

"Changing Australia's Human Rights Culture"

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The 60th Anniversary of UDHR

On December 10th 2008 we celebrated the 60th Anniversary of the by the UN General Assembly's adoption of the Universal Declaration of Human Rights (UDHR); a document which set out a new direction for humanity.

Let us go back to December 10, 1948; not the best year for human rights.

It was the time of the Berlin blockade by the Soviet army which started on June 24, and finished almost one year later. In December of 1948, western Berliners were close to starvation, without heating, unsure as to their future, and the Western Allies airlift was in full swing. The Iron Curtain was coming down and it was the beginning of Cold War.

It was also the time when the harsh process of the Stalinisation of Eastern Europe was about to accelerate in countries forcefully incorporated into the Soviet Empire. In 1948 apartheid laws were introduced in South Africa; and much of the world was still under a colonial system with national liberation movements gaining in prominence. In January the same year the modern father of political non-violence, Mahatma Gandhi, was assassinated.

As you could imagine, in the circumstances, reaching an agreement on the contents of the document was not easy.

In fact, member states voted more than 1,400 times on practically every clause of the text. The USSR would not accept the inclusion of freedom of expression and other civil liberties, some Islamic states objected to the articles on equal marriage rights and on the right to change religious belief; and several Western countries criticised the commitment to economic, social and cultural rights seeing them as an introduction of socialism by stealth.

But the agreement was reached. Clearly UDHR was a triumph of hope and optimism. It delivered universal human rights standards that continue to be of relevance today and that have guided the development of contemporary international human rights system.ⁱ

Considering all the difficulties, a question could be asked how it was possible for the UDHR to be born at all. There are at least two possible answers one could point to.

The first one is the power of leadership at the time of Eleanor Roosevelt, widow of the late US president, and of the USA which was seen then as the world's moral leader. Mrs Roosevelt, with Canadian and French support, was the principal drafter: important contributions were made by people from China, Lebanon, Chile and USSR. Only South Africa was fundamentally opposed to it.

The second answer links to people searching for high moral ground in the aftermath of atrocities of WW II. In fact many argue that the genesis of UDHR is firmly rooted in the human rights abuses of World War II in which tens of millions died across the world.

Particularly abhorrent was the Nazi holocaust and the concentration camps which were, to put it bluntly, industrial slaughter houses for the efficient killing of humans beings.

The guilt associated with the weak response to the holocaust by the Western Allies and Roman-Catholic Church may have also played a role. Then there were the issues of carpet bombing of German cities and of two atomic bombs being dropped on civilian populations.

The general feeling was “never again”. Let us build a world order that would prevent all these atrocities from ever happening again.

Human Rights in Today’s Australia

When I asked a question about how the UDHR was born, I was thinking about the recently announced by the Attorney General consultations to consider establishing an Australian bill of rights.

As we know, Australia is the only modern democracy without significant constitutional protections of civil libertiesⁱⁱ and without a statutory bill of rightsⁱⁱⁱ. Currently our Parliament is able to legislate for apartheid style laws and the High Court could uphold them as being in agreement with our Constitution.

In my opinion the key reason why we do not have an Australian Bill of Rights is that Australia, in comparison with other countries, never has experienced massive human rights abuses by government (save for the situation of Indigenous Australians), or revolution, or civil war, or an invasion and occupation by a foreign oppressor.

So historically speaking our experience is significantly different to that of Americans, French, the Poles or Indians.

We would possibly also agree that there are some practices impacting on human rights that could be improved in Australia. For example, economic and social rights of Indigenous Australians requires massive attention. Violence against women stays at significant levels - according to ABS statistics, 29 per cent of Australian women experience physical assault in their lifetime and 17 per cent experience sexual assault. Anti-terrorist laws needs to provide a proportional response to a threat and take into consideration a need to protect our civil liberties.

But I would like to concentrate for a moment on two areas of human law practice in Australia where I have a particular expertise –human rights of asylum seekers and people with mental disability.

Immigration Law and Human Rights

First, I would like to share with you some details of my work on the Children in Detention Report, called: *"A Last Resort"*.

In December 2000, when I was appointed as the Human Rights Commissioner, the Australian mandatory immigration system was to become one of the most important human rights concerns of that, and future years.

By that time the previous Commissioner, Chris Sidoti had already reported to Federal Parliament that *“the practice of mandatory and non-reviewable detention contravenes*

Australia's human rights obligation” (although at this stage the impact of long term mandatory detention on detainees was largely unknown)^{iv}.

