article 9* that everyone has the right to liberty and security of the person. No one is to be subjected to arbitrary arrest or detention. Any deprivation of liberty is to be on such grounds and in accordance with such procedure as is established by law. An arrested person is to be informed, at the time of arrest, of the reasons for arrest and to be promptly informed of any charges. In addition that person is to be promptly brought before a judicial officer and to be entitled to a trial within a reasonable time. There can be no presumption of detention. There must be a right of judicial review as to the lawfulness of detention and an enforceable right to compensation for unlawful arrest or detention.⁶¹

⁵⁸ see also Universal Declaration of Human Rights, Article 4, USA Constitution, 13th Amendment, PNG Constitution sections 43 and 253, European Convention on Human Rights, Article 4, Constitution of the Republic of South Africa, section 12.

⁵⁹ s51 (xxiiiA) - The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.

⁶⁰ s196 - DEPRIVATION OF LIBERTY:

- (1) Any person who confines or detains another in any place against his will, or otherwise deprives another of his personal liberty, is guilty of a crime and is liable to imprisonment for 7 years.
- (2) It is lawful for a parent or guardian, or a person in the place of a parent or guardian, or for a school teacher, by way of correction, to impose such confinement or detention, or to cause such deprivation of personal liberty of a child, as is reasonable under circumstances.
- (3) A person is excused from criminal responsibility for an offence defined by this section if he believes, on reasonable grounds, that the person confined, detained or deprived of his personal liberty needs to be confined, detained or deprived of his personal liberty for his own protection or benefit.

⁶¹ see also Universal Declaration of Human Rights, Articles 3 and 9, USA Constitution, 6th Amendment and note Article 1 section 9 of the Constitution as to habeas corpus, Canadian Charter of Rights and Freedoms, sections 7, 9, 10 and 11, New Zealand Bill of Rights Act, sections 21, 22, 23 and 24, Papua New Guinea Constitution, section 42,

- (b) The framing of such a right concerning detention must take into account both the legitimate interests of society in protecting itself from individuals whose conduct deserves approbation and necessitates restraining action, and the right of the individual to fair treatment and liberty, which cannot be arbitrarily interfered with.
- (c) Relevant Northern Territory provisions are contained in Part VII of the *Police Administration Act*, and in the *Bail Act*. Arguably, these provisions would comply with *Article 9* of the ICCPR. These are supplementary to the common law, such as for example, the rule that although there is no common law right to a speedy trial, undue delay is a factor that can be taken into account in deciding whether there has been a fair trial.⁶² Wrongful arrest or detention can give rise to a prerogative remedy for release (habeas corpus) and a right to damages at common law.
- (d) These Northern Territory provisions may be compared with the relevant Commonwealth provisions in the *Crimes Act* 1914, Part 1A. These have now been supplemented by the provisions of Part 1C of that Act, introduced by the *Crimes (Investigation and Commonwealth Offences) Amendment Act* 1991, and which impose what might be considered to be a more vigorous procedural regime for dealing with offenders against Commonwealth offences than those for Northern Territory offences.
- (e) While it is a matter for debate as to whether the new Commonwealth provisions go beyond what is reasonably practicable in a vast area such as the Northern Territory, with its associated difficulties of policing and communication, there is an issue whether there should be a specified minimum standard to be observed for the arrest and detention of all persons. It is clear that adequate legal protection from arbitrary arrest and detention is a hallmark of a free society, and arguably a minimum standard in these matters deserves constitutional protection such that that standard cannot be derogated from in any circumstances in the future.

6. *Rights of Detainees*

- (a) The ICCPR in *Article 10* provides that all detained persons are to be treated with humanity and respect for their inherent dignity. Accused persons are to be separated from convicted persons except in exceptional circumstances. Accused and convicted juvenile persons are to be separated from adults, their case adjudicated as speedily as possible and they are to be accorded treatment appropriate to their age and legal status. The penitentiary system is to aim at reformation and social rehabilitation.⁶³

European Convention on Human Rights, Article 5, Constitution of the Republic of South Africa, sections 11 (1) and 25.

⁶² *Jago v District Court (NSW)* (1989) 168 CLR 23.

⁶³ see also Papua New Guinea Constitution, s37 (17), (18) (19), (20), Constitution of the Republic of South Africa, section 10.

- (b) In addition, the United Nations has issued the *Standard Minimum Rules for the Treatment of Prisoners* (1955) and the *Body of Principles for the Protection of all persons under any form of Detention or Imprisonment* (1988).
- (c) In the Northern Territory, detention of prisoners is dealt with in the *Prisons (Correctional Services) Act*. There is no general law guarantee of humane treatment of detained persons, except in so far as the conduct in question may give rise to a common law cause of action in tort or may constitute a criminal offence. Convicted prisoners not yet sentenced and prisoners on remand are to be kept apart from prisoners under sentence unless the Northern Territory Minister otherwise directs.⁶⁴
- (d) The arrest and detention of juveniles (under 17 years of age) is dealt with in the *Juvenile Justice Act*. They are to be held in approved detention centres and persons cannot be admitted to those centres except in accordance with that Act.⁶⁵ In other circumstances, juveniles are to be kept apart from other persons under detention as far as practicable.⁶⁶ Juveniles charged with an offence are required to be brought before a court promptly.⁶⁷
- (e) There may be practical difficulties in a place like the Northern Territory to ensure the complete separation of accused persons from convicted persons and juveniles from adults in all circumstances. Thus any right to separate detention should be expressed to be a qualified right.

⁶⁴ s10 (5) - In a prison, convicted prisoners not yet sentenced and prisoners on remand shall be kept separate and apart from prisoners under sentence, unless the Minister otherwise directs.

⁶⁵ s63 - A person shall not be admitted to a detention centre except in accordance with this Act.

⁶⁶ s32(5) -

(1) Subject to this section, a juvenile who has been charged with an offence and is not admitted to bail shall, as soon as practicable, be taken to a detention centre or other place approved by the Minister for the purpose, and shall be detained there on an order to that effect having been made by the Court or a magistrate.

(1A) A member of the Police Force may make an application for an order under subsection (1) in person or, if it is not practicable for an application to be made in person, it may be made by telephone to a magistrate.

(2) Where a juvenile referred to in subsection (1) requires medical attention, instead of being taken to a detention centre or other place referred to in that subsection he may be taken to a hospital within the meaning of the Medical Services Act or a private hospital within the meaning of the Private Hospitals and Nursing Homes Act and, if the person in charge of the hospital or private hospital consents, be detained there.

(3) A juvenile taken to a hospital in accordance with subsection (2) shall, while in that hospital, remain in the custody of the Police Force.

(4) Upon his being discharged from hospital, a juvenile referred to in subsection (2) shall be taken to a detention centre or other place approved by the Minister for the detention of juveniles, unless he has in the meantime been admitted to bail.

(5) Where it is necessary to take a juvenile from the place at which he is detained to a court, or from a court to that place, he shall, as far as practicable, be kept apart from other persons under detention who are not juveniles.

⁶⁷ s33 - (1) Where a juvenile has been charged with an offence and has not been released from custody, he shall be brought before the Court as soon as practicable and in any case within 7 days after the arrest.

(2) Where a juvenile referred to in subsection (1) is not brought before the Court in accordance with that subsection, he shall immediately be released from custody.

7. *Imprisonment for Contractual default*

- (a) The ICCPR in *Article 11* prohibits imprisonment merely on the ground of inability to fulfil a contractual obligation.
- (b) This is not a provision usually found in Bills of Rights. The nearest equivalent is in section 42 (1)(c) of the Papua New Guinea Constitution.⁶⁸ It prevents imprisonment for civil debt except where there are other relevant factors involved.
- (c) In the Northern Territory, the *Local Court Act* enables a summons to issue for examination of a judgment debtor. If the debtor does not attend the examination hearing, the court may issue an arrest warrant to bring the debtor before the court. An instalment order operates as a stay of the arrest warrant while it is complied with. Failure to comply with the order constitutes contempt of the court. It seems these provisions would not breach *Article 11*.

8. *Freedom of Movement*

- (a) The ICCPR in *Article 12* guarantees to a person lawfully within a territory, liberty of movement within the national state and freedom to choose a residence. It also deals with freedom to leave any country, and a prohibition on arbitrarily being deprived of the right to enter the country of nationality.⁶⁹ The latter rights are not directly relevant in the context of a Northern Territory constitution. The right is implied in the USA Constitution.
- (b) Within Australia, there is a guarantee of absolute freedom of intercourse between States and with mainland territories.⁷⁰ However there is no such guarantee purely within the Northern Territory. In fact, the federal *Aboriginal Land Rights (Northern Territory) Act* and the *Aboriginal Land Act* (NT) require a permit for movement over Aboriginal land under the former Act or on some public roads within Aboriginal land, with limited exceptions.
- (c) There is no constitutional guarantee of a right of residence in the Northern Territory.

⁶⁸ s42 (1)(c) -

(1) No person shall be deprived of his personal liberty except —
(c) by reason of his failure to comply with the order of a court made to secure the fulfilment of an obligation (other than a contractual obligation) imposed upon him by law.

⁶⁹ see also Universal Declaration of Human Rights, Article 13, Canadian Charter of Rights and Freedoms, section 6, New Zealand Bill of Rights Act, section 18, Papua New Guinea Constitution section 52, Constitution of the Republic of South Africa, section 18.

⁷⁰ (a) Australian Constitution, s92 - On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.
(b) Northern Territory (Self-Government) Act 1978, s49 - Trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

- (d) It is not likely that any constitutional guarantee of movement and residence within the Northern Territory would be interpreted as being capable of overriding any existing proprietary rights, including presumably those in respect of Aboriginal land. Any review of the permit system on Aboriginal land would need to be undertaken in the context of the issues concerning Aboriginal people and the possible entrenchment of their rights. This will not be considered in this Discussion Paper as it is an issue of specific relevance to Aboriginal people, dealt with elsewhere.⁷¹

⁷¹ 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights & Issues - Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin.

9. *Right to a Fair Trial*

- (a) The ICCPR, in *Article 14*, sets out a range of minimum standards required to be observed in the criminal process against an individual. These may be summarised as follows:
- (i) All persons to be equal before courts and tribunals;
 - (ii) All persons entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, but the press and public may be excluded on grounds of morals, public order or national security in a democratic society, or where in the interests of the private lives of the parties, or where strictly necessary in special circumstances where publicity would prejudice the interests of justice;
 - (iii) The judgment is to be given publicly except where the interests of a juvenile otherwise require it or where it concerns a matrimonial dispute or guardianship of children;
 - (iv) The person charged is to be presumed innocent until proved guilty according to law;
 - (v) In determining a criminal charge, the person is to be informed of the charge in a language the person understands, to be given adequate time and facilities to prepare a defence and to communicate with own counsel, to be tried without undue delay, to be tried in the person's presence and to mount his/her own defence or through legal assistance of his or her own choosing, to be informed of his or her right to legal assistance, to have legal assistance assigned if justice so requires and without payment if without sufficient means, to examine and cross examine witnesses and require their attendance, to have the free assistance of an interpreter where necessary and not to be compelled to testify against himself or herself or to confess guilt;
 - (vi) In case of juveniles, the procedure is to take into account the age and the desirability of promoting rehabilitation;
 - (vii) There is to be a right to have any conviction and sentence reviewed by a higher tribunal;
 - (viii) There is to be a right to compensation if the conviction is subsequently reversed or he or she has been pardoned where new facts are conclusive of a miscarriage of justice;
 - (ix) The person is not to be tried or punished again for the same offence where already finally convicted or acquitted.⁷²
- (b) In the Northern Territory, some of the provisions in *Article 14* are reflected in Territory statute law — for example, in the *Justices Act*, the *Criminal Code*, the *Juvenile Justice Act* and the *Legal Aid Act*. More commonly, it is necessary to refer

⁷² see also Universal Declaration of Human Rights, Articles 10, and 11(1), USA Constitution, 5th and 6th Amendments, Canadian Charter of Rights and Freedoms, sections 10, 11 and 14, New Zealand Bill of Rights Act, sections 23, 24 and 25, Papua New Guinea Constitution, section 37, European Convention on Human Rights, Articles 6 and 7, Constitution of the Republic of South Africa, section 25.

to the common law. In a number of ways, the common law incorporates guarantees equivalent to the Article, although there remains a few of the rights in the Article not protected by the common law. Thus for example there is no right to legal counsel at public expense, although the failure to grant an adjournment to enable the accused to obtain legal representation may, in appropriate cases, be grounds for staying the proceedings on the basis that it will result in an unfair trial.⁷³

- (c) It is clear that a right to a fair trial is fundamental to the system of criminal justice that has been inherited in Australia. Such a right is part of the common law in a general sense, although the incidents of that common law right may not in all respects correspond with the provisions of *Article 14*. There is also the possibility that the common law might have been modified by statute or could be so modified in the future.
- (d) Provisions for a fair trial are common in statements of rights. It is difficult to conceive of any Bill of Rights for the Northern Territory without such provisions. Assuming there is to be a Bill of Rights in a Northern Territory Constitution, the question becomes one of the extent to which the detail as to fair trials is to be incorporated therein. Any such detail should take into account any special features of the Northern Territory criminal justice system and the difficulties encountered in administering that system. It should also have regard to any indigenous Aboriginal demands for modifications to that system.
- (e) Such a consideration may also need to take into account the need for other guarantees not in *Article 14*, such as trial by jury.⁷⁴
- (f) Detailed discussion of all these matters would be very lengthy and is beyond the scope of this Paper. Reference can, however, be made to the Report of the Queensland Electoral and Administrative Review Commission.⁷⁵

10. *Retrospective offences/penalties*

- (a) The ICCPR, in *Article 15*, deals separately with this matter. It provides that no one is to be held guilty of criminal offence that did not exist at law when committed. Nor can a penalty be imposed that is heavier than that in force at the time when the offence was committed. However, if the penalty is later lightened, the offender shall benefit.⁷⁶

⁷³ *Dietrich v the Queen* (1992) 177 CLR 292.

⁷⁴ see para 18(b)(vi), p46.

⁷⁵ 1993. *Report on the Review of the Preservation and Enhancement of Individuals Rights and Freedoms*, The Queensland Electoral and Administrative Review Commission Report, Brisbane: 183-213.

⁷⁶ see also Universal Declaration of Human Rights, Article 11.2, USA Constitution, Article 1 section 9.3, Canadian Charter of Rights and Freedoms, section 11 (g) and (i), New Zealand Bill of Rights Act, section 26(1), Papua New Guinea Constitution, section 36(7), European Convention on Human Rights, Article 7, Constitution of the Republic of South Africa, section 25(3)(f).

- (b) In Australia, this position is governed by the common law. There may be no common law or constitutional prohibition on retrospective criminal offences per se.⁷⁷ Ex post facto criminal laws have been held to offend against the USA Constitution.
- (c) The Queensland Electoral and Administrative Review Commission Report considered that it was clearly unfair and unjust to make criminal laws with retrospective effect, and recommended a Bill of Rights provision against it.⁷⁸

11. *Right to Privacy*

- (a) The ICCPR provides in *Article 17* that no one is to be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation, and that everyone has a right to the protection of the law against same.⁷⁹
- (b) In Australia, there is no general right of privacy at common law or under statute, although reference should be made to the *Privacy Act* 1988 of the Commonwealth. A great variety of laws, either common law, equity or statute, bear upon particular aspects of privacy protection, for example, the *Defamation Act* of the Northern Territory.
- (c) The desirability of protecting personal privacy has to be balanced against the wider interests of the public generally. For example in the *Police Administration Act*, there are powers of entering onto premises by police in order to search where there are grounds to believe that an offence is being committed or that evidence of an offence exists on those premises or that an offender is on those premises.

12. *Freedom of thought, conscience and religion*

- (a) Freedom of thought, conscience and religion is guaranteed by *Article 18* of the ICCPR. This includes freedom to have or to adopt a religion or belief, to manifest that religion or belief, in worship, observance, practice and teaching. This freedom is only to be subject to limitations as prescribed by law and necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others. It includes the liberty of parents/legal guardians to ensure the religious and moral education of their children.⁸⁰

⁷⁷ Polyukhovich v Commonwealth (1991) 172 CLR 501; and also R v Kidman (1915) 20 CLR 425.

⁷⁸ 1993. *Report on the Review of the Preservation and Enhancement of Individuals Rights and Freedoms*, The Queensland Electoral and Administrative Review Commission, Brisbane: 207.

⁷⁹ see also, Universal Declaration Human Rights, Article 12, Papua New Guinea Constitution, section 49, European Convention on Human Rights, Article 8, Constitution of the Republic of South Africa, section 13.

⁸⁰ see also Universal Declaration of Human Rights, Article 18, USA Constitution, first Amendment, Canadian Charter of Rights and Freedoms, section 2(a), New Zealand Bill of Rights Act, sections 13 and 15, Papua New Guinea Constitution, section 45, European Convention on Human Rights, Article 9, Constitution of the Republic of South Africa, section 14.

