

# Essential freedoms, yes, but our undertow is ugly

While recent developments in the High Court represent a big step forward for the rule of law in Australia, there is little cause for complacency, especially in relation to discrimination against migrants and minorities. ANNE SUSSKIND reports.

**A**USTRALIA RANKS SECOND last among 11 developed, high-income nations in terms of protecting immigrants, the poor and ethnic minorities from discrimination, topping only the United States. Australia also lags behind in guaranteeing equal treatment and non-discrimination for women.

These are among the findings of the World Justice Project's Rule of Law Index, released in Washington in October. The WJP is an independent, non-profit organisation which lists among its supporters the Gates Foundation, Ford Foundation, LexisNexis, Microsoft, Wal-Mart, various sections of the American Bar Association and the US Chamber of Commerce.

The 146-page report covers 35 countries, and is based on a survey of over 1,000 people in the three largest cities in each, including, it says, marginalised people, plus consultation through detailed questionnaires with 900 local legal experts.

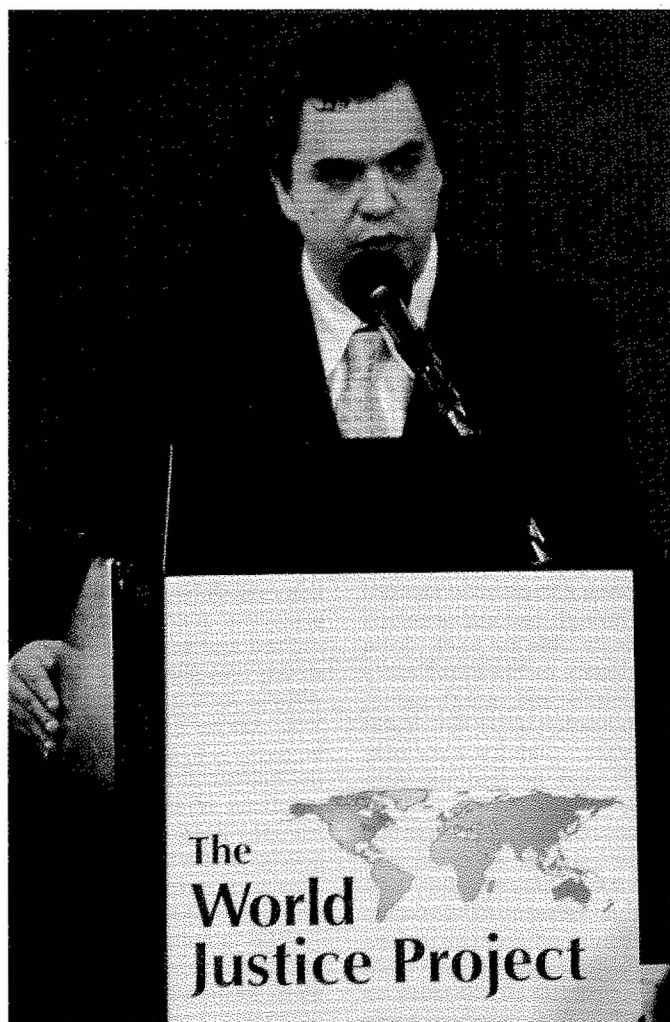
The 35 countries are compared both regionally and by income band, with Australia in the high-income band. Over-

all, the high-income countries score much better than low, underlining an obvious correlation between good government and income.

In answer to questions from *LSJ*, WJP's senior economist Alejandro Ponce, who helped design the new index, said that, in relation to discrimination, it provides assessments on the basis of race, gender, socio-economic status, religion, national origin, and sexual orientation, in areas such as access to justice, police brutality, and university enrolment. It does not include assessments of discrimination against refugees.

In terms of discrimination against immigrants, Ponce said, Australia ranked below some developing countries too, almost at the bottom overall, behind countries such as Colombia, El Salvador, and Morocco.

However, as Ponce points out, the comparison might not be very meaningful, since these countries tend to experience a net outflow of people. When compared to countries with sizeable immigrant populations, Australia ranked second to last.



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PHOTO: COURTESY WORLD JUSTICE PROJECT

"When we analyse the grounds of ethnicity, Australia extent of discrimination on the is placed 15th overall, lagging

behind countries such as Argentina and Poland,” Ponce said.

### Civil justice

According to an accompanying press release, room for improvement was also found in the area of civil justice. As reported in the index, Australia faces challenges in guaranteeing access to legal counsel to its citizens, and scores lower than all high-income countries except Canada. Australia has weaknesses in “access to justice”, sometimes even falling behind some developing countries.

Ponce’s colleague, Juan Carlos Botero, who is director of the WJP Index, says this dimension measures whether people can access and afford legal counsel in civil disputes, and encompasses two concepts: whether they have access to pro-bono legal representation and whether lawyers’ fees are perceived to be excessive. “Australia obtained low scores in both of these concepts,” Botero said.

### And now the good news...

The good news about Australia, according to the World Justice Project, is that it is “leading the world in imposing effective limits on government powers ... Australia has been found to rank third among 35 countries in creating effective constraints on government powers.”

