Australian Human Rights Commission
everyone, everywhere, everyday

What does it mean to believe in human rights in Australia today?

The University of Newcastle Annual Human Rights and Social Justice Lecture

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1 Introduction

It is a great honour to have been invited to deliver the annual University of Newcastle Social Justice Lecture.

I would like to begin by acknowledging the Traditional Owners of this land, the Pambalong clan of the Awabakal people, and pay my respect to their elders, past and present. Today I would like to explore the question: 'What does it mean to believe in human rights in Australia today?' This is an ambitious project, and I am aware that the question does not have a short and simple answer.

The Australian Human Rights Commission itself recently grappled with the question of what it means to promote and protect human rights in Australia. Essentially, we asked: Who are we? What do we do? And perhaps most importantly: Why do we do what we do? We were searching for a way to articulate a broad shared understanding of the human rights concept. We settled on the vision of human rights for 'everyone, everywhere, everyday'.

The challenge we set ourselves was to both convey the universal nature of human rights; and to make human rights relevant to everyday life.

The question of what it means to believe in human rights in Australia today requires contemplation of the implications of universality. Every person in Australia, by virtue of their humanity, is entitled to enjoy certain fundamental human rights. This is conveyed in inspirational terms in the Universal Declaration of Human Rights which recognises that 'the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.[1]

The Declaration in this statement draws a clear connection between human rights and democracy – equality is both a fundamental human rights principle and a foundational principle of modern democracies such as Australia.

If all people have equal entitlement to the enjoyment of fundamental human rights, and if our democracy is founded on the principle of equality, one might expect that our democratic institutions adequately protect human rights. Ironically, this is not always the case.

To believe in human rights in Australia today requires acceptance of the idea that human rights really are for 'everyone, everywhere, everyday' – that we are all enriched when the rights of the most vulnerable amongst us are adequately protected. Believing in human rights also requires honest consideration of whether our democracy is adequately rights respecting, and of what could be done to further build a rights-respecting culture within our democratic institutions.

2 What do people in Australia think about the protection and promotion of human rights?

So what do we know about the importance that people in Australia place upon the protection of human rights?

Last year this question was considered in part through the National Human Rights Consultation – one of the largest public consultations in Australian history.

Overwhelmingly, the message from those who participated in the National Consultation was that human rights matter. They told the Committee of their deep concern about serious breaches of human rights over the past decade, including the suspension of the Racial Discrimination Act 1975 (Cth) in order to implement the Northern Territory Emergency Response, the lengthy, and potentially indefinite, mandatory detention of asylum seekers, and the increase in law enforcement agencies' powers as a result of new national security laws. The Committee reported that it 'gained the sense that the power of the executive arm of government needs to be checked'.

Participants in the Consultation told the Committee that human rights are not abstract concepts, but that they are relevant to actual everyday experience. They mentioned basic rights, such as the right to the highest attainable standard of health, the right to an adequate standard of living, the right to adequate housing and the right to education. Many people told the Committee of their concern that vulnerable groups such as Aboriginal and Torres Strait Islander people, people experiencing homelessness, the mentally ill, people with disabilities, people in rural and remote Australia, the elderly and children in care often miss out on the fulfillment of some of their basic rights.

The majority of those who participated in the National Consultation expressed the view that human rights are currently inadequately protected in Australia.

However a strong counter-argument was made in some submissions, and in public commentary surrounding the National Consultation. This was that human rights are adequately protected by Australia's strong democratic institutions, including our representative Parliament; the distribution of power in our federal system of government; the separation of powers; the doctrine of responsible government; our system of bicameral parliaments; parliamentary committees; and our free press.

As we await the outcome of the recent federal election, we can see a demonstration of the importance of better protecting human rights in Australia. In many interviews, the four independents who have such an important role in determining our next government have continually emphasised human rights considerations affecting the constituencies that they represent. Most clearly, they have identified a lack of services to rural and remote communities, and that they feel that their constituents have not been listened to for some time. While they have framed their concerns in terms of the need for parliamentary reform and greater transparency, they are in fact talking about deficiencies in human rights protections.

