THE MITCHELL ORATION 1992

"Human Rights & Aborigines**:**
Time for a Re-appraisal"

by

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Adelaide

Her Excellency, The Honourable Dame Roma Mitchell:

I am deeply honoured to be invited to present the 1992 Mitchell Oration. This Oration is a tribute to and a celebration of the life and work of her excellency whose commitment to justice and concern for the dignity of all peoples has been an inspiration to myself and to so many others for so long. It is no accident of course that this celebration takes place in South Australia which state had the first anti-discrimination legislation, the Prohibition of Discrimination Act in 1966, and in 1976 one of the first pieces of Sex Discrimination Legislation in the Western World.

My topic for tonight is "Human Rights and Aborigines: Time for a Reappraisal". In my view, the issue of human rights in Australia tends to be spoken of in bland, abstract and congratulatory terms, which mask the realities of our condition. It is my purpose in choosing this topic tonight to peel off the mask and to look at some of those realities.

We Australians pride ourselves on being an egalitarian society, that is, a society in which every one gets a fair go, and it is often said that our human rights record is good by comparison with other countries. For those who are members of the dominant society all of that is true; Aborigines as a community, however, may well dispute those assertions.

In any event, it has been noted bv Mr Nick O'Neill (at the time a senior lecturer in law, ITS) in a paper to a human rights conference at the University of New South Wales in 1988:

"The Australian legal system was endowed with a constitution made by political pragmatists who allowed very few human rights provisions to intrude into it, a judiciary which rendered those provisions almost worthless and a common law which affords little protection to human rights. This lack of human rights protection was not a matter of great political concern until after World War II when Australia became bound up in the efforts of establish the United Nations Organisation". It may be argued by some here tonight that there have been some significant changes in Government and community commitment to human rights in Australia since Mr O'Neill made those remarks.

However, it is my argument that the treatment of Aborigines calls into serious question any such perceived commitment. Through the 1960s in particular, Aboriginal campaigns focussed on the extent of racism in this country, and most calls for human rights for Aborigines at that time were in terms of abolishing racism. So when the Australian Government legislated the *Racial Discrimination Act* in 1975 and ratified the *International Convention on the Elimination of all forms of Racial Discrimination* there was considerable optimism on the part of Aborigines and Torres Strait Islanders and their supporters that we would see a significant reduction in the incidence of racism against indigenous Australians (in particular) within a very short time. Australia's ratification a few Years later in 1980 of the *International Covenant on Civil and Political Rights [ICCPR]* reinforced that optimism.

The Racial Discrimination Act makes it unlawful to discriminate on the grounds of race, colour, descent or national or ethnic origin, in the following circumstances: refusing access to places and facilities; transactions in land or provision of accommodation; refusal of goods and services; restriction of entry to trade unions; employment or dismissal from employment; public advertisement; incitement of unlawful acts.

Under the terms of the ICCPR, which forms a schedule to the *Human Rights Commission Act 1981,* all people are entitled to the rights to: privacy; marriage and family; their own language, culture and religion; participation in public affairs; freedom of expression, movement, association and assembly; protection of their inherent right to life; liberty and security of person; freedom from degrading treatment or punishment; and equal treatment with others under the law.

I think it is not too much to say that many people at community level**,** at least, believed that those acts were sufficient to eliminate, or at least significantly reduce racism in this country, and provide the basis for victims of discrimination and abuse to institute action to secure recognition of their rights and in appropriate circumstances compensation for denial of them. That has not been the case of course. As I will indicate shortly, so far as making any serious inroads into the incidence of racism and other forms of discrimination, the legislation which we have are toothless tigers.

One very good reason for this is that at the time the legislation was proposed, there was considerable argument, largely from conservative, and indeed privileged, forces in society, along the lines that there was no place in Australia for such legislation; that our system of

justice takes care of the balance of human and community relationships. In fact our justice system does not now, nor ever did serve to regulate community relations in ways that protect and preserve the dignity of all.

