

10 June 2009

National Human Rights Consultation Secretariat
Attorney-General's Department
Central Office
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Father Brennan, Ms Kostakidis, Mr Palmer and Ms Williams,

Thank you for the opportunity to make a submission to your consultation.

No room to pick and choose

The first issue you have been asked to address is ‘Which human rights (including corresponding responsibilities) should be protected and promoted?’. This necessarily implies that there are human rights that that should *not* be protected and promoted: an untenable proposition. I encourage you to explicitly reject it.

It is likely that the question anticipates, or even invites, a distinction to be made between ‘civil and political rights’ and ‘economic social and cultural rights’. But a person is no less entitled to eat or to work than they are to vote and to speak freely. The distinction between these two ‘types’ of rights is one that was made in the political battles of the Cold War, and it distorts the single universal vision of the Universal Declaration, arrived at through the unprecedented agreement of countries of diverse histories, cultures and politics.

There is no room to pick and choose human rights that are to be respected in Australia, unless Australia proposes rejecting, or unilaterally modifying, the internationally accepted statement of human rights in the Universal Declaration of Human Rights. The answer to the first term of reference must be simply ‘all of them’.

The second issue you have been asked to address is ‘Are these human rights currently sufficiently protected and promoted?’. Reference to ‘these human rights’ is to all human rights, and the extent of ‘current sufficiency of protection’ in Australia will differ for each human right.

The third issue you have been asked to address is ‘How could Australia better protect and promote human rights?’. This question is phrased, appropriately, to address all human rights, and not a preferred selection that ‘should be’ protected and promoted.

My submission addresses the second two terms of reference together: are human rights sufficiently protected and promoted in Australia, and (if not) how could Australia better protect and promote them?

Speaking for others

My submission is based on my experience in almost thirty years of protecting, promoting and advocating for the human rights of people in Australia who are poor, disadvantaged, marginalised and oppressed. I refer to those people as ‘disempowered’ because their circumstances deprive them of the power that the majority of us have to manage, control and enjoy our lives and environment, and because our social structures and institutions consistently fail to share that power with them.

Disempowered people lack voice in mainstream debate, even when it purports to address their circumstances and interests. A process informed by human rights values would ensure that their voice – the voice of the disempowered – be heard. Inquiries such as yours should be actively, imaginatively and presumptively creating opportunities for disempowered people to be heard, and should engage in or commission research that attempts to describe the circumstances of disempowered people.

At the same time, consistently with a widely ‘representative’ approach to public debate and decision-making in our liberal democracy, I rely on my experience to give legitimacy to my claim to speak for the interests of the disempowered. I invite you to critically assess the persuasiveness of my submission on that basis, as you will, I trust, evaluate the legitimacy of all claims made to you in submissions by people claiming to speak on behalf of broader interests and constituencies.

Those who miss out

The adequacy of human rights protection in Australia must be measured first against the needs of disempowered people: people who do not gain the benefits of full participation in our liberal-democratic-market society, who do not enjoy the protection that comes from having ready access to established institutions, complex systems and a dominant culture; from being able to exercise and influence power; from being able to participate in public debate and political life; and from engaging in and profiting from the market economy.

It is glib and self-serving for those who do enjoy these benefits to analyse the adequacy of human rights protection in Australia by reference only to the very institutions and systems of which they are a part, or to which they have ready access.

I am one of those who enjoys full participation in our liberal-democratic-market society. I recognise the integrity of its venerable constituent institutions and systems. But you do not need my experience – and that of tens of thousands of social service workers – to tell you that many people in Australia do not enjoy the entitlements, opportunities and comforts that most of us can take for granted. They face constant challenges in getting access to them; many people are born and brought up without any hope of ever doing so. It is unremarkable to observe that in liberal-democratic-market societies, some people miss out.

Human rights protection matters to disempowered people, to people who are marginalised by the limited or inadequate operation of state systems and institutions. To deny that the institutions are inadequate or fail is to deny the existence of people who

suffer by those inadequacies and failures, including children and young people, casual workers, debtors, defendants, elderly people, homeless people, illiterate people, indigenous peoples, migrants, people with disabilities, people of different sexualities, poor people, prisoners, refugees, rural residents, single parents, tenants, under-educated people, and unemployed people.

Whether human rights are sufficiently protected and promoted, and how Australia could better protect and promote human rights, are questions that must be answered first and principally by reference to those who are missing out: what type of human rights protection and promotion can enhance their participation in and enjoyment of our society?

To protect and promote

The less that human rights are threatened and attacked, the less they need protection and promotion. The ideal is to reach a stage when human rights are universally respected throughout the Australian community, scarcely needing protection because they are not under threat. To reach this stage requires change in community understanding and attitude.

The resort to law

Law, alone, is not an effective means of achieving deep understanding and lasting attitudinal change in the community. Lasting social change requires a wide range of complementary strategies. Community-wide attitudinal change is driven by many factors, two of which are the legislative setting of standards, and enforcement of those standards.

