

Human Rights and Social Justice: The Convention On The Rights Of Persons With Disabilities And The Quiet Revolution In International Law

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Abstract

On the 60th anniversary of the Universal Declaration of Human Rights (UDHR), the Commonwealth Attorney-General announced a national public consultation concerning the need for better human rights protection in Australia and the viability of a federal human rights charter. Whether or not the anticipated charter includes social, economic and cultural rights is directly relevant to questions of social justice in Australia.

This paper argues that the legislative acknowledgment of civil and political rights alone will not adequately address the human rights problems that are experienced in Australia. The reluctance to include economic, social and cultural rights in human rights legislation stems from the historical construction of an artificial distinction between civil and political rights, and economic social and cultural rights. This distinction was articulated and embedded in law with the translation of the UDHR into binding international law. It has been accepted and replicated in judicial consideration of the application of human rights legislation at the domestic level. The distinction between the two forms of rights underpins a general ambivalence about the capacity of human rights legislation to deliver social justice and echoes a critical tradition in legal philosophy that cautions

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against the reification of law.

Coming into force early in the 21st century, the Convention of the Rights of Persons with Disabilities illustrates the effort of the international community to recognise and eschew the burden of the false dichotomy between civil and political rights, on the one hand, and economic, social and cultural rights on the other. Acknowledging the indivisible, interdependent and indissociable nature of human rights in Australia is a crucial step toward achieving human rights-based social justice.

I - Introduction

On the 60th anniversary of the Universal Declaration of Human Rights (UDHR)¹ the Commonwealth Attorney-General announced a national public consultation about the need for better human rights protection in Australia.² The National Human Rights Consultation Report (the Report) was delivered to the Federal Attorney-General on 30 September 2009. The Report recommends that Australia adopt a federal Human Rights Act³ based on the ‘dialogue’ model.⁴ As was widely anticipated,⁵ the Report supports a legislative model similar to the model adopted in the Australian Capital Territory and Victoria,⁶ emphasising civil and political rights.⁷ The Report leaves open the question of the inclusion of economic social and cultural rights, recommending that ‘if economic and social rights are listed’ the rights should not be justiciable.⁸ Rather, under the proposal, complaints regarding violations of economic social and cultural rights would be heard by the Australian Human Rights Commission.⁹ Furthermore, the Report recommends that if economic and social rights are listed, priority should be given to the right to an adequate standard of living, including adequate food, clothing and housing, the right to the enjoyment of the highest attainable standard of physical and mental health, and the right to education. This tentative engagement with economic, social and cultural rights marks a significant shift in Australian human rights debate.

¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (1948) 71.

² See the National Human Rights Consultation website <<http://www.humanrightsconsultation.gov.au>>.

³ Commonwealth Attorney-General’s Department, *National Human Rights Consultation Report*, 2009, Recommendation 18, xxxiv. <[http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)~NHRC+Report+\(Prelims\).pdf/\\$file/NHRC+Report+\(Prelims\).pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~NHRC+Report+(Prelims).pdf/$file/NHRC+Report+(Prelims).pdf)>.

⁴ *Ibid* Recommendation 19.

⁵ HRLRC, *National Human Rights Consultation: Submission on a Human Rights Act for All Australians* (May 2009) <<http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/a-human-rights-act-for-all-australians/>>.

⁶ *Human Rights Acts 2004 (ACT)*; *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

⁷ *National Human Rights Consultation Report*, above n 3, Recommendations 24 and 25.

⁸ Both the ACT and Victoria have indicated that they will consider the inclusion of social, economic and cultural rights in the future.

⁹ Above note 3, Recommendation 22.

The hesitation to include economic, social and cultural rights in Australian legislation reflects the perspective that to do so infringes the doctrine of parliamentary sovereignty and the separation of powers, encouraging ‘judicial activism’.¹⁰ Among other weaknesses in this position, an emphasis on the dangers of implementing social, economic and cultural rights fails to take account of the quiet revolution that has occurred in international law recognising the indivisible and interdependent nature of all human rights.