In 2001 my first report on visits to immigration detention centres reinforced the earlier HREOC advice and sought to address practical breaches of human rights of detainees that were affecting their daily life in immigration detention facilities.

Both our reports were largely ignored by the Howard government.

The question that emerged was what could be done to better protect human rights of asylum seekers in Australia and to impact on the government decision-makers? After some deliberations I concluded that we needed a new inquiry this time focussing on children (rather than dealing with all categories of asylum seekers in detention). The conduct of Children in Immigration Detention (CIDI) inquiry by HREOC was feasible because Australia ratified the *Convention on the Rights of the Child* (CROC) in 1989 and because CROC has been incorporated into the HREOC mandate.

I made this decision because the language of the Child Rights *Convention* was much more explicit than that of the *International Covenant on Civil and Political Rights* (ICCPR) in protecting their specific rights in immigration context. The CROC, for example, contained the following provisions:

- the best interests of the child shall be a primary consideration. (Article 3(1));
- detention must be as a measure of last resort and for the shortest appropriate period of time. (Article 37(b));
- children in detention have right to be treated with humanity and respect (Art.37(a), (c));
- children have the right to enjoy, to maximum extent possible, development and recovery from last trauma (Art.6(2) and (39));
- asylum-seeking and refugee children are entitled to appropriate protection and assistance (Art. 22(1)).

This made my task of communicating with the media and educating the public about the rights of children in immigration detention much easier.

Secondly, I had hoped that focussing on children will help to secure high moral ground through focusing public opinion on the evils of keeping children in long-term mandatory detention. I had hoped that this would help to quarantine the Inquiry from prejudice and racial vilification that was evident in some sectors of Australia society toward the predominantly Muslim asylum seekers.

Thirdly, I also decided that for the inquiry to be successful it needed to be open to the public and involve broader civil society.^v In my view it had to be a battle to win the hearts and minds of Australians.

In November 2001, I announced that the Commission would hold a *National Inquiry into Children in Immigration Detention* (CIDI).

The report was the result of two years of detailed research and writing. Its methodology was very comprehensive and it included visits to all IDC, written and oral submissions, public hearings, subpoena of DIMIA documents and focus groups.

The Inquiry succeeded, as it was planned, to put the issue of children in immigration detention on a national agenda and demonstrated that children's rights had been breached by:

- making immigration detention the only resort rather than the last resort,
- ignoring the children's best interests,
- the very length of immigration detention,^{vi} and
- with regard to the mental health of children and to children with disability.

The Report also documented an apparent conflict between State and Commonwealth laws with regard to child protection.

The Report has made only five Recommendations of systemic nature, namely:

- Release children.
- Change *Migration Act* to comply with CROC.
- Codify minimum standards for children in legislation.
- Review “*Excised off-shore places*” and the Pacific Solution.
- Appoint an independent guardian for each unaccompanied minor.

When in 2004 my report was tabled in Parliament, no factual information contained in the report was challenged by the Government or the Department of Immigration and some of its recommendations were implemented, namely children were released from in immigration detention and some limited changes were made to the law, for example insertion of Sections 4AA and 197AA-179AG that established a principle that “*Minor shall be only detained as a measure of last resort*” and provided for ministerial discretion to remove UNC from detention to “*a specified place*”.

Since the election of the Rudd Government, further changes have been made including abolishment of the Pacific Solution and closure of Nauru detention centre; significant softening of the immigration detention policy announced through the minister Chris Evans may 2008 document “*New Values in Detention*” and abolishment of Temporary Protection Visas.

Despite these positive developments, further changes are needed to make our immigration laws and practices compliant with the international human rights standards.

To start with, we need to repeal the excision legislation that involves some 4,000 Australian islands. If we fail to do so, we will create “*The Indian Ocean Solution*” with Christmas Island as its headquarters, and there would continue to be two sets of laws applying in Australia, depending on whether an asylum seeker lands in mainland Australia or in excised territory.

Then we need to remove the other vestiges of indefinite, non-reviewable mandatory detention so the system is in line with international human rights law. In particular, the current “softer” immigration detention policies should be put into the legislation and judicial review available to asylum seekers should be extended. These changes are particularly important as the common law protections of civil liberties were eroded by the previous government. There are still asylum seeking children kept in Immigration Residential Housing which in effect immigration detention, albeit with more humane conditions.

Australia should also pay compensation to the victims of our human rights abuses. It is only in the best tradition of Australia’s “fair go” to compensate those who were wronged by government.