- (b) It has been said by the High Court that freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.⁸¹ Notwithstanding this, it has been held that there is no common law guarantee of freedom of religion and belief.⁸² There is a limited guarantee in section 116 of the Australian Constitution, applicable only to the Commonwealth and probably extending to Commonwealth territories. The concept of 'religion' has been given a wide meaning by the High Court, but the guarantee itself has been given a narrow meaning.
- (c) The Committee has already received submissions that these should be a guarantee of freedom of religion and belief in a new Northern Territory constitution.
- (d) Undoubtedly any constitutional guarantee of freedom of religion and belief would be of relevance to Aboriginal people pursuing traditional patterns of life. For example, there is the question of Aboriginal sacred sites. The Committee in its *Discussion Paper* suggested that it would be preferable that any constitutional recognition of Aboriginal language, social, cultural and religious customs and practices should be in a form acceptable to the broader community and compatible with the Territory's multi-racial, multi-cultural nature and the principles of equality and non-discrimination.⁸³ The Committee also expressed its tentative view against any guarantee of religion applicable to Aboriginal religion only. If there was to be a guarantee, it should apply to all religions equally.⁸⁴
- (e) The guarantee in section 116 of the Australian Constitution has been held not to exclude state aid to private schools.⁸⁵ A narrow approach to this section has so far been taken by the High Court compared to the approach of the USA Supreme Court based on a similar constitutional provision. A new guarantee in wider terms in a Northern Territory constitution would need to consider whether the position as to state aid is to be expressly maintained.

13. Freedom of Expression

- (a) The ICCPR, in *Article 19*, gives everyone the right to hold opinions without interference. There is also a right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds in any medium of choice, but subject to such restrictions provided by law as are necessary for respect for the

⁸¹ Church of the New Faith v Commissioner of Payroll Tax (Vict.) (1983) 154 CLR 120.

⁸² Grace Bible Church Inc v Reedman (1984) 54 ALR 571.

⁸³ 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Discussion Paper on a Proposed New State Constitution for the Northern Territory*, Legislative Assembly of the Northern Territory, Darwin.

⁸⁴ 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin.

⁸⁵ Black v Commonwealth (1981) 146 CLR 559.

rights or reputations of others, for the protection of national security or public order or of public health or morals.⁸⁶

- (b) Freedom of expression (sometimes called freedom of speech) is another principle that is usually regarded as one of the fundamentals of individual human rights. As *Article 19* contemplates, it is not an absolute right, but has to be balanced against the rights of others and the public interest as a whole.
- (c) In Australia, while the High Court has been slow to recognise any general common law guarantee of this right, it has now recognised that there is implied constitutional right of freedom of communication in political matters as an adjunct to the representative, democratic nature of the Australian constitutional system.⁸⁷ To some extent, this development, applying Australia-wide, may have lessened the need for an express constitutional right on this matter.
- (d) While it might be said that the right to freedom of expression is widely observed in Australia in practice, it is subject to many common law and legislative restrictions. Examples of these are the law of defamation — both at common law and statute — censorship laws, anti-discrimination legislation, the law of contempt, criminal interception laws, correctional service laws, the law as to breach of confidence and fiduciary duties, and other matters. The electronic media in Australia is largely controlled by federal legislation. Broadly speaking, these controls would mostly seem to fall within the ICCPR exceptions to the right. The right, if it was to be given constitutional force, would be directed at more blatant restrictions on freedom of expression which cannot reasonably be justified in a free and democratic society.
- (e) There has in recent times been a concentration of media ownership in Australia under the wide legal freedoms that already exist, controlled to some extent by legislation on the electronic media and by cross-media and foreign investment rules. The concept of the freedom of the press has (to some extent at least) been impeded by this concentration. This is however, a development with national and international implications, largely beyond the control of the Northern Territory.
- (f) Notwithstanding these developments on the High Court mentioned above, and the limited capacity of the Northern Territory to affect the media and other wider developments, it is difficult to conceive of a Bill of Rights in a new Northern Territory constitution without a provision for freedom of expression, at least in a qualified form.

⁸⁶ see also Universal Declaration of Human Rights, Article 19, USA Constitution first Amendment, Canadian Charter of Rights and Freedoms, section 2(b), New Zealand Bill of Rights Act, section 14, Papua New Guinea Constitution, section 46, European Convention on Human Rights, Article 10, Constitution of the Republic of South Africa, section 15.

⁸⁷ see Item C14 above, p11.

14. *Freedom of Assembly*

- (a) The ICCPR, in *Article 21*, recognises a right of peaceful assembly, to be restricted only in conformity with law where necessary in democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.⁸⁸
- (b) This right is closely associated with the right to freedom of expression and the right to freedom of association — see below. It is a contentious right, in that public assemblies can in certain circumstances develop into demonstrations, and demonstrations can sometimes cease to be peaceful. However, the right to peaceful assembly has traditionally long been accepted as one of the fundamental rights.
- (c) At common law, it was an offence to engage in an unlawful assembly of 3 or more persons where it gave grounds for apprehension of a breach of the peace or the commission of a crime by force. In the Northern Territory, the relevant provisions are now contained in the *Criminal Code*, the *Police Administration Act* and note the *Summary Offences Act*.⁸⁹ Reference should also be made to the *Public Order (Protection and Persons and Property) Act 1971* of the Commonwealth in relation to Commonwealth diplomatic and consular premises.
- (d) Clearly the right has to be a restricted right in order to maintain peace and public security. This is reflected in *Article 21* of the ICCPR. It is a matter of balancing the right of peoples to peaceful assembly and to express their views against the wider public interest.

15. *Freedom of Association*

- (a) The ICCPR contains in *Article 21* a right for everyone to freedom of association with others, including as to trade unions. It is subject to the same restrictions as is the right of peaceful assembly in *Article 21*, except that this is not to prevent the imposition of lawful restrictions on members of the armed forces or the police.⁹⁰
- (b) *Article 22.3* of the ICCPR states that nothing in *Article 22* authorises legislative measures which would prejudice the 1948 ILO *Convention Concerning Freedom of Association and Protection of the Right to Organise*.⁹¹ That Convention came into

⁸⁸ see also the Universal Declaration of Rights, Article 20, USA Constitution, first Amendment, Canadian Charter of Rights and Freedoms, section 2(c), New Zealand Bill of Rights Act, section 16, Papua New Guinea Constitution, section 47, European Convention on Human Rights, Article 11, Constitution of the Republic of South Africa, section 16.

⁸⁹ see Part III Division 4 of the Criminal Code, section 148 of the Police Administration Act and note the Summary Offences Act.

⁹⁰ see also Universal Declaration of Human Rights, Article 20.2, Canadian Charter of Rights and Freedoms, section 2(d), New Zealand Bill of Rights Act, section 17, Papua New Guinea Constitution, section 47, European Convention on Human Rights, Article 11, Constitution of the Republic of South Africa, section 17.

⁹¹ ILO No. 87.

operation in Australia on 28 February 1974 and contains 9 Articles on freedom of association with respect to workers and employers' organisations, their membership, establishment and administration, plus an Article on protection of the right to organise.

- (c) *Article 22* is clearly not limited to employer or employee associations and has very wide application. Again it is a restricted right, to be balanced against the wider public interest.
- (d) There is no common law right of freedom of association as such. Controls on the formation of trade unions and their membership are contained in the *Industrial Relations Act 1988* of the Commonwealth and are not at present directly relevant to the self-governing Northern Territory, which has very limited industrial powers. Whether this position will continue if further constitutional development takes place in the Territory is as yet uncertain. It should also be noted that the Northern Territory *Anti-Discrimination Act* prohibits discrimination on the ground of trade union or employer association activity, with limited exceptions. Clubs are not permitted to discriminate under that Act on any of the specified grounds except in certain circumstances on the basis of the preservation of a minority culture, the prevention or reduction of disadvantage, or age or sex.
- (e) Much of the controversy over this right revolves around the alleged right not to associate. This is not expressly dealt with in *Article 22* of the ICCPR, although it is expressed in *Article 20.2* of the *Universal Declaration of Human Rights*.⁹² However this latter provision may not apply to trade unions.

16. Right to Participate in Public Affairs

- (a) *Article 25* of the ICCPR provides that every citizen has the right and opportunity, without discrimination and without unreasonable restrictions, to take part in public affairs directly or through freely chosen representatives, to vote at periodic elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of electors and to have access on general terms of equality to the public service.⁹³
- (b) The matter of the electoral system and the qualifications of electors and candidates for the proposed new Northern Territory Parliament have been dealt with in the Committee's *Discussion Paper*.⁹⁴ This included tentative recommendations as to a form of direct Parliamentary representation, with single member electorates, adult suffrage and secret ballots.

⁹² see Appendix 7.

⁹³ see Universal Declaration of Human Rights, Article 21, USA Constitution as to various provisions for the election of the President and Congress, and see the 15th, 19th, 24th and 26th Amendments, Canadian Charter of Rights and Freedoms, section 3, New Zealand Bill of Rights Act, section 12, Papua New Guinea Constitution, section 50, Constitution of the Republic of South Africa, sections 6 and 22.

⁹⁴ 1987. Northern Territory Legislative Assembly Select Committee on Constitutional Development. *Discussion Paper on A Proposed New State Constitution for the Northern Territory*, Legislative Assembly of the Northern Territory, Darwin.

- (c) Questions of access to the Northern Territory Public Sector are dealt with in the *Public Sector Employment and Management Act* and the *Anti-Discrimination Act* of the Northern Territory.

17. *Non Discrimination and Equal Protection of the Law*

- (a) The ICCPR contains a number of provisions of relevance in this regard. *Article 2* places an obligation on state parties to the Convention to respect and ensure the rights therein without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. *Article 3* provides for the equal rights of men and women to the enjoyment of the rights in the Convention. *Article 14* includes a provision that all persons are equal before courts and tribunals. *Article 16* gives everyone a right to recognition as a person before the law. *Article 26* provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The law is to prohibit discrimination and to guarantee the equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁹⁵
- (b) In the Northern Territory, discrimination on stated grounds is prohibited under the *Anti-Discrimination Act* (with certain exceptions), and various Commonwealth Acts also prohibit certain forms of discrimination — for example, the *Racial Discrimination Act 1975*. The above rights in the ICCPR are expressed in a more positive form and are based on the concepts of equality and non-discrimination. In some of the other instruments in the Appendices, it is a right qualified by an affirmative action provision in favour of the disadvantaged.⁹⁶
- (c) The Australian Constitution itself contains certain principles based on equality and non-discrimination across mainland Australia.⁹⁷ However these fall far short of a

⁹⁵ see Universal Declaration of Human Rights, Articles 2 and 7, USA Constitution, 14th Amendment Section 1, Canadian Charter of Rights and Freedoms, section 15, New Zealand Bill of Rights Act, section 19, Papua New Guinea Constitution, section 55, European Convention on Human Rights, Article 14, Constitution of the Republic of South Africa, section 8.

⁹⁶ see para 19(c) below, p.47.

⁹⁷ see :

- . s51 (ii) Taxation; but so as not to discriminate between States or parts of States:
- . s51 (iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth.
- . s88 Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.
- . s92 On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.
- . s99 The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.
- . s117 A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

general principle of equality before the law and non discrimination. Some members of the High Court have propounded an implied principle of equality under the law, of uncertain scope.⁹⁸

- (d) A constitutional provision against discrimination on stated grounds is likely to be less controversial than a constitutional provision for equality before or under the law, or a right to the equal protection of the law. The concept of equality can be a difficult concept to apply in practice. In the USA, the equal protection provision in the *14th Amendment* has given rise to considerable litigation and controversy. In Canada, section 15 of *The Charter* has become one of the most litigated provisions. Such provisions can raise very broad issues such as integration and segregation, access to public benefits and services, entitlements to professional and trade qualifications, access to the courts and legal aid and many other matters.
- (e) A distinction may need to be drawn between equality before the law, and equality under the law. The former may be limited to formal equality, whereas the latter may imply substantive equality and is of much wider application. The concept of equal protection extends to substantive equality.
- (f) An alternative would be to only have a constitutional provision against discrimination, such as in the New Zealand *Bill of Rights Act*⁹⁹ and in the *European Convention on Human Rights*.¹⁰⁰
- (g) This discussion leaves aside the special position of the Aboriginal inhabitants of the Northern Territory, being the subject of separate Committee Discussion Papers.¹⁰¹ To the extent that a new Northern Territory constitution makes any specific provision for Aboriginal rights, these should, in the Committee's view, be compatible with the multi-racial and multi-cultural nature of the Territory and the broad principles of equality and non-discrimination, subject perhaps to recognition of the principle of affirmative action.¹⁰² In the view taken by the Supreme Court in the USA, justifiable forms of affirmative action are non discriminatory in character, although some members at least of the High Court appear to have taken a different view.¹⁰³

18. Other Rights

⁹⁸ Leeth v Commonwealth (1992) 174 CLR 455.

⁹⁹ see Appendix 3.

¹⁰⁰ see Appendix 8.

¹⁰¹ (a) 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law*, Legislative Assembly of the Northern Territory, Darwin; and

(b) 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin.

¹⁰² 1987. Northern Territory Legislative Assembly Select; Committee on Constitutional Development. *Discussion Paper on a Proposed Constitution for the Northern Territory*, Legislative Assembly of the Northern Territory, Darwin: 94.

¹⁰³ Gerhady v Brown (1985) 159 CLR 70.

- (a) The enumerated list of rights discussed above are not to be taken as exhaustive of those civil and political rights that could be considered for inclusion in a new Northern Territory constitution. The Committee would welcome comments and suggestions, not only as to these enumerated rights, but also as to any other rights that might be considered for inclusion.
- (b) Particular rights that might be considered in this regard include:
- (i) The right to own property and to fair compensation for the arbitrary deprivation of property.¹⁰⁴
 - (ii) The right to freedom from arbitrary or unreasonable searches, entry and seizures.¹⁰⁵
 - (iii) Equality of the sexes.¹⁰⁶
 - (iv) Rights of the Child.¹⁰⁷
 - (v) The Right to Petition Government.¹⁰⁸
 - (vi) The right to trial by jury.¹⁰⁹
 - (vii) The right to freedom of information.¹¹⁰
 - (viii) Language and Cultural Rights of Minorities.¹¹¹
 - (ix) Administrative Rights and Natural Justice.¹¹²
 - (x) The Right to Education.¹¹³

¹⁰⁴ see the Universal Declaration of Human Rights, Article 17, USA Constitution 5th and 14th Amendments, Papua New Guinea Constitution, section 53, Constitution of the Republic of South Africa, section 28, section 51 (xxix) of the Australian Constitution and section 50 of the Northern Territory (Self-Government) Act 1978.

¹⁰⁵ see USA Constitution, 4th Amendment, Canadian Charter of Rights and Freedoms, section 8, New Zealand Bill of Rights Act, section 21, Papua New Guinea Constitution, section 44, Constitution of the Republic of South Africa, section 28.

¹⁰⁶ This has been already mentioned under in paragraph 17 - p.46-48, as to equality and non-discrimination. In at least one the instruments in the Appendices, it is treated separately and given superior force over other rights — see Canadian Charter of Rights and Freedoms, section 28.

¹⁰⁷ see ICCPR Article 24, Constitution of the Republic of South Africa, section 30, and the Convention on the Rights of the Child.

¹⁰⁸ see USA Constitution, first Amendment, Constitution of the Republic of South Africa, section 16.

¹⁰⁹ see USA Constitution, 5th and 7th Amendments, Australian Constitution, section 80.

¹¹⁰ see Papua New Guinea Constitution, section 51, Constitution of the Republic of South Africa, section 23 and the Freedom of Information Act 1982 of the Commonwealth.

¹¹¹ see ICCPR, Article 27, Canadian Charter of Rights and Freedoms, sections 16-23, New Zealand Bill of Rights Act, section 20, Constitution of the Republic of South Africa, section 31.

¹¹² see New Zealand Bill of Rights Act, section 27, Papua New Guinea Constitution, sections 59-62, Constitution of the Republic of South Africa, section 24.

¹¹³ see Universal Declaration of Human Rights, Article 26, Constitution of the Republic of South Africa, section 32.

19. *General Qualifications to Rights*

It is normally accepted that particular human rights are not absolute in nature. That is, they can be qualified in certain respects having regard to the rights of others and the wider public interest. The following is a discussion of possible qualifications to any Northern Territory Bill of Rights for consideration.

(a) Should a Bill of Rights bind other than government?

One question is whether any new Northern Territory Bill of Rights should only be applicable to the institutions of government and its agencies, and persons acting or purporting to act on its behalf, or whether it should be capable of having a wider application to the public generally. In part, this question is related to that of enforcement, discussed in the next item. It is not uncommon for Bills of Rights to be linked to government only in the former manner.¹¹⁴ On the other hand, the Committee understands that in the States of the USA and the Provinces of Canada, some Bills of Rights can have a wider application.¹¹⁵ In a sense, the primary goal of a Bill of Rights can be said to be to impose limitations on government, based on what are considered to be minimum standards of conduct of a fundamental nature. The fact is that government has potentially autocratic powers which it can lawfully exercise under legislation or at common law unless otherwise limited. However it has to be recognised that gross violations of human rights are not limited to actions by governments. The Committee would welcome comment on this issue.

