Published in *Issues of Our Time* in 2008 by Future Leaders (www.futureleaders.com.au)

The Long Path to Reconciliation

Larissa Behrendt

We live in a world forever changed by the terrorist attacks in New York City on 11 September 2001 that made people feel vulnerable in a way that they hadn't imagined that they were. Rather than providing us with a vision of hope and an alternative future, we have seen parties from both sides of the political divide seek to utilise the increased fear amongst the population that comes with this increased vulnerability for their own political ends.

The fear of outsiders and of those who are culturally different, which has been a direct consequence of the so-called "war on terror", has also been coupled with a growing trend that has seen the Australian population become more insular and introverted as it becomes increasingly concerned about its own economic position. When interest rates are a more important election issue than the state of our universities or the levels of health coverage, when people are too worried about their job security to be concerned about human rights, it is not surprising that they remain focused on how to protect their own interests and look suspiciously at anyone who they perceive as a threat to that. A fearful population can easily become a conservative population.

The response to this trend at the federal level has been to use the rise of conservatism in the electorate as an opportunity. It has been used as an opportunity to retain political office and power through the running of fear campaigns around elections.

It has been used as an opportunity to erode several of the few basic human rights that had enjoyed some recognition by introducing anti-terrorism legislation. And it has been used as an opportunity through which to attempt to silence those who dissent from the views of government.

David Marr, in his quarterly essay in *His Masters Voice,* observes that Australians have had fair warning about the continual attempts to silence dissent by governments and he argues that, while Australians love to characterise themselves as larrikins, we are actually very quick to trust authority.

> We haven't been hoodwinked. Each step along the way has been reported, perhaps not as thoroughly and passionately as it should have been, but we're not dealing in dark secrets here. We've known what's going on. If we cared, we didn't care enough to stop it. Boredom, indifference and fear have played a part in this. So does something about ourselves we rarely face: Australians trust authority. Not love, perhaps, but trust. It's bred in the bone. We call ourselves larrikins, but we leave our leaders to get on with it. Even the leaders we mock.

The Faith in Government Enshrined in Our Constitution

The trust in government of which Marr writes is not just a characterisation of our ethos today but was evident at the time that the modern Australian nation was founded, and it can be seen in the decision made about the kind of legal framework we would have at the time that the Constitution was drafted.

The framers of our Constitution believed that decision-making about rights protections — which ones we recognise and the extent to which we protect them — was a matter for the Parliament. They discussed the inclusion of rights within the Constitution itself and rejected this option, preferring instead to leave our founding document silent on these matters.

A non-discrimination clause was discussed, but was rejected because it was believed that entrenched rights provisions were unnecessary, and it was considered desirable to ensure that the Australian states would have the power to continue to enact laws that discriminated against people on the basis of their race,

particularly Aboriginal people. And it is a telling legacy that the first legislation passed by the new Australian parliament were laws that entrenched the White Australia policy.

The 1997 High Court case of *Kruger v The Commonwealth* highlights the further legacy of the choices made by the framers of the Constitution. This was the first case to be heard in the High Court that considered the legality of the formal government assimilation-based policy of removing Indigenous children from their families. In Kruger, the plaintiffs had brought their case on the grounds of the violation of various rights by the effects of the Northern Territory ordinance that allowed for the removal of Indigenous children from their families. The plaintiffs had claimed a series of human rights violations, including the implied rights to due process before the law, equality before the law, freedom of movement and the express right to freedom of religion. 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 child 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 people — the right to due process before the law, equality before the law, freedom of movement and freedom of religion. Kruger also highlights how few of the rights that we would assume we inherently hold are actually protected by our legal system. It reminds us that there are silences in our Constitution about rights, that these silences were intended, and it gives us a practical example of the rights violations that can be the legacy of that silence.

This legacy remains despite the attempt to change the place of Aboriginal people in Australia in the 1967 referendum. Perhaps because of the focus on "citizenship rights" in the decades leading up to the referendum, and because the rhetoric

of equality for Aboriginal people that was used in "yes" campaigns, it was inevitable that there would be a mistaken perception that the constitutional change allowed Aboriginal people to become citizens or attained the right to vote. The referendum did neither. Instead, it allowed for Indigenous people to be included in the census and it allowed the federal parliament the power to make laws in relation to Indigenous people.

Those who advocated a "yes" vote thought that the inclusion of Indigenous people in the census would create an imagined community and as such it would be a nation-building exercise, a symbolic coming together and overcome an "us" and "them" mentality.