The Convention on the Rights of Persons with Disabilities (CRPD), which entered into force on 3 May 2008,¹¹ embraces the notion that human rights are interconnected, socially embedded processes. This article traces the development of the emerging rapprochement in international law between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. It argues that the ‘quiet revolution’ in international law obliges Australia to include full recognition of economic, social and cultural rights in a federal Human Rights Act.

II - Social Justice and the Critique of Rights

Persistent ambivalence about the social justice capacity of human rights law stems from the critiques of rights that exploded in the 19th century.¹² Jeremy Bentham famously distinguished the ‘nonsense’ of declared or ‘rhetorical’ rights from rights flowing from the substantive duties that are embedded in legal systems. His appraisal of the weakness of human rights correlates with Marx’s theory of alienation and Marxist analysis of the ephemeral nature of legal rights that fail to take account of material economic conditions

¹⁰ Philip Lynch and Phoebe Knowles, Human Rights Law Resource Centre, Engage, Educate, Empower: Measures to Promote and Protect Human Rights 2009 <<http://www.hrlrc.org.au/files/hrlrc-the-national-human-rights-consultation-engaging-in-the-debate.pdf>>.

¹¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106, Annex I <<http://www2.ohchr.org/english/law/disabilities-convention.htm>>. Australia signed in New York on 30 March 2007.

¹² Jerome J Shestack, ‘The Philosophical Foundations of Human Rights’ (1998) 20 *Human Rights Quarterly* 201.

(although these two theorists are widely regarded as holding otherwise opposing views).¹³ Both these analyses have continued to influence critical debates about international human rights law and its translation into domestic law throughout the 20th century.¹⁴ They are embedded in the various critiques of rights associated with ‘critical realism’, legal sociology and the emergence of the law and society movement. The second half of the 20th century was characterised by the proliferation of rights-based legislation and the escalation of rights-based rhetoric and practice. However, by the century’s close, critical literature was dominated by a sense of the irrelevance of law. Human rights law was seen, at best, as a clumsy vehicle for the achievement of social change,¹⁵ and at worst a damaging cultural facade. In this vein, Costas Douzinas announced the end of the age of rights.¹⁶

The beginning of the 21st century saw closer and more detailed analyses of the translation of the abstract principles of human rights into the content of domestic law.¹⁷ Meckled-Garcia and Cali, for example, trace the impoverished translation of human rights principles into law.¹⁸ They note the way in which legal practices and accepted rules of law stultify or nullify legislative provisions that are intended to give effect to human rights. From this point of view, the structures of both international and domestic law are identified as barriers to achieving social justice through human rights-based legal change. Of course, strong support for human rights-based law reform has existed in tandem with the various rights critiques. Notwithstanding that support, critical engagement with the

¹³ Wendy Brown, *States of Injury – Power and Freedom in Late Modernity* (1995).

¹⁴ Penny Weller, ‘Reclaiming a Sociological Voice in Mental Health Law’ (paper presented at the TASA Conference, Melbourne, December 2008).

¹⁵ Nikolas Rose, ‘Unreasonable Rights: Mental Illness and the Limits of the Law’ (1985) 12 *Journal of Law and Society* 199; Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (1980); Alan Hunt and Gary Wickham, *Foucault and Law – Towards a Sociology of Law as Governance* (1994).

¹⁶ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000); Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (2007).

¹⁷ Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (2006); Janne E Nijman and André Nollkaemper, *New Perspectives and the Divide Between National and International Law* (2007); Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (2008).

¹⁸ Saladin Meckled-García and Basak Çali, *The Legalization of Human Rights – Multidisciplinary Perspectives on Human Rights and Human Rights Law* (2006).

law as a barrier to social change is important because it provides impetus for a reappraisal of human rights law as a tool for social justice.

In 1948 the UDHR expressed the aspirations of a fledgling human rights movement. The UDHR was adopted as a non-binding statement. It includes civil, political, economic, social and cultural rights in an integrated account of human dignity. Almost 20 years later, the two foundation Covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), translated UDHR principles into binding international law.¹⁹ The ICCPR and the ICESCR divide the UDHR principles into two sets of rights.

