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# **Substantive Equality – The Missing Link**

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I would like to begin by acknowledging the Gadigal people of the Eora Nation, the traditional custodians of this land and pay my respects to the Elders past and present.

I appreciate the opportunity to intrude on your agency – specific deliberations with my own thoughts on what you do and why it is important, noting along the way that it is that mix of egalitarianism and liberalism that we say is at the centre of “Australian Values”.

The focus of my talk will be on two issues; firstly, the case for a Charter of Rights as putting flesh on the bones of the “democratic beliefs” we share and the “rights and liberties” we respect.

Secondly, I will focus on the “equality” part of what it is to have a right and the responsibility to protect and promote it. Issues are raised here that take us deeper than “formal equality” into the depths of “substantial equality” and its challenging obligations for public policy.

But, first, let me ask of you all: Are you an optimist or a pessimist when it comes to human nature and human society? A similar question, but not quite the same, would be: Are you an idealist or a realist?

To assist me along the way I turn to the late Leonard Cohen. Firstly, the pessimist and realist Cohen in 1988: “Everybody knows the war is over. Everybody knows the good guys lost...the poor stay poor, the rich stay rich”.

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Or is it the case, as he sang in 1992, that “There is a crack in everything. That’s how the light gets in”. And further to that: “Ring the bells that still can ring. Forget your perfect offering”.

Cohen’s creed, as Simone Webb<sup>1</sup> writes, is “optimistic pessimism”. There are bells that still can be rung, a world still to be improved even though utopia is beyond our reach. To that end both head and heart need to be mobilised and it is that mix I will seek to find, starting with the analytical offering.

### **Living in and through Groups**

Let us think of all the ways in which human beings think and act in relation to their social existence. They form social groups, and then groups within groups, or indeed, partnerships beyond the lives within which they normally see themselves. So many factors can be brought to the table – gender, sexuality, religion, race and ethnicity, nationality and language, social class, disability and illness... It’s an extensive list and involves other factors too – place of residence, city, suburb and country for example; and indeed, political participation and the parties that go with it.

As philosophers and sociologists have observed over the centuries – human beings are, as Aristotle put it, social animals. He writes in **Politics**:

Man is by nature a social animal; an individual who is unsocial, naturally and not accidentally, is either beneath our notice or more than human. Society is something that precedes the individual.

He goes on to say that those who are so self-sufficient as not to need a common life are either “a beast or a God”.

One might say that a particular society, local, regional, or national, is the sum-total of all of these groups and the relationships they form one with the other. Of course, power and status will enter the picture; so too we will see traditions and mores as

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well as laws and regulations. Remember J.S. Mill's Tyranny of the Majority could involve beliefs and opinions, as well as government and law. All too often we can see the tyranny of the mob, as well as the tyranny of the party. That's why checks and balances are so important.

One way of defining the politics surrounding all of this relates to one's views on the issue of change. At one end of the spectrum, we see radicals and on the other conservatives. The latter point to the instability and dangers that can emerge from too much change or change introduced too quickly and the former to the oppression that can embed itself in the social fabric, sometimes clearly, sometimes more subtly, and not even seen as such. It's that important distinction between "formal" and "substantive", freedom and equality.

This leads me to consider the various ideas these social groups small and large, official and non-official, bring to the table when considering policy options. In your case, it's official, and there's a clear focus, human rights, their protection and promotion.

### **Legislating for Rights**

Your instrument of delivery comes from anti-discrimination and equal opportunity legislation and, in the case of Victoria, the A.C.T. and Queensland, a Charter of Rights. In my way of thinking, you are one of what we have established as "accountability agencies" or "institutes of accountability" **within** government and with the responsibility to **protect and promote good government.**<sup>2</sup>

In this we are taken beyond elections and the accountabilities they support into the territory of a broader public interest that seeks to tackle laws, regulations and practices that feed maladministration, corruption and human rights transgressions. The range of issues related to corruption take us to anti-corruption commissions and the latter to human rights commissions, a part of which could be a clearly defined Charter of Rights. It seems straightforward that liberal and social democrats

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would support such initiatives, but in both cases there has been not insignificant opposition.