It was also thought by those who advocated for a "yes" vote that the changes to section 51(xxvi) — the "races power" — of the Constitution to allow the Federal Government to make laws for Indigenous people was going to herald an era of non-discrimination for Indigenous people. There was an expectation that the granting of additional powers to the Federal Government to make laws for Indigenous people would see that power be used benevolently.

This has, however, not been the case and we can see just one example of this failure in the passing of the *Native Title Amendment Act 1998* (Cth), legislation that prevented the *Racial Discrimination Act 1975* (Cth) from applying to certain sections of the *Native Title Act 1993* (Cth).

Consideration as to whether the races power can be used only for the benefit of Aboriginal people, as the proponents of the "yes" vote had intended, was given some residual attention by the High Court in *Kartinyeri v. Commonwealth* (the Hindmarsh Island Bridge case). Only Justice Kirby argued that the "races power" did not extend to legislation that was detrimental to or discriminated against Aboriginal people. Justice Gaudron said that while there was much to recommend the idea that the "races power" could only be used beneficially, the proposition in those terms could not be sustained. Justices Gummow and Hayne held that the power

could be used to withdraw a benefit previously granted to Aboriginal people and thus to impose a disadvantage.

The 1967 referendum did not produce a new era of equality for Aboriginal people as its proponents had hoped. Instead, its most enduring, though perhaps unintended, consequence was the new relationship it created between federal and state and territory governments. And rather than being a relationship of cooperation, it is one that has seen governments of both levels try to blame the other for the failure of Indigenous policy and to shift the responsibility and the cost away from themselves.

Structural Barriers to Achieving Social Justice for Aboriginal People

Today, Indigenous Australians still have a life expectancy that is 17 years less than that of their non-Indigenous counterparts. Statistics continue to show poorer health, education, housing and employment outcomes for Indigenous people.

The question that is asked honestly and genuinely is: with so much goodwill and so many resources spent on Indigenous affairs, why is there still such a disparity between the life chances of black and white Australians?

In recent negative media coverage in the Northern Territory that focused on the high incidence of sexual assault in some communities and gang violence in others, the response of the Federal Minister for Aboriginal Affairs, Mal Brough, and the Chief Minister for the Northern Territory, Clare Martin, was a textbook example of this process whereby the two levels of government try to shift the blame and shift the cost.

The first response from the federal minister was to blame the Northern Territory government for not putting police into communities where violence was endemic. And, while he was absolutely correct in asserting that any community of 2500 people with no police force would have law and order issues, there are many other factors that contribute to the cyclical poverty and despondency within some Aboriginal communities that create, over decades, the environment in which the social

fabric unravels and violence, sexual abuse, substance abuse and other anti-social behaviour is rife. To this, the Chief Minister replied that the problem was a result of the failure to provide adequate housing — and health and education services — and she pointed the finger firmly and squarely at the federal government.

Governments of all levels continue to underfund Aboriginal communities' basic needs. Health services, educational facilities and adequate housing services have never been supported in these communities, and instead of coordinating their efforts, governments engage in the slanging matches that occurred between the federal minister and the chief minister about who was at fault. The federal government continues to assert that it is a law and order issue; Martin says it was a housing issue and points to other areas of government neglect such as health. And both are right; both levels of government have been negligent. This attempt to shift the blame is referred to as "cost-shifting" and it is a feature of many issues within the Aboriginal Affairs portfolio, where financial responsibility is shared between state/territory governments and the federal government. The attempt to avoid responsibility (or share responsibility) means that Aboriginal people are the losers.

Access Economics estimated at the time of the last election that the basic health needs of Indigenous Australians are underfunded 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 (47c for every $1). 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 highlighting the under-investment in infrastructure.

But one of the first responses of the federal government in light of the spotlight being turned on issues of Aboriginal violence was to say "we are not going to throw any more money at the problem".

One sure sign that governments were not going to take any responsibility for fixing the problems that they were so happy to chest beat about was the quick assertion that the issue didn't need any money thrown at it. This was a clear indication that they were uninterested in addressing their neglect of basic services and infrastructure — the root causes of the problem — and were instead going to grandstand about what everyone else should do.

Underspending on essential matters — and it is hard to think of anything more essential than basic health services — and lack of investment in infrastructure and human capital are far from conducive to breaking cycles of desperate poverty. In fact, they are a breeding ground for it. And against this backdrop, ad hoc measures like shared responsibility agreements and home ownership schemes are not going to solve institutionalised and systemic failings.

There is another factor that emerges in response to the situation of violence in Aboriginal communities that explains a key barrier in achieving social justice for Aboriginal people, and that is the prevalence of racism in Australian society. Studies increasingly show that Australians are resistant to the notion that they are a racist society and resent the use of the term "racism" to describe their attitudes and actions to any sector of the community, including Aboriginal and Torres Strait Islanders.