This strategic division resolved a pointed debate within the United Nations. Some nations argued for exclusion of economic, social and cultural rights from a binding covenant because they were not immediately realisable, could not be ascribed through legislation and required expenditure by States. Rather, it was argued, they could only be guaranteed by sound national policy and achieved progressively when necessary resources were available.²⁰ This rhetorical compromise allowed less economically robust member States to pursue economic, social and culture rights according to the principle of ‘progressive realisation’ as set out in Article 2 of the ICESCR. It also accommodated an ideological divide over the primacy of civil and political rights as the emblem of democratic freedoms, and the importance accorded to the provision of economic, social and cultural infrastructure for the wellbeing of people in socialist systems. In developed western nations, the conceptual division of rights coincided with the demise of welfare liberalism and the post-war ascendancy of neoliberal economic theory and practice. Progressive development in the West was to be legitimately achieved with the assistance of market forces.

¹⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, GA Res 2200A [XXI] (entered into force 23 March 1976); *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 <http://www.unhcr.org/refworld/docid/3ae6b36c0.html> (entered into force 3 January 1976).

²⁰ Louis B Sohn, ‘The New International Law: Protection of the Rights of Individuals Rather than States’ (1982 – 1983) 32 *The American University Law Review* 1, 38; D Forsythe, *Human Rights in International Relations* (2nd ed, 2006).

The division in law of the rights in the ICCPR and the ICESCR crystallised a perception of the difference between the two categories of rights. Civil and political rights were understood as concrete rights. They were characterised as clearly definable, immutable and capable of immediate application. They were seen as essential elements of democratic governance and the rule of law. They were negative rights that legitimately constrained the State. Their justiciability was unquestioned.²¹ In contrast, economic, social, and cultural rights were characterised as positive, aspirational rights.²² They were seen as quasi-rights that required positive action in the form of expenditure and policy development on the part of the State. They were not fixed because their content was subject to modification or amendment according to cultural and practical circumstances and available resources. They were malleable, discretionary and non-justiciable. The underlying message was that the realization of economic, social and cultural rights ultimately endangered, rather than strengthened, the State.

The clear distinction between two, and the consequent deference towards civil and political rights was strategically disguised by neo-liberalism. In theory, social and cultural needs could be included in the dynamics of market-driven demand. In practice, these areas of social life lack the defined economic markers that drive the creation of capitalist markets. Indeed, the conceptual division between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, fed into the burgeoning dominance of global neo-liberalism. Global neo-liberalism has emerged as the key regulatory force in the second half of the 20th century.²³ On the global stage, the division between the two categories of rights preconfigured and reinforced the reliance upon neo-liberal economics in international institutions such as the International Monetary Fund and the World Bank and was accordingly exported to nations seeking assistance from these international organisations.²⁴

²¹ Amita Dhanda, 'The Right to Treatment of Persons with Psychosocial Disabilities and the Role of the Courts' (2005) 28(2) *International Journal of Law and Psychiatry* 155, 156.

²² Sohn, above n 20, 18-19.

²³ Noam Chomsky, *Profit Over People: Neoliberalism and Global Order* (1999); Nicola Yeates, 'Globalization and Social Policy: From Global Neoliberal Hegemony to Global Political Pluralism' (2002) 2 *Global Social Policy* 69.

²⁴ David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (2004); Paul Farmer, *Pathologies of Power: Health, Human Rights, and the New War on the Poor* (2003).

At the domestic level, neo-liberalism also works to undermine the implementation of human rights. For example, neo-liberalism encourages a valorisation of individual, autonomous 'choice'. The model of bare choice encourages the view that individual rights in law should privilege isolated, self-directed decision-making, rather than decisions that are embedded in personal, communal and social contexts.²⁵ Its corollary is the notion that the consequences of 'choice' are the sole responsibility of the decision-maker. Furthermore, neo-liberalism subsumes ideas about the social realm and its impact on human experience within the economic notions of risk assessment and risk management. This is illustrated, for example, in accounts of 'managerialism' as the regulatory expression of neo-liberal philosophy at the domestic, micro-political level.²⁶

