

**THE UNIVERSITY OF WESTERN AUSTRALIA SOCIAL WORK ALUMNI FUND
INAUGURAL LECTURE**

**HUMAN RIGHTS AND SOCIAL WORK OR HOW TO SET NATIONAL
POLICY GOALS FOR AUSTRALIA**

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Acknowledgements

Thank you for inviting me to present this important inaugural lecture.

Let me to start with acknowledging of the traditional owners of the land on which we stand, and pay my respects to their elders both past and present. I make this acknowledgement to:

- pay my respects to the oldest continuous culture in the world;
- stress that Australia is a diverse society and that the First Australians are an important part of this diversity; and
- to express our aspiration in a just and fair Australia for all.

It is my pleasure also to acknowledge:

- Vice Chancellor Alan Robson,
- Associate Professor Mike Clare,
- Emeritus Professor Laki Jayasuriya, a good friend of mine, certainly one of the founding fathers of Australian multiculturalism, Foundation Chair of Social Work, intellectual giant and prolific writer, role model and mentor to many of us and simply a good Aussie 'bloke'. May I extend my congratulations on your award today. I wish you many more productive years in good health.
- UWA Social Work Alumni,
- Distinguished guests, ladies and gentlemen.

Introduction

It is a pleasure having been invited to speak at such distinguished University. As you know the University of WA, which opened in 1911, is the first University established in Western Australia. Since then it has earned international reputation for academic excellence and is one of Australia's best research-lead Universities.

The Department of Social Work and Social Policy was established some 41 years ago. It has produced over 1,200 social work graduates in that time. They are now spread all over Western Australia, Australia, Europe and the USA. Many of them

work at the coalface making a difference to individual lives every day. Others work in management, research and policy settings.

Tonight we are celebrating a historic occasion - the launch of your own:

- The UWA Social Work Alumni Association, and
- The UWA Social Work Alumni Fund.

The establishment of both will clearly advance the values you are associated with.

The Alumni Fund will help the University enhance the education of professional Social Workers and social work research capacity.

So please dig deep and give generously to the Fund.

Between 2000 and 2005 I was the Australia's Human Rights Commissioner and the Disability Discrimination Commissioner. It was my prime role to promote:

- human rights education and
- the accountability of the Australian Government with regard to a number of international human rights treaties ratified by Australia.

In this context, I initiated number of national inquiries, including the inquiries into

- children in immigration detention;
- the services for mentally ill, and
- disability and employment.

These involved community consultations, visits to prisons, detention centers, mental hospitals, subpoena of departmental documents and cross-examination of witnesses under oath, and on-going liaison with the media and civic and political leaders and resulted in reports. I also initiated many other projects.

Today I would like to talk with you about:

- the concept of human rights generally and
- about the human rights protection system that is in place in Australia today and to link them to the work of professional social workers.

I have decided to talk about human rights tonight not only because this is an area of my expertise. I have decided to do so because of number of other reasons.

The first reason is that our professions, that is social workers and human rights workers, are relatively new as they have developed in the post WWII period. They both link to the emergence of a welfare state and to the emergence of the 'rights' approach to our dealing with governments.

Secondly, human rights and social welfare workers often share a similarity of purpose between them. Both professions are interested in social justice. In fact much of their work focus on protection of individual rights and human dignity.

Ultimately all our human transactions are enhanced by the degree to which we respect each other's human rights. The moment you define your fellow human being as less worthy than you, as a person who does not command respect and human dignity, you are on a dangerously slippery slope. If you dehumanize your opponent it is easier to put him behind barbed wire or deny basic services.

Third reason is that both professions are interlocked with social change. The professions have;

- emerged as a result of past societal change,
- are part of society's present response to the change, and
- may be instrumental in advancing further social change.

Often social workers and human rights activists are also blamed for social change taking place in the first place.

To illustrate my point allow me to quote Senator Barry Goldwater, a conservative US politician. He is reported to have said: *"If the government is going to take care of our children when they are young, and take care of our parents when they are old, then what the heck has happened to the family."* In Australia for example, some twenty years ago it was expected by the majority that parents would meet the cost of pre-school child-care. Now there is an expectation that governments meet at least a proportion of the costs.

The point is that in fact since the 1950s something has happened to the family, and we no longer expect it to meet the responsibilities that were taken for granted only decades ago.

We might ask a similar question about our communities: *"If government agencies and paid officials are going to carry out the tasks that were once carried out by charities, voluntary organisations and volunteers, then what the heck has happened to the community?"*

The fact is that, for good or ill, the community has changed, too.

Furthermore, it is possibly correct to say that the changes happen because we choose to change our behaviors and because our attitudes have changed too.

And as in a case of any significant social change, it is the primary responsibility of our elected officials to note these changes and deliver appropriate policy responses through legislation and budgets. In fact, in any democratic system, the politicians will follow it, even if some of them would prefer to look back and idealize the past.

It is the government's prime responsibility furthermore to respond to this change in a pragmatic, balanced and sustainable way.

On the other hand, social workers or more broadly members of the "helping professions", if one takes a minimalist point of view, are not the main change agents

but are responsible for the delivery of statutory services legislated for by the state. They are responsible for the delivery of services at the coal-face to people who were affected by these changes. It is their job to ensure that children and elderly are taken care of now and that those worse-off in our community, as result of a change, are being look after too.

If one takes a broader view of the role of social work - social workers, as well as human rights workers, are responsible for providing practical feedback to the government about the functioning of new policies and for advocating solutions that would best serve the individual and the community in the long term.

I would not go, however, as far as to agree with those who argue that working toward delivering a systemic social change is the primary responsibility of social workers. Those who subscribe to this notion, if rather far fetched, include Pol Pot, Stalin and some others who could claim to be a part of the social worker profession.