But it explains why it is that when the government can loosely and misleadingly assert that "they are not going to throw any more money at the situation", many Australians agree. The notion that "too much money" has been spent on Aboriginal people and communities feeds into the prevalent negative stereotype that Aboriginal people are dole-bludgers, shiftless, indolent and lazy.

The prevalence of this stereotype means that governments are not scrutinised and questioned to the extent that they should be. When the government says it has increased funding on Indigenous issues and points to almost $3 billion, it does not elaborate that the figure includes the large amount of money that is spent on running the National Native Title Tribunal and the parts of the Attorney-General's Department that is spent defend-

ing and defeating native title claims. It includes spending such as $100 million on the new Shared Responsibility Agreements, of which $75 million went on administration and only $25 million made its way into Aboriginal communities. It includes amounts set aside for home ownership schemes that no-one has taken up.

The easy acceptance of Aboriginal people as welfare dependent and as getting too many handouts has crippled the capacity of Australians — including the media — to question blind and misleading assertions made by government that mask their neglect of Indigenous communities and hidden their ill-conceived and ineffective policies.

Steps to Achieving Social Justice

The real tragedy of these negative stereotypes is that they not only stop our clear thinking on Indigenous issues, they blind us from what actually works to stop Indigenous disadvantage.

Overcoming Indigenous disadvantage means governments at all levels have to take responsibility for the provision of three things as a matter of right:

- adequate standards of essential services
- adequate provision of infrastructure, and
- investment in human capital.

This is a simple formula and it as been shown in numerous reports into issues such as the high levels of sexual assault within Indigenous communities that dysfunction in Indigenous communities is the result of decades of neglect where under-funding on essential services and infrastructure, and no investment in human capital, compound to create dysfunction in some communities as the social fabric unravels.

In addition to these three goals, Indigenous policy needs to move away from its current drivers — the ideologies of assimilation and mainstreaming. The ideologies of assimilation and mainstreaming have re-entered the approach to Aboriginal issues at the national level. The pursuit of these ideologies has seen the agenda to dismantle the national representative structure that was part of the Aboriginal and Torres Strait Islander Commission

(ATSIC) and it has seen the major programs for Aboriginal people shifted from Aboriginal and Torres Strait Islander Services into mainstream departments. No doubt these moves will appease the constituency who has always resented the attention to Aboriginal issues and has interpreted the need for targeted programs as "welfare bludging" or "getting something for nothing".

But the real danger with the move is that the ideologies of "mainstreaming" and "assimilation" have failed in the past to shift the poorer health, lower levels of education, higher levels of unemployment and poorer standard of housing that Aboriginal communities have experienced. These ideologies have not offered ways to protect Aboriginal cultural heritage, interest in land, language. And they have not offered a way in which Aboriginal people can play the central role in making decisions that will impact on their families and communities.

In the past, the failure of mainstreaming has stemmed from its inability to target specific issues that arise in Aboriginal communities in relation to health, education, housing and employment. This is because mainstream services need to develop specific mechanisms and strategies for Aboriginal clients and they have to do this with stretched resources. In addition to these challenges, Aboriginal people claim that they are often subjected to racism within those mainstream services. Those claims of racism, particularly in relation to the delivery of health services, were well documented in the Royal Commission into Aboriginal Deaths in Custody.

There is no evidence to show that the ideologies of mainstreaming and assimilation that failed so dismally in the past will work now. This new shift in the delivery of Aboriginal policy and programs does not offer any new insights or any promise of more effective policy-making and program delivery. The approach to Indigenous policy should not be ideologically led. It must be directed by research-based policy so we are not the perpetual guinea pigs for government.

The focus on the ideological has blinded us to what we can learn from the many successes that go unnoticed. In the face of government neglect and failed policy, many Indigenous

communities continue to flourish, creating successful and viable institutions and continuing to keep their cultural values strong and their children safe. We could learn much from what it is that successful organisations do to ensure their effectiveness and viability in this climate and use that information as a basis for developing similar conditions in the communities that fail.

And we can look at research in Australia and North America that has detailed that better socio-economic outcomes are achieved when Indigenous people are involved in the setting of priorities within their community, the development of policy, the delivery of services and the implementation of programs.

A key aspect of this agenda is the development of social capital within Aboriginal communities. This refers to the development of leadership, skills and the quality of human relationships and exchanges. Social capital is built up when people solve shared problems and satisfy economic, spiritual, recreational and other needs to levels that change over time. It is undermined when people are dehumanised, deprived of the basic and necessary levels of housing, education and health and when politics is used as a divisive instrument.