According to the study, Australia also outranks all Asian countries in protecting essential freedoms, such as freedom of expression, freedom of religion, and labour rights. Australia scored well in most dimensions, including also government accountability and absence of corruption.

This ranking, the WJP says, reflects factors such as effective checks and balances, independent audit of government agencies, and effective sanctions for misconduct in the Public Service.

Botero said Australia, like any other country, had strengths and weaknesses.

Australia outperformed the United States in all but two categories: open government and effective criminal justice. Interestingly, Botero said,



**When we are compared with other high-income countries, it’s “not such a pretty picture,” says Sydney University’s Associate Professor Ben Saul.** PHOTO: CHRIS GLEISNER

Australia and the US had room for improvement in the same areas: absence of discrimination and access to legal counsel.

The index, Botero says, measures how laws are implemented and enforced in practice and affect people’s lives, providing comparable, reliable

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and comprehensive data and filling a void.

The rule of law, says William H. Neukom, who is WJP’s founder, president and CEO, and who formerly was a president of the American Bar Association, is the predicate for the eradication of poverty, violence, corruption, pandemics, and other threats to civil society.

“Every person on this planet,” Neukom says, “deserves a fair shake, but far too many of them live in communities without justice, and therefore without hope. This is intolerable.”

The Index is set to expand to 70 countries by 2011 and 100 by 2012. The WJP also

convenes global and regional action-oriented meetings of world leaders, provides seed grants for rule of law projects and new scholarship on rule of law issues. It will host the Asia Pacific Rule of Law Conference in Kuala Lumpur, Malaysia in January 2011, bringing together 150 delegates to address three critical issues, including building a better

business-enabling environment, mitigating environmental degradation, and ensuring basic rights for migrants and refugees ([www.worldjusticeproject.org](http://www.worldjusticeproject.org)).

### Mixed response

Locally, the WJP report has had a mixed response, ranging from that of Sydney University’s Associate Professor Ben Saul, codirector of the Centre for International Law, who finds a number of things are “quite interesting”, through to other academics who are not prepared to discuss its findings because they think its basic premises are too flawed.

Saul says that while there is not a lot of detail, a ranking system can be useful in that it gives an indication of how we benchmark against other well-off countries.

A statistic that stood out, he said, was that Australia did not do well when compared to most developed countries in terms of access to legal counsel, and access to and affordability of civil courts. There was also not a lot of confidence in the impartiality of criminal justice, or confidence in the courts.

Putting that together with the fact that the civil justice system was working slowly – with more than 45 per cent of disputes taking more than a year and a half, and 25 per cent of those never resolved at all – did mean the justice system was “not so accessible”, Saul said.

“You’d expect, as the report shows, that we’d do much better than most in the Asia-Pacific region, but if we’re lumped with high-income countries, it’s not such a pretty picture.

“On security and fundamental rights, we’ve tended to do quite well, but I’m a little surprised in that we don’t have a Bill of Rights, and that didn’t impair us too much.

“There’s one area of fundamental rights we did do badly on, and it’s where we have the strongest statutory protections – equal treatment and non-discrimination. The suspension of the *Racial Discrimination Act* doesn’t help in that area, and then there are the asylum seekers, and areas of social security

law discriminate against newly-arrived migrant and asylum seekers ... it's not great."

The statistics on criminal justice showed it to be one of the worst performing areas, with effective criminal justice one of the lowest ranking of the key factors. But, Saul said, at the same time, looking at the polls about how people experienced justice in daily life, almost 90 per cent of people, when victims of crime, did report it to the police, which was an indicator of confidence.

"This might reflect a gap between reality and perception, and the effect of the law-and-order campaigns in the media. In the region, we do reasonably well, but on a number of factors, even in the region, we are third out of seven ... On order and security, we are third out of seven, and in the income rankings, as they play out, we are sixth, or seventh out of 11 countries. It's a pretty average performance, given the amount of money we spend on the law and justice sectors."

Saul said he could not comment on the report's methodology. Law and justice were, however, viewed very differently by different people, and the report did not measure things that people came into contact with most frequently, like family law.

"It may become a useful tool for advocacy, for those who seek reforms of the civil or criminal justice system. It does add to the data that can be used to argue for reform."

#### Grandiosity

Gordon Samuel Professor of Law and Social Theory at UNSW and codirector of the Centre for Interdisciplinary Studies of Law, Martin Krygier, said he did not like to pour cold water too quickly. While he was sure the information the index provided could be useful, it was important to clarify what it was used for.

Krygier said: "It's a big problem to be telling you how it is when all they asked is how people think it is. Folk opinions are folk opinions. They can't say it's comprehensive



**UNSW's Professor Martin Krygier says we do lots of things that lawyers think necessary to improve the rule of law, but often don't look to where the problems lie in some countries, which are social, political and extra-legal in nature.** PHOTO: CHRIS GLEISNER

and can't say they're telling us what's happening in practice, when you're telling us what people say is happening in practice. Surveys can give you what ethnographers won't give you except in 100 years, but they can't give you the textures, so they may mislead you systematically."