And where there are victims, there are perpetrators, too. This may require assessment of the role of Australian Public Service (APS) officials in human rights violations inflicted through the mandatory detention regime and, where appropriate, verification of the role of individual officers. In my view, particularly the Department of Immigration and the Australian Public Service Commission should be reviewed for not upholding of human rights standards and ethics in migration policy development and implementation.

Last but not least, we need to also educate the public about the plight of refugees. This includes a need to continue post-Palmer cultural shift in DIAC.

Human Rights and Mental Health Services

In 2004, following my work on immigration detention and representations from NGO's about problems with mental health services. I joined forces with the Mental Health Council of Australia and the Brain and Mind Research Institute to conduct a national review of human rights and mental health.

And again the international human rights law provided us with a very good starting point. Article 25 of the Universal Declaration refers to "*the right to medical care and other necessary social services as part of a right to an adequate standard of living.*"

Then, Australia also signed and ratified a range of important human rights treaties, which explicitly recognise the right of everyone to the highest possible mental health care. For example, the *International Covenant on Economic Social and Cultural Rights*, Article 12, states: '*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*' Article 24 of CROC, contains a very similar statement.^{vii}

Considering Australia's economic well-being, the wording "*highest attainable standard*" sets a very high mark indeed to be met for the Australian health service.

In addition, in 1992 Australia enacted the *Disability Discrimination Act (DDA)*, which contains a broad definition of disability which includes mental disability. DDA prohibits discrimination on the basis of "*physical, intellectual, psychiatric, sensory, neurological and learning disabilities*".

Despite the very high standards set up by both the international conventions and the domestic legislation, the Burdekin Inquiry of 1993 and many others since then have documented that the rights of people with mental illness are not adequately protected in Australia.

So the key purpose for this 2004 national review of human rights and mental health issues was again not to produce another report, but to put the issue of the lack of mental services on the national agenda and to deliver change.

To achieve this, the involvement of the Australian civil society was needed. In particular, the review needed public opinion makers, media, church leaders and many others to publicise the issues associated with mental health services shortages to be effective. The review needed cooperation of the whole civil society working together with Human Rights Commission for a change.

Thus the Mental Health Review used methodology very similar to that used for the children in immigration detention inquiry. Some 360 submissions were received; consultations were conducted all over Australia: Perth, Brisbane, Sydney, Canberra, Bunbury in WA,

Rockhampton and Broken Hill – to name but a few. We invited mental health experts to share their experiences with the review; and we conducted 20 open community forums in each State and Territory with some 1,200 people participating, including consumers, carers, general members of the community, clinicians, advocates, service providers, emergency personnel, academics and administrators.

The Inquiry again brought into the public focus major failures in the delivery of care for the mentally ill. Our report further documented that people with mental illness are still denied their human rights.

In fact, it has shown that the dream of closing psychiatric institutions and moving towards community-based care has turned into a nightmare. It was often a tragic tale of medical neglect and community indifference. Those with mental illnesses are still being blamed for being sick. And this kind of thinking was affecting service delivery in every State and Territory.

Furthermore, when one adds the stigma and stereotypes that surround the mentally ill to this already explosive cocktail the extent of this bleak picture can be seen.

Below there is a list of some more specific findings made by the review:

- Mental illness is associated with poverty. Some 80% adults with mental illness are out of work and some 78% of homeless people have a mental illness.
- Inadequate medical resources. Resources provided were simply inadequate to match the level of needs and ensure access to treatment and services when they were needed. Australia currently spends only about 7% of its health budget on mental health. By comparison, other first world economies are spending between 10-14% of their health budgets on mental health. New Zealand now spends twice as much per capita compared with this country.
- Absence of early intervention. The most frequently mentioned gap in mental health services was the absence of early intervention and other specialist services for young people. We know that approximately 75 percent of mental illness first occurs in people aged between 15 and 24 years old. Yet when the illness emerges many of these young people are denied basic treatment and care – they are simply told to go home and sort themselves out and only to come back when they are really ill.
- Lack of services for dual diagnosis. Despite the increasing evidence of links between drug use and mental illness, Australia still lacks adequate mental health facilities to cope where a person has both drug addiction and mental illness at the same time – or other forms of dual diagnosis. This is especially the case for those youth who are dependent on alcohol or drugs. Medical policy dictates that drug addiction be treated first, before the mental illness is tackled. But the reality is that they are often interconnected.
- Poor emergency services, which are overburdened and often inaccessible. We were also told that it is the police who are often left to respond when someone is in the midst of a mental health crisis. This approach is so different to the approach taken to people suffering from physical illness. People experiencing a heart attack, for example, are not left to be dealt with by the police.
- Poor acute care services. Acute care services are too often simply missing, especially in regional Australia. To put it simply, these acute beds simply disappeared after the deinstitutionalisation reform. Cases were documented where the lack of acute care services resulted in preventable death.
- Use of prisons to provide mental health care. Not only are Australia's mentally ill being turned away from the health services that they need, they often end up in jails

instead. In NSW, despite the existence of court diversion programs to keep mentally ill people out of jails, some 43 percent of prisoners suffer from severe depression, anxiety or psychosis.

