



Submission No 43

Inquiry into Human Rights and Good Governance Education in the Asia Pacific Region

Organisation: Human Rights and Equal Opportunity
Commission

Contact Person: Dr Sev Ozdowski, OAM
Human Rights Commissioner

Address: GPO Box 5218
Sydney NSW 1042

**Human Rights and
Equal Opportunity Commission**



Human Rights Commissioner

Mr Adam Cunningham
Secretary, Human Rights Sub-Committee
Joint Standing Committee on Foreign Affairs,
Defence and Trade
Parliament House
Canberra ACT 2600.

Dear Mr Cunningham

Further to our conversation on Thursday 19 June 2003, I am despatching these thoughts as you suggested, which may assist the Sub-Committee's deliberations on the subject of human rights education. Please feel free to use the material as you see fit, bearing in mind that HREOC has separately completed a substantial response to many of the issues raised by the Committee.

Since my appointment as Human Rights Commissioner I have been active, via my National Human Rights Dialogue, in meeting as wide a spectrum of Australian community groups as possible, to discuss with them the broad context of human rights in Australia and its meaning to them. Under the web link www.humanrights.gov.au/human_rights/human_rights_dialogue/index.html you can see the kind of issues discussed, the groups met and the speeches delivered. Of particular relevance in this context is the televised address I delivered to the National Press Club in Canberra in February 2002 on the topic of: "Human Rights - a Challenge for Australia". In the same vein I would direct the Committee's attention to the very substantial body of material contained on the HREOC website under the "Human Rights Explained" module, which is accessible at: www.humanrights.gov.au/hr_explained/hr_in_australia.html. The common experience, however, arising out of all this effort, (bearing in mind the HREOC website is subject to an astounding "hit" ratio) is the lack of significant penetration, regarding human rights issues, into heartland Australian communities.

This is in manifest contradistinction to the broad community recognition accorded the anti-discrimination laws dealing with equality, which enjoy a profile that would be the envy of a multinational "for profit" mass marketing exercise. The way in which these equality laws have embedded themselves in the national consciousness over the last twenty years in an educative fashion, is quite remarkable. So given that the same effort has been applied to civil and political rights, why do they currently languish as the Cinderella of the Australian human rights story?

One of the more important reasons for this distinction, I believe, lies in the fact that the civil and political menu lacks for a "hook" that could more readily engage the attention of the general populace. Specifically, when discussing human rights concepts, one moves from vast universal themes analogous to a latter-day Homeric epic, to an everyday "common or garden" example of nothing much really. Imagine

Human Rights and Equal Opportunity Commission

Level 8 Piccadilly Tower 133 Castlereagh Street Sydney NSW 2000 GPO Box 5218 Sydney NSW 1042
Telephone: 02 9284 9812 Facsimile: 02 9284 9797 Complaints Info Line: 1300 656 419 Teletypewriter: 1800 620 241 (toll free)
Website: <http://www.humanrights.gov.au> ABN 47 996 232 602

yourself addressing a community group in a suburban setting anywhere in Australia and the challenge that presents in making civil and political rights relevant to your audience's everyday cares and woes! Most importantly, if you are able to make such a link, the ultimate solution of a report to Federal Parliament appears a little tame, compared with the robustness of the court sanctioned disciplines available under the equality provisions.

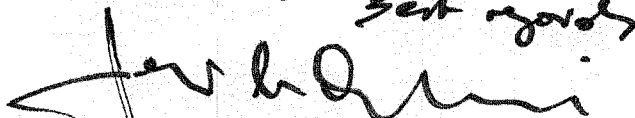
As I endeavoured to establish in my NPC speech, this failure to fully embed human rights in the domestic legal framework in a similar manner to equality rights, may also be unwittingly responsible for subtle community resistance to important social and economic improvements that our political leaders are keen for us to embrace. It is axiomatic that the deregulated economic model, espoused in Australia by governments of all persuasions is here to stay. We, the Australian community have been asked to take at face value the proposition, that if we are going to be competitive in world markets we must take more individual responsibility for our economic productivity, leaving government free to concentrate on basic service provision of health, education, defence and law and order.

But these dramatic changes are occurring against a backdrop of diminishing institutional protections. Trade unions face declining membership and relevance; parliament is dominated by the necessary discipline of "party line" voting; courts must work within the framework of the law and the media is ultimately responsible only to its shareholders. Little wonder then that your average Australian feels increasingly isolated and threatened by the "new economic order". Not to mention a strong sense of resentment towards the government that has seemingly foisted all this on him.

