

**Freilich Foundation Alice Tay Memorial Lecture on Law and Human Rights
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“As Good As it gets or As Good as it could be? Benchmarking Human Rights in Australia”

Abstract:

Sceptics have labelled human rights as a concept that is the luxury of elites. What is it that human rights can offer us in terms of improving the quality of life of the most marginalised within our community? How do universal human rights offer a practical way of improving the rights of the most disadvantaged within our community, particularly Aboriginal people?

This lecture will look at the important role that universal human rights can play in setting standards within the community. It will also discuss the impact of an human rights framework on Indigenous people, particularly women, in relation to issues such as violence and sexual assault. Rejecting notions that human rights are simply a Western concept, this lecture will also argue that such frameworks do not pose a threat to Indigenous cultural values but actually can strengthen them.

Aboriginal people in Australia have the lowest levels of education, the highest levels of unemployment, the poorest health and poorest housing conditions. Due to the legacies of past government policies – especially those of dispossession, regulation of movement and the removal of generations of Aboriginal children from their families – and the current continuance of cyclical poverty in Aboriginal communities, Aboriginal people continue to experience lower socio-economic outcomes than other Australians.

The Productivity Commission Report, *Overcoming Indigenous Disadvantage 2005* included some of the following trends. It noted that the difference in life expectancy between Aboriginal and non-Aboriginal Australians is a difference of 17 years, twice as many low birth weights and infant mortality rates 2-3 times higher and in a first world country, this remains a source of embarrassment at both the state and federal levels.

It is important to note that too few resources are being spent on some of these key indicators. In 2004, Access Economics estimated that Aboriginal health was under-funded by \$450 million in terms of meeting current health needs (let alone investing in prevention and health education) Other research has shown that in and in the 2005-2006 financial year, \$110 million dollars allocated to Indigenous education by the federal government.

It should be remembered too that the areas of health, education, employment and housing are responsibilities shared between state and federal government and rather than work together strategically for better outcomes, these two levels of government consistently cost-shift and blame each other for continuing policy failures.

Behind these statistics are horrific stories. Jenissa Ryan was described by those who knew her as happy and optimistic, a bright girl, good at reading, writing, mathematics and sport when she did attend school. She was the great granddaughter of the famous Aboriginal painter Albert Namatjira and she dreamed of one day becoming an artist like him. In January this year, those dreams came to an end. The circumstances of Jenissa's death were so shocking that the story fleetingly made national news.

Jenissa Ryan, a 15 year-old girl from Alice Springs was walking home to the Hidden Valley camp when, police believe, she was attacked by other children her own age (a 16 year-old boy and 15 year-old girl have subsequently been charged with aggravated assault causing grievous bodily harm). She continued to walk home after the assault but became unconscious near the entrance of a college campus. In the early hours of the morning, she was found by three boys who, instead of getting help for her, dragged her out of view and raped her. They left her there, along with their discarded condoms, and Jenissa lay there

until around 10.30 am when a college employee rang for an ambulance. She was taken to a hospital in Adelaide but it was too late to save her. Three boys, aged 14, 15 and 16 have been charged with sexual assault and moved to a prison in Darwin for fear of payback.

Not only has Jenissa's short life been snuffed out, there are five young Aboriginal people who are now facing serious criminal charges, most likely incarceration and are likely to become statistics in the over-representation of Aboriginal juveniles in the criminal justice system. And the story is a reminder that Aboriginal women are over-represented as both victims and perpetrators of crime.

2. Aboriginal Women: A Statistical Snapshot

An Australian Institute of Criminology study shows that Indigenous women are still significantly over-represented in Australian homicide victim statistics.¹ Other studies support the view that Indigenous women are disproportionately victims of sexual and physical violence.² In one study, 46.9 percent of reported Aboriginal victims were victims of 'crime against the person,' compared with only 11.4 percent of female non-Aboriginal victims. In

¹ Jenny Mouzos, "New Statistics Highlight High Homicide Rate for Indigenous Women." *Indigenous Law Bulletin*, 1999 Vol. 4, No. 25. At p.16.

² Michael Mackay and Sonia Smallacombe. "Aboriginal Women as Offenders and Victims: the Case of Victoria". *Indigenous Law Bulletin*. 1986 Vol.3, No.80, At pp.17-23

contrast, only 34.4 percent of female Aboriginal victims were victims of 'crime against **property**', compared to 77.7 percent of non-Aboriginal female victims.³

Speak Out Speak Strong was a report commissioned by the NSW Aboriginal Justice Advisory Committee. It interviewed Indigenous women offenders. It found that 31% of all women in prison are Indigenous, they are predominantly young (average age 25), have low levels of education and high levels of unemployment. 60% of the survey had been convicted of a serious offence and 36% had their first convictions between the ages of 11 and 12. 98% of the offenders had prior convictions as adults; 26% had between 15 and 30 previous convictions and 75% had been incarcerated previously. Most were single mothers with between two to four children of which they had the primary care. They were often also responsible for other, non-biological children and for older relatives.

