

Senate Occasional Lecture 7 December 2011

Jon Stanhope

Who's Afraid of Human Rights?

*Introduction*

Distinguished guests, ladies and gentlemen

I acknowledge the Nugunnawal people, the traditional owners of the land on which we are gathered today. I extend to them my respects and acknowledge their continuing contribution to the life of Canberra.

It is my great privilege to talk today about human rights, in our national Parliament, and in conjunction with International Human Rights Day. In so doing I want to reinforce the critical importance a commitment to human rights has as the foundation of those core values that characterise our society. I will look at the experience of the operation of the ACT's *Human Rights Act*. And I will suggest there are three paths for us to take to improve human rights of Australians:

- bold policy ideas
- strong political leadership, and
- more active community engagement.

When I talk about human rights, I mean equality and fairness for everyone. A society that commits to human rights, commits to ensuring that everyone is treated with dignity and respect. In Australia, the values that we regard as core to our national character - values such as freedom, respect, fairness, justice, democracy and equality - each stem from a commitment to human rights.

They are the values we enshrine in our vernacular as "a fair go for all".

I believe the protection of human rights is everyone's responsibility. A shared understanding and respect for human rights provides the foundation for peace, harmony, security and freedom in our community, and importantly, the right for the most vulnerable and marginalised members of our community to have their dignity respected and their basic needs fulfilled.

I took, in my decade as Chief Minister, greatest satisfaction from the way my government implemented social justice, freedom from discrimination, human rights, equality of opportunity, and the rule of law. We introduced a Human Rights Act into ACT law in 2004, the first Bill of Rights in Australia. I believe it has led to better legislation being passed, more accountability to people in the community for the provision of services, and acts as a marker of our values. Its opponents, and indeed

continuing opponents to Bills of Rights, raise a stock set of objections to their enactment.

But the sky didn't fall in.

And it is worth reflecting, now that more than six years has passed since the passage of the *Human Rights Act*, on its impact.

### *Creation of a Human Rights Culture*

My personal experience and observations, as well as formal surveys, confirm that the *Human Rights Act* has been successful in fostering the growth of a human rights culture in the ACT.

Cabinet Room discussion, Cabinet submissions, ministerial briefings and discussion between officers and within Departments are all informed by the *Human Rights Act*. That is my experience, and it is the experience I am sure of every Minister in the ACT Government as well as that of Ministerial staff and Departmental officers.

The existence of the *Human Rights Act* is a constant presence in the day to day business of the ACT Government and that is its great success.

The ACT Human Rights Commission undertook surveys throughout the ACT Public Service in 2009 which illustrate the range of ways in which the Act is used in, or affects the work of, the Public Service. These range from issues affecting mental health clients, in teaching migrants, designing buildings, prosecution policy, juvenile justice, corrections policy, law reform and the implementation of security and emergency management arrangements.

It is also not unusual for questions of human rights to be raised in correspondence to Members of the Legislative Assembly, in submissions to Government, and I have noticed increasing reference to human rights in public consultations and public forums.

Additionally, the Government is now far more likely to be taken to task by the Opposition, representative organisations and the general public for allegedly ignoring human rights or the *Human Rights Act*. While the irony of the Opposition, which trenchantly opposed the passage of the Act, taking the Government to task over its implementation and observance is not lost on me, it is I think a clear sign of its utility and efficacy that the Opposition now regularly uses the Act as a mechanism for holding the Government to account on human rights issues.

As, of course, it should.

### *Development of Policy and Legislation*

While, as you would be aware, every piece of legislation introduced by the ACT Government must be accompanied by a Human Rights compatibility statement

signed by the Attorney-General, it is, to date at least, in areas of criminal law reform and corrections where the *Human Rights Act* most starkly and consistently pervades the policy and legislative process. The highest profile examples of the Acts impact on the ACT Governments attitude to reform of the criminal law being the anti-terrorism legislation and proposals mooted for national laws for the control of Outlaw Motorcycle Gangs. The ACT took a markedly different attitude than other jurisdictions to these issues.