The myth of the division between these two categories of human rights was exploded by the ground-breaking work of Nobel Laureate Amartya Sen.²⁷ Sen demonstrated the essential interrelationship between civil and political rights and economic, social and cultural rights in his comparative study of famines. Sen's insights are complemented by feminist analyses that highlight the gendered nature of the constructed contrast between the two categories of rights which echoes the purportedly separate realms of public and private life. Feminist accounts query the assumption that public, political rights, which are traditionally exercised by men, should be regarded as naturally defensible in the courts, whereas rights associated with the work of women in the home, in subsistence economies, in health care and in the education of the family, were not. Margaret Thornton, for example, has illustrated the gendered dissonance in law surrounding the public and private divide.²⁸ Hilary Charlesworth and Christine Chinkin illustrate similar limitations in the structures and rationales of international law.²⁹

²⁵ Alistair Davidson and Roger D Spegele, *Rights Justice and Democracy in Australia* (1991).

²⁶ Spencer Paul Zifcak, *New Managerialism: Administrative Reform in Whitehall and Canberra* (1994); Ian Kirkpatrick, Stephen Ackroyd and Richard Walker, *The New Managerialism and the Public Service Professions: Change in Health, Social Services and Housing* (2005).

²⁷ Amartya Sen, *Poverty and Famines* (1983); Amartya Sen, *Famine and Other Crises* (2001); Amartya Sen, *Development as Freedom* (1999); Amartya Sen and Martha Nussbaum, *The Quality of Life* (1993).

²⁸ Margaret Thornton, *Public and Private : Feminist Legal Debates* (1995).

²⁹ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law : A Feminist Analysis* (2000).

III - The Quiet Revolution

The theoretical critique of law and the legalisation of human rights has both influenced and been informed by the experience of people who remain subject to human rights abuse.³⁰ This has led to a quiet revolution in international law, evidenced by the international community revising its approach to developing the content of international human rights instruments. In particular, it has moved toward articulating human rights approaches that respect the perspectives, experiences and aspirations of people who are subject to abuse.

Two key processes have underpinned this quiet revolution. The first was recognition that reconciling the two categories of rights is an essential precondition for the realisation of socially embedded human rights. The United Nations World Conference on Human Rights in Vienna in 1993 adopted the Vienna Declaration and Program of Action,³¹ which specifically recognizes human rights as universal, indivisible, interdependent and interrelated. Article 5 of the Vienna Declaration reads as follows

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

³⁰ Theresia Degener, ‘Disability as a Subject of International Human Rights Law and Comparative Discrimination Law’ in Stanley S Herr, Lawrence O Gostin, Larry Ogalthorpe Gostin, Harold Hongju Koh (eds), *The Human Rights of Persons with Intellectual Disabilities* (2003).

³¹ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (1993)
<[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)>.

The second process involved reform of the United Nations system to enable the active participation of non-government organisations in the formal deliberations of the United Nations.³²

IV - The Convention on the Rights of Persons with Disabilities

The CRPD is the first international convention to be drafted following the adoption of the Vienna Declaration and Program of Action, and with the collective and collaborative action of people with disabilities.³³ The views and aspirations of disability organisations involved in the drafting of the CRPD are therefore reflected in the travaux préparatoire and carry interpretive weight. This shifts the focus toward the subjective experience of human rights violations.

The reconciliation of the two categories of rights is expressed in the structure and content of the CRPD and its adoption of the social model of disability.³⁴ The social model of disability emphasises the responsibility of society to dismantle the physical and attitudinal barriers that exclude and stigmatise people on the basis of their physical or mental condition.³⁵ The CRPD seeks to limit mechanisms that replicate and reinforce the social exclusion and marginalisation of people with disabilities. To achieve this it sets out the foundational human rights of non-discrimination, equality and social participation as entitlements that must be constructed in the social fabric. For example, Articles 1–7 set out the general principles that establish that people with disabilities are the subject of rights. Articles 8 and 9 seek to raise awareness, foster respect, combat stereotypes, prejudices and harmful practices, including the exclusion of people with disabilities from physical environments and essential services. Articles 11–17 reflect the priority given to physical and mental safety and well-being as a precondition for social inclusion. Articles

³² Christine Chinkin, 'Monism and Dualism: The Impact of Private Authority on the Dichotomy Between National and International Law' in Nijman and Nolkaemper (eds), above n 17.

