

Leading the Way to Better Laws



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About the author

Susan Harris Rimmer was born and raised in Coonabarabran in central-west NSW. She graduated from the University of Queensland in 1997 with a BA (Hons)/LLB (Hons) and received a University Medal in 1996. She will be awarded a Doctorate of Juridical Science from Australian National University in December. After some volunteer work with the UN refugee agency UNHCR in Kenya and the International Criminal Tribunal for the Former Yugoslavia, Susan did her articles of clerkship with national law firm Blake Dawson Waldron and was admitted as a solicitor in March 2000.

Since then, Susan has pursued human rights/refugee advocacy work with the peak bodies the National Council of Churches in Australia, the Australian Council for International Development and the United Nations refugee agency, UNHCR. Since mid-2005, Susan has been a Research Specialist at the Parliamentary Library advising Federal Parliamentarians on legal issues relating to refugees and terrorism, as well as analysing legislation in Bills Digests. Susan also serves on committees in a voluntary capacity for the Australian Red Cross and is the President of Australian Lawyers for Human Rights. Her law reform goals are an end to mandatory immigration detention, a treaty with Indigenous Australians and a Federal Charter of Rights.

Request for feedback

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Introduction

The Cancer Council NSW runs an advocacy training program so that community members can take action for lasting solutions to cancer control and treatment issues. Long lasting and equitable solutions often involve a change in public policy, and are enacted through legislation or regulation. In 2008 I was invited to speak about how non-government organisations such as the Cancer Council NSW might use law reform as an advocacy strategy.

This pamphlet is based on my address to the 'Lead the Way' Regional Advocacy Network Conference, however the information can be applied outside of that forum. It is designed to be a useful resource for community advocates considering when to engage in law reform strategies. Examples relate to the jurisdiction of NSW.

For a more comprehensive resource, see *Working the System: A guide for citizens, consumers and communities* (2nd ed), Public Interest Advocacy Centre, Federation Press, 2003.

If you would like to know more about The Cancer Council Advocacy Training Program please email advocacy@nswcc.org.au or call 93341748 or 93341859

Motivation

going up the river

A group of social workers were having their annual picnic by the river. Suddenly a drowning person sweeps past in the current. One social worker jumps in the river, rescues the person and gets them safely to shore. Another social worker gets them out, wraps them in a blanket and gets them a hot drink. A third social worker offers counselling. Suddenly three more people in distress are swept around the bend in the river. The social workers rally—three jump in and rescue the victims, and the others form a chain on the bank for blankets, hot tea and counselling. But more people are being swept down the river. One social worker starts walking off upstream. The chief social worker says 'Where are you going? We are in the grips of a crisis here!' The other person replies, 'I'm going up the river to see who is pushing all these people in'. (Source: Eileen Pittaway, UNSW)

For those of us who act as carers and community advocates, it is always hard to let a member of the team leave the immediate pressing tasks of providing relief, in order to investigate structural reforms. But often it is necessary in the long term. This pamphlet is designed to give community advocates another tool in their toolkit to achieve sustainable long-term reform to whatever problem they are facing.

Why law reform is an important tool in a community advocate's tool kit

This section provides four reasons to engage in law reform strategies as part of an overall advocacy strategy. A case study about the advocate Bernie Banton is provided as an illustration of these points.

1. Helps you play the ball, not the man (or woman).

Many successful advocacy tactics depend on choosing a public spokesperson and forming personal relationships with decision-makers or members of the press. Often this means that in the heat of disagreement about a policy goal, individuals can become a target of negative attention on both sides of the debate. Focusing on the law itself can take some of the heat out of an issue, and avoid the attribution of blame to any particular person. A law reform strategy is, generally speaking, solutions-oriented.

2. Future generations will thank you...

Law reform, especially legislative reform, is the most lasting advocacy strategy. It is sustainable beyond the next election cycle and beyond the resignation, retirement or death of any particular key individual. Although laws are slow to change, once the change is made, the benefit is that they are binding and hard to undo.

