

POWER FROM THE PEOPLE: A COMMUNITY-BASED APPROACH TO INDIGENOUS SELF-DETERMINATION

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Elliott Johnston impresses me most not because of his involvement with the Royal Commission into Aboriginal Deaths in Custody but for his continued conviction about the rightness of social justice despite political climate and personal cost. His membership of the Communist Party no doubt cost him earlier appointment to silk and, as the first Chairperson of the Aboriginal Legal Rights Movement, formalised a long commitment to Indigenous social justice and criminal justice issues. He was, is and remains a practitioner and a judge, admired for his acute legal mind and his ability to mix the right legal reasons with the right moral reasons; something that can be found only in the best legal minds.

I would like to talk across a few themes tonight. I want to begin by canvassing the current political landscape to identify the challenges to Indigenous rights and their protection. I would then like to talk about the shortcomings of 'practical reconciliation' and the limitations of current government policy on Indigenous issues at the federal level. I would then like to discuss how this direction has marginalised the rights agenda and impoverished debate on the policy options we have. I will argue that the way forward combines short term solutions with long term goals and that this includes an understanding of the relationship between rights, economic development and governance. As part of that discussion, I would then like to canvas a few areas where increased vision would assist in the protection of Indigenous rights.

I THE STAGNATION OF AUSTRALIAN COMPASSION

There is no doubt in my mind and in my heart that history will judge this era harshly. It will look to our treatment of Indigenous people and it will look to our

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treatment of asylum seekers. It will ask why we introduced mandatory sentencing schemes. It will ask how we could prevent the *Racial Discrimination Act 1975* (Cth) from applying to native title. It will condemn our political leaders and our citizens for failing to move forward to become a republic. It will demand to know what we did — those of us who are living through this era, to prevent this insular, xenophobic, racist period of our history. It will point an accusing finger at political leaders but it will also cast an eye over us.

In reflecting on these trends, and I think we all have to do this, it appears to me that the elements that are becoming the accepted Australian ethos are the very same ones that have been romanticised in the past as embracing a white Australia; one where difference is tolerated only to the point that it is able to be assimilated. What had begun as a disturbed and shocked response to the rise of Hansonism has been replaced by a complacent concession that perhaps things had gone too far in the other direction and that the current xenophobic conservatism is a credible and sensible way forward for Australia. Nothing reinforces this picture as the current orthodoxy more than the Prime Minister's statements on the front page of 'The Australian' on May 6 under the banner 'PM's reconciliation hopes'.¹

The Prime Minister John Howard noted his belief 'that "the widespread rejection of welfare, and a lesser emphasis on the rights approach" by Indigenous activists such as Noel Pearson showed the debate was shifting towards the Coalition's viewpoint'.² His vision is clearly one of assimilation. In the article he states the following:

One of the accepted cornerstones of our immigration policy has always been that you shouldn't allow ghettos or enclaves to develop. Yet in a way ... that is exactly what has happened and it is one of the difficulties we have.³

The right always likes to say that this is just an argument against separatism. But it is more than that. Since the Indigenous rights agenda is not about separatism but about greater autonomy within the Australian state, the red rag of separatism has always been a strong political weapon for Howard and his ilk.

The clear agenda, articulated more carefully and precisely by the Minister for Aboriginal Affairs, Philip Ruddock, is one of assimilation and integration. This, of course, is not a new ideology but a throwback to the paternalistic days when Welfare Boards and Aboriginal Protection Boards dictated the lives of Indigenous people and their children. It is an ideology that has been used in the past, did not work then and has not only been rejected by Indigenous people, but has left a lasting legacy of disadvantage, trauma and family breakdown that is still plaguing Indigenous communities and Indigenous families today.

Howard is wrong to think that there is no opposition to his views. He is wrong if he thinks that changes to the socio-economic disparity between the standard of living of Indigenous people and non-Indigenous people will be countered by his

1 George Megalogenis, 'PM's reconciliation hopes', *The Australian* (Sydney), 6 May 2002, 1.

2 Ibid.

3 Ibid.

policy of 'practical reconciliation' and he is wrong to think that there are no alternative visions being put forward.

