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Human Rights Act: Myths and Misperceptions

Myth One: “We don’t need a Federal Human Rights Act. Our rights are already protected by the Constitution, the common law, and our political system of representative democracy.”

Fact: While some rights are protected, many if not most human rights are not adequately protected under our current system. Basic rights that many Australians take for granted – the right not to be tortured, the right to life, the right to vote, everyone’s right to equality before the law – are not currently protected by legislation. While many Australians are in a position to enjoy ‘the good life’, we should not be complacent about our rights. Australia distinguishes itself by being the only liberal democracy without a national Human Rights Act.¹ Furthermore, as recent events have shown, the existing legal framework is not well-equipped to respond to many of the pressing human rights issues facing Australia.² A Human Rights Act is needed to strengthen the effectiveness and fairness of our current system. Likewise, it could provide a powerful tool for protecting the human rights of all Australians and for ensuring a more responsive and accountable government.

Myth Two: “The sovereignty of the Australian Parliament would be undermined by a Federal Human Rights Act.”

Fact: A Federal Human Rights Act is perfectly compatible with Parliamentary sovereignty. Under the ‘statutory weak’ model of human rights protection envisaged for Australia, courts would not have the power to award damages for breaches of human rights or to invalidate (or ‘strike down’) a law that is incompatible with human rights. Courts would, however, be vested with the power to declare that a law is incompatible with human rights. Such a declaration would not affect the validity or the effect of the Act. Rather, it would compel Parliament to consider the human rights implications of the law in question. This type of Human Rights Act would strike the balance between preserving Parliamentary sovereignty on the one hand, and facilitating transparent and accountable government decision-making on the other. In the long term, this could help strengthen democratic processes in Australia.

¹ Amnesty International, *Human Rights Act for Australia* (13 January 2009)
<http://www.amnesty.org.au/yourhumanrights/comments/20080/>

² For example, as the Australian Human Rights Commission points out, the rights of Indigenous Australians, asylum seekers, homeless people, prisoners, working parents, and gay men and lesbians, have not been adequately protected under the current legal system. See: Australian Human Rights Commission, *Let’s Talk About Rights* (February 2009) 1, http://www.hreoc.gov.au/letstalkaboutrights/downloads/HRA_questions.pdf

Myth Three: “A Human Rights Act will only be used to protect the rights of minorities at the expense of the majority - most people just won’t use it.”

Fact: A Federal Human Rights Act will protect *all* Australians against the unjust or arbitrary exercise of public power. As the experience of other countries has shown, ordinary people stand to benefit from human rights protection.³ This means that Australians from all walks of life – from a young mother seeking to escape domestic violence without a safe place to live, to people in remote locations without access to adequate health-care or education – could potentially utilise a Human Rights Act.

Of course, human rights protection is particularly relevant to people who are vulnerable, marginalised or disadvantaged. Indeed, the true test of a Human Rights Act should be whether it provides effective protection for the least well-off members of society.⁴ This view does not seek to promote the views of minorities over that of other people, rather it emphasises 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”.

Myth Four: “Creating a Human Rights Act will be detrimental because it will limit our human rights to those contained in the Act.”

Fact: A Federal Human Rights Act would not exclude other rights and freedoms not specifically contained in the Act. In other jurisdictions, the rights set out in the Act are in addition to other rights already protected. For example, the rights outlined in the Victorian Charter do not limit, or detract from, the rights that are recognised in any other source of domestic or international law.⁵ Likewise, a Federal Human Rights Act would complement and strengthen the frameworks that already exist to protect human rights.

Myth Five: “A Federal Human Rights Act would take power away from elected politicians and give too much power to unelected judges. This is undemocratic.”

Fact: The experience in the UK demonstrates that under a Human Rights Act, judges would not be metamorphosed into legislators.⁶ The role of the judiciary would be to interpret and apply the Act, as they do with all other pieces of legislation. Moreover, judges are already involved in making decisions that require the careful balancing of competing rights.⁷ As such, they are well-

³ Geoffrey Robertson QC, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Vintage, 2009), 12.

⁴ Professor Larissa Behrendt, *Making Human Rights Matter: How Can Rights Frameworks Help Us Create A Better Community?*, Dorothy Pearce Memorial Lecture (2006) 3, <http://www.tascoss.org.au/Portals/0/Publications/Dorothy%20Pearce%20Address-Larissa%20Behrendt06.pdf>

⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 5.

⁶ Lord Bingham, *Dignity, Fairness and Good Government: The Role of a Human Rights Act* (9 December 2008), 7, http://www.hrlrc.org.au/files/MBR9WGGYQF/Dignity__Fairness_and_Good_Government___Speech_by_Lord_Bingham.pdf

⁷ Professor Larissa Behrendt, *Making Human Rights Matter: How Can Rights Frameworks Help Us Create A Better Community?*, Dorothy Pearce Memorial Lecture (2006) 17, <http://www.tascoss.org.au/Portals/0/Publications/Dorothy%20Pearce%20Address-Larissa%20Behrendt06.pdf>

equipped to make reasonable and considered determinations under a Human Rights Act. Furthermore a Human Rights Act preserves parliamentary sovereignty, as it would not prevent a Commonwealth Government from passing laws that are inconsistent with human rights, and the Courts would not have power to invalidate legislation that is inconsistent with human rights.

