

TOWARDS A HEALTHIER VIEW OF HUMAN RIGHTS IN AUSTRALIA

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Abstract

The Australian Constitutional framework and human rights debate are addressed in the context of a new governance paradigm which sees the government role as assisting regional health and sustainable development, in partnerships with communities and businesses. This primarily requires more broadly planned and scientific approaches to community management. The Nuremberg Code provides a basis for all scientific and related engagement through respectful communication. However, the Constitution holds Australia to an adversarial past rather than preparing it for a more scientific future. In this context, community management of mental health and human rights may be linked for progress towards greater health and sustainable development for all.

A Better Planned Approach to Australian Governance for Sustainable Development

This article outlines a potential regional and organizational policy approach to human rights centred on mental health, but which also arises from growing international consensus about the appropriate roles of government and the market. From a historical perspective, a new international consensus about the appropriate roles of government and the market has been growing for some time. This governance model elevates health and sustainable development as primary goals for all. For example, the first principle of the Rio Declaration on Environment, which was agreed by United Nations (UN) members in 1992, stated that human beings are at the centre of concern for sustainable development and are entitled to a healthy and productive life in harmony with nature. At the 1994 Asia Pacific Economic Cooperation (APEC) summit, national leaders agreed to creation of an Asia-Pacific free trade zone by 2020, and also supported the protection of health and the natural environment. APEC members have diverse political regimes including, for example, those of Australia, China, Japan, Indonesia and the US.

Australian governments follow the World Health Organization (WHO) in defining health holistically, as a state of complete physical, mental and social wellbeing, not merely the absence of disease or infirmity. This requires broader management perspectives than the medico-legal model of health, which focuses primarily on bodily diagnosis and treatment, rather than on improving the environments which surround groups or individuals who live in apparently debilitating circumstances. In the WHO model, education for injury prevention and rehabilitation, as well as the correction of inequality, are seen as the fundamental building blocks of health.^{1,2} Since 1986 Australia has implemented WHO health promotion goals and viewed consultation and equitable access to health as fundamental rights.³ In this context indigenous health is seen as a major national concern which also provides broader development potential.

Popper defined science as the development of knowledge which is objectively grounded in the outcome of observation and experiment.⁴ He thought this scientific perspective

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should be applied in administration. A broadly scientific approach to treating individuals occurs when the practitioner uses established bodies of evidence to judge what treatment should be applied for good results in a particular context. The treatment outcome is also examined. The practitioner may vary the normally expected treatment, to meet the apparent requirements of the presenting case and its environment. All competing treatment outcomes are evaluated comparatively, through examination of cases which have been similarly classified, according to their central features.⁵ This administrative approach is ideally implemented through regional planning processes which centre on the effectively coordinated identification, prioritisation and control of risks to health and the environment nationally and regionally.^{6,7} Coordinated governance structures ideally translate a vision of sustainability into targets, and plan, implement and review the programs that will achieve those targets. In this model the planning and commercial approaches are linked in partnerships which facilitate education and communication with workers,⁸ clients and communities.

This management model requires clear separation of policy and administration, with the former driving competitive, transparent, service provision so all may identify its outcomes.⁹⁻¹¹ Good information collection to assist development of better policy formulation and implementation in future are required. Dispute resolution is conceptualised as social service, like health or education and should provide data to assist injury prevention, rehabilitation and premium setting. However, Australians are bound by an outdated Constitution which outlines three independent governance powers. Elected politicians, government administrators, and the judiciary are the central and independent governance pillars in this model. However, Australian courts provide little or no data to assist scientific approaches to community self regulation.^{12,13} The legal fraternity do not normally classify cases or study the outcomes of a broad range of related judgements, to gain better understanding of outcomes for groups or individuals, and to improve treatment, law and policy in future. Instead, the judicial task is to interpret the meaning and requirements of law driven by the rules of an adversarial method which requires each opposing lawyer to pursue his client's interests, rather than the truth.^{14,15} The interpretation and application of the letter of specific law, rather than the treatment of key presenting problems, are dominant in this paradigm. The scientist may seek to change the world, but the judge is an interpreter of legislation. State laws and related professional requirements frustrate broader, more scientific and consultative management aimed at improving health and sustainability.^{16,17} In this context the attainment of human rights may be best linked to broader mental health and education concerns and directions.

