



Australian
Human Rights
Commission

everyone, everywhere, everyday

‘How could a Human Rights Act lead to better Government?’

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SES Breakfast

28 April 2009

The Boat by the Lake, Grevillea Park, Menindee Drive,
Barton ACT

INTRODUCTION

Good morning.

I would like to begin by acknowledging the traditional owners of the land on which we meet, the Ngunnawal peoples, and pay my respect to their elders past and present.

PERSONAL REMARKS

I am delighted to be with you at this SES Breakfast and to be able to speak to you about how a Human Rights Act could lead to better government. But before turning to that topic there are two introductory matters that I would like to address briefly.

The first will, I hope, give an indication of the perspective that I bring to this morning's topic. Some of you will know that for 14 years I was a member of the judicial branch of government – I was a judge of the Federal Court. What many of you will not know is that for virtually the equivalent amount of time I have been a member of the executive branch of government – most of that time as a member of the public service of South Australia but now, of course, as President of the Australian Human Rights Commission. In the circumstances it is probably not surprising that I am interested in government decision-making. My interest started when I joined the South Australian public service way back in, I think, 1976. I was a member of the committee, chaired by Bruce Guerin, which in the early 1980s reviewed public service management in SA. For a short period of time I was the senior policy adviser to the SA Attorney-General. Later as Permanent Head of the Attorney-General's Department of SA – a position that I filled concurrently with the position of Crown Solicitor for SA – I was directly involved in government decision-making at a senior level. As a Federal Court judge I was involved in the judicial review of government decision-making at all levels. Again as President of the Australian Human Rights Commission I am reviewing government decision-making as part of the complaint handling function of the Commission.

These experiences have persuaded me that Australians are, generally speaking, well served by their public services. But that doesn't mean that we cannot do better – I think, and I suspect that most of you agree, that we can do better.

The second matter that I want to touch on is the Australian Public Service's reaction to an earlier instance of significant reform that touched on the way that it operated.

At about the time that I joined the SA public service Commonwealth administrative law was comprehensively overhauled. The Administrative Appeals Tribunal was created to provide merits review of decisions made under Commonwealth enactments. The Administrative Decisions (Judicial Review) Act was passed to streamline judicial review of such decisions – including decisions of the AAT. There were other aspects of the reform package including the creation of the Federal Court and the Office of the Commonwealth Ombudsman. The reason why I raise these reforms is because at the time that they were introduced they were, as I understand it, not welcomed by the Commonwealth public service. Not surprisingly the change that they represented was felt to be threatening. Most of us are threatened by change. But who among this audience would now want to abolish the AAT or repeal the ADJR Act? We are proud that these initiatives continue to be seen as world best practice in administrative law. Other countries seek to emulate them.

My point is, of course, that although the change that a Human Rights Act would bring to the way in which we do our work might at first be felt to be a threat, this reaction is likely to pass. As the APSC's Delivering Performance and Accountability Report released earlier this year stated:

A flexible and adaptable public service needs to be able to devise new ways of tackling difficult policy problems and delivering services, and be prepared to experiment without always being sure of what their likely effects will be or how well they might work.¹

AN AUSTRALIAN HUMAN RIGHTS ACT?

In a way, we have been here before; the debate about whether Australia should adopt a charter or bill of rights is one that we have had before. I think that this time the time is right for us to acknowledge that while Australia is a great country for most of us most of the time, we can do better. Our nation lags behind other western liberal democracies in the human rights protections that we afford people in Australia. I am not persuaded that we alone amongst comparable democracies have no need for comprehensive human rights protections. And I am not persuaded that the global economic crisis is a reason not to address this need. Indeed the very real possibility

that attempts to address the economic crisis may not respect the human rights of the most vulnerable in our society might be thought to make it more, rather than less, important that we do so.

As you would be well aware, the National Human Rights Consultation is well underway. Father Frank Brennan and his Committee have been on the road consulting communities Australia-wide, from Ipswich and Rockhampton to Melbourne and Geelong to Alice Springs and Katherine. The Committee is seeking to hear from as many Australians as possible about how they think human rights should be protected in Australia. It has been asked to report on the options for improving rights protection in Australia.

The Australian Human Rights Commission believes that a number of steps should be taken to protect human rights in Australia. The first and most important of those steps, we believe, is the enactment of an Australian Human Rights Act. The Human Rights Act that we envisage would first identify the human rights to be protected. By doing so it would incorporate into Australian domestic law some, perhaps all, of the rights that Australia has recognised internationally by ratifying the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other human rights treaties. By way of examples, it might identify the right to life, the right not be tortured or treated in an inhuman or degrading way, the right to a fair trial, the right to respect for private and family life, the right to freedom of expression and the right to education.