3. Law is the foundation of policy and the site of values.

Law is meant to be an expression of our shared community values passed by our elected representatives in Parliament. Law reform is often needed because old laws need to be modernised, or technology changes faster than our laws can catch up to, or because social attitudes change. Or laws can get 'stuck', between the Commonwealth and a State for example, because of our federal system.

4. Not everything is a numbers game or a popularity contest.

The first impulse of an advocate is usually to ask for more resources to help fix a problem. The more people experience the same problem, the more likely it is that a decision-maker and the media will respond positively. As an example, cancer causes 29 per cent of all deaths in Australia. It should be easier to advocate and raise money to help cancer sufferers in Australia compared to other issues because of the scale of the problem. However, there may be rare forms of cancer, or people affected by cancer in remote areas of Australia, who find it harder to rely on overwhelming data alone. Sometimes, not even more money will fix a problem. Law reform can sometimes provide an argument for equity, regardless of numbers, so that all people with the same problem are treated in the same way.

Mr Bernie Banton 1946-2007

Mr Bernie Banton's advocacy goals were to gain compensation for asbestos victims from the company James Hardie; and to achieve the listing of the mesothelioma drug Alimta on the Pharmaceutical Benefits Scheme (PBS). The first goal was achieved through a series of court cases, a public campaign and an alliance with the NSW Government and union movement. A \$1.5 billion trust fund to provide compensation for asbestos victims was set up in 2005. Mr Banton's second goal was pursued by presenting the Health Minister with a petition containing the signatures of 17,000 people supporting the listing of Alimta on the PBS.

Mr Banton sued James Hardie subsidiary Amaca where he had worked as a lathe operator in the 1960s and 1970s. In 2000 he received a payout of \$800,000 for an asbestos-related lung disease. His lawyers claimed a second damages payment for the mesothelioma after a diagnosis in 2007, to seek a precedent for compensating people who developed such illnesses after their original case had been finalised. The case was settled in Mr Banton's favour just prior to his death.

These advocacy goals required setting novel and difficult legal precedents. Mr Banton was a very successful advocate because of his everyman appeal and personal bravery in dealing with his own illness, but his campaigns were aimed at helping fellow-sufferers and took a personal toll on himself and his family. During the 2007 Federal Election campaign, the then Federal Health Minister Tony Abbott impugned Banton's motives as 'impure' and the petition as a 'stunt', although the Minister later apologised.

See further: <http://www.smh.com.au/multimedia/2007/national/bernie-banton/index.html>

Eight tactics to achieve law reform

This section provides eight strategies to employ when engaging in law reform strategies. An example for each strategy is provided.

1. Identify the blockage, take a big picture view.

Usually advocacy is inspired by a particular case, when an individual or family encounters a problem, and then a pattern can be perceived. For example, it is usually only after a significant number of people experience a health problem at the same workplace that the building is checked. Sometimes the 'problem' may be a gap that opens up, leaving people uncertain how to act in a novel situation (eg ownership of in vitro eggs, when that became an issue); or identifying a practice that has unfair or harmful consequences over the long term (eg pollution).

It is sometimes important to step out of the circumstances of an individual case and try to examine whether a structural problem caused the issue for that person. Identifying problems correctly in the first place is very important. Sometimes it is even harder to think about what the solution to the problem might be, a solution that would prevent that same situation happening to anyone else in the future. For example, should we legislate for compulsory workplace audits for carcinogens? What is 'blocking' people from achieving a solution? Advocates need to see not only the broad picture of an issue, but also need to see occasions, sites and broad opportunities for law reform.

The most important and the hardest advocacy work is often identifying a useful and possible goal/solution, and viable means of achieving it. This means it is important to invest time and effort in clearly identifying the problem: not necessarily what has manifested, but what is the root cause of the issue.

