From the periphery to the centre

A new role for Indigenous rights

*By Professor Larissa Behrendt **

On 18 November 2003, the Chief Minister of the Australian Capital Territory will announce that they will be enacting a human rights Act. This legislation will be the first Bill of Rights in Australia and with this modest Act, that leaves the power to define, balance and override rights to the parliament, the ACT is seeking to bring a standard of rights protection into decision making within its jurisdiction.

I sat on the ACT Bill of Rights Consultative Committee which undertook a consultation process within the community to canvas views about whether there should be a Bill of Rights, what form it should take, and what rights it should include. The consultations revealed a scepticism, one might almost say a fear, about the recognition and protection of the rights of minorities. Feedback from those consultations included comments such as 'if a Bill of Rights includes the protection of Indigenous people, it will not be for the benefit of all Canberrans' and 'if a Bill of Rights mentions Indigenous rights and the rights of other minorities it will have no legitimacy.'

What is noticeable in these responses is a meanness of spirit about the protections that a democratic society can offer. It is shaped by a mentality which protectively guards the rights and benefits that are enjoyed by many citizens within a community and seems to assume if those rights are extended to the poor, the culturally distinct and the historically marginalised that they - middle-class, Anglo-Celtic, Christian - will be worse off. This world view sees the recognition and protection of the rights of the disadvantaged and culturally distinct as being in direct competition with their own position. It is this 'us' and 'them' mentality, this ability to psychologically divide parts of our community off as different and threatening, that is finding its way too often into law making and policy making. The effect of this psychological divide is to leave some sectors of the community - usually the most vulnerable, culturally distinct and the historically marginalised - less protected from rights violations than others...

The framers of our Constitution believed that the decision-making about rights protections - which ones we recognise and the extent to which we protect them - were matters for the parliament. They discussed the inclusion of rights within the Constitution itself and rejected this option, preferring instead to leave our founding document silent on these matters. It was also a document framed within the prejudices of a different era - of its own kind of xenophobia, sexism and racism.

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'The inequities perpetuated by the silences in the Constitution have given Australians cause to reflect upon our foundation document in the past. The feeling that this canonical document did not reflect the values of contemporary Australian society gave momentum to the 1967 referendum.'

The 1997 High Court case of *Kruger v The Commonwealth*[2] assists in making this point. This was the first case to be heard in the High Court that considered the legality of the formal government assimilation-based policy of removing Indigenous children from their families. In *Kruger*, the plaintiffs had brought their case on the grounds of the violation of various rights by the effects of the Northern Territory Ordinance that allowed for the removal of Indigenous children from their families. The plaintiffs had claimed a series of human rights violations including the implied rights to due process before the law, equality before the law, freedom of movement and the express right to freedom of religion contained in sec 116 of the Constitution. They were unsuccessful on each count, a result that highlighted the general lack of rights protection in our system of governance and the ways in which, through policies like child removal, there was a disproportionately high impact on Indigenous people as a result of those silences.

The inequities perpetuated by the silences in the Constitution have given Australians cause to reflect upon our foundation document in the past. The feeling that this canonical document did not reflect the values of contemporary Australian society gave momentum to the 1967 referendum. The result of that Constitutional change though is often misunderstood. It has been held out as the moment at which Indigenous people became citizens or Aboriginal people attained the right to vote. It did neither. In reality, the 1967 referendum did two things:

- It allowed for Indigenous people to be included in the census, and
- It allowed the federal parliament the power to make laws in relation to Indigenous people.

Marilyn Lake, in her biography of Faith Bandler,[3] goes some way towards explaining why those who advocated so hard for the constitutional change thought it went further than it did. The notion of including Indigenous people in the census was, for those who advocated a 'yes' vote, more than just a body-counting exercise. It was thought that the inclusion of Indigenous people in this way would create an imagined community and as such it would be a nation-building exercise, a symbolic coming together. It was hoped that this inclusive nation-building would overcome an 'us' and 'them' mentality.

Sadly, this anticipated result has not been achieved. One only

need look at the native title debate to see how the psychological divide has been maintained and used to produce results where Indigenous peoples rights are treated as different and given less protection. One of the fundamental vulnerabilities of the native title regime, as it currently exists, is that the interests of the native title holder(s) are treated as secondary to the property interests of all other Australians. The rhetoric of those antagonistic to native title interests often evokes the nationalistic myths of white men struggling against the land to help reaffirm three principles in the public consciousness:

- that when Aboriginal people lose a property right, it does not have a human aspect to it. The thought of farmers losing their land can evoke an emotive response but Aboriginal people can not;
- that when Aboriginal people gain recognition of a right, they are seen as getting something for nothing rather than getting protection of something that already exists. They are seen as 'special rights'; and
- that when Aboriginal people have a right recognised, it is seen as threatening the interests of non-Aboriginal property owners in a way that means that the two interests cannot co-exist. In this context, native title is often portrayed as being 'unAustralian'.