So my fourth point is that human rights and social welfare workers are natural allies when working towards a change in government policy. They are natural allies because they share many similar values and experiences of the coal-face which equip them well to offer an effective input into the strategic direction of relevant government policies.

Now, let us take look what sets of values underpin social work in Australia. Let us start with a question. What do Australians think are their rights?

The Meaning and Origins of Human Rights

What do we understand by human rights today?

In contemporary Australia many people like to talk about their rights. Sometimes the idea of rights is used loosely or to assert selfish goals. For example, I have been told that in Australia there is a right to own a car or holiday home. Not that long ago somebody complained to me that his rights are being infringed because of a barking dog in his neighborhood. I found it rather a novel approach to human rights, but perhaps he had a point.

When talking about human rights, however, Australians would link this concept to ideas of fairness, justice and balance. Most Australians would, for example agree that every person has inherent dignity and value and that human rights help us to recognize and respect the fundamental worth in ourselves and in each other.

We would also agree that human rights are the same for all people everywhere – male and female, young and old, rich and poor, irrespective of race, creed or disability status. Regardless of our background, where we live, what we think or what we believe. This is what makes human rights ‘universal’.

Australians recognize that human rights are important and should be protected. They recognize our freedom to make choices about our life and develop our potential as human beings. The rights ensure that we can live free from fear of harassment or discrimination. They secure our decent standard of living.

We would further argue that human rights exist even if governments or other people attempt to deny them.

Most of us would possibly agree also that respect for human rights helps build strong communities, based on equality and tolerance, in which every person has an opportunity to contribute. Of course, having others respect our human rights comes with the responsibility that we respect the rights of others.

Where do human rights come from?

Australians differ in their understanding of where human rights have come from. Some of us point to religious origins, others to “natural law” as a source, and some see them simply as hard won concessions from the State. I would possibly subscribe to the last school of thought.

Looking back at our history one could conclude that human rights, particularly in respect of the ‘individual’, are not a recent invention. In fact, ideas about individual human rights can be traced back thousands of years. Key milestones were:

- values developed by ancient civilizations and the teachings of the world’s major religions;
- Ideas about justice, democracy and the individual citizen were very important in Greek and Roman societies;
- The *Magna Carta* (1215);
- The American *Declaration of Independence* (1776);
- The American *Bill of Rights* (1791);
- The French *Declaration of the Rights of Man and the Citizen* (1789);
- Tom Paine publishing (1791) “*The Rights of Man*”;
- The *Geneva Conventions* (1864) governing the lawful treatment of civilians and enemy soldiers in war time or so called humanitarian law;
- The 1948 United Nations: *Universal Declaration of Human Rights*.

The UN’s human rights mandate

The contemporary notion of human rights is firmly linked to the United Nations.

In the immediate aftermath of WWII it was realized, largely due to the Jewish Holocaust, that it was not sufficient for international bodies to “arbitrate” in conflicts between nation states, but that there is a pressing need to “arbitrate” about individual human rights. Or in other words, human rights were no longer just the private business of individual nations, but were a matter of international concern.

Accordingly, in 1948 United Nations General Assembly, under the presidency of an Australian Attorney-General H. V. (Bert) Evatt, proclaimed the *Universal Declaration of Human Rights* and named the fundamental rights of all people, including:

- the right to life;
- freedom from slavery;
- freedom from torture and arbitrary arrest;
- freedom of thought, opinion and religion;
- the right to a fair trial and equality before the law;
- the right to work and education; and
- the right to participate in the social, political and cultural life of one's country.

After the Universal Declaration of Human Rights, the UN adopted a range of specific human rights treaties, dealing with

- civil and political rights,
- genocide
- economic, social and cultural rights, and
- rights of particular groups such as women, children, indigenous people, disabled, refugees and others.

What could be of particular interest to the professional social workers is that, with the adoption of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) in 1966 (entered into force 3 January 1976) as well as some other treaties, international standards were established to deal with, for instance:

- health, including the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;
- education;
- work (including right to fair wages and safe and healthy working conditions, rest and leisure);
- social security;
- protection and assistance to the family, including special protection to mothers before and after childbirth;
- adequate level of living, including adequate food, clothing and housing and to continuous improvement of living conditions;
- participation in cultural life.

In addition, there were established standards prohibiting discrimination because of gender, disability, age and so on.

The important point to note here is that today we have well established, by international law, universal human rights standards that should dictate the policy and practice of governments around the world.

These standards were established to unite people of different political, cultural and religious traditions and to overcome divisiveness and sectarianisms. Thus these standards are of direct relevance to a contemporary multicultural Australia. They define the key human values and rights and assert their universality.

These standards were in fact signed and ratified by the federal government and thus they should provide an important value base for all Australians. Human rights standards should also be of key relevance to social work.

Furthermore, the international standards should impact on how contemporary social work is conceptualized and practiced. According to Professor Jim Ife *“a human rights perspective can strengthen social work and it provides a strong basis for an assertive practice that seeks to realize social justice goals of social workers, in whatever setting”*¹

On practical level, interventions that are part of a social worker's mandate, such as challenging oppression, improving living conditions and combating discrimination or empowerment, apply readily to human rights violations that breach the internationally agreed conventions. In fact some scholars, for example Elisabeth Reichert in her book *‘Social Work and Human Rights’*² have already highlighted the parallels between the human rights standards and the codes of ethics adopted by professional social work bodies in USA and elsewhere.

