

There are many things to recommend Australia's record on social justice. Fore mostly, these emerge from a welfare state: quality public health care, public education, strong labour protections and a good system of social welfare. These can be tracked to the 1970s, to Australia's late emergence as a welfare state, to a reform agenda that has shaped the character of Australia since that time.

The importance of social justice – alternatively characterised as social and economic rights – is not to be deprioritised to civil and political rights. There are strong reasons for considering all these rights – as public international law has them to be – as an indivisible whole.¹

But it is well recognised that, with a robust and effective welfare state, comes a great deal of public involvement in the lives of citizens. While this can and does have great benefit, it also expands the capacity of public policy to do harm in individual cases. An effective welfare state requires a heavy reliance on the competence and good character of public administration. It does not require unswerving faith in the political process to detect all deficiencies in policy, nor review every administrative decision.

Moreover, there is inevitably a degree of technical specialisation that emerges in modern government, generating institutions that build up cultures and practices that may cease to have reference to broader values. Balancing technical competence with a keen eye on the human impacts of decisions is a difficult task. It is made all the more difficult without clear departmental policies that are taken seriously. The behaviour of Department of Immigration and Multicultural Affairs throughout the Howard administration is an excellent example – with a series of decisions that can be explained by an institutional culture that lost sight of the human dimension of its decisions and was committed to a single-minded pursuit of its own departmental objectives.

I believe that it is imperative that Australia bolster its systems of human rights protections by placing human rights obligations on bodies exercising public functions. This should include a legally binding obligation to respect human rights, and non-justiciable duties to protect and promote human rights.

Human rights provide a lens through which institutions are required to turn their minds to the human impacts of their decisions. This is the benefit of placing either justiciable or non-justiciable obligations on public officials. This does not often, as has been seen in relation to the UK, require controversial balancing of human rights against other people's rights or public policy. Often applications are fairly straightforward. For instance, a duty to consider the best interests of the child would have ensured that unaccompanied minors were not placed in immigration detention. That practice was an unnecessary violation of basic rights that should never have happened in a humane, liberal democracy such as Australia, and profoundly affected the physical and psychological well being of many innocent young people.

¹ In fact, in relation to freedom of association, or rights against discrimination, these rights are social, economic, civil and political all at once.

The benefit of legal review has a separate function. Parliaments and governments are best equipped to construct and deliver broad policies. They are not well equipped to monitor individual cases. They are institutionally suited to provide prospective rules for the future – they are not well equipped for dealing, retrospectively, with whether rules have been followed. The argument that human rights scrutiny should be left solely to the political process is at best naïve, and at worst, an indication that the proponent of the argument has not considered in any detail what human rights scrutiny *actually involves*. The political procedures that exist to detect rights violations – constituency representation and the work of the media and civil society – are woefully inadequate for low-level, mundane, administrative breaches of human rights. While those political procedures are nonetheless important for critique of public policy, there needs to be a safeguard system for those whose rights are violated who do not or cannot gain political attention. Sometimes broadly worded legislation, while generally beneficial, has perverse effects in particular situations. These will not be known when the legislation is passed, and, in ordinary circumstances, these effects will not be known at all without a comprehensive check on executive power.

Turning to arguments of democratic legitimacy: The Committee's terms of reference direct it to consider a legislative instrument. It is entirely acceptable for Parliament to pass legislation engaging the Courts in a more substantive checking role in administration than present judicial review of administrative action provides. If Parliament disagrees with judicial behaviour, all the options available for a legislative instrument (comprehensively canvassed in other submissions) will leave it open for the majority party in Parliament, to reassert, in unambiguous language its view of what government should be empowered to do. Where there are questions of a human rights violation, we should expect no less than a clear statement from a Parliamentary majority as to how far the powers of the executive extend. Apart from this, the democratic legitimacy of political decisions is hardly divorceable from at least certain civil and political rights: the right to vote, freedom of political communication, and freedom from arbitrary detention, for instance.

There are concerns that can be raised in relation to judicial review on human rights grounds. Certainly, many disputes about the interpretation and application of human rights standards turn on questions that have a political and moral character. But does this mean that the political safeguards of the Westminster system – designed in a time of far smaller government and a much weaker partisan system – are all we can rely on to protect these standards? And do opponents seriously seek to claim that judges do not have to address questions of a political and moral character already? They simply do so without a clear framework to guide them – a fact that may generate more judicial discretion than if there was a clear statement of fundamental rights to guide the courts in their interpretation and application of the law.

The case for, at the least, a legislative human rights instrument that places binding obligations on public authorities to respect human rights, is incredibly strong. I hope that the Committee gives its support to such an instrument in its recommendations.

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