Developing 'the Politics of Truth'

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Following Bell¹⁸ and Drucker¹⁹, Florida²⁰ sees global political convergence as due to the spread of science and has called for open management systems which increase potential for broader community learning and creativity through sharing knowledge. Sen²¹ proposes a new concept of human security in which support for the poor, freedom of speech and transparent management are understood as essential for effective operation of the market and equality. Foucault has described the scientific and democratic ideal emerging globally as ‘the politics of truth’ and saw it as first expressed by Kant, in the European Enlightenment.²² After the atrocities of World War II, the Nuremberg Code sought to express a new international awareness that a narrowly driven view of science may lead as surely to destruction as to health and that all subjects must therefore be properly informed and have the power and moral responsibility for autonomous speech and decision. The first principle of the Code states:

The voluntary consent of the human subject is absolutely essential.
The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to others with impunity. ²³

The Code may be applied in any broadly scientific approach to individual or community management, as well as in medical experiments. Communication may be seen as mutual education and dissent is protected. A recent discussion paper on the protection of human genetic information by the Australian Law Reform Commission and the National Health and Medical Research Council²⁴ concluded that ethical inquiry is consistent with scientific inquiry, in that it is centrally concerned with the kind of procedures or discussions that allow all relevant sources of information and viewpoints on a disputed matter to be taken into account in coming to a decision. Ethical judgment, like scientific activity, must be an ongoing activity for all, since community life is continually developing, along with knowledge and the conception of truth.

Freud and his followers explored their own individual and collective subjectivity. They claimed each person has a subconscious mind which defends itself against the unpalatable by trying to bury it.²⁵ Critiques quickly followed of ‘positivist’ scientific activities, in which people may be treated as objects of study, as if the researcher has no vested personal interests.²⁶ Foucault²⁷ thought many scientific, bureaucratic and professional discourses are products of the desire for social control and that when the human object of study is subjected to a superior, controlling gaze and its classification interests, distortions of reality occur. The researcher may ignore her own narrowly

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vested interests in a particular diagnosis and treatment and also ignore the perceptions and interests of those researched. Foucault later argued that all Western knowledge is organized around forms and norms that are more or less scientific and this exerts a moral obligation for any subject to try to know oneself, to try to tell the truth about oneself and to try to constitute oneself as an object of knowledge for oneself and others.²² This may be undertaken through educating students self-critically, so they can understand themselves and others as historical, cultural and economic products that are linked contractually by Nuremberg. This approach promotes broader and truer understanding through mutual education.

How the Australian Constitution Hinders Governance

After a British act in 1900, the Australian Constitution was enacted in 1901. It rules the Commonwealth parliament and the parliament of each state. Earlier, the six Australian states were self-governing colonies of Britain, each with its own Constitution. Although state parliaments pass laws on a wider range of subjects than the Commonwealth, the Constitution provides that if a Commonwealth law is inconsistent with a state one, the former overrides the latter to the extent of the inconsistency.²⁸ The desire to have a single trading area throughout Australia was the key reason for federation. However, its form has led to over-regulation, lack of service transparency and related costs. Australians discuss human rights legislation in this flawed regulatory context.

In 1990 the Council of Australian Governments (COAG) tried to establish a new, national regulatory structure. The Commonwealth and states enacted legislation to achieve mutual recognition of each others' laws and processes were established to develop national standards for health and environment protection, including related occupations and training, disability services, social security benefits and labour market programs.²⁹ In 1995 the Commonwealth Competition Policy Reform Act was passed. It requires all government and private sector service providers to compete on a 'level playing field', unless another course of action appears to be in the public interest. In this management model, all services, including dispute resolution, ideally provide data to assist better identification and control of risks to health and the environment, in order to achieve all community development sustainably. This forms a potential framework for a more scientific approach to all administration.

