

## Recognizing Resilience and Rights

Values and Public Policy. Fairness, Diversity and Social Change. Centre for Public Policy Conference.  
26th February 2009

Dr Helen Szoke, Chief Conciliator and Chief Executive Officer, Victorian Equal Opportunity and Human  
Rights Commission

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May I begin by acknowledging the traditional owners of the land, the people of the Kulin nations and pay my respect to elders past and present. Thank you to the conference organizers for the opportunity to talk today, and particularly with such an esteemed gathering.

I find it curious from where I sit at the Victorian Equal Opportunity and Human Rights Commission to see how challenging and disconnected the dialogue is in Australia around human rights and how this dialogue intersects with public policy paradigms. I suppose this disconnect is not surprising when we consider that we are fifty years behind in terms of fully understanding and integrating human rights into our daily considerations, and when we remain the only democracy in the world that does not, at a national level, have specific legislated protections of our human rights.<sup>1</sup> To use the soon to be retired Justice Michael Kirby's words:

*But we have still not taken the final institutional step of embracing, nationally, an enforceable Australian charter of fundamental human rights.*<sup>2</sup>

As we begin a national consultation about whether or not we should take this final step, whether we should finally catch up with other western democracies and accept the notion of legally enforceable fundamental human rights, it is important to understand what existing policy paradigms are being used to deal with fairness, equity and social change.

In Victoria, we do have the advantage of being two years into the implementation of the cultural change process associated with the adoption of the Charter of Human Rights. This Charter combines a range of rights protections in one domestic law, which relate to freedom, respect, equality and dignity, and which impose on public authorities a positive duty to comply with the rights contained in the Charter - and to do so in every facet of the work of government. This includes its law making, its policy development, its service delivery and in matters that come before courts and tribunals. We have the opportunity to see how human rights and values interface, and hopefully we have some important messages that will be heard in the context of the national consultation.

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<sup>1</sup> Calma, T. 'Social Inclusion for New and Emerging Communities' delivered at SA Migrant Resource Centre 'Making a Difference' conference. Adelaide, June 2008.

<sup>2</sup> Kirby, M.

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### Building Rights

In Australia we have long recognized the right not to be treated less favorably than someone else on the basis of an attribute - whether it be age, religion, gender, race, disability. We have also accepted that there are legally enforceable human rights which are binding on Australia in the form of international treaty law and some of this has translated into law on refugees, against racial discrimination, sex discrimination. However our overall public policy basis has not been underpinned or systematically informed by a human rights framework. As a result of this, we have had various iterations of values and framework that have informed how public policy is rolled out. The most notable of these is in the service delivery area and particularly in trying to challenge disadvantage in this country - whether it be social, economic or cultural.

The Danish Institute for Human Rights has looked at this in the context of service delivery and differentiated between different approaches to service delivery. This is evidenced in three different approaches that pretty much capture what has happened in Australia in terms of our social policy agenda.

The first approach is the Charity approach which focuses on input not outcomes, emphasizes increasing charity and the moral responsibility of the rich to the poor. Individuals are seen as victims who deserve assistance and it focuses on manifestation of problems.

The second is the needs approach, which focuses on input and outcomes, meeting needs, and recognizes needs as valid claims. Individuals are objects of development interventions and are seen to deserve assistance. The focus is on immediate causes of problems.

The final approach is a rights based approach which focuses on process and outcome. This emphasizes realizing rights and recognizes individual and group rights as claims toward legal and moral duty bearers. Individuals and groups are empowered to claim their rights and are entitled to assistance. This approach focuses on structural causes and their manifestations.<sup>3</sup>

We have seen various iterations of the first two approaches which have driven the social policy agendas of successive governments since the second world war, and in Victoria (and maybe the ACT), we are in the very early stages of seeing the move towards a rights based approach. But we have a long way to go.

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<sup>3</sup> As quoted in 'From Principles to Practice: Implementing the Human Rights Based Approach in the Community Organizations. VEOHRC, 2008, p. 23.

