Introduction

Welcome to the first issue of the *Australian Journal of Human Rights* for 2001.

Appropriately at the beginning of the new millennium, there have been a number of changes at the Journal, with respect to both personnel and to the Journal's style and direction. Melinda Jones has resigned as Editor-in-Chief and the Journal has a new editorial team and structure. We take this opportunity to thank Melinda for her dedication and hard work in making the Journal one of the most respected in the field.

The position of Editor-in-Chief has been replaced by three editors, with a range of expertise: Dr Anne Cossins, a criminologist; Associate Professor Peter Kriesler, an economist; and Ms Anne McNaughton, a lawyer. To date the emphasis of the Journal has tended to be on legal aspects of human rights. However, no one would argue that the discourse of human rights is exclusive to the legal discipline and it is our intention and aim to foster and promote an interdisciplinary forum for the discussion of human rights. To this end, we are actively encouraging contributions from all disciplines. In recognition of this change of emphasis, important changes have been made to the style of the Journal. In keeping with its interdisciplinary nature, we are moving, as of the next issue, from a classic 'law journal' format, to a more social sciences orientated style with in-text citations and a minimal use of footnotes. We believe these changes make the Journal well-placed to accommodate the rich and varied fruits of the scholarship being undertaken in the area of human rights.

We would like to sincerely thank Edwina McDonald and Joanna Ausan who worked tirelessly on the style guide, ironing out inconsistencies and refining it for electronic as well as paper use. It is available electronically at: <www.ahrcentre.com/AJHR/guidelines.htm>.

Our final and most heartfelt thanks go to Radhika Withana-Arachchi who has been the mainstay of the Journal for some time now. Radhika has taken up an exciting new challenge with the Diplomacy Training Programme at the University of New South Wales and we are in no doubt that the DTP will benefit greatly from her dedication, organisational skills and cheerfulness!

This issue brings together a range of interesting work, beginning with an important and timely piece on Australia and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Dianne Otto and David

Wiseman's article about the Covenant is intended to generate discussion of the Concluding Observations of the UN Committee on Economic, Social and Cultural Rights (CESCR). They caution against allowing the Australian Government's criticism of the UN human rights treaty monitoring system to deflect attention from the substantive issues of social and economic discrimination and deprivation raised by the CESCR. The authors' analysis of the Covenant and its application in Australia is offered as a guide to future efforts at monitoring Australia's compliance with the ICESCR and participating in the CESCR's review process. The first part of the article sets out the content of the ICESCR and its review process while seeking to clarify the obligations imposed by the Covenant on States that have ratified it. The authors then outline the range of direct and indirect legislative implementation measures and associated remedies that are available to Australian governments which may be relevant to making a full assessment of the extent to which specific economic, social and cultural rights have been realised. The article concludes with a summary of the CESCR's review of Australia's compliance and its Concluding Observations.

The authors pose the question of whether the indirect methods of implementation adopted by Australian governments actually fulfil Australia's legal obligations under the ICESCR. The aim of the article is not so much to assess Australia's compliance with its obligations under the ICESCR as to provide a framework for others to make that assessment.

Richard Ebney, in his article, considers the implications for prisoners' rights of judicial deference to the expertise of correctional administrators. He examines the ways in which courts approach the adjudication of prisoners' rights, contending that the courts are still reluctant to become involved in the internal decision making processes of prisons. This conclusion follows notwithstanding the progress that has been made in the development of a 'prisoners' rights' jurisprudence. Limiting himself to reported decisions of courts in Australia, the United Kingdom and the US, the author adopts a broad approach in an attempt to highlight a particular mode of interpretation that courts have employed when dealing with prisoners' rights cases. The article sets out the fundamental conflict between the interests of correctional administrators and the prisoners' interests, the development of a 'hands off' doctrine by the courts and the way in which this contributes to the vulnerability of prisoners in the system. The author notes the need to balance the interests of correctional administrators in maintaining good order and security with the need for prisoners to have a degree of autonomy that is consistent with their imprisonment. By deferring

to the 'expertise' of correctional administrators the courts are, in the view of the author, effectively transferring to such administrators the responsibility for determining where this balance should lie. The assumption that the administrators are best placed to make that determination is one which the author finds problematic.