### *Human Rights Audits and Reviews*

The Human Rights and Discrimination Commissioner has also, to date, conducted three human rights audits under s.41 of the *Human Rights Act*. The first audit involved the former ACT youth detention centre, Quamby, in 2005, the second audit related to ACT remand facilities in 2007, and most recently a human rights audit of Bimberi Youth Detention Centre was undertaken this year. In addition, the Health Services Commissioner conducted a services review of the Psychiatric Services Unit at the Canberra Hospital in 2009 in partnership with ACT Health, pursuant to s.48 of the *Human Rights Commission Act 2005*.

The focus on using these powers has been to 'shine a light' on the practices, policies and procedures of closed environments such as youth and adult detention centres and secure mental health facilities, for which Government has total responsibility. It is in these closed environments that people can be at their most vulnerable to human rights abuses and violations. The review function has been the most powerful in achieving systemic change at legislative as well as practical levels.

### *Impact in the Courts*

Prior to the enactment of the Act, critics predicted that it would be a litigious feast for lawyers, a rogue's charter favouring the rights of criminals over victims, or would have no impact on court decisions at all. The same critics prophesied that the passage of the *Human Rights Act* would destroy democracy as we know it with the transferral of law making power from the Parliament to the Courts.

None of these criticisms have been realised in practice - there has been no avalanche of cases pursued by lawyers, or of criminals escaping justice through human rights loopholes. There has been no instance of a Judge or a Court off on a law making frolic. In 2007 the then Director of Public Prosecutions confirmed that the practice of criminal law 'had not been revolutionised,' and that

'there have been no more acquittals or technical defeats for the prosecution than before the Act, nor an express reliance on the Act in ways that are different from the common law.'

Importantly, there is increasing evidence that the Act is being used as an advocacy tool for individuals in their dealings with the ACT Government, similar to the documented use of the UK Human Rights Act and Victorian Charter.

There have been nearly 150 reported cases citing the *Human Rights Act* since it came into force. The great majority of these cases have been in the ACT Supreme Court and Court of Appeal, with a small number in the Magistrates Court, Children's Court and Tribunals. Many of these matters involved issues of criminal procedure, where the Act has given renewed focus to the requirements of a fair trial, and the need to avoid undue delay in prosecution.

The *Human Rights Act* has also been applied in a wide variety of civil proceedings, including public housing and private tenancy matters, discrimination, adoption, care and protection, personal injury and planning matters. In many cases the Act has been used to support a conclusion which would likely have been reached on other grounds, but it has been a decisive consideration in some significant cases.

The enactment of the ACT *Human Rights Act* has had a demonstrably positive effect on awareness of human rights and their protection within the ACT. I am proud not just of that, but am also pleased that the Act was subsequently copied and extended by Victoria. And I remain hopeful that in time the reverberations from the passage of that first Bill of Rights will continue across Australia.

I am also proud that in the ACT we removed discrimination against gays and lesbians, created Australia's first fully elected indigenous body, designed the first human-rights compliant prison in Australia, and introduced anti-terrorism laws that complied with human rights. The ACT also decriminalised abortion.

As you know, attempts to ensure full functional equality for gay couples were thwarted when the ACT *Civil Union Act* was overturned by John Howard's federal Liberal government in 2006 and to my enduring regret its reintroduction was opposed by the Rudd Labor government in 2009. But the Territories now, at least, have more freedom to legislate as a result of the passage of Senator Bob Browns Bill and as last weekend's National Labor Conference has revealed, my Labor colleagues, or at least a majority of them, have now caught up to where we in the ACT Labor Party were ten years ago.

The steps taken by the ACT Government were bold and were a consequence of bold ideas, and their boldness continues. The ACT is now working, under the leadership of Chief Minister Katy Gallagher and Attorney-General Simon Corbell, and in partnership with the ANU, on an inquiry into the potential and desirability of introducing economic, social and cultural rights into *the ACT Human Rights Act*.

#### *Economic Social and Cultural Rights in the ACT*

The final report of the Economic Social and Cultural Rights Research Project, a linkage project between the ANU and the ACT Directorate of Justice and Community Safety, reflects the research of respected academic experts in human rights law: Professor Hilary Charlesworth and Professor Andrew Byrnes, Renuka Thilagaratnam

and Dr Katharine Young. These researchers reviewed the protection of economic, social and cultural rights across a range of comparative jurisdictions.

