SELF-DETERMINATION AND INDIGENOUS POLICY: THE RIGHTS FRAMEWORK AND PRACTICAL OUTCOMES

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Fresh-faced out of Harvard Law School, armed with my doctorate, I went to work in Canada on a treaty negotiation project for Treaty 8 First Nations of Northern Alberta. The negotiation was part of the Canadian government's Inherent Right to Self-Government policy. This meant consultation with First Nations people, communities and leaders about how they wanted the policy to be interpreted. Excited at the prospect of hearing discussions at a grass roots level about what the right to "self-government" would look like, I became frustrated that, after our eloquent presentation about the possible parameters of the policy, the first person who would get up to speak would say, "first we have to talk about the gun licences."

In my ignorance I failed to see that this was the key to self-government. It was about a way of living life. In that area, the Cree have hunted moose since the beginning of time. The regulation of gun licences stops them from continuing to use moose as part of their way of sustaining life, providing income and livelihood, and needed for ceremony. And the clear message, when I removed my legal blinkers, was that self-government was about sustaining a way of life and a cultural tradition. I think this is a universal aspiration and today I want to talk about this notion of living life the way you want to, something we also call "self-determination".

I want to look at what the vision of self-determination may be, as it is described by Indigenous people, and then talk about the government's response to reconciliation through a policy of 'practical reconciliation'. In rejecting the notion of practical reconciliation I need to do two things: firstly, explain why the rights framework is still relevant and, secondly, discuss the relationship between the rights framework and policy development. In discussing the latter, I will focus on the paper by Peter Sutton, *The Politics of Suffering: Indigenous Policy in Australia since the 1970s*[1] and Noel Pearson's 2001 Charles Perkins Oration, *"On the Human Right to Misery, Mass Incarceration and Early Death"*.

I. Treaty – Sovereignty – Self-Determination

We can never remind ourselves too often before launching in to sweeping generalizations at the national level that Indigenous communities are diverse in culture and circumstance, and their specific needs different. Communities that are enclaves within urban areas, finding themselves a sub-

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[1] Peter Sutton. *The Politics of Suffering: Indigenous Policy in Australia since the 1970s.*

group of a larger, non-Indigenous political unit, have different political needs and strategies to Indigenous communities living in remote and distinct geographical areas where they may already be engaged in initiatives that can be categorized as decentralized self-governing actions.

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?" Today I am going to choose Patrick Dodson's 4th Vincent Lingiari Memorial Lecture, 'Until the Chains are Broken' to provide an example of an Indigenous expression of self-determination.

In his lecture, Dodson identified some points that may be included in a treaty:

1. The right to all the common human rights and fundamental freedoms recognized in national and international law, as well as to our distinct rights as Indigenous peoples.
2. The right to maintain and develop our distinct characteristics and identities, whilst taking part in the life of the country as a whole. ...
3. The right to self-determination. A right to negotiate our political status and to pursue economic, social and cultural development.
4. The right to our own law, customs and traditions, and equality before the national law.
5. The right to our unique cultural traditions and customs. The right to own and control our cultural and intellectual property.
6. The right to our spiritual and religious traditions.
7. The right to our languages, histories, stories, oral traditions and names for people and places.
8. The right to participate in law and policy-making and in decisions that affect us.
9. The right to determine priorities and strategies for economic and social development. This includes the right to determine health, housing, and infrastructure, and other economic and social programs and, to the extent possible, to deliver these through our own organizations.
10. The right to special measures to improve our economic and social conditions.
11. The right to all forms and levels of public education and training.
12. The right to own and control the use of our land, waters and other resources.
13. The right to self-government and autonomy in relation to our own affairs.
14. Constitutional recognition.

15. A framework for the negotiation of agreements and a treaty.[2]

We can see in the parameters of Patrick Dodson's claims a spectrum of rights. The rights enmeshed in the concept of "self-determination" includes, 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 self-determination'.[3] It sees increased Indigenous autonomy *within* the structures of the Australian state.