The Human Rights Act that we envisage would require 'public authorities' to have regard to these rights when exercising their functions. This requirement might extend to private entities performing public functions on behalf of the government.

The kind of Human Rights Act that we envisage already exists in the ACT, Victoria and the United Kingdom. Based on what we have seen there, I believe that a similar law for the whole of Australia would benefit everyone.

Today, I wish to look more closely at some of the features that a Human Rights Act would have and how they might impact on governance and decision-making in Australia.

WHAT WILL A HUMAN RIGHTS ACT MEAN FOR THE PUBLIC SERVICE?

I am conscious that many people in the public service have concerns about how the introduction of an Australian Human Rights Act might affect our current practices, the workloads of our staff, and our budgets. We all have pressing priorities and deadlines to meet. Most of us feel that we are and will continue to face difficult economic times. As the head of an agency that is grappling with reducing resources and increasing demands on our services, I understand these concerns well.

Based on what has happened in the UK, Victoria and the ACT, I believe that likely effects of a Human Right Act will, for the most part, be positive.

A Human Rights Act should mean better government because it will create a positive duty on the part of all branches and levels of government – a positive duty to act compatibly with human rights. The rationale behind such a duty is to put into practise the principles of fairness, respect and equality – principles which already underpin the ethos of public service.

This means that a Human Rights Act should not create new burdens but rather should enhance the work that we already do. Taking a human rights approach to our work will mean refining the process of decision-making rather than radically overhauling our existing procedures.

Perhaps this will become more evident as I try to illustrate what this duty to act compatibly with human rights would mean for each of the executive, legislature and judiciary. By way of overview, the duty would mean -

- that the executive would be required to take human rights into account when developing policies and making decisions except to that the law of Australia required it to do otherwise;
- that the legislature would be required to scrutinise all proposed laws for compliance with human rights; and
- that the judiciary would be required to interpret and apply all laws compatibly with human rights unless to do so would not be consistent with the purpose of the legislation.

(a) Informing public decision-making

Let me address first in more detail what a human rights approach would mean for the executive. A Human Rights Act would require the executive, and other public authorities, to consider the rights protected under the Act in the course of policy-making and decision-making. In other words, the Act would, to use the language of a UK commentator, encourage us to put ‘the user of public services at the heart of their design and delivery’.ⁱⁱ

This is surely a healthy adjunct to our democratic processes. Requiring the executive to consider whether intrusions into human rights are justified, and if so, why, will produce a government which is both more conscious of the rights of all people in Australia and more accountable to them. This might be aided by further requiring, as has been done elsewhere, public authorities to report annually on compliance with the Human Rights Act and to prepare internal Human Rights Action Plans.

It seems to me that a ‘culture of justification’ – a culture in which every exercise of power that interferes with our fundamental freedoms is publicly and transparently justified – would only enhance the operation of the public service of which we can, with justification, generally feel proud.ⁱⁱⁱ That such a culture does not universally exist became apparent to me during my time as a Federal Court judge.

To provide an example perhaps close to home (I hope not too close) some of you may remember that I presided over a case in which public servants were prevented from taking leave to which they were *prima facie* entitled because they planned to use the leave to attend union-organised events intended to demonstrate opposition to the then proposed Work Choices legislation. It became clear during the evidence given in this case that even some experienced public servants had little understanding of individual rights of freedom of expression and freedom of association – and, perhaps more importantly, the relationship of these rights to the statutory requirement for the public service to be apolitical in character. A Human Rights Act should change this. In particular, a Human Rights Act should engender a ‘culture of justification’ such that decision-makers would need to think through how their decisions might impact on the rights of individuals, whether members of the public service or members of the public generally.

(b) Pre-legislative scrutiny process

Turning now to how a Human Rights Act might impact on the legislature. The Act would almost certainly introduce a pre-legislative scrutiny process, whereby the legislature would be required to scrutinise all proposed laws for compliance with human rights. This scrutiny would probably involve two elements –

First, any bill presented to Parliament would be accompanied by a ‘human rights impact statement’ which gave reasoned consideration to whether the bill was compatible with the rights protected by the Human Rights Act.

Secondly, a ‘human rights committee’ of the Parliament would examine the ‘human rights impact statement’ and itself report to the Parliament on the human rights implications of the bill.

