

NTCOSS Conference
Seizing the moment –
Towards formal rights recognition

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Introduction

Before I begin I'd like to acknowledge the traditional owners of the land on which we meet, and to pay my respects to their Elders, past and present. I'd also like to thank the organisers of this event for their invitation to speak and for encouraging a conversation about the Territory's chance to grapple with formal rights recognition.

Seizing the moment

Certainly, the stars are aligning for the Territory to show the rest of the nation how things should be done. A fresh new government is kicking serious goals; a Royal Commission is about to hand down a blueprint for widespread reform in the juvenile justice sphere; good will abounds and the time is right to lay the foundations for a policy and legal framework which is based on protection and recognition of human dignity.

What's more, the bulk of jurisdictions across Australia are furiously peddling in the opposite direction! I accepted this invitation, therefore, not as yet another smug southerner telling Territorians how things should be done – far from it. Rather, I'm here as a humble advocate – one who laments that so many Australian jurisdictions are atrophying and losing their appetite for progressive politics; one who is hopeful that the Territory can seize the once in a generation opportunity that lies before it.

In particular, I'm hopeful that the Territory can send a very loud message to the Federal Government – a regime which repeatedly ignores the pleas of the UN's Special Rapporteur on Human Rights on countless fronts, yet has the gall to lay claim to a seat on the UN Human Rights Council. In my view, there has been no other time in Australia's history that we've been *less* entitled to lecture others about human rights. Yet this bid has all just been part of the spin – the colour and movement on the international stage which distracts from the perpetual violations in the wings.

The question that we should ask ourselves is: would such violations be addressed by a formal rights mechanism at a Commonwealth level? Quite rightly, the Australian Human Rights Commission wanted to know the answer. So, through the Centre for Innovative Justice, Gillian Triggs and the Commission asked a team of RMIT law students to identify a range of potential violations and to measure these against a hypothetical federal Human Rights Charter. Working with a team of industry mentors this team found that a Federal Human Rights Charter not only increased transparency and debate through the need to consider the compatibility of laws and administrative decisions with human rights, but it also increased the consideration of alternative means of achieving a particular purpose by Parliament and the Courts. In other words, a National Human Rights Charter would reduce the frequency of legislation and decision-making that inappropriately infringes the rights of individuals and the litigation that results.

This small piece of work told us that we have far to go at the Commonwealth level. While we may feel that we do not hold much

sway in the current climate, we *do* have a chance to build the case for why such an instrument is not only of benefit to any population, but essential to the operation of any functioning civil society.

Making the case

Certainly, as a retired politician I can confirm that opportunities for reform don't come around very often. Nor do their results always stand the test of time. Reforms can be rolled back and are often only as good as the individuals administering them.

That's why, as Victoria's Attorney-General, I knew we needed a mechanism that entrenched rights across *all* government business. What's more, if the ACT had done it and the sky hadn't fallen in, then it was time for Victoria to become the first state to do the same.

This news, however, came as somewhat of a surprise to some of my colleagues, who saw it as another bleeding heart Hullsy special. After all, what did human rights have to do with public transport? With housing? Didn't we have constraints on government already? Here,

then, was the journey on which we needed to embark – and which confirmed some valuable lessons I'd like to share with you today.

Reform is a series of carefully considered steps along a lengthy path – and you'll fall at the first hurdle if you don't have the process right.

Clarity of purpose

The first of these steps is to have clarity of purpose – doing the research, understanding what it is that you're aiming for and, just as importantly, what it is that you are *not*. For example, when we first floated the idea of a Charter of Rights and Responsibilities, I knew that initial objectors would claim that an instrument like this would make us beholden to the judiciary – an Australian form of the US Bill of Rights in which judges had the final say over contentious issues and the legal profession could embark upon a highly protracted picnic.

This, of course, was never our intention. As you may be aware, the US Bill of Rights is the exception amongst national human rights instruments, rather than the rule. Most other jurisdictions have developed a mechanism which encourages dialogue between the

arms of government. Yet this didn't stop the panic merchants – those who maintained that activist judges would storm the barricades.

The accompanying layers of misinformation, therefore, had to be countered. No, a Charter of Rights would not flood the streets with dangerous criminals. No, we didn't already have our human rights constitutionally protected, despite what the parade of frowning TV “experts” through our living rooms each night might say.

We had to make a clear case, therefore - explaining that, despite being such a champion for the human rights of others last century, Australia remains the one developed nation that has not been a champion for these rights a little closer to home.

Clear course

The second step is to plot a clear course by which the reform can be achieved. Community consultation is a crucial part of this, especially around an issue that is so poorly understood. Ideally, it can work as a

two-way street, communicating the benefits of the reform to the public, but also building the case to bring back to the Cabinet table.

Our Community Consultation Committee – made up of a diverse mix of academics, community advocates, a former politician and a prominent sports person - travelled the state holding hearings and receiving over 2,500 written submissions. The message from the community was overwhelming – yes, they wanted their rights better recognised; they wanted corresponding responsibilities included; and legislative articulation was the way to see it done.