(b) Should a Bill of Rights refer to Aboriginal Rights?

Another question to be addressed in any Northern Territory Bill of Rights is that of specific Aboriginal rights. As discussed, the Committee does not intend to deal with Aboriginal rights in this Paper. However, it has considered elsewhere the possible constitutional entrenchment of Aboriginal rights.¹¹⁶ It would therefore seem desirable, in any Northern Territory Bill of Rights, to include a provision to the effect that, except as otherwise provided in that Bill of Rights, a right elsewhere provided by the constitution as to particular rights of Aboriginal people is not adversely affected by the provisions of the Bill of Rights.

¹¹⁴ see, for example, the New Zealand Bill of Rights Act, section 3.

¹¹⁵ see also the Papua New Guinea Constitution section 34.

¹¹⁶ (a) 1992. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Recognition of Aboriginal Customary Law*, Legislative Assembly of the Northern Territory, Darwin; and

(b) 1993. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Aboriginal Rights and Issues - Options for Entrenchment*, Legislative Assembly of the Northern Territory, Darwin.

(c) Should a Bill of Rights have affirmative action provisions

Another issue is that of a possible constitutional provision that legally permits forms of affirmative action for the benefit of particular persons or groups who are disadvantaged, a matter already discussed. This is particularly important if there is to be a provision in the Bill of Rights against discrimination and/or about equality. A number of the national and international instruments considered in this Paper have express affirmative action provisions.¹¹⁷

(d) Should express qualifications to a Bill of Rights be permitted?

- (i) A most important issue is the extent to which any Bill of Rights should have any provisions which legally permits the qualification of any express rights for justifiable reasons. This is in part related to the need to balance the application of particular rights with each other, arising from the principle of the indivisibility of rights. In part, it relates to the need to balance individual rights with the wider public interest. This is a delicate issue. Too broad a qualification could significantly reduce the protection offered by a Bill of Rights and hence the justification for having one. Too narrow a qualification could result in injustices and invite judicial invention of implications considered necessary or desirable.
- (ii) Most Bills of Rights permit such qualifications applicable in limited circumstances. Thus the ICCPR has express exceptions in particular Articles.¹¹⁸ Some of these have already been mentioned in this Paper. Some of the national instruments in the Appendices contain a general qualification, such as in section 1 of the Canadian *Charter of Rights and Freedoms*, which guarantees the rights and freedoms therein, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."¹¹⁹
- (iii) Arguably, there are some rights which are so basic that they should never be subject to qualification - for example, the right not to be subjected to torture.¹²⁰
- (iv) Ultimately it is a matter for the judiciary to interpret and apply any such qualifications, no matter how carefully expressed. Some guidance could be given in undertaking this task by requiring the judiciary to have regard to specific factors such as public safety, public order, public health and the protection of the rights and freedoms of others. In addition, the judiciary would be assisted by a provision directing it to have regard to authoritative judgments, findings and opinions of international and national courts, tribunals and other bodies concerning comparable human rights, and any other relevant information.

¹¹⁷ see the Canadian Charter of Rights and Freedoms, section 15(2), New Zealand Bill of Rights Act, section 19(2), Papua New Guinea Constitution, section 55(2) Constitution of the Republic of South Africa, section 8(3) and the Racial Discrimination Convention, Article 1.4, scheduled to the Racial Discrimination Act 1975 of the Commonwealth. It has been held to be implied in the USA Constitution.

¹¹⁸ see Appendix 2 - International Covenant on Civil and Political Rights - Articles 8, 10, 12, 13, 14, 15 18, 19, 21, 22 and 25.

¹¹⁹ see also New Zealand Bill of Rights Act, section 5, Papua New Guinea Constitution section 38 (as to qualified rights only), Constitution of the Republic of South Africa, section 33.

¹²⁰ see item F3, p.31.

(e) Should there be power to suspend a Bill of Rights?

- (i) Another issue for consideration is whether there should be any power to suspend the operation of all or any parts of any Northern Territory Bill of Rights in an emergency. Such a provision is contained in *Article 4* of the ICCPR in fairly limited circumstances. It must be a public emergency which threatens the life of the nation and its existence, the measures may be taken only to the extent strictly required by the exigencies of the situation, the measures must not be inconsistent with the nation's obligations under international law and must not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin. No derogation is permitted from the rights concerning life, torture and other unacceptable punishments, slavery, imprisonment for debts, retrospective criminal offences, recognition as a person before the law, and freedom of religion. There is an obligation to inform other state parties of the measures and their termination.¹²¹
- (ii) These are clear dangers in any power to suspend a Bill of Rights. Similar provisions in the constitutions of some other countries have sometimes been abused. If there is to be such a provision in any Northern Territory Bill of Rights, it seems clear that it should be strictly limited and that these limits should be judicially enforceable.
- (iii) There is also a question whether the fixed maximum term of the Parliament should be capable of extension by government or the Parliament in a genuine emergency. This is a matter not discussed in the Committee's first Discussion Paper. By way of comparison, the Canadian *Charter of Rights and Freedoms* provides for such a power in section 4.¹²² The same question arises in respect of the maximum time between Parliamentary sittings.

(f) Other Matters

- (i) There may be other provisions that should be considered for inclusion in a Northern Territory Bill of Rights. For example, that the rights expressed in that Bill are without limitation to any other rights, and that the Bill is to be interpreted such that no person or organisation is to be entitled to do anything aimed at the destruction or limitation of the rights of others. It might also be considered that a provision should be inserted requiring the Bill of Rights to be interpreted in a manner consistent with the preservation and enhancement of the multicultural nature of the Northern Territory community, based on freedom and equality, so as to promote harmony, tolerance and unity.¹²³
- (ii) The Committee invites comment on all of these matters.

¹²¹ see also Papua New Guinea Constitution, section 40, European Convention on Human Rights, Article 15, Constitution of the Republic of South Africa, section 34; or note that the Canadian Charter of Rights and Freedoms allows a general legislative power of express derogation from section 2 and sections 7-15, but it is only operative for 5 years.

¹²² see Appendix 5 - Canadian Charter of Rights and Freedoms.

¹²³ see Appendix 5 - Canadian Charter of Rights and Freedoms, section 27.

G. ENFORCEMENT AND ENTRENCHMENT OF A NORTHERN TERRITORY BILL OF RIGHTS

1. Enforcement and Entrenchment generally

- (a) The effectiveness of any Bill of Rights largely depends upon the extent to which it is capable of being enforced against the person or body in breach. However, the desirability of effective enforcement mechanisms has to be balanced against the desirability of the democratically elected legislature having the maximum capacity to enact laws which it considers to be in the best interests of the community, and for government to be able to administer those laws and to be able to govern effectively and efficiently with the minimum of restrictions.
- (b) The issue of enforceability and entrenchment can be directly related. The greater the degree of entrenchment of a Bill of Rights in a constitution, that is, the more difficult it is to later change that Bill of Rights, the more likely it is to be capable of effective enforcement. The greater the degree of entrenchment, the more difficult it will be for government to secure a change to the Bill of Rights where it is found to be operating in a manner that is disadvantageous to effective and efficient government or to the wider public interest generally.
- (c) Most national Bills of Rights are constitutionally entrenched to some degree. The *Bill of Rights Act* in New Zealand is more an exception in this regard, being in the form of an ordinary statute of the Parliament, capable of being amended or repealed by a later statute.¹²⁴ On the other hand, it is still an Act capable of being enforced through the courts against government.
- (d) Most national Bills of Rights are enforceable through the courts. However, the effectiveness of this depends on the extent to which the principle of the independence of the judiciary is established in the particular jurisdiction. This is a matter discussed in the Committee's *Discussion Paper*.¹²⁵

2. Options

Assuming a Bill of Rights is to be adopted in the Northern Territory as part of its further constitutional development, the possible options for its adoption are as follows:

¹²⁴ see Appendix 3.

¹²⁵ 1987. Northern Territory Legislative Assembly Sessional Committee on Constitutional Development. *Discussion Paper on A Proposed New Constitution for the Northern Territory*, Legislative Assembly of the Northern Territory, Darwin.

(a) Ordinary Statute

There may be some advantages to including the Bill of Rights in an ordinary statute, such as has been done in New Zealand, and was first done in Canada. This would enable the Bill to be given a "phasing-in" trial period, when its operation could be assessed and analysed and any deficiencies corrected where necessary. The Bill could be given constitutional status after that initial period had expired and the judiciary and others had adjusted to the changes introduced by it. The Bill could also be enacted by the Northern Territory Legislative Assembly before the commencement of the new constitution if thought appropriate. This may be an option that would appeal to those who favour some legal statement of rights as part of further Northern Territory constitutional development, but who might be concerned about the wide ramifications of an enforceable Bill of Rights that was firmly entrenched in the constitution from its inception and which might have unforeseen consequences in the particular circumstances of the Northern Territory.

(b) Organic Law

The option of a Bill of Rights in an organic law may also have some attractions, in that while the Bill of Rights would remain as a statute and could be changed later if found necessary. Any such change would have to comply with the specified amendment procedures for organic laws, involving a special majority of the Parliament and associated safeguards against hasty amendment. The difficulty in practice with this suggestion is that the Northern Territory presently has no power to make organic laws, so the option could not be implemented until after the new constitution came into effect.

(c) Preamble to the new Northern Territory constitution

The inclusion of the Bill of Rights in a preamble to the new Territory constitution, presumably in a form that was not directly enforceable in the courts at the suit of a person claiming an infringement of rights, is another option deserving consideration. Whilst not directly enforceable, the Bill could have some meaningful operation, in that the provisions of the Bill may impact upon matters of legal interpretation of other laws in appropriate cases, and may also affect the manner of administration of those laws by government by way of introducing a further relevant matter for consideration by administrators.

(d) Non-enforceable constitutional provision

A variation of the option discussed in paragraph (c) above would be to include the Bill of Rights in the body of the new constitution itself, but to expressly provide that that part was not to be directly enforceable at the suit of any person in the courts, nor was it to provide a defence in any court action against that person. Its operation could be limited to matters of interpretation and administration, discussed above.

(e) Parliamentary Scrutiny

The options discussed in paragraphs (c) or (d) above could also be combined with a constitutional provision for the establishment of a standing Parliamentary Committee, the duty of which would include that of considering all legislation (including subordinate legislation) and reporting on whether it complied with the Bill of Rights. Such a provision along these lines was recommended in the Report by the Legal and Constitutional Committee of the Victorian Parliament.¹²⁶

(f) Ombudsman

The option in paragraph (e) above could also be supplemented by a constitutional provision conferring on the Northern Territory Ombudsman the duty of considering all administrative actions the subject of a complaint and reporting on whether they complied with the Bill of Rights, together with any recommendations for changes in matters of administration in order to conform to the Bill.

(g) Enforceable constitutional provision

If it is considered that all of these options are too weak, and do not effectively secure a minimum standard of fundamental rights, the only option is a constitutionally entrenched Bill of Rights, directly enforceable in the courts. There would still be a question of the degree of entrenchment of that Bill of Rights in that constitution. One possibility would be to provide for a simpler method of amendment than a referendum for an initial trial period, perhaps by a special majority of the Parliament only. Another possibility would be to give the Parliament the power of later amendment of the Bill of Rights by way of an express overriding statute, but to provide that any such amendment only operates for a limited period of years — as in Canada.¹²⁷

(h) Status quo

If none of these options are considered to be acceptable, then the status quo will remain, that is, there will be no comprehensive Bill of Rights as part of further Northern Territory constitutional development. However, there may well be selected constitutional provisions of a human rights nature on particular topics, for example, against any compulsory acquisition of property without fair compensation, and there would still be scope for introducing a statutory Bill of Rights or possibly an organic law at a later time. The advantage of framing a Bill of Rights at the same time as the adoption of a new Northern Territory constitution as a part of further Northern Territory constitutional development would, however, be lost.

(i) The Committee repeats that it has as yet made no firm decision of the question of whether there should be a Bill of Rights for the Northern Territory, and if so, what rights it should contain, the extent to which it should be entrenched and how it should be enforceable. These are matters upon which it invites public comment.

¹²⁶ 1989. *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*, Legal and Constitutional Committee, Parliament of Victoria, Melbourne.

¹²⁷ see Appendix 5.

APPENDICES

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H. APPENDIX 1

I. List of Persons and Organisations who have commented on the human rights aspects of the Committee's first Discussion Paper.

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List of Persons and Organisations who commented on the Human Rights Aspects of the Committee's first Discussion Paper.

Persons

Bennett, Steve
Bromley, Toni Vine
Brown, George
Campbell, H M
Driffin, Chris
Fletcher, Kevin F
Forrester, Vince
Forscutt, Jim
Gilmour, Susan
Hockey, Phillip R
James, Earl
Johannsen, Dave
Joshua,
Keunen, Sheila
Kimber, R G
Malcolm, David (Chief Justice)
McNab, Peter
O'Donoghue, Lois
Perceval, Francis
Pfeifer, Horst
Reyburn,
Ross, Bruce
Shannon, David
Smith-Vaughan, P
Thomson, Jim (Professor)
Thorn, Peter (Dr)
Yuell, Ian
Whiley, W

Organisations

Constitutional Heritage Protection Society
Council of Government Schools Organisations (NT) (R Creswick)
Federal Miscellaneous Workers Union (Peter Tullgren)
Jabiru Town Council (Don Ditchburn)
Local Government Association (NT)
National Spiritual Assembly of the Baha'is of Australia Inc
Office of Equal Opportunity (NT)
Tangentyere Council
Trades and Labour Council (NT) (Mark Crossin, Rod Ellis and Joan Wilkinson)
Uniting Church in Australia
Women's Advisory Council (Myrna Bull, Sue Schmolke, Ida Williams)
Yirrkala Dhanbul Community Association Inc

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J. APPENDIX 2

**K. The International Covenant on Civil and Political Rights and Optional Protocol,
1996**

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[A] *International covenant on civil and political rights, 1966*

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized therein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour;
(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
(c) For the purpose of this paragraph the term 'forced or compulsory labour' shall not include:
 - (i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
 - (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
 - (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
 - (iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reason for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully, in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows exclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs limitations as may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others,
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights,

consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in Article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with Article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in Article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with preceding Articles of this part of the present Covenant.

Article 33

1. If in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with Article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with Article 29 for the purpose of fulfilling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with Article 33 shall hold office for the remainder of the term of the member who vacated the seat of the Committee under the provisions of that Article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia* that:
 - (a) Twelve members shall constitute a quorum;
 - (b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:
 - (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
 - (b) Thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this Article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this Article shall be dealt with in accordance with the following procedure:

- (a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication, the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter.
- (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State.
- (c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.
- (d) The Committee shall hold closed meetings when examining communications under this article.
- (e) Subject to the provisions of sub-paragraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant.
- (f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in sub-paragraph (b), to supply any relevant information.
- (g) The States Parties concerned, referred to in sub-paragraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing.
- (h) The Committee shall, within twelve months after the date of receipt of notice under sub-paragraph (b), submit a report:
 - (i) If a solution within the terms of sub-paragraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
 - (ii) If a solution within the terms of sub-paragraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this Article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this Article. Such declarations shall be deposited by the States Parties to the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this Article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1. (a) If a matter referred to the Committee in accordance with Article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not party to the present Covenant, or of a State Party which has not made, the declaration under Article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Head quarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with Article 36 shall also service, the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the State Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned.

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter.

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached the Commission shall confine its report to a brief statement of the fact and of the solution reached.

(c) If a solution within the terms of sub-paragraph (b) is not reached. the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned.

(d) If the Commission's report is submitted under sub-paragraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this Article are without prejudice to the responsibilities of the Committee under Article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this Article.

Article 43

The members of the Committee, and of the *ad hoc* conciliation commissions which may be appointed under Article 42, shall be entitled to the facilities, privileges and immunes of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under Article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same Article of the following particulars:

- (a) Signatures, ratifications and accessions under Article 48;
- (b) The date of the entry into force of the present Covenant under Article 49 and the date of the entry into force of any amendments under Article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in Article 48.

[B] *Optional protocol to the international covenant on civil and political rights, 1966*

The States Parties to the present Protocol,

Considering that in order further to achieve the purposes of the Covenant on Civil and Political Rights (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in Part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victim of violations of any of the rights set forth in the Covenant,

Have agreed as follows:

Article 1

A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol.

Article 2

Subject to the provisions of Article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

Article 3

The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.

Article 4

1. Subject to the provisions of Article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.
2. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 5

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.
2. The Committee shall not consider any communication from an individual unless it has ascertained that:
 - (a) The same matter is not examined under another procedure of international investigation or settlement;
 - (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.
3. The Committee shall hold closed meetings when examining communications under the present Protocol.
4. The Committee shall forward its views to the State Party concerned and to the individual.

