INDIGENOUS RIGHTS

The debate over a Charter of Rights

TOM CALMA speaks about Indigenous human rights at an HRLRC dinner in Melbourne on 4 April 2008

A few weeks ago, I was honoured and humbled to be entrusted by the national Stolen Generations' representative groups with the responsibility to participate in and later to speak in response to the Prime Minister's Apology to the Stolen Generations. I was touched by the Apology in all imaginable ways: as the Aboriginal and Torres Strait Islander Social Justice Commissioner, the National Race Discrimination Commissioner and, most importantly, as the great grandchild of a Stolen Generations woman.

'Her mother will not part with her'.

This was the chilling account of the officer who reported on my great-grandmother in 1899. When I recalled this at the Apology ceremony, I had in mind not solely the pain of the past, but also the responsibilities of the present, and the demands upon the future to prevent the violation of basic human rights and dignity, such as the right of a mother to care for her child.

Yet, despite our knowledge of these past events, the spectre of human rights violations remains vivid to many people living in Indigenous communities today. Most recently, we have seen the introduction of the Northern Territory intervention that, in the name of protecting children and women from abuse and violence, involves violations of the rights of Indigenous peoples. The Northern Territory intervention adopts an approach that is entirely inappropriate from a human rights perspective by seeking to justify measures which breach basic human rights on the basis that they are taken to advance other, 'superior', human rights.

No one wants to see children abused, families destroyed, and the aspirations for a bright future dulled because hope has been overwhelmed by despair. Ultimately, the sustained scrutiny and national debate on issues of violence and abuse in our Indigenous communities creates a momentum for change, and for action.

Clearly we need such action.

Such change should, however, be considered evidence-based, capable of being achieved and systemic.

In my latest Social Justice Report [1] to the federal Parliament, I argue that measures which violate the human rights of the intended beneficiaries are more likely to work in ways that undermine the overall well-being of the communities in which they live in both the short and the longer term. For example, the federal government has clearly stated that the Northern Territory intervention seeks to address a breakdown in law and order in Aboriginal communities and yet it involves introducing measures that undermine the rule of law and do not treat Aboriginal citizens equally. This places inequality at the heart of the Northern Territory intervention measures. Such inequality will inhibit the building of relationships, partnerships and trust between the government and Indigenous communities. It will also undermine the credibility of the measures and, ultimately, threaten the sustainability and long-term impact of the measures.

Human rights law is clear that any measures must be non-discriminatory in their application and their impact. This obligation is non-negotiable and unable to be deviated from. Put simply, all measures to address family violence and child abuse should themselves respect human rights. It would be outrageous to suggest that it is not possible to achieve this.

What I want to see is a change to the current model for the Northern Territory intervention so that it is consistent with human rights, and draws on the strengths of communities so they are part of the solution and not just treated as if they are the problem. My report to Parliament sets out a ten point plan for making the Northern Territory intervention compliant with human rights. Ultimately, this is about the workability of the Northern Territory intervention and enabling it to shift so that it can become a shared ambition and a partnership with Indigenous communities. **The ten point action plan** for modifying the Northern Territory intervention, outlined in detail in my Social Justice Report, include:

Action 1: Restore all rights to procedural fairness and external merits review under the Northern Territory intervention legislation.

Action 2: Reinstate protections against racial discrimination in the operation of the Northern Territory intervention legislation.

Action 3: Amend or remove the provisions that declare that the Northern Territory intervention legislation constitutes a 'special measure'. This includes adding provisions to the legislation that requires decision makers to exercise their discretion consistent with the beneficial 'special measures' purpose of the legislation.

Action 4: Reinstate protections against discrimination in the Northern Territory and Queensland.

Action 5: Require consent to be obtained in the management of Indigenous property and amend the Northern Territory intervention legislation to confirm the guarantee of just terms compensation.

For the above action points, I challenge anyone to explain how providing these basic democratic protections could possibly hinder the goal of protecting children. The only possible answer is short term expedience prevailing over guarantees of access to justice, and that is not good enough.

Action 6: Reinstate the Commonwealth Development Employment Projects (CDEP) program and review the operation of the income management scheme so that it is consistent with human rights.

REFERENCES

1. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2007*, Report No 1 (2008) at <www.hreoc.gov.au/social_justice/sj_report/sjreport07/pdf/sjr_2007.pdf>.

