Law Council
OF AUSTRALIA

No Time like the Present to Protect our Human Rights

Speech delivered by Pauline Wright, President, Law Council of Australia and Stephen Kiem SC, member of the Law Council's National Human Rights Committee, at the National Press Club, Canberra.

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Pauline Wright, Law Council President

It is an absolute pleasure to be here today.

I would like to begin by acknowledging the Ngunnawal people, traditional custodians of the land on which we gather today and pay my respects to their Elders past and present. I also acknowledge their youth, in whose hands is held our hope as a nation for a reconciled future.

I extend that respect to all Aboriginal and Torres Strait Islander people here today. This vast continent of Australia is privileged to be home to the oldest continuous cultures on the planet.

I am delighted to be joined here on the podium by Stephen Keim SC, a highly esteemed national expert in human rights law, who generously volunteers on the Law Council's National Human Rights Committee, who will share his keen insights on the policy being addressed here today.

2020 has been a year where we have all been faced with extraordinary challenges and sacrifices.

We have faced storms of all kinds: fires, floods and of course, the COVID-19 pandemic.

Some people have lost their livelihoods.

Some have lost their lives.

But Australians have pulled together to weather these crises and now – national attention is turning to rebuilding our economy.

Lawyers, whose practical advice and expertise is critical to helping Australians stay on their feet through such crises, will play their vital part in this rebuilding effort.

We at the Law Council consider that this moment presents a unique opportunity for Australians to broaden the conversation on survival.

Being prosperous is one thing – but how do we, as a society, uphold and enshrine our core democratic values of freedom, fairness and equality before the law?

This is why now is the time to reignite the national conversation on a federal Human Rights Charter – an issue which is bigger than any single government, or political party.

And while on one hand we can be proud of the collective efforts of Australians to combat the COVID-19 pandemic, we must be careful to avoid an erosion of the rights and freedoms that my father and his parents' generation fought for and that many Australians have had the luxury of taking for granted.

Consider:

- The recent criminal prosecution of whistleblower Witness K and the trial of Bernard Collaery.
- Threats to press freedoms evident in raids on the homes of journalists and media organisations.
- New legislation giving the government sweeping powers enabling unprecedented encroachments on Australians' right to privacy.

- And technology companies facing an environment of enforced surveillance with legislation enacted requiring IT companies to hand over user information, even if it is encrypted.

At a time of global power shifts, increasingly fragmented and insular national politics, and events characterised as 'profound' blows to fundamental freedoms being played out across the globe, the Law Council believes it is time to consider a renewed commitment to the fundamental, universal norms of human rights – born out of the horrors of World War II.

As you'd expect from a mob of lawyers – the Law Council looks to the legal infrastructure we have in place to pass on to future generations, not only the economic infrastructure.

That brings us to the fact that Australia is the only Western democracy without some form of a charter of rights at the national level, whether legislated by parliament, or constitutionally enshrined.

Today, I am proud to announce the Law Council's refreshed policy on a federal Human Rights Act.

The earlier policy is now 12 years old and, in the intervening period, there have been significant political, legal and policy developments necessitating its review.

The refreshed policy promotes a legislative model of human rights protection as a first step in achieving a constitutional model. It is Law Council's longstanding position that guarantees of human rights should be included in the Commonwealth Constitution, thus assuring the most effective protection against legislative incursions into those rights.

However, the policy put forward today is a pragmatic acceptance that a federal Human Rights Act is the most feasible way forward in the first instance.

The statutory model allays some fears about entrenched bills of rights – unchangeable and in the hands of unelected judges – as opposed to elected representatives – making it clear that elected legislators have the last say on broad policy issues.

In Australia, two states and one territory have now enacted a Human Rights Act.

The Australian Capital Territory, Victorian and new Queensland charters primarily guarantee civil and political rights, including cultural rights (embracing the distinctive rights of Indigenous peoples).

Some jurisdictions extend to protecting certain economic, social and cultural rights such as the rights to education (as included in the ACT and Queensland), the right to work (ACT) and the right to access health services without discrimination, and not to be denied access to emergency medical care (Queensland).

These jurisdictions give us insight into how such legislation works in practice.

While Queensland's legislation is relatively new, the ACT's statute has been in place for 16 years, and Victoria's for 12 years.

We can also look to comparable jurisdictions overseas, such as the United Kingdom, Canada and New Zealand, and draw from the lessons learned so far.

So, why call for a federal Human Rights Act?

Let's look at two scenarios which, we believe, illustrate the need for a federal Human Rights Act.

Firstly, the COVID-19 pandemic – which has engaged multiple human rights in many different dimensions in Australia – from lockdowns to travel restrictions, to tracing apps, to mandatory quarantine and emergency health plans.

Many Australians believe that their rights are already protected – that we already have a bill of rights, similar to that in the United States.