Article 6

The Committee shall include in its annual report under Article 45 of the Covenant a summary of its activities under the present Protocol.

Article 7

Pending the achievement of the objectives of resolution 1514 (XV) adopted by the General Assembly of the United Nations on 14 December 1960 concerning the Declaration on the Granting of Independence to Colonial Countries and Peoples, the provisions of the present Protocol shall in no way limit the right of petition granted to these peoples by the Charter of the United Nations and other international conventions and instruments under the United Nations and its specialized agencies.

Article 8

1. The present Protocol is open for signature by any State which has signed the Covenant.
2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Covenant.
4. Accession shall be effected by the deposit of an instrument of accessories with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 9

1. Subject to the entry into force of the Covenant, the present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or instrument of accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 10

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 11

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one-third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-third majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

Article 12

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under Article 2 before the effective date of denunciation.

Article 13

Irrespective of the notifications made under Article 8, paragraph 5, of the present Protocol, the Secretary-General of the United Nations shall inform all States referred to in Article 48, paragraph 1, of the Covenant of the following particulars:

- (a) Signatures, ratifications and accessions under Article 8;
- (b) The date of the entry into force of the present Protocol under Article 9 and the date of the entry into force of any amendments under Article 11;
- (c) Denunciations under Article 12.

Article 14

1. The present Protocol, of which the Chinese, English, French Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in Article 48 of the Covenant.

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L. APPENDIX 3

M. New Zealand Bill of Rights Act 1990

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New Zealand Bill of Rights Act 1990

1. Short Title and commencement — (1) This Act may be cited as the New Zealand Bill of Rights Act 1990.

(2) This Act shall come into force on the 28th day after the date on which it receives the Royal assent.

PART I

GENERAL PROVISIONS

2. Rights affirmed— The rights and freedoms contained in this Bill Rights are affirmed.

3. Application — This Bill of Rights applies only to acts done —

(a) By the legislative, executive, or judicial branches of the government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

4. Other enactments not affected — No court shall, in relation to any enactment (whether passed or made before or after the commencement this Bill of Rights), —

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5. Justified limitations — Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. Interpretation consistent with Bill of Rights to be preferred — Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

7. Attorney-General to report to Parliament where Bill appears to be consistent with Bill of Rights — Where any Bill is introduced into the House of Representatives, the Attorney-General shall, —

(a) In the case of a Government Bill, on the introduction of that Bill; or

(b) In any other case, as soon as practicable after the introduction of the Bill,— bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights

PART II
CIVIL AND POLITICAL RIGHTS

Life and Security of the Person

8. Right not to be deprived of life — No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9. Right not to be subjected to torture or cruel treatment — Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

10. Right not to be subjected to medical or scientific experimentation — Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

11. Right to refuse to undergo medical treatment — Everyone has the right to refuse to undergo any medical treatment.

Democratic and Civil Rights

12. Electoral rights — Every New Zealand citizen who is of or over the age of 18 years —

- (a) Has the right to vote in genuine periodic elections of members, of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
- (b) Is qualified for membership of the House of Representatives.

13. Freedom of thought, conscience, and religion — Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

14. Freedom of expression — Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

15. Manifestation of religion and belief — Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

16. Freedom of peaceful assembly — Everyone has the right to freedom of peaceful assembly.

17. Freedom of association — Everyone has the right to freedom of association.

18. Freedom of movement — (1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

(2) Every New Zealand citizen has the right to enter New Zealand.

(3) Everyone has the right to leave New Zealand.

(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under decision taken on grounds prescribed by law.

Non-Discrimination and Minority Rights

19. Freedom from discrimination — (1) Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief do not constitute discrimination.

20. Rights of minorities — A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, and to profess and practise the religion, or to use the language, of that minority.

Search, Arrest, and Detention

21. Unreasonable search and seizure — Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

22. Liberty of the person — Everyone has the right not to be arbitrarily arrested or detained.

23. Rights of persons arrested or detained — (1) Everyone who is arrested or who is detained under any enactment —

- (a) Shall be informed at the time of the arrest or detention of the reason for it; and
- (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
- (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is —

- (a) Arrested; or
- (b) Detained under any enactment —

or any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

24. Rights of persons charged — Everyone who is charged with an offence —

- (a) Shall be informed promptly and in detail of the nature and cause of the charge; and
- (b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and
- (c) Shall have the right to consult and instruct a lawyer; and
- (d) Shall have the right to adequate time and facilities to prepare defence; and
- (e) Shall have the right, except in the case of an offence under military law tried before a military tribunal to the benefit of a trial jury when the penalty for the offence is or includes imprisonment for more than 3 months; and

- (f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and
- (g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

25. Minimum standards of criminal procedure — Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

- (a) The right to a fair and public hearing by an independent and impartial court:
- (b) The right to be tried without undue delay:
- (c) The right to be presumed innocent until proved guilty according to law:
- (d) The right not to be compelled to be a witness or to confess guilt:
- (e) The right to be present at the trial and to present a defence:
- (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
- (g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
- (h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
- (i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

26. Retroactive penalties and double jeopardy — (1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

(2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

27. Right to justice — (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

PART III

MISCELLANEOUS PROVISIONS

28. Other rights and freedoms not affected — An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

29. Application to legal persons — Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

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N. APPENDIX 4

O. USA Bill of Rights

**Relevant excerpts of Amendments to the Constitution
of the United States of America**

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ARTICLES IN ADDITION TO, AND IN
AMENDMENT OF, THE CONSTITUTION
OF THE UNITED STATES OF AMERICA,
PROPOSED BY CONGRESS, AND
RATIFIED BY THE LEGISLATURES OF
THE SEVERAL STATES PURSUANT TO
THE FIFTH ARTICLE OF THE ORIGINAL
CONSTITUTION

ARTICLE [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE [II]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ARTICLE [III]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE [IV]

The right of the people to be secure in their persons, house papers, and effects, against unreasonable searches and seizure shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

ARTICLE [VII]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

ARTICLE [VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE [IX]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE [XIII]

Section 1. Neither slavery nor involuntary servitude, except, as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal promotion of the laws.

Section 2 Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of presentation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.:

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or

obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE [XV]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE [XIX]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

ARTICLE [XXIV]

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice-President, or for Senator or Representative in Congress, shall not be denied or abridged by United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE [XXVI]

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

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P. APPENDIX 5

Q. Canadian Charter of Rights and Freedoms

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CONSTITUTION ACT, 1982

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:
- (a) freedom of conscience and religion;
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - (c) freedom of peaceful assembly; and
 - (d) freedom of association.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

(2) In time of real or apprehended war, invasion of insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

5. There shall be a sitting of Parliament and of each legislature sitting at least once every twelve months.

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
 - (b) to pursue the gaining of a livelihood in any province.
- (3) The rights specified in subsection (2) are subject to
- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
 - (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

11. Any person charged with an offence has the right,

- (a) to be informed without unreasonable delay of the specific offence;
- (b) to be tried within a reasonable time;
- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- (e) not to be denied reasonable bail without just cause;
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury

where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations:
- (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and

privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed. [*New, Constitution Amendment 1993 (New Brunswick)*]

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19. (1) Either English or French may be used in courts by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleadings in or process issuing from, any court of New Brunswick.

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

- (a) there is a significant demand for communications with and services from that office in such language; or
- (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

23. (1) Citizens of Canada

- (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
- (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French minority population of a province

- (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
- (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any affected by aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. [*Amended, Constitution Amendment Proclamation, 1983.*]

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

32. (1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

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R. APPENDIX 6

S. Relevant excerpts from the

T. Papua New Guinea Constitution:

[A.] Preamble (part thereof) and

[B.] Part III - Basic Principles of Government (part thereof):

Division 3 - Basic Rights,

Division 4 - Principles of Natural Justice and

Division 5 - Basic Social Obligations

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RELEVANT EXCERPTS FROM THE CONSTITUTION OF THE
INDEPENDENT STATE OF PAPUA NEW GUINEA

[A] **PREAMBLE** (*part thereof*)

National Goals and Directive Principles.

WE HEREBY PROCLAIM the following aims as our National Goals, and direct all persons and bodies, corporate and unincorporate, to be guided by these our declared Directives in pursuing and achieving our aims :-

1. - INTEGRAL HUMAN DEVELOPMENT.

We declare our first goal to be for every person to be dynamically involved in the process of freeing himself or herself from every form of domination or oppression that each man or woman will have the opportunity to develop as a whole person in relationship with others.

WE ACCORDINGLY CALL FOR -

- (1) everyone to be involved in our endeavours to achieve integral human development of the whole person for every person and to seek fulfilment through his or her contribution to the common good; and
- (2) education to be based on mutual respect and dialogue, and to promote awareness of our human potential and motivation to achieve our National Goals through self-reliant effort; and
- (3) all forms of beneficial creativity, including sciences and cultures, to be actively encouraged; and
- (4) improvement in the level of nutrition and the standard of public health to enable our people to attain self fulfilment; and
- (5) the family unit to be recognized as the fundamental basis of our society, and for every step to be taken to promote the moral, cultural, economic and social standing of the Melanesian family; and
- (6) development to take place primarily through the use of Papua New Guinean forms of social and political organization.

2. - EQUALITY AND PARTICIPATION.

We declare our second goal to be for all citizens to have an equal opportunity to participate in, and benefit from the development of our country.

WE ACCORDINGLY CALL FOR -

- (1) an equal opportunity for every citizen to take part in the political, economic, social, religious and cultural life of the country; and
- (2) the creation of political structures that will enable effective, meaningful participation by our people in that life, and in view of the rich cultural and ethnic diversity of our people for those structures to provide for "substantial decentralization of all forms of government activity; and

- (3) every effort to be made to achieve an equitable distribution of incomes and other benefits of development among individuals and throughout the various parts of the country; and
- (4) equalization of services in all parts of the country, and for every citizen to have equal access to legal processes and all services, governmental and otherwise, that are required for the fulfilment of his or her real needs and aspirations; and
- (5) equal participation by women citizens in all political, economic, social and religious activities; and
- (6) the maximization of the number of citizens participating in every aspect of development; and
- (7) active steps to be taken to facilitate the organization and legal recognition of all groups engaging in development activities; and
- (8) means to be provided to ensure that any citizen can exercise his personal creativity and enterprise in pursuit of fulfilment that is consistent with the common good, and for no citizen to be deprived of this opportunity because of the predominant position of another; and
- (9) every citizen to be able to participate, either directly or through a representative, in the consideration of any matter affecting his interests or the interests of his community; and
- (10) all persons and governmental bodies of Papua New Guinea to ensure that, as far as possible, political and official bodies are so composed as to be broadly representative of citizens from the various areas of the country; and
- (11) all persons and governmental bodies to endeavour to achieve universal literacy in *Pisin, Hiri Motu*, or English, and in "*tok ples*" or "*ita eda tano gado*"; and
- (12) recognition of the principles that a complete relationship in marriage rests on equality of rights and duties of the partners, and that responsible parenthood is based on that equality.

3. - NATIONAL SOVEREIGNTY AND SELF-RELIANCE

We declare our third goal to be for Papua New Guinea to be politically and economically independent, and our economy basically self-reliant.

WE ACCORDINGLY CALL FOR -

- (1) our leaders to be committed to these National Goals and Directive Principles, to ensure that their freedom to make decisions is not restricted by obligations to or relationship with others, and to make all of their decisions in the national interest; and
- (2) all governmental bodies to base their planning for political, economic and social development on these Goals and Principles; and
- (3) internal interdependence and solidarity among citizens, and between provinces, to be actively promoted; and
- (4) citizens and governmental bodies to have control of the bulk of economic enterprise and production; and
- (5) strict control of foreign investment capital and wise assessment of foreign ideas and values so that these will be subordinate to goal of national sovereignty and self-reliance

and *in particular* for the entry of foreign capital to be geared to internal social and economic policies and to the integrity of the Nation and the People; and

- (6) the State to take effective measures to control and actively participate in the national economy, and *in particular* to control major enterprises engaged in the exploitation of natural resources; and
- (7) economic development to take place primarily by the use of skills and resources available in the country either from citizens or the State and not in dependence on imported skills and resources; and
- (8) the constant recognition of our sovereignty, which must not be undermined by dependence on foreign assistance of any sort, and *in particular* for no investment, military or foreign aid agreement or understanding to be entered into that imperils our self-reliance and self-respect, or our commitment to these National Goals and Directive Principles, or that may lead to substantial dependence upon or influence by any country, investor, lender or donor.

4. - NATURAL RESOURCES AND ENVIRONMENT.

We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations.

WE ACCORDINGLY CALL FOR -

- (1) wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations; and
- (2) the conservation and replenishment, for the benefit of ourselves and posterity, of the environment and its sacred, scenic and historical qualities; and
- (3) all necessary steps to be taken to give adequate protection to our valued birds, animals, fish, insects, plants and trees.

5. - PAPUA NEW GUINEAN WAYS.

We declare our fifth goal to be to achieve development primarily through the use of Papua New Guinean forms of socials political and economic organization.

WE ACCORDINGLY CALL FOR -

- (1) a fundamental re-orientation of our attitudes and the institutions of government, commerce, education and religion towards Papua New Guinean forms of participation, consultation and consensus, and a continuous renewal of the responsiveness of these institutions to the needs and attitudes of the People; and
- (2) particular emphasis in our economic developments be placed on small-scale artisan, service business activity; and
- (3) recognition that the cultural, commercial and ethnic diversity of our people is a positive strength, and for the fostering of a respect for, and appreciation of, traditional ways of life and culture, including language, in all their richness and variety, as well as for a willingness to apply these ways dynamically and creatively for the tasks of development; and

- (4) traditional villages and communities to remain as viable units of Papua New Guinean society, and for active steps to be taken to improve their cultural, social, economic and ethical quality

Basic Rights.

WE HEREBY ACKNOWLEDGE that, subject to any restrictions imposed by law on non-citizens, all persons in our country are entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever their race, tribe, places of origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the legitimate public interest, to each of the following :-

- (a) life, liberty, security of the person and the protection of the law; and
- (b) the right to take part in political activities; and
- (c) freedom from inhuman treatment and forced labour; and
- (d) freedom of conscience, of expression, of information and of assembly and association; and
- (e) freedom of employment and freedom of movement; and
- (f) protection for the privacy of their homes and other property and from unjust deprivation of property,

and have accordingly included in this Constitution provisions designed to afford protection to those rights and freedoms, subject to such limitations on that protection as are contained in those provisions, being limitations primarily designed to ensure that the enjoyment of the acknowledged rights and freedoms by an individual does not prejudice the rights and freedoms of others or the legitimate public interest.

Basic Social Obligations.

WE HEREBY DECLARE that all persons in our country have the following basic obligations to themselves and their descendants, to each other, and to the Nation :-

- (a) to respect, and to act in the spirit of, this Constitution; and
- (b) to recognize that they can fully develop their capabilities and advance their true interests only by active participation in the development of the national community as a whole; and
- (c) to exercise the rights guaranteed or conferred by this Constitution, and to use the opportunities made available to them under it to Participate fully in the government of the Nation; and
- (d) to protect Papua New Guinea and to safeguard the national wealth, resources and environment in the interests not only of the present generation but also of future generations; and
- (e) to work according to their talents in socially useful employment, and if necessary to create for themselves legitimate opportunities for such employment; and
- (f) to respect the rights and freedoms of others, and to co-operate fully with others in the interests of interdependence and solidarity; and
- (g) to contribute, as required by law, according to their means to the revenues required for the advancement of the Nation and the purposes of Papua New Guinea; and

- (h) in the case of parents, to support, assist and educate their children (whether born in or out of wedlock), and in particular to give them a true understanding of their basic rights and obligations and of the National Goals and Directive Principles; and
- (i) in the case of the children, to respect their parents.

IN ADDITION, WE HEREBY DECLARE that all citizens have an obligation to themselves and their descendants, to each other and to the Nation to use profits from economic activities in the advancement of our country and our people, and that the law may impose a similar obligation on non-citizens carrying on economic activities in or from our country.

[B] PART 111 - BASIC PRINCIPLES OF GOVERNMENT (part thereof)

Division 3. - Basic Rights

Subdivision A. - Introductory.

32. - RIGHT TO FREEDOM

(1) Freedom based on law consists in the least amount of restriction on the activities of individuals that is consistent with the maintenance and development of Papua New Guinea and of society in accordance with this Constitution and, in particular, with the National Goals and Directive Principles and the Basic Social Obligations.

(2) Every person has the right to freedom based on law, and accordingly has a legal right to do anything that -

- (a) does not injure or interfere with the rights and freedoms of others; and
- (b) is not prohibited by law,

and no person -

- (c) is obliged to do anything that is not required by law; and
- (d) may be prevented from doing anything that complies with the provisions of paragraphs (a) and (b)

(3) This section is not intended to reflect on the extra-legal existence, nature, or effect of social, civic, family or religious obligations, or other obligations of an extra-legal nature, or to prevent such obligations being given effect to by law.