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The other lesson that can be learnt from the 1967 referendum is that the federal parliament cannot be relied upon to act in a way that is beneficial to Indigenous people. It was thought by those who advocated for a 'yes' vote that the change to section 51(xxvi) (the 'races power') of the Constitution to allow the federal government to make laws for Indigenous people was going to herald in an era of non-discrimination for Indigenous people. There was an expectation that the granting of additional powers to the federal government to make laws for Indigenous people would see that power be used benevolently. This has, however, not been the case and we can see just one example of this failure in the passing of the *Native Title Amendment Act 1998* (Cth), legislation that prevented the *Racial Discrimination Act 1975* (Cth) from applying to certain sections of the *Native Title Act 1993* (Cth)[4].

When analysing the failure of the amendment of the races power to ensure benevolent and protective legislation as its proponents envisaged, one is reminded of the original intent of the framers to leave decisions about the rights to the legislature. History provides us with many examples of where the legislature has overridden recognised human rights or has passed legislation that protects rights only to override them when there is political motivation to do so.

At the hand-over of the final report by the Council for Aboriginal Reconciliation, the Prime Minister announced that his government rejected the recommendation of a treaty - the centrepiece of a rights agenda - with Indigenous peoples preferring instead to concentrate on the concept of 'practical reconciliation.' It is a policy that targets, only through policy, socio-economic areas such as health, education, housing and employment.[5] To this end, the federal government boasts of the amount it spends on 'Indigenous-specific programs' - over $2 billion. It is less vocal about detailing that those 'Indigenous specific programs' include funding for defending the stolen generations case brought by Peter Gunner and Lorna Cubillo in the Northern Territory[6] and the $16.3 million plus a year that is spent by various areas of the government that are actively trying to defeat native title claims.

'Practical reconciliation' targets problems as they emerge and find favour with the broader community. It does not seek to attack the systemic and institutionalised aspects of the impediments to socio-economic development and will not create the infrastructure and capacity needed to reduce the occurrence and perpetuation of social and economic problems.

The biggest casualty in the rise of 'practical reconciliation' as a policy has been the rights agenda. The rights agenda has not only been marginalized, it has been increasingly seen as irrelevant. It is a compelling rhetorical claim too, that esoteric talk of constitutional change does not put food on the table or end high levels of violence in the community. It is easy, when placed in that light, to dismiss the focus on the human rights agenda as the privilege of the elite. This is especially so when we see articles published every day noting the increase in incarceration rates, the high levels of violence within Indigenous communities and the continuing poor levels of health and access to education.

But we should not keep focusing only on the federal sphere. The statistics of increased Indigenous incarceration alone show that there continue to be inequalities in the way that seemingly neutral laws - particularly those in the area of criminal justice - impact on different sectors of the community. One of the key obstacles in finding solutions in this realm is that the populist law and order agenda is always going to be at odds with the recommendations for flexible, innovative and alternative methods of sentencing and dealing with offending behaviour. The tough on crime laws are impacting on many people who are poor and marginalised, convicted not of serious offences but for crimes against property or driving offences. For example, when changes were made last year to the Bail Act, it was foreseeable, and pointed out to government, that the changes to the legislation were going to disproportionately impact on Indigenous people. The main mechanism put in

place to counter this was to employ more Indigenous bail officers. This is an example of the episodic, piecemeal and ad hoc way in which the disproportionate impact on Indigenous people is dealt with in the criminal justice system. It is an approach that seeks to tinker around the margins with impacts on Indigenous people rather than taking an approach that seeks to address the structural and institutional problems that have been identified as contributing to the overrepresentation of Indigenous people - particularly women and children - in the criminal justice system.

In rejecting the notion that only the rights framework or only policy initiatives offer the way forward, we should be careful not to interpret calls for one as a rejection of the other or we will continue with our inability to link targeted policy and long-term solutions. Instead, we should see the relationship between the two as a trajectory with policy initiatives at one end and structural changes on the other. Policies will only help to achieve long-term change if they work towards a broader and systemic vision of change at the same time as they target inequality and identify problems in the short term. Similarly, long-term strategies are ineffective unless the strategy for achieving them includes considered and targeted policy...

The challenge for those who believe in the importance of equality in society and value the integrity of institutions is to link the law reform needed with a 'hearts and minds' change amongst middle Australia. This is a challenge for Aboriginal and non-Aboriginal Australia alike. And our roles are quite different at this point in our country's history.

