A Human Rights Charter for NSW

NSW Bar Association Continuing Professional Development

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Introduction

Welcome everybody. I'd like to begin by acknowledging that we are meeting on the traditional lands of the Gadigal people of the Eora Nations, and to pay my respect to their elders past and present. I'd also like to acknowledge that sovereignty was never ceded and to apologise for the ongoing impacts of colonisation on families now. And thankyou to the New South Wales Bar Association for inviting me here to speak to you all today.

Human Rights, Doc Evatt and NSW

Believe it or not, this is far from the first time I've been asked to give a speech like this one. Unsurprisingly, the desire for formal rights recognition does not stop at the Murray River, and in the years since we adopted the Charter of Human Rights and Responsibilities in Victoria, advocates around the country are still curious to know what lessons can be learnt from the Victorian experience.

In 2015 I was invited to give a speech in Queensland on this very topic. I don't know whether it was just because they didn't want me to come back, but three years on and I'm delighted to say that the government there is now busy legislating for the establishment of its own state charter, which is set to be stronger than ours in Victoria. Who knows, then, what's in store for New South Wales in three years' time!

It was of course a great New South Welshman who 70 years ago this month presided over the signing of the most significant human rights charter in world history – the Universal Declaration of Human Rights. I imagine Doctor Herbert Vere Evatt would be proud of the enduring legacy of that document as the human rights benchmark to which the global community aspires.

But perhaps closer to home, I wonder if he would be despondent at the parlous abuse of human rights by this country – on Manus and Nauru, in our indigenous communities, and in our prisons, among others. Of our arrogance to lecture others abroad about their human rights

obligations while ignoring our own responsibilities at home. Of embarrassing interventions by the Special Rapporteur on Human Rights from Doc Evatt's own former organisation, the United Nations, to hold us to account for our transgressions. Of the unrelenting attacks on our national guardian of human rights, the former President of the Australian Human Rights Commission.

It begs the question: would such violations be addressed by a formal rights mechanism at the Commonwealth level? Well, in 2016 that same Human Rights Commission asked my organisation, the Centre for Innovative Justice, to find out the answer. Leading a team of RMIT law students, our research found that a Federal Charter would not only increase transparency and debate through the need to consider the compatibility of laws and administrative decisions with human rights, but it would also increase the consideration of alternative means of achieving a particular purpose by Parliament and the Courts. In other words, a National Human Rights Charter would actually reduce the frequency of legislation and decision-making that inappropriately infringes the rights of individuals and the litigation that results.

I'm by no means the first to point out that the same country that spawned one of the leading post-war figures in the recognition of universal human rights, remains the only western democracy without a formal charter. If he were still around, I like to think that Doc Evatt would be joining you here today to agitate for the introduction of charters both federally and here in his home state.

Certainly, a New South Wales state election next March, and federally probably in May - do present the opportunity to ramp up the human rights campaigns in the next few months. After last weekend's Victorian election result, I am hopeful that the tide of public discourse may be turning, and that there may once again be an appetite for progressive policy that seeks to improve the lives of all in our community – not just the powerful. I am hopeful that timing may finally be on our side.

Making the case

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. 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. And if the process is bungled – like the republic, or the carbon tax, the opportunity may not come around again for a generation.

As Victoria's Attorney-General back in the early 2000s, 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? In fact, convincing some of my own cabinet colleagues was in some ways, the hardest job.

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, in six steps.

Clarity of purpose

The **first step** 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. In fact, it was another New South Welshman – and my own Labor comrade, Bob Carr - who lead the pack of doubters. To this day I cannot decide if he was ignorantly misconceived or deliberately making mischief by conflating our plans for a charter with that of America.

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.

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 sportsman - 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.

This brings me to the **third step** – the art of compromise. 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, that 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 first-term Andrews Labor Government commissioned the next step of the review and aspects of the Charter's operation have been significantly strengthened. My hope now is that the re-elected Andrews Government will use its overwhelming mandate to further strengthen the Charter – or risk being left behind in Queensland's wake!

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, former Federal Labor Governments during that period of time 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 Government shirked at the final hurdle in enacting a formal mechanism. If we see a Labor Government voted in to Canberra next May, however, I'm optimistic that they already understand the benefits of a federal mechanism. Certainly, Mark Dreyfus is already in no doubt that he'll be hearing from me about this on a regular basis!

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.

Rights recognition is about the innate humanity in us all. Rights begin, if I can paraphrase Eleanor Roosevelt:

'…in small places, close to home - the neighborhood [we] live in; the school or college [we] attend; the factory, farm, or office where [we] work. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination….'

Culture

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. This means that the relevant legislation has to be sound, but also that it should lay the foundation for cultural change – **my sixth and final point**.

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.

In the years since it was introduced, the charter 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.

More visibly, the Charter has also played a pivotal role in landmark rulings of the court. Just last year, it resulted in children being removed from detention in the notorious Barwon maximum security adult jail. The case, brought by the Human Rights Law Centre, saw the Supreme Court find that the State Government had breached the children's human rights, established under the Charter, by putting them in adult prison. The decision sent a crucial message to the government and to the community that there is a line in the sand that should not be crossed.

Conclusion

So, fast forward to 2018, and where are the naysayers now? Well, while some of them are probably still no fans of the Victorian Charter, or human rights charters in general, others have come to view it as a "Great Labor Legacy" and more importantly, as a broadly accepted and proudly embraced part of Victoria's legal and cultural D-N-A.

This does not mean, of course, that attempts haven't been, and won't again 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.

So where to now for New South Wales? Well, with Queensland now joining the human rights fray, I'm hoping for a domino effect. Just like a Federal ICAC, I regard a Human Rights Charter as something inevitable – a case of when, not if. The question is, does the birthplace of Australia's father of human rights, want to be left behind?

Thankyou.