It would be nice to know that there is sufficient concern, understanding and regard for others in our society that legislation would be unnecessary; but since that is not the case, then I believe it is important for us to have legislation such as the *Racial Discrimination Act*, and other anti-discrimination acts, as educative tools to be used to raise community consciousness about the issues dealt with in the legislation. At the same time as I say that however, I emphasize my view that the legislation which we have has been a signal failure in overcoming those social ills that the legislation was ostensibly designed to alleviate. The challenge that confronts us in relation to the legislation as it stands is to build on what is, to improve it so that it serves us properly, effecting those changes it was intended to effect.

The major difficulty rests in the way that the legislation is framed, and that is a direct outcome from the opposition that was mounted against the original proposals. Each piece legislatively proscribes, or outlaws, those forms of discrimination set out in the international covenants, but does not provide for any real and effective or lasting sanctions for breaches of those provisions. Rather the legislation provides that an aggrieved individual may make a complaint to the Human Rights Commission.

The Commission's powers are limited. It does not have powers of enforcement-that is to say, it cannot order parties to do or not to do certain things, and it cannot impose any sanctions or penalties against offenders. Its function is to receive complaints, and upon receiving those to try to conciliate matters between the aggrieved person and the person who has offended. Conciliation is a process of negotiating a fair and satisfactory settlement between the parties, and depends on trying to gain their willingness and co-operation in effecting such a settlement. If the Commission's attempts at settling the differences between the parties fail then the Commission may issue a certificate which enables the aggrieved person to take the matter to a court.

Over the years there has been a tendency, particularly on the part of politicians and bureaucrats to overstate the case in terms of the benefits to be gained from persuasion and conciliation. This self-congratulatory stance has generated a certain amount of indifference or complacency on the part of the media, the judiciary and the courts, and other institutions, to the issue of human rights in this country, so that there is little, if any, critical public analysis of the issues and their application in Australia. In any event, laypersons in the community tend to believe that human rights issues are more appropriately the province of politics and law.

At the same time another reason for the complacency which I mention shortly is that human rights are seen as being needed by the poor and dispossessed, and it is the reality that those who are poor and dispossessed simply do not engage the attention of the powerful and influential institutions.

We can only wonder at what could possibly be considered to be a fair and satisfactory settlement for an Aboriginal complainant, given the experiences of and the continuing conditions suffered by Aborigines. My own view is that a system of complaints handling based on persuasion and conciliation can only mean superficial and incremental changes which leave intact the fundamental causes of the social and economic problems which manifest in discrimination. I argue that changing the social and economic conditions which discriminate against any sector of the community, and particularly Aborigines, must be primary tasks in establishing human rights. After all, the *Universal Declaration on Human Rights* was promulgated by the United Nationals General Assembly in order to give meaning to the United Nations Charter, which recognizes that "the dignity and worth of the human person" can only be established and maintained through "social progress and better standards of life", and "promotion of the economic and social advancement of all peoples". There is then a great responsibility resting on governments such as ours to implement social and economic programs and practices in addition to any educative programs.

It is worth reminding ourselves that the United Nations Organisation came into being in 1948 as a consequence of World War II with the stated desire of the nations of the world to obviate future wars. It was recognized by the world's nations some thirty years previously, in forming the League of Nations, that universal peace could only be established if it is based upon social justice.

This is no more evident I submit than it is in relation to Aborigines.

Some years ago, Dr. Keith Suter in a paper on human rights, prepared for the United Nations Association of Australia, pointed out that at whilst developed countries are faced with concerns about economic uncertainty, inflation and unemployment, the Third World by contrast is overwhelmed by its problems of malnutrition, illiteracy disease, underemployment, low income, high birth rates and infant mortality rates. If that is what distinguishes the Third World from the First World, then Australian Aborigines are Third World People.