For Black Australia, the challenges are primarily the clear articulation of the political, social and cultural agenda. We need to be able to explain to all Australians what our view of a reconciled Australia should be. We need to be able to better communicate our vision of the sort of lives we want for our families, our community and our descendants. In order to achieve change, the end goal must be clearly articulated and there is common ground about what this vision is. When Aboriginal representatives are set up against each other - Noel Pearson against Geoff Clark; Aden Ridgeway against Michael Mansell - there is greater difference in the strategy to achieve the vision than in the vision itself.

This vision can be seen in attempts to map out the right to self-determination by Indigenous people. It can be seen in various reports, in community expressions such as the Barunga Statement and in the speeches of our leaders and representatives. It includes the right not to be discriminated against, the rights to enjoy language, culture and heritage, our rights to land, seas, waters and natural resources, the right to be educated and to work, the right to be economic self sufficient, the right to be involved in decision-making processes that impact upon our lives and the right to govern and manage our own affairs and our own communities.

We need to return focus to this agenda, articulate it clearly and discuss it with the rest of Australia. We have a responsibility to do this because we need to be able to clearly answer the question so often asked of us by those in the community who do want to see the disparity between Indigenous and non-Indigenous Australians remedied. They ask: 'What do you want?' and we need to have an answer to that question. As I have already said, when we look at the different ways in which visions of the long term goals are for how we as Indigenous people will live our lives, how our culture will be protected and the opportunities that will be available for our children, there is much shared vision. We need to acknowledge that shared vision, even if we continue to disagree over the best way to achieve it. We need to have the right leaders and representatives to sell that message and we must not attack them the moment they step up to advocate on our behalf.

I believe that the long term agenda as I have explained it briefly above - and I expand upon it in my book, *Achieving social justice* - is not divisive. It is calling for co-existence within the Australian state rather than separation from it. It seeks the recognition and protection of rights that are in the most part enjoyed unquestioningly by all other Australians. It is an agenda that is just, fair and achievable.

For White Australia, the current challenges are even greater as there is more division about the vision of what kind of Australia we should be living in from the non-Indigenous side of the equation. This split is evidence of an identity crisis and finds its current form in the 'culture wars', the fierce debates about the telling of history, the squabbling about numbers killed on the frontier and the debates over the proper legal definition of 'genocide'. These 'culture wars' are not about Aboriginal history because our experience and perspectives remain unchanged by semantic and numerical debates by academics. They are, instead, a battle about white history and, more importantly, white identity.

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It is within this 'war' that White Australians have the most at stake and it is within this 'war' that they cannot afford to remain silent. It is a debate whose results will have a profound influence on the values of our society for years to come and will determine whether we move towards tolerance, acceptance, co-existence and diversity or whether we continue to move towards intolerance, suspicion, fear and conformity. It is because the stakes are so high that it has been waged through so many of our cultural institutions, including the

Australian Broadcasting Commission and the National Museum of Australia.

If this 'war' is lost to those who take an insular, xenophobic and exclusionary view, White Australia will not have the generosity of spirit and the necessary civic responsibility in its heart to be the type of society that can treat all of its members - regardless of race, socio-economic background and religious belief - equally, justly and fairly. And non-Indigenous Australia will be unable to take a place beside Aboriginal Australia. It will be unable to look us in the eye while it refuses to acknowledge our past and current experiences. An inability to acknowledge and respect will be a continuing barrier to the creation of an honest and trusting relationship.

It is worth remembering at times like these something that Martin Luther King once said, 'In the end, we will remember not the words of our enemies, but the silence of our friends.' In a similar vein he commented, 'Our lives begin to end the day we become silent about things that matter.'

In his book, *Against paranoid nationalism*, Ghassan Hage describes the difference between a caring society and a defensive one. He writes:

> The caring society is essentially an embracing society that generates hope among its citizens and induces them to care for it. The defensive society, such as the one we have in Australia today suffers from a scarcity of hope and creates citizens who see threats everywhere. It generates worrying citizens and a paranoid nationalism[7].

If we are to have a society that values fairness, equality and justice, we must strive towards the vision of a caring society. In order to do that, we need to move from an 'us' and 'them' mentality and realise that we are, as Indigenous and non-Indigenous people, bound to each other's fate. As a colonised people, we have long understood that we are beholden to the fate of non-Indigenous Australia. But we do not as often enter into the consciousness of Australia's dominant culture the way that we should.

