

# WHY WE NEED AN AUSTRALIAN CHARTER OF RIGHTS

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2018 Higinbotham Lecture  
RMIT University  
20 September 2018

## Introduction

Thank you so much for coming and for your interest in hearing about how we can build better, fairer Australia.

It will come as no secret that I'm passionate about human rights and have spent a lot of my time thinking about and working on human rights issues. I'm really looking forward to speaking to you tonight about why a Charter of Human Rights is so important for Australia and how it will contribute to better society – one that is grounded in the values we all care about, like compassion, fairness, decency and respect.

It's an honour to be asked to deliver this lecture and particularly to follow in the footsteps of people who I greatly admire like Cathy Branson, Gillian Triggs, Marcia Neave and Michael Kirby.

I also want to recognise Rob Hulls, the Director of the Centre for Innovative Justice here at RMIT and his team. Rob has been an absolute champion for justice and human rights throughout his career – particularly so as a progressive Attorney-General who left behind a proud legacy of reform. While we don't yet have an Australian Charter of Rights, we do have a Victorian Charter, and that's largely thanks to Rob.

I also want to acknowledge the RMIT law students who worked on the project outlining the difference an Australian Charter of Rights would make. I'll be drawing on some of their work tonight.

In talking about a Charter tonight, I want to talk about our human rights past, our present and our future.

## The past

It's appropriate, given this lecture is named after George Higinbotham, to start there, in the past. Higinbotham was an early Victorian Chief Justice, but also much more than that: a journalist, barrister, politician, Attorney-General and reformer. He arrived in Victoria 19 years after John Batman sailed up the Yarra River and presumed to start a settlement on the lands of the Wurundjeri people of the Kulin Nation – sparking the next round of dispossession.

There are many today who still seek to downplay the devastation that Europeans and their settlement inflicted on First Nations peoples. Devastation that rippled across generations and still reverberates today. So it's appropriate in acknowledging that we're meeting tonight on traditional Wurundjeri land, to quote from one of the editorials of *The Argus* from 1859 when Higinbotham was editor. Higinbotham wrote that the treatment of Aboriginal people:

[Has], from the very commencement of the settlement of the continent, been a standing reproach against the colonists. [...] Dark stories are told in bush circles of murder by wholesale and in detail, by open force and by cunning plot, by which it was sought to exterminate a troublesome race. [...] The circumstances under which we took possession of this land were more those of a hostile invasion than any other.

It is from this people, whom we have expelled from their own territory, that we have seized the vast area of rich lands on which we are settling a new nation. Whatever right of title we may claim on the ground of discovery...the great fact can never be ignored, that these people were first in possession, that Australia is their native land and their right to obtain from its soil the necessities and comforts of life is an inalienable one.<sup>1</sup>

What a contrast to today's debates about acknowledging past atrocities.

Higinbotham, like many writers of his time and later, goes on in the editorial to contemplate the possible end of the Aboriginal race. It is, of course, a tribute to the resilience of the Aboriginal and Torres Strait Islander people that they have survived. They have endured and their culture continues, in spite of the dispossession, the injustice and the racism. I want to recognise the many Aboriginal and Torres Strait Islander leaders who have done so much to advance human rights for their people and for this country.

A Human Rights Charter will benefit all Australians – but it will particularly benefit people who are disadvantaged. So it holds particular promise for Aboriginal and Torres Strait Islander peoples.

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<sup>1</sup> Editorial, *The Argus* (Melbourne), 3 February 1859, 4.

## Career

I was born close to a century after Higinbotham died and now live within walking distance of his grave. I was lucky in the lottery of life on this planet – being born in a stable, safe, prosperous country, into a loving, safe, happy and financially comfortable family. I studied law and arts at Melbourne University and then started my legal career at one of the top corporate law firms.

It was a good introduction to one aspect of our legal system, but it was never where I wanted my career to lead long term. So after a few years, I took the opportunity to do a secondment to a community legal centre.

I went from a nice office level 30 of the Rialto in Collins St to a demountable site shed in outer suburban Melbourne. When it rained on the tin roof you couldn't hear clients on the phone and when the sheep trucks passed outside on Ballarat Road the whole office shook and you could smell the animals.

Those first six months at the Brimbank Community Legal Centre are where I started to properly understand human rights.

## Community legal centres

We worked with people on the fringes. People facing family violence, grappling with the consequences of sexual assault or struggling with mental illness. We helped prisoners, victims of crime, refugees, people in poverty and ill health – people struggling with deep disadvantage.