In fact, since Dr. Suter wrote those descriptions in the mid 1980s, Australian Aborigines have been described as the "Fourth World" at least in respect of illth profiles. That description is meant to relate to the fact that Aboriginal health has deteriorated over the last decade. Briefly, it has been shown that: * death rates for Aborigines are 4-5 times the standardised rate for the total population; * maternal death rates remain 3-5 times higher than other Australians while infant mortality rates remain 3 times greater; * the continuous presence of widespread under-nutrition in Aboriginal infants and children persisting until early adulthood at which stage a significant number (particularly women) become overweight and/or obese; * heart disease, accidents and violence, diseases of the respiratory system and neoplasms (cancers) comprise the major causes of death; * causes of morbidity include a combination of "Third World" illnesses (e.g., respiratory, ear, diarrhoeal and eye diseases) and lifestyle issues (e.g., hypertension, diabetes, mental disorders), and dental disease is also significantly worse amongst Aborigines.

Further to these statistics are those relating to Aborigines' involvement in the criminal justice system. Those are best indicated by the imprisonment rates. According to a study conducted by Chris Cunneen (a Sydney-based criminologist) on "Aboriginal imprisonment during and since the Royal Commission into Aboriginal Deaths in Custody", between 1988 and 1992 "there have been dramatic increases in the level of imprisonment of Aboriginal people in New South Wales, Western Australia and Victoria. Over the 4-year period New South Wales had the greatest increase in Australia with an 80% rise in the number of Aboriginal prisoners and also the highest increase in real numbers from 369 to 664 Aboriginal prisoners. Victoria recorded an increase of 75% during the period. While the actual numbers there were comparatively small (an increase from 52 to 91 Aboriginal prisoners) the magnitude of the Victorian increase is disturbing. Western Australia recorded an increase of 24% which is particularly alarming given the number of Aboriginal prisoners in that State . . . Nationally there has been a 25% increase in the number of Aboriginal people in prison during the 4-year period of the Royal Commission into Aboriginal Deaths in Custody. The increase has occurred at a time when it was recognised that over-representation of Aboriginal people in custody was a contributing factor to the large number of deaths in custody". During the same period, he notes that the imprisonment of Aboriginal women increased 63% nationally, the New South Wales increase in the numbers of Aboriginal women imprisoned increasing "by no less than 168%", whilst "Western Australia saw a rise of 54% in Aboriginal women prisoners during the same period".

Whilst he gives no comprehensive reasons for the dramatic national increases in Aboriginal imprisonment, he points to the RCIADIC comments: "It is to be noted that at the less serious end of the scale, there are proportionately more Aboriginal than nonAboriginal prisoners held for traffic, good order offences, property offences and for the group of offences known as 'justice procedures' which includes breaches of orders and fine default".

During this period it should also be noted, the New South Wales Attorney-General and the Minister for Justice have stated many times publicly, that imprisonment should be the last resort. At the same time, however, it is their conservative government which has re-introduced imprisonment for minor public order offences, including offensive behaviour and offensive language. It is for just these types of offences that Aboriginal people are over-represented, indicating both the discriminatory effect of these laws and the discriminatory way in which they are policed. If Australian Governments were truly concerned to implement human rights in this country then one place they could start would be the repeal of such discriminatory legislation.

Implicit in these various statistics are the statistics on Aboriginal housing, employment and education. All show that in the last decade there has been a significant deterioration in the socioeconomic conditions of Aborigines. It is in the last decade that we have formalised by way of domestic legislation Australia's commitment to human rights.

This deterioration has been going on for a very long time, and especially since 1948 when the world's nations (including Australia) proclaimed their commitment to human rights. So that there has been ample opportunity for Australian Governments to implement policies and

programs which have at their base the realisation of human rights for Aborigines. It was not necessary to await Federal anti-discrimination legislation based on international Conventions and Covenants in order to implement measures in accord with the principles of human rights adopted by the United Nations Organisation.

Governments in particular would argue that there have been huge amounts of monies poured into various services for Aborigines, including education programs, health programs, housing programs, and employment programs, and legal services. In fact that is the case, and there is a significant section in the community who seize on that fact, and argue, firstly, that such monies have been wasted; and secondly, that Aborigines themselves do not want to improve their conditions-and that is obvious (they argue) from the waste of monies.