- Community services unable to cope. The community supports are seriously overburdened and unable to cope with the existing demand. The issue of community resources, or lack of them, also had particular application for young people still within the family environment. Further, the carers of people with mental health problems are frequently ignored by services.
- Stigma and discrimination. There is also still fear and intolerance of people with mental health problems. Those with a mental illness were still being blamed for being sick. This stigma is reflected in discrimination against people with mental illness in their daily life. People with mental illness are denied job opportunities, access to accommodation and health services and so on.
- Rural and remote areas – double disadvantage. For example, there is an over-reliance on treatment by phone and there were sometimes extremely long journeys for people needing acute care under conditions which were entirely inappropriate.

The Review, as envisaged, through its public process put the issue of mental health services on the national agenda and politicised thousands upon thousands of people in our country whose daily lives are affected either directly or indirectly by mental illness. It provided a momentum and direction for a change.

Two days after the Report was launched by the Minister for Health, the Prime Minister announced that it will spend additional \$2.4 billion dollars to improve services to people with mental illness. For the first time ever, the mentally ill people were able to seek help for their illness from General Practitioners using their Medicare card.

Despite this significant additional expenditure on mental health services, we did not reach the expenditure level comparable with other OECD countries and the human rights of people with mental illness require much more improvement to reach “*highest attainable standard*” required by many human rights conventions we have ratified.

To sum up, looking at our treatment of refugees and mentally ill needs to be examined in Australia to fully comply with the international human rights treaties we ratified.

Australian Bill Of Rights

So let us come back to the fact that I mentioned earlier, that Australia is only first world country without significant constitutional protections of civil liberties and without a statutory bill of rights.

So allow me to use this occasion to welcome the recent announcement by our Federal Attorney General The Hon Robert McClelland to start consultations on the proposed bill of rights for Australia. I also wish to acknowledge here the Attorney-General’s long term commitment to this important change as evidenced by his powerful June 2000 speech in support of fundamental rights.

And here I would like to declare my hand and say that I have been a supporter of an Australian Bill of Rights for quite some time.^{viii} But I do not propose to recite in this paper all the arguments one could muster in support for the bill.

In my remarks today, I wish only to point out that Australia is clearly not immune to human rights violations and that any improvement to strengthen the human rights system would work in our favour

In particular I agree with the opening lines of Mick Palmer's report that:

'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.'

In my view, Australia needs a bill of rights that will define Australian human rights standards; provide for better "checks and balances" for interactions between individual citizens and their governments; that will assist with development of our own jurisprudence.

I do not, however, argue that an Australian bill of rights would provide a panacea or response to all our human rights problems in contemporary Australia. In my view, it will only add an additional protection of individual freedoms mechanism to the already rich tapestry of our civil society.

I prefer a bill that would be stronger than average legislation and enforceable in the courts of law, able to provide effective protection to minorities and to create our own jurisprudence.

I prefer that we adopt effective human rights legislation similar to that existing in other comparable democracies and that adopt a model which is best suited to protection of civil liberties in modern Australia. My argument is that as we learn about technology, trade practices and legal and financial systems from the other countries, we also need to learn about, and import human rights protections from countries which, because of their experience, have developed more sophisticated systems and jurisprudence to protect their civil liberties.

Considering the entrenched opposition to the bill among many of our political, religious and media leaders^{ix} and the sorry saga of previous attempts to introduce human rights into Australian Constitution or to legislate for Australian bill of rights, I would expect that consultations would result at best in Parliament legislating for a weak form of a bill of rights - a bill that would set standards only and would have no enforcement value. Let us not forget that the 1948 UDHR was established as non-enforceable set of principles, too, despite that initial intention was to establish an internationally enforceable bill of rights.

Such a weak bill would most likely focus on civil and political liberties only as for Constitutional reasons it would need to be based on ICCPR ratified by Australia (that is currently appended to the Human Rights Commission Act).

If such a minimum bill is agreed upon, it would be better than nothing. At least, it would provide a much needed start and it would have some standard setting and educational roles. It would reassert our common values and provide an agreed set of standards or a code of common values for our diverse society.