Their Report provides a detailed analysis of the nature and scope of such rights and possible mechanisms for their protection. The Report makes a clear case that economic, social and cultural rights could be better protected through inclusion in the ACT *Human Rights Act*, and provides a draft bill prepared with the assistance of Parliamentary Counsel, which sets out a considered implementation model.

The Report recommends that the following rights be included in the ACT Act - the right to housing; the right to health, including food, water, social security and a healthy environment; the right to education; the right to work, including the right to enjoy just and favourable work conditions and the right to form and join work-related organisations; and the right to take part in cultural life.

The distinction between the rights contained in the International Covenant on Civil and Political Rights - the ICCPR - and the International Covenant on Economic Social and Cultural Rights - ICESCR - is an artificial one, influenced by historical political divisions when the treaties were drafted during the Cold War. Human Rights are universal, inherent, inalienable and indivisible.<sup>1</sup> Rights in the ICCPR should not be seen as more important or more relevant than the rights in the ICESCR. Newer treaties such as the Convention on the Rights of the Child and Convention for the Elimination of all forms of Racial Discrimination do not distinguish between categories of rights. Nor should the *Human Rights Act*, which is an important mechanism for domestic implementation of our international human rights obligations.

Economic, social and cultural rights, including the right to housing, the right to education, the right to work and the right to the highest attainable standard of health, are critical for individuals to lead dignified lives. In practice, individuals and advocates who have invoked the *Human Rights Act* have often sought indirect redress for breaches of economic, social or cultural rights through arguments based on civil and political rights. This indicates a need for a broader protection of rights in the ACT, and broad protection federally. For example, in the ACT case of *Peters v ACT Housing*,<sup>2</sup> tenancy advocates relied on the right to equality to indirectly protect the right to housing, arguing that public housing tenants should be compensated to the same extent as private tenants where the property owner had failed to carry out essential maintenance work to ensure that the properties were habitable.

As I earlier noted in 2009, the ACT Human Rights Commission conducted a Community Survey. The following question was put as part of the survey:

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<sup>1</sup> See Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights, 14-25 June 1993, A/CONF.157/24 (Part I), Chapter III.

<sup>2</sup> [2006] ACTRTT 6.

‘The ACT Human Rights Act 2004 currently covers civil and political rights. It does not include economic, social and cultural rights such as the right to health, housing and education. Do you think these rights should be included in the ACT Human Rights Act 2004?’

Respondents were overwhelmingly in support of including economic, social and cultural rights in the Act with 82.6 percent favouring inclusion.

Similarly the National Human Rights Consultation chaired by Father Frank Brennan involved the commissioning of research that found economic, social and cultural rights were most important to Australians, with the Committee stating:

‘The research the Committee commissioned demonstrated that economic, social and cultural rights are at the top of the list of rights that are considered most important to the Australian community.’<sup>3</sup>

‘The way they are protected and promoted has a major impact on the lives of many Australians. The right to adequate housing, the right to the highest attainable standard of physical and mental health, and the right to education are particular priorities for the community.’<sup>4</sup>

The *Human Rights Act*, with only ICCPR protection, has not, as I said earlier, led to a significant increase in litigation, and the ACT courts and tribunals have adopted a cautious approach to the application of civil and political rights. There is no reason to suggest that the inclusion of economic, social and cultural rights would have more than a modest and appropriate impact in strengthening protections for these fundamental rights in the Territory. There is nothing to fear.

The work of the Research Project provides a solid and practical foundation for the incorporation of economic, social and cultural rights into the *Human Rights Act*, and the ACT Government now has an important opportunity to progress the vision and potential of the Act to protect all of the fundamental human rights of people within the ACT.

I look forward to the Government's response on this important issue.

### *Bold policy ideas*

The passage of Human Rights legislation is of itself obviously not enough.

It is also important to move the debate into actual policy initiatives, and to test and act on creative ideas from other jurisdictions.

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<sup>3</sup> At pXV.

<sup>4</sup> At p96.

The UK for example has a new piece of legislation on corporate manslaughter which I believe has merit for consideration in the Australian context. A Corporate Manslaughter and Corporate Homicide Bill was introduced to the House of Commons by the then Home Secretary, John Reid, on 20 July 2006 to create new offences of corporate manslaughter, in England and Wales, and corporate homicide, in Scotland. The Bill received royal assent on the 26th July 2007, becoming the *Corporate Manslaughter and Corporate Homicide Act 2007*. The Act came into force in early 2008.