³³ Amita Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?' (2007) 34(2) *Syracuse Journal of International Law & Commerce* 429, 432.

³⁴ Rosemary Kayess and Ben Fogarty, 'The Rights and Dignity of Person with Disabilities' (2007) 32(1) *Alternative Law Journal* 22.

³⁵ Gerard Quinn and Teresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (2002); Degener, above n 30.

18–30 recognise the barriers to effective social participation as the interplay between the embodied experience of disability and the disabling effects of active and passive discrimination.³⁶ Although the CRPD does not purport to create new rights,³⁷ its critical contribution to the human rights landscape is a new articulation of how established rights are conceived, expressed and realised. Full implementation of the CRPD, therefore, requires a re-examination of the relevant domestic legal framework with a view to the realisation of integrated ICCPR and ICESCR rights.

A - The CRPD in Australia

In Australia, the debate about the implementation of the Convention on the Rights of Persons with Disabilities remains enmeshed in the traditional separation of negative (civil and political) and positive (economic, social and cultural) rights. In the context of mental health care, this is reflected in a preoccupation with the question of involuntary detention and treatment, at the expense of discussions about the positive obligations imposed by the CRPD.

Australia signed the CRPD on 30 March 2007 and ratified on 17 July 2008. The Convention entered into force for Australia on 16 August 2008. Australia also acceded to the CRPD Optional Protocol³⁸ on 21 August 2009. The Optional Protocol allows the Committee on the Rights of Persons with Disabilities to receive communications from or on behalf of individuals or groups of individuals who claim to be victims of a violation of the provisions of the CRPD by that State party.³⁹ On ratification, Australia lodged an

³⁶ Penny Weller, 'Supported Decision-Making and the Achievement of Non-Discrimination: The Promise and Paradox of the Convention on the Rights of Persons with Disabilities' in Bernadette McSherry (ed) *International Trends in Mental Health Laws* (2008).

³⁷ Louise Arbour, 'Statement on the Ad Hoc Committee's Adoption of the International Convention on the Rights of Persons with Disabilities New York' (Press Release, 5 December 2006) <<http://www.ohchr.org/english/press/newsFrameset-2.htm>> at 2 March 2007.

³⁸ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, UN Doc A/61/611 (entered into force 3 May 2008).

³⁹ *Ibid* Article 1. Accession indicates that the State consents to becoming a party to that treaty by depositing an 'instrument of accession'.

interpretive declaration.⁴⁰ The first two paragraphs of the declaration⁴¹ are relevant to this discussion and read as follows:

“Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;

Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.”⁴²

The Joint Standing Committee on Treaties (JSCOT) conducts public consultation and makes recommendations to the federal government regarding the incorporation of treaties.⁴³ In its report on the CRPD, JSCOT explains the declaration as an attempt to clarify Australia’s position in relation to substituted decision-making and compulsory treatment.⁴⁴ JSCOT notes that while different views were expressed in relation to substituted decision-making⁴⁵ and compulsory treatment,⁴⁶ the majority of disability organisations supported a declaration that would clarify Australia’s understanding of its

⁴⁰ An interpretative declaration is a declaration by a State as to its understanding of some matter covered by a treaty or its interpretation of a particular provision. Declarations clarify a State’s position and do not purport to exclude or modify the legal effect of a treaty.

⁴¹ <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec>.

⁴² United Nations Treaty Database: <<http://www.un.org>> at 1 October 2009.

⁴³ <<http://www.aph.gov.au/house/committee/jsct/index.htm>>.

⁴⁴ Commonwealth, *Report No 95 of the Joint Standing Committee on Treaties*, (2008) Chapter 2: Convention on the Rights of Persons with Disabilities, para 2.7.

⁴⁵ This paper refers to ‘substituted decision-making’ as the process whereby decisions are made on behalf of people who are considered not capable of being able to make decisions for themselves.