2. The public service is your friend. Trust me.

It is a good idea to map out clearly for your group what the decision-making 'machinery' is for your problem. For example, if your group wants an expensive drug listed on the PBS, who will make that decision? The minister? An expert panel? A delegate from the Therapeutic Goods Administration? What process will be followed and what are the key dates? Another good strategy is to find the right person in the minister's office and the relevant Department and let them know of your interest and goals. Ask them to keep you updated with any developments, and in return provide them with information about your campaign at regular intervals. As long as you respect the different roles of the public service and ministerial staffers, this could be the best way of having influence or being consulted. Usually successful advocacy is all about timing.

3. Find a friendly lawyer.

A range of legal resources exist to help community advocates. It never hurts to ask whether someone can help you. Just make sure you ask for pro bono (free) advice.

4. Find advocacy partners, especially unusual suspects.

Once you have discovered your solution, it becomes clear that other groups are working towards that same goal for different reasons. The best advocacy usually comes from alliances, especially unlikely alliances. Take a look at which other groups turn up at important events, talk to them, and share goals. For example, the union movement might join cancer groups in advocacy around safe workplaces. Other groups based around illness, such as the MS Society, would have many of the same goals as a cancer advocacy group, such as patient rights or assistance for isolated patients.

5. Make a submission, use the system.

Make sure you use every opportunity to use the system already in place—until you succeed in changing it! For example, talk to your local federal and state MPs and senators, it is their job to represent your concerns. Find out which is the relevant Parliamentary Committee for your issue and register your interest in hearing about upcoming inquiries (for example, the Senate Standing Committee on Community Affairs). If there is a journalist whose stories you always read and like, ask to meet them. Whenever you meet anyone, leave them with a one page sheet with your concerns, your solutions and clear contact details. One of these connections might help your group one day.

Community action is increasingly important and effective. The organisation Get-Up! is a good example (www.getup.org.au). Developing community support within your community of interest and more widely is a very useful tactic. The internet can be a very effective low-cost advocacy tool.

6. Politicians are also lawmakers. Remind them a lot.

With everything else that is on a politician's mind, their role as a legislator can get lost. It is important to put yourself in their shoes, and make it easy for them to make the right decision. Do the work so that all the Minister has to say is 'yes' or 'no'. Make sure the 'yes' case is clear, costed and persuasive, and point out where the 'no' case has electoral consequences. For example, if you want a stronger charter of patient rights with penalties and incentives, draft it yourself, then figure out what it would take in terms of training and dissemination to make it effective. Commission a poll or survey to back up your claim that such a Charter would be popular.

7. Monitor the work of the Australian Law Reform Commission.

Established in 1975, the Australian Law Reform Commission (ALRC) is a permanent, independent federal statutory corporation based in Sydney. The ALRC conducts inquiries - known as references - into areas of law reform at the request of the Attorney-General of Australia. The ALRC does not offer legal advice or handle complaints. It cannot intervene in individual cases and does not act as a 'watch-dog' for the legal system or the legal profession. However, it may be worth talking to the Federal Attorney-General about an ALRC reference for a really big reform issue, and there are lots of opportunities for members of the public to make submissions to inquiries. Think about how your issue fits in—for example, a submission on better assistance for cancer sufferers and their family might fit into a broader inquiry into tax reform or stem cell research. www.alrc.gov.au/index.html

See also the Law Reform Commission of NSW:
www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_index

8. Run a test case (watch The Castle!).

If there is a particular individual case with a very strong prospect of success, sometimes it is useful to run a 'test' case in the courts (see PIAC details above). The individual involved must be fully informed and prepared for a long, difficult process, as was the case for Mr Bernie Banton in his second compensation claim for mesothelioma. The Mabo case regarding the doctrine of terra nullius and native title is a good example of a successful test case. The case had a strong set of facts and an indefatigable plaintiff. Even so, it was a long road and Eddie Mabo died before the High Court found in his favour. Running a test case is long, exhausting, expensive, risky and possibly only of short-term value if the case is then over-ridden by legislation. It is only feasible when there is a strong cause of action and an opportunity in the current state of the common law. Even then, a test case cannot succeed in securing change without a dedicated plaintiff, huge funds or donations in kind, and complementary tactics using media, lobbying and community development. Therefore, this tactic is usually a last resort.

