AS GOOD AS IT GETS OR AS GOOD AS IT COULD BE?
BENCHMARKING HUMAN RIGHTS IN AUSTRALIA

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1. Introduction

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 a 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 was 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) and in the 2004-2005 financial year, $110 million 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

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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 10.30am when a college employee rang for an ambulance. She was taken to a hospital in Adelaide but it was too late to save her.

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. Other studies support the view that Indigenous women are disproportionately victims of sexual and physical violence. 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 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.

Speak Out Speak Strong was a report commissioned by the New South Wales Aboriginal Justice Advisory Council. It interviewed Indigenous women offenders. It found that Indigenous, they are predi education and high levels of cycles of violence. Ninety- percent of Aboriginal women as offenders. It found that Indigenous, they are predisposed to cycles of violence. Ninety-eight percent of Aboriginal women as offenders. It found that Indigenous, they are predisposed to cycles of violence. Ninety-eight percent of Aboriginal women as offenders. It found that Indigenous, they are predisposed to cycles of violence. Ninety-eight percent of Aboriginal women as offenders. It found that Indigenous, they are predisposed to cycles of violence. Ninety-eight percent of Aboriginal women as offenders. It found that Indigenous, they are predisposed to cycles of violence. Ninety-eight percent of Aboriginal women as

4 Ibid.
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Sixty-eight percent of the women surveyed were on drugs at the time of the offence, fourteen percent were under the influence of alcohol. One third of them said they were heroin users. Seventy percent of the women had been sexually abused as children, seventy-eight percent had been victims of violence as adults and forty-four percent had been sexually assaulted as adults.

This statistical snapshot starts to reveal a number of themes. These are the indicators of cyclical poverty (low levels of education, high levels of unemployment), the use of drugs and alcohol, recidivism and institutionalism, and cycles of abuse. One revealing piece of data was that ninety-eight percent 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. Ninety-two percent of respondents on the AJAC survey said they were not employed at the time they committed their offence. Only fifty-two percent of those who were unemployed said they were receiving benefits from Centrelink. Forty-two percent said that they had never received any benefits at all. This survey showed that forty-three percent of the participants who had dependent children did not receive an income from employment or Centrelink payments. Approximately seventy percent of the surveyed participants said they were stay-at-home mothers. Thirteen percent 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.
forward 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, 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 ... and indeed the chastity of women is not as importantly regarded as in white communities.

In R v Mingkilli, Martin and Mintuma, 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.’

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 had been 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, on appeal. This is not the first time that a trial judge has shown leniency to criminal 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.

6 Unreported, Supreme Court of the Northern Territory, 1980.
7 Ibid. Audrey Bolger, Aboriginal Women and Violence, 1991.
8 Unreported, Supreme Court of the Northern Territory, 1991
10 R v GJ (unreported), Northern Territory Supreme Court, Martin CJ, 11 August 2005.
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 colonisation, 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 over-representation 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’s 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 over-representation 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 Kamilaroi 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 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 is 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 tolerate this kind of behaviour any more.

- Victims of sexual violence need to be treated with respect and immediately provided with support and assistance;

- Resources need to be provided immediately to our women to prevent sexual abuse;

- Longer term plans for address the deeper reasons why our people in bush and isolated communities need to be developed;

- Poverty and alcoholism need to be dealt with in an obvious and accountable way, usually through the Elders and through community guidance to our people.

Joe Hockey, the former Treasurer, said this week about a regional Aboriginal town camps like Hidden Valley, Rockhampton, they are ‘shanty-towns’ that he had seen and the town camps around Australia that are run by authorities who often don’t know how to deal with the too-hard basket. Joe was working on trying to provide practical solutions and guidance to communities who are losing their culture.

Former Minister for Indigenous Affairs, Joe Hockey, said in a recent speech that there was little wonder that the closure of our communities in the Northern Territory, could be the result of any community service. What Mal Brough had been an under-funding, was an under-funding of the closure project which has been the trademark of government. It has been estimated that the basic funding of $450 million and the additional funding needs was not addressed. If the government was going to address this then the need to address the closure of the Northern Territory could be less is spent on the non-Aboriginal student. When you look at the closure of the area and the children all being sent away to live with their families or teachers.

I could tell are not fit to be the strong Aboriginal women to insist that mistreatment is about our rights. I grew up in the midst of our self-determination, the pain of racial discrimination, and efforts that are not recognised and celebrated. As inherent in every human, is a young girl exposed to violence is no reason why our national human rights laws and the world are expected to protect the rights of an old man to take physical, sexual, mental and emotional abuse at any time. If we are to ensure the safety of our own people – value them. The breaking of those women, that is the sexual abuse and physical violence that their behaviour is a terrible message to our own people – value them. The breaking of those women, that is the sexual abuse and physical violence that our communities practice to physically and sexually abuse young girls. That is a terrible message to our communities.

Joe Hockey, the former 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.

Former Minister for Aboriginal Affairs, Mal Brough, observed that there was little wonder that there was such a high level of criminality in remote communities in the Northern Territory when there were no police there and, he pointed out that 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 of 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 backdrop, 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 who are 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 role 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 governments 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 impossible, to rectify. In fact, to have rights protections for the importance of the rights of vulnerable that need to be raised.

And it is these systemic abuses of rights question why it is worse levels of health care than secondly, it is not enough human rights report card: As has been attributed.

When it shall be said ignorance nor distress is the streets of beggars; the world is my friend, be be said, then may that be.

In this way, a human there is more acceptance of rights, there has been less power of the latter have often been decreased. But is it too difficult? I would be a harder task that recently changed to include the highest court deemed the economy, were required to and ensure that all children and children who do not go to resources into education and

While the rights agenda is interesting to see how our to tackle than us, are using the difference. It is a strategy to issue a priority.

One final aspect of constant claim within policy we need to move on to open the government agenda that we short of Indigenous aspirations and most of the rhetoric might not have ended in the responsibility for health.

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 worse 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. 14

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 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 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

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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 the 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 affected 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.

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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
ATSIC was a convenient place where the governments of all levels could meet. And many think that success because, while it changed the form of self-management, it co-processed but did not seek to give Aboriginal people, at the community. In short, the policy in devolving power from that ‘self-determination’ as the principle failed. In the sense that there is no such proof. There in its true sense was the key principle or ideology. If problem-based policy, they would do nada where models of self-principle of self-determination for Aboriginal communities. It people are with decision-making in a more effective they are cornerstone for a research-

acknowledge that if children sexual abuse, they begin to think to being perpetrators. They to cope with their pain, sadness to poverty and violence. children as young as fourteen guide them and see a girl who needs help? practice safe sex but saw rather than a crime. The end lives of five other teenagers 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.