Arguably, an Australian Bill of Rights, giving rise to legally enforceable outcomes could restore some sense of balance. If individual Australians were confident that the requirement to become economically more self reliant was underpinned by a safety net of enforceable rights they might feel more relaxed about their increasingly deregulated world and it could also form the basis of a new "social contract" with the government.

It is my contention that human rights education in Australia will never really take hold, despite the very best efforts of organisations such as HREOC and others, until its direct relevance to everyday Australian lives can be demonstrated and this is most effectively achieved by a sanctioning capacity.

Yours sincerely

Best regards


Dr Sev Ozdowski OAM
Human Rights Commissioner
27 June 2003

"HUMAN RIGHTS - A CHALLENGE FOR AUSTRALIA."

Address By Dr Sev Ozdowski, OAM, Australian Human Rights Commissioner

NATIONAL PRESS CLUB

6 February 2002

Thank you. Mr Ken Randall, representatives of the media, ladies and gentlemen, it's so good to see you all here.

Allow me to start in the customary way. I would like to acknowledge the Ngunnawal people who are the traditional custodians of the land we are meeting at. Thank you for your invitation.

I would like to start with a story somebody told me after visiting Sydney Fish Markets. There was a man selling crabs. He had two baskets with crabs; one basket had its top open and the second was covered by a net over its top. A question was asked, why the difference? Why is only the second basket covered?

The man replied with a smile, "It's simple. The crabs in the first basket are local, the others are imports. You see our local crabs pull each other down so no one escapes. The imported crabs don't pull each other down. On the contrary, they climb over each other to escape. If I took the net off, there would only be a few of them left for cooking."

And that, ladies and gentlemen, describes our human rights culture. We focus on equality and cut tall poppies down. We feel uncomfortable about challenging boundaries, and we do not encourage others to search for opportunities. In fact, we have placed a huge value on equality, and this has worked for us well in the past but we have neglected our civil and political liberties. We simply take them for granted.

Or, if I could put it in Professor Brian Galligan's words, and I quote: "The tendency of Australian democracy was toward equality, [except of course for Aboriginals,] rather than individual liberty, levelling down as well up to standardise material circumstances."

Ladies and gentlemen, if you go away with nothing more from my speech today, I want you to remember two things: Firstly I will argue that this neglect of individual liberties in a time of increasing globalisation is starting to work against us. Secondly I will demonstrate that individual liberties are good for business and that a civil rights culture adds to individual enterprise and innovation.

So let's have a brief look at our human rights culture. What do Australians know about human rights? The answer is very little. I remember when I worked with Joan Kirner on the Centenary of Federation Report, we travelled across Australia asking people what they knew about the Australian Constitution. It was surprising to find that many Australians didn't even know that we had a constitution.

When visiting schools we looked at the libraries, and found no copy of the Constitution there. Similarly when I started in my job as Human Rights Commissioner and decided to establish a human rights dialogue throughout Australia. As a first step I accepted many invitations and went around the country speaking to people about human rights.

It was interesting to discover the extent of misconceptions, especially misconceptions about the linkages between Australia and the UN. Many people said: "Listen, human rights are un-Australian. They are coming from the UN and, you know, the UN is unaccountable, undemocratic, it includes Somalia, Afghanistan and a few other countries, so what do UN standards have to do with us?"

But nothing could be further from the truth. Australia gets involved with the creation of international instruments from the moment of drafting. Then, if appropriate, it signs it. Then it ratifies it. And it's still not obligatory for the Australian public. It needs to be incorporated into our domestic law to apply here and that requires full parliamentary involvement.

So basically any human rights which are enforceable in Australia, which originated from international instruments, apply here because of the will of the Australian Parliament.

Let's have a brief look at our attitudes towards human rights. We certainly have a very strong sense of social justice or "a fair go." We know what is right. We also expect that governments will continue to deliver this for us. But when it comes down to civil liberties, our attitudes are very different. And the legislative record is patchy.

Our founding fathers, in putting the Constitution together, looked at a number of different constitutions. They looked at the French and American, amongst others, and decided that there was no need to include a Bill of Rights into our Constitution. So we ended with a Constitution which has only five explicitly recognised rights.

What is especially important is not the rights which are included, but the rights which somehow missed out. To give you some examples, the Constitution doesn't cover freedom from arbitrary arrest or detention - a very topical issue. Nor right to a fair trial or due process - again a topical issue. Equality of all persons before the law, freedom of association, freedom of movement, freedom of thought, freedom of opinion - none of these are covered in our Constitution.

