Protecting Human Rights Conference: October 2, 2009

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Recent debate in Australia about how best to protect human rights has been conducted in the knowledge that we have much to learn from the experience of other jurisdictions. Thank you Professor Gardbaum, for your very thoughtful, and detailed, exposition of some of the key issues arising in other jurisdictions. I'm pleased, on behalf of Catherine Branson, President of the Australian Human Rights Commission, to present this response. And today, Mahatma Gandhi's birthday, is a most appropriate day to be discussing human rights issues.

Human rights protections are currently inadequate in Australia. Our system provides no protection from legislation that breaches human rights, beyond limited and patchy Constitutional rights; and too often no remedy to the individuals whose rights are breached as a result of the exercise of executive power.

As the National Human Rights Consultation was repeatedly told, Australia must do a better job of protecting human rights. And Professor Gardbaum’s paper confirms my view, and the view of the Australian Human Rights Commission, that the best way to do this is through an Australian Human Rights Act.

I want to offer a few observations in response to Professor Gardbaum's paper, particularly with respect to your comments about judicial power.

'More power to unelected judges' has become a mantra in Australia for many opponents of statutory human rights protection. So your analysis of how power is distributed under a Human Rights Act is particularly valuable. You suggest that in assessing models of Human Rights Acts, 'the relevant question is not whether there has been an increase in judicial power, but rather whether it is too much or too little'. In my view, the balance in the model being considered in Australia is the right one. It will not, as some have suggested, compromise our system of democracy.

It's worth remembering that a Human Rights Act is, after all, an act of Parliament. Opponents of a Human Rights Act are caught in a bind on this. They say we should place our faith in our elected representatives to protect human rights. But not if they should decide to do so through a Human Rights Act.
The fact is that an Australian Human Rights Act would be fundamentally
democratic. It would be an act of our democratically elected Parliament, setting
out the framework for human rights protections in Australia. And a Human Rights
Act would enhance Australian democracy: there would be a more open and
transparent consideration of human rights within our system of government; and
access to more information about the impact and operation of laws should lead to
a more active and engaged public.

A Human Rights Act obviously does give courts an increased role in protecting
rights. Lord Bingham of Cornhill has described the benefit of the UK Human
Rights Act as 'empowering the courts to uphold certain very basic safeguards…
for those members of society who are most disadvantaged, most vulnerable, and
least well-represented in any democratic representative assembly'.

A Human Rights Act should recalibrate the relationship between the courts and
Parliament. Parliament does not always get it right. Parliament does not always
fully contemplate the human rights impacts of the laws that it makes. We do want
the courts to have a say in how human rights are protected. And we do want
Parliament to listen.

But the role of the court is a clearly defined one, given to it by Parliament. The
point of the dialogue model being considered in Australia - and a point that is
made clear in Professor Gardbaum's paper, is that parliamentary supremacy is
maintained. We do need to remember that the Australian Constitution prevents
any Parliament in Australia from being completely sovereign. This aside,
Parliament has both the first and the last word. Before it exercises the final say,
Parliament should engage in a principled, serious and transparent consideration
of the human rights impacts of legislation, following a court decision.

Opponents of an Australian Human Rights Act seem again to lose their
confidence in our elected representatives at this point. they suggest that
Parliament may be unwilling to overturn an interpretation by a court with which
there is serious disagreement. The point of the dialogue model is, of course, that
they should not do so lightly, but it is not credible to suggest that in Australia our
Parliament is not clearly in control of the dialogue.

The great challenge facing us is to make sure that a Human Rights Act does
enable an active and engaged public, more fully informed about human rights, to
influence our decision-makers. Building a broad culture of human rights is critical
to making enhanced human rights protections a reality.

It's worth remembering that the interpretive principle that courts would apply
under an Australian Human Rights Act is not significantly different to the principle
of legality that is an established part of our common law. This principle is that
statutes should not be understood so as to interfere with fundamental common
law rights, unless Parliament has demonstrated an unambiguous intention to do so. Chief Justice French has observed:

Freedom of expression is one such fundamental freedom [recognised] by the common law. Another is personal liberty. It does not take a great stretch of the imagination to visualise intersections between these fundamental rights and freedoms, long recognised by the common law, and the fundamental rights and freedoms which are the subject of the Universal Declaration of Human Rights, and subsequent international Conventions to which Australia is a party.

An interpretive principle of the type under consideration for an Australian Human Rights Act is not a revolution. It is a careful development of the way our system currently works, and would not disturb the balance of power between our Parliament and our judiciary. It would strengthen the principle of legality, by supplementing the protected common law freedoms with a specific list of rights, agreed to by Parliament, that reflect Australia's international human rights obligations.

Another significant issue of power under the Human Rights Act, is the impact upon executive power. This was beyond the scope of Professor Gardbaum's paper, but I'll mention it just briefly. Under the model of an Australian Human Rights Act proposed by the Australian Human Rights Commission, and others, acts of the executive arm of government would be unlawful where they are inconsistent with human rights. Many - including me - would see this as a welcome counterpoint to the increase in executive power that we have seen over recent years, particularly in response to the threat of terrorism. And again, giving such a role to courts is consistent with the role of judicial review already given to them under the Administrative Decisions (Judicial Review) Act - or, indeed, in the case of the High Court, by the Constitution. It will not upset the balance of our democracy to extend this role, to ensure compliance by the executive with the rights to which the legislative have committed.

The final issue about which I want to comment is that of a remedy for violations of human rights. I was interested, Professor, in your comments about remedies where a law is found to breach an individual's human rights. The fact that there is no remedy for an individual who challenges a law under a Human Rights Act, and it is found to be inconsistent with their rights, does seem to be a significant shortcoming in the dialogue model.

We should also take note of the possibility of 'strong pressure' being placed on courts, to use the interpretive provision to protect the rights of an aggrieved individual, in the absence of a remedy where inconsistency is found. I am attracted, Professor, to your arguments that the model would be enhanced if the legislature, where it responds to a finding of inconsistency by amending or repealing the relevant law, also provides a remedy including either or both compensation, or retroactive effect. It seems to me inconsistent for there to be an individual remedy for a violation of human rights through executive action, but not
where a law itself violates a human right. We will need to think carefully about how best to address this issue, and it is one that the Commission will explore further in the next stages of the conversation about a Human Rights Act for Australia.

As many have commented today, we look forward to the publication of the report of the National Human Rights Consultation. We know that the majority of those who communicated with the Consultation favoured enhanced rights protection. We are about to enter a new phase in the discussion of how best to protect rights in Australia. Many of the people in this room will be extremely influential in the ongoing advocacy for better human rights protection. Many of you will also play a significant role in the design of both policy, and potentially legislative, responses to the Brennan report.

A Human Rights Act of the kind being considered for Australia is not novel. We’ve been reminded today of what we can learn from the experience of comparative jurisdictions: both those overseas, and those within Australia. An Australian Human Rights Act would build, not just on those experiences but also, most importantly, on our existing system of democracy.