# Implementing human rights — the way forward

**Peter Bailey***

When considering the way forward in terms of the implementation of human rights in Australia, it is appropriate to attempt to identify some issues that require attention if the cause of human rights and the embodiment of human rights standards in Australian law are to prosper. Four issues will be dealt with. The first, concerning proposals to have a 'Human Responsibilities Commission', is of immediate import. The other three, relating to the incorporation/transformation argument about international law, to the modes of implementation of human rights standards in Australia, and the need to change Australia's legal culture, relate to the longer term process of building human rights into the legal system.

## A Human Rights and Responsibilities Commission

It has been proposed that the Human Rights and Equal Opportunity Commission (the Commission) should be renamed the Human Rights and Responsibilities Commission.[1] The first point that needs to be made is: where has the 'equal opportunity' gone? The 'equal opportunity' addition to the 1986 Commission's title was made both to differentiate it from the 1981 Human Rights Commission and to include a specific reference to the International Labour Organisation (ILO) Convention 111[2] that was (usefully) added to the 1981 Commission's terms of reference. But the use of 'responsibility' in the Commission's title is of a very different order and appears not to reflect, as did the 1986 change, any addition to the Commission's jurisdiction. The proposed change seems to be in a direction of decreased enforcement of human rights in Australia.

The second point concerns the implications of introducing the notion of 'responsibility'. So far there seems to have been no substantive public discussion of

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1 This proposal was included in the Human Rights Legislation Amendment Bill (No 2) 1998, the first clause of which proposed deletion of the words 'Equal Opportunity' in the title and the inclusion in their place of the word 'Responsibilities'. The Bill lapsed when the Commonwealth Parliament was dissolved in September 1998 for an election.

2 International Labour Organisation Convention No 111 on Discrimination in Employment and Occupation, operative June 1960.

the issues the proposal appears to raise. Initially I expect that most people would be inclined, in today's climate, to support the idea. It suggests that there are responsibilities that need to be borne in mind by all, even if they are predominantly interested in making rights claims. Australians may be entering a period when the hard face of economic reality demands that people are reminded that the State cannot do everything: that individuals will in future have to assume responsibility for at least some of the functions that Australians have come to expect of the State. However, a closer analysis of the proposal to incorporate 'responsibilities' into the Commission's charter shows it to be at least muddle-headed, and perhaps perverse or worse.

The concept behind the Commission is that it is to help people, usually in powerless or disadvantaged situations, to assert their human rights and also to assert their right not to be discriminated against and, in so doing, to be assisted by an agency of the State to achieve at least formal equality of opportunity. A deconstructionist approach would ask what a 'Responsibilities Commission' would do. An appropriate parallel might reasonably be that its purpose in relation to responsibilities is to remind the power-holders in the community (for example governments, large firms, parents) of their responsibilities, and in some way to assist them to discharge those responsibilities effectively. If so, what a good idea! The revamped Commission could start by reminding the Commonwealth Government that it has not provided proper remedies in relation to the existing machinery, particularly in the human rights jurisdiction, of the Commission. That is, it has not acted responsibly. It has too easily limited the application of the human rights functions of the Commission to acts and practices of the Commonwealth, not even giving those human rights functions the benefit of the weak enforcement processes available under discrimination law (themselves too narrowly defined).

Sadly, there is little doubt that the idea of including 'responsibilities' in the Commission's title is *not* to assure people that the Commonwealth will introduce stronger enforcement machinery for its human rights functions. While it should be recognised that, prompted by the *Brandy* decision,[3] the Commonwealth is working towards more direct enforcement for the important part of human rights covered by unlawful discrimination legislation, it has not demonstrated any sense of responsibility for strengthening the enforcement processes of the general human rights functions of the Commission. The general human rights functions of the Commission affect a wide range of people. The rights involved are those set forth in the International Covenant on Civil and Political Rights (ICCPR), in ILO Convention 111,[4] in the Convention on the

3 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

Rights of the Child[5] and in the three original and one added Declaration of rights. The originally scheduled Declarations relate to the rights of the child[6], of disabled persons[7] and of mentally retarded (sic) persons.[8] The more recently declared declaration relates to the proscribing of all forms of religious intolerance.[9]

Given these criticisms, it is worth looking more closely at the meaning of the word 'responsibility'. The Macquarie Dictionary provides two main definitions. The first states that 'responsibility' involves a situation in which a person or body is answerable for something in their control. Thus a minister is responsible to the parliament for the general operations of her/his department. Presumably that definition is not relevant to the idea of adding the responsibilities concept here as there appears to be no attempt to make the Commission itself more answerable for the work it does in either the general human rights area, based broadly on the provisions of the ICCPR and the Declarations, or in the anti-discrimination or employment area, based on a range of other international instruments and the supporting discrimination legislation.