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Arguably the needs based approach is how the current emphasis on Social Inclusion may be defined, and if we agree that this is the case, the importance of linking social inclusion with a human rights framework becomes even more pressing if in fact we want to realize rights for our citizens. It is pleasing to see that this link has been made in the Foundation Principles of the S.A. social Inclusion Initiative.<sup>4</sup>

Our Social Justice Commissioner, Tom Calma, describes social inclusion as an 'elastic' term, mainly because it is vaguely described.<sup>5</sup> By definition, social inclusion is addressing barriers to 'inclusion' and its approach may be population groups or location-focussed in terms of how this is addressed. It is multi faceted and as its values base has many of the similar values that might be seen to underpin a rights based approach. This is both the strength of the social inclusion approach and its limitation. It is not systemic in the sense that it is looking at the interests of the whole community and it predicates on the notion of doing things for people - the needs approach that is outlined above.

Whilst important as a social policy tool, as has been evidenced in Victoria through the manifestation of *A Fairer Victoria* policy, social inclusion can be made more robust when linked to a human rights framework. This is a journey which is at the very early stages in the Victorian context, as is evidenced by the complete lack of mention or recognition of the Charter of Human Rights in the latest iteration of *A Fairer Victoria*, released in May 2008.

Why does this matter, if nevertheless governments have targeted good work in the community? It matters because social inclusion should be informed and enhanced by a human rights framework, which states that no matter what specific initiatives government may take on behalf of its people, there should be a standard below which a government will not fall, and that standard should be defined by fundamental human rights. Legislative protection of rights means that governments have an instrument or vehicle through which they can govern, and which defines the relationship between the individual and the state. Social inclusion is evidence yet again of how Australian public policy has been buffeted by the winds of policy from

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<sup>4</sup> 'People and community at the Heart of systems and Bureaucracy.' South Australia's social Inclusion Initiative. Feb. 2009

<sup>5</sup> Calma, T. op. cit.

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overseas,<sup>6</sup> but where we fail to develop a policy approach which is authentic and suitable to the Australian context and needs. A rights based framework in which such policy sits will provide for less capacity for ambiguity when we look at the target populations for social inclusion. These are the people who are likely to have a much higher level of contact and interaction with government. If you are rich and socially 'included' it is much easier to avoid contact with government. However if you are disadvantaged economically, then every part of your day is likely to involve some interaction with government - through Centre link, housing trusts, law enforcement agencies, transport systems. These interactions should be defined by a clear set of standards that define the human rights of the individuals involved as well as the broader responsibilities of the community as a whole.

It is interesting that in the Canadian context, where there has been a long history of human rights protections, there is a more robust definition of social inclusion:

*Social inclusion is about making sure that all children and adults are able to participate as valued, respected and contributing members of society. It is, therefore, a normative (value based) concept - a way of raising the bar and understanding where we want to be and how to get there.<sup>7</sup>*

### Building Resilience

Last year a statewide forum was held with representatives of the Indigenous Community, to discuss Victorian government policy in relation to aboriginal people in this state. The forum was originally set to be a joint meeting of the Aboriginal Justice Forum and the Aboriginal DHS Forum, but strong representation from Aboriginal elders to the Parliamentary Secretary for Justice, Mr. Brian Tee, resulted in a broadening of focus to all of government agencies and central government departments. The event, which will become an annual event, was important for a number of reasons. The first was that the people to whom the government policy is directed identified an avenue to have their voice heard on their terms. They

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<sup>6</sup> See Origins of Social inclusion in Hayes, A., Gray, M. and Edwards, B. 2008, *Social inclusion: Origins, concepts and key themes*, paper prepared by the Australian Institute of Family Studies for the Social Inclusion Unit, Department of the Prime Minister and Cabinet, p. 4

<sup>7</sup> Saloojee, A. 2003, *Social Inclusion, Anti-Racism and Democratic Citizenship*, Working paper series Perspectives on social Inclusion, Laidlaw Foundation. P. x

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understood the interconnectedness of the issues facing their community and the important role of government working across departmental boundaries. Much of this work is coordinated through the Ministerial Taskforce on Aboriginal Affairs, but still faces the challenges of bureaucratic inflexibility and rigidity. The people affected determined how they thought government should be talking to them.