But in truth, our Constitution protects very few rights, and Australians would be surprised to learn that the rights which have been so hotly debated during the pandemic, are in fact backed by few Constitutional or statutory guarantees.

And currently there is a disconnect between Australia's obligations under international law, and their translation into Australian domestic legislation – which is where they become enforceable.

Take one example: quarantining arrangements.

These interfere with rights recognised under international law, such as the rights to freedom of movement, security of the person and freedom from arbitrary detention, and the right to non-interference with privacy, family, or the home.

At the same time, these measures are intended to preserve other rights – such as the right to life, the right to the highest attainable standard of physical and mental health. But many of these rights are not currently protected and our current federal legal framework of protection is very limited and is fragmented.

Against this backdrop, who can blame individuals for becoming confused?

The pandemic illustrated a need for a greater understanding that multiple rights may be at play in any given situation, and that tensions can and do arise between conflicting rights, which must be resolved.

Specific rights are sometimes asserted by members of one part of the community, to the detriment of the rights of others.

For instance, some may say that the requirement for quarantining following travel infringes their freedom of movement or freedom from arbitrary detention.

However, there may not always be a full appreciation that the broader community has, under international instruments, rights to health and life, which governments and lawmakers are obliged to respect, protect and enable.

A human rights charter may assist public acceptance of government decision-making processes – including for decisions which must be made against rapidly unfolding circumstances.

It would provide a much needed, established framework setting out the core principles to resolve tensions which arise when rights come into conflict.

That is one scenario.

Another is the spate of much-needed Royal Commissions established by successive governments. They have been called in response to and have confirmed in graphic detail a series of systemic and sometimes harrowing breaches of the human rights of diverse

groups of Australians. There remains an urgent need to address the evidence received by and the findings of these Commissions.

They include the Royal Commissions into Aged Care Quality and Safety, into Violence, Abuse, Neglect and Exploitation of People with Disability, into the Protection and Detention of Children in the Northern Territory … to name a few.

They have revealed stories of children in detention being put into spit hoods and solitary detention, aged care residents subject to shocking levels of neglect, and the widespread use of restrictive practices in group homes for people with disability. Instances where preventative safeguards were inadequate, absent or simply not being observed.

Each of these Royal Commissions, while welcome and necessary, has been reactive, crisis-driven, and highly resource-intensive.

Further, as we all know, the recommendations of Royal Commissions are not always implemented fully, or even to a substantial degree.

We need look no further than the largely ignored recommendations of the Royal Commission into Aboriginal Deaths in Custody.

The result? New data in June 2020 disclosed that 434 Aboriginal people had died in custody since the report was released in 1991.

And while Royal Commissions will always provide an essential policy tool, when responding to urgent and complex situations, the Law Council considers that having a federal Human Rights Act would provide an excellent preventative measure.

We are not suggesting that a Human Rights Act is an instant cure to all social ills; however, a human rights ethos – established across the public and private sectors, across aged care, disability services, childcare, education, health and detention facilities – may curb the systemic need for what can seem like almost rolling Royal Commissions, investigating complex, wide-ranging social justice failures in Australia.

I will now ask Stephen Keim SC to introduce the new policy to you.

Stephen Kiem SC, member, LCA National Human Rights Committee

Thank you, Pauline.

As has been previously mentioned, Australia is the only Western democracy not to have a Human Rights Act or some form of broad statutory or constitutional human rights protection.

Countries with whose political systems we tend to identify, most closely, such as Canada, New Zealand and the United Kingdom, all have some such form of established human rights protection and an associated jurisprudence upon which Australian courts already draw.

It is always difficult to know where to start and where to finish with the history of international human rights instruments.

Suffice to say that Australia played a big role leading up to the adoption, by the General Assembly of the UN, of the Universal Declaration of Human Rights on 10 December 1948. We ratified the two major covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1980.

On the international stage, Australia has taken a leading role. It is only at home that we seem to drag our feet.

The promises we made in that process are encapsulated in the words of article two of the International Covenant on Civil and Political Rights: "*We undertake to respect and to ensure to all individuals within our territory and subject to our jurisdiction the rights recognized in this Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*."

A solemn promise like that should be honoured and the Human Rights Act sought by the Law Council's Policy would be a major advance towards honouring and giving effect to, in a thorough going way, Australia's international human rights obligations arising under the major instruments to which Australia is a party.

The ACT, Victoria and Queensland have paved the way. Federal legislation to give effect to Australia's international obligations can draw upon, but not be limited by, this experience gained in these domestic jurisdictions and other jurisdictions around the world.

The Law Council's revised policy covers the following eight areas, and I will say a word or two about each of them in turn. They are:

1) The rights to be protected;

2) Who should receive protection;

3) The importance of an interpretive clause;

4) Statements of compatibility;

5) Duties on public authorities;

6) An independent direct right of action;

7) Remedies; and

8) Procedural matters, especially costs provisions.