3 Human rights and the foundation of modern liberal democracy

It is important to recall that recognition and protection of certain civil rights was a critical feature of the development of modern liberal democracy. This is evident in the Magna Carta, which for the first time placed a limit on the legitimate exercise of power by the King, and sought to protect the rights of some of his subjects. Some time later, intellectuals like Hobbes and Locke put forward theories about the relationship between the individual and the State.

In doing so, they began to lay the foundations of both liberal democracy and human rights: they wrote that all human beings were equal in dignity; they valued the idea of individual liberty and freedom; and argued that, by virtue of these human

characteristics, there should be limits to executive power. This was the beginning of the idea that legislative authority belonged to the united will of the people.

These persuasive ideas were captured in influential documents such as the 1689 English Bill of Rights which cemented the role of the Parliament, and the American Declaration of Independence which declares that government derive 'their just powers from the consent of the governed' and that the people have the right 'to alter or abolish' a government and 'institute a new government'.

4 Are human rights fundamental to modern democracy?

These ideas remain prevalent in modern democracies such as Australia. The critical nexus between human rights and democracy is aptly characterised by Professor David Kinley. He sees the foundations of political democracy as located in the protection of civil and political rights such as the right to vote, freedom of expression, assembly, movement and thought, non-discrimination and equality before the law. The foundation of social democracy, he says, is located in fair and equal access to economic and social rights such as housing, health and education.[2]

Undoubtedly, belief in the importance of protecting both of these categories of rights is critical to our conception of Australia as a modern democracy and as a fair country in which to live. However, while we virtually take for granted formal protection of many of the foundational elements of our political democracy (our Westminster system of government, universal adult franchise, the right of political communication, to give just some examples of protections contained in our constitution), formal protection of our social democracy remains highly controversial.

If we believe in the protection of human rights we must ask ourselves whether our democratic institutions really do provide adequate protection of all human rights. Arguably they do not: our Parliament can make laws that breach human rights without providing explicit justification; human rights can be overlooked in law and policy development processes; and Australia does not always provide effective remedies for human rights breaches.

It is ironic that democratic processes are unable to ensure the adequate protection of human rights, when rights protection is a fundamental element of democracy itself. It is true that federal members of Parliament are held accountable at the ballot-box, in the case of the lower house, every three years. However, elections express the will of the majority, and a majority view is not always aware of, let alone sympathetic to, the need to treat justly and fairly those whose voices do not form a significant part of mainstream political discourse. I am not speaking only of Aboriginal Australians and Muslim Australians (both groups who, incidentally, have for the very first time seen one of their own elected to the House of Representatives at the recent election). I am speaking also of those who live outside our major cities, recently arrived immigrant communities, of children, of the homeless, of many people with disability and of those with lasting mental ill-health and their carers. You will be able to think of others marginalised in Australian political discourse.

There is, I think, a fear held by many that requiring governments to respect human rights will require them to protect individual or minority interests at the expense of community interests or the interest of the majority. There are, I believe, at least two answers to this concern.

The first is that in the long term, protecting human rights strengthens, rather than undermines, democracy in the interest of everyone. This idea was eloquently articulated by the former Chief Justice of the Israel Supreme Court when bringing down that court's decision that torture was unlawful even in a ticking bomb situation. His Honour said:

> We are aware that this decision does not ease dealing with [the harsh] reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices are open to it. Although a democracy must sometimes fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day they strengthen its spirit and strength and allow it to overcome its difficulties.[3]

The second answer to this fear is that, unlike the right not to be subjected to torture, most human rights are not absolute. Human rights law accommodates the tension between the protection of individual or minority interests and community or majority interests by requiring that competing rights be balanced one against the other. In particular, it calls for proportionate responses to the need for community protection. That is, a balancing exercise that results in measures taken in the general interest that are proportionate both to the aim pursued and the effect on the individual interest concerned.[4] We all intuitively understand this requirement of proportionality in the balancing of human rights. It is encapsulated in the aphorisms about freedom of speech not extending to falsely shouting 'fire' in crowded theatres and the freedom to move one's fist in any direction being limited by the position of one's neighbour's nose. Concerns about proportionality also inform our consideration, for example, of the extent to which it is legitimate for governments to impinge on long treasured individual freedoms, such as the right not to be detained without charge, in the interest of protecting the community's right to live free from violence.