The second significant aspect of this forum was the clear message from the Indigenous community that they were no longer willing to take their cause to government as one of deprivation or need, but that they were a community with a proud culture and history and that they deserved recognition and redress as a consequence of that. This message was ultimately reflected in a communiqué to government from the community. The message clearly reflects the view that the community wants to move from being treated within a needs framework to being part of a rights based framework where their own dignity and role in determining their future is respected and acknowledged. They are not a vulnerable community but a community that has been ripped off!

This forum has not overnight solved the historical dispossession of aboriginal people of Victoria, nor has it provided redress to the poorer outcomes on any social, health or economic measure. What it has done is to begin the process of responding to these challenges within a human rights framework, which acknowledges the process is as important as the outcome, and in which individuals and groups are empowered in realizing their rights.

This approach which has the acronym, PANEL, is one that is derived from the United Nations development work, but which the Commission views as a critical process which should inform how we develop our public policy within a rights based framework.

The PANEL approach has five basic human rights principles:

Participation which involves all of the stakeholders in the assessment, decision-making and implementation of strategies, policies and services. Participation is more than just consultation and often this means that time and resources will be required to create the capacity for participation.

Accountability means that in order for results to be achieved, clear accountabilities must be set. All human rights contain corresponding duties.

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Non discrimination, equality and attention to vulnerable groups will be required to ensure that all people can participate equally, and where people have fewer social, economic or political resources, they will need assistance.

Empowerment requires the improvement of the capacity of the target group to claim and exercise their rights and to make rights based complaints.

Linkages to human rights standards: progressive realization and non-retrogression – these standards are minimum guarantees and held to identify problem areas and what is required to resolve them. In many cases resources may be limited, but the protection, promotion and fulfillment of human rights may be progressively realized.<sup>8</sup>

These principles are consistent with the notion of encouraging and building on the resilience of people rather than making them passive recipients of government services.

### Building Fairness

In Victoria we are at the early stages of this cultural change that will develop this rights framework into our policy settings. The other change that I hope will be realized to build on this rights framework is the equality review. This review sought submissions to elicit the legislative and structural changes that are needed to ensure that discrimination is eliminated to the greatest possible extent. In the Commission's submission to the review, we sought changes that would impose a positive duty on organizations and agencies to be proactive in eliminating discrimination, shifting this burden away from individual complainants. This focus means that discrimination which is systemic and institutionalized can be addressed through regulatory and facilitative work by the Commission with the community. The value of fairness is yet to be realized, where we continue to require that individuals bring complaints about lack of fairness, and where often the fairness or the lack of equity is embedded and systemic. It is time that we also modernized our equality laws to enable them to achieve a society that accepts responsibility for actively pursuing equality. The value of fairness will be better realized if this occurs, and again, this demonstrates the importance of having a rights based focus to bring some rigor into the work which attempts to tackle discrimination, which is irrevocably interlinked with disadvantage.

### In conclusion

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<sup>8</sup> VEOHRC. From Principles to Practice. Op. cit. p. 14.

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I have titled this talk Recognizing Resilience and Rights for a number of reasons. The first is that I am keen to ensure that the forthcoming consultation about a national rights instrument, and our own work in Victoria, is understood to be intrinsically connected and enhancing of the public policy processes in Australia generally. More importantly, I want to make the point that without these human rights protections, we can never move beyond the needs based model in our approach to public policy, and we can never move on the development of a resilient Australian Community.

The rights based approach is not about what goes on in the courts but what goes on in all aspects of government activity, of which the courts are one component. To quote John Warhurst:

*But our system is not about parliament versus the courts. It is about parliament and the courts working together in tandem.<sup>9</sup>*

And finally, given that so much of our energy and attention is being directed on the Social Inclusion agenda, lets work to give it the best possible chance of making a difference by complementing and strengthening it by bringing in the human rights framework and process.

Thank you.

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<sup>9</sup> Warhurst, J. 'Rights debate is about government not parliament' in *Australian Policy Online*. Posted 18/12/08. [www.apo.org.au](http://www.apo.org.au)