II HEADING IN THE WRONG DIRECTION

The era of 'practical reconciliation' is a wrong turn in the road. It is more than a backward step. A backward step would seem to indicate that the ground that has been lost can be easily regained. I don't think that is true. The native title rights that have been extinguished can never be resuscitated. Cultural heritage that has been destroyed by development cannot be reclaimed. Missed opportunities to education cannot be compensated for. Decreasing mortality rates will not bring children back to life. For these many shortcomings, the policy of 'practical reconciliation' requires close scrutiny.

At the hand-over of the final report by the Council for Aboriginal Reconciliation, Prime Minister John Howard announced that his government rejected the recommendation of a treaty with Indigenous peoples, preferring instead to concentrate on the concept of 'practical reconciliation.' This 'practical reconciliation' describes a policy of government funding in targeted areas that goes to the core of socio-economic disadvantage, namely employment, education, housing and health.⁴

This strategy targets, only through policy, the main socio-economic areas. To this end, Howard pointed to the amount of dollars he had spent on 'indigenous-specific programs':

A measure of the genuineness of the government's commitment to practical reconciliation is that the \$2.3 billion now annually spent on indigenous-specific programmes is, in real terms, a record for any government — coalition or labor.⁵

What Howard didn't detail is that part of that \$2.3 billion went towards defending the stolen generations case brought by Peter Gunner and Lorna Cabillo in the Northern Territory⁶ and went into the various areas of the government arm that were actively trying to defeat native title claims. That is, included with the money allocated for specific policy areas is the money spent preventing the recognition and protection of Indigenous rights.

In his Menzies lecture, delivered on 13 December 2000, just a few days after receiving the final report from the Council for Aboriginal Reconciliation, Howard stated the following:

4 John Howard (Speech delivered 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>> 13 November 2002.

5 John Howard, 'Reconciliation in Australia Today' (Sydney, December 2000) <http://www.mrcltd.org.au/uploaded_documents/ACF60C.htm> 22 May 2003.

6 *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1.

It is true, as was noted recently, that past policies designed to assist have often failed to recognise the significance of indigenous culture and resulted in the further marginalisation of Aboriginal and Torres Strait Islander people from the social, cultural and economic development of mainstream Australian society.⁷

Under this view, current socio-economic disparity is the result of past cultural conflict and unsympathetic policy-making and it is this that has been instrumental in establishing a welfare mentality. He states:

This led to a culture of dependency and victimhood, which condemned many indigenous Australians to lives of poverty and further devalued their culture in the eyes of their fellow Australians.⁸

The main issues are dependency, victimhood and poverty and it can be redressed, according to the proponents of 'practical reconciliation', by a more benevolent legislature.

It is absolutely true that past government policies such as child removal practices have contributed to the socio-economic inequalities and systemic racism experienced in Indigenous communities and families today. This has been compounded by the absence of a rights framework that can protect from unfair and racist policy-making.

'Practical reconciliation' does not attack the systemic and institutionalised aspects of the impediments to socio-economic development. Without a rights framework that works, there is no ability to create and protect the rights to economic self-sufficiency and Indigenous peoples, families and communities will only be dependant on welfare. Even worse, they will remain dependant upon the benevolence of the government.

What I am saying should not be read as a rejection of the right to access welfare. Rather, it is a criticism of policy made in a reactionary way without a view to larger, long-term goals and aspirations. As can be seen by the contents of the *Native Title Amendment Act 1998* (Cth), the days of governments actively truncating and extinguishing Indigenous rights are far from over and in that climate, asking us to put our faith in the benevolence of the government will make many of us nervous.

John Howard's view that the widespread rejection of welfare and to a lesser emphasis on the rights approach shows how completely he misunderstands the spectrum of claims made by Indigenous people. It is easy for Howard and others to take comfort from Pearson if they choose to only selectively look at his thesis. Pearson was right to call for a new approach. The embracing of his ideas illustrates how impoverished the debate of options is at the national level, something that the Australian Labor Party and the Aboriginal and Torres Strait Islander Commission ('ATSIC') also have to take some responsibility for. But it is not an endorsement of his 'practical reconciliation' thesis. In the first instance, he conveniently

7 John Howard, 'Perspectives on Aboriginal and Torres Strait Islander Issues' (Speech delivered at the Menzies Lecture Series, Canberra, 13 December 2000) <<http://www.pm.gov.au/news/speeches/2000/speech587.htm>> 13 November 2002.