33. - OTHER RIGHTS AND FREEDOMS, ETC.

Nothing in this Division derogates the rights and freedoms of the individual under any other law and, in particular, an Organic Law or an Act of the Parliament may provide further guarantees of rights and freedoms and may further restrict the limitations that may be placed on, or on the exercise of, any right or freedom (including the limitations that may be imposed under Section 38 (*general qualifications on qualified rights*)).

34. - APPLICATION OF DIVISION 3.

Subject to this Constitution, each provision of this Division applies, as far as may be -

- (a) as between individuals as well as between governmental bodies and individuals; and
- (b) to and in relation to corporations and associations (other than governmental bodies) in the same way as it applies to and in relation to individuals,

except where, or to the extent that the contrary intention appears in this Constitution.

Subdivision B. - Fundamental Rights.

35. - RIGHT TO LIFE.

(1) No person shall be deprived of his life intentionally except -

- (a) in execution of a sentence of a court following his conviction of an offence for which the penalty of death is prescribed by law; or
- (b) as the result of the use of force to such an extent is reasonable in the circumstances of the case and is permitted by any other law -
 - (i) for the defence of any person from violence; or
 - (ii) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
 - (iii) for the purpose of suppressing riot, an insurrection or a mutiny; or
 - (iv) in order to prevent him from committing an offence; or
 - (v) for the purpose of suppressing piracy or terrorism or similar acts; or
- (c) as the result of a lawful act of war.

(2) Nothing in Subsection (1)(b) relieves any person from any liability at law in respect of the killing of another.

36. - FREEDOM FROM INHUMAN TREATMENT.

(1) No person shall be submitted to torture (whether physical or mental), or to treatment or punishment that is cruel or otherwise inhuman, or is inconsistent with respect for the inherent dignity of the human person.

(2) The killing of a person in circumstances in which Section 35(1)(a) (*right to life*) does not, of itself contravene Subsection (1), although the manner or the circumstances of the killing may contravene it.

37. - PROTECTION OF THE LAW.

(1) Every person has the right to the full protection of the law and the succeeding provisions of this section are intended to ensure that that right is fully available, especially to persons in custody or charged with offences.

(2) Except, subject to any Act of the Parliament the contrary, in the case of the offence commonly known as contempt of court, nobody may be convicted of an offence that is not defined by, and the penalty for which is not prescribed by, a written law.

(3) A person charged with an offence shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time, by an independent and impartial court.

(4) A person charged with an offence -

(a) shall be presumed innocent until proved guilty according to law, but a law may place upon a person charged with an offence the burden of proving particular facts which are, or would with the exercise of reasonable care be, peculiarly within his knowledge; and

(b) shall be informed promptly in a language which the offence with which he is charged; and

(c) shall be given adequate time and facilities for the preparation of his defence; and

(d) shall be permitted to have without payment the assistance of an interpreter if he cannot understand or speak the language used at the trial of the charge; and

(e) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice, or if he is a person entitled to legal aid, by the Public Solicitor or another legal representative assigned to him in accordance with law; and

(f) shall be afforded facilities to examine in person or by his legal representative the witnesses called before the court by the prosecution, and to obtain the attendance and carry out the examination of witnesses and to testify before the court on his own behalf, on the same conditions as those applying to witnesses called by the prosecution.

(5) Except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable, and the court orders him to be removed and the trial to proceed in his absence, but provision may be made by law for a charge that a person has committed an offence the maximum penalty for which does not include imprisonment, (except in default of payment of a fine), to be heard summarily in his absence if it is established that he has been duly served with a summons in respect of the alleged offence.

(6) Nothing in Subsection (4)(f) invalidates a law which imposes reasonable conditions that must be satisfied if witness called to testify on behalf of a person charged with an offence are to be paid their expenses out of public funds.

(7) No person shall be convicted of an offence on account of any act that did not, at the time when it took place, constitute an offence, and no penalty shall be imposed for an offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed

(8) No person who shows that he has been tried by a competent court for an offence and has been convicted or acquitted shall again be tried for that offence or for any other offence of which he could have been convicted at the trial for that offence, except upon the order of a superior court made in the course of appeal or review proceedings relating to the conviction or acquittal.

(9) No person shall be tried for an offence for which he has been pardoned.

(10) No person shall be compelled in the trial of an offence to be witness against himself.

(11) A determination of the existence or extent of a civil right or obligation shall not be made except by an independent and impartial court or other authority prescribed by law or agreed upon by the parties, and proceedings for such a determination shall be fairly heard within a reasonable time.

(12) Except with the agreement of the parties, or by order of the court in the interests of national security, proceedings in any jurisdiction of a court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall be held in public.

(13) Nothing in Subsection (12) prevents a court or other authority from excluding from the hearing of the proceedings before it persons, other than the parties and their legal representatives, to such an extent as the court or other authority -

(a) is by law empowered to do and considers necessary or expedient in the interests of public welfare or in circumstances where publicity would prejudice the interests of justice, the welfare of persons under voting age or the protection of the private lives of persons concerned in the proceedings; or

(b) is by law empowered or required to do in the interests of defence, public safety or public order.

(14) In the event that the trial of a person is not commenced within four months of the date on which he was committed for trial, a detailed report concerning the case shall be made by the Chief Justice to the Minister responsible for the National Legal Administration.

(15) Every person convicted of an offence is entitled to have his conviction and sentence reviewed by a higher court or tribunal according to law.

(16) No person shall be deprived by law of a right of appeal against his conviction or sentence by any court that existed at the time of the conviction or sentence, as the case may be.

(17) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

(18) Accused persons shall be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.

(19) Persons under voting age who are in custody in connexion with an offence or alleged offence shall be separated from other persons in custody and be accorded treatment appropriate to their age.

(20) An offender shall not be transferred to an area away from that in which his relatives reside except for reasons of security or other good cause and, if such a transfer is made, the reason for so doing shall be endorsed on the file of the offender.

(21) Nothing in this section -

(a) derogates Division III.4 (*principles of natural justice*) or

(b) affects the powers and procedures of village courts.

(22) Notwithstanding Subsection 21(b) powers and procedures of village courts shall be exercised in accordance with the principles of natural justice.

Subdivision C. - Qualified Rights.

General.

38. - GENERAL QUALIFICATIONS ON QUALIFIED RIGHTS.

(1) For the purposes of this Subdivision, a law that complies with the requirements of this section is a law that is made and certified in accordance with Subsection (2), and that -

- (a) regulates or restricts the exercise of a right or freedom referred to in this Subdivision to the extent that the regulation or restriction is necessary -
 - (i) taking account of the National Goals and Directive Principles and the Basic Social Obligations, for the purpose of giving effect to the public interest in -
 - (A) defence; or
 - (B) public safety; or
 - (C) public order; or
 - (D) public welfare; or
 - (E) public health (including animal and plant health); or
 - (F) the protection of children and persons under his disability (whether legal or practical); or
 - (G) the development of under-privileged or less advanced groups or areas; or
 - (ii) in order to protect the exercise of the rights and freedoms of others; or
- (b) makes reasonable provision for cases where the exercise of one such right may conflict with the exercise of another,

to the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.

(2) For the purposes of Subsection (1), a law must -

- (a) be expressed to be a law that is made for that purpose; and
- (b) specify the right or freedom that it regulates or restricts; and
- (c) be made, and certified by the Speaker in his certificate under Section 110 (*certification as to making of laws*) to have been made, by an absolute majority.

(3) The burden of showing that a law is a law that complies with the requirements of Subsection (1) is on the party relying on its validity.

39. - "REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY", ETC.

(1) The question, whether a law or act is reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind, is to be determined in the light of the circumstances obtaining at the time when the decision on the question is made.

(2) A law shall not be declared not to be reasonably justifiable in a society having a proper regard for the rights and dignity of mankind except by the Supreme Court or the National Court, or any other court prescribed for the purpose by or under an Act of the Parliament, and unless the court is satisfied that the law was never so justifiable such a declaration operates as a repeal of the law as at the date of the declaration.

(3) For the purposes of determining whether or not any law, matter or thing is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, a court may have regard to -

- (a) the provisions of this Constitution generally and especially the National Goals and Directive Principles and the Basic Social Obligations; and
- (b) the Charter of the United Nations: and
- (c) the Universal Declaration of Human Rights and any other declaration, recommendation or decision of the General Assembly of the United Nations concerning human rights and fundamental freedoms; and
- (d) the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and any other international conventions, agreements or declaration. concerning human rights and fundamental freedoms; and
- (e) judgements, reports and opinions of the International Court of Justice, the European Commission of Human Rights, the European Court of Human Rights and other international courts and tribunals dealing with human rights and fundamental freedoms; and
- (f) previous laws, practices and Judicial decisions and opinions in the country; and
- (g) laws, practices and judicial decisions and opinions in other countries; and
- (h) the Final Report of the Pre-Independence Constitutional Planning Committee dated 13 August 1974 and presented to the pre-Independence House of Assembly on 16 August 1974, as affected by decisions of that House on the report and by decisions of the Constituent Assembly on the draft of this Constitution; and
- (i) declarations by the International Commission of Jurists and other similar organizations;
- (j) any other material that the court considers relevant.

40. - VALIDITY OF EMERGENCY LAWS.

Nothing in this Part invalidates an emergency law as defined in Part X. (*emergency powers*). but nevertheless so far as is consistent with their purposes and terms all such laws shall be interpreted and applied so as not to affect or derogate a right or freedom referred to in this Division to an extent that is more than is reasonably necessary to deal with the emergency concerned and matters arising out of it, but only so far as is reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind.

41. - PROSCRIBED ACTS.

(1) Notwithstanding anything to the contrary in any other provision of any law, any act that is done under a valid law but in the particular case -

- (a) is harsh or oppressive; or
- (b) is not warranted by, or is disproportionate to, the requirements of the particular circumstances or of the particular case; or
- (c) is otherwise not, in the particular circumstances, reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind,

is an unlawful act.

(2) The burden of showing that Subsection (1)(a), (b) or (c) applies in respect of an act is on the party alleging it, and may be discharged on the balance of probabilities.

(3) Nothing in this section affects the operation of any other law under which an act may be held to be lawful or invalid.

Rights of All Persons.

42. - LIBERTY OF THE PERSON.

- (1) No person shall be deprived of his personal liberty except -
 - (a) in consequence of his unfitness to plead to a criminal charge; or
 - (b) in the execution of the sentence or order of a court in respect of an offence of which he has been found guilty, or in the execution of the order of a court of record punishing him for contempt of itself or another court or tribunal; or
 - (c) by reason of his failure to comply with the order of a court made to secure the fulfilment of an obligation (other than a contractual obligation) imposed upon him by law; or
 - (d) upon reasonable suspicion of his having committed, or being about to commit, an offence; or
 - (e) for the purpose of bringing him before a court in execution of the order of a court; or
 - (f) for the purpose of preventing the introduction or spread of a disease or suspected disease, whether of humans, animals or plants, or for normal purposes of quarantine; or
 - (g) for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of those purposes; or
 - (h) in the, case of a person who is, or is reasonably suspected of being of unsound mind -
 - (i) or addicted to drugs or alcohol, for the purpose of his care or treatment or the protection of the community, under an order of a court;
or
 - (ii) for the purpose of taking prompt legal proceedings to obtain an order of a court of a type referred to in Subparagraph (i).
- (2) A person who is arrested or detained -
 - (a) shall be informed promptly, in a language that he understands, of the reasons for his arrest or detention and of any charge against him; and
 - (b) shall be permitted whenever practicable to communicate without delay and in private with a member of his family or a personal friend, and with a lawyer of his choice (including the Public Solicitor if he is entitled to legal aid); and
 - (c) shall be given adequate opportunity to give instructions to a lawyer of his choice in the place in which he is detained,

and shall be informed immediately on his arrest of his rights under this subsection.

- (3) A person who is arrested or detained -
 - (a) for the purpose of being brought before a court in the execution of an order of a court;
or

- (b) upon reasonable suspicion of his having committed, or being about to commit, an offence,

shall, unless he is released, be brought without delay before a court or a judicial officer and, in a case referred to in paragraph (b) shall not be further held in custody in connexion with the offence except by order of a court or judicial officer.

(4) The necessity or desirability of interrogating the person concerned or other persons, or any administrative requirement or convenience, is not a good ground for failing to comply with Subsection (3), but exigencies of travel which in the circumstances are reasonable may, without derogating any other protection available to the person concerned, be such a ground.

(5) Where a complaint is made to the National Court or a Judge that a person is unlawfully or unreasonably detained -

- (a) the National Court or Judge shall inquire into the complaint and order the person concerned to be brought before it or him; and
- (b) unless the court or Judge is satisfied that the detention is lawful, and in the case of a person being detained on remand pending his trial does not constitute an unreasonable detention having regard, in particular, to its length, the Court or a Judge shall order his release either unconditionally or subject to such conditions as the Court or Judge thinks fit.

(6) A person arrested or detained for an offence (other than treason or wilful murder as defined by an Act of the Parliament) is entitled to bail at all times from arrest or detention to acquittal or conviction unless the interests of justice otherwise require.

(7) Where a person to whom Subsection (6) applies is refused bail -

- (a) the court or person refusing bail shall, on request by the person concerned or his representative, state in writing the reason for the refusal; and
- (b) the person or his representative may apply to the Supreme Court or the National Court in a summary manner for his release.

(8) Subject to any other law, nothing in this section applies in respect of any reasonable act of the parent or guardian of a child, or a person into whose care a child has been committed, in the course of the education, discipline or upbringing of the child.

(9) Subject to any Constitutional Law or Act of the Parliament, nothing in this section applies in respect of a person who is in custody under the law of another country -

- (a) while in transit through the country; or
- (b) permitted by or under an Act of the Parliament made for the purposes of Section 206 (*visiting forces*).

43. - FREEDOM FROM FORCED LABOUR.

- (1) No person shall be required to perform forced labour.
- (2) In Subsection (1), "forced labour" does not include -
 - (a) labour required by the sentence or order of a court; or
 - (b) labour required of a person while in lawful custody, being labour that, although not required by the sentence or order of a court, is necessary for the hygiene of, or for the maintenance of, the place in which he is in custody; or
 - (c) in the case of a person in custody for the purpose of his care, treatment, rehabilitation or welfare, labour reasonably required for that purpose; or
 - (d) labour required of a member of a disciplined force in pursuance of his duties as such a member; or
 - (e) subject to the approval of any local government body for the area in which he is required to work, labour reasonably required as part of reasonable and normal communal or other civic duties; or
 - (f) labour of a reasonable amount and kind (including, in the case of compulsory military service, labour required as an alternative to such service in the case of a person who has conscientious objections to military service) that is required in the national interest by an Organic Law that complies with Section 38 (*general qualifications on qualified rights*).

44. - FREEDOM FROM ARBITRARY SEARCH AND ENTRY.

No person shall be subjected to the search of his person or property or to entry of his premises, except to the extent that the exercise of that right is regulated or restricted by a law -

- (a) that makes reasonable provision for a search or entry -
 - (i) under an order made by a court; or
 - (ii) under a warrant for a search issued by a court or judicial officer on reasonable grounds, supported by oath or affirmation, Particularly describing the purpose of the search; or
 - (iii) that authorizes a public officer or government agent of Papua New Guinea or an officer of a body corporate established by law for a public purpose to enter, where necessary on the premises of a person in order to inspect those premises or anything in or on them in relation to any rate or tax or in order to carry out work connected with any property that is lawfully in or on those premises and belongs to the Government or any such body corporate; or
 - (iv) that authorizes the inspection of goods, premises, vehicles, ships or aircraft to ensure compliance with lawful requirements as to the entry of persons or importation of goods into Papua New Guinea or departure of persons or exportation of goods from Papua New Guinea or as to standards of safe construction, public safety, public health, permitted use or similar matters, or to secure compliance with the terms of a licence to engage in manufacture or trade; or
 - (v) for the purpose of inspecting or taking copies of documents relating to -

- (A) the conduct of a business, trade, profession or industry in accordance with a law regulating the conduct of that business, trade, profession or industry; or
- (B) the affairs of a company in accordance with a law relating to companies; or
- (vi) for the purpose of inspecting goods or inspecting or taking copies of documents, in connexion with the collection, or the enforcement of payment of taxes or under a law prohibiting or restricting the importation of goods into Papua New Guinea or the exportation of goods from Papua New Guinea; or
- (b) that complies with Section 38 (*general qualifications on qualified rights*)

45. - FREEDOM OF CONSCIENCE, THOUGHT AND RELIGION.

(1) Every person has the right to freedom of conscience, thought and religion and the practice of his religion and beliefs, including freedom to manifest and propagate his religion and beliefs in such a way as not to interfere with the freedom of others, except to the extent that the exercise of that right is regulated or restricted by a law that complies with Section 38 (*general qualifications on qualified rights*).

