

Human Rights - making them relevant to the vulnerable and marginalised in Australia.

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Introduction- Fostering the Better Protection of Human Rights¹

It is a difficult predicament, in the current legal and political climate, to work in a legal practice where the clients are economically and socially disadvantaged and powerless. Sometimes, being an academic who is supposed to grapple with the theoretical and philosophical concepts in academic journals comes into conflict with the realities and practicalities of working as a clinical supervising solicitor in this academic role in a disadvantaged suburb of Melbourne. Yet from this vantage point, being an academic and a practitioner, a constructive inter-play occurs where theory can inform practice and vice versa. It is this inter-play which can make a valuable contribution to policy debates. From such a vantage point, I consider it incumbent on universities and policy makers to tap into the experience of the day-to-day dilemmas facing the members of the community for whom survival, emotional and physical well-being are precarious. With exposure to this in an academic/practitioner role, the theory and real life strategies can intersect to ensure strategies are realistic and can make a difference. This article challenges the prevailing 'legalistic' approach to human rights which tends to consider court litigation as the means by which human rights can be enforced. The new human rights legislation in Victoria and the Australian Capital Territory (ACT) (with Western Australia and Tasmania examining the possibilities for legislation) offer broader opportunities for improving the human condition of people on Australian shores. Furthermore, since the Rudd Government was elected there may be brighter prospects for human rights protection at a Federal level. The new human rights mechanisms in Victoria and the ACT present opportunities beyond litigation which can be utilised to ensure a culture of human rights develops in legislatures and in bureaucrats and how they administer their policies on the ground. Audits, parliamentary scrutiny processes and direct mediation with regional public authorities are all fertile ground to enforce the human rights of community members.

From my position as a community lawyer in a disadvantaged community, the limitations of a legalistic approach to human rights, without its grounding in the day-to-day realities of community, is highly problematic.² From this perspective, a human rights framework that consists of only civil and political rights or which requires clients to use the courts to complain of ill-treatment fails to recognise the integral connection between the economic and social position of human beings and their capacity to exercise civil and political rights.³ Such a legalistic approach to human rights can overlook other opportunities for cultural change, negotiation and dialogue, which a less adversarial environment than the legal system can allow. These opportunities will be discussed in this article. The legal system certainly has a place within the human rights framework; however, debates should also be constructed around the need to adhere to human rights and how to best foster such adherence before matters are the subject of complaint. In other words, how can a respect for human rights become entrenched in day-to-day dealings with each other? Evans has argued that the human rights debate needs to be widened to have a 'focus beyond the legislative process'.⁴

From my perspective, the offerings of a legalistic approach to human rights are restrictive in that some clients lack the money, power, capacity, confidence and knowledge to even realise their human rights. This article will discuss modest research by Mary Anne Noone and me which demonstrates this point.⁵ A purely legalistic approach to human rights, with the limitations imposed by rules and procedures, not only constrains the opportunities for human rights mechanisms and frameworks to be applied more broadly but means that those who will be able to

take advantage of their rights are people who have the resources to navigate these rules and procedures.⁶ Such a concentration on legalistic approaches can also provide ammunition for those who are opposed to human rights protection.⁷

Lessons to be learned from the United Kingdom

In the United Kingdom, human rights are seen by opponents and some powerful media interests as the domain of the legal: judges, politicians and lawyers. The *Human Rights Act 1998 (UK)* is seen as being used by those considered unpopular, mainly because these groups are already within the legal system. Such groups include asylum seekers, defendants and prisoners. Whilst these people's rights are just as important as those in the rest of the community, it nevertheless enables opponents to label human rights as an 'industry for lawyers'.

The United Kingdom experience of their *Human Rights Act* reveals that although the Act has improved many facets of life, it has also been used as a public 'whipping boy' and is blamed for decisions that do not actually pertain to the Act.⁸ This is unfortunate, but it reflects the more sensational coverage which some media are prone to than reportage of the actual facts behind many of the cases. It also highlights the dangers of narrowly constraining the definition of human rights to the civil and political rights sphere. As a lawyer and civil libertarian, I have been witness on many occasions to arguments that devalue economic, cultural and social rights in order to give precedence to civil and political rights. The latter are often seen in legal arenas as 'higher order rights'. Such attitudes are perhaps more reflective of the socially and economically privileged position of many in the legal profession rather than an accurate reflection of the positioning of human rights in international law.⁹ These views conflict with the fundamental notions of human rights being inviolable, indivisible and inalienable.