8 Ibid.

misquotes Pearson. In his inaugural Charles Perkins Memorial Oration given at the University of Sydney on 25 October, 2001, Noel Pearson stated a clear belief in the necessity of the recognition of rights. He noted that the civil rights movement was just and right and correct but noted that it had failed to deliver change. The reason, he asserts, lies in the failure of policy.⁹

Pearson can take much credit for bringing to the attention of mainstream Australia the issues of passive welfare dependency, endemic substance abuse and related violence within the Indigenous community of Cape York. But for these key issues, a policy of 'practical reconciliation' that seeks only to address areas through benevolent policy-making is not going to provide a solution. Instead, policies and programs are only going to respond to problems as they emerge. As such, they will not develop infrastructure and capacity that will reduce the occurrence and perpetuation of social and economic problems. Further, the reactionary policy-making that 'practical reconciliation' embodies cannot guarantee that its current policies and programs are not creating a 'breeding ground' for further economic, cultural and social problems. Without a long-term vision to work towards and without a reference to measure the limitations of policy, 'practical reconciliation' is not going to change systemic welfare dependency or any other structural issue.

It is true that Indigenous people do not want to be caught in a welfare mentality. While not claiming to speak on behalf of Indigenous people, it would appear that the very notion of self-determination is about being actively involved in determining one's own future. It has always been an agenda that has constantly and consistently sought ways to move away from the welfare mentality. We can find it in the various expressions of Indigenous self-determination. There is already evidence as to what that vision of self-determination may look like. If we look at the contents of the *Barunga Statement*,¹⁰ the *Eva Valley Statement*¹¹ and Patrick Dodson's 4th Vincent Lingiari Memorial Lecture, 'Until the Chains are Broken,'¹² we can see the parameters of the claims in a spectrum of rights. The rights enmeshed in the concept of 'self-determination' include, I would argue, everything from 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 economically 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. These rights that can be unpacked from the concept of 'self-determination' point to a vision that has been described as 'internal

9 Noel Pearson, 'Human Right To Misery, Mass Incarceration and Early Death' (Speech delivered at the Dr Charles Perkins Memorial Oration, University of Sydney, 25 October 2001).

10 *The Barunga Statement* (1988) Council for Aboriginal Reconciliation <<http://www.reconciliation.org.au/docrec/policy/brief/attach.htm>> 13 November 2002.

11 *The Eva Valley Statement* (1993) <<http://nativenet.uthscsa.edu/archive/nl/9308/0042.html>> 13 November 2002.

12 Patrick Dodson, 'Until the Chains are Broken' (Speech delivered at the 4th Vincent Lingiari Memorial Lecture, Darwin, 27 August 1999) <<http://www.montageplus.co.uk/civics/resources/resindig.html>> 13 November 2002.

self-determination'. It is a vision of increased Indigenous autonomy *within* the structures of the Australian state.

The Federal Government has claimed that its policy of 'practical reconciliation' has seen record amounts spent on Indigenous specific programs. In 1996 ATSIC funding was drastically cut and as a result, family violence programs had to be terminated. Yet, 2001–2002 Portfolio Budget Statements show that the Federal government has only spent \$2 million on Indigenous family violence. This should be compared to the \$16.3 million dollars allocated to the Attorney-General's Department and to the States for litigation against native title claimants. The money spent on a key issue like family violence can also be compared to the \$1 million dollars that was spent on Indigenous cultural, education and recruitment programs by the Department of Defence. The Federal Government has been putting forward a policy of 'practical reconciliation', saying that it will target the problems in Indigenous communities. What those budget figures show is that there is little money spent on the issues affecting Indigenous communities and a lot of money being spent on stopping Aboriginal and Torres Strait Islander rights from being recognised. Of the \$2.3 billion it claims to spend on Indigenous people, ATSIC gets only \$1.1 billion. The other \$1.2 billion is not monitored closely enough to ensure that money allocated for Aboriginal and Torres Strait Islander issues through government departments is being used effectively, efficiently and for the benefit of our people.