Human rights treaties ratified by Australia

Australia has played a leading role since 1948 in the development of international human rights treaties at the UN; and by now Australia has ratified most of the fifteen principal human rights treaties, namely:

- International Covenant on Civil and Political Rights (including the First Optional Protocol allowing individual complaints and the Second Optional Protocol on the death penalty);
- International Covenant on Economic, Social and Cultural Rights;
- Convention on the Rights of the Child;
- Convention on the Prevention and Punishment of the Crime of Genocide;
- International Convention on the Elimination of All Forms of Racial Discrimination;
- Convention on the Elimination of All Forms of Discrimination Against Women (but not the Optional Protocol allowing individual complaints);
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention and Protocol Relating to the Status of Refugees;
- UNESCO Convention Against Discrimination in Education;
- Freedom of Association and Protection of the Right to Organize Convention (ILO 87);
- Right to Organize and Collective Bargaining Convention (ILO 98);
- Equal Remuneration Convention (ILO 100);
- Discrimination (Employment and Occupation) Convention (ILO 111);
- Workers with Family Responsibilities Convention (ILO 156);
- Termination of Employment Convention (ILO 158).

So how these important international human rights standards are implemented and protected in Australia?

UN human rights treaties incorporated into domestic law

For a treaty to be explicitly binding within Australia, it must be incorporated into domestic legal system by an enactment of a federal law.

The above listed treaties did not have much impact on domestic law until the early 1970s. Since then, out of those fifteen key international human rights treaties, Australia has enacted specific federal legislation to implement comprehensively eight and partially three treaties.

Particular progress was made with incorporation of anti-discrimination laws. As early as in the 1975 Australia legislated *Racial Discrimination Act* which incorporated the ***International Convention on the Elimination of All Forms of Racial Discrimination*** into domestic law. A Commissioner for Community Relations was appointed in 1975 to monitor the new Act.

Then the ***Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*** adopted by the General assembly in 1979 was almost fully incorporated in Australian law through the *Sex Discrimination Act* of 1984 and the statutory office of Sex Discrimination Commissioner was established within the Human Rights and Equal Opportunity Commission (HREOC).

The Convention and Protocol Relating to the Status of Refugees were also comprehensively incorporated into the migration legislation.

However, the most important ***International Covenant on Civil and Political Rights*** (ICCPR) - which covers the most important civil and political rights and the Convention on the Rights of the Child (CROC) were not given specific federal enacting legislation but have been 'referred' or appended to HREOC Act. Although with regard to CROC, in addition to HREOC reference, it has been incorporated by reference to variety of State child protection laws throughout Australia.

With regard to ICCPR, Australia appears to be the one of very few western nations that never legislated to properly protect the human rights set out in the ICCPR. As you would be aware, all States belonging to the EEU surrender part of their sovereignty to the human rights court in Strasbourg. Furthermore, Australia is the only developed common law country without a Bill of Rights traditionally protecting civil and political freedoms. Look at Canada, it legislated for a Charter of Rights and Freedoms in 1982; even our friends the Kiwis and Mother England have adopted human rights legislation.

And it's curious in a way, that in the time of sweeping globalization, Australia swims against the tide in terms of protection of individual rights. This, despite the Prime Minister's statement that our future is linked with engagement not isolation, that we need to be a part of the globalization process. And, as a matter of fact, we are doing

quite well out of it. We've got engagement with whole levels of globalization processes, dealing with relaxation of trade barriers, World Trade Organization references or greenhouse gas emissions at Kyoto to name but a few. And yet, consideration of our individual civil liberties has slipped through the cracks.³

As result of Australia adopting a minimalist view with regards to civil liberties relevant checks and balances are missing. For example, the US Supreme Court recently found that military commissions establish to judge David Hicks and others break American law and Geneva Conventions. The United Kingdom's High Court ruled that British anti-terrorism laws allowing home detention without trial breach European Convention on Human Rights. Similar judicial findings relating to our domestic anti-terrorism laws or our immigration detainees in Nauru are unlikely in Australia.

Another consequence of swimming against the protection of our individual liberties tide is that our legal system will become increasingly isolated from developments in human rights jurisprudence. This was one of the key considerations of the British Parliament when they introduced their human rights legislation.

Some other agreements and in particular the ***International Covenant on Economic, Social and Cultural Rights*** (ICESCR) were not formally implemented through Federal enactments.

Not incorporation of the ICESCR, however needs to be seen against the background of Australia's proud history as a pioneer in the field of economic, social and political rights. Australia has instituted the eight-hour day as early as the 1850s. We made available, well ahead of most of the world, free universal education. We were among the first to legislate for women's suffrage. The Harvester decision in 1907 resulted in the important safety net of the basic wage.

In conclusion, it could be summarized that the impact of international human rights standards on domestic law in Australia is relatively limited.

International law has clearly impacted on our federal "*fair go*" or equality laws and in particular on the laws protecting rights of particular groups such as women, children, indigenous people, disabled, refugees and others, but has had only limited impact on defining our civil and political liberties and economic, social and cultural rights.

The limited impact on social, economic and political freedoms could be explained by our achievements in these areas prior to the emergence of international law.

The above reflects our history and "*fair go*" culture.

Civil liberties were certainly not given a high priority by Australian lawmakers over the years. Furthermore, the lack of international jurisdiction over human rights violations in Australia, similar to that of the jurisdiction of the European Court of Human Rights with regard to European nations, undermine the relevance of human

rights in daily life and deny our judiciary valuable access to international jurisprudence.

Not incorporating ICCPR into domestic law reflects our relatively low priority given to civil liberties by Australian political culture.

Protection of Rights in Australia

So how are our rights protected in Australia now? Is our system of human rights protection so good that there is nothing we could learn from the international human rights standards?

Most Australians are proud of our human rights record. We often assert that, perhaps with the exception of our historical treatment of Indigenous people, our human rights record is one of the finest in the world.

