

**ANU Conference on
Australian Bills of Rights: The ACT and Beyond**

***The Human Rights and Equal Opportunity Commission
and the Protection of Human Rights at the Federal Level***

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Introduction

I would like to begin by acknowledging the traditional owners of the land on which we stand, and pay my respects to their elders both past and present.

It is humbling – and daunting - to be speaking to such a knowledgeable audience and in such a distinguished panel of speakers. I was appointed as Human Rights Commissioner 6 months ago. I have had considerable experience in the field of developing charters or road-maps for the enforcement of disability rights both in Australia and in the United Nations. But I have spent relatively less time concentrating on the details – and the politics – of introducing a more general Charter of Rights for Australia.

Interestingly, it was a side comment made by the Attorney-General, as reported in the Daily Telegraph on 7 April this year, that really started me thinking about a Federal Charter of Rights. The article reported the Attorney as stating that “the law could be thrown into confusion if each state drew up its own bill of rights.” He apparently said that premiers could “instead ask for access to the federal Human Rights and Equal Opportunity Commission”.

The comment made me stop. It is true that the States could confer power on the federal Human Rights Commission if they chose to do so. But are the Commission’s functions and powers really sufficient to cover the issues contemplated by the State and Territory Charters? Put another way, is it possible that the 1986 *Human Rights and Equal Opportunity Commission Act* could become a surrogate Charter of Rights for Australia? Or is there more to it than that?

Perhaps those questions display the enthusiasm of a newly appointed Human Rights Commissioner. Nevertheless, I thought I would share with you today why I am of the view that there needs to be a much more fundamental change to the workings of government than simply to increase the powers of the Federal Human Rights Commission if human rights principles and protections are to gain the prominence in our society that they deserve.

I’ll briefly review the jurisdiction and main functions of the Commission as they currently stand. Then I’ll consider what sorts of changes might need to occur for the Commission to have a greater impact on the enforcement of human rights in Australia. Finally, I’ll discuss an example of work that the Commission

is involved in to show some of the weaknesses in the current law making processes.

Over what rights does the Commission have jurisdiction?

I must say, one of the most alluring aspects of having the Human Rights and Equal Opportunity Act as a surrogate Charter of Rights is that it incorporates a much, much broader concept of human rights than either the ACT or the Victorian Charters.

The Commission's human rights functions cover the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination Against Women, the Convention on the Elimination of Racial Discrimination, ILO Convention 111 on the Elimination of Discrimination in Employment and, in the context of Indigenous Peoples, the International Covenant on Economic Social and Cultural Rights.

I think it is fairly safe to say that it is quite unlikely that any federal Charter of Rights would have such broad coverage.

But of course, the real question is what the Commission can do to protect and promote those rights.

What are some of the more important powers of the Human Rights Commission?

Perhaps the Commission's most relevant function in the context of a discussion of a Charter of Rights is the power to **examine whether Federal laws are consistent** with the human rights principles over which the Commission has jurisdiction.

If the Commission finds inconsistencies between existing Federal laws and Australia's human rights obligations, it writes a report to that effect, makes recommendations for changes and presents it to the Attorney who is then obliged to table that report in Parliament within 15 Parliamentary sitting days. But the Commission has no power to enforce its recommendations and the Attorney is not obliged to give reasons for refusing to implement the Commission's recommendations.

The Commission also has a more general function to make recommendations to the Attorney about Commonwealth laws that should be made in relation to human rights. This allows the Commission to examine broader issues, including the impact of State laws. But again, the Attorney is not required to implement the Commission's recommendations.

The most recent example of the Commission's activities pursuant to these two functions is our current examination into whether Federal, State or Territory laws regarding financial and work related entitlements might discriminate against same-sex couples.

The third relevant function is the Commission's **'inquiry'** function which is used both in the context of investigating individual complaints against the Commonwealth and its agents and in more general Inquiries like the National Inquiry into Children in Immigration Detention.

If the Commission finds that the Federal government has breached a person's human rights, it presents a report to the Attorney to that effect, and can make recommendations, including for damages. Again, the Attorney is obliged to table that report in Parliament, but there are no enforcement powers, and the Attorney is not required to justify the government's refusal to implement the Commission's recommendations. In reality there has been mixed success regarding implementation of the Commission's recommendations about individual complaints.

The fourth important function is the Commission's ability to **seek leave to intervene** in courts and tribunals where there may be a human rights issue at stake. The court or tribunal is not required to notify the Commission in advance if such an issue is thought to arise, nor is the court required to give leave or to consider the Commission's submissions in its findings. Nevertheless, the Commission has intervened in 48 cases covering a wide variety of issues.

Finally there is the Commission's **education function**. It is under this power that much of the Commission's work takes place. For example, it is the foundation for the many, many submissions that we make to Parliamentary Inquiries, it permits broad consultation projects like the *Rights of Passage* youth dialogue we conducted last year, indeed it permits me to make speeches like this in the name of promoting discussion and understanding of human rights in Australia.