(2) No person shall be compelled to receive religious instruction or to take part in a religious ceremony or observance, but this does not apply to the giving of religious instruction to a child with the consent of his parent or guardian or to the inclusion in a course of study of secular instruction concerning any religion or belief.

(3) No person is entitled, to intervene unsolicited into the religious affairs of a person of different belief, or to attempt to force his or any religion (or irreligion) on another, by harassment or otherwise.

(4) No person may be compelled to take an oath that is contrary to his religion or belief, or to take an oath in a manner or form that is contrary to his religion or belief.

(5) A reference in this section to religion includes reference to the traditional religious beliefs and customs of the peoples of Papua New Guinea.

46. - FREEDOM OF EXPRESSION.

(1) Every person has the right to freedom of expression and publication, except to the extent that the exercise of that right is regulated or restricted by law -

- (a) that imposes reasonable restrictions on public office-holders; or
- (b) that imposes restrictions on non-citizens; or
- (c) that complies with Section 38 (*general qualifications on qualified rights*).

(2) In Subsection (1), "freedom of expression and publication" includes -

- (a) freedom to hold opinions, to receive ideas and information and to communicate ideas and information, whether to the public generally or to a person or class of persons;
- (b) freedom of the press and other mass communications media.

(3) Notwithstanding anything in this section, an Act of the Parliament may make reasonable provision for securing reasonable access to mass communications media for interested persons and associations -

- (a) for the communication of ideas and information; and

- (b) to allow rebuttal of false or misleading statements concerning their acts, ideas or beliefs, and generally for enabling and encouraging freedom of expression.

47. - FREEDOM OF ASSEMBLY AND ASSOCIATION.

(1) Every person has the right peacefully to assemble and associate and to form or belong to, or not to belong to, political parties, industrial organizations or other associations, except to the extent that the exercise of that right is regulated or restricted by a law -

- (a) that takes reasonable provision in respect of the registration of all or any associations; or
- (b) that imposes reasonable restrictions on public office-holders; or
- (c) that imposes restrictions on non-citizens; or
- (d) that complies with Section 38 (*general qualifications on qualified rights*).

48. - FREEDOM OF EMPLOYMENT

(1) Every person has the right to freedom of choice of employment in any calling for which he has the qualifications (if any) lawfully required, except to the extent that that freedom is related or restricted voluntarily or by a law that complies with Section 38 (*general qualifications on qualified rights*) or a law that imposes restrictions on non-citizens.

(2) Subsection (1) does not prohibit reasonable action or provision for the encouragement of persons to join industrial organizations or for requiring membership of an industrial organization for any purpose.

49. - RIGHT TO PRIVACY.

Every person has the right to reasonable privacy in respect of his private and family life, his communications with other persons and his personal papers and effects, except to the extent that the exercise of that right is regulated or restricted by a law that complies with Section 38 (*general qualifications on qualified rights*).

Special Rights of Citizens.

50. - RIGHT TO VOTE AND STAND FOR PUBLIC OFFICE.

(1) Subject to the express limitations imposed by this Constitution, every citizen who is of full capacity and has reached voting age, other than a person who -

- (a) is under sentence of death or imprisonment for a period of more than nine months; or
- (b) has been convicted, within the period of three years next preceding the first day of the polling period for the election concerned, of an offence relating to elections that is prescribed by an Organic Law or an Act of the Parliament for the purposes of this paragraph,

has the right, and shall be given a reasonable opportunity -

- (c) to take part in the conduct of public affairs, either directly or through freely chosen representatives; and

- (d) to vote for, and to be elected to, elective public office at genuine, periodic, free elections; and
- (e) to hold public office and to exercise public functions.

(2) The exercise of those rights may be regulated by a law that is reasonably justifiable for the purpose in a democratic society that has a proper regard for the rights and dignity of mankind.

51. - RIGHT TO FREEDOM OF INFORMATION.

(1) Every citizen has the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably, justifiable in a democratic society in respect of -

- (a) matters relating to national security, defence or international relations of Papua New Guinea (including Papua New Guinea's relations with the Government of any other country or with any international organization); or
- (b) records of meetings and decisions of the National Executive Council and of such executive bodies and elected governmental authorities as are prescribed by Organic Law or Act of the Parliament; or
- (c) trade secrets, and privileged or confidential commercial or financial information obtained from a person or body; or
- (d) parliamentary papers the subject of parliamentary privilege; or
- (e) reports, official registers and memoranda prepared by governmental authorities or authorities established by government, prior to completion; or
- (f) papers relating to lawful official activities for investigation and prosecution of crime; or
- (g) the prevention, investigation and prosecution of crime; or
- (h) the maintenance of personal privacy and security of the person; or
- (i) matters contained in or related to reports prepared by, on behalf of or for the use of a governmental authority responsible for the regulation or supervision of financial institutions; or
- (j) geological or geophysical information and data concerning wells and ore bodies.

(2) A law that complies with Section 38 (*general qualifications on qualified rights*) may regulate or restrict the right guaranteed by this section.

(3) Provision shall be made by law to establish procedures by which citizens may obtain ready access to official information.

(4) This section does not authorize -

- (a) withholding information or limiting the availability of records to the public except in accordance with its provisions; or
- (b) withholding information from the Parliament.

52. - RIGHT TO FREEDOM OF MOVEMENT.

(1) Subject to Subsection (3), no citizen may be deprived of the right to move freely throughout the country, to reside in any part of the country and to enter and leave the country, except in consequence of a law that provides for deprivation of personal liberty in accordance with Section 42 (*liberty of the person*).

(2) No citizen shall be expelled or deported from the country except by virtue of an order of a court made under a law in respect of the extradition of offenders, or alleged offenders, against the law of some other place.

(3) A law that complies with Section 38 (*general qualifications on qualified rights*) may regulate or restrict the exercise of the right referred to in Subsection (1), and in particular may regulate or restrict the freedom of movement of persons convicted of offences and of members of a disciplined force.

53. - PROTECTION FROM UNJUST DEPRIVATION OF PROPERTY.

(1) Subject to Subsection 54 (*special provision in relation to certain lands*) and except as permitted by this section, possession may not be compulsorily taken of any property, and no interest in or right over property may be compulsorily acquired, except in accordance with Organic Law or an Act of the Parliament, and unless -

(a) the property is required for -

(i) a public purpose; or

(ii) a reason that is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind,

that is so declared and so described, for the purposes of this section, in an Organic Law or an Act of the Parliament; and

(b) the necessity for the taking of possession or acquisition for the attainment of that purpose or for that reason is such as to afford reasonable justification for the causing of any resultant hardship to any person affected.

(2) Subject to this section, just compensation must be made on just terms by the expropriating authority, giving full weight to the National Goals and Directive Principles and having due regard to the national interest and to the expression of that interest by the Parliament, as well as to the person affected.

(3) For the purposes of Subsection (2), compensation shall not be deemed not to be just and on just terms solely by reason of a fair provision for deferred payment, payment by instalments or compensation otherwise than in cash.

(4) In this section, a reference to the taking of possession of property, or the acquisition of an interest in or right over property includes reference to -

(a) the forfeiture; or

(b) the extinction or determination (otherwise than by way of a reasonable provision for the limitation of actions or reasonable law in the nature of prescription or adverse possession),

of any right or interest in property.

(5) Nothing in the preceding provisions of this section prevents -

- (a) the taking of possession of property, or the acquisition of an interest in or right over property, that is authorized by any other provision of this Constitution; or
- (b) any taking of possession or acquisition -
 - (i) in consequence of an offence or attempted offence against, or breach or attempted breach of, or other failure to comply with a law or
 - (ii) in satisfaction of a debt or civil obligation or
 - (iii) subject to Subsection (6), where the property is or may be required as evidence in proceedings or possible proceedings before court or tribunal,

in accordance with a law that is reasonably justifiable in a democratic society that has a proper regard for the rights and dignity of mankind; or
- (c) any taking of possession or acquisition that was an incident of the grant or acceptance of, or of any interest in or right over, that property or any other property by the holder or any of his predecessors in title; or
- (d) any taking of possession or acquisition that is in accordance with custom; or
- (e) any taking of possession or acquisition of ownerless or abandoned property (other than customary land); or
- (f) any restriction on the use of or on dealing with property or any interest in or right over any property that is reasonably necessary for the preservation of the environment or of the national cultural inheritance.

(6) Subsection (5)(b)(iii) does not authorize the retention of any property after the end of the period for which its retention is reasonably required for the purpose referred to in that paragraph.

(7) Nothing in the preceding provisions of this section applies to or in relation to the property of any person who is not a citizen and the power to compulsorily take possession of, or to acquire an interest in, or right over, the property of any such person shall be as provided for by an Act of the Parliament.

54. - SPECIAL PROVISION IN RELATION TO CERTAIN LANDS.

Nothing in Section 37 (*protection of the law*) or 53 (*protection from unjust deprivation of property*) invalidates a law that is reasonably justifiable in a democratic society that has a proper regard for human rights and that provides -

- (a) for the recognition of the claimed title of Papua New Guinea to land where -
 - (i) there is a genuine dispute as to whether the land was acquired validly or at all from the customary owners before Independence Day; and
 - (ii) if the land were acquired compulsorily the acquisition would comply with Section 53(1) (*protection from unjust deprivation of property*); or
- (b) for the settlement by extra-judicial means of disputes as to the ownership of customary land that appear not to be capable of being reasonably settled in practice by judicial means; or
- (c) for the prohibition or regulation of the holding of certain interests in, or in relation to, some or all land by non-citizens.

55. - EQUALITY OF CITIZENS.

(1) Subject to this Constitution, all citizens have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex.

(2) Subsection (1) does not prevent the making of laws for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged or less advanced groups or residents of less advanced areas.

(3) Subsection (1) does not affect the operation of a pre-Independence law.

56. - OTHER RIGHTS AND PRIVILEGES OF CITIZENS.

(1) Only citizens may -

(a) vote in elections for, or hold, elective public offices; or

(b) acquire freehold land.

(2) An Act of the Parliament may -

(a) define the offices that are to be regarded as elective public offices; and

(b) define the forms of ownership that are to be regarded as freehold; and

(c) define the corporations that are to be regarded as citizens,

for the purposes of Subsection (1).

(3) An Act of the Parliament may make further provision for rights and privileges to be reserved for citizens.

Subdivision D. - Enforcement.

57. - ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS.

(1) A right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.

(2) For the purposes of this section -

(a) the Law Officers of Papua New Guinea; and

(b) any other persons prescribed for the purpose by an Act of the Parliament; and

(c) any other persons with an interest (whether personal or not) in the maintenance of the principles commonly known as the Rule of Law such that, in the opinion of the court concerned, they ought to be allowed to appear and be heard on the matter in question,

have an interest in the protection and enforcement of the rights and freedoms referred to in this Division, but this subsection does not limit the persons or classes of persons who have such an interest.

(3) A court that has jurisdiction under Subsection (1) may make all such orders and declarations as are necessary or appropriate for the purposes of this section, and may make an order or declaration in relation to a statute at any time after it is made (whether or not it is in force).

(4) Any court, tribunal or authority may, on its own initiative or at the request of a person referred to in, Subsection (1), adjourn, or otherwise delay a decision, in any proceedings before it in order to allow a question concerning the effect or application of this Division to be determined in accordance with Subsection (1).

(5) Relief under this section is not limited to cases of actual or imminent infringement of the guaranteed rights and freedoms, but may, if the court thinks it proper to do so, be given in cases in which there is a reasonable probability of infringement, or in which an action that a person reasonably desires to take is inhibited by the likelihood of, or a reasonable fear of, an infringement.

(6) The jurisdiction and powers of the courts under this section are in addition to, and not in derogation of, their jurisdiction and powers under any other provision of this Constitution.

58. - COMPENSATION.

(1) This section is in addition to, and not in derogation of, Section 57 (*enforcement of guaranteed rights and freedoms*).

(2) A person whose rights or freedoms declared or protected by, this Division are infringed including any infringement caused by a derogation of the restrictions specified in Part X.5 (*internment*) on the use of emergency powers in relation to internment is entitled to reasonable damages and, if the court thinks it proper, exemplary damages in respect of the infringement responsible for, the infringement.

(3) Subject to Subsections (4) and (5), damages may be awarded against any person who committed, or was responsible for, the infringement.

(4) Where the infringement was committed by a governmental body, damages may be awarded either -

(a) subject to Subsection (5), against a person referred to in Subsection (3); or

(b) against the governmental body to which any such person was responsible,

or against both, in which last case the court may apportion the damages between them.

(5) Damages shall not be awarded against a person who was responsible to a governmental body in respect of the action giving rise to the infringement if -

(a) the action was an action made unlawful only by Section 41(1) (*Proscribed acts*); and

(b) the action taken was genuinely believed by that person to be required by law,

but the burden of proof of the belief referred to in paragraph (b) is on the party alleging it.

Division 4. - Principles of Natural Justice.

59. - PRINCIPLES OF NATURAL JUSTICE.

(1) Subject to this Constitution and to any statute, the principles of natural justice are the rules of the underlying law known by that name developed for control of judicial and administrative proceedings.

(2) The minimum requirement of natural justice is the duty to act fairly and, in principle, to be seen to act fairly.

60. - DEVELOPMENT OF PRINCIPLES.

In the development of the rules of the underlying law in accordance with Sch. 2 (*Adoption, etc., of certain laws*) particular attention shall be given to the development of a system of principles of natural justice and of administrative law specifically designed for Papua New Guinea, taking special account of the National Goals and Directive Principles and of the Basic Social Obligations, and also of typically Papua New Guinean procedures and forms of organization.

61 - BASIC RIGHTS AND FREEDOMS.

For the avoidance of doubt, it is hereby declared that nothing in the preceding provisions of this Division derogates any of the rights and freedoms provided for by Division 3 (*basic rights*).

62. - DECISIONS IN "DELIBERATE JUDGEMENT".

(1) Where a law provides or allows for an act to be done in the "deliberate judgement" of a person, body or authority, the principles of natural justice apply only to the extent that the exercise of judgement must not be biased, arbitrary or capricious.

(2) Except -

(a) to the extent provided for by Subsection (1);and

(b) in accordance with Section 155(5) (*the National Judicial System*);and

(c) provided by a Constitutional Law or an Act of the Parliament,

an act to which Subsection (1) applies is, to the extent to which it is done in the deliberate judgement of the person concerned non-justiciable.

Division 5. - Basic Social Obligations.

63. - ENFORCEMENT OF THE BASIC SOCIAL OBLIGATIONS.

(1) Except to the extent provided in Subsections (3) and (4), the Basic Social Obligations are non-justiciable.

(2) Nevertheless, it is the duty of all governmental bodies to encourage compliance with them as far as lies within their respective powers.

(3) Where any law, or any power conferred or duty imposed by any law (whether the power or duty be of legislative, judicial, executive, administrative or other kind), can reasonably be understood, applied, exercised, complied with or enforced, without failing to give effect to the intention

of the Parliament or to this Constitution, in such a way as to enforce or encourage compliance with the Basic Social Obligations, or at least not to derogate them, it is to be understood, applied, exercised, complied with or enforced in that way.

(4) Subsection (1) does not apply in the exercise of the jurisdiction of the Ombudsman Commission or other body prescribed for the purposes of Division III.2 (*leadership code*), which shall take the Basic Social Obligations fully into account in all cases as appropriate.

U. APPENDIX 7

V. Universal Declaration of Human Rights of 1948

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UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948.

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.

Now, Therefore,

The General Assembly

proclaims

This universal declaration of human rights as a common standard of achievement for all peoples and all nations, to the end that every individual and organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude: slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and its dissolution.
2. Marriage shall be entered into only with the free and full consent of intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

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W. APPENDIX 8

X. European Convention on Human Rights and its Protocols

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THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS PROTOCOLS

The Governments signatory hereto, being Members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948.

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which the aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by understanding and observance of the Human Rights upon which they depend;

Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration;

Have agreed as follows:

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

Section I

Article 2

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term 'forced or compulsory labour' shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
 - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations.

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

- (a) the lawful detention of a person after conviction by a court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language in which he understands, of the reasons for his arrest and any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17

Nothing in this Convention may be interpreted as implying for any State group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Section II

Article 19

To ensure the observance of the engagements undertaken by the Contracting Parties in the present Convention, there shall be set up:

1. A European Commission of Human Rights hereinafter referred to as 'the Commission';
2. A European Court of Human Rights, hereinafter referred to as 'the Court'.

Section III

Article 20

The Commission shall consist of a number of members equal to that of the High Contracting Parties. No two members of the Commission may be nationals of the same State.

Article 21

1. The members of the Commission shall be elected by the Committee of Ministers by an absolute majority of votes, from a list of names drawn up by the Bureau of the Consultative Assembly; each group of the Representatives of the High Contracting Parties in the Consultative Assembly shall put forward three candidates, of whom two at least shall be its nationals.
2. As far as applicable, the same procedure shall be followed to complete the Commission in the event of other States subsequently becoming Parties to this Convention, and in filling casual vacancies.