Further, I think all of us here tonight would agree that in the broad, Australia is a good example of a well functioning civil society.

In fact, many of our political leaders claim that our strong civil society structures deliver us one of the best protections of human rights in the world and that there is no need for the Australian Bill of Rights to supplement the civil society structures.

But history shows that civil society does not provide always a fool proof protection against human rights violations. In fact some countries with a well functioning 'civil society' structures transformed very quickly into major human rights violators. For example, it took only few years for Nazi party to dismantle the vibrant German civil society and commit gross human violations both domestically and internationally.

The notion of civil society

So, let us examine, what are the key components Australian 'civil society'? They include:

- Federal Constitution and statutory laws;
- Well developed tradition of common law;
- An efficient judiciary and legal system;
- Robust parliamentary institutions and separation of the executive, the parliament and the judiciary;
- Freely contested elections with universal adult suffrage.
- An independent, diverse and questioning media.
- Well trained police forces who operate according to the 'rule of law'.
- Efficient public service that is merit based and free of systemic corruption.
- Independent watchdog bodies, such as HRC, Ombudsman etc.
- Active and vigilant NGO sector.
- A community that generally expects all responsible members of that community to abide by the 'rule of law'.

- A culture of genuine commitment to ideas of “fair go” and justice and to the international human rights standards

This list is not meant to be conclusive. I am sure you could each add other important ingredients, but I think that for the sake of tonight’s discussion it is an adequate starting point.

So let us examine in more detail the key three components of the Australian “civil society”, namely:

- our legal system and in particular the Federal Constitution and statutory laws, the changing nature of the common law and the latest judgments of the High Court;
- our parliamentary system; and
- the watchdog bodies, in particular jurisdiction of the Human Rights and Equal Opportunity Commission

from the point of view of their role in the protection of human rights of Australians.

Federal Constitution

Let us start with the Federal Constitution⁴ adopted in 1901 as the cornerstone of the Australian legal system.

The Constitution of Australia divides spheres of legislative, judicial and executive responsibility between the Commonwealth of Australia and the States. Both Federal and State governments are responsible for human rights protection. States, for example, may also incorporate international human rights principles into state legislation to the extent that such legislation is not inconsistent with any Commonwealth legislation in the area. ACT and Victoria recently adopted a bill of rights legislation and Tasmania is in process of doing so.

It is important to note, however, that no comprehensive statement of human rights – or citizenship rights as they might have been known at Federation – was included in Australia’s Constitution.

In fact, very few individual rights were explicitly recognized in the Constitution. For the record they are:

- the right to vote (Section 41) - although still to be confirmed by the High Court as explicitly thus;
- the right to a trial by jury in the State where the alleged federal offence took place (Section 80);
- the denial of federal legislative power with respect to religion (Section 116); and
- the prohibition against discrimination on the basis of State of residency (Section 117).

There are also two “economic rights”:

- Section 92 guaranteeing freedom of interstate trade; and

- Section 51 mandating payment on just terms for property acquired by the Commonwealth.

The Constitution is silent in relation to numerous other rights that are well recognized in the constitutions of other Western democracies. For example, the Constitution does not guarantee:

- the fundamental freedoms such as the freedom of association, freedom of movement, freedom of peaceful assembly, freedom of thought, belief and opinion, and freedom from arbitrary arrest or detention;
- the right to a fair trial or due process;
- equality of all persons in Australia before the law.

This could be largely explained by reference to our history – Australia’s mostly peaceful development towards nationhood and independence and reliance on the common law.

Federal legislation

The history of Australian domestic legislation from the point of compliance with human rights standards is uneven.

The first act of the new federal Parliament in 1901 was to pass the *Immigration Restriction Act* and the *Pacific Island Labourers Act* giving effect to the White Australia Policy.

On the other hand, Australia did reasonably well by contemporary standards in creating a democratic system of government. For example, as early as in 1902 the federal franchise - the vote - was extended to women. (This voting equality was however not extended to other spheres of importance to women until the early seventies.)

As it was mentioned earlier, Australia’s particular achievement, in the early years, was the development of a comprehensive system of protection of economic and social rights, which was put in place well before the Bolshevik Revolution in Russia.

In fact Australia has been an international leader in this field. The concept of the basic wage and development of labour relations around a framework of conciliation and arbitration, are but two of the more high profile examples of those achievements. So, many human rights in Australia were protected by domestic legislation, well in advance of the emergence of international human rights treaties.

The High Court

The jurisprudence of the High Court in respect of the Constitution has made a significant contribution to the protection of human rights in Australia. I refer here to the *Tasmanian Dam Case* (1983)⁵. Here the High Court reassessed the external affairs power – that provision in the Constitution which gives the Commonwealth control of external affairs.

From this, section 51(xxix) of the Constitution, the external affairs power, provided the Commonwealth Parliament with the ability to legislate so as to incorporate provisions of international human rights conventions into Australian domestic law. So the High Court affirmed in a decision where Queensland challenged the constitutional validity of the *Racial Discrimination Act 1975*.⁶

A High Court interested in an expansive reading of the Constitution has also found that certain individual rights are implicit in the system of government it establishes. Thus in 1997 the individual right to communicate freely in political matters was recognized by the High Court.⁷

The High Court also acknowledged that international human rights law is a legitimate influence on the development of the common law. In *Teoh*, the Court held that the ratification of a convention "*is a positive statement by the executive government... that the executive government and its agencies will act in accordance with the convention*".

Accordingly, there is a legitimate expectation, in the absence of any indication to the contrary, that administrative decision-makers will act in conformity with the convention. So the High Court established a principle that at least there is a limited role for human rights in the operations of executive government. It should be noted that this expectation forms a part of procedural fairness and does not give rise to a right to any particular outcome.