Sustainability in Aboriginal communities requires leadership. And quality leadership is defined by integrity, commitment and vision. Leaders need to be able to handle the privilege of being selected, to realise that a leadership position is not about being elevated, it is about assuming the burden of responsibility. And this is not a technical skill; it also includes an element of intuition — of reading the environment and the people you are leading and, of being able to take the people with you because they trust you and you understand what they need and how they think. You don't crush opposition, you meet it head on. You do not silence and ridicule those who disagree with you, you seek to engage them.

In the current conservative climate, there has been 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. Eleanor Roosevelt described this role most eloquently:

> Where, after all, do universal human rights begin? In small places, close to home — so close and small that they cannot be seen on any map of the world. Yet they are the world of the individual person; the neigbourhood he lives in; the school or college he attends; the factory or farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning here, they have little meaning anywhere.

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.

Every other Commonwealth country, even the United Kingdom from whom we inherited our legal system, has modernised their legal system by incorporating a bill of rights that entrenches the contemporary understanding we have that all people have inherent human rights. Every other Commonwealth country now draws a line in the sand that tells the government that this is the point at which you cannot cross; this is the point at which your power ends. In this era where every Commonwealth country has enacted anti-terrorism legislation that infringes on the human rights of their citizens, only Australian has no such line to monitor the exercise of power by our 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.

In this way, popular arguments against a Bill of Rights often seem shallow to those who have been at the receiving end of rights violations. For example, the claim that a Bill of Rights should be rejected because it is creates "a lawyer's picnic" seems to value dislike of the legal profession above the rights of people and ignores the unfettering of the power of politicians. The experience in the ACT with its new *Human Rights Act* also shows how shallow these claims of increased litigation are. Under that legislative Bill of Rights, there have been few cases where the rights under the Act have been referred to, and the overwhelming impact has not been on the hip pocket of lawyers but on bureaucrats who are now required to think about the rights of the citizens of the ACT when they implement policies and programs. That is, the greatest impact has been to make government more accountable to the people in the way it does business.

It is wrong to think that our society travels in a lineal progression where over time we become more tolerant and understanding and, even if we occasionally take a step back, we eventually take two steps forward.

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 question why we are not as concerned about the Aboriginal child who is experiencing third world levels of health care than we are for the child actually living in the third world. And I also believe that 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.

Thomas Paine wrote:

> 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 saying this, Paine challenges us to think about the very thing that strong and effective leaders should provide: a vision of the kind of country we want to live in.

What Kind of Australia Do We Want?

Do we want a society that is guarded, fearful, backward looking, insular and intolerant? Or do we want a society that is forward looking, inclusive and generous? Do we want to live in a community where difference is looked upon suspiciously or in one which they are celebrated? Do we want a system of laws that are considered fair because they look neutral on their face or do we want a legal system that is considered equitable because it has no hidden prejudices and biased outcomes? What would our ideal, reconciled Australia look like?

Although the 1967 referendum did not herald in the new era of equality for Aboriginal people that the proponents of the "yes" vote had hoped for, that constitutional change stands for something very important. At that moment, 90.77% of Australians voted "yes" for what they thought was the beginning of a new relationship with Aboriginal people. It is one of

the few occasions in our history that we can point to where we can see clear evidence of an understanding that the fates of black and white Australia are tied. It is a moment when it is understood that the quality of Australian society is going to be judged by the way it treats its Aboriginal people.

And I believe that Aboriginal people play a key role in assessing the fairness of our laws and institutions. I have always argued that it is never enough that laws, policies or the Constitution work for middle-class members of the dominant culture. The true test of their worth is the extent to which they work for the poor, the marginalised and the culturally distinct. Using this test, we can see that there is room for improvement in the rights of Indigenous people.

This is not a view that seeks to merely promote the views of one sector of the community over and above those of the others. Instead, it is a position that says that when those who are less well off in our society can find protection in the laws of this country, we have a better system of governance, a better society, and this is indeed a good outcome for every Australian.

Larissa Behrendt is Professor of Law and Director of Research, Jumbunna Indigenous House of Learning, University of Technology Sydney. Larissa is a Judicial Member of the Administrative Decisions Tribunal, Equal Opportunity Division, Alternate Chair of the Serious Offenders Review Board, Board Member of the Museum of Contemporary Art and Director of the Sydney Writer's Festival and Bangarra Dance Theatre. She won the 2002 David Uniapon Award and a 2005 Commonwealth Writer's Prize for her novel *Home*.