In summary, I think that it is fair to say that the Commission's jurisdiction and powers are fairly broad. And I like to think that we are doing the best we can within that framework, and within the resources we are given, to protect and promote human rights in Australia.

But ultimately the impact of what the Commission does will continue to be limited until the Parliament, the Executive and the Judiciary have some incentive to take human rights seriously by considering Australia's human rights obligations in their daily decision-making processes.

What would these incentives look like?

Such incentives would need to be either policy directives, legislative requirements or both to ensure that the three arms of government routinely and rigorously consider Australia's human rights obligations. And let's face it, that is exactly what the ACT and Victorian Charters have tried to do.

Amongst other things, those Charters require an MP or the Attorney to present a statement of compatibility to parliament on the introduction of a Bill;

they require a parliamentary scrutiny committee to independently assess the compatibility of the Bill with human rights; they require the parties to a court action to notify the Attorney and relevant human rights commission when human rights principles might arise and they permit intervention in such a case. They require courts to interpret legislation consistently with human rights and they empower courts to issue statements of incompatibility where it is not possible to do so. Perhaps most importantly, they require parliament to publicly explain its actions in the event that it decides to enact or maintain legislation that is inconsistent with human rights principles.

It may be that the processes introduced by the ACT and Victorian Charters sound radical to some. But really it is just about adapting what is already there so that our public servants, judges and elected representatives have the tools they need to ensure that they are acting consistently with the human rights principles that the government has already agreed to be bound to.

Perhaps a short example will help to show that, while the Federal Human Rights Commission may not necessarily need broader powers, it does need better processes to feed into if those powers are going to have any real impact on the human rights dialogue in Australia.

Case study: Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill

Yesterday, the Federal Parliament was in the final throes of discussing the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill.

The Bill covers a variety of issues, but there is one provision that particularly caught the Commission's attention when it was first introduced in the Federal House of Representatives in December 2005.

The Bill denies the right to vote for any convicted person who is in prison on the day that a writ of election is issued. It doesn't matter whether you have been convicted for a fine default or for murder, you can't vote if you are in jail on that specific day.

When the Bill was initially introduced and debated, neither the Explanatory Memorandum nor the Second Reading Speeches discussed whether these provisions might be inconsistent with Australia's human rights obligations. However, in February 2006 the Bill was referred to the Senate Finance and Public Administration Legislation Committee for further scrutiny.

Pursuant to our education functions, the Human Rights Commission made a submission to the Senate Committee. In that submission, we explained our view that the prisoner disenfranchisement provisions breached Article 25 of the ICCPR and, in the case of Indigenous Peoples, articles 2 and 5 of CERD.

When the Committee issued its report at the end of March it noted that almost 50 percent of the submissions, including the Commission's submission,

suggested that the disenfranchisement provisions were contrary to a range of international human rights norms and principles. But in its concluding view the Committee made absolutely no mention of the human rights concerns. The Committee simply stated that it “believes that people serving a sentence of full time imprisonment should not be entitled to vote in federal elections.” And that was that.

So the Bill was introduced without any discussion of human rights considerations and although a Senate Committee heard about human rights concerns from a large number of organisations, it paid them no heed when making its recommendations.

The good news is that when the Bill went again before the Senate last Friday, some Senators picked up on the human rights considerations relevant to the prisoner provisions. Some amendments were proposed in an attempt to better protect the rights of prisoners, but we understand that they have failed.

The point is that debates about human rights should not be left to chance. In my view we need parliamentary processes that guarantee that Australia’s human rights obligations are taken seriously right at the outset of law-making procedures. And in the event that the Parliament decides to pass legislation that is inconsistent with human rights obligations, it should be required to clearly justify its reasoning.

Conclusion

Going back to the Attorney’s statement to the Daily Telegraph, I think that he was probably correct. The Federal Human Rights and Equal Opportunity Commission does essentially have the powers and the jurisdiction to assess and talk about most of the human rights obligations undertaken by Australia – albeit that our powers focus on Federal laws and practices. And States could refer laws to the Commission for review.

But the real problem is that nobody in a position to implement human rights is required to listen to what we say.

The Commission, and many others in this room, already provide Federal Parliament, the Executive and the Courts, with numerous submissions and reports which outline Australia’s human rights obligations, and note the inconsistencies that exist in law and practise. But to have a more effective consideration of human rights, Australia’s governmental institutions would need to pay closer attention to the information and recommendations put before them.

Government would need to take human rights into account in all decision making, and in the event that they chose to override those considerations, they would need to justify that position thoroughly and publicly.

Only then would Australia be marching on the path of transparent and rigorous human rights enforcement.

Thank you.