68% of the women surveyed were on drugs at the time of the offence, 14 % were under the influence of alcohol. One third of them said they were heroin users. 70% of the women had been sexually abused as children, 78% had been victims of violence as adults and 44% had been sexually assaulted as adults.

This statistical snapshot starts to reveal a number of themes. There are the indicators of cyclical poverty (low levels of education, high levels of

³ Ibid.

unemployment), the use of drugs and alcohol, recidivism and institutionalism, and cycles of abuse. One revealing piece of data was that 98% of those who said they were sexually assaulted as children also had a drug problem. The study identified a clear link between child sexual abuse, drug addiction and offending behaviour. The evidence of how many children and extended family members are supported by incarcerated women starts to give a glimpse of the impact of imprisonment of Indigenous women on Indigenous families.

If there is evidence that there are elements to criminality that relate to socio-economic status, the solutions to reducing the over-representation of Indigenous women as offenders relate to breaking the cycle of poverty and the cycles of violence. 92% of respondents on the AJAC survey said they were not employed at the time they committed their offence. Only 52% of those who were unemployed said they were receiving benefits from Centrelink. 42% said that they had never received any benefits at all. This survey showed that 43% of the participants who had dependant children did not receive an income from employment or Centrelink payments. Approximately 70% of the surveyed participants said they were stay-at-home mothers. 13% said that their income was from drug dealing. According to the AJAC survey, one quarter of Aboriginal women in custody have relied on crime to support themselves and family members.

3. The Stereotypes in the Legal System

There is much evidence to support the assertion that stereotypes of Aboriginal women as bad mothers and promiscuous women exacerbate their treatment before the courts. The reliance by perpetrators of sexual violence on what has been termed a “customary law” defence has seen arguments put from the bar table and accepted by the bench that rape in Aboriginal culture is not treated as seriously as it is in Western culture.

In *R v Burt Lane, Ronald Hunt and Reggie Smith*,⁴ the defendants were accused of sexual assault. The defense obtained evidence from non-Aboriginal males to show that rape was not a very serious crime in Aboriginal society and that, by approaching the men and asking for a cigarette, an Aboriginal woman may have been seen as inviting a sexual relationship. The dissenting evidence of a female anthropologist was presented to the court to show that an assault on a woman’s sexual character was and is treated seriously in Aboriginal culture and that, traditionally, women punished men severely for it. Despite this evidence, the judge found the following:

There is evidence before me, which I accept, that rape is not considered as seriously in Aboriginal communities as it is in the white community ...

⁴ Unreported, *Supreme Court of the Northern Territory*, 1980.

and indeed the chastity of women is not as importantly regarded as in white communities.⁵

In *R v Mingkilli, Martin and Mintuma*,⁶ Police aides and a police warden, while drunk on duty, sexually assaulted a woman they held in custody. Sergeant Berry, giving evidence on their behalf said there was no crime of rape known to the offenders' community. Justice Milhouse, persuaded by this evidence, concluded:

"Forcing women to have sexual intercourse is not socially acceptable, but it is not regarded with the seriousness that it is by the white people."⁷

More recently, the Northern Territory Court of Criminal Appeal increased the sentence of an Aboriginal elder who had raped a 14 year old Aboriginal girl. During the trial the defence had argued that the man had not been aware of the fact that it was against the laws of the Northern Territory to rape a woman and instead, the judge had decided that the man had honestly believed that he was entitled, under customary law, to take her as a wife and to sodomise her. He was given a one month prison sentence in the first instance and this was increased to three years and eleven months, with eighteen months minimum to serve, by the appeal. This is not the first time that a trial judge has shown leniency to criminal

⁵ Ibid. At pp. 99-100. Cited in Bolger. At pp. 81-82.

⁶ Unreported. *Supreme Court of the Northern Territory*, 1991

⁷ Judy Atkinson. Book Review: *Aboriginal Women and Violence* by Audrey Bolger. *Aboriginal Law Bulletin*. 1992, Vol. 2. No. 54.

behaviour against Aboriginal women by giving more weight to the “customary law defence” of older men than to the rights of the young girl who has been violated. It should be stressed that in other cases, Aboriginal women have strongly contested the misogynistic views put forward by defence lawyers – and happily accepted by magistrates and judges – and instead, these women assert that under our traditional cultural values, Aboriginal women are treated with respect, crimes of sexual assault are treated with great severity and that it is only since the sexism of the colonising culture was imposed on us that Aboriginal women were treated as inferior. Hiding behind “traditional culture” to justify the actions is an insult to the victim. The Northern Territory court was right to increase the punishment to better suit the severity of the crime.