The second main definition is that 'responsibility' arises when a person accepts a related burden. In this meaning, responsibility is a state or fact of being responsible, for example, for one's children. This is another facet of accountability but it does not appear to be an operative concept in the Government's proposals. Indeed, the reverse seems to be the case. If anything, governmental criticism of the Commission is that it has been too zealous in its acceptance of its role of standing in support of people to whom it is, in a substantive sense, accountable or responsible: those who perceive their human rights have been infringed.[10]

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4 The ICCPR was included as a schedule to the original *Human Rights Commission Act 1981* and the ILO Convention was added in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

5 The Convention on the Rights of the Child was declared under s 47 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) on 22 December 1992.

6 Declaration of the Rights of the Child, November 1954.

7 Declaration on the Rights of Disabled Persons, December 1975.

8 Declaration on the Rights of Mentally Retarded Persons, December 1971. The three declarations were annexed as schedules to the 1981 legislation and this was repeated in the 1986 Act.

9 The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief was declared for the Commission on 24 February 1994.

10 Further weight is added to this comment by reference to the fact that in the Human Rights Legislation Amendment Bill (No 2) 1998 (see above, note 1) proposals 21 and 23 are to the effect that the Commission will lose its power to determine when it should seek a court's leave to intervene in a case. The proposals require it to obtain the approval of the Attorney-General before it can exercise that power.

What I fear is something much more unpleasant and insidious. It is that 'responsibility' in the minds of the proposers is a perversion of either or both of these definitions. In each case the perversion applies the responsibility concept to the disadvantaged person or group. Under the first definition — that responsibility exists in a situation in which a person (power-holder) is answerable for something in his or her control — the perversion applies the concept to the disadvantaged (powerless) person. So, for example, if you are an Aborigine you had better stop malingering and get well; or you should brush up and get a job. If you are a woman who is discriminated against, you should perform better and so stop your employer from being able to discriminate on what appears to the employer to be good grounds. If you have AIDS, then you had better face up to your folly and be a responsible person and not complain when someone discriminates against you, because it is your fault. You, the powerless person whom the legislation was originally intended to empower, must now become 'responsible' and fix yourself up.

Under the second definition — by being responsible, you accept the associated burden — the perversion again applies the concept to the less powerful person. So if you are lucky enough to have a job, you had better be responsible and accept that your employer is entitled to work you too hard; or if you are a disabled person, you should accept your disability and not try to claim that you have been discriminated against because of it. You must accept that it is up to you to behave well, to overcome your disability, to take your own steps to rectify the position, and to shape up with the rest.

It is not easy to determine what the proposers of the introduction of the responsibility concept have in mind. However, it may well be that they have in mind the classical liberal idea of equality. We are all equal. The community is best served if, fully aware as good citizens of our responsibilities, we are all left to look after ourselves.[11] The difficulty with this kind of vision is that it has not in the past proved effective in empowering the less advantaged, even if it has not led in all cases to the perversions identified above.

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11 Some of the passages in the Second Reading Speech on the Human Rights Legislation Amendment Bill (No 2) 1998 (House of Representatives, Hansard, 8 April 1998, pp 2829-2830) seem to bear out this hypothesis: 'The Commission and its members will have a common responsibility to protect and promote human rights for all Australians ... [T]he new Commission's priority will be to educate Australians about human rights and discrimination, and to help them to understand their responsibility, as members of the Australian community, to respect other people's human rights ... The Bill provides further evidence of this Government's commitment to the effective and equitable protection of the human rights of *all* Australians' (emphasis given in the Attorney-General's press statement of that date).

In short, in a selfish and economics-driven world, what the proposal for adding 'responsibilities' to the Commission seems likely to amount to in practice is to justify a governmental withdrawal from the enforcement of human rights. It is in effect saying to the victim of discrimination, or other human rights violation, that she or he should recognise that they are wholly or partly responsible for their situation and should not complain too much, or at least only responsibly. The Commission's role should be not so much to enforce, as to educate all Australians to behave more nicely towards each other. Enforcement of human rights is, along with many other functions of government, to be privatised.

