



## Transcript - Human Rights Explainer

**Kate:** Hello everyone, my name is Kate, and I am part of the Rule of Law Education team, and today with me we have Lorraine Finlay who is currently the Australian Human Rights Commissioner with the Australian Human Rights Commission. Part of her role with the Human Rights Commission is to protect and to promote fundamental Human Rights and Freedoms. Before commencing this role, she worked as an academic and a lawyer specializing in public law and human rights law.

**Kate:** So, to get us started Lorraine, what is the relationship between human rights and the rule of law?

**Lorraine:** Well, it's so great to be here with you today and you know, human rights and the rule of law are just inextricably linked. If we look to for example, the Universal Declaration of Human Rights, in the preamble it tells us that human rights have to be protected by the rule of law, and we know that if you don't have the rule of law - the idea that no one's above the law and the idea that the law has to apply equally and fairly, not just to citizens but also to the government - without that, human rights can't be properly protected, and even more importantly they can't be properly protected for the most disadvantaged and vulnerable in our communities.

**Kate:** Lorraine, you mentioned vulnerable people can you give us some specific examples of how the rule of law affects human rights in relation to these vulnerable people?

**Lorraine:** Sure, there are lots of examples, but you know I think probably one of the most useful ones to look at in Australia is the rule of law, human rights, and our treatment of Asylum Seekers. That might be a bit of an unusual example because a lot of people know that Australia has been criticized internationally for our treatment of Asylum Seekers and there'd be many Australians who would be concerned about whether or not Australia is complying with our human rights obligations. But the reason I use that as an example is because in our system in Australia even people who are claiming Asylum - who are amongst the most vulnerable and disadvantaged - have access to the court system to make those claims, have access to the full judicial process to be able to make those claims and what's even more important and I'll use the example of NZYQ which is the recent High Court decision, where the High Court in a unanimous decision, overruled an earlier decision called Al-Kateb and actually ruled that indefinite immigration detention in Australia is unconstitutional. Now let's put to one side the controversial nature of that and you know people might have different views about that decision but where it's important from a rule of law perspective is the government were very very clear that they disagreed with the court decision and they've stated that repeatedly since the court decision but they've still complied with it. They still released people from detention as a result of the decision and that shows the rule of law in operation because even the government has had its power limited by the courts and they've respected the role that the courts play in Australian Society.

\* \* \* **Kate:** That's such a great example of just how the rule of law and human rights interact. When we talk about rights in Australia, they're protected by a combination of things so our constitution some statute law and some common law. What do you think is the most effective way to protect human rights?

\* \* **Lorraine:** Well it's such an interesting question because there is no one perfect way of protecting human rights and I actually think when you get down to it the most important thing isn't the Constitution or a particular law or the common law. The most important thing is actually having citizens who believe in human rights and who are willing to see human rights enacted and part of their day-to-day lives and you know I'll give the example if you look right around the world some of the best human rights constitutions in the world are in some of the least human rights friendly jurisdictions and it's something that is really important for us to keep in mind, the law is an incredibly important tool it's really important to have human rights compliant laws but in and of themselves unless you have citizens and governments that are willing to comply with the rule of law those human right protections are really not as helpful as they should be.

**Kate:** I know I've heard you talk about how having a - for example a Bill of Rights will actually restrict our rights because it's kind of hard to change, so what do you think about - do you think we should have a Bill of Rights or a Charter of Rights and what do you think the pros and cons of that are?

**Lorraine:** Well, I think it's a really important conversation to be having because we always need to think about how do we want to protect rights and what more can we do to better protect our human rights and so the people who argue for a Charter of Rights would point to the fact that it offers Express Clear protection. That it's a way of making human rights accessible to people it's a way of educating people about what our rights are and it's a way of providing clear guidelines to government - more than guidelines because they're enforceable - but



a clear outline to government of what's expected of them and citizens with clear remedies if their rights are breached. The other side of it is that if you actually write your rights down in that way, you actually restrict them, because you're limiting them to what's written in the charter, and where charters really have challenges is when it comes to determining where the balance lies between conflicting rights. So, when you put a charter into place, what you're really saying is who gets to make the final decision about conflicting rights and how we strike the right balance. In our system at the moment, that's the Australian Parliament, with a Charter of Rights, that becomes the Australian Judiciary. So those questions are transferred from the parliament to the courts and that's really where the debate lies. Where do you want that final decision to rest, and in my view, its more democratic to have it resting with parliament.

