

Making Human Rights Matter: How can Rights Frameworks Help us create a Better Community?

Are human rights really just abstract concepts as their critics claim? This lecture will look at what a human rights framework can mean to a society in terms of improving outcomes for the most disadvantaged. It will consider models and experiences from other jurisdictions and argue that human rights are not only inherent and relevant but can provide a basis upon which to improve the fabric of our community.

*Larissa Behrendt is Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning, University of Technology, Sydney. She has a law degree from the University of New South Wales and a Masters of Laws and Senior Doctorate of Jurisprudence from the Harvard Law School. Her current research is focused on Indigenous governance and Indigenous policy issues. She is the author of *Achieving Social Justice* and the award-winning novel, *Home*. She is a Director of the Bangarra Dance Theatre and the Sydney Writers Festival. Larissa also sits on the Board of the Museum of Contemporary Art. She is a Judicial Member of the Administrative Decisions Tribunal and the Serious Offenders Review Council. She is also a columnist for the *National Indigenous Times*.*

Ian McEwan, in *Enduring Love*, wrote: “A good society makes sense of being good.” This simple quote reminds us that the kind of society we have is important and that the best societies value qualities and ideals that improve the fabric of our community.

In his Boyer Lectures, *Between Fear and Hope*, Martin Krygier writes that:

... there are two very different kinds of questions constantly lurking behind debates over the worth of societies and institutions. Crudely put, one question is whether these societies and institutions could be worse; the other, whether they could be better. ... Some people cherish their society and its institutions simply because they have experienced or know of much worse. Others denounce the same things because they hope for much better.”¹

¹ Martin Krygier. *Civil Passions: Selected Writings*. Black Inc Press, 2005. At p.147.

What Krygier notes in this observation is the extent to which we can be reluctant to encourage change in our key institutions if we are happy enough with the way that society is going but see institutional change as an opportunity of altering the status quo if we feel that we have been let down by it.

To tell a story – a perspective – from the side that, as Krygier says, would “hope for much better”, I will use the example of my own people. And I do this because I have argued elsewhere – and firmly believe – that we should judge societies institutions, laws and policies not on whether they work for those that are already well off but whether they work for the poor, the marginalised and the dispossessed. How they work for those who are the least well off is the test by which we should value their effectiveness, fairness and justness. And in Australia, Aboriginal people are the best litmus test of this principle.

This is not a view that seeks to merely promote the views of minorities of that above others. Instead, it is a position that says that when those who are less well off in our society can find

protection in the laws of this country, we have a better system of governance, a better society, and this is indeed a good outcome for every Australian.

This notion that our human rights record is an important benchmark for our society understands what Martin Luther King meant when he wrote, “Injustice anywhere is a threat to rights everywhere.”

1. No Safe Place for Rights

Aboriginal people who see their cultural rights eroded, native title interests extinguished, are over-represented in the criminal justice system and experience racism in the delivery of basic services do not share such an uncritical view of the performance of our legal system in protecting rights. While the experience of Indigenous people in modern Australia offers many examples of the infringement of basic human rights – dispossession, genocide, cultural genocide, lack of access to services, racism in the provision of services – the policy of removing Aboriginal children

from their families is one that also leaves a legacy in Aboriginal communities today.

In 1997, our High Court considered a case brought by several members of the “stolen generation” and a mother her had lost her child to the policy. The Aboriginal plaintiffs argued that the policy of removing children infringed on some of their basic human rights including the right to due process before the law, equality before the law, freedom of religion and freedom of movement.

That the High Court found that Australian law did not protect any of those rights is as instructive as it is sobering. It tells us that many of the rights that Australians would believe are protected by the laws of this country are actually not protected at all. And the decision in the Kruger case also tells us that where there are gaps in rights protection in Australia, breaches of human rights are most likely to be experienced by the culturally distinct, socioeconomically disadvantaged and the historically marginalised.

Chief Justice Gleeson has referred to these gaps in protection of human rights as constitutional silences and a Bill of Rights is an important mechanism in seeking to remedy the harshest impacts of those omissions and indeed become an important safety net against any tyranny or abuse by government.