## Incorporation or transformation of international law?

The judgment of Brennan J in *Mabo*[12] opened up again the old discussion about the relationship between domestic and international law. In proposing to overturn the accepted doctrine of *terra nullius* in favour of a concept of native title based on usage, he said:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights ... However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system.[13]

This Australian statement is a refreshing new slant on the possibility of influencing the effect of international law on domestic law. It goes beyond the *Trendtex* decision[14] because it has the effect of introducing a new principle of law — common law recognition of native title in Australia — rather than of simply updating an existing application of a rule of international law (about sovereign immunity).

I hope very much that the principle of judicial incorporation of internationally recognised rules, especially in the human rights area, will continue, following the lead the High Court has now given. Examples are the decisions of the High Court in *Dietrich*[15] and *Newcrest*.[16] In the latter case Kirby J, when interpreting s 51 (xxxi),

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12 *Mabo v Queensland* [No 2] (1992) 175 CLR 1.

13 *Ibid* at 42, 43.

14 *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529 (CA) at 554-7 per Lord Denning MR.

15 *Dietrich v R* (1992) 177 CLR 292.

16 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

made the following comment: 'Where there is an ambiguity in the meaning of the Constitution, as there is here, it should be resolved in favour of upholding ... fundamental and universal rights.'[17] It needs to be suggested to practitioners, and through them to the judiciary, that international law principles particularly in the human rights area should be drawn on, and not necessarily by only the highest court, as Lord Denning suggested in *Trendtex*. It is to be hoped that this process can continue and that the limitation imposed by the concept of fracturing a skeletal principle of the law will not be drawn too wide.

Is it too bold to suggest that the applicability of international human rights law could be increased by a small modification of the principle enunciated by Brennan J? He said that the common law *does not necessarily conform* with international law but that international law is a legitimate and important influence. Could the principle become that the common law *should conform* with international law, unless there are clear reasons why it should not?

## How should human rights principles be implemented in Australian law?

In many areas of Australian law there are effective inclusion of the principles enunciated in international human rights law. My study of Australian law for the purposes of preparing the *Halsbury's Laws of Australia* title on civil and political rights[18] has shown that much of our law already incorporates current human rights standards. For example:

- much of the content of Article 14 of the ICCPR relating to a fair trial is included in current practice;[19]

- there is substantial protection in most state and territory jurisdictions of the right to freedom of assembly and procession as recognised in Article 22 of the ICCPR;[20]

- elements of the requirements associated with incidents of the right to an adequate standard of living in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) are embodied in current law, such as by the

17 Above, note 16, at 661.

18 Published in March 1998 as Title 80 in *Halsbury's Laws of Australia*, Vol 4.

19 See above Ch 8 and, for a critical comment on some aspects of criminal procedure, Bronitt S and Ayers M 'Criminal Law and Human Rights' in Kinley D (ed) *Human Rights in Australian Law* (Federation, 1998) p 120.

20 See Gaze B and Jones M *Law, Liberty and Australian Democracy* (LBC, 1990) Ch 4 and Bailey P 'Freedom of Association, Assembly and Procession', *Halsbury's Laws of Australia*, above, note 18, Pt III, Ch 3.

provisior of income support through social security law and by taxation exemptions relating to food and clothing; through the housing arrangements contained in the Commonwealth-State housing agreements; and in landlord and tenant law generally;[21] and

- there is even quite diverse protection of aspects of the right to privacy, as enunciated in Article 17 of the ICCPR, for example, through the provisions of tort law relating to trespass to persons and property, and through the Commonwealth's *Privacy Act 1988* relating to information privacy, although there is as yet no recognition of a general right to privacy.[22]

Two questions arise. First, does it matter whether the connection is made between aspects of Australian law, such as those listed above, which in effect embody international human rights standards, and the human rights themselves? If it does matter, then how is the process moved forward so that these aspects of Australian law are recognised as expressing, at least in part, international human rights standards? In my view, it does matter whether the connection is made. It matters first and foremost because linking these often scattered provisions, that may form part of the law of criminal procedure, of social security law, of criminal law, of property law or the law of evidence, enables them to be seen as a whole that is governed by coherent principles. Moreover, the principles are drawn from international law instruments, which serve to link Australia to the international community. Using them as guiding points would represent a kind of globalisation of Australian law.