However, there is, I suggest, a deficit in Australia's present democratic processes in that currently our law and policy makers are not required even to give consideration to human rights. And, in the absence of this requirement, democratic processes can operate either too slowly, or too quickly, to ensure that fundamental human rights are protected. This often results in breaches of the human rights of the more vulnerable amongst us. If we believe that human rights are universal, we should insist that our democratic institutions better protect the rights of all people in Australia, but especially those of people whose voices tend to carry little weight in public debate.

I will illustrate the limits of democracy in achieving adequate human rights protection with two relevant, recent examples.

4.1 Democratic processes can be too slow

That democratic processes can at times be too slow is demonstrated in the example of Australia's failure to ensure the adequate protection of the human rights of children held in immigration detention.

Since the early 1990s, the vast majority people who seek asylum in Australia, if they arrive without a valid visa, have been held in immigration detention. This includes families with children and unaccompanied minors.

In 2004, the Australian Human Rights Commission published the report of the National Inquiry into Children in Immigration Detention. It found that between 2000 – 2002 children were held in high security immigration detention facilities, often in remote locations, in breach of the rights contained in the *Convention on the Rights of the Child*. The report found that the conditions in detention failed these children. They were not protected from physical and mental violence; did not receive an appropriate standard of physical and mental health; and unaccompanied children were not given the special protection that they needed.

In 2005, a year after the publication of this report, there was some change. The Migration Act was amended to affirm 'as a principle' that a minor should only be detained as a measure of last resort[5] and to allow the Minister to place families with children, unaccompanied minors and other vulnerable people in community-based detention rather than closed detention facilities.

Democratic processes including the Commission report and a concerted advocacy movement contributed to these changes.

However they only came about as a result of the courageous actions of the parliamentarian, Mr Petro Georgiou, and a few colleagues from the Liberal Party, who negotiated this outcome with the then Prime Minister John Howard. Democracy moved very slowly for children in immigration detention. Those directly affected by this failure to respect basis human rights were amongst the most marginalised in the Australian political discourse of the day. It is not surprising that it took quite some time before the human cost of the policy was fully appreciated by the Australian community and our political leaders.

These changes were a significant step in the right direction. However, the Commission has repeatedly argued that there remains inadequate protection of the rights of asylum-seeking children. Children are no longer held in secure immigration detention centres. However, as I speak today there are over 700 children in immigration detention throughout Australia – they are held in low security facilities, and the conditions of detention have improved. However, the Community Detention system that was established in 2005 is rarely being used. Children remain in immigration detention, often for periods of many months, their liberty severely restricted, while applications for refugee status are assessed.

4.2 Democratic processes can be too swift

In contrast to this example, sometime democracy moves too quickly for there to be proper consideration of human rights, particularly in times of perceived emergency. Take for example, the Northern Territory Emergency Response legislation, which contained far reaching measures that discriminated on the basis of race.

The Commission did not and does not dispute that the Australian Government has an obligation to promote and protect the right of Aboriginal people to be free from family violence and child abuse. However, the Commission does not accept that to take the urgent action necessary to protect the rights of children and families it is necessary to discriminate on the basis of race.

The haste with which this legislation was introduced limited both the potential for adequate consultation with Aboriginal people and adequate consideration of whether

less-restrictive and non-discriminatory action could have been taken to protect the rights of children and families.

