

VOICES IN THE HUMAN RIGHTS DIALOGUE

The individual victim and the Australian Human Rights Commission

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In late 2009, the National Human Rights Consultation Committee ('the Committee') released its much anticipated report into protecting human rights in Australia.¹ Running at over 400 pages, the report was a blueprint for enhancing the protection of human rights including the recommendation that the federal government introduce a Human Rights Act.² It is now part of history that, in 2010, the then Rudd Government decided not to introduce a Human Rights Act. Instead, the government will introduce a human rights framework, which includes establishing a Parliamentary Joint Committee on Human Rights and supporting human rights education. The government will review the framework's operation in 2014 and revisit the issue of human rights protection.³

During the Committee's nationwide consultation, and in the immediate aftermath of the report's release, there was a great deal of commentary from those for and against a Human Rights Act in the academic community, the media and elsewhere. The debate concerned the type of rights to protect, whether the 'dialogue' model was suitable for Australia, how best to protect the sovereignty of parliament and what the Committee termed 'hot button' topics, such as same-sex marriage and abortion. The role of the Australian Human Rights Commission ('AHRC') and how complaints about human rights violations should be resolved were largely absent from the debate.

From the outset, it is worth highlighting that the Committee had a limited mandate. Due to the failure of Constitutional Bills of Rights in the past,⁴ and also possibly what Hilary Charlesworth terms Australia's 'reluctance about rights',⁵ the government did not permit the Committee to consider constitutionally-entrenched human rights protection. The Committee was left to consider a human rights statute and other reforms that would strengthen the democratic process.⁶ The recent popularity of the dialogue model ensured that it received the most attention.

So-called because it sets up a dialogue between the courts, the legislature and the executive, the individual victim and the human rights institution appear to be silent participants in this conversation. During the consultation, little attention was devoted to the process of resolving a human rights violation, apart from the stage of a court hearing. As such, it was surprising that the Committee recommended an independent cause of action without considering the process of enforcing that right, particularly whether victims will be financially able to enforce their rights in the Federal Court and whether

other informal processes should be made available to them. However, the AHRC recommended that human rights complaints be dealt with in the same way as discrimination complaints, namely through its Alternative Dispute Resolution ('ADR') process but, as this article shows, aspects of this model have proved problematic in the anti-discrimination jurisdiction.

This article examines the role of the other participants in human rights dialogue — the individual victim and the AHRC. It considers the issues surrounding enforcement through the experience of resolving discrimination complaints. The second part considers the role of the AHRC and how it could move beyond the role of conciliator to become a crusader — an advocate — for victims of human rights abuses.

The AHRC's current role

In addition to its responsibility for handling and attempting to resolve complaints lodged under the four Commonwealth anti-discrimination Acts, the AHRC is responsible for protecting and promoting human rights. To fulfil its responsibilities, the AHRC can conduct an inquiry into an act or practice which may be contrary to human rights, and attempt to resolve the issue through conciliation. 'Human rights' are those contained in relevant international human rights instruments, such as the International Covenant on Civil and Political Rights. If the Commission considers that the act or practice is contrary to human rights and it is not appropriate or possible to settle the complaint through conciliation, it can report this to the Attorney-General.⁷ In addition, the AHRC can seek leave to intervene in litigation if the proceeding raises issues relating to human rights, review legislation as requested by the Attorney-General to ascertain its compatibility with human rights, report to the Government on any action needed to protect human rights, conduct inquiries into human rights violations, make submissions to Parliamentary and other inquiries in relation to human rights, and educate the community about human rights.⁸

The Human Rights Consultation Committee's proposal

The Committee's proposal would not radically alter that process. It proposed expanding the definition of 'human rights' to include the extensive list of human rights treaties that Australia has ratified, and giving the AHRC additional responsibilities for examining any Bill and any act or practice of a federal public authority to ascertain their compatibility with human rights.⁹

REFERENCES

1. The National Human Rights Consultation was run by an independent Committee chaired by Father Frank Brennan, with Mary Kostakidis, Mick Palmer and Tammy Williams. More information and the full Report is available at <humanrightsconsultation.gov.au/>.
2. National Human Rights Consultation, *Report* (2009), Recommendation 18.
3. Attorney-General's Department, *Australia's Human Rights Framework* (2010), 3.
4. See generally above n 1; Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia* (2009), Chapter 2.
5. Hilary Charlesworth, 'The Australian reluctance about rights' (1993) 31 *Osgoode Hall Law Journal* 195.
6. Above n 1, Appendix A.
7. *Australian Human Rights Commission Act 1986* (Cth), s 11(1)(f).
8. *Australian Human Rights Commission Act 1986* (Cth), s 11.
9. Above n 1, Recommendation 13.