Colonial notions that Aboriginal women are ‘easy sexual sport’ have also contributed to the perception that incidents of sexual assault are the fault of Aboriginal women. While behaviour and treatment of Aboriginal men is often contextualized within the process of colonization, no context is provided for the colonial attitudes that have seen the sexuality of Aboriginal women demeaned, devalued and degraded. The result of these messages given to Aboriginal women by their contact with the criminal justice system would only reinforce any sense of worthlessness and lack of respect that sexual assault and abuse have scarred them with.

The statistics that link sexual abuse with drug abuse also relate to low socio-economic living standards. It is for these reasons that much careful analysis should be given to the recommendations of the Royal Commission into Aboriginal Deaths in Custody. The report noted that the overrepresentation of Aboriginal people in custody was due to the fact that Indigenous people would be convicted and given custodial sentences for crimes that non-Indigenous people would not be charged with – namely, public order offences like drunken behaviour or offensive language. In these circumstances, it was recommended that alternatives to imprisonment be explored.

Nowhere in the Royal Commission report was there a recommendation that offences of a serious nature should not be given serious punishment and it is with much concern that we see a general trend to try and avoid or lessen custodial sentences for any crime where the offender is Indigenous.

In matters of sexual assault, it sends the wrong message to not impose harsh sentences for offenders, especially those who prey on children. These serious offenders were not the prison population that was to be targeted in reducing the overrepresentation of Indigenous people. We must remain vigilant to ensure the distinction between offenders who have committed public order type offences and those who have committed crimes against the person, especially sexual assault. To fail to maintain this distinction fails to send a

message that violence, especially sexual violence, must not be tolerated. It makes a mockery of the continued suffering of victims who are unable to come to terms with what has happened to them.

I am a Eualeyai and Kamillaroi woman. My nation is matrilineal and our creation spirit is female. As a child, I attended political meetings with my father and watched as the men postulated and shouted and then, in the end, the women would have the final say. I look at women who I have grown up admiring like Marcia Langton, Pat Anderson, Roberta Sykes, Mum Shirl and Norma Ingram and I did not see victims or submissiveness. I saw women who understood that they are the backbone of our communities and I grew up respecting them and I feel that this was a strong cultural value that was imbued into me. I was shocked as I began my professional career working in Indigenous affairs to see the level of sexism that pervades Aboriginal politics (the stories I could tell are not fit to be printed...) and it only increased my admiration of the strong Aboriginal women who lead our Indigenous communities who continue to insist that mistreatment of women is not acceptable under any circumstances.

At the same political meetings, I heard a lot about our rights. I grew up understanding that we have a right to our sovereignty, our self-determination, access to health, access to education and freedom from racial discrimination. We often claim that we have a whole range of rights that are not recognised and

protected by the Australian legal system. For this reason, it makes no sense that we claim all of these rights that are long recognised as inherent in every human being only to ignore them when that human being is a young girl exposed to great physical, mental and emotional danger. There is no reason why our cultural values cannot conform to respect basic international human rights laws and indeed they should and must. All cultures around the world are expected to do so.

And if it is a matter of balancing the cultural rights of an old man to take a child bride against a child's right to be free from physical, sexual, mental and emotional abuse, I think the latter has to win, every time. If we are to ensure the continuation of our nations and our cultures, we need to make sure that the rights of our children are protected first and foremost. Our elders should know better. Whatever the "cultural way" to treat 14 year old girls in our communities was centuries before, it is not part of our cultural practice to physically and sexually mistreat them now. We have modern, contemporary Indigenous cultures and part of our cultural values must be to respect the human rights of our fellow Aboriginals (especially the children) that we continually ask non-Aboriginal people to recognise and respect.

Giving light sentences to perpetrators of sexual and physical violence against children not only gives comfort to the criminals that their behaviour will

be protected by the white legal system, it sends a terrible message to our young people of how little that system – and their own people – value them. Hiding behind “traditional culture” to justify the actions is an insult to the victim. The Northern Territory court was right to increase the punishment to better suit the severity of the crime.