But at this stage, it is difficult to take even such a limited outcome for granted.

Conclusion

I would like to finish on an optimistic note.

Although the current level of support in Australia for legislating bill of rights does not even approach the level of support for UDHR in 1948 and our Australian Eleanor Roosevelt is yet to emerge to provide leadership, I think the improvements in human rights are achievable.

Referring back to my experience as Federal Human Rights Commissioner, I wish to make two further observations:

First, that public opinion on human rights issues can change. When it was explained to Australians what mental health damage the Government is doing to children in immigration detention - Australians stopped supporting government policy of indefinite mandatory detention of children; they changed their mind.

Similarly, the battle to win support for a bill of rights can be won. But it will be won only if pro bill forces will be able to convince the Australian people that such bill is needed and that it will be of benefit to them. The non-sense that a statutory bill will give unfettered power to judges needs to be put to bed. The fact is that the bill will be an act that could be changed any time through democratically elected Parliament. The ACT and Victorian Charters are ordinary acts of Parliament, so are the human rights laws of UK and New Zealand. Australians also need to learn that the bill is about reassertion of their individual liberties against domination of political establishment.

Second, a change in public attitudes may only be achieved where there is a forceful leadership advocating for a change.

In the case of human rights – such leadership is unlikely to come from our political leadership (as bill of rights is about restricting their power) but the emergence of people's power can make a real difference. During the 2000 -2005 period I witnessed the emergence of a great people power coalition around the mandatory detention and mental health issues. This led to wins in the battle of ideas and to subsequent political change. The Howard government stopped the indefinite and mandatory detention of children. \$2.4 billion was provided for mentally ill.

In order to secure a bill of rights for Australia, we as leaders of Australian civil society need to create a "*people's power*" movement for this bill. And such "*people's power*" is starting to emerge. To succeed we need to stay engaged with the Australian society and lead the educational campaign during the period of public consultations on the bill.

In addition, I would also argue for giving a higher priority to human rights education in our schools. As we well know, the human rights concepts are not automatically acquired at the birth – they need to be learned and re-learned by each generation. Without human rights education, we will not be able to sustain Australia's human rights culture even if a human rights bill is passed by Parliament.

The now emerging leadership for a change, combined with education, could in my opinion deliver both a bill of rights for Australia and a lasting change in Australia's human rights culture.

ⁱ Since then UDHR standards have been developed and incorporated into many international laws and treaties - such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic Social and Cultural Rights (ICESCR) and Convention on the Rights of the Child (CROC).

ⁱⁱ In fact, very few individual rights were explicitly recognised 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 recognised 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.

ⁱⁱⁱ 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. 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. 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. More recently Australia has developed many world class anti-discrimination laws dealing with sex, disability, race and age discrimination.

^{iv} “*Those who’ve come across the seas. Detention of unauthorised arrivals*”. Human Rights and Equal Opportunity Commission 1998

^v The public support for the Inquiry was enormous. It was possibly the largest civil rights movement in Australia since the Vietnam War. Many established organisations became involved and new organisations focussing specifically on children in immigration detention emerged, e.g. *Chilout* or *Rural Australians for Refugees*.

^{vi} Here are some statistics. On 1 October 2003, 62 children (51%) had been in detention for more than 2 years (8 of whom had been there for more than 3 years). All of those children were in detention with one or more parents. The children, who were in detention on Boxing Day in 2003, had spent an average of one year, eight months and 11 days (619 days) in detention. The longest a child spent in an Australian immigration detention centre it was 5 years 5 months and 20 days. Then the child was recognized as genuine refugees and allowed to settle.

^{vii} Australia also adopted the 1991 “*Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*”, which reinforce the rights enshrined in the International Covenants and provide valuable guidance as to how those rights ought to apply to people with mental illness, namely: Principle 8 (1) makes clear that people with mental illness have the right to the same standard of health care as other ill persons; Principle 14 states that mental health facilities should have the same level of resources as any other health facility. Additionally, Principle 7 emphasises the right to be treated and cared for as far as possible in the community. Recently Australia has signed and ratified the new UN “*Convention on the Rights of Persons with Disabilities*” and its “*Optional Protocol*”. The *Convention* will provide further protection of rights of people with mental disability. It includes mental health into disability definition, aims at empowerment and inclusion (Art. 9) and specifically refers to the right to work and employment (Art. 27).

^{viii} See for example an address by Dr Sev Ozdowski, Australian Human Rights Commissioner, to the National Press Club delivered on 6 February 2002

^{ix} For example, a front page article in the Australian on 10 December 2008 called the proposed bill “villans’ charter”.