I'm disappointed that the work done in Western Australia in the first decade of the new century to develop a Human Rights Act didn't come to fruition. A Labor Government initiated committee chaired by Hon. Fred Chaney OA, found that there was strong community support for such an act. As many here would recall, the discussion and debate about this shifted across to the national land. Again, a proposal was developed by way of an inquiry chaired by Frank Brennan, but despite an Australian Bill of Rights, Bill from Andrew Wilkie, Australia remains without such an institution.

Still there's plenty of these accountability agencies within government, anti-discrimination commissions, auditors, an ombudsman, corruption commissions, freedom of information commissions just to name a few. They are what we might say causes an itch in the socks of modern government; their role being well described by Canadian consultant Mark Schacter.<sup>3</sup>

“Formal attributes of democratic government – universal suffrage and multi-party elections – are necessary but not sufficient to ensure healthy accountability between citizens and government.

Direct accountability to citizens via the ballot box must be accompanied by the state's willingness to *restrain itself* by creating and sustaining independent public institutions empowered to oversee its actions, demand explanations, and, when circumstances warrant, impose penalties on the government for improper or illegal activity.

In a well-functioning state, therefore, the government is subjected to accountability that is both *imposed upon it* from outside by citizens, and accountability that it imposes *upon itself*. Through public institutions empowered to restrain the political executive”.

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## Charter of Rights

Let me focus now on the Charters we see in operation in Victoria, Queensland and the A.C.T. We all know the criticisms that are made – that they aren't needed in our parliamentary democracy, that they would shift power to the judiciary and away from elected politicians, that they only benefit minorities and criminals, and that they are bound to clog the courts, lawyers being what they are, searchers for another angle to assist their clients.

I have spoken about the arguments and what I see to be their deficiencies in earlier days.<sup>4</sup> And today, I want to urge upon you what I believe to be the most powerful arguments in support of such charters, namely, that (i) they bring life and soul to our oft stated beliefs in liberty and equality and (ii) they provide much needed support for our everyday citizens and, in particular, the marginalised and vulnerable amongst us.

In making this case, I am indebted to the excellent publication from the Human Rights Law Centre **Charters of Human Rights makes our lives better**. By the provision of 101 case studies, the publication illustrates what it is that is so important about a Charter of Rights. What they also inform us is the wide range of rights that we put on the table, when it comes to moving from a principle or generalisation, like, “liberty” or “equality”, to what they would mean in a particular context, and alongside other principles, sometimes in conflict.

So much of what we think of as democracy lies in and around these matters. Just to list and consider the list of rights that come from the **International Covenant on Civil and Political Rights** or the **International Covenant on Economics, Social And Cultural Rights**, is an educative process. That we have legislation, whether ordinary or constitutional, that enables such principles-led inquiry, is consistent with the deliberation we expect from within our political institutions.

The charters in Victoria, Queensland and the A.C.T ensure (i) that values associated with our human rights are considered when government make decisions, (ii) that we

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have a framework within which to educate our youngsters about the human rights tradition in government and politics and (iii) that citizens and communities can seek justice in the event of their rights being infringed or denied. As the Centre's publication put it: "Charters reflect our values and help to articulate the kind of society we all want to live in".<sup>5</sup> They bring life to beliefs.

Consider, for example, the 101 case studies from Victoria, Queensland and the A.C.T. Who is it, that is given assistance by their Charters? It might be the disabled, it might be those with a mental illness, single parents already struggling, it might be those homeless, it might be indigenous Australians, it might be those facing trial or already incarcerated, political spectators and that political protesters, believers in religion, asylum seekers...

This takes us to the heart of the matter and that is the role of charters as seeking to ensure a "fair go" for all amongst us no matter where they fit in the power structure and no matter what stigmatising attitudes they attract. It provides all of us with a sense of security about the rights we should have to live a **decent, dignified life** no matter in **who** we are or **where** we live.

I say all of this noting that it is not a straightforward business, rather it's a well-crafted initiative that allows for a restriction on rights if there are good reasons for doing so, and reasonable means are used. Indeed, our Charters facilitate "continuous dialogue and interaction between the legislative, the executive and the courts. If the courts find that there is evidence of any discrepancy between the Act and other legislation, such legislation would be referred back to the executive and with the Parliament having the final say".<sup>6</sup> Parliament, the first amongst equals, we might say.