**Kate:** You bring up a good point. Can you give us some examples of some conflicting rights that we might see if we had a Bill of Rights?

**Lorraine:** Well, you can see them every day, and you know, it is true, Australia is, one of the few countries in the world that's a western liberal democracy - in fact, the only one that doesn't have a Bill of Rights. That doesn't mean that the countries that do have them don't have the same human rights challenges that we do. And I think that's a really important point to understand. No country anywhere in the world is perfect when it comes to Human Rights, and despite the different mechanisms that different countries use, be it Constitution, statute, common law, we still all face human rights challenges and still all need to do more to make sure human rights are protected.

**Kate:** Is there an example that you can think of of any, rights protected in our common law?

**Lorraine:** Well, again, the common law really, from the starting point, is about protecting rights because the very first idea of the common law is that you, as an individual, are free to do anything that you want unless it's limited expressly by law. And so the idea of the common law is, the starting point is very freedom focused, with the law then coming over top only to tell you what you can't do and place limits around that. So the common law, from the start, is really based on the idea of freedom and rights, but it's really interesting how so many of our rights are still embedded or arrive from the common law. There's a great example of a speech given a few years ago by Robert French, the former High Court Chief Justice, where he spoke about the common law really being the heart of Human Rights and so many of our fundamental rights and freedoms stemming from that. And increasingly we're seeing statute law becoming more and more important, but the foundations really do lie in the common law.

**Kate:** Yeah, we can see that different states have legislation in place, so Human Rights Acts. For example, in ACT, Victoria and Queensland. Do you think that there is a conflict with government policy or law, and maybe an example could be with the COVID-19 legislation in Victoria?

**Lorraine:** Yeah, it's a really interesting example because proponents of charters of Rights would tell you that the COVID example really shows how Charters can be effective because they did provide people with remedies in some cases, albeit the remedies coming a long time after the rights had been breached. But what proponents will say in Victoria, ACT, and Queensland is that those jurisdictions, all of whom have Human Rights Acts or Charters, really show how Charters have two key impacts. The first is they give individuals direct legal remedies when their rights are breached or an opportunity to raise those issues. And the second thing is that Charters create a rights compliance culture, and particularly when you look at the dialogue models that we have in Australia. The idea being that even if an individual can't themselves bring a legal action, hopefully, Human Rights Charters result in the public service when they're crafting policies and crafting laws taking a more human rights-compliant approach. What we saw in COVID is that it isn't that straightforward, because I would say that if you look, for example, at Victoria, which has a charter, the fact is they took the most restrictive approach of any state in Australia to the COVID-19 pandemic and restricted rights in a much tougher way and for a lot longer than other jurisdictions. So, it showed again that a charter in and of itself isn't the single answer to any of this and that it really can't protect rights unless you have a rights-compliant culture underneath and people wanting to see those rights.

**Kate:** So, you talked about Charters of Rights providing legal remedies to people – what kind of legal remedies are there if we don't have a Charter of Rights?

**Speaker:** So I should say some Charters of Rights provide legal remedies - because others don't provide a direct right to remedy. That is dependent on the type of Charter that you have. But certainly, without Charters, you still do have human rights. So, it's not the case, for example, in the COVID-19 pandemic, that Victorian people had human rights but New South Wales people didn't. And in actual fact, I think you can make a strong argument that rights were better protected in New South Wales without a charter because, in fact, you had a



government that was focused on trying to strike a balance. And again, there's a whole separate discussion about whether that balance was right and where rights could have been better protected during that period. But in terms of the question of Charters or not, without Charters in Australia, we still have a constitution that doesn't contain Express Rights – well - doesn't contain many Express Rights or a full Bill of Rights but certainly does contain rights protective features. By that in particular, I mean when you look at the institutional framework it sets up things like the separation of powers, judicial review, federalism, responsible and representative government. There are a whole range of features in the Constitution that don't protect or call out an individual right but provide protection for rights as a whole because of the way they limit government power and put checks and balances in place. And then in addition to that, we've got a whole range of statutes that protect human rights, we've got the common law that protects human rights, and even down to the way that we interpret statutes using the principle of legality. There are a whole range of mechanisms that we have for protecting rights through the law. And then a whole range of mechanisms in terms of institutions like the Australian Human Rights Commission that are designed to protect and promote human rights in Australia.