⁴⁶ This paper refers to ‘compulsory treatment’ as treatment of mental illness that is conducted without consent, or contrary to the wishes of the person receiving treatment.

ability to continue existing practices related to substituted decision-making and compulsory treatment.⁴⁷

The declaration indicates that both substituted decision-making and compulsory treatment will only be accepted as last resorts and with appropriate safeguards. There is sufficient evidence from inquiries into the current provision of mental health services in Australia to suggest that, in practice, the provision of mental health services often fails to conform with Australia's declared understanding of the CPRD.⁴⁸ The material also suggests that the content and operation of human rights safeguards is inadequate. These deficiencies can be illustrated by a brief discussion of the scope of Articles 12, 17 and 25. In sum, the quiet revolution requires an assessment of the practical application of the relevant legal frameworks that is informed by the perspectives of people whose rights are infringed.

⁴⁷ Above note 44, para 2.9.

⁴⁸ Human Rights and Equal Opportunity Commission, *National Inquiry into the Human Rights of People with Mental Illness* (1993) Vols 1 and 2 <http://www.humanrights.gov.au/human_rights/mental_illness/national_inquiry.html>; Commonwealth, *First Report & Final Report of the Senate Select Committee on Mental Health: A National Approach to Mental Health – From Crisis to Community* (2006) <http://www.aph.gov.au/Senate/committee/mentalhealth_ctte/report/index.htm>; Mental Health Council of Australia, Brain and Mind Research Institute, and the Human Rights and Equal Opportunity Commission, *Not for Service* (2005) <http://www.hreoc.gov.au/disability_rights/notforservice/index.html>; Australian Health Minister's Advisory Council, *Evaluation of the Second National Mental Health Plan* (2003) <<http://www.alrc.gov.au/inquiries/title/alrc103/index.html>> at 9 August 2009; James Ogloff 'Identifying the Needs of Mentally Ill People in Gaols and Prisons' (2002) 9(1) *Psychiatry, Psychology and Law* 1.

B - The effect of Articles 12, 17 and 25

Article 12, with Articles 5 and 13, encompass the rights to non-discrimination and equal protection and benefit of the law.⁴⁹ The CRPD enshrines a presumption of capacity for all persons with a disability, and imposes obligations to provide the support which may be necessary to exercise capacity. The CRPD's strong emphasis on participation⁵⁰ suggests that the obligation to include people with mental illness in decision-making may require the provision of additional support beyond what is ordinarily available. Recourse may be had to substituted decision-making only after the possibilities for self-directed decision-making are exhausted. Article 12(3) requires that substituted decision-making processes

“respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body”

and

“shall be proportional to the degree to which such measures affect the person's rights and interests.”

In all Australian jurisdictions, treating mental health practitioners are legislatively empowered to make decisions about compulsory treatment. As a result, the decisions that a person with mental illness may make about their own future care when they have capacity, or the decisions which are made by an appointed representative, are able to be compulsorily overridden.⁵¹ While it may be argued that the authority given to treating

⁴⁹ Lawson Anna, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era Or False Dawn?' (2007) 34(2) *Syracuse Journal of International Law & Commerce* 583, 595.

⁵⁰ A reference to participation is included in preamble paras e, k, m and y, and Articles 1, 3, 19, 24, 16 19, 30 and 34.

⁵¹ Paul Biegler, Cameron Stewart, Julian Savulescu and Loane Skene (2000) 'Determining the Validity of Advance Directives' (2000) 172 *Medical Journal of Australia* 545; Lindy Willmott, Ben White and Michelle Howard (2006) 'Refusing Advance Refusals: Advance Directives and Life Sustaining Medical Treatment' [2006] *Melbourne University Law Review* 7.

practitioners facilitates prompt treatment, human rights principles require that health interventions taken without the consent of the person affected or contrary to their expressed preferences must be strictly justified, subject to real safeguards, and demonstrably proportionate to the risk that is being averted. Any accompanying restrictions on rights must also be proportionate. This suggests that it is necessary to closely examine current practice in order to ascertain whether the exercises of compulsory powers by health practitioners are appropriate.