Referring to a speech by Frank Brennan<sup>7</sup> on his proposal, Catherine Branson noted that "Parliament would not be obliged to change the law, but would have the opportunity to undertake a serious, principled and transparent discussion of whether to do so". Again, it puts skin on the bones of the "democratic beliefs" we share and the "rights and liberties" we respect.

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In all of this, it is understood that there may very well be conflicting values, and certainly interests involved in what a government or a parliament seeks to do. There's no perfect world here, no one formula that reveals all as politicians and their public servants learn, and usually quickly.

Nor one way of looking at things as we have the Executive, the Parliament and the Courts all at the table. Concepts related to being reasonable and acting fairly sit alongside concepts like unconscionable and compromised behaviour. It's not a model that avoids or ignores judgement in a world of complexity and contradiction, rather it facilitates its exercise.

Note too that it is **Parliament** itself that is needed to set up the Charter and choose what rights are included and there is always a debate amongst those who support a Charter about what to include. Just how wide do we spread the net?

In the A.C.T. and Queensland, the right to education is protected, as is the right to access health services in Queensland. For their part, the A.C.T protects the right to work and related workplace rights. Models can be compared for their effectiveness.

We are reminded here that there is a view that the Charter approach involving the courts is not well suited to a whole range of economic, social and cultural rights. It is not that they aren't important, it's just that rights like those to an adequate standard of living, to the enjoyment of the highest standards of physical and mental health and to education are seen as "too imprecise" to be subject of judicial determination.<sup>8</sup> Indeed a distinction is often made between negative liberty and positive liberty, the latter being more complicated when put under the microscope.

How this issue of economic, social and cultural rights might be tackled within the framework of a Rights Charter has been given serious attention by a number of scholars, the Brennan approach being to include them, but not make them judicially enforceable. Untangling the elements at stake here isn't easy but I will take up the question more generally, concluding that whatever is the destiny of the charter, and other equal opportunity and anti-discrimination law, more needs to be done about

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the social and economic inequalities in our society, not just because it is **just** but because it is **necessary**.

### **Liberty, Equality and Fraternity**

I take you back to French Revolution and the motto that was developed in the heat of battle – “Liberty, Equality and Fraternity”, it’s still there, in the Constitution and adorned on public buildings as a guide and inspiration for a proud nation. It was reinstated after the Second World War, the Vichy Government having replaced it with “Work, family and fatherhood”. Make no mistake – words do matter!

Most of the focus has been on liberty and equality and how their combined pursuit creates a good society, liberty **and** equality, not liberty **or** equality. What, then, of fraternity? It’s that strength of our feelings for and commitment to each other in the face of attack, noting as we must the monarchies of Europe went to war against the revolution on behalf of the established order.

One can see how these three principles worked together – the first two establishing goals and the third the commitment to defend them. Sadly, what had been a means to an end-in-itself fell into a Reign of Terror. Robespierre, the young poet, Samuel Taylor Coleridge wrote, was a “Caligula with the cap of Liberty on his head”. To prevent tyranny he became a tyrant.<sup>9</sup>

Plenty to learn from these days about “ends” and “means” and how the two are not as separated as we might wish. So too can we learn from them regarding the pursuit of liberty and equality. Let me use the Enlightenment language of “cause” and “effect” to illustrate. It goes like this – bring liberty and equality to the development and implementation of public policy (“the cause”) and you will create a healthy, productive and peaceful community (“the effect”).



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## J.S. Mill and John Rawls

You might think, and I certainly do, that what is involved here is a desired partnership between liberalism and socialism, the former with John Stuart Mill's "harm principle" and the latter with John Rawls "fairness principle".<sup>10</sup>

In respect of Rawls' scheme as it relates to equality (and inequality) he leads us, firstly, to offices and positions open to all "and under conditions of fair equality of opportunity". Secondly, he makes the case that inequalities can be justified if they are to "the greatest benefit of the least advantaged". That is the controversial piece of the argument, the radical bit of the argument.