The Emergency Response legislation was introduced on 7 August 2007, and passed through the House of Representatives that same day. This is quite remarkable given the legislative package contained five separate bills and was 480 pages long.[6] The following day a Senate Inquiry was called, with two day's notice for public hearings. Only five days passed before a report was tabled. The entire legislative process was concluded within ten days of the bills being introduced in Parliament. This was a scandalously abbreviated parliamentary process for a complex legislative process that limited fundamental human rights. It is particularly so given the international requirement, articulated in the United Nations Declaration on the Rights of Indigenous Peoples, for real and meaningful consultation with Indigenous peoples who will be affected by government policies and decisions.[7] There was, you may recall, no Aboriginal representative in either house of Parliament at the time.

4.3 A good system of human rights protection

So how can we ensure that our democratic institutions better protect and promote the human rights of all people in Australia, especially those of the most vulnerable amongst us? Or to put it another way, how can we embed into our law and policy-making processes the principles necessary to ensure that as a nation we respect fundamental human rights?

I believe that in a well-functioning democracy, one in which social democracy as well as political democracy is valued, it is essential that consideration is given to human rights at all levels, and by all branches of government.

The building blocks of such a system include a Parliament that considers the human rights implications of all new laws and government decision-makers who respect human rights when implementing laws, developing policy and delivering public services.

It is, of course, the case that the very best protection of human rights is a national culture or ethos highly attuned to failures to respect human rights and a population willing to use the ballot box to discipline those responsible for any such failures. Unfortunately, as the report of the National Human Rights Consultation shows, Australia is a long way from having a well-developed human rights culture. Many people in Australia are not familiar with either their own human rights or their obligation to respect the human rights of others.

The Commission strongly supports the key features of the national Human Rights Framework, released in response to the National Human Rights Consultation. These include a broad-based community human rights education program, as well as enhanced parliamentary scrutiny processes to assist the consideration of the human rights implications of new laws and policies. These measures will go a long way to building a human rights-respecting culture in Australia.

However, I continue to believe that ultimately, the most effective way of to ensure that our democratic institutions better respect and promote human rights is for us to have the benefit of an over-arching legislative instrument such as a national Human Rights Act. Such a law would, in the words of a commentator from the United Kingdom, work to 'protect individuals and minorities whose views and aspirations are

not necessarily represented by a system based on majority rule'.[8] For now the government has decided not to take this path. We hope that this decision will be reviewed in years to come.

5 Human rights are about everyone

I would now like to turn to a consideration of what belief in the universality of human rights might mean in our daily lives. Human rights are not only about the relationship between the individual and the state.

Belief in the importance of respect for human rights requires each of us to evaluate our relationships with others – in our families, our workplaces, our schools, the various communities to which we belong. In each of these places, do I find respect for the inherent human dignity of every person? What can I do in each of these spaces to promote respect for human dignity?

As Eleanor Roosevelt has famously said, human rights begin in 'small places, close to home'. She says that these places are:

> so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.[9]

Inherent in Roosevelt's words is the notion that rights and responsibilities are inextricably interwoven. This idea is contained in all important international human rights instruments. The Universal Declaration proclaims that human beings 'should act towards each other in a spirit of brotherhood' and that '[e]veryone has duties to the community in which alone the free and full development of his personality is possible'.[10] The preambles of both international covenants state that: 'The individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant'.

The National Human Rights Consultation repeatedly heard from participants that they did not want an 'individualistic society where people are self-centredly focused on their 'rights', without thinking of the greater good and our 'responsibilities'. I agree with the Consultation Committee report conclusion that:

> If we are to create a culture of human rights, regardless of the legal enforcement mechanisms that might be instituted, education about responsibilities is just as important as education about rights. It is imperative that we provide better opportunities for citizens to answer the question: 'What should I do and what can I do to create a society in which the just entitlements of all people are acknowledged, respected and fulfilled?'[11]

6 What can I do to ensure respect for human rights: at home, at school, and at work?

So what can each of us do to create such a society? What can we do to protect human rights in small places close to home?

Each of us is in a position to play a part in building a culture of respect for human rights. This is fundamental to some of the Commission's recent work on the role of the 'bystander' in the protection and promotion of human rights. This work originated in concern at the increasing frequency of cyber-racism, and is now focussing on young people's experience of cyber-bullying more generally.