The right to respect for physical and mental integrity in Article 17 must also be evaluated through the lens of the quiet revolution.⁵² Article 17 is linked in the structure of the CRPD to the prohibition against torture, inhumane and degrading treatment and the right to protection from exploitation, violence and abuse. Tina Minkowitz argues that this contextual reading of Article 17, coupled with the full weight of international human rights law, invests Article 17 with the force of a prohibition against all involuntary treatment.⁵³ Bernadette McSherry suggests that Article 17 is more correctly viewed as a limitation on practices of restraint and seclusion, and as providing protection from both unbeneficial treatment and overly intrusive treatment.⁵⁴ Both writers imply that Article 17 requires, at least, an evaluation of the ‘taken for granted’ practices in mental health care that may infringe Article 17, including non-therapeutic practices that are imposed for administrative purposes, convenience or as punishment.

This interpretation of Articles 12 and 17 as requiring a critical evaluation of current practices is reinforced by the content of Article 25 on the right to health.⁵⁵ Article 25 requires that people with a disability are provided with adequate, appropriate and accessible services, guided by the overarching principles of non-discrimination and the

⁵² Amita Dhandu, ‘Convention on the Rights of Persons with Disabilities’ (Keynote Address presented at the ANZAPPL Annual Conference, Manly, October 2008); A Lawson, ‘People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the United Nations Convention on the Rights of Persons with Disabilities: Changing the World?’ in Bernadette McSherry (ed), *Law in Context* (2008).

⁵³ Tina Minkowitz, ‘The United Nations Convention on The Rights Of Persons With Disabilities and The Right To Be Free From Non-consensual Psychiatric Interventions’ (2007) 34(2) *Syracuse Journal of International Law and Commerce* 405, 405.

⁵⁴ Bernadette McSherry, ‘Protecting the Integrity of the Person: Developing Limitations on Involuntary Treatment’ in Bernadette McSherry (ed), *International Trends in Mental Health Law* (2008) 11-124, 121.

⁵⁵ Sylvia Bell, ‘What Does the “Right to Health” Have to Offer Mental Health Patients?’ (2005) 28(2) *International Journal of Law and Psychiatry* 141.

obligation to elicit free and informed consent. Article 25 also emphasises the importance of providing health professionals with human rights training and developing human rights-based professional ethics. Giving appropriate weight to Article 25, in particular, illuminates the social dimensions of the human rights framework in the CRPD.

V - Conclusion

Australia's commitment to international human rights norms requires the development of appropriate legislative frameworks to support good practice. This can only comprehensively be facilitated by the formal recognition of human rights in Australian law, particularly the inclusive recognition of economic social and cultural rights. New national and regional human rights instruments provide templates for an inclusive iteration of human rights. For example, both the Constitution of the Republic of South Africa (1996)⁵⁶ and the Charter of Fundamental Rights of the European Union (2000)⁵⁷ adopt an integrated approach and could provide templates for Australian federal legislation.

The CRPD, and especially Articles 12, 17 and 25, illustrate profound shifts both in the conception of human rights and the implementation of human rights in public policy domains. In contrast, the Australian declaration to the CRPD emphasises the continuation of existing practices. It represents a missed opportunity to evaluate mental health care from a contemporary human rights perspective.

The Universal Declaration of Human Rights and the Convention on the Rights of Persons with Disabilities bracket a period in which the social justice principles were subsumed within a false division between civil and political rights on the one hand and economic, social and cultural rights on the other. The revitalised social justice agenda in human

⁵⁶ Constitution of the Republic of South Africa Act, 1996.

⁵⁷ European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, *Official Journal of the European Communities*, 18 December 2000 (2000/C 364/01), <<http://www.unhcr.org/refworld/docid/3ae6b3b70.html>>.

rights law recognises the indivisible, interdependent and interrelated nature of all human rights. The real challenge is to recognise the full implications of the quiet revolution. With or without a legislative or constitutional instrument which explicitly enshrines human rights at the federal level, engagement with the CRPD will invariably develop a deeper a human rights sensibility in Australia.