In respect of liberty our legitimate claim is to "equal basic liberties" that are compatible "with the same scheme of liberties for all". It's a freedom **within** community that he has in mind.

Rawls, not unreasonably, says that these are the requirements that would be laid down by humans should they be in a world before any rules were devised and implemented. In such a world, we are just one human being amongst others and our background and destiny, rich or poor, citizen or subject, was yet to be determined. What would we choose as being fair for all, no matter what background?

In reality we are never in such a world. After all, following Aristotle, I've declared agreement with the view that humans are social animals. So too are they political animals and they do make judgements about what is fair for them and their families. This being said to imagine oneself before any society and reflecting upon what social life might bring in different scenarios is not a "way-out-there" way of thinking without resonance. Note too that deep in our own traditions is the notion of solidarity with "the least advantaged". Just look to the Parable of the Good Samaritan for example.

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In liberalism and socialism we might add “conservatism” as well and by that I don’t mean opposition to value-based change but rather care in delivery.<sup>11</sup> It’s one thing to have an evidence-based initiative that has general support but another to ensure it is implemented properly. Timing enters the equation and so-too the notion of “progressive realisation” and the reality that resource availability matters.<sup>12</sup>

All of this reminds us that governing with an eye to human rights, is not just about ensuring individual cases that present themselves and are dealt with properly but that there is strategic intent, that being to create that healthy, productive and peaceful community. We want the various initiatives we take to add up to what we can label “a better society”, not “perfect” in all probability, but certainly “better”.

To this end we might ask the two questions Mill and Rawls put before us:

- (i) Are there unjustifiable legal (and other) restrictions placed on individuals and communities today?
- (ii) Are the benefits and burdens associated with life today distributed fairly throughout society? Are the inequalities that exist justified as being in “the public interest”? Do the interests of the least advantaged come to the table of decision?

### **Substantive Equality**

Helping us to seek answers to these questions are the various human rights instruments that have been established but do we stretch them far enough? When dealing with the question of racism as Chair of the Anti-Racism Task Force in Western Australia I found that digging deep was necessary; that is to say taking the argument from the province of “formal equality” to “substantive equality”. It means a number of things but most notably incorporating into the picture “the effects of past discrimination” and recognising that “equal or the same application of rules to unequal groups can have unequal results”. Promoting sensitivity to the different needs of client groups becomes a priority for those working in the public sector.<sup>13</sup>

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So too sensitivity to one's own prejudices when carrying out duties. In this context I note the results of research indicating disproportionate treatment when it comes to the administration of our drug laws in New South Wales. In the five years from 2013 to 2017 82 per cent of all Indigenous people caught with a non-indictable quantity of cannabis were pursued through the courts compared with 52 per cent for the non-Indigenous population. The other option had been recommended by the Drug Summit in 1999 and it involved a system of cannabis cautioning.<sup>14</sup>

There is another aspect of the difference between "formal" and "substantive" equality that becomes important and that is a focus on "equitable outcomes as well as equal opportunity".<sup>15</sup> Writing in the context of a discussion around educational inequality Pasi Sahlberg and Trevor Cobbold make the important point that "it is unreasonable to expect in educational policies or in school leadership strategies that all children will achieve the same education outcomes because, as individuals, they have a range of abilities and talents which lead to different choices in schooling. However, it is reasonable to expect that these different abilities and talents are distributed similarly across different social, ethnic and gender groups in society". They go on to say that "equity in education demands similar school outcomes for students from different social groups that, historically, have been discriminated against in terms of education outcomes".<sup>16</sup>

This takes us into the territory of social, economic and cultural rights. In respect of the first two there's been a clearly demonstrated increase in inequality, and not just of opportunity. Indeed it's been a feature of public policy for some time that economic freedom has been given precedence over social equality. In education it means "choice first" and we see it at play in much of the media commentary.

Some commentators and researchers point to the emergence of what may be called a New Middle-Class, well ahead in the wealth and income race and determined to keep it that way. "It's a case of reward based on merit". Others disagree, most notably US social philosopher, Michael Sandel. He speaks of a new phenomenon "meritocratic hubris"<sup>17</sup> defined as follows:

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“It's the tendency of those who land on top to believe that their success is their own doing, the measure of their merit, and, by implication, that those who struggle, those who were left behind, must deserve their fate as well.”