The right to self-determination is recognized under international law. Although the right is clearly recognized in Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, there is much debate about the application of the content of self-determination as it applies to Indigenous people. I have argued elsewhere that we, as Indigenous peoples, do not need to feel confined by the semantic debates under international law. Rather, the key to the way forward is in the concepts and rights that we have implied into the terms "self-determination" and "sovereignty" when we use those words to describe a vision of what we would like our communities to be like and the way we want to live our lives as Indigenous peoples.

This is an approach that takes the starting point for self-determination from the way in which it is expressed by Indigenous peoples at a grass-roots level, rather than by imposing concepts as they have been developed in international forums on to Indigenous communities. So it is a bottom-up, rather than top-down approach.

This debate shows the way that international concepts can be transformed and take on new meaning in the domestic political sphere for the furtherance of rights protections in a way that is not reliant upon active international intervention. It also shows the use of rights as a language of communication. An example of this use of rights as a language can be found in the 1997 case of *Kruger v. The Commonwealth* (1997).[4] 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

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[2] Patrick Dodson, 'Until the Chains are Broken', 4th Vincent Lingiari Memorial Lecture, 1999.

[3] S. James Anaya. *Indigenous Peoples and International Law*. Oxford: Oxford University Press, 1996.

[4] *Kruger v. The commonwealth* (1997) 190 CLR 1

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 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 peoples 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 would 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.

This approach to the recognition of Indigenous rights through entrenched legal status is in stark contrast to the federal government's response to the recommendations of the council for aboriginal reconciliation.

Ii. Practical Reconciliation

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 go to the core of socio-economic disadvantage, namely, employment, education, housing, and health:

> "We are determined to design policy and structure administrative arrangements to address these very real issues and ensure standards in education and employment, health, and housing improve to a significant degree. ... that is why we place a great deal of emphasis on practical reconciliation."[5]

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."[6]

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[5] John Howard. Address presented 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/main00.htm> at 30 October 2001.

[6] Ibid.

What Howard didn't detail is that part of that $2.3 billion went towards defending the stolen generation's case brought by Peter Gunner and Lorna Cabillo in the Northern Territory[7] and went into the various areas of the government arm that were actively trying to defeat native title claims. That is, counted in 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:

> "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 peoples from the social, cultural and economic development of mainstream Australian society."[8]

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:

> "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."[9]

The main issue is 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. But as the *Kruger* case illustrated, this has been compounded by the absence of a rights framework that can protect individuals 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

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[7] *Cubillo v Commonwealth* (2000) 103 FCR 1

[8] John Howard, 'Perspectives on Aboriginal and Torres Strait Islander Issues' (Menzies Lecture Series, 13 December 2000) <http://www.pm.gov.au/news/speeches/main00.htm> at 30 October, 2001.

[9] Ibid.

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.

III. The Importance of the Rights Agenda

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 'Aborigines dying out at twice average rate'[10] and 'Nearly one in three Aborigines arrested, revealed study'.[11]

Granted, structural change, particularly constitutional change, is a long-term goal. However, there are several things that the rights agenda offers Indigenous peoples even 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, and 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.[12] 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

[10] *Sydney Morning Herald*, 11 December 2001.
[11] *Sydney Morning Herald*, 10 December 2001.
[12] Committee on the Elimination of Racial Doscrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, Un Doc CERD/C/56/Misc.42/rev.3, (2000).

generations and its refusal to interfere 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 time-frame 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 include:

- **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*).
- **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.[13] 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.[14]
- **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 recognized and affirmed.
- **A National Framework Agreement:** There needs to be a negotiated agreement between Indigenous peoples and the

[13] See George Williams. *Human Rights Under the Australian Constitution.* Melbourne: Oxford University Press, 2000.

[14] George Williams. *A Bill of Rights for Australia.* Kensington: UNSW Press, 1999.

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 peoples – 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 peoples that are infringed 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 peoples.

IV. The Importance of Economic Rights

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 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 colonization 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 peoples and to colonise Australia, it is simplistic to assume that one approach or one 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 peoples, 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 right 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.