An alarming number of children and young people in Australia will experience cyber-bullying. Australian studies conducted in 2006–7 suggest that between 10–40% of school children experience online bullying depending on the age of the young people involved. These figures are likely to have increased due to greater access to technology, and the growth in social networking since that time.

The question the Commission is currently asking is how can community members be encouraged and supported to take constructive action in situations where they see discrimination, violence, harassment or bullying taking place. We believe that 'bystanders' have a critical role to play in making the world around them a safer, more secure and more human rights-respecting community.

This approach has the potential for extremely wide application. While the Commission will start with a focus on young people and cyber-bullying, all of us are in a position to challenge behaviours that do not adequately respect human rights – in our workplaces, in sporting clubs, community organisations, in public spaces.

Our responsibility to contribute to creating a society where every person enjoys their human rights requires us to ask what we can do in the small places close to home. What can we do to reduce racism, to challenge discrimination against people with disability, to challenge sexual harassment, to challenge homophobia?

We all have the right to be treated fairly, but we also all have the power and the responsibility to make sure that others are treated fairly too.

7 Conclusion

Individual responsibility to ensure that human rights are respected involves, but also goes beyond, consideration of what we can do in our immediate communities. It requires us also to acknowledge that all people in Australia are entitled to enjoy basic human rights.

If we believe in the principle of equality and that the inherent dignity of all people in Australia should be protected, we should consider what we can do to ensure respect for the human rights of all people in Australia. What can we do to build acceptance of the idea that we are all enhanced when the human rights of the most vulnerable among us are adequately protected? It is the human rights of those not at the centre of our political discourse that should be of the greatest concern – those who may not be able to speak for themselves such as children, the frail elderly, those with intellectual disability and also those who are seen to constitute minority communities

within Australia including those who live in rural and remote Australia, Aboriginal and Torres Strait Islander peoples, recent arrivals from Africa and Muslim Australians.

I believe that ensuring the adequate protection of the human rights of everyone in Australia requires strengthening of Australia's human rights culture. In the absence of a national Human Rights Act, the human rights education and enhanced scrutiny processes of the Human Rights Framework are important first steps towards building an enhanced human rights culture in our country.

There is also much that each of us can do within the various communities to which we belong, to build a culture of human rights.

However, belief in the importance of protecting human rights should also bring us to question whether our democratic system – to which the importance of individual liberty and freedom is foundational – adequately protects human rights. Our democratic right, and our democratic responsibility, is to insist that our system of government robustly protects the rights of all amongst us. Only if it does this will we be able to look to the future with confidence that our increasingly diverse community will also be an inclusive, cohesive and respectful community.

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[1] The Universal Declaration of Human Rights, 1948, Preamble.
[2] David Kinley, 'Human Rights Fundamentalisms', (2007) 29 *University of Sydney Law Review* 545, p5.
[3] H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. Gov't of Israel, 53(4) P.D. 817, 845.
[4] Luzius Wildhaber, former President of the European Court of Human Rights, 'Human Rights and Democracy', *Paul Siegart Memorial Lecture 2001*, London, 22 November 2001.
[5] *Migration Act 1958* (Cth), s 4AA.
[6] Human Rights and Equal Opportunity Commission, Chapter 3: The Northern Territory 'Emergency Response' Intervention – A human rights analysis, *Social Justice Report 2007.*
[7] United Nations Declaration on the Rights of Indigenous Peoples, General Assembly Resolution 61/295, September 2007.
[8] Klug, F and Wildbore, H, 'Protecting rights: how do we stop rights and freedoms becoming a political football?', Unlock Democracy, 2009.
[9] Eleanor Roosevelt, at the presentation of 'In Your Hands: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights', United Nations, New York 27 March 1958.
[10] Universal Declaration of Human Rights, 1948, articles 1 and 29.
[11] National Human Rights Consultation report, p68.