4. Breaking the Cycle

It is easy to make moral pontifications about a case as appalling as this one but what people like Jenissa’s mother really want is that her death not be in vain and that the hard, cruel issues that the brutal circumstances of her death raised be discussed and addressed. There are no easy, quick fixes to the issues that compound to create a dysfunctional Aboriginal community. The breaking of that cycle requires a multi-pronged approach.

- Communities need to make a stand and say that the sexual abuse and violence are not acceptable and are certainly not a part of Aboriginal culture and that real change to these cycles of poverty and violence can only begin when we send a strong message that we will not tolerate this kind of behaviour and reinforce to children that when they are victims of violence or abuse that what has happened to them is not acceptable;

- Victims of sexual abuse need to be treated as survivors rather than treated with shame and perpetrators who have caused havoc amongst generations of children through their abuse must be held to account;
- Resources need to be invested into dysfunctional communities that provide immediate intervention for violence, substance abuse and sexual abuse; and
- Longer term programs are needed to be introduced to assist young people in building self-esteem and providing them with skills development and opportunities. Those longer term programs also need to be developed to assist older people in breaking cycles of poverty and abuse. In particular, we should be putting resources behind the Elders in our community that are able to give moral guidance to others to assist them with their very important work.

Joe Hockey, the Minister for Community Services, has compared Town camps like Hidden Valley to ghettos. He said that they reminded him of shanty-towns that he had seen on a visit to Alice Springs in the 1990s. Just like the town camps around Alice Springs, they are the result of decades of neglect by

authorities who often put the plethora of issues facing those communities in the too-hard basket while giving too little resources to those on the ground trying to provide practical solutions and alternatives to the people within the communities who are looking for change.

Minister for Aboriginal Affairs, Mal Brough made a more thoughtful interjection when he said that there was little wonder that there was such level of criminality in remote communities in the Northern Territory when there were no police there and, he pointed out, **any** community of 2 500 people would have issues without that service. What Mal Brough, I suspect inadvertently hit upon, was that there has been an under-funding of infrastructure in these communities. I say “inadvertently” because the underspending on Indigenous essential services has been the trademark of governments of all levels. As I mentioned earlier, it is estimated that the basic health needs on Indigenous Australians are under-funded by \$450 million and in a year of record budget surpluses, this pressing need was not addressed. Data from the COAG trial in Wadeye highlighted that less is spent on the education of an Aboriginal student than a non-Aboriginal student. When a shared responsibility agreement was signed in that area and the children all turned up to school, there was not enough classrooms or teachers.

In the face of this underspending on essential matters, and it is hard to think of anything more essential than basic health services, this backdrop of under-investment in basic services, infrastructure and human capital is far from conducive to breaking cycles of desperate poverty, in fact, it is more of a breeding ground for it. And against this back drop, ad hoc measures like shared responsibility agreements are not going to solve institutionalised and systemic failings.

While governments say the community must make the changes, those within the community strong enough to lead that change must be assisted and they cannot get very far unless there is investment in intervention, education, employment, housing and other infrastructure. And in making that investment, they need to appreciate that changes will come slowly, that undoing the damage in communities in crisis will take generations. Talk of closing the camps should not be seen as a long-term solution as the social problems that fester in town camps will simply be relocated to other areas. What is needed is investment in infrastructure, investment in human capital and the provision of basic services.

5. The Role of A Rights Framework

And it is for this reason that a rights framework is important. In the current conservative climate, there has been, in some quarters, a failure to appreciate the

important roles that respect of rights plays in balancing the freedom of the individual from the tyranny of government. Discussion of rights tends to be dismissed as the folly and luxury of the elite who are out of touch with the realities of the day-to-day lives of the masses.

This simplistic rhetoric fails to appreciate the important role rights play in the small details of people's lives. Rights such as access to education, adequate health care, employment, due process before the law, freedom of movement and equality before the law target the very freedoms that an individual needs to be able to live with dignity. They are precious and they are inherent and should not be given merely at the benevolence of government.

Bills of Rights are not about curtailing the rights of the majority. And they are not about giving more power to judges. Bills of Rights are aimed at ensuring a better balance between the rights of individuals against the state and as such are more often an infringement on the rights of governments than the rights of people.

Thomas Jefferson wrote "the natural progress of things is for liberty to yield and government's to gain ground." It is as true today as when he penned those words in 1788, the year in which the colonisation of Aboriginal Australia began. And Aboriginal people have experienced in recent years the infringement of human rights that cannot be rectified. Native title that has been extinguished

will never be regained, cultural heritage that has been destroyed will never be recovered and failure to access adequate health services and opportunities for basic standards of education are difficult, sometimes impossible, to rectify. In fact, these losses are a reminder of why it is important to have rights protections in place when society moves away from valuing the importance of the rights of the vulnerable.