If there does not seem to be a strong voice in Indigenous politics at the moment, people are not listening too carefully. Pearson is not the only one setting the agenda. Indigenous leaders like Peter Yu, Patrick Dodson, Mick Dodson and Marcia Langton have also been consistent critics of ineffective government policy. Things are happening in Indigenous communities and it is not because of the Federal Government's policies. The most exciting and transforming activities within the Indigenous community are not propelled by government policy but have been facilitated by Indigenous people themselves. Economic development in the Kimberley and Murdi Paaki region show the way in which Indigenous people have — independent of government structures — simply got on with the business of creating economic and governance opportunities. Similarly, the most energetic advocates for policy development have come from Indigenous communities. In this area, Marcia Langton, Judy Atkinson, Boni Robertson, Winsome Matthews, Brownwyn Fredericks and many, many others have been quantifying, recording, offering suggestions and finding solutions to endemic levels of violence in Indigenous communities. These same women and their colleagues are often the ones who set up the community-based initiatives and institutions, the dry-out shelters, the medical centres and the community buses when government policy fails. They make things happen when the federal government can only find \$2 million dollars to allocate towards family violence.

The restatement of this commitment to assimilation came with Philip Ruddock's policy statement at the ATSIC policy conference. There, he noted five points that heralded the new directions that 'practical reconciliation' would take. This included emphasis on assimilation, mainstreaming services and

focus on individuals.¹³ With government policy remaining focused on 'practical reconciliation' and supported by a zealous embracing of the notion of assimilation, the following things need to be remembered:

- Assimilation assumes that there is an equal playing field. The socio-economic statistics and historical legacies of colonisation fundamentally undermine that assumption.
- The assertion that self-determination has not worked is erroneous and misleading. Philip Ruddock uses the term to describe a past government policy that was used to set up ATSIC. This is not what Indigenous people mean when they use the word and read examples of that expression; whether it is the *Barunga Statement* or the *Kalkaringi Statement* it is easy to see that Aboriginal and Torres Strait Islander people use the term to describe a political vision. It is symbolic of the inability of the federal government and the right to listen to Indigenous people on matters of policy that affect us, that they fail to hear what we mean when we use the term.
- Self-determination and self-government as Indigenous people have described it is as not about separatism or a nation. That is an untruth spread by the anti-Aboriginal brigade. What is sought is a relationship with the Australian state that sees Aboriginal and Torres Strait Islander people having greater control over the decision-making processes that affect our lives.
- The focus on the individual is important but it must be matched with consideration of the broader impact of policies on Indigenous families and communities.
- The need for specific services for Aboriginal and Torres Strait Islander people has occurred because of the inability of mainstream services to provide for the specific needs of Indigenous people. This is particularly so in the areas of health, housing, employment and justice. There is nothing in the plan put forward by Philip Ruddock to indicate that those mainstream services will now be able to cater to the specific needs of Indigenous people that they have historically been incapable of addressing. 'A fair go for all', that catch-phrase so often utilised by the right, should actually mean ensuring that all Australians enjoy the same standards of services. This would mean acknowledging the uneven playing field we start with and moving forward from there.

The biggest casualty in the political debate has been the rights agenda. It is sad but true that the rights agenda is not only marginalised, but seen as being irrelevant. I think a competing vision to the one put forward by Philip Ruddock lies in the reclaiming and the clear articulation of rights and working with policies that promote economic development and governance.

13 Philip Ruddock 'Changing Directions' (Speech delivered at the ATSIC National Policy Conference — Setting the Agenda, 26 March 2002).

In parallel with the rise of 'practical reconciliation', there has been an emerging voice starting to question the emphasis on the rights framework, with particular frustration expressed at the slowness of the process. It is a compelling 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 rights agenda as the privilege of the elite. This is especially so when we see articles published every week with headings such as '[a]borigines dying out at twice average rate'¹⁴ and '[n]early one in three aborigines arrested, revealed study'.¹⁵

III FINDING A NEW VISION

The challenge for Indigenous leadership is, I think, to reclaim the rights agenda and to illustrate how those rights are relevant to the Indigenous communities' political, economic, social and cultural aspirations.

Granted, structural change, particularly constitutional change, is a long-term goal. However, there are several things that the rights agenda offers Indigenous people even in the short-term.

To make these points, I need to remind you of the stolen generations' case of *Kruger v The Commonwealth* (1997).¹⁶ 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 violations of 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 s 116 of the Australian 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.

What we can see in the *Kruger* case is the way that the issue of removal — seen as a particularly Indigenous experience and a particularly Indigenous legal issue — can be expressed in language that explains what those harms are in terms of rights held by all other Australians. *Kruger* also highlights how few of our rights that we assume as given are actually protected by our legal system and the case has been used to illustrate the need to change this failure through legal, particularly constitutional, reform.

14 *Sydney Morning Herald*, 11 December 2001.

15 *Sydney Morning Herald*, 10 December 2001.

