

HOW A HUMAN  
RIGHTS ACT WOULD  
MAKE A PRACTICAL  
DIFFERENCE TO  
IMPROVE SOCIAL  
JUSTICE IN  
AUSTRALIA

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- 1 See, eg, National Pro Bono Centre, 'What is Social Justice?' (Occasional Paper No 1, National Pro Bono Centre, October 2011) 2.
- 2 In particular the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').
- 3 See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), Preamble para 1, arts 1–2.
- 4 The *Macquarie Dictionary* defines 'Social Justice' as 'a concept of justice which requires there to be a fundamental fairness in the way in which individuals can be active and productive participants in a society which thus enables its individual members to participate fully.' Baldry describes social justice as 'ensuring systemic and structural social arrangements to improve equality' National Pro Bono Centre, above n 1, 2 citing Eileen Baldry, 'The Revival of Social Justice' (Speech delivered at the Marg Barry Memorial Lecture, Alexandria Town Hall, 16 September 2010) 7.
- 5 Australian Human Rights Commission, *Ten Common Questions about a Human Rights Act for Australia* <[https://www.humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA\\_questions.pdf](https://www.humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_questions.pdf)>.

## I SOCIAL JUSTICE AND HUMAN RIGHTS

What precisely the term 'social justice' means is a matter of debate.<sup>1</sup> This includes debate on how social justice can be realised and what role government should play. This article will focus on the role of government in improving social justice through legislative protection of human rights in a Human Rights Act ('HRA').

The concept of 'human rights' is perhaps as contentious as that of social justice, however, since the adoption of the *Universal Declaration of Human Rights* in 1948, the concept has crystallised in international law. This article adopts the definition of human rights as understood in international law.<sup>2</sup>

At the core of international human rights law are the principles of equality and non-discrimination and that the recognition of those rights is the foundation of justice.<sup>3</sup> Fairness and equality are usually concepts inherent to any understanding of 'social justice'.<sup>4</sup> Ensuring the recognition and protection of human rights in law would improve social justice in Australia.

## II A HUMAN RIGHTS ACT

Australia remains alone in the western democratic world in not having some form of national 'Bill of Rights'.<sup>5</sup> The two main forms that Bills of Rights take in nations with a common law tradition are: a constitutionally entrenched Bill of Rights like those which exists in the USA, South Africa or Canada, or a HRA such as those which exists in the UK, New Zealand, Victoria and the ACT. A constitutional Bill of Rights allows a court to strike down legislation that is incompatible with human rights while a HRA does not. At most, courts are required to interpret laws in accordance with the HRA and can make formal declarations of incompatibility. Parliament remains sovereign

and retains the power to explicitly violate human rights if it so wishes. Importantly, inconsistent conduct by public authorities is unlawful.

### III THE GOVERNMENT'S ROLE IN SOCIAL JUSTICE

One theme of social justice is the joint responsibility to address systemic/structural poverty and inequality.<sup>6</sup> This includes the creation of fair institutions and institutional frameworks and assumes a positive intervention by government for the fair distribution of society's resources (distributive justice).

There are different views on how to distribute society's resources fairly including:

- 1 Equal rights and equal opportunity to obtain social goods;
- 2 A fair system of law and due process;
- 3 The state's responsibility to build an individual's ability to take up opportunities and exercise rights; and
- 4 A recognition that there will always be some people in society who will need a lot of support and assistance.<sup>7</sup>

Another theme of social justice is the recognition of human value and wellbeing. This supports an unequal distribution of resources based on an individual's needs and requirements. Central to this view is the recognition of human dignity.<sup>8</sup>

### IV A PRACTICAL DIFFERENCE

In illustrating how a HRA will make a practical difference to improving social justice, the discussion below will refer to real-life examples. These examples are by no means exhaustive and reference is made to a number of publications reviewing the UK, Victorian and ACT HRAs which contain much greater detail than space permits in this discussion. It is these HRAs and these practical examples that assisted in influencing the Queensland Premier to announce at the October 2016 Queensland Labor state conference that her cabinet has agreed to introduce a Human Rights Act for Queensland.