The rights to be protected

As we now have experience of human rights legislation operating in Australian jurisdictions, the policy looks to broader sources of rights to be protected not just the civil and political rights in the ICCPR. Greater recourse is urged to the economic and social rights; the rights of people with disability; the rights of children as identified in the more specialised international conventions, and the rights of older persons.

Who should receive protection?

It seems fairly uncontroversial that human rights protect the rights of human beings not those of corporations. That does not mean that a tradesperson who conducts their business using a trust or corporate structure would not receive protection from an egregious assault on their rights.

The importance of an interpretive clause

General legislative provisions have the potential to operate unfairly when applied to specific fact situations. This is something that the general law is conscious of and against which it seeks to guard. A provision in a human rights statute that instructs the courts, as far as reasonably possible, to interpret all legislation, past and future, in a manner that is consistent with, or most consistent with, human rights will strengthen the ability of courts to avoid unjust applications of the law.

Statements of compatibility

The requirement that draft legislation be accompanied by more robust statements of compatibility, if implemented in good spirit, is likely to lead to legislation that is better considered and, ultimately, better legislation. Parliaments are required as part of regulating society required to limit the exercise of various human rights.

Indeed, laws restrict human rights to protect human rights. A statement of compatibility process, especially when combined with a strong parliamentary committee process, is directed to ensure that drafters of such legislation use a human rights focus to give consideration to the precise objectives being pursued and to whether those objectives can be achieved in a different way with less draconian impacts on people's human rights. Ultimately, statements of compatibility seek to ensure that the legislation passed by our parliaments represents the best possible version of such legislation, especially from a human rights point of view.

Duties on public authorities

A Human Rights Act should include explicit duties on public authorities to act compatibly with human rights, and to give proper consideration to human rights in the development of policy and the making of decisions. This is one of the most beneficial roles of human rights legislation. It is not doubted that public servants and public service agencies are dedicated to excellent and just administration. But a duty to consider and comply with human rights provides a touchstone against which every decision and practice can be measured. It also allows members of the public and advocates for vulnerable people a reference point by which questionable decisions and practices can be called into question, and the presence of an enforceable duty on public authorities focuses the mind.

An independent direct right of action

This should not be controversial but my home state, Queensland, went with the so-called piggyback provision such that a human rights basis for relief can only be pursued if a general law basis is also being pursued. That does not make a lot of sense to me and may add unnecessary complexity to some litigation. The experience with human rights-based litigation around the world is that flood-gates fears have not been warranted in practice. The Law Council believes that barriers to raising human rights concerns in court should be minimised so that vulnerable people are not prevented from seeking a remedy for what they see as injustices. The *ACT Human Rights Act* (s 40C) provides for a stand-alone right to sue for breaches of one's human rights under that legislation. We support that approach.

Remedies

The Law Council considers that, in every case, an effective remedy should be available to provide appropriate and adequate reparation for the injustice suffered. Some jurisdictions have been cautious and, for example, have ruled out money damages as an available

remedy. It is true that righting the wrong with a declaration and/or an injunction will be sufficient in many cases but there will be other cases where a complainant has suffered greatly and many years of their life have been affected. They should not be denied monetary compensation.

Procedural matters – costs

Costs regimes in human rights legislation raise several competing considerations. On the one hand, the threat of losing one's house and other assets because of losing a meritorious case will inhibit people's willingness to pursue their rights. On the other hand, the availability of a favourable costs order for a successful applicant will allow actions to be brought with the assistance of lawyers who are prepared to take a risk. The Law Council recommends a variety of approaches including a less stringent "costs follow the event" rule to protect unsuccessful applicants; the availability of protective costs orders made early in the proceedings which allow applicants to know that they will not be saddled with a horrendous legal bill involving the cost of three government senior counsel; and an ability for successful applicants to receive compensation for the costs they have incurred in bringing the litigation.

It is my pleasure to hand you back to Pauline.

Pauline Wright, Law Council President

Thank you, Stephen.

Naysayers will claim there are considerable negatives for enacting a federal Human Rights Act – the cost to taxpayers for one, or pressures on an already stretched court system for another.

However, the Law Council does not consider that the experience to date bears this out.

Reviews of the operation of existing state and territory human rights acts indicate that, rather than resulting in a 'lawyers' picnic', the benefits often lie outside court proceedings and that human rights are considered by the Executive and the Legislature early in their processes.

It may in fact be costly for taxpayers not to promote human rights protection.

For instance, last year, the Law Council noted reports that:

- the Royal Commission into Aged Care would cost $104 million over four years;
- the Royal Commission into Institutional Responses to Child Sexual Abuse had cost about $500 million;
- the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability would cost $528 million over five years; and
- the Royal Commission into the Protection and Detention of Children in the Northern Territory had cost around $54 million.

