

Day Two of Public Hearings

Session: The Great Debate – Does Australia need a Charter of Human Rights?

Presentation from the Hon Catherine Branson QC, President, Australian Human Rights Commission

My role today is to talk about what a Human Rights Act for Australia might look like and to address some of the arguments that have been made against an Act of this kind being adopted.

But I would like to open with a few more general observations.

The first is that there is no perfect model of human rights protection. Thoughtful, informed and well-meaning individuals who care about human rights hold, sometimes passionately, very different views on the best way, or ways, for Australia to protect human rights. While the views of all of these people should be respected, ultimately the issue calls for judgment about what is the best that we can do at this time for this country. We on this side do not suggest that a Human Rights Act provides the perfect solution; but we believe that, in spite of its shortcomings, it is a necessary element of the best model of human rights protection that can be devised for Australia now.

My second observation is that fear of change is natural. So we in Australia are lucky that we're not the first liberal democracy to consider statutory protection of human rights. We can learn from the experiences of comparable jurisdictions like the UK, Canada and New Zealand – and also Victoria and the ACT – that have gone down this path. Those jurisdictions have not experienced the terrible things that we have been told to fear from a Human Rights Act. In none of those jurisdictions has the sky fallen in. Indeed many who have worked closely with the Human Rights Acts of those jurisdictions are very comfortable with the way that they have impacted on all branches of government.

My third observation is that while human rights are for everyone, some in Australia are much more likely than others to find that their human rights are not being respected. Lisa has illustrated this in moving terms. These people are not, as a general rule, found in academia or in judges' chambers; they do not hold office as Ministers of the Crown, as Senators, or indeed as President of the Australian Human Rights Commission. I urge the Committee, in forming its judgments as to whether human rights are adequately protected in Australia, and as to those rights that most need additional protection, to give primary weight to the voices of those who are most vulnerable to human rights abuses.

My final general observation is that the Human Rights Act for which we on this side advocate is not a powerful instrument – indeed, it is criticised by many for being too weak. The Act would be a modest addition to the existing checks and balances on the powers of the three branches of our national government which we value. But it would be an addition that appropriately reflects the growing recognition in this country and elsewhere that respect for human rights is critical to a peaceful, inclusive and safe

society. Equally importantly, it would provide us with a moral compass to guide public decision-making during good times and bad.

Models of a Human Rights Act

There are, of course, many possible models of a Human Rights Act. The model that we support would help develop a culture of respect for human rights in Australian government. It would do this by requiring each branch of government to integrate consideration of human rights into its work. It would require:

- Parliament to scrutinise all proposed laws for compliance with human rights
 - the executive to take human rights into account when developing policies and making decisions
- and
- the judiciary to interpret and apply all laws compatibly with human rights unless to do so would not be consistent with the purpose of the legislation.

Parliament and Executive

A Human Rights Act would not prohibit the passing of laws that infringe human rights. But it would require governments to consider human rights from the earliest stages of policy-making and law-making. It would promote a culture in which every law which infringes our human rights is justified.

All new laws should be accompanied by a human rights impact statement. A Parliamentary committee should assess that statement and publish its own report. These measures would inform and improve parliamentary debate. They would also encourage informed public debate about the human rights impacts of executive and parliamentary decisions – and may prevent human rights breaches from occurring. Although we could have these things without having a Human Rights Act, their impact is likely to be greater if reinforced by an Act.

Judiciary

A Human Rights Act should also provide guidance to the courts on how the legislature wishes its laws to be construed by indicating that all laws should be construed consistently with the rights protected by the Act unless this would be inconsistent with the purpose of the legislation. An interpretative provision of this kind would be a modest expansion of the common law presumption that Parliament does not intend to infringe on common law rights and freedoms. It would be in this context that a court might find that it was unable to construe a law compatibly with the Human Rights Act. In the case of such a finding the Human Rights Act should, we believe, allow for the Attorney-General

to be advised and require that office holder, when so advised, to report on the court's finding to the Parliament.

The Human Rights Act which we envisage would not give courts the power to invalidate laws, and so would do nothing to impair Parliamentary supremacy.

Individual Complaints

We urge the enactment of a Human Rights Act which gives individuals the right to obtain redress when their human rights, as protected by the Act, are not respected. Redress would only be available where the act complained of was not required by law. We are persuaded that a right for which there is no remedy is no right at all.

We also recommend that the right to obtain redress extend to social and economic rights.

Conclusion

Australia is a great country to live in – for most of us, most of the time. However, review of our history, including our recent history, shows that we can do better – particularly so far as the most vulnerable in our communities are concerned. The enactment of a Human Rights Act would show that we are seriously committed to doing just that.