**Kate:** Yeah. So part of your role as the Human Rights Commissioner is to protect human rights. Can you give us any examples of some things that you've seen in your job as a Human Rights Commissioner where you've had to protect human rights?

**Speaker:** The Australian Human Rights Commission has a really important role in promoting and protecting human rights in Australia, and it does that in a number of ways. So part of our job is education and awareness-raising in Australia, having that conversation about why human rights matter and what more we need to do. Part of it is providing recommendations and advice to government in terms of policies and laws and whether they're compliant with rights. We hold our own inquiries and do our own research into a variety of things. So one example of that is, in my role as a Human Rights Commissioner, I engage in regular inspections of immigration detention centres to look at how they – if they - meet minimum human rights standards. But then another thing that we do that's really important is we have a complaints and conciliation function. So Australians have the ability under our legislation to bring certain complaints to us when their human rights are being breached. We're not a court, we can't make a finding determination, we can't order remedies, but we can bring parties together to conciliate disputes and try to find a way to constructively work through those to hopefully help people realize their human rights and have them protected.

**Kate:** Wow, that sounds like a very important role that you've got there. So you talked about education. So what else do you do to promote human rights?

**Lorraine:** We do a whole variety of things to promote human rights, and obviously as the Human Rights Commissioner, I have a focus on human rights generally. But in addition to myself, we have a president, and we have, in total, seven specific purpose Commissioners. So we have Commissioners who focus on particular human rights issues. For example, there's a National Children's Commissioner who looks particularly at children and their human rights, and we have a sex discrimination commissioner who looks particularly at ensuring gender equality within Australia. That's just a few examples. But what it means is that we can focus across the board on human rights, recognizing that human rights aren't just about one group of people or one particular right, it's about everybody in the Australian community and the full range of human rights that we want to see reflected in our country.

**Kate:** The Australian Human Rights Commission and the separation of powers – is this a government body or kind of how does that work with the government? Because you also said you're not you can't enforce decisions and you can't enforce remedies, but how does that work within our system of government?

**Lorraine:** It's a really important question. So we're technically part of the government, but we're independent from the government. So we're accountable to the parliament, we report through the Attorney General's Department to the parliament of Australia. But really importantly, our independence is protected under our statute. And what that means is we have the power to be able to be very open with government and to criticize them where that's necessary. So we have to take a constructive role, we want to obviously work with government to make sure that human rights are protected, but where necessary, we will be critical and we are able to do that because of our independence, which is protected under law.

**Kate:** It's so great to have all those checks and balances protecting that. It's kind of like the judiciary, where they have their independence so they can administer or conciliate certain things. With the Australian Human Rights Commission, do you do much with the international scope, with, for example, the United Nations or anything?



**Lorraine:** Our primary focus is human rights in Australia, but we are Australia's national human rights institution, or NHRI as they're called, and NHRIs exist not in every country around the world, but in a significant number of countries around the world. NHRIs, under the United Nations system, have particular roles and responsibilities that they do play, again providing an independent voice to the United Nations with respect to the country that they're from. So we do regularly make representations to, and appear before the United Nations on a variety of issues to ensure that we provide them with up-to-date and independent information about what Australia is doing with respect to our international human rights obligations. And again, while our focus is Australia, we work really closely with other human rights commissions and similar bodies around the world simply to recognize the fact that human rights are universal and many of the issues we're facing are both issues that other countries have as well, so we can learn from each other, but are also issues where we need to have cooperation, because if you look at things like modern slavery, for example, no one country can deal with that problem on their own. We actually all do need to cooperate. And so we do a lot of work with our international colleagues to make sure that we are learning from each other, but we're also cooperating to really try and maximize the impact we can have.

**Kate:** Do you think that there are some human rights that need greater protection than others, or do you think that we should be focusing on everything equally?

**Lorraine:** It's such a good question. If you go back to the foundation of human rights, the idea is they're indivisible and they're non-hierarchical. So no one human right is officially more important than another. We don't rank them. But obviously, it is important to have a focus on all of them, and there are times when the direct impact of restricting a particular right will be so significant and serious that it perhaps does need to take priority over other rights where the direct impact of harm is a little bit less. So it is a matter, when rights come into conflict with each other, of working out not which right is more important, but of how you can better balance them out to make sure you maximize rights protection across the board and minimize the harm that's caused to people when their rights are breached.