Far from being the special and separate sector of the Australian community, we are its benchmark. The way to measure the effectiveness and fairness of our laws is to test them against the way in which they work for the poor, the marginalised and the culturally distinct. It is not enough that they work well for the rich, well-educated and culturally dominant. This measure of fairness and equity rejects an 'us' and 'them' mentality and holds that our fate and our worth as a society are measured best by how the most disadvantaged within our community fare. By valuing laws, policies and practices that work best because they achieve an equality of outcome, society begins to understand that extending the protections of a democratic society to those who are marginalised does not disadvantage another sector; it actually makes everyone better off.

Indigenous people are the best measure of the fairness of Australia's laws and institutions. As an historically marginalised, culturally distinct and socioeconomically disadvantaged sector of the Australian community, our treatment within Australian society is its success or its condemnation. Viewing Indigenous well-being in this way moves us from the periphery of society's consciousness to its centre. Not only does this erode the 'us' and 'them' mentality, it also moves to a mind-set that sees the transmission of the benefits of a democratic society to the disadvantaged as a transaction that will enrich society as a whole.

This is a huge challenge at this time in our history. Indigenous experience currently illustrates that the recognition and protection of rights is still vulnerable to the whims of the legislature and at the moment it is a parliament that is most influenced by the ebb and flow of the tide of public opinion.

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But there are at least two ways that the NSW jurisdiction could begin to make that shift. The first is a small but simple way. When the NSW parliamentary inquiry rejected a Bill of Rights for this jurisdiction, it recommended that a parliamentary committee be established to scrutinise Bills as they came before parliament to advise on the extent to which legislation will breach human rights. To this end, the Legislation Review Committee has already been established and it is mandated to report on whether Bills trespass on 'personal rights and liberties.' Like similar committees in other jurisdictions, the work of the committee is not guided by reference to a document of accepted and agreed rights and is not required to pay particular attention to the impact on Indigenous people. It is within the work of such committees that the principle of using the impact on Indigenous people as the litmus test of fairness could be implemented.

The second example would require more commitment. The Aboriginal Justice Advisory Council has been running a trial in Nowra of circle sentencing, an alternative approach to dealing with juvenile offenders. The results of the trial to date have been encouraging and pilots are being undertaken in other parts of New South Wales. This is a classic example of an innovative mechanism that has been explored to assist with the problem of the disproportionate number of Indigenous youth who have contact with the criminal justice system. It offers a way of dealing with offending behaviour that is focused on building a sense of personal responsibility and strengthening strong community ties. Part of the failure of pilot programs to provide long-term solutions even when they are successful in

their initial stages is that they often fail to attract long-term or broad political and economic support. Circle sentencing should not just be viewed as a mechanism that benefits Indigenous people. The fact that it reduces recidivism and contact with the criminal justice system for Indigenous children should see its extension across Indigenous communities in New South Wales and across the broader community as well. If the process is working for Indigenous children, who are often socio-economically disadvantaged and living in a culturally distinct community, there must be benefits of such a process for non-Indigenous children. It is a process that should be attracting the same level of commitment that can see the construction of four new prisons.

As someone who has felt the privileges of education and constant employment, who has never wanted for food or feared violence within my home, I have a responsibility to those in my community who do. The life I have now is the one that my father's generation fought for on Freedom Rides and at the Tent Embassy. When generations to come look back on this era and ask those hard questions about the way in which our laws treated people and the values they represented, I would at least like to be able to say - as my father and his peers can say when his generation is put under the same scrutiny - that I did not remain silent. It is my greatest wish that enough people feel the same civic responsibility to pass the privileges we take for granted on to those in our society who are different and who have less.

1 Michael Pusey. *The experience of middle Australia: The dark side of economic reform*. Port Melbourne, Cambridge University Press, 2003. At p.41

2 *Kruger v. The Commonwealth* (1997) 190 CLR 1

3 Marilyn Lake. *Faith: Faith Bandler, gentle activist*. Sydney: Allen & Unwin, 2002.

4 In addition, we have seen the High Court avoid the question of whether the races power can only be used to promote the rights of Indigenous people in *Kartinyeri v. Commonwealth (the Hindmarsh Island Bridge case)* (1998) 195 CLR 337.

5 John Howard. Address presented at the Presentation of the Final Report to Federal Parliament by the Council for Aboriginal Reconciliation, Canberra, 7 December 2000. http://www.pm.gov.au/news/speeches/2000/speech581.htm at 30 October 2001.

6 *Cubillo v Commonwealth* (2000) 103 FCR 1

7 Ghassan Hage, *Against paranoid nationalism: Searching for hope in a shrinking society*. Annandale, Pluto Press, 2003. At p.3.