In the current conservative climate, there has been a failure to appreciate the important roles that respect of rights plays in balancing the freedom of the individual from the tyranny of government. Discussion of rights tends to be dismissed as the folly and luxury of the elite who are out of touch with the realities of the day-to-day lives of the masses.

This simplistic rhetoric fails to appreciate the important role rights play in the small details of people's lives. Eleanor Roosevelt described this role most eloquently:

“Where, after all, do universal human rights begin? In small places, close to home – so close and small that they cannot be seen on any map of the world. Yet they *are* the world of the individual person; the neighbourhood he lives in; the school or

college he attends; the factory or 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 here, they have little meaning anywhere.”

It is wrong to think that our society travels in a lineal progression where over time we become more tolerant and understanding and, even if we occasionally take a step back, we eventually take two steps forward.

Thomas Jefferson wrote: “the natural progress of things is for liberty to yield and government’s to gain ground.” It is as true today as when he penned those words in 1788, the year in which the colonisation of Aboriginal Australia began. And Aboriginal people have experienced in recent years the infringement of human rights that cannot be rectified. Native title that has been extinguished will never be regained, cultural heritage that has been destroyed will never be recovered and failure to access adequate health services and opportunities for basic standards of education

are difficult, sometimes impossible, to rectify. In fact, these losses are a reminder of why it is important to have strong rights protections in place when society moves away from valuing the importance of the rights of the vulnerable.

And it is these experiences of the infringements of the rights of the vulnerable that need to remain our focus. It is not enough to say that our human rights standards are better than other countries who have more brutal and systemic abuses of rights than those that occur on Australian soil. I firstly question why it is worse for an Aboriginal child to experience third world levels of health care than for the child actually living in the third world. And secondly, it is not enough that we are better than the worst offenders on a human rights report card; we should be the best society that we can be.

The following has been attributed to Thomas Paine:

“When it shall be said in any country in the world, “My poor are happy; neither ignorance nor distress is to be found among them; my jails are empty of prisoners, my streets of

beggars; the aged are not in want, the taxes are not oppressive; the rational world is my friend, because I am the friend of its happiness”: when these things can be said, then may that country boast of its constitution and its government.”

I think we have seen many examples in recent years that highlight that we are no where near the point at which Thomas Paine would allow us to be complacent about rights. And we do not even need to look to Indigenous people to catalogue the many ways in which the rights of all Australians remain unprotected and vulnerable.

There is a fear that has cloaked the western world since the attack on the world trade centre on September 11, 2001 and has been fuelled by political leaders who emphasised the threat to life, security and a way of life that such attacks symbolised. It quickly became apparent that one of the first casualties in this climate of fear was the voice of dissent.

In many countries, particularly Australia where we have no entrenched tradition of rights protection within our modern legal and constitutional structure, we have seen the continual erosion of basic and fundamental human rights in legislation aimed at fighting a war on terror. We have, as a country, perhaps eagerly, perhaps unwittingly, sacrificed rights such as the freedom of speech, rights to privacy and due process before the law for increased, unfettered power in the state to fight a threat that makes people fearful but has, to date, been more imagined than real.

And, in Australia, the fear of the “other” and difference is not a new phenomena and we can see its genesis in the earliest days of the Australian state with the first law that passed through the Australian parliament in 1901 enacting our “White Australia policy.” And we can see it in the many policies that regulated the lives of Aboriginal people particularly the policy of removing children from their families as part of the philosophy of assimilation. These were policies crafted by the fear of difference in the past.

In today's climate and culture of fear, we have ceased to value the power of free speech and have been almost passive to the increased erosion of the voice of dissent. From the cut in federal funding to monitoring bodies such as the Human Rights and Equal Opportunity Commission, the dismantling of organisations such as the Aboriginal and Torres Strait Islander Commission (or ATSIC) that advocated alternative policy positions and lobbied international human rights bodies and the clauses in contracts such as those used in the out-sourcing of the job-network that prohibit public criticism and comment, we have seen the voice of the marginalised silenced. We will see this even more with the tightening of the rules around tax-free status that will prohibit public comment and advocacy on policy matters. Why restrain a body whose sole function is provision of food and shelter to the poor from commenting on welfare and poverty policy? How are we as a society enriched if those voices are silenced from public debate?