The Act contains a duty of care that certain organisations owe to persons who are held in detention or custody. A company will be guilty of the new offence if the way in which its activities are managed or organised, by its senior management, amount to a gross breach of the duty of care it owes to its employees, the public or other individual, and those failings caused the person's death.

Companies, and importantly government bodies, face prosecution if they are found to have caused a person's death due to their corporate health and safety failings.

The Act was then extended in 2011 to cover all deaths in police custody suites, prison cells, mental health detention facilities, young offenders institutions and immigration suites. It also covers Ministry of Defence institutions.

This is groundbreaking because the previous law linked a company's guilt to the gross negligence of an individual who is said to be the embodiment of the company.

It had proved very difficult to prosecute companies and large organisations, and the only successful prosecutions have been against small companies where the director and company are essentially one and the same.

The new *Corporate Manslaughter and Corporate Homicide Act* seeks to address this difficulty by focusing on the way in which a company's activities are managed or organised, and it is not reliant on one individual being found guilty of gross negligence manslaughter. The courts will now be able to consider the wider corporate picture, looking collectively at the actions, or more appropriately the failings, of the organisation or the company's senior management.

There had likewise been no successful prosecutions of police or prison officers, individually or at a senior management level, for institutional failures that have contributed to a death in custody<sup>5</sup>.

The background to the 2011 amendment was that in the UK, in the 10 years between 1999 and 2009, 333 people died in or following police custody, according to the Independent Police Complaints Commission. Ministry of Justice figures show that in 2010 alone there were 58 self-inflicted deaths among prisoners in England

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<sup>5</sup> [http://www.cps.gov.uk/legal/a\\_to\\_c/corporate\\_manslaughter/](http://www.cps.gov.uk/legal/a_to_c/corporate_manslaughter/)

and Wales. There were also deaths of people being transported to and from immigration detention centres – such as the prominent case of Jimmy Mubenga who died while being restrained on a British Airways plane to Angola in 2010.<sup>6</sup> (Notably, the private firm hired to transport him cannot be prosecuted under the Act because the law is not retrospective).

Prosecutions can take place if it can be proved that the way the facilities are managed or organised caused a death and amounted to a breach of the duty of care. The penalty for organisations convicted is a fine with no maximum limit. Crown Prosecution Service guidance says that the fines are likely to be in the many millions of pounds.

Campaigners for the families of those who die in custody believe the new law will provide extra protection for vulnerable individuals and at last inject some accountability into the system, according to reportage last year in the *Guardian* newspaper.<sup>7</sup>

Helen Shaw, the co-director of Inquest, the UK charity that works with families of those who die in custody, said:

"While not all deaths in custody are a result of grossly negligent management failings that would lead to consideration of a corporate manslaughter prosecution many of Inquest's cases have revealed a catalogue of failings in the treatment and care of vulnerable people in custody and raised issues of negligence, management failings and failures in the duty of care.

"The new provisions provide a new avenue to address these problems and will hopefully have a deterrent effect, preventing future deaths."

Inquest said that until now, there had been no successful prosecutions for deaths in custody, even in the 10 cases since 1990 where an inquest jury had returned an unlawful killing verdict.

Implementation of the clause covering custody deaths was delayed in order to give police forces and prisons time to inspect their custody facilities and their management protocols and administrative arrangements and make sure they were up to the highest standards.

John Coppen, the Police Federation representative for custody sergeants, said:

"This will mean the people at the top, who actually control the buildings and the budgets, have to think about their responsibilities. In future if someone was to hang themselves from a ligature in a cell, not only would the custody

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<sup>6</sup> <http://www.guardian.co.uk/uk/2010/oct/15/mps-demand-inquiry-flight-death>

<sup>7</sup> <http://www.guardian.co.uk/uk/2011/aug/28/corporate-homicide-law-prison-police>

sergeant be questioned, but the authorities would look at the way the building was designed, whether there were any obvious ligature points that had not been removed, and the force could be held responsible."

As well as unlimited fines, courts can also impose an order requiring the company or organisation to publicise the fact that it has been convicted of the offence, and give details.