However, requirements of the Constitution and the Uniform Evidence Acts determine court procedures. The evidence acts do not discuss the search for truth other than tangentially and favour instead the concept of 'probative value'. The pursuit of client interest is expected to be the lawyer's paramount aim, carried out according to the particular letter of particular law and the related rules of evidence. The concept of 'privilege' is a central legal concept, used to justify denial of information. This is considered to outweigh the alternative benefit of having all information available to facilitate the trial. A central assumption of the legal paradigm is that the lawyer will

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rightly conceal or mould what his client knows is true, to maximise his interest in revenge or escape from any guilty judgment and its consequences.^{14,15} In comparison to this, all scientific searches for truth take a backseat, which may result in the production of ‘junk science’.³⁰ From a scientific perspective legal behaviour may seem like attempted fraud.

The International Human Rights Context

Many Australians appear convinced that recognition of individual rights must be balanced by recognition of responsibilities.³¹ The United Kingdom, Canada and New Zealand have recently enacted human rights legislation, but Australia has not, except in the Australian Capital Territory. This covers those living in the capital city. Neither the Australian Constitution nor other law has any equivalent to the Bill of Rights in the US Constitution, which prevents a legislature from passing laws that infringe certain basic freedoms, supposedly given to individuals by God. The concept of human rights which Australia adopted into a variety of legislation is based on the UN Declaration of Human Rights proclaimed by the newly established UN General Assembly in 1948, in response to the atrocities perpetrated during World War II.³² The Declaration states that all human beings are born equal in dignity and rights without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. All human beings are declared to have the right to a standard of living adequate for the health and well-being of the family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond control.

The UN Declaration, or ‘Bill of Rights’, is implemented through two enforceable covenants, the Covenant on Economic, Social and Cultural Rights (ICESCR) and the Covenant on Civil and Political Rights (ICCPR). The former deals with the right to fair wages and equal remuneration for work of equal value; safe and healthy working conditions; equal opportunity; rest, leisure, and limitation of working hours, with periodic paid holidays as well as remuneration for public holidays. It also deals with the right to social protection, adequate standards of living and health and specifies international rights to education and cultural freedom. The ICCPR addresses rights to freedom of movement, equality before the law and freedom of thought, conscience and religion. It also deals with the right to freedom of opinion and expression, peaceful assembly, freedom of association and participation in public affairs, and the protection of minority rights. The UN made the International Labour Organization (ILO), which continued to operate in spite of the demise of the League of Nations, responsible for conventions supporting the ICESCR. Governments which sign UN agreements ideally commit to providing the means for implementation of their principles. However, reporting requirements involve bureaucratic outlays which might have been better spent on health and education of the poor. This is often a problem with legalistic approaches to change.

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All can agree that health is life flourishing. However, human rights may become very unclear when divorced from the need to improve the health of all people and environments. Varying cultural environments may produce sharply conflicting ideas about how to achieve freedom of the individual from state interference on the one hand, and their right to community protection and to equal treatment on the other. For example, in the US, voting is not compulsory but the Constitution protects the right to gun ownership, which has also encouraged it. Australians, on the contrary, are required by law to vote, and, with key exceptions, are banned from owning guns. These are sharp cultural differences in moral outlook. Problems of cultural difference in interpretation are avoided if health and environment protection are primary goals, and the rights and responsibilities of the individual are debated and constructed in this context, through continuing communication and debate. An alternative, apparently feudal logic, suggests we may each have a right to an atomic bomb, to protect the family.

Australian Human Rights and Mental Health Development

Australia has signed both Covenants of the UN Declaration of Human Rights and adopted related UN and ILO agreements. Adoption occurs when national consultation processes are followed by the development and implementation of relevant state or Commonwealth legislation. For example, in 1972 the Commonwealth revoked the White Australia policy and replaced it with a policy for the avoidance of discrimination on the grounds of colour of skin or nationality. In 1973 Australia ratified the ILO Convention on Discrimination in Employment and Occupation and state committees to address such matters were set up. Broader state anti-discrimination legislation quickly followed. Since then, state and Commonwealth legislation has gradually extended the range of rights to equality of treatment which Australians supposedly are guaranteed.³³