To come to the present, the prevailing wisdom is that with elected parliaments, independent judges, the common law and a free press our civil liberties are fixed. There is no need for further legislative review of this matter.

This uneasiness with our "civil liberty" was also demonstrated by recent parliaments trying to negate the 1995 Teoh High Court outcome. And Teoh established a very simple principle. The High Court held that government officials must take into account, when making decisions, the international human rights instruments which were ratified by Australia. It even went one step further. It said this should apply to all domestic legislation unless the Parliament explicitly states that international obligations are not to apply.

And yet, both the Labor and now the Coalition Government have attempted to legislate to negate the impact of Teoh.

Even looking at our own Commission, it reflects very much this culture which is in Australia. If you are discriminated because of your sex or because of your race or because of your disability and conciliation fails, you can go to the court and get the matter heard. But with civil liberties there is a big difference. The difference is that we can attempt to conciliate, but you can't go to the court if conciliation fails. At best we can only report to Federal Parliament and say, "Well, these particular provisions of, say, the international covenants on civil rights were breached."

Furthermore, what's disturbing in Australia is previously we have been quite willing to sacrifice our civil liberties to achieve other goals. So, for example during the first and second world wars, we locked up Australians of Italian and German origin. Post Tampa legislation, which was rushed through the Parliament, abolished judicial review for asylum seekers.

There are good historical explanations for these characteristics: the strongest legal protections of civil liberties exist in countries where massive human rights abuse was perpetrated, such as a war of independence or a violent revolution. Historically we were lucky on this score; we never went through the periods of massive social upheaval or oppression, with the notable exception of Aboriginal people.

The net outcome is that individual liberties are not the focus of Australian human rights culture, and consequently the legislative protections in this area are very patchy.

Now let's have a brief look at the international scene. Let's examine the world from which the imported crabs come. There is a large body of evidence supporting the proposition that the importance of individual freedoms must never be underestimated. Whether you deal with the civilising of society, or development of the arts or economic impact, individual freedoms are very important.

You can go back as far as 1215, to the Magna Carta. This document wasn't just a very important statement of human rights, it was also a document with enormous economic importance. It restricted the power of the monarchy by telling the king, "Listen, no new taxes without parliamentary agreement." This meant that kings could no longer wage war and pay for it later by seizing their subjects' money. This led to the subjects accumulating wealth which further restricted the powers of the monarch. Believe it or not, this laid the foundation for modern British democracy.

Focusing on more contemporary times, let's look at our key economic partners. We'll start with the USA, the world's most successful economy. It is characterised by strong protections of both equality and civil liberties. It has a constitutional Bill of Rights, one of the strongest in the world, which invalidates all legislation that is inconsistent with it.

It also has a very strong civil rights culture. There, individual freedoms are encouraged, giving rise to a can-do capacity, innovation and collective reward. Just remember the film "Erin Brokovich." It is a good illustration of civil rights at work in America. This woman was so determined, even in circumstances where everything was against her, despite these major difficulties she at least knew she'd got "rights"!!

Take the European Union, another world leader in human rights. As you would be aware, all States belonging to the EEU surrender part of their sovereignty to the human rights court in Strasbourg. Look at Canada, it legislated for a Charter of Rights and Freedoms in 1982; New Zealand and the United Kingdom, even our friends the Kiwis and Mother England have adopted human rights legislation.

Despite our belief that the common law protects our rights adequately, in my country of origin, Poland, the lack of civil liberties in communist Poland created enormous injustices to thousands of Poles. It also stifled economic activity. It effectively killed innovation and enterprise, and spawned a culture of dependency on the State.

So what conclusions can we draw from the international scene? First I would say that where individual rights are enshrined in legislation there's certainly a much better level of protection

for individuals from government action. And civil rights tend to stimulate a can-do mind set of innovation.

In addition, it must be said that there is a trend in the world, including the first world or maybe even especially the first world, to enhance human rights protections. So, why is Australia the only developed common law country without a Bill of Rights?

And it's curious in a way, that in the time of sweeping globalisation, Australia swims against the tide in terms of protection of individual rights. This, despite the Prime Minister's statement recently that our future is linked with engagement not isolation, that we need to be a part of the globalisation process. And, as a matter of fact, we are doing quite well out of it. We've got engagement with whole levels of globalisation processes, dealing with relaxation of trade barriers, World Trade Organisation references or greenhouse gas emissions at Kyoto to name but a few. And yet, consideration of our individual civil liberties has slipped through the cracks.