Article 22

1. The members of the Commission shall be elected for a period of six years. They may be re-elected. However, of the members elected at the first election, the terms of seven members shall expire at the end of three years.
2. The members whose terms are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary-General of the Council of Europe immediately after the first election has been completed.
3. A member of the Commission elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.
4. The members of the Commission shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

Article 23

The members of the Commission shall sit on the Commission in their individual capacity.

Article 24

Any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party.

Article 25

1. The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.
2. Such declarations may be made for a specific period.

3. The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

4. The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.

Article 26

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.

Article 27

1. The Commission shall not deal with any petition submitted under Article 25 which

(a) is anonymous, or

(b) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure or international investigation or settlement and if it contains no relevant new information.

2. The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the petition.

3. The Commission shall reject any petition referred to it which it considers inadmissible under Article 26.

Article 28

In the event of the Commission accepting a petition referred to it:

(a) it shall, with a view to ascertaining the facts undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission:

(b) it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.

Article 29

1. The Commission shall perform the functions set out in Article 28 by means of a Sub-Commission consisting of seven members of the Commission.

2. Each of the parties concerned may appoint as members of this Sub-Commission a person of its choice.

3. The remaining members shall be chosen by lot in accordance with arrangements prescribed in the Rules of Procedure of the Commission.

Article 30

If the Sub-Commission succeeds in effecting a friendly settlement in accordance with Article 28, it shall draw up a Report which shall be sent to the States concerned, to the Committee of Ministers and to the Secretary-General of the Council of Europe for publication. This Report shall be confined to a brief statement of the facts and of the solution reached.

Article 31

1. If a solution is not reached, the Commission shall draw up a Report on the facts and state its opinion as to whether the facts found disclose a breach the State concerned of its obligations under the Convention. The opinions of all the members of the Commission on this point may be stated in the Report.
2. The Report shall be transmitted to the Committee of Ministers. It shall also be transmitted to the States concerned, who shall not be at liberty to publish it.
3. In transmitting the Report to the Committee of Ministers the Commission may make such proposals as it thinks fit.

Article 32

1. If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the Report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention.
2. In the affirmative case the Committee of Ministers shall prescribe a period during which the Contracting Party concerned must take the measures required by the decision of the Committee of Ministers.
3. If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide by the majority provided for in paragraph 1 above what effect shall be given to its original decision and shall publish the Report.
4. The Contracting Parties undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the preceding paragraphs.

Article 33

The Commission shall meet *in camera*.

Article 34

The Commission shall take its decision by a majority of the Members present and voting; the Sub-Commission shall take its decisions by a majority of its members.

Article 35

The Commission shall meet as the circumstances require. The meetings shall be convened by the Secretary-General of the Council of Europe.

Article 36

The Commission shall draw up its own rules of procedure.

Article 37

The secretariat of the Commission shall be provided by the Secretary-General of the Council of Europe.

Section IV

Article 38

The European Court of Human Rights shall consist of a number of judges equal to that of the Members of the Council of Europe. No two judges may be nationals of the same State.

Article 39

1. The members of the Court shall be elected by the Consultative Assembly by a majority of the votes cast from a list of persons nominated by the Members of the Council of Europe; each Member shall nominate three candidates, of whom two at least shall be its nationals.
2. As far as applicable, the same procedure shall be followed to complete the Court in the event of the admission of new members of the Council of Europe, and in filling casual vacancies.
3. The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.

Article 40

1. The members of the Court shall be elected for a period of nine years. They may be re-elected. However, of the members elected at the first election the terms of four members shall expire at the end of three years and the terms of four more members shall expire at the end of six years.
2. The members whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot by the Secretary-General immediately after the first election has been completed.
3. A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.
4. The members of the Court shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

Article 41

The Court shall elect its President and Vice-President for a period of three years. They may be re-elected.

Article 42

The members of the Court shall receive for each day of duty a compensation to be determined by the Committee of Ministers.

Article 43

For the consideration of each case brought before it the Court shall consist of a Chamber composed of seven judges. There shall sit as an *ex officio* member of the Chamber the judge who is a national of any State party, or, if there is none, a person of its choice who shall sit in the capacity of judge; the names of the other judges shall be chosen by lot by the President before the opening of the case.

Article 44

Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court.

Article 45

The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48.

Article 46

1. Any of the High Contracting Parties may at any time declare that it recognizes as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.
2. The declarations referred to above may be made unconditionally or on condition of reciprocity, on the part of several or certain other High Contracting Parties or for a specified period.
3. These declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties.

Article 47

The Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32.

Article 48

The following may bring a case before the Court, provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or of the High Contracting Parties concerned if there is more than one:

- (a) the Commission;
- (b) a High Contracting Party whose national is alleged to be a victim;
- (c) a High Contracting Party which referred the case to the Commission;
- (d) a High Contracting Party against which the complaint has been lodged.

Article 49

In the event of dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 50

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present Convention and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

Article 51

1. Reasons shall be given for the judgment of the Court.
2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 52

The judgment of the Court shall be final.

Article 53

The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.

Article 54

The judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

Article 55

The Court shall draw up its own rules and shall determine its own procedure.

Article 56

1. The first election of the members of the Court shall take place after the declarations by the High Contracting Parties mentioned in Article 46 have reached a total of eight.
2. No case can be brought before the Court before this election.

Section V

Article 57

On receipt of a request from the Secretary-General of the Council of Europe any Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention.

Article 58

The expenses of the Commission and the Court shall be borne by the Council of Europe.

Article 59

The members of the Commission and of the Court shall be entitled, during the discharge of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Article 60

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 61

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 62

The High Contracting Parties agree that, except by special agreement they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 63

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary-General of the Council of Europe that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.

2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary-General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Commission to receive petitions from individuals, non-governmental organizations or groups of individuals in accordance with Article 25 of the present Convention.

Article 64

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
2. Any reservation made under this article shall contain a brief statement of the law concerned.

Article 65

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date of which it became a Party to it and after six months' notice contained in a notification addressed to the Secretary-General of the Council of Europe, who shall inform the other High Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
3. Any High Contracting Party which shall cease to be a Member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.
4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 63.

Article 66

1. This Convention shall be open to the signature of the Members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary-General of the Council of Europe.
2. The present Convention shall come into force after the deposit of ten instruments of ratification.
3. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.
4. The Secretary-General of the Council of Europe shall notify all the Members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November, 1950, in English and French, being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatories.

Protocols

1. *Enforcement of certain Rights and Freedoms not included in Section I of the Convention.*

The Governments signatory hereto, being Members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950 (hereinafter referred to as 'the Convention'),

Have agreed as follows:

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 4

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary-General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 63 of the Convention.

Article 5

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 6

This Protocol shall be open for signature by the Members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary-General of the Council of Europe, who will notify all Members of the names of those who have ratified.

Done at Paris on the 20th day of March 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory Governments.

2. Conferring upon the European Court of Human Rights competence to give Advisory Opinions

The member States of the Council of Europe signatory hereto:

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention'), and in particular Article 19 instituting, among other bodies, a European Court of Human Rights (hereinafter referred to as 'the Court');

Considering that it is expedient to confer upon the Court competence to give advisory opinions subject to certain conditions;

Have agreed as follows:

Article 1

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.
2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and in the Protocols thereto, or with any other question which the Commission, the Court, or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.
3. Decisions of the Committee of Ministers to request an advisory opinion shall require a two-thirds majority vote of the representatives entitled to sit on the Committee.

Article 2

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its consultative competence as defined in Article 1 of this Protocol.

Article 3

1. For the consideration of requests for an advisory opinion, the Court shall sit in plenary session.
2. Reasons shall be given for advisory opinions of the Court.
3. If the advisory opinion does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
4. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Article 4

The powers of the Court under Article 55 of the Convention shall extend to the drawing up of such rules and the determination of such procedure as the Court may think necessary for the purposes of this Protocol.

Article 5

1. This Protocol shall be open to signature by Member States of the Council of Europe, signatories to the Convention, who may become Parties to it by:
 - (a) signature without reservation in respect of ratification or acceptance;
 - (b) signature with reservation in respect of ratification or acceptance followed by ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary-General of the Council of Europe.
2. This Protocol shall enter into force as soon as all the States Parties Convention shall have become Parties to the Protocol in accordance with the provisions of paragraph 1 of this Article.
3. From the date of the entry into force of this Protocol, Articles 1 to 4 shall be considered an integral part of the Convention.
4. The Secretary-General of the Council of Europe shall notify the Member States of the Council of:
 - (a) any signature without reservation in respect of ratification of acceptance;
 - (b) any signature with reservation in respect of ratification or acceptance;
 - (c) the deposit of any instrument of ratification or acceptance;
 - (d) the date of entry into force of this Protocol in accordance with paragraph 2 of this Article.

In witness whereof the undersigned, being duly authorized thereto have signed this Protocol.

Done at Strasbourg, this 6th day of May 1963, in English and in French both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory States.

3. Amending Articles 29, 30, and 94 of the Convention

The member States of the Council of Europe, signatories to this Protocol,

Considering that it is advisable to amend certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1960 (hereinafter referred to as 'the Convention') concerning the procedure of the European Commission of Human Rights

Have agreed as follows:

Article 1

1. Article 29 of the Convention is deleted.
2. The following provision shall be inserted in the Convention:

'Article 29

After it has accepted a petition submitted under Article 25, the Commission may nevertheless decide unanimously to reject the petition if, in the course of its examination, it finds that the existence of one of the grounds for non-acceptance provided for in Article 27 has been established.

In such a case, the decision shall be communicated to the parties.'

Article 2

In Article 30 of the Convention, the word 'Sub-Commission' shall be replaced by the word 'Commission'.

Article 3

1. At the beginning of Article 34 of the Convention, the following shall be inserted:
'Subject to the provisions of Article 29...'
2. At the end of the same article, the sentence 'the Sub-Commission shall take its decisions by a majority of its members' shall be deleted.

Article 4

1. The Protocol shall be open to signature by the member States of the Council of Europe, who may become Parties to it either by:
 - (a) signature without reservation in respect of ratification or acceptance,; or
 - (b) signature with reservation in respect of ratification or acceptance, followed by ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary-General of the Council of Europe.
2. This Protocol shall enter into force as soon as all States Parties to the Convention shall have become Parties to the Protocol, in accordance with the provisions of paragraph 1 of this Article.
3. The Secretary-General of the Council of Europe shall notify the Member States of the Council of:
 - (a) any signature without reservation in respect of ratification or acceptance;

- (b) any signature with reservation in respect of ratification or acceptance;
- (c) the deposit of any instrument of ratification or acceptance;
- (d) the date of entry into force of this Protocol in accordance with paragraph 2 of this Article.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 6th day of May 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary shall transmit certified copies to each of the signatory States.

4. Securing certain Rights and Freedoms other than those included in the Convention and in Protocol No.1

The Governments signatory hereto, being Members of the Council of Europe.

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention') and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20 March 1952,

Have agreed as follows:

Article 1

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

Article 2

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of 'ordre public', for the prevention of crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the interest in a democratic society.

Article 3

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
2. No one shall be deprived of the right to enter the territory of the State of which he is a national.

Article 4

Collective expulsion of aliens is prohibited.

Article 5

1. Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary-General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.
2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.
3. A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 63 of the Convention.
4. The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this applied by virtue of a declaration by that State under this article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.

Article 6

1. As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.
2. Nevertheless, the right of individual recourse recognized by a declaration made under Article 25 of the Convention, or the acceptance of the compulsory jurisdiction of the Court by a declaration made under Article 46 of the Convention, shall not be effective in relation to this Protocol unless the High Contracting Party concerned has made a statement recognizing such right, or accepting such jurisdiction, in respect of all or any of Articles 1 to 4 of the Protocol.

Article 7

1. This Protocol shall be open for signature by the members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.
2. The instruments of ratification shall be deposited with the Secretary-General of the Council of Europe, who will notify all members of the names of those who have ratified.

In witness thereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Strasbourg, this 16th day of September 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory States.

5. Amending Articles 22 and 40 of the Convention

The Governments signatory hereto, being Members of the Council of Europe.

Considering that certain inconveniences have arisen in the application of the provisions of Articles 22 and 40 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as 'the Convention') relating to the length of the terms of office of the members of the European Commission of Human Rights (hereinafter referred to as 'the Commission') and of the European Court of Human Rights (hereinafter referred to as the Court):

Considering that it is desirable to ensure as far as possible an election every three years of one half of the members of the Commission and of one-third of the members of the Court;

Considering therefore that it is desirable to amend certain provisions of the Convention,

Have agreed as follows:

Article 1

In Article 22 of the Convention, the following two paragraphs shall be inserted after paragraph (2):

'(3) In order to ensure that, as far as possible, one half of the membership of the Commission shall be renewed every three years, the Committee of Ministers may decide, before proceeding to any subsequent election, that the term or terms of office of one or more members to be elected shall be for a period other than six years but not more than nine and not less than three years.

(4) In cases where more than one term of office is involved and the Committee of Ministers applies the preceding paragraph, the allocation of the terms of office shall be effected by the drawing of lots by the Secretary-General, immediately after the election.'

Article 2

In Article 22 of the Convention, the former paragraphs (3) and (4) shall become respectively paragraphs (5) and (6).

Article 3

In Article 40 of the Convention, the following two paragraphs shall be inserted after paragraph (2):

'(3) In order to ensure that, as far as possible, one third of the membership of the Court shall be renewed every three years, the Consultative Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more members to be elected shall be for a period other than nine years but not more than twelve and not less than six years.

(4) In cases where more than one term of office is involved and the Consultative Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by the drawing of lots by the Secretary-General immediately after the election.'

Article 4

In Article 40 of the Convention, the former paragraphs (3) and (4) shall become respectively paragraphs (5) and (6).

Article 5

1. This Protocol shall be open to signature by Members of the Council of Europe, signatories to the Convention, who may become Parties to it by:

- (a) signature without reservation in respect of ratification or acceptance;
- (b) signature with reservation in respect of ratification or acceptance, followed by ratification or acceptance.

Instruments of ratification or acceptance shall be deposited with the Secretary-General of the Council of Europe.

2. This Protocol shall enter into force as soon as all Contracting Parties to the Convention shall have become Parties to the Protocol, in accordance with the provisions of paragraph 1 of this Article.

3. The Secretary-General of the Council of Europe shall notify the Members of the Council of:

- (a) any signature without reservation in respect of ratification or acceptance;
- (b) any signature with reservation in respect of ratification or acceptance;
- (c) the deposit of any instrument of ratification or acceptance;
- (d) the date of entry into force of this Protocol in accordance of paragraph 2 of this Article.

In witness whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Strasbourg, this 20th day of January 1966, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory Governments.

6. Concerning the Abolition of the Death Penalty

The member States of the Council of Europe, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention'),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty;

Have agreed as follows:

Article 1

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary-General of the Council of Europe the relevant provisions of that law.

Article 3

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 4

No reservation may be made under Article 64 of the Convention in respect of the provisions of this Protocol.

Article 5

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

Article 6

As between the States Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention and all provisions of the Convention shall apply accordingly.

Article 7

This Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 8

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.
2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

Article 9

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with articles 5 and 8;

(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 28th day of April 1983, in English and French both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

7. Concerning Various Matters

The member States of the Council of Europe signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention'),

Have agreed as follows:

Article 1

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
 - (a) to submit reasons against his expulsion,
 - (b) to have his case reviewed, and
 - (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Article 2

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised shall be governed by law.
2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 3

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.

Article 4

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the re-opening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention.

Article 5

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

Article 6

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply and state the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.
2. Any State may at any later day, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of such notification by the Secretary General.
4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 63 of the Convention.
5. The territory of any State to which this Protocol applies by virtue of ratification, acceptance or approval by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, may be treated as separate territories for the purpose of the reference in Article 1 to the territory of a State.

Article 7

1. As between the States Parties, the provisions of Articles 1 to 6 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

2. Nevertheless, the right of individual recourse recognised by a declaration made under Article 25 of the Convention, or the acceptance of the compulsory jurisdiction of the Court by a declaration made under Article 46 of the Convention, shall not be effective in relation to this Protocol unless the State concerned has made a statement recognising such right, or accepting such jurisdiction in respect of Articles 1 to 5 of this Protocol.

Article 8

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 9

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 8.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 10

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Articles 6 and 9;
- (d) any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 22nd day of November 1984, in English and French both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

8. Concerning Various Matters.

The member States of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention'),

Considering that it is desirable to amend certain provisions of the Convention with a view to improving and in particular to expediting the procedure of the European Commission of Human Rights,

Considering that it is also advisable to amend certain provisions of the Convention concerning the procedure of the European Court of Human Rights.

Have agreed as follows:

Article 1

1. The existing text of Article 20 of the Convention shall become paragraph 1 of that Article and shall be supplemented by the following four paragraphs:

'2. The Commission shall sit in plenary session. It may, however, set up Chambers, each composed of at least seven members. The Chambers may examine petitions submitted under Article 25 of this Convention which can be dealt with on the basis of established case law or which raise no serious question affecting the interpretation or application of the Convention. Subject to this restriction and to the provisions of paragraph 5 of this Article, the Chambers shall exercise all the powers conferred on the Commission by the Convention.