There are several observations that have to be made about the ways in which governments have dealt with Aborigines. The first is succinctly made by Commissioner Elliott Johnson, QC, in his *National Report: Overview and Recommendations* of the Royal Commission into Aboriginal Deaths in Custody, when he noted: "Every turn in the policy of Government and the practice of the non-Aboriginal Community was postulated on the inferiority of the Aboriginal people . . ." In the pursuit of those Government policies Aborigines were dispossessed, disempowered, institutionalised and rendered dependent, and subjected to genocide. [Genocide is defined by the United Nations *Convention on Genocide*, 1948, as meaning any of the following acts committed with intent to destroy in whole or in part a national, ethnical, racial or religious group as such: (a) killing, members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of living calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.]

It is clear to see from this encapsulation of the history of Aboriginal and nonAboriginal relations that the socioeconomic conditions which are suffered by Aborigines today are systemic.

It is widely assumed by the community at large and including sections of the Aboriginal community, that the position of Aborigines has improved over the last 25 years since the Referendum of 1967 gave the Federal Government power to make laws with respect to Aborigines, and provided that Aborigines be counted in Census. Many forget that the Federal Government was always responsible for Aboriginal Affairs in the Northern Territory where some of the worst conditions prevailed, and to a large extent, still do; but assuming that there is clear cause for the belief that since the Federal Government has assumed greater responsibility in Aboriginal Affairs then conditions have improved, I would argue that 25 years is barely enough time to see any counter effects to the legacies of almost 180 years of brutality and barbarity that this society has visited upon our people.

Furthermore, I argue that the allocation of resources by Government has been piecemeal and ineffective, and that has been deliberate if not conscious. In every sphere of Aboriginal

Affairs-health, housing, education-there has been a proliferation of agencies, both Government and non-Government i.e. community-based Aboriginal organisations. So that whilst the total sum of resources allocated to Aboriginal Affairs by Governments amounts to a -real deal, in fact, when spread over the range of organisations involved in the various services to Aborigines, the amounts are very small. Thus all of these agencies (many of which are Government bodies of inquiry and evaluation) have been forced into internecine battles for what they each consider to be their proper share of the available resources. All of these bodies have established their own bureaucracies and infrastructures, and those necessarily consume substantial amounts of the available funds. (The increase in the numbers of community-based Aboriginal organisations has been encouraged by Governments in response to demands of self determination and empowerment; but in fact such organisations have been caught in a quandary. Without exception, as far as I know, all such community based bodies have been at the mercy of Governments in respect of funding and accounting for same. Funds have been given on short term bases which do not allow organisations to develop and execute long term planning and programs. The majority, if not all, of the organisations continually face the situation of exhausting their available funds by the end of each term, usually a quarter, or half year, sometimes yearly, but never triennially, and thereby being forced to the brink of extinction. The heavy and unrealistic bureaucratic demands on them to account for their funds prior to the next release results in demoralisation, destabilisation, dissipation of energy, enthusiasm and innovation. In those circumstances, empowerment and self determination are illusory.)

There are two very striking things to note about the administration of Aboriginal Affairs in all spheres. The first is that at least for 156 years there have been inquiries into the evident social problems suffered by Aborigines; that there have been numerous evaluations of the various programs introduced by Governments; and that time after time these inquiries and evaluations have reported the same things, in terms of both causes and solutions.

The second is that there has been an obvious reluctance on the part of Governments to act on the recommendations made by these various bodies over the decades, but more, that there has never been any realistic attempt to formulate a comprehensive, integrated program of change. Rather the programs that have been implemented can be clearly seen as being politically expedient, short term, and stop gap-and obviously doomed to failure. Further, the characteristic way in which implementation is announced and carried out inevitably leads to the generation of anti-Aboriginal sentiment in the community at large. (In this context at least there is something extraordinarily contradictory in the way in which Governments encourage the educative role of the Human Rights Commission).