If those links are made as cases are argued before the courts, or as public or parliamentary discussion takes place, then the element of principle can come to the fore and its implications can be embodied in the law. The law may become instrumental in implementing human rights rather than just successful in patching up technical loopholes from a procedural, financial or purely political point of view. It is precisely the facilitation of this kind of process that gives meaning to a close analysis of existing law from a human rights standpoint. Indeed it is what I have been hoping will happen if both the human rights title in *The Laws of Australia* (now mostly available) and the civil and political rights title in *Halsbury* (now on the shelves) are used imaginatively by our practitioners and judges, as well as by those with responsibility for critiquing and amending the various relevant bodies of law. We need to keep reminding all those with responsibilities in these areas of the

21 See Bailey P 'The Right to an Adequate Standard of Living: New Issues for Australian Law' (1997) 4 AJHR 25.

22 See Gaze and Jones, above, note 17, Ch 9 and Bailey P, *Halsbury's Laws of Australia*, above, note 18, Pt II, Ch 5.

existence and relevance of such works, as well as of the growing number of relevant texts here and abroad,[23] and we need to build on the principles now established in cases such as *Mabo* and *Dietrich*.

## Limitations of Australian legal culture

Finally, I want to make clear that the Australian legal culture has imposed limitations on our thinking. I have become particularly aware of these limitations in the area of economic, social and cultural rights. Australians seem to have a very strong inclination to believe — or at least unthinkingly to assume — that while civil and political rights are clearly important and are able to be embodied in law, economic, social and cultural rights are not as important and are not able to be embodied in law. For example, I was at a conference in Colombo some years ago and was talking with a fellow participant who was from another Asian State about the importance of civil and political rights. I had been emphasising the importance to the full development of every human being of the right to privacy. He said to me that he was not convinced. Of what use was the right to privacy to the beggar lying in the street at night? Why should his State worry about privacy when the beggar could not get education, could not get decent health care, could not find accommodation, could not get work? Weren't these things a whole lot more important than privacy, or developing a foolproof voting system? I had to agree, though I did say that I thought that a willingness to respect the beggar's privacy might have been an advantage.

As I reviewed Australian law as it relates to implementation of the right to an adequate standard of living, it became clear that Australians do not do more than mouth platitudes about such rights, or tend to evade the issue altogether. Thus in *Green v Daniels*,[24] an unemployed school leaver was told by the High Court that hers was not a legally enforceable right but amounted only to a gratuity or benefit. How demeaning. Her only legally enforceable right was to a proper consideration of her case. Likewise, the Housing Agreements between the Commonwealth and the States

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23 Two recent examples of this kind of writing are contained in Bronitt S '"No Records. No Time. No Reason" — Protecting Rape Victims' Privacy and the Fair Trial', 8(2) *Current Issues in Criminal Justice* 131 and Bronitt S 'Electronic Surveillance, Human Rights and Criminal Justice' (1997) 3(2) AJHR 183. See also O'Neill N and Handley R *Retreat from Injustice — Human Rights in Australian Law* (Federation, 1994) especially Ch 8.

24 *Green v Daniels* (1977) 51 ALJR 463. The government had issued an edict from which it followed that Karen Green, although having clear evidence of trying to get a job and living with a widow pensioner mother, could neither be granted a pension until the new school year had begun, nor receive any retrospective payment, even if it became clear she was not returning to school.

refer to the need to ensure absence of discrimination in allocating housing and the importance of recognising the special needs of homeless persons. But there are no enforceable rights. Unfairness does occur, but there is a reluctance to give any real substance to economic, social and cultural rights, even if there is some recognition, albeit without much acknowledgment, and still less enforcement, that they exist.[25]

Further, there is a tendency, almost subconsciously, to 'convert' economic, social and cultural rights into civil and political rights. In *Green v Daniels*,[26] Karen Green was said by many to have a right to an unemployment benefit (now a job search allowance). She did have a right, which was upheld by the High Court but it was a right to due process in administrative law: a civil and political right. She did not have the much more important element: the economic right to income support.[27]

A similar situation arises with the tribunals, such as the Social Security Appeals Tribunal and the Administrative Appeals Tribunal, which have been established to review the welfare and other administrative systems. The basic complaint is that, although there is a procedural right, there is no legally enforceable right to a pension or whatever. It is true that by a roundabout way one can get administrative law enforcement of a decision that a pension is due but no right to the pension is recognised. This is disempowering. Perhaps there are areas where a tribunal-provided right, possibly involving review on the merits, would be an appropriate method of enforcement. If so, what may need to be changed is the understanding of what a right is. Rights may not need to be legislatively or judicially created or enforced by the courts. Tribunal-provided recourse could be regarded as being rights-bearing. Once again, though, a cultural change is necessary. Even with such a change, what would be needed to create a right recognisably categorised as a legally mandated implementation of a human right would be that the tribunal was required in making its decision to have regard to, and where possible to implement, the relevant human right lying behind the substance of the claim.