**Kate:** Yeah, that's so important. Are there any examples of rights that, you're focusing on a bit more in your work or...?

**Lorraine:** Well, I guess, in terms of key human rights issues in Australia, again, there are a number of issues that have been there, unfortunately, for a really, really long time and that are significant challenges and that have been a core focus of our work at the Australian Human Rights Commission. And I guess, to look broadly at the commission as a whole, some of those key issues include things like the continued entrenched disadvantage amongst Indigenous communities in Australia, and we see that in a variety of policy areas, be it the criminal justice system, healthcare, education, housing. The list goes on. If you look currently, the royal commission in relation to disability, which recently handed down findings that gave us a really clear picture of the work that Australia needs to do to meet its obligations in relation to people with disability. If we look at rates of domestic and family violence, child abuse, and neglect, there's a whole variety of really serious issues across Australia. But in terms of my work, I particularly focus on the work that we do to promote and protect fundamental rights and freedoms. So things like freedom of speech, freedom of movement, freedom of association. I also particularly focus on our areas of work around modern slavery, around detention practices, and in particular, torture prevention. So looking at the Optional Protocol to the Convention Against Torture, our work around technology and human rights, business and human rights, and immigration and asylum seekers. So they're the key areas that I focus on, but that's more because of the way we break the work up in the commission rather than saying those areas are more important than anything else.

**Kate:** So we've talked a little bit about NZYQ. Let's talk a little bit more about that decision and how it has impacted human rights and why is it important to the rule of law?

**Lorraine:** Yeah, again, I think that decision is really important in terms of the rule of law impacts and what it says about the government being required to comply with the law in the same way that citizens are, and that's something we really take for granted in Australia, but it is actually a profoundly important idea that the law doesn't just apply to each and every one of us, it also applies to the government and it limits their power and means they can't just do whatever they want. So NZYQ, again, regardless of the fact that it's a controversial decision and people might have different views about it, from a rule of law perspective, it's a really important example of how those concepts apply in Australia and how even when the government might not like a decision of the Court, they do comply with it. And if you look right through the history of the High Court of Australia, even though we don't have a Bill of Rights, human rights are an important thread in many of the cases before the



court, even if not expressly from a human rights perspective, also from a constitutional perspective in terms of reinforcing those concepts around the rule of law and checks and balances on government power.

**Kate:** So we kind of talked about rights, but do you think there are more important ones for young people to think about, or do you think that there are ones that young people have more of an influence over than others, or do you have any thoughts on that?

**Lorraine:** I think it's really important just as a starting point for young people to have an interest in human rights and an understanding of what human rights mean to them because, again, it is something that is so easy for us to take for granted in Australia. We're not perfect when it comes to Human Rights, but when you look comparatively around the world, we can be really proud of the country that we've built and the way we have got human rights at the core of that even if we don't always meet the ideals that we set for ourselves. So I think for Australians, it's important not to take that for granted and to understand that human rights are really important but they're not inevitable. So unless we're constantly renewing and reaffirming our commitment to Human Rights, it's so easy for them to be eroded and restricted and to fall away literally overnight. And we saw some of that happening with the Covid-19 pandemic where I think a lot of Australians were surprised at just how easily rights could be removed in Australia. And it just highlights the need for young people to actually understand what rights mean and to understand how they can impact human rights, both through their day-to-day lives. Eleanor Roosevelt famously said when the Universal Declaration was first created that human rights actually begin in small places close to home. And I think that's really true because we often talk about government policies and big plans but actually at its heart human rights is about how we treat each other as human beings. And so for young people, I'd say the first thing is living human rights in your daily life, making sure you bring those values of kindness and respect and empathy and compassion to everything that you do in really small ways. But the second thing is to actually be engaged as citizens in helping to build a better and fairer future. And the way to do that is by getting educated, getting informed, making sure you're engaged and active in your community. And even simple things like not taking your right to vote for granted is really important when it comes to building the kind of society we want in the future and having human rights at the heart of that.

**Kate:** Definitely. I think Covid showed us how human rights can be taken away so quickly. Thank you, Lorraine.