Recently, at a Public Interest Law Advocacy Centre¹⁰ conference in Sydney, a former parliamentarian argued that the most prudent course of action for advocates for bills or charters of human rights is to settle for civil and political rights and not agitate for the inclusion of economic, social, cultural and other rights, as this could be fatal to any such bill.¹¹ Such arguments not only fail to understand the importance of economic and social rights to the general population,¹² they also risk thwarting the longevity of statutory human rights measures as the more narrow and legalistic rights come to be seen as 'exclusive', 'selective' and utilised only by a few 'sectional' interests. By contrast, human rights protections can and should offer opportunities for all human beings to maximise their full potential and be treated with respect and dignity.¹³ As Gearty has argued, if the manner of articulating the importance of human rights is not sophisticated and representative, then human rights arguments will be greeted without warmth and with blank indifference or mute incomprehension.¹⁴ Worse still, they will be manipulated and commandeered to the point where they can be used to justify the undermining of human rights. Gearty, Charlesworth and Williams have highlighted how human rights language can be twisted so as to actually allow for incursions of human rights.¹⁵

The distortion of human rights by 'cherry picking' civil and political rights and making human rights overly legalistic makes it easier for opponents to thwart future human rights frameworks in Australia. In the end, the people affected, for whom social and economic as well as cultural rights are important, go unrealised and are forgotten. As a consequence, their civil and political rights are also never realised. Gearty warns:

It follows that, at its core, human rights is a subject that is concerned with the outsider, with the marginalised, and with the powerless – these are the various individuals who in any given culture or time are most likely to

be invisible to those around them, who are most liable to find themselves pushed beyond the periphery of a community's field of vision, all who are viewed as a non- or sub-human if they are seen it is these people who need human rights protection the most.¹⁶

The Human Rights of the Vulnerable and Disadvantaged

Many vulnerable and disadvantaged groups are reliant on government agencies for support and subsistence. Accordingly, they are susceptible to infringements of their rights by agents of government.¹⁷ The Audit Committee in the United Kingdom¹⁸ has indicated that there is still a lot of work to be done to change entrenched culture and equip government agencies to conceive of their role in enabling the human rights of citizens in how they administer government policies. There is a lesson in this recommendation in Australian jurisdictions as each State and Territory rolls out its human rights frameworks. If training civil servants and their agencies on human rights is to be effective it must be regular and resourced, especially in view of high staff turnover. It must be more than just a formulaic or 'tick a box' approach to human rights compliance.

So how can human rights be utilised by those without money, resources, or power?

For many of my clients, the issues foremost in their minds are the struggles of maintaining adequate affordable housing; ill-health; remaining in school or work; having adequate income support to pay for food, health care, pharmaceuticals, and other basic necessities; mental health issues; drug and alcohol addictions often induced by trauma; lack of social support, particularly for the elderly and those with an intellectual disability; and coping with discrimination. These issues are mainly economic, social and cultural rights, although many may have a civil and political rights dimension that can come into play. All of these rights need to be dealt with in a holistic way rather than taking a 'cherry picking' approach to human rights.

What my clients want above all are solutions to their problems, a decent standard of living and to be treated with decency and respect. All of these elements are consistent with human rights which governments are required to adhere to and/or progressively work towards.¹⁹ These items go beyond what can be provided by litigation; they extend to how people are treated in their day-to-day lives by others in the community, the government and its agencies. They also relate to the provision of resources and services that are necessary for an adequate standard of living.

Politicians and bureaucrats can easily claim that human rights are being adhered to but these claims may not be accurately accord with the experience of people on the ground.²⁰ Accordingly, for compliance to occur it is not merely a matter of self-auditing by Parliament and the civil service but also measuring the experience of people affected. In a modest trial of research methodology, Mary Anne Noone and I (Curran and Noone) have endeavoured to develop a process for measuring people's experience of human rights which could be utilised to fill this void. This will be discussed later in this article.

Beyond Formal Legal Structural Approaches: the potential for human rights protection

Evans, noting the reticence of national government in Australia to implement a bill of rights, has explored ways in which human rights compliance might be integrated into the policy-making and legislative process and he sets out a constructive proposal.²¹ He has examined the use of Regulatory Impact Statements on legislation and policy initiatives and their independent oversight by the Office of Regulation Review and argues that similarly, a model for Human Rights Impact Statements²² could be adopted with Statements to be reviewed by a statutory entity such as the

Human Rights and Equal Opportunity Commission. He notes the limitations of parliamentary scrutiny committees, which still have a place, but argues that early on in the process, there are opportunities for human rights considerations to inform policy analysis and deliberations as part of the existing repertoire. Kelly has observed that the institutionalisation of human rights at a policy-making and legislative level will be 'invisible to practitioners and the public, in many respects it is where the biggest impact of the Act²³ will be felt'.²⁴

This author argues that similarly, and as a complement to human rights mechanisms involving the Executive, Parliament, the civil service and the courts, mechanisms are needed to benchmark and measure people's actual experience of human rights compliance on the ground. This then compliments such policy-making initiatives to ensure that the bold statements about human rights compliance by both politicians and bureaucrats can be tested and verified. Such a measure brings the notion of human rights and democracy together as those who are likely to be affected by government legislation, policy and its administration are able to share their experience as befits participatory democracy.