In 1986 the Commonwealth Human Rights and Equal Opportunity Commission (HREOC) was established. The Commission investigates allegations of discrimination on the grounds of race, colour or ethnic origin, racial vilification, sex, sexual harassment, marital status, pregnancy, or disability. Human Rights education is one of its core responsibilities, along with investigation and attempted resolution of complaints about breaches of human rights as well as anti-discrimination legislation. It has a President, assisted by commissioners for Human Rights, Race, Sex, Disability and Aboriginal and Torres Strait Islander Social Justice. The Commission inquires into alleged infringements under the Racial Discrimination Act 1975, the Sex Discrimination Act 1984, the Disability Discrimination Act 1992 and the Age Discrimination Act 2004. It may also inquire into alleged infringements of human rights under the HREOC Act. The Aboriginal and Torres Strait Islander Social Justice Commissioner has specific functions under the HREOC Act and under the Native Title Act, 1993. The Sex Discrimination Commissioner has additional responsibilities in relation to federal agreements related to work and equal pay under the Workplace Relations Act 1996.³⁴

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In 1991, Australian Health Ministers adopted a Statement of Rights and Responsibilities with the aim of promoting social justice, equity, access and a compassionate society with mental health as its primary goal.³⁵ This reflects the holistic WHO view, that health is general wellbeing. In the same year the UN General Assembly adopted the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care. These state that every patient has the right to treatment in the least restrictive environment and in the least restrictive manner, and that every patient shall have the right, so far as is practicable, to live, work and receive treatment in the community. These principles were endorsed in the national health policy and plan of 1992 but were not formally adopted into legislation nor scheduled to the HREOC Act.

In 1993 the National Inquiry into Human Rights of People with Mental Illness found that many suffer widespread systematic discrimination and are denied the rights and services to which they are entitled. In 2000, the National Mental Health Report found the first national mental health plan from 1993-1998 reduced beds in psychiatric institutions by 42% and funds allocated to mental health non-government organizations grew by 200%. This increased their share of total funding from 2% to 5%.³⁶ In 2005, the report of the Mental Health Council of Australia and the Brain and Mind Research Institute found the current system still results in a failure to provide basic health care and uses inappropriate short term seclusion, confinement or over reliance on sedating medications. It found this may lead to deteriorating mental wellbeing, suicide, higher rates of homelessness, prolonged unemployment, incarceration, increased financial burden and poverty. It called upon Australian governments to adopt a whole of government service response.

From this perspective, there seems more need for better services than new legislation. However, in 2005 the report of the Human Rights Consultation Committee (HRCC) was provided to the Victorian Attorney General, who had requested it, along with the draft Charter of Human Rights and Responsibilities Act 2006.³¹ The report recommended a legislative route which does not set down unchangeable rights in the Victorian Constitution. Supposedly, the approach does not give the final say to the courts but ensures the continuing 'sovereignty' of the Victorian Parliament. The Australian Christian Lobby are against the proposed legislation because they believe that 'inalienable and immutable' human rights are given only by God and are not found in the decree of any parliament but only in 'natural law and the scriptures, heritage and tradition of the Judaeo-Christian faith and the Bible'.³¹ Since 2000, north of the border, the NSW Community Relations Commission and Principles of Multiculturalism Act has stated that all individuals should have the greatest possible opportunity to contribute to and participate in all aspects of public life and that all institutions should recognise linguistic and cultural assets as a valuable resource and promote them to maximise development.

Some Australians would like to follow the British approach in which a Commission for Equality and Human Rights was established to merge a number of existing anti-

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discrimination agencies.³¹ The proposed Victorian Commission would track progress towards human rights and have power to conduct inquiries into matters of related public policy, in order to make recommendations for change. However, this approach may give more power to courts. Predictably, the definition of ‘freedom of expression’, in the proposed Victorian Charter, does not allude to any need to seek or try to speak the truth. The responsibilities attached to ‘freedom of expression’ relate to respecting the rights and reputation of others as well as protecting national security, public order, public health and public morality. This may easily come to represent a preference for maintaining any existing order, rather than encouraging scientific development or other truth seeking based on respectful and honest communication. In contrast, a bill for more open government contracts has been put forward in NSW, to gain more informed debate.