Why would this bill be relevant to Australia?

I argue for three reasons.

First, we have an ongoing problem with deaths in custody, and in particular with Aboriginal deaths in custody. You will all remember the terrible case of indigenous elder Mr Ward dying in 50 degree heat in January 2008 while being transported in a van in WA.<sup>8</sup> April 2011 marked the 20<sup>th</sup> anniversary of the Royal Commission report into Aboriginal deaths in custody. It recommended governments immediately work to reduce the number of Aboriginal people in prison. Yes, fewer aboriginal people are dying in lock-ups and prisons, but more are in jail. And the situation for the next generation is dire. In our juvenile detention centres more than half the children are indigenous.

The Northern Territory Criminal Lawyers' Association president John Lawrence says the lessons of the report have not been heeded.

"The bottom line is that we've gotten nowhere - slowly, backwards, up a hill blindfolded"<sup>9</sup>

Of topical interest to residents of the ACT is the current debate about the right of drug injecting prisoners in the Alexander Maconochie Center to access clean needles and the consequences and responsibility that would flow if as a result of their non-availability or non-provision a prisoner is, say, infected with a life threatening disease and subsequently dies. The position put and maintained by the CPSU, the union representative of prison officers, is that clean needles will only be made available to prisoners over their dead bodies. It is not clear who the CPSU believes should be responsible for dead prisoners. Certainly not the Union or its members. Drug injecting members of the CPSU and indeed all Australians have access to 3,500 publically operating needle exchange facilities throughout Australia.

Second, Australians die in mental health institutions. The *Age*, for example, reported in September 2011 that 36 people died unexpected, unnatural or violent deaths in

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<sup>8</sup> <http://www.watoday.com.au/wa-news/man-dies-in-50-degree-heat-during-inhumane-treatment-20090613-c6gx.html>

<sup>9</sup> <http://www.abc.net.au/news/2011-04-15/aboriginal-deaths-in-custody-lessons-not-heeded/2614616/?site=darwin>

Victorian mental health facilities alone between 2008 and 2010 according to Coroner's Court files.

And third, there have been 27 deaths in immigration detention since 2000, with five in the last year, and there is a sense of growing concern about the mental health and treatment of detainees in privatised detention centres.

These deaths are currently dealt with in Coroners Courts and in an ad hoc manner, state by state or territory, and mostly in a highly reactive way. Compensation has to be fought for, and structural reform to prevent further deaths is not guaranteed.'

It is moot to ask if a person dies in the sorts of circumstances I outlined above, ie in circumstances where the detainee has not been availed of services or care of the sort or standard available to all other members of the community and they die and their death is reasonably foreseeable or a consequence of a reckless or negligent failure to provide that service or an appropriate level of care, should someone or some organisation or entity be held accountable for that death. The Government of the United Kingdom thinks so, as do I.

The ACT has now had in operation for a number years an offence of industrial manslaughter. It provides that an employer or a senior officer of a company commits the offence of industrial manslaughter if a worker dies as a result of reckless or negligent conduct of that employer or senior officer that causes the death of the worker or serious harm that later causes the worker to die.

There have been no prosecutions under the Act but it is nevertheless credited with having generated massive cultural change on construction and industrial sites within the ACT and to have a marked impact on work site culture and safety. The legislation was passed following vigorous and cogent representation and argument by ACT based unions, most particularly the CFMEU and Unions ACT. I am certain that all unions operating in the ACT and affiliated with Unions ACT and associated with the industrial manslaughter regime campaign would support it being extended as I have proposed, to people other than workers who die as a result of similarly reckless or negligent behaviour so as to cover a broader range of organisations and companies, including within the public sector and even the unions themselves.

Australia needs this type of legislation.

All Governments in Australia today should consider it as a priority.

### *The need for strong political leadership*

I became a politician as a direct consequence of having been made redundant following the 1996 Federal election and the then cuts to the public service. Unemployed and living in a town dominated at the time by two Liberal Governments and virtually unemployable as a consequence, in 1998 I stood for the Legislative Assembly.

A classic case of if you can't beat them, join them.