Unfortunately, this proposal will be met with initial resistance as those in power rarely wish to hear the negative elements of their policy's impacts. However, if parliamentarians want to stay in touch, develop good policies and avoid criticism, having information on a regular basis on how people's human rights are affected by policies on the ground can lead to better and more informed policy-making. It averts pitfalls before they occur. Both the positive and negative aspects of policies may also be identified and give improved opportunities for fixing unintended consequences of legislation, policies and administration.

To this end, Curran and Noone in a recent modest trial have explored a new methodology that seeks to measure people's experience of human rights. This demonstrates that the task is not impossible. It is the funding for the conduct of such research that will be critical if the rhetoric around human rights implementation is to be tested in the community. In view of modest funding, the trial of the methodology examined only one human right: the right to social security.²⁵ The approach used internationally recognised rights ratified by Australia; developing indicators as to what would be needed were the right to be implemented; measuring the experience of people by benchmarking them against the indicators required for the human rights to be adhered to; and drawing conclusions. The details of the methodology and the outcomes of this research are articulated in a conference paper and in a recent report.²⁶ The methodology could be utilised more extensively in the future to test people's experience of a range of other human rights through the use of focus groups and, only where appropriate, surveys as occurred in the research project. In addition to the need to measure people's actual experience of human rights, there are further measures that need to be adopted if vulnerable and marginalised groups are going to reap any benefits from human rights mechanisms.

The Problems for Vulnerable and Marginalised Groups: a need for greater knowledge, capacity, support and capability

The research of Curran and Noone (which was very modest due to limited funding; the small sample of people who participated in the suburb of West Heidelberg; and the fact it was only a trial of new methodology) revealed that service providers as well as service users had very little knowledge or understanding of social security as a human right or their rights at law. The overwhelming majority of participants had little information, knowledge or understanding of the methods by which such treatment could be addressed, including that there were legal aspects to the problem and that legal advice could be sought. Few people were aware of their rights or remedies when their right to social security was infringed or when Centrelink officers treated them inappropriately.

Participants expressed a high level of fear about reprisals for complaining about their treatment, as

many service users believed that if they challenged a decision or their treatment they might jeopardise their remaining payments.

Without information and knowledge about the right to social security and the norms of appropriate treatment and in the absence of the capacity or confidence to pursue the right, it was unlikely that the right was going to be realised. Hence the international benchmarks for the right were not met.

When a right is threatened or curtailed, knowledge and the capacity and confidence to exercise that right are necessary pre-conditions to receiving an effective remedy.

The research by Curran and Noone revealed participants had little knowledge, capacity or confidence and were unable to exercise their rights even in the context of likely infringement of their rights. Supportive of these research findings are findings of Rebecca Sandefur, who conducted research into money and housing problems in the United States. She states that '[t]he implication of this body of research is that people whose social position is near the bottom of an unequal structure will be the less likely to take actions that might protect and further their own interests.'²⁷

In addition, research findings (again consistent with Curran and Noone and with Sandefur²⁸ in the United States) by the United Kingdom's Legal Services Research Centre (LSRC) notes that the results from their 2004 Civil Social Justice Survey across England and Wales found that often people thought that seeking advice would make little difference; they had uncertainty about what to do and where to get help or they felt that nothing be done. Self-esteem affected their ability as well as entrenched avoidance behaviour that was often linked to previous experience, life circumstances and the availability of support networks. All of these factors were found to come into play in why people did not take action and it was noted that these factors were often accompanied by anxiety.²⁹

This body of research reveals that people's state of knowledge about their rights, whether they have the capability, wherewithal and confidence to access their rights, can influence their ability to have their rights enforced. The Curran and Noone research also highlights the impediments for the people in West Heidelberg in accessing their legal rights in a context of a lack of knowledge and where the administrative system itself seems to compound these impediments.

Such research can inform the delivery of legal and other services in the context of the realities for vulnerable and marginalised members of our community. It points to not only the need for legal and other services to be more proactive, holistic, multi-disciplinary and outreach-based, but also suggests that community education is needed with improved strategies to deliver relevant information to vulnerable and disadvantaged groups in an accessible, timely and digestible form.