It was over a decade ago now, but I still clearly remember many of the clients.

A young woman recounting childhood sexual assault by her step-father. A mother crying as she heard her young son tell me how he had been bashed by guards in prison. How he couldn't trust anyone and how he'd become a hardened criminal. A mother who'd completely turned her life around for herself and her two beautiful children, who was then summarily sacked from her job when a criminal record check revealed old prostitution and drug offences.

The contrast from corporate law couldn't have been starker. In the corporate firm, Australia's biggest companies could access the best lawyers and all the access to justice that their money could buy.

At the community legal centre, the need for assistance was huge and justice was remote. Every day we made tough decisions about who to help, and how much to help them, knowing that every hour we spent was an hour not spent on the next person who needed help.

I ended up managing that legal centre for the next three years. Through my time there, I saw convincingly how the law can empower. How it can uphold dignity. But also how it can entrench disadvantage. The injustice faced by our clients deeply motivated me in my work, and continues to motivate me.

But instead of addressing injustice through individual client work, case by case, sometimes in band-aid solutions, my work has become focussed on fixing the system, the law and policies, that generate or allow injustice to occur. And that's why I'm so passionate about an Australian Charter of Human Rights.

## **What are human rights?**

To understand how a Charter will benefit Australia, we need to first understand human rights. Human rights are the rules that governments around the world have promised to comply with to ensure that every single person, no matter who you are or where you are, can live a decent, dignified life. They are rules like the right to be heard, to be safe, to vote, to stand for elections, to have food, a reasonable standard of health, education and more. They are grounded in shared values like freedom, respect, equality and dignity.

When we drive or take the train to see friends and family we enjoy our freedom of movement. When we join a trade union or a community group we enjoy our freedom of association. When we attend a protest we enjoy our freedom of assembly and expression. When we attend a church, a mosque or synagogue, we enjoy our freedom of religion. When we take our children to the doctor we enjoy our right to health. And when we can access jobs, goods and services regardless of our gender, race or disability, we enjoy our rights to equality and non-discrimination.

Under international law, most human rights can be limited or restricted, but only if limitation is reasonable and necessary to achieve a legitimate goal. For example, freedom of expression is not absolute and can be justifiably restricted to prohibit threats to kills, child pornography or racist hate speech.

Human rights have a long history going back to the Magna Carta and earlier. To the rule that no one is above the law, not even the king. The rule that you can't be locked up unfairly or punished without a proper trial.

Modern human rights stem from the Universal Declaration of Human Rights, adopted 70 years ago in 1948. After the horrors of WWII, the international community came together to say, "never again." Out of the nadir of mass slaughter and human suffering, they drafted a document that should rightly be celebrated as one of the pinnacles of human achievement.

Australia was closely involved in the push for the universal declaration. An Australian, William Hodgson, was one of just nine drafters led by the extraordinary Eleanor Roosevelt. Our Foreign Minister, Doc Evatt, was strongly supportive. On 10 December 1948, on what is now International Human Rights Day, the Declaration was adopted by the UN General Assembly.

Its first article declares that all human beings are born free and equal in dignity and rights. In doing so, it says to every one of us, no matter who you are, or where you are, that you have value, you matter and you deserve dignity. Coming after slavery, genocide, eugenics and more, this universalism was critical. It is a concept that seems unremarkable now, but wasn't then. And the fact that it is unremarkable now speaks to one of the great successes of the human rights movements.

The Declaration then goes on to list 30 articles or rules to protect human rights – from the right to life, to rights to health, housing and social security – all of which governments must respect in dealing with us because of the mere and vital fact that we are human.

The Declaration sparked the major international human rights treaties that successive Labor and Liberal governments would sign and ratify in coming decades – with the Turnbull Government most recently ratifying the protocol to the anti-torture treaty on Human Rights Day last year.

All of this international law sounds good – and it is. The problem, though, is that in Australia, when our government commits to an international treaty, unlike some countries, it doesn't automatically become part of our domestic law. So, if the Australian Government locks you up unfairly, you can't take legal action in Australian courts arguing that the government has breached Article 9 of the International Covenant on Civil and Political rights. Instead, Australia is meant under international law to ensure that its domestic laws implement the obligations in the human rights treaties. And this is where the problem lies.