V. The Despair of Whites – the Peter Sutton Thesis

Peter Sutton has addressed the failure of Indigenous policy in the critical overview contained in his paper, *The Politics of Suffering: Indigenous Policy in Australia since the 1970s.*[15] Sutton's paper should not be read as a rejection of the rights framework. Rather, it is critical of too much emphasis on notions of governance and self-determination at the expense of well-crafted and effective policy. He seeks a rethinking of the emphasis placed on each. Nothing in what I have covered in this paper contradicts that assertion. In fact, it is consistent with the above claims that there be a re-examination of the relationship between rights, economic development and policy. Sutton's starting premise that "policy revision must now go back to bedrock questions, with all bets off, if it is to respond meaningfully to this crisis" is the same question that I have advocated asking about "practical reconciliation".

Sutton tracks the current socio-economic disparity and social problems in some Indigenous communities to many factors – passive welfare, a shift towards the freedom of liberal democratic policy, the breakdown of social control in Indigenous communities, increased access to alcohol, the secularisation of Indigenous community administrations, and "the boredom and purposelessness of life in so many communities, as well as the psychological legacy of past years of ethnic discrimination, coercive assimilation, the devaluing of traditional male roles, and the mourning and lowered self-regard that followed what was often brutal initial conquest, and the epidemic of alcohol and drug misuse which has run riot from the 1970s onwards in so many places ...".[16] It is an account that highlights the multifaceted elements that have worked together to bring about a disparity between the seemingly entrenched socio-economic status of Indigenous and non-Indigenous Australians and to continue and intensify the social problems facing Indigenous communities.

Sutton points out that most of this decline can be placed in an era of civil rights and even as a result of the granting of those rights.[17] He is clear that the recognition and protection of those rights was proper but the implementation of policy in relation to those rights has been ineffective and detrimental.

We have to be careful not to confuse the use of the rights framework as a tool for expression of the relationship to, and claims against, the state with policies used to implement strategies in Indigenous communities. "Self-determination" as it has been expressed by Indigenous peoples should not be equated with the provision of parallel services. Nor can it, as an expression of Indigenous vision, be equated with government policy. Sutton writes:

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[15] Peter Sutton. *The Politics of Suffering: Indigenous Policy in Australia since the 1970s.* To be published in *Anthropological Forum.*

[16] Sutton. At p.7.

[17] However, the assumption that the technical obstacle to equal rights have been removed must be questioned in light of the 1998 amendments to the *Native Title Act 1993 (Cth).* Where ever the freedom from racial discrimination under the *Racial Discrimination Act 1975 (Cth)* is specifically deemed not to apply, we can assume the intentional infringement of equal rights.

> "In a remote community, I recently almost drove into a young woman who staggered across the road, clearly in advanced pregnancy, and clutching a can of petrol to her face. It is one of many communities in a desperate condition, and where observations of this kind are not rare. Officially, it was a community enjoying 'self-determination'. What 'self-determination' was being enjoyed by that unborn child?"[18]

Whatever "self-determination" may mean "officially", it cannot be argued that the implementation of policy has ever been done with the Indigenous definition of what that might mean as a starting point. To claim that the image evoked by Sutton is one that describes 'self-determination' as Indigenous people see it is to be deaf to the concept as we have described it.

To condemn the advocates of "self-determination" as a principle for Indigenous empowerment along with those who have implemented an ineffective government policy of "self-determination" fails to understand that there are two very different contexts in which the word is being used. It fails to hear the ambit of claims in the Indigenous expression of the notion. It also fails to appreciate the impoverishment of a language where descriptors of a relationship to the state are confined to 'self-management', 'self-government', 'self-determination' and 'sovereignty'.