Significantly, under the Committee's proposal, an individual victim would have an independent cause of action against a federal public authority for a breach of the Human Rights Act, except for economic, social and cultural rights, which the AHRC would hear.¹⁰ What the Committee did not spell out was whether cases would go directly to the Federal Court or follow the model in place for resolving discrimination complaints.

In its submission to the consultation, the AHRC recommended that all human rights complaints should be resolved in the same way as discrimination complaints.¹¹ Following this process, the victim would attempt to resolve the complaint through ADR provided by the Commission. If the model followed the discrimination approach, the victim would not have direct access to the Federal Court; they could only litigate the complaint if they were unsuccessful in procuring a resolution at the AHRC.

The vast majority of discrimination complaints are resolved through conciliation at the AHRC or they are withdrawn; very few reach the courts.¹² While that probability may calm those who fear that a Human Rights Act will lead to a flood of litigation, for those who would prefer that the legal system offered victims an effective process of resolving their complaint, it is worth teasing out some problems with the AHRC's model, some of which are drawn from the experience of resolving discrimination complaints.

Using ADR

The advantages of using ADR to resolve a legal dispute are that it is quick, cost-effective, less formal than litigation and the parties control the process and the outcome. It is certainly valuable to offer a less formal resolution process in the human rights arena because victims of human rights violations — like victims of discrimination — are often the most vulnerable members of the community, so participating in a protracted legal battle may not be in their best interests. Giving victims of human rights abuses the opportunity to resolve their dispute outside of a court hearing should be supported but the disadvantages of ADR must also be taken into consideration.

ADR may exacerbate power imbalances between the parties, particularly if lawyers are involved and they engage in aggressive, adversarial behaviour.¹³ This may be a significant limitation in human rights matters because the respondent will be a public authority with access to legal advice, while the victim may be unrepresented. The conciliator, as an impartial third party to the process, is expected to address any power imbalances but to do so they may need to play an active role in resolving the dispute, rather than simply facilitating a resolution.¹⁴

Limited effectiveness at addressing other violations

ADR does not necessarily protect the community's interests in addressing a human rights violation. There is no guarantee that the parties will negotiate a remedy that addresses the wider, systemic aspects of the violation or affects similarly situated individuals. The parties could simply settle the dispute with compensation, as is

common in discrimination settlements.¹⁵ This is foremost a problem if ADR is used as a case management technique, rather than as a forum for reaching a mutually acceptable resolution.¹⁶ It then becomes, as Fiss fears, the civil equivalent of plea bargaining. While the parties may settle the dispute, justice within the wider community may be left undone.¹⁷

Just as some matters are more suitable to resolve through ADR, others require a determination by a court. This includes matters that require immediate action, such as the eviction of a public housing tenant¹⁸ and determining the status of a refugee,¹⁹ and those matters with wider ramifications, such as for a group or community.²⁰ This suggests that the process of enforcing discrimination complaints should not simply be extended to human rights violations. Victims of human rights abuses should have direct access to the Federal Court, so that they can choose whether to resolve their dispute through ADR or litigation.

Privatisation of human rights violations

These problems will be exacerbated if human rights breaches are privatised. In the discrimination context, the terms of settlement are usually kept confidential and the AHRC does not catalogue the outcome of complaint, even in a de-identified form.²¹ If these practices extend to human rights complaints, the community will not be aware that there was a violation or how it was resolved, meaning that the violation will have limited educative or deterrent effect.

Trickle of litigation

Human Rights Act opponents feared that the courts would be flooded with human rights litigation.²² Proponents challenged this myth and it has not been borne out in the ACT or Victoria. If the experience of discrimination complaints is anything to go by, funnelling complaints to ADR prior to the Federal Court would result in only a trickle of cases reaching the courts. While the AHRC received 1779 discrimination complaints in 2006–2007, the Federal Court heard only 12 cases in 2007.²³ The risk is that if the vast majority of human rights disputes are resolved through ADR and very few reach the courts, limited human rights jurisprudence will develop, particularly from higher courts. This is the experience of anti-discrimination laws in this country: the High Court has never considered the Sex Discrimination Act 1984 (Cth) and has considered special measures — or affirmative action — on only one occasion.²⁴

Limits on the AHRC's role

A final problem is the restriction this process places on the AHRC's role. If the AHRC is the complaints handler and the conciliator, it must remain neutral. It cannot advise victims, nor litigate human rights claims on their behalf. Its enforcement activities will be limited to intervening in litigation and conducting inquiries into human rights violations. It is worth noting that human rights institutions in comparable countries do not play a role in resolving human rights complaints, whether or not the victim has an independent cause of action.²⁵ Instead, they are expected to be advocates for human rights.