**"Australia and the US had room for improvement in the same areas: absence of discrimination and access to legal counsel."**

That the surveys were carried out in major cities was another flaw, Krygier said. "If there are problems with the rule of law, particularly in less developed countries, they are not greatest in the major cities.

"Australia is probably okay because so many people are in big cities, but even here that would be interesting. Fred

Chaney has said that remote Australia is failing across the board, with failing infrastructure that can't support unplanned growth, inadequate housing, escalating cost of living, environmental degradation ... and disengaged, or remotely engaged, governments in distant capital cities.

He said Australia in large parts of the centre and north is like a failed state, with no resources, services etc, and has a whole range of pathologies. You're not going to find that out in Sydney or Brisbane. If that is even close to the truth, you won't find out about it in the CBD."

Asking people the same

questions in disparate countries, he said, was also a problem. "Imagine in a sense a flat comparison where the questions are the same. They won't necessarily mean the same to people in different circumstances, with different experiences and expectations. What people take for granted as natural differs from country to country, as does what they complain about. The Lionel Murphy scandal, for example, was an issue here, but would not even have rated in other places.

"You can't condemn surveys. What they do is ask lots of people in lots of countries lots of questions, but it is what they don't do. If they take the answer to be 'well, now we know about the rule of law,' they are guilty of over-reaching."

Asking lawyers as the experts would also miss the range of ways in which most people were affected by law. Legal sociologists have often pointed out that, just as health is not necessarily found in hospitals, a lot of law is not found in the central legal institutions or even in what comes to lawyers. People believe law is found in law offices, but that's an insiders' misconception. "It's in the role law plays, or fails to play, in everyday interactions that you should look for much of the rule of law," Krygier told *LSJ*.

Each profession, too, imagined that what their profession did was most important. "Educators, for example, think that they're the most important in their field, but what if we found that children were much more influenced by parents and socio-economic status and school was a kind of holding bay? People who work in schools or hospitals or courts see them as the centre of action.

"It's a massive amount of data, but overblown claims are made for it. It would be better if people said exactly what conclusions could be drawn from it rather than pretend it's a comprehensive statement on the rule of law.

"Billions of dollars are spent internationally each year on the rule of law, promising a great deal, but maybe we are just whistling in the wind. We



**In talking to refugees, migrant workers, Indigenous Australians and people with disabilities, Australia does not return a high rating on the human rights scale, according to Professor Andrea Durbach.** PHOTO FIORA SACCO

do lots of things lawyers think necessary, like train judges, and improve court procedures, but often don't look to where the problems lie in screwed-up countries, which are social, political and extra-legal sources. To put it bluntly, and fortunately in the words of another: in the business of rule of law promotion, "We know how to do a lot of things, but deep down we don't really know what we are doing."

Professor Andrea Durbach, who is director of the Australian Human Rights Centre at UNSW, also has major misgivings. "Although the Index promises to provide comparative reference points for countries in the same region, the method for such a comprehensive rule of law comparison seems flawed, perhaps even crude. They appear to have applied a template of indices across countries with extremely diverse and complex

political histories and varying experiences and understanding of the rule of law – both as an aspiration and in its actual manifestation. And so it leads to some particularly unhelpful claims and analogies. What this does is allows a wealthy democracy like Australia to assert that it has, according to the Index, performed 'highly' in protecting the most fundamental rights, and in reality, in practice, if you talk to refugees in Australia, migrant workers, Indigenous Australians, people with disabilities, or in the healthcare system, we certainly don't rate highly on the human rights scale.

"It has the banality of a rule of law IQ test. For example, can you seriously measure the rule of law by reference to questions regarding the criminal justice system by asking whether people had a good experience when they reported something to the

police, or whether they were burgled in the last three years, or experienced conflict about a contract or debt?"

"It's an interesting exercise but oddly executed. No doubt it has some great collaborators and experts involved, but the methodology seems flawed and the evidence relied on to support large claims, appears tenuous at best."

#### Spot on

The CEO of the Rule of Law Institute of Australia, Richard Gilbert, said there was a crying need for enhanced law reform in Australia. "If you look at the World Justice Report, we do well in some of the main categories ... It is spot on, however, that there is an emerging weakness in transparency, accountability and openness of government processes for good law development and reform.

"I have reviewed the open government and regulatory accountability sections in the Index, and our scores and rankings there are lower than

others, especially when compared to high-income cohorts. This gives us no cause for complacency. If you look at some of the things happening in Canberra, the diminution of the Australian Law Reform Commission via fewer references and lower levels of funding, there is cause for concern. For us to be a quality rule of law country, we have to have quality law and quality law reform and a quality law reform commission.

"The downscaling of the Administrative Review Council via lower levels of activity and a withdrawal of dedicated resources is also a concern, as our system of administrative law requires a strong oversight of a body like the ARC.

"I think the report and the current senate debate on the ALRC is a wake-up call for Canberra to do better on this front. In Australia there has been a tendency to deny funding to some of these institutions protecting people's rights, and access to justice and legal aid remain issues of concern." □

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