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

So the two things that the rights agenda can deliver in the short term:

Firstly, as the *Kruger* case highlighted, the existence of an agreed standard of rights creates a medium through which to communicate harms suffered. In a more positive way, the language of rights can provide a means of communicating political aspirations. The principle of the right to self-determination has become a powerful description of the notion of deciding our own future. Indeed, the content of that notion is also expressed in the language of rights: the right to hunt and fish, the right to native title, the right to work, the right to provide for our families, the right to education, the right to adequate health services.

Secondly, the rights framework already provides minimum standards against which we can hold the federal government accountable and therefore provides the basis for objective assessment of performance in relation to the recognition and protection of Indigenous rights. This objective assessment was particularly evident in the 2000 report by the United Nations Committee on the Elimination of all forms of Racial Discrimination critical of Australia's record.¹⁷ It found that our country, and our government, had failed to meet certain obligations that we, as a nation, have agreed to uphold under the *Convention to Eliminate all forms of Racial Discrimination* ('CERD'). The CERD committee's report expressed concern about the absence of any entrenched law guaranteeing against racial discrimination, provisions of the *Native Title Amendment Act 1998* (Cth), the failure to apologise for the stolen generations and its refusal to interfere in order to change mandatory sentencing laws. The need for these objective standards is particularly necessary while we are without stronger domestic remedies for rights protection.

The rights framework also offers long-term solutions that should not be dismissed because of the lengthy timeframe necessary for their implementation. It offers the ability to provide renewed protection of Indigenous rights and substantially change the status quo between Indigenous peoples and the Australian state. Such institutional change needs to go so far as to consider constitutional amendment as it is the document that establishes government and not insignificantly, symbolises our coming together to consent to nationhood.

The legal reform needed to complement this includes:

- **A Preamble to the Constitution:** a Preamble is important because it sets the tone for the rest of the document. It can be used to give assistance in interpreting the act that follows. If recognition of prior sovereignty and prior ownership were contained in a Constitution Preamble, we may find that courts would read the Constitution as clearly promoting Indigenous rights protections (something that was left unclear in the *Hindmarsh Island Bridge* case).¹⁸

17 Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, Comm (1398th mtg) 56th sess, UN Doc CERD/C/56/Misc.42/rev.3 (2000).

18 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

- **A Bill of Rights:** Although some rights have been implied into the Constitution, the few explicitly in the text of our founding document have been interpreted minimally.¹⁹ Many rights the High Court has found have been implied. A Bill of Rights that granted rights and freedoms to everyone would be a non-contentious way in which to ensure some Indigenous rights protections. As an interim step towards a constitutionally entrenched Bill of Rights, a legislative Bill of Rights would be a useful option.²⁰
- **A Non-Discrimination Clause:** Such a clause could enshrine the notion of non-discrimination in the Constitution. However, it must acknowledge the international human rights standard that understands that affirmative action initiatives do not breach this principle.
- **Specific Constitutional Protection:** An amendment could be made to include a specific provision. In Canada, a comparable jurisdiction with a comparable history and comparable relationship with its Indigenous communities, the *Constitutional Act 1982* added the following provision to the Constitution:

Section 35 (1): The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.
- **A National Framework Agreement:** There needs to be a negotiated agreement between Indigenous peoples and the Australian state to define the principles and terms of the relationship between the two. Such a framework agreement must allow for detailed agreement making at the regional and local levels. This process would have two benefits:
 - It would begin a process of inclusive and legitimate nation building — a process that did not take place at the time of federation.
 - It would allow for the exercise of self-determination at a 'grass-roots' level as Indigenous communities would have a greater say over the way they live their lives and their future directions.

Some of these steps to improve the Australian rights framework for Indigenous people — a Constitutional Preamble, a Bill of Rights — would have benefits for all Australians. This reinforces the point that comes out of the litigation in the *Kruger* case, namely, that many of the rights of Indigenous people that are infringed upon are not 'special rights' but rights held by all people. On the 'flip side', measures that protect the rights of all Australians will have particular relevance and utility for Indigenous people.

Not all the answers to breaking the legacies of colonisation lie in the blind implementation of a rights framework. In ensuring that rights mechanisms can be used to counter socio-economic inequality, the Canadian experience holds many lessons. Canada has several mechanisms in place that work towards greater rights

19 See George Williams, *Human Rights Under the Australian Constitution* (1999).

20 George Williams, *A Bill of Rights for Australia* (2000).

protection, including a constitutionally entrenched Bill of Rights and a clause in the constitution that gives specific protection to aboriginal and treaty rights.