The LSRC has stated that:

Not doing anything about the problem points to the lack of knowledge about the seriousness of the problem and what action to take, and being able to handle a problem alone requires expertise, confidence and also monetary resources. It is certainly the case that sometimes people are more than able to deal with problems alone, and sometimes it might be reasonable to make no attempt to resolve the problem. No one strategy to deal with problems can be universally prescribed. However, particularly for those people who face problems of social exclusion, and may be the least able to solve problems themselves, clear information and assistance may be vital to enable them to escape from civil justice problems that they might well act to entrench or even worsen their predicament.³⁰

The Experience in the United Kingdom

The experience in the United Kingdom can provide some lessons on the important role of training

and education, not just of agencies working with people but also of members within the community itself, which can make a serious impact upon human rights compliance.³¹ It requires government and funders to recognise the role of non-government organisations in fearless advocacy on behalf of the community. It also requires significant commitment and resourcing to enable capacity building, empowerment and infrastructure for communities of marginalised groups and those within locations of disadvantage.

In the United Kingdom, subsequent to training of workers in agencies and local community members, there was a demonstrable increase in the use of the *Human Rights Act 1998 (UK)* by these people to raise issues around human rights non-compliance and unlawful activity.³² For these groups litigation was not an option for reasons of cost, a lack of access to legal advice or representation, the trauma of legal action and the nature of the adversarial system. In a manner largely 'invisible to practitioners and the public',³³ these workers and community members were able to raise agencies' non-compliance and breaches of human rights directly with those agencies and were able to secure better treatment and compliance with human rights standards. As stated in the introduction, this highlights that by taking only a legalistic approach to human rights, opportunities for clients can be lost. Human rights mechanisms offer potential and great opportunities for many vulnerable and marginalised in our community who often cannot access the legal system with its formal thresholds, procedures and significant costs.

Work done at this day-to-day level with agencies by advocates and citizens needs to be acknowledged and facilitated as it is a significant area in which human rights of all people can be enhanced. The groups in the United Kingdom who benefited from changes in practice due to the activities of these trained workers (which include lawyers, advocates and community services) have empowered citizens from a wide section of the population, from parents of school children and the elderly, as well as other disempowered groups such as people with a mental illness and people with a disability. The opportunities for negotiating with authorities for improved treatment based on these human rights frameworks need to be acknowledged and celebrated just as much as the formalised legal opportunities for greater compliance with people's human rights.

To properly arm advocacy groups, to locate them in areas and communities of disadvantage (as is occurring in South Africa) and to equip and train communities in how they can respond to human rights infringements is an area where the human rights frameworks have greatest potential.³⁴ This also requires advocacy groups themselves to be willing to be trained in human rights standards and for their organisations to endorse and support them. If this can occur then they will be better equipped to use the new human rights frameworks to the advantage of their clients/patients/community members.

Conclusion

If human rights are to be effectively protected and adhered to, then they need to be owned by all and be based on what civilises (concepts of decency; compassion;³⁵ social cohesion; humanity; ethics;³⁶ deliberation;³⁷ good will; and collaboration).³⁸ Those most likely to experience human rights intrusions also need to be protected and clear explanations as to why they are being protected need to be advanced coherently to the general population so it understands, owns and claims the rights for all.³⁹ In addition, it is imperative that those on the margins, who so often lack a space to be heard due to the lack of power, money, political clout and a willingness of the media to convey the matters that concern them, are given a voice .

A selective approach to human rights protection by limiting definitions of human rights only to the sphere of political and civil rights, as is the case with the Victorian, ACT and United Kingdom's human rights legislation, is unfortunate and reduces opportunities for fundamental reform for those most excluded and likely to have their human rights infringed. The language of human

rights, as Gearty argues, should give voice and represent the language of hospitality, kindness and compassion as well as providing an ethical frame.⁴⁰ South Africa's human rights framework took an expansive view of human rights which includes economic and social rights and accordingly enables much to be predicated on this foundation.⁴¹ In areas of health and social housing, the human rights framework under Chapter Two of their Bill of Rights has been successfully used to force the government to protect people in townships.⁴²

For a long time, there has been discourse which tries to devalue the economic, cultural and social rights in favor of civil and political rights. They should be seen as interdependent, interrelated and indivisible with other rights, rather than as rights in competition with each other.⁴³ They are 'indispensable for dignity and free development of his [or her] personality'.⁴⁴ It is access to conditions of subsistence, health, education which, in an extended sense, allows for liberty, freedom and participation. Without basic conditions for life to flourish and be enabled, it is unlikely that these civil and political rights will be owned by all. Human rights protection must include equal access to the conditions outlined in human rights instruments, including equal access to resources. It must build on the conception of human rights by allowing for the emergence and self-development of people's goals and capacities over time⁴⁵ otherwise human rights protections risk gaining the reputation for being the purview of the exclusive and unpopular rather than being owned by everyone by virtue of merely being human.⁴⁶