I mentioned that a federal Human Rights Act will not cure all ills.

But, when we are being asked to tighten our fiscal belts, more cost-effective, preventative solutions are what we should be looking for – resulting not only in cost savings, but also in less personal heartache to many in the Australian community.

Let's look at what is working at the moment.

Of the two states and one territory that have a charter of human rights, reviews indicate that the courts in the ACT and Victoria have not been flooded with litigation.

Instead, there has been an improved parliamentary and bureaucratic culture of respect for human rights – in a preventative sense.

The five-year review of the ACT Act found its main effect had been on the legislature and executive. It's fostered a lively human rights culture within government, leading to human rights concerns being given due consideration in the framing of new legislation and policy.

These improved laws are likely to have tangible benefits over the longer term, particularly in the form of additional safeguards for vulnerable individuals in the community.

Meanwhile, in Victoria, the charter has played a crucial role in preventing or curbing many human rights breaches (and their associated social and economic costs).

The experience of jurisdictions with human rights acts in place indicate that these have led to tangible and practical improvements in the way that people's rights are upheld in practice.

These range from successfully challenging the use of restraints on a sick older woman in distress, to moving a 40 year-old man with disability from aged care into more appropriate care, to delaying evictions of older people until alternative accommodation can be found, to stopping the transfer of children into adult prisons.

These improvements have frequently been negotiated at an early stage with bureaucrats and policymakers, rather than through the courts.

Such experiences underline the potential of a federal Human Rights Act in driving a government-wide culture of respect for human rights.

But… I hear you ask… will legislating rights and freedoms help ensure that all persons are treated fairly and equally, with dignity and respect?

We know that few Australians are aware of the reality about the lack of protection of their human rights, and it is difficult for people to defend their rights when they know little about them in the first place.

For human rights to have any practical effect, they must be incorporated in the education and practice of everyone in the Australian community.

This includes, for example, teachers, the police, health workers, prison and detention facility operators, disability and aged care providers, business leaders, and the media.

The Law Council is also concerned that there is a lack of human rights engagement and training across public departments and processes more generally.

This may result in human rights not being properly considered when cabinet decisions are made, laws are designed, and policies and programs are implemented.

Too often, human rights compatibility statements – which are often lacking in substance and quality – are tacked on at the end of the process, rather than being baked in at the beginning.

This lack of early consideration may mean that the needs of diverse groups within the Australian community are consistently overlooked.

One recent example, provided in evidence given to the recent Royal Commission, was that people with disability were not mentioned in the Australian Government's original pandemic emergency health plan.

While this was later rectified, it was an extraordinary omission.

Human rights should never be an afterthought. They should be part of the democratic recipe.

A well-drafted federal Human Rights Act would, in the Law Council's view, help ensure that the needs and circumstances of people in Australia in all their diversity are better understood and reflected in policy and program design upfront – whether in emergencies, or otherwise.

It would embed a general and fundamental understanding across the Australian community, that all persons are of equal dignity and worth, with human rights which must be respected, protected, and fulfilled.

I think we can all agree that 2020 has been a year that many of us would rather forget.

Australians have been challenged by unprecedented restrictions to their liberties.

It is not my place to comment on what the most appropriate measures should have been during the pandemic or what should be taken in the future – except to say that Australia has continued, and will continue, to have international human rights law obligations throughout this challenging period and beyond.

Any restrictions on the enjoyment of rights imposed as a result of the pandemic must be justified by reference to the standard framework within which such questions ought to be considered.

Some limitations of certain rights may be needed, but any such limitation must be necessary, reasonable and proportionate to a legitimate purpose, and never to those fundamental rights which are immutable.

The COVID-19 pandemic is not, of course, the only national emergency that Australia will face.

Moreover, history tells us that in times of crisis, human rights are peculiarly vulnerable to serious infringement.

We do need to remain vigilant – to ensure that measures taken in crisis are temporary and do not endure beyond the tail of the crisis.

We do need the tools to guard against overreach.

A federal Human Rights Act would be a powerful tool to build the edifice of Australia's international human rights obligations.

It would ensure that the decisions and actions of our governments are guided by the time-honoured values of freedom, equality, justice, compassion and dignity.

It will help everyone, from school children to recent arrivals, including those fleeing war and terror, to understand the rights and freedoms that we all share, and to place a premium on them for our future.

It will mean that questions of human dignity are taken into account when they matter most.

We are at a turning point in Australian history as we look past 2020.

Now is the time for conversations between the Australian people and their governments – what kind of future do we envisage for coming generations?

How can we be a prosperous and a just and fair community?

A federal Human Rights Act may not be a complete answer, but it's a start.

So I ask this question – What are we afraid of?

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