The decision in *Teoh* has, however, caused significant controversy and in the later High Court's decision in *Ex parte Lam* there were strong indications from members of the Court that they may be prepared to reconsider the legitimate expectations principle.

Such a move by the High Court (to reconsider *Teoh*) would undoubtedly be strongly supported by federal parliament. In a joint press release by the Attorney-General and the Foreign Affairs Minister, dated 10 May 1995, it was asserted: '*that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty...*'

In fact there have been three previous attempts to introduce federal legislation that overrules the '*legitimate expectation*' principle. For a variety of different reasons on each occasion the Bill has failed to become law. Whether or not the recent changes in the Senate will mean that this issue is revisited by Parliament

The recent case of *Al Kateb* dealing with detention under *the Migration Act* has put beyond any doubt the supremacy of statutory law over the common law. As Justice McHugh summarized:

"As long as the detention is for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by the Parliament is not examinable in this or any other domestic court. It is

not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights”.

Justice McHugh did go on and lament the practical effect of his legal reasoning. He acknowledged that the future prospects of the unfortunate Mr. Al-Kateb had shades of the fate of French prisoners on Devil’s Island: the Australian law acknowledges a legal possibility of release from immigration detention only by way of the grave.

His Honor further concluded that change to this state of affairs, from the legal perspective, could only be achieved by adopting a federal bill of rights in Australia.

And I agree with his conclusion.

What this demonstrates however, is the limited and potentially fragile nature of the protection of human rights under the common law and reinforces, in my view, the case for a bill of rights.

This is not to diminish the importance of the common law, which has played a very significant role in this area by reason of its traditional regard for fundamental individual rights. A good example of the common law impact on domestic human rights, is its role in the acknowledgement and development of the native title rights of indigenous Australians⁸.

I believe we would accept as a general proposition that the Australian Constitution and federal statutory law offer only limited protection for civil, and perhaps political, rights in this country.

Federal Parliament

Let us now have a brief look at our federal law makers. In fact many federal and state politicians declare that they are the keepers of this nation’s human rights flame. Events in the ACT and now in Victoria, indicate that some of their state and territory colleagues are even prepared to legislate for a bill of rights.

But generally the attitude is that of the former NSW Premier Bob Carr who welcomed a state parliamentary report that found NSW residents’ rights would not be enhanced by a state-based bill of rights. This, despite all the evidence gathered by the committee pointing the other way.

Former Premier Carr was moved to say:

“A bill of rights is an admission of the failure of parliaments, governments and the people to behave in a reasonable, responsible and respectful manner. I do not believe that we have failed.”

One avoids with difficulty at this point reprising Mandy Rice Davies’ immortal line: *“Well, he would say that wouldn’t he!”*

Similar views are being held by many federal politicians including the current Federal Attorney-General Philip Ruddock who according to former deputy secretary of DIMA Tony Harris holds “*the minimalist view of human rights*”. (The Australian Financial Review, 18 July 2006, p.62)

So it is difficult to conclude that Parliaments do actually provide the best available protection for human rights.

As that lawyer’s lawyer Lord Scarman, British Lord of Appeal in Ordinary from 1977 to 1986 said:

“if you are going to protect people who will never have political power, at any rate in the foreseeable future - not only individuals but minority groups - if they are going to be protected, it won’t be done in Parliament - they will never muster a majority. It’s got to be done by the courts and the courts can only do it if they’ve got proper guidelines.”

My own critique of politicians’ position on this matter follows two lines of reasoning.

Majority rules

Firstly, decisions regarding the need for new or amended laws may be taken by Federal parliament without due consideration of human rights principles. This, for example, may happen for populist reasons or because of the heat of the moment, for example in response to a terrorist attack.

In fact, these reactive, often potentially draconian laws, are frequently introduced by governments of the day, with the tacit support of a large segment of the population.

At least as measured by focus groups and talk back radio. This can give the process the appearance of a soccer match played towards one goal only; in that the point of view or values espoused by civil liberties’ advocates are easily dismissed.

And let us be clear. Terrorist attacks against civilian targets constitute the gravest possible assault on human rights imaginable. Acts of terrorism are conceived and perpetrated by a few with the deliberate intent of causing indiscriminate death and serious injury to their victims – whoever they happen to be – for some often undefined and unspecified cause.

It is important, however, to note that such arbitrary and unjustifiable acts not only violate the human rights of their victims, but also circumvent both the democratic principles and the values established by the various international human rights conventions - the very essence of the society against which they are perpetrated.

In other words, a society’s civil liberties may also become a victim of terrorism.

Here I would like to quote from Professor George Williams, who is chairing Victoria’s Human Rights Consultation Committee, from his 2003 NPC address:

“The (ASIO) Bill must not be assessed as if we have become divorced from our history and shared values since September 11. This context is an important source of guidance at a time of community fear and national grief after the Bali attack.”

My argument is – when it is necessary to draft new anti-terror laws, let us assess the new laws, in a systematic way, against the freedoms they are likely to infringe. Let us also ensure that the necessary infringements or limitations of HR are kept to a minimum.

Human rights principles are capable of delivering wisdom and balance - a combination that has served Australians well in the past and could be said to represent the core of our democracy.

While the Parliament will clearly express the priorities and aspirations of the majority, it is up to human rights and social workers to draw attention to minority rights. Whatever and whomever they may be at any point in time.

Party discipline

Secondly, our political process, in regard to individual federal politicians, no longer provides the kind of protection and assurance that it once might have. The dominance of the major political parties and the rigidity of their discipline undermine the prospects of individual protection at the parliamentary level - Petro Georgiou and the ‘gang of four’ notwithstanding.