Another example of our reluctance to recognise economic, social and cultural rights as true rights, even when they are given in substance, relates to food and clothing.

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25 For a more detailed exposition of these and other aspects of the right to an adequate standard of living, see Bailey P 'The Right to an Adequate Standard of Living: New Issues for Australian Law' (1997) 4 AJHR 25.

26 Above, note 24.

27 Many of these issues are discussed in Beddard R and Hill D (eds) *Economic, Social and Cultural Rights — Progress and Achievement* (Macmillan, 1992) especially Chs 1 and 5.

There is no recognition that there is a right to have tax exemptions for such basic commodities. No connection is made between giving people access to affordable food and clothing and the related important economic, social and cultural right to an adequate standard of living. We need to lift the scales from our vision, the fog from our thoughts. The discourse should not only be about improving the taxation system, but also about how the rights it protects or, in effect, implements can be preserved.

Finally on the matter of cultural perception, there is a difficulty in discerning how a court, or even a legislature, can provide rights-bearing outcomes for economic, social and cultural rights in the way that is being done increasingly for civil and political rights, such as in *Australian Capital Television*.[28] Such decisions are not found in *Green v Daniels* or in the many welfare and education or health areas. The shining exceptions are *Mabo* and then *Wik*.[29] The public (especially political) outrage that was expressed following those decisions was significant, reflecting the cultural assumption about what role courts should play. It also demonstrated clearly that there is not the faintest recognition that these issues are about important economic, social and cultural rights. The perceptive and cogent argument in *Mabo (No 1)* by Brennan, Toohey and Gaudron JJ,[30] constitutes a shining exception to the cultural blinkers.

On the legislative side, there are suggestions of a comprehensive Bill of Rights. Indeed, rights have been provided in legislation such as the *Freedom of Information Act 1982* (Cth). But these are only in the area of civil and political rights. They have no counterpart in the economic, social and cultural rights area. For example, the form of right provided for disabled persons in the Commonwealth's *Disability Services Act 1986*, being the right to support — and so within the economic, social and cultural rights area — is only of the same 'gratuity' kind of right as was recognised in *Green v Daniels*. These disability services provisions are pioneering, but they do not allow the assistance of administrative law (as was available in *Green v Daniels*), because what is provided is only in the form of tabled guidelines. There is no enforceable

28 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, concerning a right to freedom of (political) communication.

29 *Wik Peoples v Queensland* (1996) 187 CLR 1.

30 *Mabo v Queensland (No 1)* (1988) 166 CLR 186 at 216-7, where they made reference to the Universal Declaration of Human Rights Article 17(1) ('Everyone has the right to own property alone as well as in association with others') and also to the Convention on the Elimination of All Forms of Racial Discrimination Article 5(d) (which is in the same terms as UDHR Article 17(1) except for the word 'everyone').

right conferred by formal legislated process.[31] On the positive side, however, the *Disability Services Act 1986* does take an important step in pointing the way forward. If, at least for the time being, there is a need to have regard for resources, then that Act has achieved it. It provides for the tabling in Parliament of a charter of rights which is required to have regard to 'the limited resources available'.[32]

So my plea is for a rethinking of our cultural perceptions and some kind of evening up of the recognition given in Australia to economic, social and cultural rights as well as, increasingly, to civil and political rights. As we do this through teaching in the law schools, through articles and books, in the courts and (hopefully) in the parliaments, maybe we can gradually change the culture by increasing the focus on, and action in relation to implementation of, economic, social and cultural rights as well as civil and political rights. ●

31 See generally Bailey, above, note 21, p 44.

32 This point is further discussed in Bailey, above, note 21, p 46 and footnote 85. The charter of rights limitation could be regarded as being reflective of the phrase in the ICESCR Article 2, which couches the implementation obligation in terms of 'achieving progressively' and 'to the maximum of its available resources' the obligations in the Covenant.