Both the UK and Victorian human rights committees are comprised of members from all parties and from both Houses of Parliament. The committee has proved to be an important mechanism whereby the legislature is informed about the human rights aspects of proposed laws.

Finally, a Human Rights Act would be likely to establish a procedure whereby the Parliament was advised, probably by the Attorney-General, of significant court decisions in which it had been identified that a law of the Parliament could not be interpreted in a way that respected the rights protected by the Human Rights Act. The Parliament would not be required to amend the law but would be required to give some response within, say, 6 months, to the court’s decision. The response might be an explanation of why the Government was satisfied that the public interest required that a law that did not fully respect human rights remain on the statute books.

(c) Analogous to Charter of Public Service in a Culturally Diverse Society

While this may all sound very novel and foreign, it is not; the incorporation of human rights thinking is likely to complement and reinforce what our public service is already doing. This is because the principles of public service reform – focusing on service users and providing the right service – are underpinned by human rights values though they are not necessarily described in those terms. Human rights advocates and public service reformers agree that greater personalisation of public service means better public service, leading to better policy outcomes.

Since 1998, the Australian Public Service has had in place the Charter of Public Service in a Culturally Diverse Society.^{iv} The Charter recognises that the delivery of services that are relevant and appropriate to different groups of people is ‘the foundation upon which to improve effectiveness and efficiency’.^v

[I]n the case of the public sector, effectiveness is a matter of providing good service to every customer and ensuring that government serves all citizens. Efficiency is a matter of making sure that resources are properly used: providing the right service, the right way the first time to meet the precise needs of each and every client.^{vi}

An Australian Human Rights Act would similarly be about ensuring that government properly considers the needs of all members of Australia’s increasingly diverse population. This means not applying blanket policies without proper regard to the particular circumstances of an individual user of public services.

The Victorian *Charter of Human Rights and Responsibilities* has been instrumental in challenging blanket policies and bringing about decision-making which prioritises the person rather than the policy for its own sake. For example, the Charter was used to challenge a government policy that denied a 13-year-old boy with Asperger Syndrome disability support services because the Victorian Department of Human Services did not consider Asperger Syndrome and other Autism Spectrum Disorders to be a ‘disability’. The boy’s mother applied to the Victorian Civil and Administrative Tribunal for a review of the decision, arguing for an inclusive and contextual interpretation of ‘disability’, in light of rights in the Charter including the right to privacy, the right to protection of families and children, and the right to equality before the law. This prompted a decision by the Victorian Government to acknowledge Autism Spectrum Disorders (including Asperger Syndrome) as a disability under the Disability Act, which meant that Victorians with autism were thereafter entitled to disability assistance.^{vii}

OTHER BENEFITS

In the longer term, the flow-on benefits of a Human Rights Act for our work practices should outweigh any burden which might be associated with the positive duty to act compatibility with human rights.

A Human Rights Act should make our jobs easier, for several reasons.

(a) Clarity

First, a pre-legislative scrutiny process would require the Parliament to give more careful consideration to how proposed laws might impact on the different classes of persons to whom the laws might apply. This would not only reduce the number of occasions on which courts are left with little or no guidance as to the actual intention of the legislature, it would also assist members of the public service required to administer the laws.

(b) Problem-solving

Secondly, as the UK experience has shown, '[h]uman rights principles [enshrined in the Act] can help decision-makers and others see seemingly intractable problems in a new light.'^{viii} This is because a Human Rights Act would define substantive human rights and provide a framework for assessing whether a limitation upon these rights is reasonable. This framework could be used to analyse, understand and ultimately resolve issues which, at first blush, seemed to be intractable.^{ix}

In a UK case study, an 89-year-old woman living in a London nursing home was perceived by staff to be very difficult, particularly because she shouted continuously in the mornings. A consultant geriatrician tried to understand why her behaviour was so hostile but found it particularly challenging because the woman suffered from dementia and found it difficult to talk about her state of mind. The consultant made contact with the woman's daughter and discovered that the woman had been orphaned early in life, and looked after all her siblings and later her own children. In addition, she worked long hours as a cleaner. Her many responsibilities meant that she maintained a life-long routine of rising at 5 am each day. This explained why she became so agitated in the mornings – the woman was being left in bed until 11 am each day. The consultant explained to staff that in order to deliver services in a manner consistent with human rights, they needed to take the woman's individual needs into account, which meant respecting her preferred routine as much as possible, in accordance with her right to respect for private life. From then on, the woman was helped out of bed at 5 am each morning, fed breakfast in her chair, toileted and left to enjoy the rest of her morning. Her shouting and difficult behaviour ceased.^x