When viewed in this light, expressions of 'self-determination' as a claim will necessarily be an evolving and continuing dialogue. Stopping that dialogue because "it plays into the hands of those who make political capital out of alleging that in Australian Indigenous affairs there is an enduring culture of complaint regardless of whatever progress has been made" [19] would be no different to stopping discussions about the possibilities for a treaty because Keith Windshuttle thinks it is divisive. Without such a dialogue, we will not encourage a diversity of voices. We will not hear the voices of those who need to be encouraged to speak up, those who are most often silent and forgotten, but whose view of 'self-determination' is as important as any other member of the Indigenous community.

It is an erroneous and misguided assumption that those of us who advocate the rights strategy have no idea about the levels of violence within our own communities, that we are not privy to the scenes that cause non-Indigenous experts so much angst. It is also an assumption that we have not been the victims of the very sorts of violence that they claim we overlook in advocating a rights framework. In many cases, our response to these issues has been driven by our own personal experience and it is unfortunate that articulate, educated and vocal Indigenous people can be mistaken as having very little to do with our own communities at a grass roots level. [20]

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[18] Sutton. At p.17.

[19] Sutton. At p.15.

[20] It is misleading to imply that the article by Diane Bell and T. Napurrula Nelson was followed by the reports and research of Judy Atkinson and Audrey Bolger as though Bell's article brought the issue of violence against Indigenous women to the attention of Indigenous women.

Those who advocate a right to drink and a right to beat their children or elders should be treated no differently than non-Indigenous people who advocate such rights. That is, those views cannot be taken to be reflective of the whole of the Indigenous community. There is a clouding of the diversity of voices within the community, which often includes a failure to acknowledge the voices *within* the community that do speak out. There can be a danger that the beginning of a debate in the non-Indigenous community about these issues can be interpreted as the first time in which the subject has been raised.

Sutton also observes that the implementation of effective policy has been stifled by the failure of policy makers to understand Indigenous culture. Romanticism about Indigenous culture, and assumptions that it has some kind of 'purity', are a problematic basis for rights protection. There is a real risk that we will be characterized as being Aboriginal only if certain pre-requisites are met. Then, if we fail to meet those stereotypes, we are deemed inauthentic and unworthy to enjoy the rights assigned to Indigenous people.

Aboriginal culture is diverse and dynamic.[21] We are not naïve about the manipulations of culture. When 'cultural practice' is cited as a defence in rape cases against teenage girls by gang-rapists, we cannot be assumed to so easily be misled about what Aboriginality and Aboriginal culture means.[22] Just as it is probably true that anthropology can give insights in certain circumstances into Indigenous culture, it is not true to assert that, as a discipline, it has always done so. It is not true to assert that it can provide us with a better definition of what culture is than other perspectives, most particular our own, or that we – as Indigenous peoples – lack the critical capacity to step back and view our culture reflectively.

The failure of policy has been compounded by the failure to understand cultural dynamics and the imposition of processes or institutions into Indigenous communities without thought as to how those cultural conflicts might then emerge. Crafting processes and institutional responses that marry cultural practices with structures in a way appropriate to the community should provide a basis for more effective structures. Just as we have seen the imposition of western models of dispute resolution into Indigenous contexts without thought to the cultural dynamics of the parties, so too we see the imposition of bureaucratic structures onto communities without thought of the

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[21] I would maintain that this aspect if captured by the definition in the Council for Aboriginal Reconciliation's rights strategy that Sutton is (at p.16) so critical of: "Culture extends further than languages. It is diverse and dynamic and reflects politics, histories, stories, songs, ceremonies, traditions and relationships to land."

[22] See the work of Judy Atkinson, Violence Against Aboriginal Women: Reconstitution of Community Law - the Way Forward. *Aboriginal Law Bulletin*. 1990, Vol.2 No. 46.; Audrey Bolger. *Aboriginal Women and Violence*. Darwin: Australian National University North Australia Research Unit, 1991.; Edie Carter, *Aboriginal Women Speak Out*. Adelaide: Adelaide Rape Crisis Centre Inc., 1987.; Judy Atkinson. "We Al-li. Womens Forum. Making a Difference", *Queensland Youth Affairs Conference Report*, 1994.; Aboriginal and Torres Strait Islander Women's Task Force on Violence. *Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*. Queensland: Department of Aboriginal and Torres Strait Islander Policy and Development (DATSIPD), 1999.

cultural conflicts that may arise. Innovative approaches to institutions and processes seems to be missing from an area where cultural conflict has left such devastating legacies.