Legislation has significant hortatory power. The mere existence of a law is a sign that the elected parliament knows, cares and is prepared to act about an issue. At the same time, the role of legislation is unremarkable. It is unremarkable that legislation expresses community standards, or policy aspirations. And it is unremarkable that legislation offers recourse for those affected by breaches of community standards. It is commonplace that laws express and enforce standards that require fairness, reasonableness, care, honesty, disclosure, compliance and so on, in all areas of life, such as employment, services, trade, sales, administration, and corporate conduct. It is commonplace too that the parliament places the interpretation and circumstantial application of these laws, and their enforcement, in the hands of courts and tribunals.

Over time, laws and their enforcement achieve high levels of compliance with these standards, when those laws complement other mechanisms for change such as public policy and practice, political and community leadership, public education and awareness campaigns, education and training of professionals and the bureaucracy, and community education and development.

Reliance is commonly placed on education and awareness activity as a means of achieving community-wide attitudinal change particularly, in recent years in Australia, in relation to human rights. But in the absence of laws and their enforcement, no amount of education and awareness activity will achieve lasting change. Education and awareness activity alone do not prevent false and misleading commercial conduct, which is why we have fair trading laws, or prevent race discrimination, which is why we have anti-discrimination laws, or prevent erroneous decisions by bureaucrats, which is why we have laws that permit review.

Those who work to protect disempowered people from loss, harm and oppression, and to extend to them the protection of the state and its institutions, get no immediate help from education and awareness activity. It does not offer remedy or hope to reassure a wrongfully evicted tenant that landlords will eventually learn that they should comply with a lease agreement, or to tell a wrongfully arrested or badly treated suspect that the police will at some stage learn that they should act with restraint and respect, or to suggest to a person with a disability that the government will one day see the need to ensure that they can cast a secret ballot.

Nor is reliance on our the institutions of state enough to redress the situation of disempowered people. Parliaments and bureaucracies are not unbiased and infallible, and are not accessible equally to all. Periodic elections of a majority government do not offer hope to those who cannot vote or are not represented, or whose situation is invisible to or under-regarded by the electorate. For the disempowered – for those to whom a guarantee of human rights has real meaning – law is a last but necessary resort when advocacy, persuasion, campaigning, shaming, and pleading fail to alleviate harm being done, or unfairness being perpetrated. Legal remedies are a part of the liberal-democratic package of protecting people and controlling the state.

But it is often the case that no law has been written to address a person's situation, and creative use of existing laws is futile. What is missing – the tool that the disempowered need for access to equal treatment and equal opportunity – is a law that is designed to address their circumstances, a law that shows that their elected parliament knows, cares and is prepared to act, that gives them the same entitlement to fairness regardless of their status, that sets universal expectations of behaviour, that speaks to and for all people in all circumstances, and that guarantees minimum standards of respect, decency, and regard for human dignity.

In the absence of such a law, the legal system and the society whose standards the legal system reflects, fail to protect the disempowered.

It is both empowering and divisive to dedicate policies and laws to promoting and protecting the interests of named sectors of the community. A piecemeal approach to protecting interests will always exclude some and privilege others. A single law that guarantees the same standards to all is a unique statement of equity, inclusiveness and respect, and an essential means of directing society's attention to the needs of the disempowered.

In Australia, we are engaged in a continuing project to achieve a fair and inclusive society. We have developed policies, practices and complementary laws that offer protection and promise in many areas of life, to many people. None, yet, offers protection and promise to all. A law that guarantees respect for human rights, by everyone for everyone, is an essential step towards completion of the project, and achieving a fair and inclusive Australian society.

The answer

The Government has asked you, and you have asked us: are human rights sufficiently protected and promoted in Australia, and (if not) how could Australia better protect and promote them?

It is self-evidently the case that the human rights of the disempowered are not sufficiently protected. That people in Australia live today, and tonight, in poverty, fear, hunger,

homelessness, ignorance, confusion, pain, powerlessness and despair is confronting evidence of the inadequacy of human rights protections in Australia.

Our democratic institutions are not currently designed or operated to extend human rights protection to all members of society. Reliance on those institutions alone suits principally people with the power – usually derived from wealth, social position, education, family, friendships, and simple good fortune – to influence public affairs. Measures such as public policy and practice, political and community leadership, public education and awareness campaigns, education and training of professionals and the bureaucracy, and community education and development would, if they were to happen, all contribute to protecting and promoting human rights.

But all such measures need to be supported by complementary legislation that defines, promotes and enforces human rights standards only in the same way that legislation, and courts, commonly promote and enforce expected standards of behaviour in society.

Without such a law, Australia fails to do all it can to include those who miss out.

Sincerely,

Simon Rice OAM
Director, Law Reform and Social Justice
ANU College of Law
The Australian National University
Canberra ACT