In this issue we include two invited articles from scholars on the issue of reconciliation in Australia. In a thought provoking piece on reconciliation, Damien Grace explains why the failure of the Australian Government to apologise to our indigenous citizens diminishes us as a community. Drawing on the writings of Aristotle, McIntyre and John Rawls, among others, the author explains why apologising is essential to restoring trust and faith in the relationships upon which our society is based. He points out that an apology 'establishes a pact of recognition, remorse and perhaps reconciliation so that even life's evils are not wasted'. The article concludes with the apology made by John Howard [the actor not the Prime Minister] on the television program, 'The Games', in 2000.

Continuing the theme of reconciliation as an expression of our humanity, Emeritus Professor Garth Nettheim writes about the challenges of reconciliation for Australian law. He considers the nature and use of Truth Commissions and asks whether Australia needs one itself. In this context, he discusses the Royal Commissions into Aboriginal Deaths in Custody and the Separation of Aboriginal and Torres Strait Islander Children from their Families ('Bringing Them Home'). In relation to the latter report, he notes that the national response to the truth-telling in this report has not taken us any closer to our express goal of reconciliation. Professor Nettheim also explores the concept of reconciliation, discussing the significance of the High Court's decisions in the *Mabo* and *Wik* cases and the role of the Council for Aboriginal Reconciliation in advancing reconciliation between indigenous and non-indigenous Australians. The article concludes with some reflections on the question of the extent to which the law can be part of the solution, rather than part of the problem, in advancing reconciliation.

Rosemary Rayfuse considers the implications for the continuing development of and respect for human rights, of limiting immunity from legal process for UN Human Rights Special Rapporteurs. This is one of the quieter but no less significant debates in which the international community has been recently engaged. The author addresses the key question in this debate: who has power to determine the issue of immunity from legal process of such Rapporteurs? She argues that in the first instance, the power to make such a

determination rests with the Secretary-General, but that the International Court of Justice (ICJ) should have the power to make a final and conclusive determination in the event of a dispute. The article canvasses a number of aspects of the concept of immunity in international law and uses the plight of Dato' Param Cumaraswamy, the Special Rapporteur on the Independence of Judges and Lawyers and a Malaysian national to illustrate the issues raised in the article. Cumaraswamy was named in four defamation suits filed in the High Court of Malaysia following comments he made in his capacity as Special Rapporteur, in an interview for *International Commercial Litigation* in 1995. The situation was only resolved in 1999 when the ICJ gave an advisory opinion that, among other things, Cumaraswamy was entitled to immunity from every kind of legal process in respect of his comments in the interview.

Gus Bernardi writes about the evolution of Tasmanian anti-discrimination laws, beginning with the first attempt at the end of the 1970s and culminating in the appointment in December 1999 of Tasmania's first Anti-Discrimination Commissioner. The article provides interesting insights into the political tensions that underpinned this evolution, tracing the shift in perspective from resistance and conflict, to support and agreement.

This issue includes reviews of three quite different, but equally stimulating books. Sir Anthony Mason reviews one of the Centre's own publications, *Globalisation, Human Rights and Civil Society*, which is a selection of essays edited by Melinda Jones and Peter Kriesler. Antoinette Baroni reviews two conference proceedings, both dealing with the nature and progress of dialogue between human rights activists and corporations and governments and Stephen Bennetts writes about Richard Bauman's *Human Rights in the Ancient World*.

Finally, the issue includes a casenote by Anna Cody of the *Joy William* case. Kingsford Legal Centre commenced proceedings several years ago on behalf of Joy Williams, an Aboriginal woman who argued she had been unlawfully removed from her mother as an infant. Although Joy won her initial battle for an extension of time under the *Limitation Act* in the NSW Court of Appeal, the casenote sets out the reasons why her action against the NSW Government failed.

There is exciting and stimulating work being done in the field of human rights and we hope to continue showcasing the best of this work for a long time to come. ●

Anne Cossins, Peter Kriesler and Anne McNaughton
20 February 2001