Sutton notes that policy is given no connection to the notions of governance. There is no theory of governance articulated as policy-making and other powers are devolved to Indigenous communities. Here our views converge. With the concept of 'Indigenous governance', as with other issues around 'self-determination', there is no clear indication of what the large picture is and with such a vision absent, policy-making is aimless and misdirected.

VII. The Despair of Blacks – the Pearson Thesis

Simple solutions to complex problems as an approach to Indigenous policy have a long history. In his inaugural Charles Perkins Memorial Oration given at the University of Sydney on 25 October, 2001, Noel Pearson stated 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:

> "Maybe we should confront the possibility that the policy analysis and recommendations that have informed the past thirty years of determination may have been wrong. Our refusal to confront this possibility is a testament to the degree to which we will insist on our ideological indulgences ahead of diminishing social suffering."

Pearson's critique of the failure of policy further reinforces the proposition that a policy of "practical reconciliation" that only seeks to address areas through benevolent policy making is not going to be the solution. Policies and programs that only respond to problems as they emerge will not assist in the development of infrastructure and capacity that can work to reduce the occurrence and perpetuation of social and economic problems.

However, there are a couple of points about Pearson's thesis that need to be emphasised. While ineffective policy can be apportioned blame for the continual socio-economic disparity and social issues, we need to also question the assumptions that the "civil rights" era created an equal playing field. The assertion that the 1967 Referendum gave citizenship rights is one that continues to create myths about what the constitutional amendment actually achieved.

What it actually did was give the federal government the power to make laws in relation to Indigenous peoples and included Indigenous peoples in the census. In relation to the alteration of the races power, it is not even clear that the power can only be used for the benefit of Indigenous peoples.

Perhaps the ground swell of support for Indigenous peoples in 1967 led to romanticism of what we gained by constitutional change at the time. It did not provide Indigenous peoples with the right to vote, it did not guarantee protection against racial discrimination, and it did not provide any guarantees for the protection of property interests. The repeal of the *Racial Discrimination*

Act 1975 from applying to certain parts of the *Native Title Act 1993* through the 1998 amendments illustrates how vulnerable Indigenous rights are and illustrate how erroneous the assumption of an equal playing field is.

The failure of the equal wages policy identified by Pearson was undermined by the failure to protect Indigenous rights. It was introduced into a context where Indigenous rights to land were not recognised, respected or enforced. It was a failure to protect inherent and fundamental rights in the first place that has led to many of the problems that we face today. There is no attempt to capacity build in Indigenous communities through education and employment opportunities. This context, one of lack of rights recognition and protection, can assist us with hindsight to see why the results of the equal wages policy were as devastating as they were. As Pearson points out in his Charles Perkins lecture: "our dispossession is the ultimate cause of our passive welfare dependency."

The reason why policies have failed is that they have failed to reach a connection with a broader vision. Pearson admits that rights are important but does not explore the link between policy and rights. Disconnecting policy from the rights framework fails to understand that the rights framework can – in the long term – deliver outcomes and the protection of rights that short-term policy measures can only alleviate. It fails to admit that the strategy to recognize and protect the rights of Indigenous peoples includes economic rights and property rights. The recognition and protection of those rights puts land under people's feet and could allow access to natural and other economic resources. This protection of rights could work towards ensuring that Indigenous communities are economically self-sufficient. For example, the recognition of native title interests can return land to Indigenous communities and the protection of Indigenous intellectual property rights can lead to protection of income and the protection of cultural heritage. These allow the basis for income generation, enterprise and self-sufficiency in Indigenous communities that have the ability to take advantage of those assets. Despite being a long-term strategy, the rights agenda does have real outcomes that go to the heart of the socio-economic problems to which policy can only react.