The member of the Commission elected in respect of a High Contracting Party against which a petition has been lodged shall have the right to sit on a Chamber to which that petition has been referred.

3. The Commission may set up committees, each composed of at least three members, with the power, exercisable by a unanimous vote to declare inadmissible or strike from its list of cases a petition submitted under Article 25, when such a decision can be taken without further examination.

4. A Chamber or committee may at any time relinquish jurisdiction in favour of the plenary Commission, which may also order the transfer to it of any petition referred to a Chamber or committee.
5. Only the plenary Commission can exercise the following powers:
 - (a) the examination of applications submitted under Article 24;
 - (b) the bringing of a case before the Court in accordance with Article 48a;
 - (c) the drawing up of rules of procedure in accordance with Article 36.'

Article 2

Article 21 of the Convention shall be supplemented by the following third paragraph:

'3. The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be persons of recognised competence in national or international law.'

Article 3

Article 23 of the Convention shall be supplemented by the following sentence:

'During their term of office they shall not hold any position which is incompatible with their independence and impartiality as members of the Commission or the demands of this office.'

Article 4

The text, with modifications, of Article 28 of the Convention shall become paragraph 1 of that Article and the text, with modifications, of Article 30 shall become paragraph 2. The new text of Article 28 shall read as

'Article 28

1. In the event of the Commission accepting a petition referred to it:
 - (a) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;
 - (b) it shall at the same time place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.
2. If the Commission succeeds in effecting a friendly settlement, it 'shall draw up a Report which shall be sent to the States concerned, to the Committee of Ministers and to the Secretary General of the Council of Europe for publication. This Report shall be confined to a brief statement of the facts and of the solution reached.'

Article 5

In the first paragraph of Article 29 of the Convention, the word 'unanimously' shall be replaced by the words 'by a majority of two-thirds of its members'.

Article 6

The following provision shall be inserted in the Convention:

'Article 30

1. The Commission may at any stage of the proceedings decide to strike a petition out of its list of cases where the circumstances lead to the conclusion that:

- (a) the applicant does not intend to pursue his petition, or
- (b) the matter has been resolved, or
- (c) for any other reason established by the Commission, it is no longer justified to continue the examination of the petition.

However, the Commission shall continue the examination of a petition if respect for Human Rights as defined in this Convention so requires.

2. If the Commission decides to strike a petition out of its list after having accepted it, it shall draw up a Report which shall contain a statement of the facts and the decision striking out the petition together with the reasons therefor. The Report shall be transmitted to the parties, as well as to the Committee of Ministers for information. The Commission may publish it.

3. The Commission may decide to restore a petition to its list of cases if it considers that the circumstances justify such a course.'

Article 7

In Article 31 of the Convention, paragraph 1 shall read as follows:

'1. If the examination of a petition has not been completed in accordance with Article 28 (paragraph 2), 29 or 30, the Commission shall draw up a Report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. The individual opinions of members of the Commission on this point may be stated in the Report.'

Article 8

Article 34 of the Convention shall read as follows:

'Subject to the provisions of Articles 20 (paragraph 3) and 29, the Commission shall take its decisions by a majority of the members present and voting.'

Article 9

Article 40 of the Convention shall be supplemented by the following seventh paragraph:

'7. The members of the Court shall sit on the Court in their individual capacity. During their term of office they shall not hold any position which is incompatible with their independence and impartiality as members of the Court or the demands of this office.'

Article 10

Article 41 of the Convention shall read as follows:

'The Court shall elect its President and one or two Vice-Presidents for a period of three years. They may be re-elected.'

Article 11

In the first sentence of Article 43 of the Convention, the word 'seven' shall be replaced by the word 'nine'.

Article 12

1. This Protocol shall be open for signature by member States of the Council of Europe signatories to the Convention, which may express their consent to be bound by:
 - (a) signature without reservation as to ratification acceptance or approval, or
 - (b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.
2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 13

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 12.

Article 14

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) the date of entry into force of this Protocol in accordance with Article 13;
- (d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Vienna, this 19th day of March 1985, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

9. Concerning access to the Court by Individuals

The member States of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention'),

Being resolved to make further improvements to the procedure under the Convention,

Have agreed as follows:

Article 1

For parties to the Convention which are bound by this Protocol, the Convention shall be amended as provided in Articles 2 to 5.

Article 2

Article 31, paragraph 2, of the Convention, shall read as follows:

'2. The Report shall be transmitted to the Committee of Ministers. The Report shall also be transmitted to the States concerned, and, if it deals with a petition submitted under Article 25, the applicant. The States concerned and the applicant shall not be at liberty to publish it.'

Article 3

Article 44 of the Convention shall read as follows:

'Only the High Contracting Parties, the Commission, and persons, non-governmental organisations or groups of individuals having submitted a petition under Article 25 shall have the right to bring a case before the Court.'

Article 4

Article 45 of the Convention shall read as follows:

'The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which are referred to it in accordance with Article 48.'

Article 5

Article 48 of the Convention shall read as follows:

'1. The following may refer a case to the Court, provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or, of the High Contracting Parties concerned if there is more than one:

- (a) the Commission;
- (b) a High Contracting Party whose national is alleged to be a victim;
- (c) a High Contracting Party which referred the case to the Commission;
- (d) a High Contracting Party against which the complaint has been lodged;
- (e) the person, non-governmental organisation or group of individuals having lodged the complaint with the Commission.'

2. If a case is referred to the Court only in accordance with paragraph i.e, it shall first be submitted to a panel composed of three members of the Court. There shall sit as an *ex-officio* member of the panel the judge who is elected in respect of the High Contracting Party against which the complaint has been lodged, or, if there is none, a person of its choice who shall sit in

the capacity of judge. If the complaint has been lodged against more than one High Contracting Party, the size of the panel shall be increased accordingly.

If the case does not raise a serious question affecting the interpretation or application of the Convention and does not for any other reason warrant consideration by the Court, the panel may, by a unanimous vote, decide that it shall not be considered by the Court. In that event the Committee of Ministers shall decide, in accordance with the provisions of Article 32, whether there has been a violation of the Convention.'

Article 6

1. This Protocol shall be open for signature by member States of the Council of Europe signatories to the Convention, which may express their consent to be bound by:

- (a) signature without reservation as to ratification, acceptance or approval; or
- (b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 7

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of signature or of the deposit of the instrument of ratification, acceptance or approval.

Article 8

1. The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Article 7;
- (d) any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Rome, this 6th day of November 1990, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

10. *Concerning Various Matters (Provisional text)*

The member States of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention').

Considering that it is advisable to amend Article 32 of the Convention with a view to the reduction of the two-thirds majority provided therein,

Have agreed as follows:

Article 1

The words 'of two-thirds' shall be deleted from paragraph 1 of Article 32 of the Convention.

Article 2.

1. This Protocol shall be open for signature by member States of the Council of Europe signatories to the Convention, which may express their consent to be bound by:

- (a) signature without reservation as to ratification, acceptance or approval; or
- (b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 3

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 2.

Article 4

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) the date of entry into force of this Protocol in accordance with Article 3;
- (d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at ... this ... day of....., in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Y. APPENDIX 9

Z. Relevant excerpts of the Constitution of the Republic of South Africa, 1993:

[A.] Chapter 3 - Fundamental Rights and

[B.] Schedule 4 - Constitutional Principles

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[A] CHAPTER 3 Fundamental Rights

Application

7. (1) This Chapter shall bind all legislative and executive organs of state at all levels of government.

(2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

(3) Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.

(4) (a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in paragraph (a) may be sought by—

- (i) a person acting in his or her own interest;
- (ii) an association acting in the interest of its members;
- (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
- (iv) a person acting as a member of or in the interest of a group or class of persons; or
- (v) a person acting in the public interest.

Equality

8. (1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

Life

9. Every person shall have the right to life.

Human dignity

10. Every person shall have the right to respect for and protection of his or her dignity.

Freedom and security of the person

11. (1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

Servitude and forced labour

12. No person shall be subject to servitude or forced labour.

Privacy

13. Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

Religion belief and opinion

14. (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.

(2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.

(3) Nothing in this Chapter shall preclude legislation recognising—

- (a) a system of personal and family law adhered to by persons professing a particular religion; and
- (b) the validity of marriages concluded under a system of religious law subject to specified procedures.

Freedom of expression

15. (1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.

(2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

Assembly, demonstration and petition

16. Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.

Freedom of association

17. Every person shall have the right to freedom of association.

Freedom of movement

18. Every person shall have the right to freedom of movement anywhere within the national territory.

Residence

19. Every person shall have the right freely to choose his or her place of residence anywhere in the national territory.

Citizens' rights

20. Every citizen shall have the right to enter, remain in and leave the Republic, and no citizen shall without justification be deprived of his or her citizenship.

Political rights

21. (1) Every citizen shall have the right—

- (a) to form, to participate in the activities of and to recruit members for a political party;
- (b) to campaign for a political party or cause; and
- (c) freely to make political choices.

(2) Every citizen shall have the right to vote, to do so in secret and to stand for election to public office.

Access to court

22. Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

Access to information

23. Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

Administrative justice

24. Every person shall have the right to—

- (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

Detained arrested and accused persons

25. (1) Every person who is detained, including every sentenced prisoner shall have the right—

- (a) to be informed promptly in a language which he or she understands of the reason for his or her detention;
- (b) to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense;
- (c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state;
- (d) to be given the opportunity to communicate with, and to be visited by his or her spouse or partner next-of-kin, religious counsellor and a medical practitioner of his or her choice; and
- (e) to challenge the lawfulness of his or her detention in person before a court of law and to be released if such detention is unlawful.

(2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right—

- (a) promptly to be informed, in a language which he or she understands that he or she has the right to remain silent and to be warned of the consequences of making any statement;

- (b) as soon as it is reasonably possible, but not later than 48 hours after the arrest or, if the said period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;
 - (c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and
 - (d) to be released from detention with or without bail, unless the interests of justice require otherwise.
- (3) Every accused person shall have the right to a fair trial which shall include the right—
- (a) to a public trial before an ordinary court of law within a reasonable time after having been charged;
 - (b) to be informed with sufficient particularity of the charge;
 - (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
 - (d) to adduce and challenge evidence and not to be a compellable witness against himself or herself;
 - (e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights;
 - (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
 - (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;
 - (h) to have recourse by way of appeal or review to a higher court than the court of first instance;
 - (i) to be tried in a language which he or she understands or failing this to have the proceedings interpreted to him or her; and
 - (j) to be sentenced within a reasonable time after conviction.

Economic activity

26. (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

Labour relations

27. (1) Every person shall have the right to fair labour practices.

(2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.

(3) Workers and employers shall have the right to organise and bargain collectively.

(4) Workers shall have the right to strike for the purpose of collective bargaining.

(5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1).

Property

28. (1) Every person shall have the right to acquire and hold rights in property and to the extent that the nature of the rights permits, to dispose of such rights.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

Environment

29. Every person shall have the right to an environment which is not detrimental to his or her health or well-being.

Children

30. (1) Every child shall have the right—

(a) to a name and nationality as from birth;

(b) to parental care;

(c) to security, basic nutrition and basic health and social services;

(d) not to be subject to neglect or abuse; and

(e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.

(2) Every child who is in detention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age.

(3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount

Language and culture

31. Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

Education

32. Every person shall have the right—

- (a) to basic education and to equal access to educational institution;
- (b) to instruction in the language of his or her choice where this is reasonably practicable; and
- (c) to establish where practicable educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

Limitation

33. (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation—

- (a) shall be permissible only to the extent that it is—
 - (i) reasonable; and
 - (ii) justifiable in an open and democratic society based on freedom and equality; and
- (b) shall not negate the essential content of the right in question.

and provided further that any limitation to—

- (aa) a right entrenched section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or
- (bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity,

shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary.

(2) Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.

(3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights of freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.

(4) This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies other than those bound in terms of section 7(1).

(5) (a) The provision of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature.

(b) If a proposed enactment amending or repealing a law referred to in paragraph (a) deals with a matter in respect of which the National Manpower Commission referred to in section 2A of the Labour Relations Act, 1956 (Act No.28 of 1956) or any other similar body which may replace the Commission, is competent in terms of a law then in force to consider and make recommendations, such proposed enactment shall not be introduced in Parliament unless the said Commission or such other body has been given an opportunity to consider the proposed enactment and to make recommendations with regard thereto.

State of emergency and suspension

34. (1) A state of emergency shall be proclaimed prospectively under an Act of Parliament, and shall be declared only where the security of the Republic is threatened by war, invasion, general insurrection or disorder or at a time of national disaster, and if the declaration of a state of emergency is necessary, to restore peace or order.

(2) The declaration of a state of emergency and any action taken, including any regulation enacted, in consequence thereof, shall be of force for a period of not more than 21 days, unless it is extended for a period of not longer than three months, or consecutive periods of not longer than three months at a time, by resolution of the National Assembly adopted by a majority of at least two-thirds of all its members.

(3) Any superior court shall be competent to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration.

(4) The rights entrenched in this Chapter may be suspended only in consequence of the declaration of a state of emergency, and only to the extent necessary to restore peace or order.

(5) Neither any law which provides for the declaration of a state of emergency, nor any action taken, including any regulation enacted, in consequence thereof, shall permit or authorise—

- (a) the creation of retrospective crimes;
- (b) the indemnification of the state or of persons acting under its authority for unlawful actions during the state of emergency; or
- (c) the suspension of this section, and sections 7,8(2), 9,10, 11(2), 12,14, 27(1) and (2), 30(1)(d) and (e) and (2) and 33(1) and (2).

(6) Where a person is detained under a state of emergency the detention shall be subject to the following conditions:

- (a) An adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;
- (b) the names of all detainees and a reference to the measures in terms of which they are being detained shall be published in the *Gazette* within five days of their detention;
- (c) when rights entrenched in section 11 or 25 have been suspended—
 - (i) the detention of a detainee shall as soon as it is reasonably possible but not later than 10 days after his or her detention, be reviewed by a court of law, and the court shall order the release of the detainee if it is satisfied that the detention is not necessary to restore peace or order;
 - (ii) a detainee shall at any stage after the expiry of a period of 10 days after a review in terms of subparagraph (i) be entitled to apply to a court of law for a further review of his or her detention, and the court shall order the release of the detainee if it is satisfied that the detention is no longer necessary to restore peace or order;
- (d) the detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against his or her continued detention;

- (e) the detainee shall be entitled at all reasonable times to have access to a legal representative of his or her choice;
- (f) the detainee shall be entitled at all times to have access to a medical practitioner of his or her choice; and
- (g) the state shall for the purpose of a review referred to in paragraph (c) (i) or (ii) submit written reasons to justify the detention or further detention of the detainee to the court, and shall furnish the detainee, with such reasons not later than two days before the review.

(7) If a court of law, having found the grounds for a detainee's detention unjustified orders his or her release, such a person shall not be detained again on the same grounds unless the state shows good cause to a court of law prior to such re-detention.

Interpretation

35. (1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

(2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.

[B] SCHEDULE 4 Constitutional Principles

I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

II

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia*, the fundamental rights contained in Chapter 3 of the Constitution.

III

The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

IV

The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

V

The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour, or gender.

IV

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

VII

The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

VIII

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.

IX

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

X

Formal legislative procedure shall be adhered to by legislative organs at all levels of government.

XI

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

XII

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

XIII

The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specially therewith.

XIV

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

XV

Amendments to the Constitution shall require special procedures involving special majorities.

XVI

Government shall be structured at national, provincial and local levels.

XVII

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

XVIII

The powers, boundaries and functions of the national, governments and provincial governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval, of the legislatures of such provinces will also be needed. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

XIX

The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

XX

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between

different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

XXI

The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:

1. The level at which decisions can be taken most effectively in respect of the quality rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

2. Where it is necessary for the maintenance of essential national standards for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province, or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity—in particular in relation to other states—powers should be allocated to the national government.

4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.

5. The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour should be allocated to the national government.

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, *inter alia*—

- (a) for the purposes of provincial planning and development and the rendering of services; and
- (b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of province.

7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.

8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXII

The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

XXIV

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.

XXV

The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.

XXVI

Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.

XXVII

A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

XXVIII

Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to just labour practices.

XXIX

The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

XXX

1. There shall be an efficient, non-partisan, career-oriented public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members of the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the law policies of the government of the day in the

performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members shall be regulated by law.

2. Every member of the public service shall be entitled to a fair pension.

XXXI

Every member of the security forces (police, military and intelligence), and the security forces as a whole shall be required to perform their functions and exercise their power in the national interest and shall be prohibited from furthering or prejudicing party political interest.

XXXII

The Constitution shall provide that until 30 April 1999 the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of this Constitution.

XXXIII

The Constitution shall provide that unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999.