Those June 2005 amendments to the Migration Act, softening the impact of immigration detention on children and families, are a case in point.

These changes, negotiated by the Prime Minister, came after a long-term, sustained campaign, by all arms of civil society.

A campaign which I modestly feel, in regard to children in immigration detention, was given considerable new impetus by my report ‘A last resort?’

These changes to the Migration Act to soften the immigration detention regime are undoubtedly the step in the right direction. In fact, the first such step taken since 1992.

But despite all this, Petro’s proposals, as outlined in his Private Member’s Bills, were considerably modified. And some would argue that if the events in London had occurred on the sixteenth of June 2005 instead of the seventh of July 2005, border security considerations could have outweighed the need, despite Petro’s, and others, strong feelings to the contrary.

And I am not taking here an easy pot shot at the government. The Opposition policies are certainly not better. They are confused and lacking commitment to human rights in immigration area.

My point here is that within the major parties, organizational discipline makes it extremely difficult - not impossible - but very difficult for individuals or even groups of individuals to change laws from an HR perspective. Especially if there is a broad community support for the present policies.

The role of the Human Rights Commission

Now let's have a look at the Human Rights and Equal Opportunity Commission and its role in the protection of human rights.

HREOC was established by an act of federal Parliament in 1986 as a national independent statutory authority. It replaced the previous Human Rights Commission, which was set up in 1981 by Fraser government. The Commission administers federal legislation in the area of human rights, anti-discrimination and social justice. It reports to the federal Parliament through the Attorney-General.

HREOC has a number of functions.

Education Function

The key Commission's responsibility is to educate Australians about human rights. It is to foster greater understanding, respect and protection of human rights in Australia, with a particular focus on sex, race, disability and most recently age discrimination, as well as the rights of indigenous Australians. It is also responsible for raising public awareness of human rights by fostering public discussion and developing educational programs and resources for schools, workplaces and the community.

HREOC has some limited success in this area. Although it was not able to secure inclusion of a human rights unit into any school curricula, the website is frequently visited by Australians. For example, in 2003 – 2004 the HREOC website attracted 4,392,429 page-views.

Complaint handling

HREOC also investigates alleged infringements of the Federal Race, Sex, Disability and Age Discrimination Acts as well as alleged infringements of civil and political rights and some other alleged infringements under the HREOC Act.

It is, however, important to note that HREOC does not have 'court like' powers with regard implementation of its findings. Nor does the Commission have any power to enforce the outcomes of individual complaints. I could only mediate between the parties. It is possibly why the number of complaints lodged with the Commission is very small; for example in 2004-05 only 1,241 complaints were received in all areas of HREOC jurisdiction from over 20 million Australians.

Furthermore, there is a vital difference between complaints brought under Sex, Race, Disability and Age equality protection laws and the human rights complaints.

In case of unlawful discrimination complaints, if the parties cannot come to a negotiated settlement of such a complaint, in most of those cases the complainant is entitled to take the matter to court for a decision and a remedy, including compensation where appropriate.

Individuals may also complain to HREOC about alleged breaches of civil and political rights where the Commonwealth is involved and about discrimination in employment by the Commonwealth on a range of grounds, such as religion, sexual preference, political opinion, trade union activity and medical records.

Complaints received under this provision are also potentially resolved by conciliation between the parties. However, unlike complaints under the anti-discrimination laws, if the matter can't be conciliated, even if the Commonwealth is found to be in violation of human rights, there is no provision for the matter to be referred to an Australian court for conclusive arbitration.

So there cannot be a court imposed remedy, no requirement to pay compensation – even where the Commission ‘finds’ a breach. The Commission only has the power to report on the matter to the Parliament.

Although the Commission’s report must be tabled in Parliament, the government is under no obligation to respond to the recommendations.

The lack of an effective remedy for civil and political rights violations is evidenced by the limits on HREOC’s complaints powers. The contrast with remedies available in race and sex discrimination cases - not limited to financial remedies - is very stark indeed.

Put bluntly, the robustness of the court sanctioned remedies potentially available under the equality provisions, contrasts with the tameness of a ‘report to parliament’ available in the civil and political rights domain.

So arguably the HREOC legislation reflects Australian contemporary human rights culture which is stronger in terms of protection of equality rights and political rights; but considerably weaker on civil liberties.

Assistance to Courts and Parliament

Further, HREOC provides independent advice to assist courts in cases that involve human rights principles such as:

- International law and the extent to which administrative decision makers are obliged to take into account international human rights instruments in making decisions (the *Teoh* case);
- Inconsistency between state and federal legislation in relation to the criminalization of homosexuality (the *Croome & Toonen* case⁹);
- Freedom of political speech (the *Langer* case¹⁰).

The Commission also provides advice to parliaments and governments to develop laws, programs and policies such as the new *Federal Age Discrimination Act (2004)*.

Inquiry Function

Holding inquiries into systemic issues of national importance, such as:

- the forced removal of Aboriginal children from their families¹¹ undertaken by distinguished West Australian Sir Ron Wilson
- paid maternity leave¹²; and
- the rights of children in immigration detention centers¹³

is possibly the most important function of HREOC.

The inquiries, if properly conceived, designed and executed, constitute the most powerful weapon of the Commission that could be used in advancement of human rights in Australia. And now I would like to share with you some information about two inquiries I initiated namely:

- *National Inquiry into Children in Immigration Detention – ‘A last resort?’*
- *National Inquiry into Mental Health Services – ‘Not for Service – Experiences of injustices and despair in mental health care in Australia’.*

Both inquiries resulted in high profile reports and significant changes to government policies.