What is required are strategic plans which specify realistic targets set within realistic time frames: e.g., 95% child immunisation within 5 years, together with 100% provision of sanitation facilities, together with 60% adult literacy and numeracy. Housing (these figures are only by way of illustrating the point I wish to make and are not based on any assessment of the present situation. That would have to be done by people who have the expertise and resources to do the appropriate figuring.) Housing and health, education and employment targets have to be integrated in an overall strategic plan designed to effect real human rights for Aborigines (and in the process, let me say, for all Australians). Anything less than such integrated and

comprehensive plans are, and can only be, piecemeal. Piecemeal programs, as I believe my preceding remarks demonstrate, are not only failures, but actively contribute to further deterioration of the socioeconomic conditions of Aborigines.

It is often said that Aborigines today are better off than they were. To that I say, the real comparison is that between Aborigines and non-Aborigines, and in that test it is clear that Aborigines remain severely disadvantaged.

As I said earlier, the problems are systemic.

The various United Nations instruments on human rights impose a clear, unequivocal duty on Governments to implement measures to effect social justice. When we look at the socioeconomic profile of Aborigines today it is clear that Australian Governments have failed to discharge their international duties.

So What Can We Do?

On 25 December 1991 the first optional protocol to the International Covenant on Civil and Political Rights came into force in Australia. There was considerable excitement in some quarters that this had happened, as it would give Aborigines at least an avenue of relief. Article 2 to the protocol provides that an individual who believes that any rights protected by the covenant have been violated, may make a complaint to the United Nations Human Rights Committee, provided however that all domestic remedies have been exhausted. It is important to stress, however, that the protocol allows only individual communications. General claims on behalf of a group cannot be made. Further, the protocol is not designed for wide attacks on State Legislation or Government policy. Further again, an individual must be able to show to the committee that she is a victim of the circumstances about which she complains.

It is clear then that the first optional protocol procedures can afford no redress to Aborigines against the systemic discrimination which I have described.

There also exists under the auspices of the UN Economic and Social Council the Sub-Commission on Prevention of Discrimination and Protection of Minorities which will receive complaints (what the UN calls "communications") about consistent patterns of violations, i.e., "situations affecting a large number of people over a protracted period of time", under what is known as "The 1503 Procedure". Such communications may be made by individuals or groups who claim to be victims of human rights violations, or they may be made by organisations on behalf of alleged victims provided that such organisations act in good faith and have direct, reliable evidence of the situation it is describing. Given the background I have described then clearly this procedure affords more opportunity to air Aboriginal grievances than does the protocol procedure.

Having recourse to the United Nations machinery for redress in these circumstances however is very very protracted and highly formalised, and it may take several years before any action is taken by the Sub-Commission, if it does decide to take action.

However there is little regard given to advising Aborigines of the opportunities to refer matters to the United Nations, especially in respect of such mundane matters as health, housing, education and employment. Rather, those people, particularly lawyers, particularly male, who seek to access the United Nations procedures have an over-riding concern with issues such as self determination and sovereignty. In themselves they might have some merit; but in terms of the daily experiences of poverty, despair and deteriorating social conditions, they are, without doubt, lesser issues. I do not subscribe to the view that if we get the issues of self determination and sovereignty right then we will get the other issues right. Far from it. In any event, by the time we win those battles, if we do, then we may not have a population to enjoy the spoils.

Whilst it is comforting to know that ultimately we can take complaints to the United Nations, it is my view that continuing broad based political campaigns on the domestic front is the most necessary and effective action we can take. Human rights groups can join us in campaigning for the sorts of integrated, comprehensive and long term strategic plans which I mentioned earlier.

In 1987, the then Minister for Foreign Affairs, the Hon. Mr Bill Hayden, in an address to the Australian Parliamentary group of Amnesty International, explained the basis of Australia's policy in promoting human rights. He went on to say:

> "We pursue this policy for reasons which have great significance for our best interests... all human beings are entitled to certain fundamental and inalienable rights. This is not just luxuriating. It imposes certain obligations on us. It factors into our policy-making (whether in domestic or external affairs) a standard set by these elementary values. If we reject this standard, our activities will be seen as devoid of moral authority . . ."

J'Accuse!