The Art of Compromise

In asking the question, of course, we had to be prepared to listen to the answer. While support for better recognition of our civil and political rights was almost unanimous, there was some ambivalence about formal recognition of social, cultural and economic rights. This was in part because these usually come with a price tag attached, as well as being more difficult to balance with competing imperatives.

A crucial thing to remember when embarking on contentious reform is that compromise is almost always essential. That's why we made the decision to proceed with the Charter on the basis of civil and political rights and then embed a review process down the track. As it happened, the review was conducted by the subsequent conservative government, with the Charter's very existence being the issue on the table for a while. More recently, the current Labor Government commissioned the next step of the review and aspects of the Charter's operation have been significantly strengthened.

Commitment, not capitulation

That said, compromise should not mean total capitulation. The fourth crucial step is to be prepared to hold your nerve – to stick to your commitments, to have passion about what you're hoping to achieve.

Disappointingly, the former Federal Labor Government did not see it that way and, after a national consultation process led by Father Frank Brennan revealed a level of community commitment similar to that shown in Victoria, the Federal Labor Government shirked at the

final hurdle in enacting a formal mechanism. Here, we return to the question asked by those RMIT students: would some of our more notorious recent human rights failures have gone unaccounted for had that particular Government's decision been a different one?

Communicate

The fifth step – which of course is related to all the others – is to communicate your message effectively, bringing the public with you. This, however, is where so many vital reforms falter.

Governments are peculiarly bad at explaining to the public (a) what the problem is in the first place and (b) why what they're offering is part of the solution. In the sphere of rights reform, communication is a particular challenge, but the overriding imperative of any reform is to make each person understand that it is relevant to *them*.

The task for any advocate of rights recognition, then, is to explain that rights are about everyone; about our everyday hopes for ourselves and for our families; about how we expect to be treated when

interacting with the world. The task is also to argue that rights are a formal manifestation of the fair go, that quintessentially Australian characteristic about which we soliloquise, yet selectively apply.

Culture

This means that the relevant legislation has to be sound, but also that it should lay the foundation for cultural change. For that is what the Victorian Charter of Rights and Responsibilities has always been about – changing the culture of government and public life so that human rights are brought from the periphery to the core.

Far from a Trojan horse from which radical judges have leapt on an unsuspecting public, the real impact of Victoria's Charter has been in actions and decisions which make a difference to individual lives. This has meant something as simple as protection from eviction for refugee families; a man living with a disability in shared supported accommodation finally being allowed access to his own mail; and a

woman in residential care having her right to privacy when showering better protected.

Preventing a family from being thrown into homelessness, the provision of a shower curtain - none of these things on their own will change the world.

There is no doubt, however, that they would have changed the world of the individuals affected and, in doing so, would not only have changed the way in which treatment was offered to the next individual, but the way in which broader decisions are made.

Of course, these quiet things are not the Charter's only achievement. On occasion, the Charter has played a more prominent role.

Responding to a series of riots in Victoria's juvenile detention facilities – riots brought about, by the way, by overcrowding as a result of punitive remand policies and disintegrating facilities – the relevant Minister saw fit to place the most high-risk of those young offenders into an *adult* jail. During this time, one young offender had his vertebrae snapped when he was stomped on by a prison guard.

It was Victoria's Charter of Rights and Responsibilities that got those kids out again. Where all other legal arguments failed, the valiant attempts by the Human Rights Law Centre saw Victoria's Supreme Court accept the arguments that the detention breached these children's human rights.

In doing so, the decision sent a crucial message to the government and to the community that there was a line in the sand that should not be crossed. This does not mean, of course, that other attempts won't be made in the scramble to flex the law and order muscle. My strong sense, however, is that the Charter will remain in view when these attempts are made.

The Territory's time

So, what does all of this mean for reform in the Territory? I don't claim for a minute that the existence of a formal rights mechanism prevents human failure. What I do suggest, however, is that it provides a framework through which to hold these failures to

account; and through which to work towards their mitigation in the future.

What's more, a human rights framework which not only prevents or holds accountable violations of civil and political rights would be further strengthened by inclusion of social and economic rights – an improvement which advocates in the Territory might like to consider. For example, I firmly believe in the transformative power of education for young offenders. Contact with the justice system should therefore be an opportunity for these young people – so many of whom have offended in part because of a disconnection from education – to have their right to education fully realised.

Again, Victoria was on a promising path for some time in relation to this, with a really encouraging program being delivered at one of our juvenile detention facilities. *Ad lib about Parkville.*

The convergence of public furore and bad timing, however, has put this program at risk, and the Territory now has an opportunity to

show Victoria how it's done – to lead the way, to build the evidence, to contribute to a brighter future for its next generation.

Reforms are not just born of good ideas and strong convictions.

Lasting reforms are born of these things **plus** serendipitous timing.

Well, now is the time for the Territory to ensure that future governments are held accountable for the way in which their citizens are treated. My humble advice is: Don't let the full potential of this moment slip you by.