Inquiry into Children in Immigration Detention

Let us start with the National Inquiry into Children in Immigration Detention – ‘A last resort?’.

When I was appointed the Human Rights Commissioner of Australia on 7 December 2000 I thought that I would not need to undertake any significant inquiry into the detention issues. Simply, my predecessor Commissioner Chris Sidoti presented Parliament with a very competent report entitled ‘*Those Who’ve Come Across the Seas*’ on 11 May 1998. The report has found among others that the “*policy of mandatory detention of most unauthorized arrivals breaches international human rights standards*” and proposed appropriate changes.

Soon after I was appointed, in early 2001, I visited most of the Australian immigration detention facilities and reported my findings with recommendations to Parliament. I also met with the then Minister of Immigration Philip Ruddock MP and asked that the recommendations of both reports are implemented. In particular I mentioned that there are no appropriate facilities (schooling, recreation, medical) for children and young people. I was particularly concerned about lack of schooling and pointed out that the time in detention should be used to teach refugee children English and Australian culture so that they could integrate into community smoothly when released from detention. The Minister promised that he would look into the matter.

My second round of visits to immigration detention centers took place in late 2001 and early 2002. By that time it became obviously clear that nothing was being done

to improve the situation and that in fact the situation deteriorated because of emergence of mental health issues associated with long term detention.

As a result I met Minister Ruddock again and said that I intended to launch a full scale inquiry into the human rights of detainees. The Minister responded angrily by reading me the riot act. I was told that I should not dare do it, because he, as an elected representative, knew what was best for Australia, and I, as a government appointed official should follow the government lead. He further suggested that if I do not like the government policy I should have the guts to stand for parliament and furthermore that HREOC's interpretation of human right law was wrong, and that there would be other consequences.

It was an interesting exchange to say the least. I took the Minister's rhetoric seriously and decided that any future inquiry must establish a dialogue with the Australian people and that it must be clearly seen as being within the HREOC mandate.

Consequently, I decided to limit the scope of the inquiry to children in detention only. I took this decision because the Convention of the Rights of the Child (which is a part of HREOC jurisdiction) contained very relevant and well defined clauses such as: *"detention of a child shall be used only as a measure of last resort and for the shortest appropriate period of time."*

In order to involve Australian public, I decided that the inquiry would be open to the public and media. The inquiry invited public submissions (346 received), held public hearings, interviewed people in detention centers, including children and cross-examined under oath DIMIA and ACM officials and took about 2 years to complete.

Case example 1

Many of you present here today would be only too familiar with the kind of mental problems faced by asylum seekers who have been in long-term immigration detention. But I thought it would be useful to set the scene by giving you a step-by-step account from one of the case studies in *"A last resort?"*.

Because the Yousefi family chose to identify themselves publicly and permit in-depth media coverage of their situation, I have chosen their case because I think this adds to our capacity to gain better understanding.

This family consists of a father (Parvis), mother (Mehrnoosh), and a son (Manucheher) who was born on 17 July 1990.

20 April 2001

Family arrives at Ashmore Islands. Transferred to Woomera.

August 2001

Family split. Mother and son accommodated in the Woomera Residential Housing

Project (RHP), father left in the main detention centre. This was the first time I met the family.

May 2002

The South Australian Department of Family and Youth Services (FAYS) was notified regarding this family after the father attempted to hang himself twice and the son threatened to self-harm. The assessment notes that the son was: *'exhibiting clear signs of severe stress: his sleep-talking, nightmares and now sleep-walking indicate deep-seated trauma. The current stressors of detention and his parents' depression are clearly causing [the child] extreme distress ... his mental health will only deteriorate further without sensitive and effective long-term intervention'*.

ACM psychiatric nurse notes that the boy's: *'mental health and behaviors have deteriorated since his father has been depressed and suicidal. He has attempted to assume the role of head of the household in his father's absence'*.

February 2003

A psychiatrist examining the boy wrote the following: *'When I asked if there was anything I could do to help him, he told me that I could bring a razor or knife so that he could cut himself more effectively than with the plastic knives that are available.'*

There then ensued approximately 20 recommendations from mental health professionals saying that he should be released from detention with his family. Some said that removal from detention was a matter of urgency and that family health couldn't improve in detention.

Finally, this child, with his family, was removed, into the Adelaide community, in mid-June 2004, after they won a Refugee Review Tribunal case and were declared to be refugees. But as was revealed in Elizabeth Colman's article, the family's mental health is terrible upon release; Parvis has created his own little prison in a rented apartment in Adelaide, where he was prescribed: 5mg of the anti-psychotic Olanzapine, 20mg of the anti-obsessional Fluoxetine and up to three tablets of the tranquilizer Diazepam daily. The then 13 year old son was taking a daily anti-psychotic, Neulactil.

The Inquiry found that the Department's failure to implement the repeated recommendations to release children suffering from mental illness amounts to *"cruel and inhumane treatment"* under article 37(a) of the Convention on the Rights of the Child.

This was the most serious finding of the Inquiry.

The Parvis family was not isolated case. Just to give you another example.

Case example 2

Between April 2002 and July 2002 - a four month period - a 14 year old boy detained at Woomera:

- attempted to hang himself four times
- climbed into the razor wire four times
- slashed his arms twice and
- went on hunger strike twice.

This boy's mother was hospitalized due to her own mental illness during this whole period.

Although not every child in long term immigration detention suffered to the same degree, there many other stories like the above examples. Particularly depressing were the cases of families with disabled children denied access to proper medical care. Other children have been diagnosed with:

- clinical depression
- post traumatic stress disorder and
- developmental delays and
- suicidal ideation - the list goes on.

The Inquiry also found that the longest a child spent in detention was 5 years, 5 months and 20 days; that access to schooling, medical services and recreation was lacking and recommended appropriate changes.