Perhaps the erosion of the freedom of speech and political thought is best highlighted by the Chief Minister of the ACT, Jon Stanhope. At the Australia Day ceremony in 2003, he gave an address and in it he mentioned that he was ashamed, as an Australian, of the policy that saw the locking up of the children of illegal immigrants and refugees. As a result of these statements, his power to officiate over these ceremonies was revoked by the Federal Government. There were two questions for me about this: firstly, if the Chief Minister of the ACT cannot enforce his rights of free speech and political expression, what hope is there for a single Aboriginal mother with four children in Wilcannia? And secondly, why weren't Australians outraged about this blatant breach of Mr Stanhope's basic human rights?

2. A Bill of Rights

Rights such as access to education, adequate health care, employment, due process before the law, freedom of movement and equality before the law target the very freedoms that an

individual needs to be able to live with dignity. They are precious and they are inherent and should not be given merely at the benevolence of government.

Bills of Rights are not about curtailing the rights of the majority. And they are not about giving more power to judges. Bills of Rights are aimed at ensuring a better balance between the rights of individuals against the state and as such are more often an infringement on the rights of governments than the rights of people.

In this way, popular arguments against a Bill of Rights often seem shallow to those who have been at the receiving end of rights violations.

And that is why I support a legislative Bill of Rights. Constitutional Bills of Rights are stagnant and interpreted by the judiciary who retain the primary responsibility for balancing rights. By contrast, a legislative Bill of Rights means that the debates about how to balance the rights protected against other priorities remains in the public domain. It means that, when government's

debate the balancing of rights or propose to over-ride aspects of a Bill of Rights, this is a discussion that takes place in the public realm and allows citizens to become actively involved in that public debate about the way in which we balance and protect rights.

The effect of this can be seen in Canada where the experience of a legislative Bill of Rights, that preceded the Constitutional enshrinement of certain rights, led to a more heightened awareness amongst Canadians that they held certain rights against their government.

3. And why Not?

Rather than going through the usual list of arguments in favour of a Bill of Rights, I thought it would be a more interesting approach if I addressed some of the frequent arguments put forward against a Bill of Rights and explain why they do not persuade me.

One of the key arguments against a Bill of Rights is that under our legal system, rights are already well protected in our country through both the common law and legislation such as the anti-discrimination and sex discrimination acts. From an Indigenous point of view, this argument overlooks the many examples where relying on government benevolence has not been enough. The removal of children is one and heritage protection is another. When Doreen Kartinyeri sought to enforce heritage protection laws that were being repealed to ensure that the Hindmarsh Island Bridge could be built over her traditional and sacred land, the court told her that, if the federal parliament can grant heritage protection, it is free to take it away if and when it so chooses. From the continual extinguishment of native title rights to the abolition of a national representative structure, the experience of Aboriginal people often highlights how dependent we are on the benevolence of governments that too often do not have the best interests of Aboriginal people at heart.

More generally, though, where so much power does vest in the elected arm, it is good to have some mechanism to temper it. All Commonwealth countries have passed anti-terrorism legislation in the post-September 11 era. But every other Commonwealth country has seen the need to introduce a Bill of Rights into their own legal system that provides a basic minimum of rights protection for their citizens that confines the government's ability to erode rights. Even the United Kingdom, from whom we inherited our own legal system, has introduced a legislative bill of rights to offer their citizens a minimum human rights benchmark. We allow our government all the power without any of the checks, balances and benchmarks other democracies demand.

There is an argument that says that it is more appropriate for the elected arm rather than the non-elected arm of government to make decisions about rights. I support this to the extent that I prefer the legislative bill of rights model that keeps the action of balancing right in the public domain with judges having more of a

monitoring role. This allows for the general population to be much more involved with decision-making either through lobbying or at election time. However, I do not find the argument that judges are not capable of making decisions about human rights at all convincing. Every day the judiciary is involved with balancing rights – landlord against tenant, shareholder against Director, debtor against creditor, custodial against non-custodial parent – and there is no question of their capacity to make important decisions in those competing interests so it is curious as to why it is perceived that they would lack the capacity to do so in other contexts.