Action 7: Review the operation and effectiveness of the alcohol management schemes under the Northern Territory intervention legislation.

Action points 6 and 7 seek to address the arbitrariness of the existing regimes for income management and alcohol restrictions provided under the Northern Territory intervention legislation. My Social Justice Report states that some form of quarantining and some form of alcohol restrictions can be justified consistently with human rights. The sweeping and discriminatory approach adopted through the legislation, however, is not that approach. My report recommends that the federal government seek to implement voluntary community based schemes in place of the blanket bans currently provided.

Action points 8 to 10 then look at how the Northern Territory intervention can move towards a process that is a partnership with Indigenous communities and where the ambitions are shared rather than imposed, as follows:

Action 8: Ensure the effective participation of Indigenous peoples in all aspects of the intervention by developing Community Partnership Agreements.

Action 9: Set a timetable for the transition from an 'emergency' intervention to a community development plan.

Action 10: Ensure stringent monitoring and review processes.

The most revealing indicator that the Northern Territory intervention was not consistent with human rights principles was the provision at the centre of the legislative machinery used to support the intervention; namely, suspending the operation of the *Racial Discrimination Act 1975* (Cth) ('RDA'). Further, immunity is provided for any act of discrimination that occurs under the provisions of the intervention legislation. This includes decisions made by bureaucrats or other agents — such as store owners — in communities. This provides an extraordinarily broad exemption from the protection of discrimination.

In the current federal government's review of the Northern Territory intervention measures, the first priority should be to reinstate the RDA. In so doing, the government also needs to consider how, in the longer term, Australia's federal anti-discrimination laws can be made more resilient to the exigencies of political manipulation and more effective in achieving their goals of equality and non-discrimination.

There is a need for the federal RDA to evolve if it is to remain relevant to contemporary Australian society. Because of this, the Human Rights and Equal Opportunity Commission (HREOC) will shortly be releasing the first of a series of research papers aimed at assessing the effectiveness of the RDA and highlighting the need for future reform. For instance, the ability of the RDA to deal with systemic discrimination, as well as individual complaints, needs to be improved. In addition, the burden of proof in race discrimination cases is so onerous that many incidents of racism occur without legal redress. This needs to be reviewed.

The first HREOC research paper about to be released seeks to contribute to an analysis of the continuing usefulness and effectiveness of the RDA by placing it in context with contemporary race discrimination legislation in Canada, the United Kingdom, the United States and the European Union. By looking at the way in which other similarly-placed nations have responded to the problems of racial discrimination and inequality, we are presented with a series of alternative models against which the current Australian legislation may be compared. Recent developments in these other jurisdictions may suggest potential directions for legislative reform.

History tells us that neither democracy nor laws stop politicians and public authorities from pursuing a course of action simply because it overrides the collective or individual rights of minority groups. Anna Katzmann, president of the New South Wales Bar Association, in the context of the debate about a Bill of Rights in New South Wales, rebuffed the common argument that says our political structure has served us well since federation and that the founding fathers themselves didn't recommend a Bill of Rights. As Katzmann rightly observes:

> Yet, these are the same men who did not think that Aborigines should be counted as members of the Australian populations. These are the same men who were determined to ensure that governments could discriminate against 'coloured aliens'.

The Northern Territory intervention shows us that the issue of basic human rights should not be left solely in the hands of a particular government or be subject to the exigencies of a particular set of circumstances. We need to have a more comprehensive legal net to protect human rights in Australia.

In the environment created by the Prime Minister's Apology, I believe that a Charter of Rights in Australia — which specifies those fundamental rights that should never be compromised other than in grave exceptional circumstances — will assure all Australians, Indigenous and non-Indigenous, that their basic rights are protected.

Some would say that a Charter of Rights in general terms protects the rights of individuals not the collective, so how would it aid Indigenous people in our struggle to have our collective rights recognised. I have in mind a few responses:

- Yes, a Charter of Rights is not adequate by itself to deal with Indigenous issues but is nevertheless an important element of a holistic approach that includes capacity building, governance measures, and effective participation in government policy and service delivery.
- Indigenous people — as individuals — should have the protection of a Charter of Rights as a supplement to, rather than a substitute for, their collective rights to self-determination and cultural identity.
- The protection of equality and non-discrimination through a Charter of Rights may not necessarily exclude the recognition of peoples' collective right to enjoy their culture. A Charter that protects economic, social and cultural rights, as well as political and civil rights, would contribute positively to the much needed recognition of Indigenous rights.

