

Does Australia need to do it better? If so, how?

Does it really matter? We are, after all, better off than a lot of other countries when it comes to human rights – we think of ourselves as the land of mateship and the fair go, we have free and fair elections and we think we are pretty good at multiculturalism.

CLA thinks that it does matter – it's the piece that completes the jigsaw – for three reasons:

Firstly, for all the talk about human rights being inalienable and indivisible and to be applied equally, the fact is that in Australia your rights depend on where you live. All Australians are not equal under the law. For example:

As a prisoner in the ACT, you can vote in elections in that jurisdiction – but if you are locked up in a NSW jail, you can't vote in NSW elections.

If you live in Queanbeyan in southern NSW, you have the right to access voluntary assisted dying. If you take one step across the border into the ACT, the ACT government has been prevented, by Commonwealth legislation, from even debating whether voluntary assisted dying should be allowed, and from voting on the issue.

These and a myriad of other anomalies arising from human rights evolving in distinct jurisdictions eat into Australians' perception of our country as free and equal.

Secondly, Governments sometimes forget to be humane to the powerless.

- You are a young woman with an intellectual disability. Your mother has just had a stroke and is now in a care home. You have been threatened with eviction from social housing – the house you have lived in your whole life – because your mother was the tenant and she isn't there anymore. You have no right to the house.
- You are a model prisoner and you have been paroled, but you can't get out of jail and back into the community because a stable home is a condition of your parole and the Housing Authority has taken you off its priority list...because you are in jail.
- You are made a part of ParentsNext, a compulsory federal program that affects certain families relying on the Parenting Payment. Under the program, parenting payments can be automatically and immediately cut off if a parent does not attend prescribed activities. As a result, children and their parents have been left without adequate money for food, shelter and other necessities.
- You are mother experiencing domestic violence. You have no access to finances. You want to leave and you've tried to get access to public housing but you were told it will be a long wait. Many women's refuges won't take you because you have a dog. So you are stuck in an abusive relationship.
- You were the victim of the Robodebt¹ scandal.

The examples above are the type of daily trauma of tens of thousands of Australians in their relationships with government. None of these cases, and thousands like them, could access a tribunal to get fair and equal treatment in the jurisdictions they occurred in.

Thirdly – the fact that we have such a limited and confusing, formal ethical infrastructure means that we put a lot of trust in that informal element of unwritten conventions and rights-based leadership. There is increasing evidence that the trust is misplaced when it comes to protecting our rights.

There are two parts to this – the first is that our leadership is increasingly allowed to claim that, if it isn't illegal, it's OK. Codes of conduct for ministers in parliaments around Australia were once the primary determinants of a politician's behaviour. Now they are largely irrelevant in determining the consequences for ministerial transgressions.

The real test now is not whether a decision maker's behaviour was ethical, but whether it was legal, which leaves scope for a vast range of potentially unethical behaviour to go unchecked.

The informal ethical infrastructure is also largely what maintains the checks and balances between Parliament, Executive Government and the Judiciary. It has been a long time since Parliament has broken party lines to prevent unethical behaviour on the part of Executive Government: meanwhile, the Judiciary's capacity to interpret law consistent with our informal ethical infrastructure has been whittled away as common law is increasingly replaced by statute.

This has meant that there is no effective counterbalance in place to stop leaders sacrificing our rights in order to make the leaders look decisive. This trend has become pervasive in Australian law making and Australians are being treated less fairly and equally as a result. The follow up to "9/11" (the Twin Towers aircraft attacks in the USA) is a case in point.

Since those attacks on the World Trade Centre in New York in 2001, Australian governments have passed some 100 pieces of legislation that constrain our rights in the name of combating the threat of terrorism. There is no evidence that the threat level – in Australia – is proportional to the severity of the legislation that has been put in place to demonstrate how "tough" our leaders want to be seen to be on terrorists.

This legislation has now evolved to the point where federal government agencies can hold a 14-year-old child in detention for 168 hours without informing the child's parents purely because the child witnessed what the agencies believe is a terrorist incident.



This is not the Australia that most of us think we live in and we have very little protection from it. The Northern Territory intervention², Robodebt and our treatment of people seeking asylum³ are human rights breaches on a vast scale which prove the reality.

It is a theme that has also led to questions arising from outside Australia about the increasing gap between who we say we are as a nation, and what we do.

The world is beginning to suspect that Australia is less open, less tolerant. It sees that we secretly imprison our own citizens and bring the full weight of the law to bear on journalists and lawyers who might embarrass us.

It sees that we keep asylum seekers outside our jurisdiction so they cannot access what rights our law would otherwise provide, and we hide them from people who want to tell the truth about how we treat them.

It sees that we abuse children we have placed in juvenile jail and that we assume social security recipients are criminals and treat them accordingly.

It sees that we protect the powerful from scrutiny as they rip off the powerless and that we increasingly assume that the poor deserve to be poor.

It sees that we marginalise Australia's First Nations people, deny them their history and their culture, and jail them in unprecedented, disproportionate numbers. For years we turned our backs on their offer of forgiveness and reconciliation.

The usual response is that these are uninformed criticisms of isolated acts arising in specific circumstances, that they are unrepresentative of the "real Australia," the land of mateship and the fair go. But these acts are real enough to those who suffer them and the rest of the world notices, and draws its own conclusions. Nations condemn us, as we condemn other nations who offer the same defence when they are abusing their vulnerable citizens.

Perhaps some this will change with a Labor government in 2022, but we should not have to rely on a change of government to recognise abuses of human rights, and do something about fixing them.

So, for these three reasons, it's time for Australia to shore up its reliance on the informal ethical infrastructure with a Federal Human Rights Act (FHRA) that can serve as a model for future state human rights acts in NSW, WA, SA, NT and Tasmania.

An effective FHRA would ensure:

- Obligations on our nation, arising from the family of UN human rights instruments Australia has ratified, are fully implemented in Commonwealth law;
- Parliament only passes laws compatible with Australia's human rights obligations;
- Decision-makers balance rights and civil liberties when they are in conflict;

- The Australian Human Rights Commission can conciliate claims quickly and simply that are brought by individuals over possible rights breaches by federal public bodies; and
- Individuals with federal human rights complaints can bring them before a tribunal simply and cheaply for remedy in a way that removes the power imbalance between complainant and decision maker.

This would provide:

- Harmonised human rights protection for all Australians in the federal jurisdiction by reference to one law;
- Consistent government behaviour across the relevant jurisdiction;
- Enforceable remedies for citizens where a public body has breached their rights;
- More efficient and effective government that puts fairness and equality at the centre of its decision making; and
- Human rights that work for all Australians in a simpler, quicker and cheaper way.

Enacting a FHRA will not answer all human rights breaches – no one piece of legislation ever is – but it will offer a consistent set of standards to which individuals and the community can hold politicians and bureaucrats publicly accountable.

It offers somewhere to start changing the culture of government from one that sacrifices our rights to look tough, to one that places fair and equal treatment of its citizens at the centre of its decision making.



And one that lives up to the treaty obligations our government has signed on to internationally that are the one universally accepted recipe for a sustainable society.

ENDS

¹ https://en.wikipedia.org/wiki/Robodebt_scheme

² https://en.wikipedia.org/wiki/Northern_Territory_National_Emergency_Response

³ https://en.wikipedia.org/wiki/Asylum_in_Australia