While the ALP was defeated I was elected as an MLA for Ginninderra, and was appointed Leader of the Opposition. I won the next election and have just retired after nearly ten years as Chief Minister. I always enjoyed attending meetings of the Council of Australian Governments, particularly while John Howard was Prime Minister, having regard to the primary role he played in my rather accidental entrée into politics and my presence at the COAG table.

It has been an enormous privilege to have been Chief Minister. It is a great job. The rewards are immense. The ability to control a legislative program. To develop and implement reform. To lead conversations. To direct change. To deliver services that people rely on.

It is also an incredibly tough job. It's stressful and tiring, the hours are long and the workload heavy. It is at times puerile and the constant negativity and the personal attacks, so much a feature of the Australian brand of Westminster, can be debilitating.

The profession of politics attracts those with passion. Yet surprisingly, one of the hardest things about being a politician is to remain true. True to yourself, to your ideals, your values and principles and to those of your Party and your Government. In politics there is an almost constant pressure to compromise, to rationalise, to remain silent, to do nothing, to pretend that it really isn't your concern, to look away, to go with the flow. And the pressure is more intense in the circumstance of minority government, which is almost the default political circumstance in the ACT.

Most politicians, when they succumb to the pressure justify it as simply good politics or as being loyal to the Party. We characterise it as being pragmatic. We insist that we are simply reflecting the views of our constituents. We justify the breach of basic principle on the grounds of some contrived greater good. We don't implement controversial policies that have stood in our party platforms for decades, and we say it is because of resource constraints or isn't a priority. We coin convenient little slogans like "politics is the art of the possible" to comfort ourselves.

These are all of course excuses, and I can't pretend that I haven't been guilty of dragging the odd one out myself. But they are excuses. Excuses designed to justify decisions or actions that at their heart can lack integrity and principle and often attempt to disguise a want of courage or leadership.

For myself, and it is difficult to discuss these things without seeming arrogant or self serving, but I did try very hard to keep the faith.

As Chief Minister and leader of the Party in the ACT I believed it my duty and my responsibility to consistently reflect my values and those of my Party. I thought the people of the ACT had a right to expect me to stand up and defend things that I had led them believe I stood for.

It wasn't always easy. It brought me into major conflict with Prime Ministers, Premiers, other Ministers, the media, and sections of the community. I received death threats. I was pilloried and ridiculed. Sticking to principle, particularly if you are going against the tide, can be a very lonely business.

And while it was often difficult to argue these positions in the face of virulent and at times ill advised opposition I am proud that we did. Because while each of these issues is important alone and each had to be faced and acted upon, the fact that we advocated particular positions on them also subtly drove an important conversation amongst Canberrans about identity. And I believe governments have an obligation to lead those conversations, as much as they have a responsibility to deliver services. I also think that time, history and experience will or already have vindicated the position we took on all these issues.

I instance again the ALP's new national position on gay marriage. A position adopted and advocated by the ACT Government for the whole of the last decade.

#### *The need for more robust community engagement*

I earlier gave some examples of the sorts of rationale that politicians often advance for not supporting policies or positions on important issues including of fundamental human rights.

But, of course, it is not only politicians that behave like this or explain or try to justify their behaviour in these ways. When I read the papers or listen to radio or observe the community conversation on so many issues of importance I am often disappointed or surprised at both the quality of the debate and the extent of community engagement. I am surprised at how many of us are happy for someone else to speak and act for us and to purport to represent our views and opinions.

I have a strong interest in the human rights of prisoners. I argue strongly on the needle exchange issue but the debate is about much more than the health needs of injecting drug prisoners. It is really about recognising the humanity of all prisoners and that they have rights as humans. I think we are each seriously diminished if we by our silence passively condone the breach of any ones human rights, including of prisoners irrespective of how heinous their crime. My point is, and I may be wrong, but I am aware of a total of only seven or eight members of the Canberra public who have, to date, publically supported the right of prisoners to have the same standard of health services as the rest of us. Why is that?

Politicians should lead these conversations, but if we citizens are to truly engage in our own community, we need to join in.

And lastly if our aspiration is, as I believe we would all claim, for a fair and just society, then we all have a role to play in achieving it. We can't all leave it to someone else. And we shouldn't reach for an easy excuse.

Happy Human Rights Day for Saturday, 10 December.

Thank you.