The enactment of a Charter of Rights does not mean that we no longer demand the recognition of the distinct status of Indigenous Australians. Indigenous peoples are the First Peoples of this land, not simply

a dispersed collection of disadvantaged communities or a minority group with special needs. The unique status of Indigenous peoples should be recognised in the *Constitution* as a prerequisite for a genuine process of reconciliation and the promotion of a human rights culture. In addition, and at the same time, constitutional change will be necessary to ensure that recognition, once it comes, is not whittled back in the eternal swings and roundabouts of politics.

I have called on the federal government to consider the Canadian constitutional precedent of recognising and affirming Aboriginal rights in section 35 of the Canadian Constitution. Such a provision in the Australian *Constitution* might read as follows: 'The pre-existing rights of Aboriginal peoples in Australia are hereby recognised and affirmed, consistent with international human rights standards'.

I strongly support the introduction of an Australian Charter of Rights because it provides protection to all Australians. I also think a Charter of Rights would provide a convivial environment to progress the struggle of Indigenous people towards the more substantive rights pertaining to our status as a people.

The issues I raise may appear to some to be essentially 'Australian'. One of the great benefits of bringing people like our esteemed guest, Gay McDougall, to Australia is that we are provided with a broader perspective that sees these domestic issues as part of global trends and patterns. A few years ago many of us turned on the evening news to become spectators of a race riot that was taking place in a local municipality of Sydney but could have been taking place in London, Paris or anywhere in Europe. The underlying forces of discontent and conflict being played out in Cronulla in 2005 were not that different to those present in the social discontent manifesting throughout the world then and today.

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LAW REFORM

Family violence in Victoria: a recent history

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After a fairly slow start compared with some other states, Victoria tackled family violence with the enactment of the *Crimes (Family Violence) Act 1987* (Vic) in 1987. The last two decades have seen significant changes to that statute and the last five to six years have reflected a commitment to an integrated approach to family violence, adopting various strategies and reforms at different levels within the government, public and community sectors.[1]

Family violence was one of the main platforms in the *Women's Safety Strategy 2002–2007*, leading to Victorian government initiated reforms aimed at providing safety measures for women and children and making men accountable for their violence. An initial amount of $35.1 million over four years was allocated in 2005 towards that strategy.

In August 2004, Victoria Police released a new code of practice for the investigation of family violence. A new model of police procedures for dealing with family violence has been introduced that includes:

- police initiating far more complaints on behalf of victims or aggrieved family members;
- greater use of the complaint and warrant procedure;
- referrals to community-based services; and
- the creation of new police roles such as Family Violence Advisers and Family Violence Liaison Officers.

In 2006, the *Crimes (Family Violence) Act 1987* (Vic) was amended to give police holding powers in addition to their other powers to enter and search premises.[2]

The Family Violence Court Division (FVCD) was established under the *Magistrates Court (Family Violence) Act 2004* (Vic) in 2004. In June 2005, a two-year pilot program commenced with specialist Family Violence Courts in Heidelberg and Ballarat. That pilot has continued. In addition, the Specialist Family Violence Service (SFVS) commenced late in 2005 and now operates at Melbourne, Sunshine and Frankston with staff and resources specifically catering to family violence cases.

There have been other campaigns and reforms away from the courts and police. Victorian Health Promotion Foundation and the AFL have run high-profile education and awareness-raising campaigns. Victoria Legal Aid and community legal centres have provided more lawyers and resources to court work and education and outreach services. And the Departments of Justice, Human Services, and Planning and Community Development have each released various protocols and programs aimed at victims and perpetrators.

Also in 2004 — it was a big year — the Victorian Law Reform Commission (VLRC) announced a detailed review of family violence laws. Its final report, *Review of*

REFERENCES

1. For a detailed history, see Australian Domestic & Family Violence Clearinghouse, *Newsletter*, No 3 (April, 2008), 4-7, <www.adfvc.unsw.edu.au/PDF%20files/Newsletter_32.pdf> at 6 June 2008.

2. Amended by the *Crimes (Family Violence) (Holding Powers) Act 2006* (Vic).