#### A EQUAL OPPORTUNITY TO OBTAIN SOCIAL GOODS

Social goods include things such as health care, housing, employment and education. To a certain extent, existing anti-discrimination law already assists in realising equal access to these goods; however, the 2009 human rights consultation report<sup>9</sup> revealed that rights to health, housing and education mattered most to Australians.<sup>10</sup> There was also great concern for those with mental illness, the elderly and people with disabilities.<sup>11</sup> These concerns would suggest that existing protections are not going far enough to provide what was described by the Human Rights Consultation Committee as 'a fair go'.<sup>12</sup>

A HRA could improve the situation in Australia. It would remedy the patchwork human rights protection currently in existence and as noted by Professor George Williams, give 'effect to many, usually assumed, freedoms for the first time'.<sup>13</sup> This has been seen in the UK where the HRA has provided a way for groups falling outside anti-discrimination legislation such as gay partners, family carers, mothers in prison and domestic violence victims to argue for equality.<sup>14</sup>

It is beyond the scope of this article to analyse the gaps in current Australian anti-discrimination legislation that may benefit from a HRA; however, the examples below involve situations to which current anti-discrimination legislation is

6 National Pro Bono Centre, above n 1, 10.

7 Ibid 11–12.

8 Ibid 15.

9 National Human Rights Consultation Committee, 'National Human Rights Consultation: Report' (Attorney-General's Department, September 2009) 97.

10 Ibid 344.

11 Ibid 343.

12 Ibid 348.

13 George Williams, 'A Charter of Rights for Australia' (2009) 9(3) *Evatt Journal* <<http://evatt.org.au/papers/charter-rights-australia.html>>.

14 Alice Donald et al, 'Human Rights in Britain Since the *Human Rights Act 1998*: A Critical Review' (Research Report No 28, Equality and Human Rights Commission, April 2008), 68–9.

- 15 Human Rights Law Centre, *How Could a Human Rights Act Benefit Aboriginal and Torres Strait Islander Peoples?* A Human Rights Act for Queensland <<http://www.humanrights4qld.com.au/resources>>.
- 16 Human Rights Law Centre, *How Could a Human Rights Act Assist with the Issue of Homelessness?*, A Human Rights Act for Queensland <<http://www.humanrights4qld.com.au/resources>>.
- 17 Human Rights Law Centre, *How Would a Human Rights Act Assist Women Experiencing Domestic Violence?* <<http://www.humanrights4qld.com.au/resources>>.
- 18 National Pro Bono Centre, above n 1, 12.
- 19 Ibid 11.
- 20 Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Vintage, North Sydney, 2009) 59.
- 21 See, eg, *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24–5; *Human Rights Act 2004* (ACT) ss 21–2.
- 22 *Commissioner for Housing in the ACT v Y* [2007] ACTSC 84 (12 October 2007) (Higgins CJ).
- 23 *Kracke v Mental Health Review Board* (2009) 29 VAR 1.
- 24 [2010] ACAT 74 (29 October 2010).

unlikely to respond. Through the use of a HRA the people involved have been able to access social goods they might otherwise have been denied.

The Victorian *HRA* was used to prevent an Aboriginal woman from being excluded from housing owned and leased by a non-Aboriginal community organisation. A condition of her tenancy was that she was required to engage with community services. Her nephew died and she returned to country for ‘sorry business’. On her return, she was not able to engage with community services as she was overwhelmed with family responsibilities, trauma and grief. Her advocates were able to prevent her eviction by arguing that the organisation did not engage with her family’s cultural rights which are protected under the Victorian *HRA*. The community organisation then engaged an Aboriginal support service.<sup>15</sup> It is unlikely that current racial discrimination legislation could have been utilised to obtain this result.

HRAs have also been used to:

- Prevent a woman with a mental illness from losing her home due to concerns about the clutter of personal items in the house when her advocate raised the right to privacy;<sup>16</sup> and
- Prevent a woman from losing her children and being made homeless after a UK Department decided she was an unfit parent because she was constantly moving her children in order to flee domestic violence. An advocate argued that the right to respect for family life was not being properly considered and the Department reversed its decision and agreed to assist with the initial costs associated with a rental home.<sup>17</sup>

## B DUE PROCESS

Equality of access to opportunities and rights cannot be achieved without a fair process of decision-making in a society.<sup>18</sup> It is the mechanism by which everyone in society applies the requirements of social justice to particular cases.<sup>19</sup>

The *Australian Constitution* makes no provision for due process. Such a clause was specifically rejected for racist reasons.<sup>20</sup> The exclusion of such a clause from our *Constitution* was in direct contradiction to improving social justice in Australia. A HRA would remedy this.

