

National Human Rights Consultation Submission

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Name: Simon Walker

Submission Text:

I work for the Office of the United Nations High Commissioner for Human Rights so it will come as no surprise to you that I fully support the introduction of a Human Rights Act in Australia. I believe that legal guarantees are one of the fundamental elements that distinguish a good deed from a right - the former is optional, the latter is a requirement and so I would like to congratulate you on holding this community discussion to move towards a Human Rights Act.

I would like to focus on one aspect of the draft Human Rights legislation, namely, the inclusion of cultural, economic, and social rights. Unfortunately, these rights are sometimes seen as second best or optional programmatic goals, even amongst some human rights practitioners. I argue that they are fundamental rights as it is not possible to enjoy fully civil and political rights without enjoying cultural, economic and social rights at the same time - and vice versa. The right to vote is dependent on the enjoyment of the right to education (free and universal primary education and progressively free secondary education); the provision of minimum social rights in prisons is necessary to avoid torture and inhuman and degrading treatment; universal access to essential medicines (the right to health) is necessary for the enjoyment of the right to life; a minimum wage and trade union rights are necessary for freedom from exploitation, violence and abuse. So I would like to support in strong terms the inclusion of these rights in a future Human Rights Act.

In the Australian context, cultural, economic and social rights are particularly relevant. The often inhuman conditions suffered by indigenous peoples in Australia is often linked to the failure to respect cultural rights as well as social rights. A Human Rights Act with legal guarantees of the right to health might provide greater legal protection to improve the situation of Aboriginal health. A legally enforceable right to education can help hold governments accountable to ensure that all Australians receive a quality education. Similarly, in the field of the rights of persons with disabilities, cultural, economic and social rights are as important as civil and political rights. The failure to respect free and informed consent for treatments by persons with psychosocial disabilities has led to some serious violations of the right to health in the past. The failure to make buildings accessible to persons with disabilities can obstruct persons with disabilities from participating fully in the community. To give another example, free or affordable access to HIV treatments is crucial to ensure the right to health of persons with HIV.

Cultural, economic and social rights are relevant not only in the field of discrimination law. The government has recently had to reform the previous government's work place laws. Legal guarantees of fundamental workers' rights would have ensured protection of these rights from the outset, identifying those areas of work place conditions which are minimum guarantees that should always be respected. A right to housing should once and for all expose the unacceptable situation of child homelessness - society, through its government, has an obligation to ensure the basic means of a decent life for all children.

Not only is respect for cultural, economic and social rights important in and of itself. Australia has undertaken international obligations, even recently, to promote and protect these rights. Australia recently ratified the Convention on the Rights of Persons with Disabilities. The Convention includes civil, cultural, economic, political and social rights and Australia has voluntarily accepted responsibilities in relation to all

these rights. Australia has also ratified the International Covenant on Economic, Social and Cultural Rights. A Human Rights Act including all rights would be the only way for Australia to meet its international commitments.

I would also like to say something about access to justice and cultural, economic and social rights. Internationally and nationally, Australia has been reticent in accepting the justiciability of cultural, economic and social rights. The failure to accept legal protection of these rights really calls into question whether cultural, economic and social rights are rights at all, or merely good ideas to be implemented when and if a government wishes. Legal accountability is one way to protect these rights and to hold governments accountable. Without legal protection, resort to political and other means is necessary to protect rights - which necessarily weakens them. This is not to say that legal protection of human rights is the only way to protect human rights. But case law from South Africa, India, Colombia, Argentina, Costa Rica, Portugal, Finland, Brazil, the US and many other countries indicates how legal guarantees of cultural, economic and social rights can really make a difference in the lives of people, particularly those living in poverty.

One of the arguments against the justiciability of cultural, economic and social rights is the fear that unelected judges could run amuck and interfere with political decision-making processes. First of all, the culture of judicial restraint in Australia would suggest that this would not be likely to occur. Second, our judges fully understand their role in reviewing decisions of the administration to ensure that they meet the requirements of the constitution - without intruding into the sphere of administrative decision-making. As the South African Constitutional Court has emphasized, there are no clear lines between the role of the judiciary and the administration - however, the judiciary does have a role to ensure that the administration does not fail in its tasks to promote and protect cultural, economic and social rights or to make unconstitutional decisions in this regard. Much has been written on the positive experiences of judicial protection of cultural, economic and social rights, including a recent publication by the World Bank which is supportive of such legal protections. For the World Bank to be so supportive, clearly there is a ground swell of evidence to suggest that the world is moving in the direction of accepting all rights as part of the body of human rights law.

In short, Australia should not fall behind but should enact a Human Rights Act with legal guarantees for all rights - civil, cultural, economic, political and social rights - nor should it let down a large part of its population who depend on government support and policies to ensure universal access to free education, universal access to health care, social security, minimum protections in the work place, access to water at affordable rates and other fundamental elements necessary for the social and economic welfare of all Australians.