10. The Committee recommended that economic, social and cultural rights should be non-justiciable and that the AHRC hear those complaints. The AHRC could not make a binding decision but would report to the government about a violation of such rights and the government would be required to table a response within six months of receiving the report: above n 1, Recommendations 13, 22, 31.

11. Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (2009), 67–68, 75–76.

12. This is the situation in other jurisdictions as well. See further Dominique Allen, 'Behind the Conciliation Doors Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 776.

13. Paula Gonzalez and Karen McCabe, *Giving Them What They Want – Challenges in Using the Adversarial and Interest Based Models of Statutory Conciliation* (2003), 9.

14. For example, as Hunter and Leonard proposed in their 'rights-based' approach to ADR: Rosemary Hunter and Alice Leonard, 'Sex Discrimination and Alternative Dispute Resolution: British Proposals in Light of International Experience' (1997) *Public Law* 298.

15. See further Allen, above n 11.

16. Rosemary Hunter and Alice Leonard, 'The Outcomes of Conciliation in Sex Discrimination Cases', (Working Paper No 8, Centre for Employment and Labour Relations Law, University of Melbourne, 1995), 1.

17. Owen M. Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073, 1075, 1085.

18. See, eg, *Director of Housing v TP (Residential Tenancies)* [2008] VCAT 1275.

19. See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562.

20. See, eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

21. It has recently introduced an online conciliation register which may address this information gap <hrcoc.gov.au/complaints_information/register/index.html> at 6 August 2010.

22. Summarised, above n 1, 291–292.

23. Allen, above n 11, Table 1.

24. *Gerhardy v Brown* (1985) 159 CLR 70.

Significantly, under the Committee's proposal, an individual victim would have an independent cause of action against a federal public authority for a breach of the Human Rights Act, except for economic, social and cultural rights, which the AHRC would hear.

The human rights framework that the Government will introduce does not change the AHRC's role or functions. The AHRC will continue to fulfil its present duties — conducting an inquiry into a human rights violation and reporting to the government on the status of Australia's human rights protection, intervening in human rights related proceedings and educating the community about human rights.²⁶

Towards 2014

In 2014, if the government considers giving victims an independent cause of action for a breach of human rights, the model for enforcing these rights must be carefully considered. Not only does the model discussed above silence the individual's voice in the human rights dialogue, it may also prevent their complaint from having any impact on the wider community.

The discussion above suggests that victims should have direct access to the Federal Court so that those who want their 'day in court' can proceed without delay, and ADR should be optional. This will not guarantee that the 'right' cases reach the courts or that individualised settlements do not dominate but it will open two avenues for victims to access justice. Funding for community legal centres and Legal Aid and the AHRC's role in educating the community about their rights will also play a part. If the AHRC is not responsible for providing ADR, it could fully assume the role of an advocate or crusader for human rights without any perceived conflict of interest. It is worth exploring this further, given that the AHRC's role did not receive much attention during the consultation.

The AHRC — conciliator or crusader?

The AHRC could be divested of its responsibilities for complaint handling and conciliation. A separate institution would need to be established to provide voluntary ADR in discrimination and human rights complaints. This model is used, though only for discrimination complaints, in the United Kingdom, Ireland and South Africa.²⁷ If the AHRC was divested of these responsibilities, it would be free to act as a human rights crusader, rather than a conciliator, without any expectation that it be neutral. It could then be given stronger enforcement powers. For example, the AHRC could act as an advocate for the victims of human rights violations by advising and assisting those considering legal action. In addition to intervening in human rights related matters, it could provide legal assistance to victims or institute proceedings in its own name.

The Human Rights Commissions in Northern Ireland and Ireland can perform both functions, while the UK's Equality and Human Rights Commission and the South African Human Rights Commission can litigate in their own names.

While some countries have chosen to separate human rights and discrimination between two institutions,²⁸ others have one institution which is responsible for both.²⁹ In Australia, it would make economic sense to continue to have one institution that could share resources and expertise. The institution could continue to tackle overlapping issues.³⁰ As a crusader, the AHRC would also be the most appropriate institution to regularly review the state of human rights in Australia, develop an action plan for addressing problems, and report to Parliament. For example, the New Zealand Human Rights Commission published *Mana ki te Tangata*, the first New Zealand Action Plan for Human Rights. This publication identified human rights achievements, prioritised areas for improvement and set out an action plan for addressing these issues over the following five years.³¹ The Commission then conducted a mid-term review of whether Government had met the requirements of the action plan.³²