However, except in the areas of health, the socio-economic statistics are fairly comparable between the Indigenous communities in Canada and Australia. This raises a serious challenge for advocates of the rights framework: if it looks so good on paper, why isn't it working in practice?

Four suggestions can be offered as to why this is so:

- *An economic block* — that communities do not have the economic ability to access rights. People are too poor and distracted by the demands of a life in cyclical poverty to use formal mechanisms in place to protect rights.
- *A bureaucratic block* — that the bureaucracy both within the First Nations' communities and in the federal government is difficult to navigate
- *A time lag* — that the constitutional protection has only been in place since 1982. With centuries of colonisation and with racist ideologies embedded in the institutions of the state, there needs to be a longer time to overturn the impediments to rights protection.
- *The continual impact of negative racial stereotypes* — that the decision-making processes within the framework are influenced by the continuing and pervasive influence of negative stereotypes about Indian and First Nations' people.

The Canadian experience highlights two things of relevance for the Australian context.

Firstly, the need for a holistic approach to counter 200 years of colonisation. With the persuasive and concerted effort to dispossess Indigenous people and to colonise Australia, it is simplistic to assume that one approach or strategy is going to effectively address the systemic legacies left by the plethora of legal, political, cultural and social practices that have impacted on Indigenous people, families and communities.

Secondly, that there is a link between economic status and the ability to access rights frameworks indicating a relationship that requires further examination. It would appear that our understanding of the connection between the rights framework and socio-economic position has, to date, been unsophisticated. There have been two areas where there has been a particularly apparent failure to draw the links between the rights framework and economic development and sustainability:

- Advocates of the rights framework have failed to address how that agenda is relevant to the everyday issues. The fact that a rights framework could protect from the policies that erode Indigenous self-sufficiency is not often mentioned.
- There has been a failure to introduce the language of rights in communicating about the economic issues. Rights such as the right to work,

the right to own property, the right to education and the right to a family go to the heart of the everyday issues.

These failures in the Canadian context to ensure that the benefits of entrenched rights protections filter down to those who need them most shows a failure in strategy and a failure in policy. They illustrate a failure to implement mechanisms that are effective and provide a link to long-term solutions. This inability to link targeted policy and long-term solutions is also evident in Australia.

The link between the two can be seen as a trajectory with policy initiatives on one end and long-term, structural changes on the other end. Policies will only help to achieve long-term change if they can work towards a long-term strategy as they target inequality or identified problems in the short term. Similarly, long-term strategies are ineffective unless the strategy for achieving them includes consideration of targeted policy along the way. The development of Indigenous policy has, to date, been most often ineffective or non-existent. The articulation of clear long-term goals for structural and legal change has also been missing. With this view of a trajectory, and bearing in mind the Canadian experience, we can begin to see clear links between the co-ordination of policy and a rights agenda.

IV A COMMUNITY-BASED VISION

This vision of linking rights, economic development and governance sees the agency of governance being filtered down to Indigenous people and there are two essential elements in that approach.

Firstly, there must be a return to a vision that is based on self-determination as Indigenous people see it. It cannot be dictated from the top down. It needs to be facilitated and nurtured from the community. Political leaders need to be responsive to those claims and ensure that they become part of the political strategy. Despite these cultural and geographical differences, there is much 'common ground' in responses to the questions that seek aspirational answers: 'What do you want?', 'When you say "Aboriginal sovereignty" what do you mean?' and 'What do you want in a treaty?' It is the answer to those aspirational questions that can provide the best basis for the aims and goals of the Indigenous political and legal agenda. This requires a recommitment to the principle of self-determination, a commitment that the Howard government refuses to make and this needs to be matched with a commitment and respect for rights.

Secondly, there needs to be an expansion of jurisdiction, a filtering down of decision-making power, to Indigenous communities and Indigenous families. One of the strongest themes running through claims for the exercise of self-determination is that initiatives need to have a strong local and regional

community focus. This emphasis is hardly surprising given that the best way to ensure effective representation is to make political units smaller and more community-based. Involvement with organisations at this level can generate a feeling of consensus and inclusiveness that membership of large political parties and systems are unable to provide.