(c) Expertise

Thirdly, by integrating a clear human rights framework into the policy-making and legislative process, a Human Rights Act would enable the entire Australian Public Service to develop expertise in human rights and ensure the application of that expertise when it is most needed.^{xi} In the context of the *UK Human Rights Act*, the Chairman of the UK Audit Commission has observed:

Time and again we observe in those public bodies, fast increasing in number, which have adopted and embedded human rights principles in their everyday operations, that they provide much higher levels of service to the public.^{xii}

SIGNIFICANCE FOR US IN OUR PRIVATE CAPACITIES

I've confined discussion thus far to how a Human Rights Act will affect our work but it's important to note that a Human Rights Act will also be a tool that we can use in our private capacities, as members of the community and as users of public services ourselves. If you have a child with special education needs, an elderly parent living in an aged care home or a family member experiencing mental illness, you too might find that, equipped with the language of the Act, you can better negotiate your way to improved services for your loved one.

Here in the ACT, Australia's first Human Rights Act has produced many positive outcomes. It has been used to audit and improve adult correction facilities such as Belconnen Remand Centre and Symonston Temporary Remand Centre. After an audit of the former Quamby Juvenile Detention Centre, the ACT Government reopened it as an adult facility, to address overcrowding and potentially inhumane conditions at the Belconnen and Symonston centres.^{xiii} The lessons learnt from these audits have been applied to the new Bimberi Youth Justice Centre and the new Alexander Maconochie Centre,^{xiv} the first prison in the country to be designed and built in line with human rights principles.^{xv}

The Act also allowed the ACT Human Rights Commission to conduct a review of the psychiatric services unit at Canberra Hospital.^{xvi}

The Act has also made a difference to people's day-to-day lives. For example, a woman and her children were at risk of being evicted from their public housing property after her mother's death because the lease was in her mother's name. The children had always lived in the house and had close contacts with the local community, school and nearby friends. The mother appealed to Housing ACT on the basis of her right to protection of family life, which is contained in the Act, and she was given a lease over the property.^{xvii}

BENEFITS FELT ELSEWHERE

The aggregate result of the benefits I have outlined should be a higher standard of public service delivery. Public authorities would necessarily become more conscious of the need to respect human rights when making decisions. Human rights would become more widely and clearly understood, and a culture of human rights would emerge over time. This is happening in the UK, the ACT and Victoria.

Speaking about the impact of Victoria's *Charter of Human Rights and Responsibilities*, the Victorian Deputy Premier and Attorney-General Rob Hulls has said:

Not only is the human rights dialogue permeating all levels of Government, there has been a change in culture so that when laws are developed, decisions made or services delivered, they are done with the human rights and responsibilities of every Victorian in mind.^{xviii}

This change in culture is evident at the Victorian Department of Human Services. The Secretary of the Department, Fran Thorn, has said that the Charter is becoming part of the way the Department conducts its business, and the Department now knows more about what human rights means for its business than it did 12 or 18 months ago. The Charter has also been the driver of the Department's review of the Mental Health Act. Each year, around 9,000 patients in Victoria receive involuntary treatment for a serious mental illness under the Act. Informed by the Charter, the Department is looking at encouraging participation by the patient in the decision-making about their treatment and care by obtaining an advance statement of their wishes and preferences.^{xix}

When delivering services with human rights in mind, we should also achieve greater efficiency. This is because a duty to act compatibly with human rights should mean better targeted service delivery from the outset and therefore less need for subsequent redress.

OTHER MEASURES

I indicated that the Australian Human Rights Commission sees a Human Rights Act for Australia as only one of the steps that we should take as a nation to improve protection of our human rights. Another important step would be to address the low level of public consciousness and understanding of human rights in this country. The United Nations Decade for Human Rights Education extended from 1995-2004. The World Programme for Human Rights Education has been ongoing since 2005. Yet the impact of these UN initiatives is barely apparent here. I am hopeful that the National Human Rights Consultation will lead to a recommendation for Australia to do much more by way of education, including class-room education, to enhance human rights understanding in this country.

Another positive outcome of the Consultation, in my view, would be a recommendation for improved human rights training for all administrative decision-makers in this country and, indeed, for all legislators and members of the judiciary. Yet another would be to require human rights impact statements to accompany Cabinet proposals and all other major policy initiatives.