It can sometimes be difficult to value those rights and choose one or the other but we do it and we ask judges to do it. And sometimes it is not hard to place one right over another. Pearson, and I agree with him, makes value judgements about rights in his thesis. Valuing rights of children to parents and freedom from violence against the asserted right to drink is stating that the rights of one are more important than the rights of another. When a policy decision is made to implement curfews or allow rights to drink we are making value judgements about rights. Policy makers who see their actions as separate to the rights agenda fail to appreciate the impact their decision-making has on the lives of those touched by their policies. Those who deny that policy making should take precedenc over a consideration of the rights analysis exhibits an inability to understand the very real connection between the two.

A danger of the Pearson thesis is that his experience in Cape York will be interpreted as being reflective of all Indigenous communities. Not all

Indigenous communities are incapacitated or dysfunctional. Many have been able to establish community initiatives - medical services, legal services, drying out areas. Some have made their communities dry. To assume that we are all in the miserable state is to overlook the agency and achievements of Indigenous peoples and our communities across Australia. We need to ensure that the crisis in some communities does not stop the progression of others. We cannot deny self-determination where there is the clear capacity for it. It is true, and if we look at where it is that communities are exhibiting self-sufficiency and the capacity for autonomy, it is often in places where an individual, or group of individuals, have made all the difference for the broader community. However, we need to ensure that the crises in some Indigenous communities do not stop the progression of development and autonomy in others. If we do, it is the same as saying that since Australia's human rights record is better than that of some of our neighbours, say Indonesia and China, we do not have to be monitored for breaches of those standards. That is, to deny furtherance of 'self-determination' in some communities because of the incapacity of others makes the Indigenous rights framework one that only responds to a 'worst case scenario' rather than supports aspirational best practices.

It may also be misinterpreted as implying that women and children are only victims in Indigenous communities when in fact they have been the biggest crusaders. 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. We can thank Pearson for gaining coverage that Indigenous women have been unable to gain. It is not an indictment on Pearson, but on media and policy-makers that Indigenous women cannot attract national media attention for these issues themselves.

IX. The Path Forward

One clear theme throughout this paper is the need to take a holistic approach to the socio-economic disparity and social issues that affect Indigenous communities. Aspirations contained in the concept of "self-determination", or in the content of a treaty provide a starting point for those discussions in terms of long-term strategies. This needs to be complemented with short-term targeted policy that addresses immediate concerns and works in with larger institutional and systemic change.

The gap between these long and short-term agendas will narrow as expressions of what 'self-determination' means in practice become more plentiful. Part of this process must include understanding the way in which Indigenous peoples use the term 'self-determination' and distinguish it from its use in other contexts. It also means acknowledging the impoverishment of the language we are using.

A rejection of the rights agenda is a rejection of the vision of Indigenous peoples for self-determination. It is patronising to assert that Indigenous peoples who claim rights, and express self-determination in the language of rights, have no idea about the issues that affect our community and that we do not understand the solutions to problems within our own communities. It is usually our personal experience with rights violations that have led us to work relentlessly on those issues and we would not be pursuing an agenda that we thought was a waste of our time.

It must also be remembered that the protection of Indigenous rights does not occur in a lineal progression. There is often an assumption that as time goes on, rights protections will gradually improve. Recent experience in Australia should highlight the fact that rights that have been recognized in the past – native title and heritage protection – can be extinguished. So it is more accurate to view Indigenous rights – and indeed rights in general – as something that has high and low water marks. It is an important observation in terms of strategy as it means more diligence must be exercised in the way which gains in protection are made at moments of increased support for these issues.

It needs to be remembered that, whatever the feeling in 1967, there was little effective structural change as a result of that collective sympathy. The next time there is such a ground swell of support, the agenda for structural change should be more ambitious to ensure that the achievements of that moment leave a longer, more positive legacy. And it must be a legacy that allows Indigenous peoples self-determination in the terms that we decide.