Protecting the AHRC's unique status

There is a risk, however, that the government may punish the human rights institution with funding cuts or scaling back its powers for criticising or supporting litigation against the government. Therefore, to perform the crusader role effectively, the AHRC must be independent of government and its unique status should be protected. Other countries have attempted to do this in varying ways. South Africa's first democratic Constitution recognises the Human Rights Commission as one of the seven institutions which support democracy. The Commission is subject only to the Constitution, and other State organs are obliged to assist and protect it 'to ensure... [its] independence, impartiality, dignity and effectiveness.'³³ Similarly, the Human Rights Commissions in Northern Ireland and Ireland were established as part of the Northern Ireland Peace Agreement in 1998.³⁴ Both institutions arose out of complex political negotiations and the advent of a new social order, but jurisdictions with less tumultuous pasts have also acknowledged the importance of human rights institutions. In its inquiry into the proposed Equality and Human Rights Commission, the Joint Committee on Human Rights in the United Kingdom said that the government must recognise that there is a class of bodies which have a

25. The UK Equality and Human Rights Commission, the NZ Human Rights Commission, the Canadian Human Rights Commission, the Northern Ireland Human Rights Commission and the Irish Human Rights Commission do not play a role in resolving complaints relating to their respective human rights instruments. The South African Human Rights Commission provides ADR services but victims also have direct recourse to the courts.

26. The government did commit to giving the AHRC an additional \$6.6 million over four years so that the Commission can expand its education role: above n 2.

27. The Advisory, Conciliation and Arbitration Service, the Equality Tribunal and the Commission for Conciliation, Mediation and Arbitration respectively. The South African Human Rights Commission also provides ADR services.

28. See, eg, Northern Ireland and Ireland.

29. See, eg, New Zealand, South Africa and Britain.

30. The range of human rights issues that the AHRC has worked on can be found at <hrcoc.gov.au/Human_Rights/issues/index.html> at 6 August 2010.

31. NZ Human Rights Commission, *New Zealand Action Plan for Human Rights* <hrc.co.nz/report/#english> at 6 August 2010.

32. *New Zealand Action Plan for Human Rights, Mid-Term Review* <hrc.co.nz/hrc_new/hrc/cms/files/documents/08-Dec-2008_11-08-51_Mid-Term-Review_Action_Plan_Human_Rights.pdf> at 6 August 2010.

33. Constitution of the Republic of South Africa Act No 108 of 1996, s 181(3).

34. *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland* (10 April 1998), Strand Three.



'distinctive constitutional role' and were established to act as a check on the abuse of executive power. The Joint Committee termed these bodies 'independent national institutions supporting democracy'³⁵ and said that the new human rights institution must be designed with this 'special status in mind'.³⁶ The Joint Committee proposed the following features for the UK's equivalent institution to the AHRC:

- statutory guarantees of independence from both the executive and Parliament;
- a system of funding independent of direct ministerial control;
- independent staffing arrangements;
- statutory involvement of a parliamentary body in approving and overseeing its budget and strategic plans;
- parliamentary involvement in key appointments; and
- direct reporting to Parliament.³⁷

This article does not propose to enshrine the AHRC in the Australian Constitution but it does suggest that the UK Joint Committee's recommendations should be considered. If the AHRC is to act as a crusader for the victims of human rights abuses and enforce the law, the Commission's independence and special status should be recognised and protected. To perform its role most effectively, the AHRC cannot operate in fear of government reprisal.

Conclusion

The 2009 National Human Rights Consultation was an ideal time to consider the process for resolving

human rights disputes and re-examine the AHRC's role. However, little attention was devoted to either of these issues. This article highlighted some of the issues around designing a system to resolve individual human rights violations. While ADR is valuable to this jurisdiction, it also has significant drawbacks. Instead, the process needs to be flexible so that violations reach the courts and resolving human rights complaints does not become privatised in the same way as discrimination complaints. The benefits of enabling the AHRC to assume the role of human rights crusader were highlighted. The Commission could perform such functions as advising and assisting victims, intervening in litigation, reviewing the state of human rights in Australia and continue to conduct national inquiries and educate the community. When the issue of human rights protection is revisited in 2014, if the result is an independent cause of action for breach of human rights, the government must not only establish the machinery to protect human rights but also give victims access to an effective procedure for enforcing their rights and establish an independent institution that can monitor, promote and enforce human rights.

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35. House of Lords and House of Commons Joint Committee on Human Rights, *Commission for Equality and Human Rights: The Government's White Paper (Sixteenth Report of Session 2003–04)*, 19.

36. *Ibid.* 18.

37. *Ibid.* 19.