PIAC and PILCH (NSW)

Public Interest Advocacy Centre (PIAC)

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal and policy centre.

PIAC makes strategic legal and policy interventions in public interest matters to foster a fair, just and democratic society and to empower citizens, consumers and communities.

PIAC's work is often with people or communities who have the least access to economic, social and legal resources and opportunities, and their advocates.

Through its work PIAC seeks to:

- expose unjust or unsafe practices, deficient laws and policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law — both statutory and common — that better reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

It does this through a range of strategies including legal advice and casework, training and community development, research and public policy development, submissions to government and other inquiries.

PIAC also delivers training for community advocates.

Level 9, 299 Elizabeth St Sydney NSW 2000

Tel: 61 2 8898 6500 Fax: 61 2 8898 6555 E-mail: piac@piac.asn.au

Public Interest Law Clearing House (PILCH)

PILCH bridges the justice gap by linking individuals and not-for-profit organisations with legal and other professional advisors to provide pro bono (free or reduced fee) assistance to address issues of concern in the community. PILCH is a membership based organisation which refers requests for assistance to members, provides advice, co-ordinates projects to create systemic change and hosts events to raise awareness about public interest matters. PILCH assesses requests against public interest criteria.

Level 9, 299 Elizabeth Street, Sydney 2000

Tel: (02) 8898 6550 Fax: (02) 8898 6555

Other Legal Resources in NSW

Law Access NSW

Community Legal Centres

National Association of Community Legal Centres (NACLC)

Law Society of NSW - Information for the Public

Law Society of NSW

Legal Information

Legal Information Access Centre (LIAC) at the State Library of NSW

Legal Resources

Australasian Legal Information Institute (AUSTLII)

Possible law reform issues in cancer control

- compulsory audits to remove carcinogens from Australian workplaces
- free or cheaper access to drugs on the PBS (effect of US Free Trade Agreements)
- social security reforms, carers benefits, pensions
- encouragement of medical research into cancer cures, genetic testing, stem cell research
- patient rights – binding rather than declaratory, carrying penalties/incentives
- increased tax relief for carers
- a Federal Minister for Cancer and a National Cancer Plan (based on NSW model)
- stronger legislative basis for Isolated Patient's Travel Accommodation Assistance Scheme (IPTAAS) Program (NSW model)
- regulatory strategies to prevent young people taking up smoking.



Four tips to remember on the road to law reform

Law reform is a team sport, bigger than any one person, and intergenerational in scope. It is important to have faith in your expertise as an advocate — no-one knows an issue like the person who is living it. Here are four tips to think about and help you keep going.

- a. Law reform is the long road home, be patient.
- b. The law is meant to serve society, not the other way round.
- c. Most lawyers are not as smart as they think they are (keep this one a secret). Have faith in your expertise.
- d. Stronger than 1000 marching armies is an idea whose time has come (Victor Hugo).



Conclusion: The view from up the river

Law reform is a hard, long process. Why would you bother?

Because sometimes it is the only way to ensure that the injustice that inspired your advocacy work never happens to anyone else again. Make sure law reform is a tool in your toolkit. It can contribute to an effective, sustainable strategy. And take heart: community advocates can make history. 'Never doubt that a small group of thoughtful committed citizens can change the world,' said Margaret Mead. 'Indeed, it is the only thing that ever has.'

I also want to make special mention tonight of Bernie Banton. Bernie, a fighter for the victims of asbestos who is gravely ill in hospital in Sydney tonight. I say to Bernie, if he is watching this broadcast, mate, you're not going to be forgotten in this place... Bernie, you stand out as a beacon and clarion call to us all about what is decent and necessary in life and mate, I salute you.

Kevin Rudd's election victory speech, November 2007