What is of utmost importance, however, the Inquiry:

- placed the issue of children in detention camps on the national agenda and impacted on public opinion – by now some 75% of Australians believe that no children should be kept in immigration detention for extended periods;
- delivered a high profile report to Parliament and resulted in children with their parents being released from mandatory detention, and
- opened the way for legislative and policy changes.

What is of importance to professional social workers is the fact that despite the existence of excellent state laws protecting social and cultural rights of children, these laws proved ineffective in federal immigration detention. They were rendered ineffective because there are no effective federal protections of civil liberties for immigration detainees. There are also no effective international review mechanisms available to them.

The conclusion is that human rights are indivisible - civil liberties constitute an important dimension of human rights standards and without them welfare rights may be difficult to deliver.

National Inquiry into Mental Health Services – ‘Not for Service’

Another inquiry that had similar impact was *the National Inquiry into Mental Health Services – ‘Not for Service – Experiences of injustices and despair in mental health care in Australia’*.

The Inquiry was undertaken in association with Mental Health Association of Australia and the Brain and Mind Institute and adopted public inquiry process as its methodology.

The Inquiry placed the issue of mentally illness and human rights on the national agenda and resulted in reform of and major budgetary increases for mental health services in Australia. For example, the federal Government committed \$1.8 billion of new money over the next four years.

It has also pointed out to a need for stronger protection of civil liberties and personal freedoms of people with mental illness.

Conclusion

To provide you with my overall assessment of the adequacy of the Australian human rights protection system I will quote a former federal Commissioner of Police Mick Palmer. According to his elegant summation:

‘Protection of individual liberty is at the heart of Australian democracy. When there exist powers that have the capacity to interfere with individual liberty they should be accompanied by checks and balances sufficient to engender public confidence that those powers are being exercised with integrity.’

My examination of the Australian human rights protection system indicates that in comparison with other countries our system works reasonably well, although it is far from being perfect as checks and balances are not always in place.

However those to whom much is given, much is expected. As the Prime Minister often states: *‘the work of reform is never finished’* – well so too in the world of human rights, we can never afford to become complacent, and it is in that spirit that we must consider tonight, what still needs to be done.

As many of you here would know, over the last 5 years I have been a strong public advocate for the need for a national, legislated bill of rights. It will therefore come as no surprise to you that I do not feel the present system and in particular common law is an adequate shield for Australia’s residents when their civil liberties are under pressure.

Australia needs the addition of a Bill of Rights to ensure the correct weighting of Mick Palmer’s *“checks and balances”*.

Social workers and human rights

So what social workers could do advance ideas of human rights and justice in Australia.

First, I think the professional social workers need to adopt and popularize the UN international standards that relate to their work. For example the Convention on the Rights of the Child should be a basic text for all child protection workers.

Secondly, we need to stay vigilant and act upon human rights violations. This may require taking leadership and showing courage. On occasions, it may even mean that your commitment to human rights could put your professional career in jeopardy. I have seen this happen to some Department of Immigration (DIMIA) and Australasian Correctional Management (ACM) officials.

We have won on the children in immigration detention and mental health fronts only because professionals like you were vigilant and took sometimes courageous action.

Thus my 'call to arms' today, is that each and every one of us must take personal responsibility for ensuring that our fellow men are treated with dignity and respect in Australia.

Finally, make sure that your professional experience at the coal face is translated into new policies and legislation.

Unquestionably the lack of a domestically enacted, actionable 'Bill of Rights' is the single biggest human rights issue facing civil society in Australia today.

Other issues requiring attention are:

- Additional protections for the mentally ill;
- Vigilance at further erosion of individual rights when considering additional anti-terrorist measures; and
- Global activity to further protect children's rights.

And remember, participation of every one of us counts. Even as an individual working on a project or major undertaking which ultimately will have a beneficial effect on a particular field, locality, group, community or humanity at large, we need and generally win the support of others in some way to fully accomplish the mission.

You have all heard the old saying "to drop a pebble in the pond the ripples make bigger circles and travel far and wide" - a good pebble makes good ripples!

Tonight this room is full of people who throw good pebbles which in turn benefit all peoples.

Thank you.

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- 1 Jim Ife, *Human Rights and Social Work: Towards Rights Based Practice*, Cambridge University Press, 2006
- 2 Elisabeth Reichert, *Social Work and Human Rights: A Foundation for Policy and Practice*, New York: Columbia University Press, 2003. See also A.S. Kohli, *Human Rights and Social Work: Issues, Challenges and Responsibilities*, New Delhi, Kanishka Publications, 2004
- 3 For full discussion see; *Human Rights - A Challenge for Australia*; address by Dr Sev Ozdowski, OAM, Australian Human Rights Commissioner to the National Press Club on 6 February 2002
- 4 Commonwealth of Australia Constitution Act 1900
- 5 *Commonwealth v. Tasmania (Tasmanian Dam Case)* [1983] 158 CLR 1
- 6 *Koowarta v. Bjelke-Petersen* [1982] 153 CLR 168
- 7 *Lange v. Australian Broadcasting Corporation* [1997] 189 CLR 520
- 8 *Mabo v. Queensland (No. 2)* [1992] 175 CLR 1
- 10 *Croome v. Tasmania* [1997] 191 CLR 119
- 11 *Langer v. Commonwealth* [1996] 186 CLR 302
- 12 *Bringing them home: The 'Stolen Children' Report*, HREOC, Sydney 1997
- 13 *A time to value – proposal for a national paid maternity leave scheme*, HREOC Sydney 2002
- 14 *A last resort? – Report of the national inquiry into children in immigration detention*, HREOC, Sydney 2004