And it is these experiences of the infringements of the rights of the vulnerable that need to remain our focus. It is not enough to say that our human rights standards are better than other countries who have more brutal and systemic abuses of rights than those that occur on Australian soil. I firstly question why it is better for an Aboriginal child to experience third world levels of health care than for the child actually living in the third world. And secondly, it is not enough that we are better than the worst offenders on a human rights report card; we should be the best society that we can be.

As has been attributed to Thomas Paine:

“When it shall be said in any country in the world, “My poor are happy; neither ignorance nor distress is to be found among them; my jails are empty of prisoners, my streets of beggars; the aged are not in want, the taxes are not oppressive; the rational world is my friend, because I am the

friend of its happiness”: when these things can be said, then may that country boast of its constitution and its government.”

In this way, a human rights framework can be a benchmark. And while there is more acceptance of a rights framework that protects civil and political rights, there has been less support for economic, social and cultural rights. The latter have often been deemed too difficult to legislate into a rights framework. But is it too difficult? I would estimate that eradicating illiteracy from Australia would not be a harder task than erasing it from India. The Indian Constitution was recently changed to include a right to education and during my visit there their highest court deemed that this meant that the states, regardless of their economy, were required to put adequate resources into the education system and ensure that all children had an education (there are an estimated 10 million children who do not go to school!). This gives states in India a duty to put more resources into education and so prioritise it over other things.

While the rights agenda is out of favour with our federal government, it is interesting to see how other countries, with far deeper socio-economic issues to tackle than us, are using a simple right like the right to education to make a difference. It is a strategy that puts the emphasis on government to make the issue a priority.

One final aspect of a rights agenda that needs to be addressed is the constant claim within political rhetoric that “self-determination” has failed so we need to move on to other ideas. The “self-determination that failed was a government agenda that weakly promoted Indigenous participation but fell far short of *Indigenous* aspirations for self-determination. It was the era of ATSIC and most of the rhetoric implies that ATSIC failed. Indigenous disadvantage might not have ended in the ATSIC era. Of course, ATSIC did not have fiscal responsibility for health and education. They were still the responsibility of federal and state and territory governments. ATSIC was a convenient scapegoat. But it was also a strong advocate on where the governments of all levels failed to meet basic human rights standards. And many think that success goes further to explain why they were dismantled.

“Self-determination” as a policy failed because, while it changed the dominant philosophy of paternalism to notion of self-management, it co-opted Indigenous people into decision making processes but did not seek to alter structures or institutions. It did not seek to give Aboriginal people, at the grassroots level, capacity to make decisions over the policies that affect them and the programs that were delivered into their community. In short, the policy of “self-determination” did not go far enough in devolving power from government to Aboriginal people.

This means that, while it is true to say that “self-determination” as the Labor Party implemented the policy was a failure, it is not true to say that self-determination as a fundamental human rights principle failed. In the sense that both Indigenous people aspire to self-determination and the right is understood under international law, no government has ever attempted to use it as a basis for policy. Despite that, too many commentators are using the catch-phrase that “self-determination has failed” and making the additional, erroneous, step that there is proof that the rights agenda has failed. There is no such proof. There has never been a time when self-determination in its true sense was the key basis for the approach to Indigenous policy.

And self-determination is not just a principle or ideology. If governments are concerned to implement research-based policy, they would do well to look at similar jurisdictions like Canada where models of self-government based on a stronger adoption of the principle of self-determination are leading to better socio-economic outcomes for Aboriginal communities. It is proven that the more involved Indigenous people are with decision-making over policy and programs and their implementation, the more effective they are likely to be. It is this principle that should provide a cornerstone for a research-based approach to policy.

As Aboriginal communities, we need to acknowledge that if children grow up seeing and experiencing violence and sexual abuse, they begin to think that it is normal and can move from being victims to being perpetrators. They will use alcohol and petrol sniffing as a way to cope with their pain, sadness and low self-esteem. This drags them into the cycles of poverty and violence.

In this environment, is it little wonder that children as young as fourteen have developed with no moral compass to guide them and see a girl unconscious by the roadside as prey rather than someone who needs help? They knew that they should use a condom and practice safe sex but saw Jenissa's being unconscious as an opportunity rather than a crime. The end result is that Jenissa's death has also meant that the lives of five other teenagers are also doomed and we need to ask why and what we are going to do to make sure that the lives of children are not thrown away so cheaply. We need to make sure that when a young person's life ends as tragically and cruelly as Jenissa's did that we do not let it be forgotten and do not hide the underlying issues under the carpet.

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