HRAs improve due process by clearly articulating the right to a fair hearing in criminal and civil matters.<sup>21</sup> This right has been used to interpret legislation so as to allow a review of a decision to deny a woman public housing that would otherwise have been unreviewable<sup>22</sup> and to ensure the review of treatment of a mentally ill man which was undertaken without his consent.<sup>23</sup> Absent the HRA it is not certain what recourse the man would have had and how long the treatment would have continued without review.

The right not to have a person’s privacy, family or home unlawfully or arbitrarily interfered with is another right that has ad hoc protection in Australian law. The Victorian and ACT HRAs clearly articulate the right in international human rights law terms. In *Canberra Fathers and Children Services Inc v Michael Watson*,<sup>24</sup> the ACT *HRA* prevented a father and his children being evicted from housing provided by Canberra Fathers and Children Services. Their eviction would have resulted in homelessness. There were no published consistent rules regarding evictions and therefore the decision to evict the family was found to be an arbitrary interference with the family unit and the home. The *HRA* was therefore used to ensure due process in decisions being made

to deprive a person of a vital social resource – housing. Without the *HRA* it is questionable what recourse Mr Watson would have had given the notice to vacate was made under an option under the occupancy agreement.

### C EMPOWERMENT

In order for people to take up opportunities and exercise rights they need to be empowered to do so, as do advocates for those who cannot help themselves.

The empowering effect of a HRA is one of the key benefits identified by the Victorian Equal Opportunity and Human Rights Commission. It gives people the tools to question and challenge matters that may potentially impact their rights.<sup>25</sup> The same effect is seen in the UK where people are using the language and ideas of human rights to challenge poor treatment and negotiate improvements to public services. The UK *HRA* has been described as a ‘practical tool for people facing discrimination, disadvantage or exclusion’.<sup>26</sup> HRAs lead to a strong human rights culture and a better understanding by all member of society about human rights.

Although not an all-encompassing HRA, a 2003 study of the *Americans with Disabilities Act of 1990*<sup>27</sup> was undertaken through interviewing people with disabilities and examining their life histories. The researchers found that the new law was affecting the way people talk and think. In granting basic rights to people with disabilities, their self-image transformed, their career aspirations were enhanced, and the perceptions and assumptions of their employers and co-workers were altered. More inclusive institutional arrangements were the result.<sup>28</sup>

In Australia, the Productivity Commission found similar results in its review of the *Disability Discrimination Act 1992* (Cth). It concluded that reducing disability discrimination may enhance participation and employment of people with disabilities and incentivise younger people with disabilities to improve their educational outcomes and become more economically productive in society.<sup>29</sup>

The above are two examples that focus only on disability rights but show clear social justice improvements when human rights are protected by law. A HRA encompasses many more rights than disability discrimination legislation and applies to all members of society. It has the ability to improve social justice in the wider community allowing access to social goods that some people would otherwise be denied.

An example from Victoria shows how important a HRA is compared to ad hoc legislation dealing with only specific rights. A wheelchair user who suffered from mental illness and spoke a limited amount of English was to be evicted from his premises by the Department of Human Services due to information against him about a drug related allegation. The man had not been charged with any offence. Although he was a person with disabilities, disability anti-discrimination legislation would not have assisted here as he was not being discriminated against because of his disability. Using the *HRA* advocates argued that the man’s rights were not being considered, in particular the presumption of innocence and no consideration of procedural fairness. The matter was successfully resolved and the man was able to reside in alternative accommodation.<sup>30</sup>

While the presumption of innocence is the ‘golden thread’ of criminal law, without a HRA guaranteeing this right and requiring public authorities to consider and act compatibly with it, any submissions would have been limited to grounds of procedural fairness. This may not have been as persuasive and may have required the commencement of expensive litigation to enforce.

25 Victorian Equal Opportunity and Human Rights Commission, *Victoria's Charter of Human Rights and Responsibilities*, <<http://www.humanrightscommission.vic.gov.au/index.php/the-charter#what-are-the-benefits-of-having-the-charter>>.