Of course, I appreciate that by identifying steps other than the enactment of a Human Rights Act that might enhance human rights protection in this country I raise the possibility of those steps being implemented at the expense of a Human Rights Act. Even the steps of requiring bills to be accompanied by a human rights impact statement and of establishing a human rights standing committee of the Parliament could be undertaken without a Human Rights Act being enacted. And if they were, they would be better than nothing. However, experience elsewhere is that measures of this kind only work as well as might be hoped when backed by a Human Rights Act.

SUMMARY

Most of us are pleased that we live in Australia, but this is not to say that we cannot make it an ever better place in which to live. As I have mentioned, we have an excellent public service, but this does not mean that we can't make it better internationally. We like to remember the role that Dr Evatt, and also Jessie Street, played in the early days of the UN and in particular their role in the drafting of the UN Charter and the Universal Declaration of Human Rights. During the course of the last year when the world celebrated the 60th anniversary of the Universal Charter, we felt proud that Australia was President of the General Assembly when that Declaration was adopted by the international community. Should the National Consultation recommend, as I hope that it will, a Human Rights Act for Australia, let us embrace the prospect of change. An Australian Human Rights Act would not give rise to any rights to which Australia is not already committed in the international arena. It would be good for our country, I suggest, if we were now to bring home the rights that Australia was influential in having included in the Universal Declaration over 60 years ago.

Word count: 4,218 words (including headings)

ⁱ Australian Public Service Commission, *Delivering Performance and Accountability* (2009), p 2.

ⁱⁱ F Butler, *Improving Public Services: Using a Human Rights Approach*, Report of the Department for Constitutional Affairs from IPPR Trading Ltd, June 2005, p 10.

ⁱⁱⁱ Murray Hunt, Legal Advisor to the UK Joint Standing Committee on Human Rights, 'The UK Human Rights Act as a 'parliamentary model' of rights protection: lessons for Australia', Seminar at the Australian Human Rights Commission, 17 February 2009.

^{iv} Department of Immigration and Multicultural Affairs, *Charter of Public Service in a Culturally Diverse Society* (1998).

^v M Kalantis and B Cope, 'The charter of public service in a culturally diverse society, Australian Government', *New Learning*, <http://newlearningonline.com/new-learning/chapters/chapter-4-learning-civics/civic-pluralism-new-learning/page-5/> (viewed 17 March 2009).

^{vi} As above.

^{vii} Human Rights Law Resource Centre, *HRLRC Bulletin*, Volume 33, January 2009, p 27. At http://www.hrlrc.org.au/html/s02_article/default.asp?nav_top_id=59&nav_cat_id=138 (viewed 25 March 2009).

^{viii} British Institute of Human Rights, *The Human Rights Act - Changing Lives* (2nd ed., 2008), p 5. At <http://www.bih.org.uk/sites/default/files/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf> (viewed 13 March 2009).

^{ix} Victorian Equal Opportunity and Human Rights Commission, *First steps forward: the 2007 Report on the Operation of the Charter of Human Rights and Responsibilities* (2008), p 6.

^x British Institute of Human Rights, *The Human Rights Act - Changing Lives* (2nd ed., 2008), p 21. At <http://www.bih.org.uk/sites/default/files/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf> (viewed 23 March 2009).

^{xi} Victorian Equal Opportunity and Human Rights Commission, *First steps forward: the 2007 Report on the Operation of the Charter of Human Rights and Responsibilities* (2008), p 6.

^{xii} J Strachan, *Human Rights – Who Needs Them? Using Human Rights in the Voluntary Sector*, Speech at the launch of the Institute for Public Policy Research, British Academy, 10 December 2004. At http://www.ippr.org.uk/uploadedFiles/research/events/Social_Policy/James%20Strachan.pdf (viewed 13 March 2009).

^{xiii} ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs, 'At last powers that be want to hear about your rights', *The Canberra Times*, 31 March 2009.

^{xiv} As above.

^{xv} ACT Human Rights Commission, 'Canberrans views sought on National Human Rights laws', Media Release, 27 March 2009.

^{xvi} ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs, 'At last powers that be want to hear about your rights', *The Canberra Times*, 31 March 2009.

^{xvii} As above.

^{xviii} Deputy Premier and Attorney-General of Victoria, Rob Hulls MP, Official Opening Address given at the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) Conference, Melbourne, 16 March 2009.

^{xix} Secretary Fran Thorn, Department of Human Services, *The Charter of Human Rights and Responsibilities*, Presentation given at the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) Conference, Melbourne, 16 March 2009.