Myth Six: “A Human Rights Act could make mischief by creating a conflict between the government and judiciary.”

Fact: Not all the decisions made by the judiciary under a Human Rights Act will be popular with the government. This is a good thing! It is inevitable that, in a democratic society, there should be a proper tension between the government and the judiciary.⁸ In fact, as Lord Bingham points out, there would be cause for concern if the decisions of the judiciary ‘consistently found favour with the powers that be’.⁹ Lord Bingham argues that most governments would in fact “recognise that losing cases on occasion is part of the price to be paid for the rule of law”.

Myth Seven: “Human Rights Acts or Charters are usually just a “Lawyers’ Picnic” - lawyers will use the existence of an Act in order to create excessive litigation.”

Fact: In jurisdictions that have a Charter of Human Rights, there has not been the expected flood of litigation - the courts have identified those cases that are meritorious and raise human rights concerns, and those that are not. Indeed, Geoffrey Robertson observes that, in the United Kingdom, human rights arguments have often simplified court proceedings by replacing “lengthier submissions based on endless old cases and precedents”.¹⁰ The experience of other jurisdictions indicates that a Human Rights Act will not lead to excessive litigation by opportunistic lawyers. In fact, the most significant effect of a Human Rights Act is likely to be educational: raising greater awareness of how to protect, promote and respect human dignity in Australia.¹¹

Myth Eight: “Human rights are too individualistic. They give priority to individual needs over and above the greater good.”

Fact: While some human rights are absolute (such as the prohibition against torture), most invite a balancing act between the rights of the individual and the rights of the community.¹² The role of a Federal Human Rights Act would be to strike a proper balance between these rights, and to ensure that public authorities act in a fair and consistent manner. Moreover, by ensuring that

⁸ Lord Bingham, *Dignity, Fairness and Good Government: The Role of a Human Rights Act* (9 December 2008) 8, http://www.hrlrc.org.au/files/MBR9WGGYQF/Dignity__Fairness_and_Good_Government__Speech_by_Lord_Bingham.pdf

⁹ Lord Bingham, *Dignity, Fairness and Good Government: The Role of a Human Rights Act* (9 December 2008) 8, http://www.hrlrc.org.au/files/MBR9WGGYQF/Dignity__Fairness_and_Good_Government__Speech_by_Lord_Bingham.pdf

¹⁰ Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Vintage, 2009) 12.

¹¹ Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Vintage, 2009) 94.

¹² Lord Bingham, *Dignity, Fairness and Good Government: The Role of a Human Rights Act* (9 December 2008) 9, http://www.hrlrc.org.au/files/MBR9WGGYQF/Dignity__Fairness_and_Good_Government__Speech_by_Lord_Bingham.pdf

individuals are afforded some recourse when their rights are breached, a Human Rights Act could in fact enhance the cohesiveness of Australian society.¹³

Myth Nine: “A Federal Human Rights Act will undermine religious freedom, particularly by constraining freedom of religious speech and expression.”

Fact: Human rights and religious faith are not mutually exclusive – legislative recognition of human rights can strengthen our community values and ethics by fostering a culture of tolerance and respect. It is unlikely that religious speech and expression will be constrained under a Federal Human Rights Act. In other jurisdictions that have a Charter of Human Rights, public authorities have been excused from their human rights obligations where such an obligation will impede or prevent a religious body from acting in conformity with their religious doctrines. Religious freedom would not be undermined by a Federal Human Rights Act.

Myth Ten: “Human rights law is un-Australian. A Federal Human Rights Act will not reflect distinctively Australian values.”

Fact: At their essence, human rights promote values such as equality, dignity and justice; in short, the idea that people are entitled to ‘a fair go’. A Federal Human Rights Act would protect the rights that each Australian needs in order to live their life with dignity. Furthermore, the benefit of adopting a legislative human rights framework is precisely that it is not rigid or frozen in time. A Human Rights Act would be a fluid document that protects certain fundamental freedoms whilst also adapting to the changing conditions of Australian society.¹⁴

¹³ Lord Bingham, *Dignity, Fairness and Good Government: The Role of a Human Rights Act* (9 December 2008) 10, http://www.hrlrc.org.au/files/MBR9WGGYQF/Dignity__Fairness_and_Good_Government___Speech_by_Lord_Bingham.pdf

¹⁴ Professor Larissa Behrendt, *Making Human Rights Matter: How Can Rights Frameworks Help Us Create A Better Community?*, Dorothy Pearce Memorial Lecture (2006) 18, <http://www.tascoss.org.au/Portals/0/Publications/Dorothy%20Pearce%20Address-Larissa%20Behrendt06.pdf>