Rule of Law Institute of Australia – Answers to Questions on Notice – Chris Merritt

Questions

1. Does the Commission's model enable the legislature to avoid taking responsibility for difficult public policy issues? If so, how?

2. In March this year Human Rights Commission President Emeritus Professor Rosalind Croucher AM wrote:

Australia is the only liberal democracy that does not have an act or charter of rights, and Australians currently enjoy very few legal protections for their basic rights…The present failure to meet this expectation shows why a Human Rights Act is the central missing piece of government accountability in Australia."

What is your response to those comments? Is a Human Rights Act the "missing piece of government accountability in Australia"?

3. The submission from Professors Aroney, Ekins and Saunders indicate that (p.2) "Human rights are best protected by carefully drafted legislation which specifically addresses particular issues in a manner that ensures a reasonable level of certainty and predictability for all those affected by the law."

What is your position on that? Do you agree that a Human Rights Act could act in a contradictory fashion to what it states to achieve?

Answer to question 1:

The commission's model, if enacted, would require the judiciary to determine the extent of each of the rights listed in the proposed charter. That function, in essence, requires the application of value judgements in order to weigh conflicting goals. This is a political function that is best discharged by parliament.

For example, the proposed right to health in the Commission's model would be limited by the single limitation clause that would apply to all proposed rights. That means the judiciary could be asked to decide whether limited public funding for health services amounted to a breach of this right. It would make that determination by applying the limitation clause which says rights can be limited if the limitation is reasonable and demonstrably justified in a free and democratic society.

This means the judiciary, instead of the government and parliament, could be asked to decide if the level of public expenditure on health is appropriate. This would amount to second-guessing the normal budgetary process and would be fundamentally undemocratic.

The same problem would arise with other rights that amount to broad aspirational statements that lack the specificity of normal legislation.

A judge might decide, for example, that freedom to manifest religious belief should be restricted more severely than the restrictions imposed by parliament. The impact of such decisions would inevitably have a political impact that could interfere with the normal process of responsible government.

Governments, at the moment, are responsible for their actions to parliament and through parliament to the community. Under a charter, the judiciary would inevitably become a player in that process by influencing political decisions and limiting or extending rights in ways that are at odds with the views of parliament.

Answer to question 2:

I have the greatest respect for Professor Croucher but I cannot agree with her statement. I believe it proceeds from the flawed assumption that a Human Rights Act, or charter of rights, is the best or only effective method of protecting fundamental rights.

The World Justice Project's recently released Rule of Law Index for 2023 shows that Australia ranks 13 out of 142 countries when measured by the overall health of the rule of law.

Within those overall rankings, the WJP also considered the effectiveness of the ways in which the 142 countries protected fundamental rights. Australia's overall rank on fundamental rights protection was 21, ahead of the United States which ranks 38 (and which has a constitutionalised Bill of Rights) and France which ranks 27 (and is subject to the European Union's Charter of Fundamental Rights).

[These rankings are available at page 31 of the WJP's report which can be downloaded from its website: https://worldjusticeproject.org]

The point is that the mere existence of a charter of rights or a constitutionalised bill of rights does not result in greater protection of fundamental rights.

Answer to question 3:

I agree with Professor Croucher's statement in the second question on notice that Australians currently enjoy very few legal protections for their basic rights. Property rights, for example, are regularly being eroded by state and federal regulations restricting what can and cannot be done on private property. Freedom to manifest religious belief is also at risk because there is no religious freedom act that could be used to bring balance to a system in which freedom from discrimination receives greater legal protection. Religion, of its nature, requires its adherents to be discriminating and make choices about their behaviour that align with their religious precepts regardless of the views of others.

However I also agree with Professors Aroney, Ekins and Saunders that human rights issues - including those referred to above - are best dealt with by parliament and the government. If particular rights are at risk, the solution under our system of government is for parliament to address that problem through legislation, or for the government to make administrative changes.

Parliament, for example, is best placed to take account of the conflicting interests that must be considered when deciding whether - and to what degree - property rights and religious freedom should be restricted in order to give effect to other public policy goals. Few rights are absolute and their scope is best determined by parliament because it is best placed to gauge community sentiment.

The judiciary is not equipped to undertake that function and would produce a balance between conflicting goals that would be less informed and therefore inferior to the balance that would be set by parliament.

The judiciary, if forced to implement a Human Rights Act, would be at risk of losing the appearance of impartiality because it would be making decisions that, in essence, would be political, not judicial.

Parliamentary and governmental decisions on human rights have the advantage of certainty once they take the form of legislation and regulation. This would not be the case with a judicially administered Human Rights Act because decisions under such a charter would relate primarily to the parties or matters before the court, not the community at large.

Similar issues could arise in subsequent proceedings and result in different outcomes, depending on the circumstances of the case before the court.