Instead of comprehensively protecting human rights in our domestic laws, we have an incomplete patchwork of protections through legislation, the common law and the few rights in our constitution. Free speech and association are only partially protected. The right to privacy is only partially protected. The right not to be locked up unfairly and so on. At the state and territory level, only Victoria and the ACT have Charters of Rights that apply to those governments respectively.

Unlike every other Western democratic nation, we don't have a national charter of rights that protects our rights in law. We have less rights protection than our friends in New Zealand, Canada, the UK, Europe and so on.

Does this matter? Of course it does.

## **Rights protection in Australia today**

We live in one of the safest, most stable and prosperous countries on the planet, and we should celebrate the fact that we are one of the most successful democracies. But that safety, stability and prosperity has not been shared equally. Governments and people in power have abused rights over our history. The shameful treatment of Aboriginal and Torres Strait Islander people, to the criminalisation of homosexuality, to entrenched sex discrimination, the White Australia policy and more.

On the White Australia policy, with its notorious English test, my own family history highlights the prejudice and incoherence of the policy, and also how fortunate I am to have grown up here. My father's family are Dutch Burgher Sri Lankans – the descendants of Portuguese and Dutch settlers in Sri Lanka who, over centuries became of mixed European and Sri Lankan descent. The only reason my father's family was able to immigrate to Australia in 1949 under the White Australia policy was by proving their European heritage – being able to trace our family line back to a sailor Louis de Kretser who left Holland for Ceylon in the 1600s. But the arrival of "European" Sri Lankans with non-European appearances caused consternation, and in 1951 the Department of Immigration told the Australian

High Commission in Colombo it: “should not authorise the entry of persons who are likely to cause adverse comment on arrival or be restricted from landing by immigration officers at the ports as being predominantly non-European in appearance.” So, in many ways we were lucky.

Fast forward to today and we have politicians advocating for a return to racially selective migration policies. For a ban on Muslim immigration. For prioritising immigration from white South African farmers and stopping it from other African nations. For an English exam to qualify for citizenship set at a standard that many Australians would fail.

Today, many of us enjoy our human rights without thinking much about them. We just assume them. That’s partly a good thing – a reflection of our success – but it is also a recipe for complacency. Because it’s also clear that for many people in Australia, human rights are not taken for granted. They are part of a sometimes daily struggle for dignity, for respect, for freedom and for equality. It’s clear that for many, human rights matter deeply.

If you are living with a violent partner, human rights matter.

If you’re being bullied at high school for being gay, lesbian or trans, human rights matter.

If you have the onset of dementia and face the prospect of someone being appointed to make decisions about your money, your medical treatment, where you live and who you can spend time with, human rights matter.

If you are a migrant, being racially abused on public transport, the sporting field or at work, human rights matter.

If you’re one of the thousands of young people with disabilities forced to live in old aged homes, human rights matter.

If you are living in a remote Aboriginal community with grossly inadequate housing and your family and friends dying too early and your community hit by punitive laws that see too many Aboriginal people locked up, and sometimes dying in our jails, human rights matter.

And if you’re are a refugee held indefinitely on Manus Island or Nauru, despairing for your future and fearing for your safety, human rights matter.

Sadly, there are far too many examples where our current system of protecting rights is failing us. We see it in our work every day at the Human Rights Law Centre. Right now, we have refugee clients in Australia who can’t buy food or pay for housing because they have no access to social security.

We have families split across Australia and Nauru and Manus Island merely because, by an accident of fate, they arrived on different boats on either side of a policy change. So a father held by our government on Manus has to watch each year, for five long years now, as his son living and going to school in the Australian community holds a Fathers’ Day card up on a dodgy Skype connection.

A wife held by our government on Nauru has to endure the pain of separation from her husband in Australia, speaking daily on scratchy, often disconnecting phone calls, and not knowing when, if ever she will be able to hold him again.

And a father on Nauru, forced apart from his wife by our government when they stopped him travelling with her to Australia to give birth, cannot be with his first baby boy, born in an Australian hospital and living in the Australian community. He can't be there as his son takes his first steps and speaks his first words. Our government is depriving a child of its father, a wife of her husband.

Our politicians have been too willing to trample on rights to protect their power. Our public servants have been too willing to enable those policies. And our Parliaments have been too acquiescent in approving laws that undermine rights. And we're in the midst of a trend, both here and abroad, where populist authoritarian leaders are explicitly trashing hard won human rights guarantees to protect their power.