A further argument against a bill of rights would be that it is too inflexible and that rights that might be relevant now may not be so in the future. The right to bear arms, entrenched into the American Constitution, is perhaps the best example of that phenomenon. This again is an argument that really targets a constitutional rather than legislative bill of rights. This entrenchment is one of the reasons I don't like the constitutional

bill of rights model. By contrast, a legislative bill of rights can be fluid – a living document – that reflects society’s values over time.

There is the claim that a bill of rights should be rejected because it creates “a lawyer’s picnic” seems to value dislike of the legal profession above the rights of people and ignores the unfettering of the power of politicians. The experience in the ACT with its’ new Human Rights Act also shows how shallow these claims of increased litigation are. Under that legislative Bill of Rights, there have been few cases where the rights under the Act have been referred to and the overwhelming impact has not been on the hip pocket of lawyers but on bureaucrats who are now required to think about the rights of the citizens of the ACT when they implement policies and programs. That is, the greatest impact has been to make government more accountable to the people in the way it does business. When government wants to build a new prison, consideration has to be given to whether it conforms to human rights standards. When government wants to impose a new fee or fine, there must be a mechanism to appeal it and provide due

process. If government wants to create a new housing policy, consideration needs to be given to the implications of the rights protected in the bill of rights. In this way, a bill of rights makes the government accountable and transparent in the way it undertakes its duties.

Finally, in relation to specific groups such as Indigenous people, there is an argument that, in other jurisdictions that have had a bill of rights, such as the United States, human rights have not been protected. It is also run in relation to the fact that Stalin's Russia and Hitler's Germany supposedly had rights protections in this form. This is an argument that is based on two erroneous assumptions. Firstly, that a bill of rights will cure any rights violation. (It won't and I think that most advocates would only go so far as to say that it offers an additional buffer to or fettering of a government's powers over its citizens). And secondly, it assumes that laws act independently of the society by which they are created. They do not though they can sometimes lead to normative

change within that community and the impact of anti-discrimination legislation is perhaps a good example of that.

I have yet to find the argument against a Bill of Rights that convinces me that there is a need to be more cautious and I have seen too many cases that have convinced me that we should be more proactive about rights protections.

Bills of rights do not have to specifically mention the needs and experiences of minorities to offer them special protection. I would argue that all rights have a special resonance for Aboriginal and Torres Strait Islander people. The right to freedom from forced work, the right to take part in public life, rights to education and work and rights to a fair trial are fundamental human rights that have not been protected and the failure to do so has impacted on Indigenous people the most. For the members of the stolen generation who could not get redress from the High Court for the breaches of their human rights in the Kruger case, the protection of freedom of movement, freedom of religion, equality before the law

and the protection of the family will have particular resonance and significance.

4. Why Now?

If we are to have a society that values fairness, equality and justice, we must strive towards the vision of what Ghassan Hage calls a “caring society”. He writes:

“The caring society is essentially an embracing society that generates hope among its citizens and induces them to care for it. The defensive society, such as the one we have in Australia today suffers from a scarcity of hope and creates citizens who see threats everywhere. It generates worrying citizens and a paranoid nationalism.²”

In order to do that, we need to move from an “us” and “them” mentality and realise that the way to measure the effectiveness and fairness of our laws is to measure them against the test I identified earlier, namely, measure them against the way

² Ghassan Hage. *Against Paranoid Nationalism: Searching for Hope in a Shrinking Society*. Annandale: Pluto Press, 2003. At p.3.

in which they work for the poor, the marginalised and the culturally distinct. In order to do that, society needs to understand that when you extend benefits to those who are less well off, you do not have to give something up, you do not have to surrender anything, you do not have to lose, but you are securing the social fabric for everyone.

As Carmen Lawrence wrote in her book *Fear and Politics*:

We need a moral dimension to the public realm. We need an answering vision of justice and optimism. We need to learn to manage our fears and face a complex world.

A bill of rights not only has the capacity to strengthen the social fabric by creating a base line under which no citizen should fall in terms of their rights and entitlements against a government's abuse of power and human rights.

It also offers a chance to re-engage more Australian citizens with importance of participating in public debate and feeling that their voice matters.