He goes on to say that “the more we believe that our success is our own doing, the harder it is to see ourselves in other people’s shoes, the harder it is to feel a sense of mutual responsibility for the fate of our fellow citizens, including those who are not flourishing in the new economy”.

How many times do we hear it said that “you can make it if you try” or “it’s yours to have, personal effort is the key”. Any talk of race and ethnicity, class and status, gender and sexuality as “barriers to achievement” is pictured as pointless “identity politics” or out-of-date “class war”. What should matter in tackling inequality is not just “motivation” but also “capacity” and “opportunity”.

It’s true, of course, that class and identity politics can only take you so far but to wipe them off the blackboard of social analysis leaves our thinking and practice wanting. Human beings do ask the question – is our society fair? Am I being treated fairly? Are the burdens and benefits of society distributed fairly? Don’t we see such inequalities at play when reflecting on COVID and natural catastrophes and despite talk of “solidarity”. Aren’t average citizens a little more than sceptical when told that “trickle-down” from economic growth is all that can be expected in a competitive world?

In asking these questions they are also being confronted with extensive information in respect of how far inequality has become entrenched in our society, and sadly, in aspects of our politics too! We particularly see it in health, education and aged care, major areas within which living standards and opportunities do (or don’t) take shape.

The challenge here is to understand how formal equality, as important as it is, can only take us so far before substantive equality needs to kick in. It’s that French Revolutionary idea of a proper balance between liberty and equality as conducive to a productive, healthy and peaceful society. In saying this I refer you to the all-

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important work of Wilkinson and Pickett in their book, **The Spirit Level: Why Equality is Better for Everyone** (2009). They use data from the 23 richest countries and 50 US states to demonstrate people were worst-off and significantly so in more unequal states or nations. They used 11 health and social measures to make their point,<sup>18</sup> adding that it's a lesson for all, including the middle-class. "Inequality", they say, "increases status competition and status insecurity" and "intensifies worries about how we are seen and judged".<sup>19</sup>

### **The Challenge of the Times**

It's interesting to note that when asked about their views on charters of rights the citizenry more often than not turn to this "fairness question". Inequalities do matter to them. As UK writer Sam Freedman put it in a recent article on "Boomers and the Ultimate Failure of Thatcherism".<sup>20</sup>

Ultimately if you care about the success of popular capitalism you cannot downplay inequality or the state's role in redistribution because it has to be underpinned by a sense of fairness. Once people no longer believe their actions will dictate their success or otherwise, the game is up.

He notes that in the UK today, admittedly not Australia, only 20% of people under 40 think a person's income and position are the result of "individual effort".

A question arises: would the incorporation of social and economic rights in a charter provide a foundation upon which to ensure the question of equality (and inequality) are taken as seriously as they ought?

Most of the focus has been on the "civil and political" rather than the "social and economic" aspect of human rights. Indeed, some inquirers do express worry about extending charter rights to the economic, social and cultural spheres. These are, they say, matters for politics not courts.

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This being said, we could give more attention to the reporting of the overall state of equality in Australia today. There was potential for this to happen under the framework provided by the now abolished COAG Reform Council (of which I was the Deputy Chair). We can also point to the Closing of the Gap initiative designed specifically to promote the social and economic rights of Aboriginal and Torres Strait Islander People.

Taking on board the observation from WA's Equal Opportunity Commission that Closing the Gap "is a significant Substantive Equality (SE) initiative although not expressed in SE terminology", we can get a clear idea on how an equality agenda could work if given strategic support within government.<sup>21</sup>

I'm thinking here of the following rights listed in the UN's ICESCR -

- to the enjoyment of just and favourable conditions of work,
- to an adequate standard of living,
- to enjoyment of the highest attainable standard of physical and mental health, and to education.