Delegation of decision-making power to smaller political units would allow the breakdown of large councils and shires into smaller neighborhood groups that can more effectively pin-point and address community needs. These smaller political units become more responsive as they allow for more active participation from interested community members who feel alienated from large-scale political institutions. This community-based focus would also enable Indigenous community groups to take responsibility for decision-making processes on issues that affect them. Such groups should be active in the areas of cultural protection, health and education. This moves from a model for decision making processes that see government departments making decisions and developing policies that then filter down to Indigenous communities to a model that embraces a 'bottom-up' approach to policy-making.

There has already been consideration, some practical examples and theoretical formulations of this 'grass-roots' approach to increased Indigenous decision-making. Here I am going to rely upon the work of Darryl Pearce and Patrick Sullivan. Darryl Pearce has noted that:

With control of local government, Aboriginal people can control water, sewerage, roads, etc — all the municipal services. ... With control of local government in place, Aboriginal people can begin to work towards self-government on a greater scale.²¹

He goes on to say:

[W]hat Aboriginal people are talking about are better ways of delivering health and education policies which most affect us. We are talking about doing these things in a way which suits Aboriginal people. We are talking about having control of the funds which are rightfully ours, for the carrying out of these functions and using them as we see fit.²²

Like Pearson, Pearce is seeking a way to break out of the cycle of welfare dependency and from a sound economic base he has identified local government as an appropriate level for the exercise of this greater community control.

The model of the local council is a useful one as it is a regulatory entity that covers a distinct territory that also falls under the jurisdiction of state and federal powers but allows the community the power to make regulations and set up institutions. This is a useful model because:

- Indigenous communities are no different from other communities in Australia that can be subject to special laws and regulations. In this way there can be no difference between allowing a municipal council the

21 Darryl Pearce, 'Aboriginal Self Government' in Christine Fletcher (ed), *Aboriginal Self-Determination in Australia* (1994) 48.

22 Ibid.

authority to make by-laws for people who live in their district and local land councils creating by-laws that regulate the conduct of people living on areas of land owned and administered by a land council.

- Powers could be delegated from the state or federal government that allow Indigenous communities to establish institutions and infrastructure that would allow greater community autonomy.
- State legislation would need to be passed that would enable the establishment of Aboriginal administered schools, health services and Courts that dealt with matters formerly the domain of the state.
- Federal government can make legislation under the race power²³ to delegate powers formerly held by the federal government. Those powers include matters under the jurisdiction of the federal courts, importantly including family law matters (including custody and adoption).

However, there is one note of caution about a process of delegation of power and it relates to the reproduction of institutions of the dominant culture into Indigenous communities. There is a tendency to merely mirror the institutions of the dominant culture without thinking about whether they work for Indigenous people and without consideration of modifications or alternatives. The plan of introducing new institutional arrangements into communities is usually to place the set of institutions used in the dominant culture into the minority culture, perhaps scaled down and with some tinkering to make them more 'cultural specific'. This uncritical 'mirroring' of institutions in Indigenous communities may erode traditional cultural values and practices. These transplanted institutional structures erode the cultural differences of the Indigenous community and stifle an environment where institutional experimentation can be rich. This phenomenon occurs at many levels: constitutions, tribal courts, mediation processes.

Patrick Sullivan's work in the Kimberley region, has led him to conclude that '[f]ormulating and implementing regional plans involves Aborigines taking control of their daily lives and their own service delivery' and that this adaptation 'would require adaptation of the procedures in favour of Aboriginal processes and away from the European administrative rationalism that drives them.'²⁴ He adds that '[m]ore effective delivery of welfare lies not in more efficient bureaucracy but in changing the structure of delivery to accommodate Aboriginal ways of doing things.'²⁵

What Sullivan highlights is the need to allow self-induced adaptation of institutions into Indigenous communities. He warns against the blind imposition of the institutions of the dominant culture into Indigenous communities. He argues

23 Section 51(26) of the Australian Constitution allows the federal government the power to legislate in relation to matters concerning race. This power has been invoked to pass legislation concerning Indigenous people such as the *Aboriginal and Torres Strait Islander Commission Act 1988* (Cth).

24 Patrick Sullivan, *All Free Man Now: Culture, Community and Politics in the Kimberley Region, North-Western Australia*, Australian Institute of Aboriginal and Torres Strait Islander Studies Report Series (1996) 66–67.