At the Federal level, many of these rights problems arise in the immigration and national security context, but the issues are far broader than that. The Australian Law Reform Commission was tasked with the job of identifying federal laws that potentially breached rights. Despite specifically being prevented from looking at laws that allowed people to be locked up unfairly or that breach privacy, it still identified over 100 laws that potentially breached rights, from secrecy laws to laws that reverse the presumption of innocence.

## **A Charter of Rights**

An Australian Charter of Rights would better protect all of our human rights. It would fill the holes in our patchwork protection of rights in this country creating a better rights safety net for all us. It would help to ensure that our government complies with the rules it has promised to comply with under international law. It would build a culture of rights – of respecting the values we all care about.

There are different models that a Charter could take. The strongest protection for human rights would come from enshrining a Charter of Rights into our Constitution – the rule book for our nation. This is the version adopted by Canada, South Africa and the US, although the US bill of rights is conceptually quite different.

Constitutionally protected human rights would override any laws passed by federal or state parliaments that breached rights. A constitutional Charter however, would require a successful referendum for implementation.

A more achievable option is for a legislative Charter of Rights. This was the model proposed by the 2009 Human Rights Consultation led by Father Frank Brennan. That Consultation received over 35,000 submissions and hosted 66 roundtables in 52 locations throughout metropolitan, regional and rural Australia. Over 80 per cent of the submissions and a majority of people polled in social research supported an Australian Human Rights Act. Yet the Rudd Government, in its spiralling final months, failed to act on that support.



A legislative Charter would be a normal piece of legislation passed by the Australian Parliament and which Parliament could change if and when it wanted. This is the version adopted by Victoria and the ACT, and overseas by the UK and New Zealand. A legislative Charter would provide an enhanced rights-protecting role for each of the parliament, the government and the courts.

A Charter like this would do two key things. Firstly, it would require Australian Government bodies, like government departments, the Federal Police, Medicare, Centrelink and more, to properly consider and act compatibly with human rights when developing laws and policies and delivering services. It would force them to think about human rights before they act. And secondly, it would give power to people to take action if government bodies cross the line and breach our rights.

It would not give the courts the power to strike down legislation, but they would interpret our laws consistently with human rights and could issue a declaration about any laws that could not be interpreted consistently with rights. This declaration would send the issue back to Parliament to decide what action to take in response.

The experience from Victoria, the ACT and overseas is that the biggest impact a Charter of Rights has is in developing better laws, policies and services. Most of this work is done quietly, as part of the normal business of government. What's the goal we're seeking to achieve with this law? Will it restrict rights? If so, is it justified? Is there a less restrictive way to achieve that goal? This is human rights in action delivering good, human-focused law and policy making.

But it is critical that there be an effective, accessible enforcement mechanism. That means giving people the power to take action in court if government crosses the line. That power is needed to make sure governments take human rights seriously. Because rights without remedies aren't rights at all.

Opponents of human rights Charters argue that they transfer power from elected parliamentarians to unelected judges – setting up a false binary, as if only one should protect rights, when the Brennan Inquiry showed that Australians want an enhanced rights role for both.

In fact what Charters do is transfer power to ordinary people to protect their rights, by requiring governments to act compatibly with rights, and by enabling people to advocate and failing that, take court action to protect their rights.

If your family is being held on Nauru by the Australian Government and your two year old daughter is gravely sick and at risk of dying, when the government ignores the advice of multiple doctors to urgently evacuate her to an Australian hospital, well then you want an unelected judge to have the power to protect your rights.

Of course a Charter on its own is not enough. We need rights to be well understood in Australia by our MPs, our public servants and the public. We need our community to stand up for them. A Charter would be just one of the pillars of rights protections alongside other pillars, like a properly functioning court system, a free press, free and fair elections and more. But the foundations of our nation are weaker without it.



Momentum is building. Charters in the ACT and Victoria have been successful, based on their somewhat modest models. Queensland is on the verge of getting a Charter.

We need to continue this momentum with a renewed push for a federal Charter, which is why we're launching a community campaign for a Charter and asking you to sign up, speak up and support a Charter.

### **The future: a Charter for our nation**

I believe firmly that a Human Rights Charter is one of the key missing pieces in our nationhood. For at their heart, human rights are about the relationships and communities we want. As human beings, our destinies are linked. A threat to the rights of some is a threat to the rights of all. When governments treat all with decency and respect, with compassion and justice, when all of our rights are understood, protected and upheld, our communities are stronger and better.

A Charter of Rights will be a big step towards a more confident, forward looking nation. A step towards our common humanity. A step we need to take now.

Hugh de Kretser  
20 September 2018