26 Sonya Sceats, 'The Human Rights Act: Changing Lives' (Advice and Guidance, British Institute of Human Rights, 12 April 2007) 5.

27 42 USC § 12101.

28 Williams, above n 13.

29 Productivity Commission, 'Review of the *Disability Discrimination Act 1992*' (Report No 30, 30 April 2004) 134–5.

30 Human Rights Law Centre, 'Victoria's Charter of Human Rights and Responsibilities in Action: Case Studies from the First Five Years of Operation' (Report, Human Rights Law Centre, March 2012), 31.

31 *ICCPR* Preamble para 2; *ICESCR* Preamble para 2.

32 Williams, above n 14.

33 *Ibid.*

34 ACT Human Rights Act Research Team, 'The Human Rights Act 2004 (ACT): The First Five Years of Operation' (Report, Australian National University, May 2009), 6.

35 ACT Human Rights Act Research Project Team, 'ACT Justice and Community Safety Directorate, 'Government Response: Australian National University Human Rights Research Project Report' (Report, ACT Government, March 2012) 2, 26.

36 *Ibid.* 1.

37 Human Rights Law Centre, 'More Accessible, More Effective and Simpler to Enforce: Strengthening Victoria's Human Rights Charter, HRLC Submission to the 2015 Review of the Victorian Charter of Human Rights' (Report, Human Rights Law Centre, June 2015), 1.

38 *Ibid.*

39 Victorian Equal Opportunity and Human Rights Commission, '2014 Report on the Operation of the Charter of Human Rights and Responsibilities (Report, Victorian Equal Opportunity and Human Rights Commission, June 2015), 1.

40 It is noted both *HRAs* in the ACT and Victoria only enact civil and political rights.

## V HUMAN DIGNITY

The preambles to the *ICCPR* and *ICESCR* both recognise that 'rights derive from the inherent dignity of the human person'.<sup>31</sup> A HRA would make a practical difference to social justice in Australia by placing human rights and human dignity at the centre of policy making. Professor George Williams puts it succinctly:

An Australian charter of rights would mark an important shift not only in the law but in how we approach politics and government policy. The focus would be on ensuring that basic freedoms and human dignity are taken into account at the earliest stages of the development of law and policy. The charter would recognise that the decisive point in protecting human rights is not in court after damage has been done, but in government and parliament before a law or policy comes into effect.<sup>32</sup>

The role of protecting human rights would be exercised most frequently by government departments and agencies. Without a HRA there are only ad hoc obligations in Australian law for human rights to be considered. A HRA would mean that rights 'are given a higher status and legitimacy within government. Their protection would be approached more seriously and systematically'.<sup>33</sup>

One of 'the clearest effects' of the *HRA* in the ACT has been an improvement in the quality of law making.<sup>34</sup> The ACT Government has noted a positive impact on political debate and consideration of policy issues by government as well as an impetus for agencies to consider human rights issues.<sup>35</sup> Many agencies are exploring opportunities to better serve the community through human rights compliant policies and operational practices.<sup>36</sup>

In Victoria, the *HRA* has played an important role in ensuring human rights are appropriately considered by government.<sup>37</sup> It has led to improvement in public service design, delivery and outcomes.<sup>38</sup> It drives important human rights initiatives to address systemic issues.<sup>39</sup>

## VI CONCLUSION

Governments deliver social justice through the tools available to them – legislation, policies and other programs. In Australia, however, decisions are being made without adequate consideration of the very minimum standards of justice and equality – human rights. In only two jurisdictions have these rights been enacted into law.<sup>40</sup> Only in these two jurisdictions have the gaps in civil and political human rights protection been plugged and it is unlawful for public authorities to act contrary to these rights.

It is those that have most difficulty accessing social resources that are most in need of an HRA to enforce their rights. The discussion above shows that HRAs have helped empower people who would otherwise be powerless to challenge government decisions and demand respect for their rights allowing them access to social goods and the ability to live the life they choose. HRAs have also created a society respectful of rights and caused a cultural shift in governments and their departments leading to better policy and law making which deliver better social justice outcomes. Just as HRAs have done elsewhere, a HRA would make a practical difference to improving social justice in Australia.