Human Rights Through Health Education and Alternative Dispute Resolution

Much Australian statute law may now be understood and administered as a required community aim or standard, consultatively made by elected representatives, which all relevant citizens are expected to uphold and benefit from. Australian national, regional and industry stakeholders are now beginning to coordinate their responses to the community need for healthy development through regional planning in which housing, education, communication, dispute resolution, and research may all be related and aimed at better health and sustainability. For example, the human services plan for Redfern-Waterloo, an economically and culturally diverse community in inner Sydney, provides a model health planning approach which may be adapted to the requirements of any Australian community.³⁷ In this management paradigm, services are ideally delivered to meet regionally identified health and environment objectives competitively and their outcomes are available for examination, thus aiding the future development of policy and service delivery. Governments may also provide additional funding, to ensure that the minimum nationally guaranteed services are available to all. This may be necessary in rural, remote or other situations normally unattractive to commercial service providers.

All Australian managers are expected to apply relevant health and safety codes at work unless there is evidence that another course of action is safer in specific circumstances.³⁸ State occupational health and safety legislation provides the context for a more independent and informed approach to all work, which can be compared with the scientific, evidence based approach, required of health workers. For example, a health worker is ideally expected to identify a client’s problem and apply treatment after consultation and consideration of the relevant body of scientific evidence.⁵ However, the treatment may vary from related expert protocols when this appears necessary to meet the health needs of a particular individual or situation. The reasons for deviation are documented. All such information may contribute to research aimed at improving governance and treatment outcomes for communities, related groups or individuals.

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In 1994 the ILO, the UN Educational, Scientific and Cultural Organization and the WHO defined community based rehabilitation as:

A strategy within community development for the rehabilitation (CBR), equalization of opportunities and social integration of all people with disabilities. CBR is implemented through the combined efforts of disabled people themselves, their families and communities, and the appropriate health, education, vocational and social services.³⁹

From this perspective, mental health may be seen as the product of how individuals and communities care for their own and each other's needs, including teaching themselves to communicate, analyse and act to improve environments for all. Attainment of mental health and human rights may be best discussed together, in the context of the regional need to coordinate all relevant stakeholder perspectives, to meet community health needs, especially those which have been identified as most severe or common. A mental health problem may be broadly conceptualised as any issue which needs tackling, so that all people involved in an apparently stressful environment can get on with life more effectively. In this transparent management and development model, service operators may be held accountable through their openness to scrutiny and their willingness to gather data which may be used to identify and address problems for individuals and communities better in future. This mental health and human rights governance model requires open and continuing community education and debate.

In 1999, health experts advised health ministers to initiate national actions for safety and quality related to strengthening the consumer voice and learning from incidents, adverse events and complaints.⁴⁰ From this perspective, dispute resolution should be managed as a service, like health or education provision, which aims to improve community health and related social or environmental outcomes. Alternative Dispute Resolution (ADR) is vital in this context. It is a process in which an impartial person assists those in dispute to resolve the issues between them. ADR can be facilitative, advisory, determinative or, in some cases, a combination of all three. Mediation is facilitative; because the practitioner assists the parties identify disputed issues, develop options, consider alternatives and try to reach an agreement about some issues or the whole dispute. Conciliation is an advisory process in which the conciliator is a neutral party who considers and appraises a dispute. Expert assistance may be sought in regard to apparent facts of the dispute, the law, possible or desirable outcomes and how these may be achieved. Arbitration, expert determination and private judging are examples of determinative (decision making) ADR processes.⁴¹ Many now argue in favour of the comparatively greater efficacy of ADR processes in comparison with those of courts.^{42,43,44} This requires more investigation.

Conclusion

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Australia is embarked upon a new governance paradigm involving national standards for health and sustainable development and more transparent service delivery to achieve all regional, organizational and individual goals. This development is hindered by an outdated Constitution, which promotes overregulation and prevents effective implementation of more scientific approaches to achieving health and sustainability. Community health and environmental requirements need to be identified, prioritised and delivered through appropriately designed, regionally coordinated services which are also data driven, to assist injury prevention, rehabilitation and premium setting. Courts provide little or no data which would help. In this context, human rights are better conceptualised in a flexible, mental health related, scientific and problem solving light, rather than in an adversarial tradition. Broader inquiry is now required about the appropriate linkages between vocational and community education and ADR systems.

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