25 *Ibid* 67.

that the imposition of European institutions and demand for European behaviour will defeat self-determination and self-government.²⁶ Patrick Sullivan has observed that this process 'must be a slow self-generating process occurring as a result of the manipulation and resolution of ambiguities by Aborigines themselves which arise out of their interactions with Europeans.'²⁷

He elaborates:

If the conditions for organic development are encouraged it will take two forms. On the one hand Aboriginal practices that were previously relatively loosely codified and open to variation will become institutionalised and applied to new forums for which there is no traditional precedent. On the other hand these practices will be recognised, legitimated and endorsed by the dominant European political system. Only by the modernisation of Aboriginal culture can effective de-colonisation of Aborigines proceed.²⁸

The advantage of Sullivan's approach is that it could provide for pockets of experimental self-governance while allowing for the representation at a higher level. This would need an institutional arrangement that would allow for the delegation of powers from state and federal governments coupled with non-discriminatory recognition and rights of citizenship.

These delegations of power are the seeds of regional agreements. This delegation of power is the first step towards providing a framework for regional self-sufficiency. There has been some confusion between the talk of a treaty and the development of regional agreements, often facilitated by the use of the term 'framework agreement' to describe both processes. This delegation of power can be pursued as a solid start to the development of regional agreements for self-determination and self-government. This can take place concurrently with the negotiation of an agreed process at a national level, perhaps resulting in a 'treaty' that provides principles and jurisdiction that will guide regional and local processes. Regional and local negotiations should be concluded on the understanding that they will be held to the standards set by the national or 'treaty' process so that regional and local self-determination and self-government models will not fall *below* those standards.

The advantage of this coordinated, two-pronged approach is that regional autonomy is not 'put on hold' until a national 'treaty' process is resolved. It will also allow for the application of national principles to ensure

- an equality of results;
- the establishment of fundamental principles and minimum standards that regional agreements cannot fall below;
- a united, and therefore more powerful, political front from which Indigenous people can negotiate.

26 Ibid 123.

27 Ibid.

28 Ibid 125.

Regional Agreements between government and communities that grant powers similar to that of local councils could also be a model that would allow power to be concentrated in a local community by providing Aboriginal communities with a base from which to negotiate with government and industry over a wide range of issues, including land title and management, resource exploitation, environmental control and the delivery of services. The untapped potential of regional agreements to secure economic development and increased rights protection has been noted by Peter Yu.

Regional empowerment is the loom for successful weaving of Indigenous rights into the national economic and social fabric, repairing the threadbare rips of chronic disadvantage. It is the key ingredient to a reconciled Australia. When I raise the concept of regional governance I am not advocating some form of separatism, but quite the opposite. It is a mechanism that will empower Aboriginal people to negotiate our inclusion and participation in the society and economies we share with our non-Aboriginal neighbours. ... In my view the important feature of Indigenous governance is that it combines traditional authority with western notions of political power. Through this Indigenous people can maintain the distinctive and unique dimensions of our culture and society as well as negotiate equitable relationships.²⁹

V CONCLUSION: TAKING RESPONSIBILITY

In conclusion, to change the current climate, to alleviate the lack of compassion towards Indigenous people and Indigenous rights poses a challenge for the political leadership. At the national level, the Howard orthodoxy needs to be challenged. It needs to be challenged by 'blackfellas' and 'whitefellas'. People like Sir William Deane and Malcolm Fraser have not been quiet about these re-emerging ideologies. But their voices are few. And even more noticeable is the silence from Indigenous policy-makers. There has not been strong national response to Howard's agenda and claims. While Marcia Langton, Peter Yu and Mick Dodson have done so, it is fair to say that ATSIC has not done so and has not offered a strong alternative vision. In the absence of this, we need to be inspired by the Aboriginal women and Aboriginal men who worked together to set up medical centres, legal centres and dry-out centres. Those who have just gone ahead and found solutions when politicians and policy-makers have failed. It is incumbent on all of us to take some responsibility for filling in the gaps that the failure of political vision has plagued us with.

29 Peter Yu, 'Unfinished Business — National Responsibilities and Local Actions' (Speech delivered at the Australian Indigenous Human Rights Conference, Southern Cross University, 12 February 2000) published as Peter Yu, 'Unfinished Business — National Responsibilities and Legal Action' in Sam Garkawe, Loretta Kelly and Warwick Fisher (eds) *Indigenous Human Rights* (2001) 248,251.