Much of the concern about these issues is dealt with by politics as we know it; having an independent body looking to see if there is a progressive realisation of the rights would surely add value to the politics as was intended with the COAG Referendum Council and is a potential role for the Human Rights Commission. As former Rights Commissioner, Catherine Branson QC<sup>22</sup> wrote:

"The Commission also supports the recommendation that some economic, social and cultural rights should be included in a Human Rights Act. Those parts of the Act, such as pre-legislative scrutiny of proposed laws, that do not involve access to the courts should apply to these rights. The lives of many people in Australia will be enhanced if a human rights framework is consistently applied to the development of law and policy affecting the rights to an adequate standard of living, the highest attainable standards of health and the right to education".

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My primary observation that leads me down this path is that we've lost the required balance between liberty and equality, and seriously so particularly in respect of the right to education. Building consensus around much needed changes in other areas of policy, namely climate change and productivity, requires a community at ease with its foundations and confident that all are being treated fairly. Taking equality seriously is now not just the right thing to do but the necessary thing to do.

Putting it crudely but correctly we might say we've had a long period in which economic freedom has been prioritised over social equality. Fairness has been the inevitable loser, followed by a growth in distrust of mainstream governments whether left or right.

Distrust seeks leadership and we've seen in many jurisdictions, most notably for us, in the United States, how this can play out, not as a renewal of the post-World War II commitments to liberty and equality but rather as an aggressive and ugly nationalism.

Step by step, policy by policy we need to bring the people back on board for, as Leonard Cohen put it in 1992: "I've seen the future, brother. It is murder".

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## Footnotes

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- <sup>1</sup> See Simone Webb, “Everybody knows ...” **Epoch, Philosophy Monthly**, Issue 31 May 2020.
- <sup>2</sup> See **WA Report of the Royal Commission into the Commercial Activities of Government and Other Matters**, Part 2, 12 November 1992.
- <sup>3</sup> “When accountability fails: A Framework for Diagnosis and Action”, **Policy Brief**, No. 9, May 2000.
- <sup>4</sup> “The Case for a Charter of Rights”, **University of Notre Dame: Australian Law Review**, Vol. 12, December 2010.
- <sup>5</sup> **Charters of Human Rights, makes our lives better**, p.2.
- <sup>6</sup> The Australian Collaboration, *Democracy in Australia – Arguments for and Against a National Charter of Rights and Responsibilities*, p.4.
- <sup>7</sup> The National Human Rights Consultation: Outcomes (21 October 2009).
- <sup>8</sup> Ibid.
- <sup>9</sup> *Collected Works*, ed. Patton and Mann, Vol. 1, p. 35.
- <sup>10</sup> J.S. Mill *On Liberty* (1859) and J. Rawls *A Theory of Justice* (1971).
- <sup>11</sup> See UK Cabinet Office, *Strategy Survival Guide* (July 2004), pp. 8-9.
- <sup>12</sup> “The concept of progressive realisation constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time”. <https://humanrights.gov.au>.
- <sup>13</sup> WA Equal Opportunity Commission, **The Policy Framework for Substantive Equality**, pp. 6-7.
- <sup>14</sup> Michael McGowan and Christophe Knaus “NSW police pursue 80 per cent of Indigenous people caught with cannabis through courts”, **The Guardian**, 10 June 2020.
- <sup>15</sup> Ibid.
- <sup>16</sup> “Leadership for equity and adequacy in education”, **School Leadership and Management**, 20021, pp. 11-12.
- <sup>17</sup> Quoted in Evan Osnos “A Political Philosopher on why Democrats should think differently about merit”, **The New Yorker**, 14 September 2020.
- <sup>18</sup> In the area of health the list includes life expectancy, literacy, infant mortality, homicides, imprisonment, teenage births, trust, obesity, mental illness including drug and alcohol addiction and social mobility.
- <sup>19</sup> This quote comes from Richard Wilkinson, “Inequality: the enemy between us?”, <https://www.ilo.org>
- <sup>20</sup> [https://samf.substack.com/p/boomers-and-the-ultimate-failure?utm\\_campaign=post](https://samf.substack.com/p/boomers-and-the-ultimate-failure?utm_campaign=post)
- <sup>21</sup> Update on Status of Policy Framework for Substantive Equality in Western Australia (EOC, 2023).
- <sup>22</sup> **National Human Rights Consultation.**