So what are the consequences of swimming against the protection of our individual liberties tide? There's a number of them, but I will mention only the most obvious. And this is that our legal system will become increasingly isolated from developments in human rights jurisprudence. This was one of the key considerations of the British Parliament when they introduced their human rights legislation.

In Australia we need to rely on our courts to tease out the rights which are implied in our constitution rather than having Parliament lay them out in a legislative menu. It is important to understand that we risk not being able to utilise the civil rights dividend to our economic advantage. In a world where both equality and liberty are part of the economic equation we cannot continue to rely on equality only while neglecting civil liberties. It's a bit like a one-legged runner in competition with healthy bodied runners.

The egalitarian nature of our society served us well in the past and we need to maintain our egalitarian ethos, however, we now need both legs to continue to be competitive in the globalisation race.

Over the last 30 years, massive structural change has occurred which has removed many of the traditional protections previously offered by our system. We can no longer rely on government to look after us. Just look at the changes in the labour market. Most of us are now on individual, performance-based contracts. Just look at small government, getting smaller, with less functions and less services to deliver. Traditional political protections have also retracted.

When you look at trade unions there is a decline both in its membership and influence; also our political processes, due to the dominance of major parties and party discipline, no longer provide the kind of protections they used to provide in the past.

Perhaps the media is the only one still able to champion individual liberties; but really does this approach best protect our rights?

The question to be asked is whether in a time of structural change with greater reliance on individuality enabling Australia to become much more competitive internationally, are our individual rights sufficiently well protected?

No wonder these structural changes threaten many Australians who feel they have lost control over their individual destiny. This partly explains the rise of Pauline Hanson who articulated some of these views but didn't deliver the answers.

To put it simply, there is a civil liberties black hole at the heart of these issues. It is adversely affecting our chances of becoming a more efficient, globally effective economy. All systems need harmony to produce optimal outcomes. Harmony requires checks and balances. It's evident that in contemporary Australia, individuals cannot adequately protect their civil rights.

This condition is not widely understood, but its effects are. The result is that people become change and risk averse, and feelings of aversion to change and risk do not deliver innovation and best practice.

The nub of my argument is that we've been so busy dismantling the old ways of doing business in our drive for efficiency that we've neglected to erect appropriate new safeguards for civil liberties.

So where do we go from here? One possible solution would be to legislate for our own Australian citizens' charter just as any Australian corporation worth its salt, even banks, have done with customers' rights - because it's good for business.

Such a citizens' charter would re-empower Australians, they will have less fear of economic deregulation, and become more open-minded about globalisation. The charter would provide an opportunity for government to re-engage with the Australian people, just like the Magna Carta established operating procedures for King John and his nobility.

Such a charter would provide our courts with Parliament-determined standards and, as the distinguished British jurist, Lord Scarman said: "If you are going to protect people who will never have political power, at any rate in the foreseeable future, not only individuals but minority groups, it won't be done in Parliament. They will never amass a majority. It's got to be done by courts and the courts can only do it if they've got proper guidelines."

Last but not least the charter would advance a culture of freedom and create a human rights mindset which I believe would clearly add to our international competitiveness.

So what kind of charter are we talking about? In my personal view, we shouldn't be too ambitious. We should limit it to basic freedoms. It should be statutory not constitutional and, above all, it must reflect Australian values and traditions. But it's really not up to me to decide what kind of a charter we need to have. I think we need to have a national debate to discuss it even though conduct of such a debate may be difficult in the present circumstances. Issues such as Tampa or the September 11 tragedy have added complexity to it. Tensions between protecting freedoms and protecting security are real and they are here. We need to discuss these issues. It must be noted that no one in the human rights community disputes Australia's right to protect our borders. But, this coupling of border protection with the asylum seekers issue has arguably produced mandatory detention and the elimination of judicial review.

Historically speaking, executive action without judicial review has always been an explosive cocktail which is why the time is right to have this debate about civil liberties.

Therefore, I call on the Australian business community to participate in such a debate. I call on them because of the linkage between individual freedom and economic prosperity. I also call on our political leaders and the media to re-engage the Australian people in this cause. In

time it may lead to the Australian Parliament establishing those standards for a court to interpret. Without the charter of individual liberties we cannot be adequately protected. Without the charter our economy will not reach its full potential. Without the charter, we would be like crabs in an open basket, pulling each other down and refusing to challenge the boundaries.