everyone would be a non-contentious way in which to ensure some Indigenous rights protection. Public discussion needs to be focused on whether we should have a constitutional or a legislative Bill of Rights and, indeed, a legislative Bill of Rights could be viewed as an interim step towards a constitutionally entrenched Bill of Rights.[15] A Bill of Rights, like the *Human Rights* Act now enacted in the Australian Capital Territory, has no reference to specific Indigenous rights. Instead, it refers to rights such as education, health and equality. These would be rights protections that would benefit all Australians but would have particular resonance for Indigenous people.

- **A Non-Discrimination Clause:** Such a clause could enshrine the notion of non-discrimination in the Constitution. Such a clause must also adhere to the principle that affirmative action mechanisms aid in the achievement of non-discrimination, consistent with international human rights norms.

- **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.

- **Repeal Section 25:** Section 25 of the Constitution contains the clause:
  ... if by the law of any State all persons of any races are disqualified from voting at elections...

The racist implications of the section offend principles of racial equality and even though it may be unlikely that the States will pass such legislation, we need to move away from expressions of such overt racism in the text of the Constitution.

Some of these steps to improve the Australian rights framework for Indigenous people – a Constitutional preamble, a Bill of Rights – would have benefits for all Australians. This reinforces the point that measures that protect the rights of all Australians will have particular relevance and utility for Indigenous people.

(c) Bureaucracy in a Reconciled Australia

[15] For a full discussion of the legislative Bill of Rights model, see George Williams. *A Bill of Rights for Australia*. Sydney : UNSW Press, 2000.

The era of "practical reconciliation" has seen a false division created between the focus on immediate issues – family violence, substance abuse, socioeconomic disparity – and the rights agenda. This is unhelpful as it places one strategy in competition with the other. Instead, the relationship between the two should be viewed as a trajectory with policy initiatives at one end and structural changes on the other. Policies will only help to achieve long-term change if they work towards a broader and systemic vision of change at the same time as they target inequality and identify problems in the short term. Similarly, long-term strategies are ineffective unless the strategy for achieving them includes considered and targeted policy.

In a reconciled Australia, the bureaucracy would return to the neutral body that it is theoretically supposed to be in a Westminster system of democracy. Recently, we have seen the erosion of the neutrality of the public service. In the currently political climate, the public service has lost much of its objectivity.

Michael Pusey writes about this shift. He points to the departments of the Prime Minister, Treasury and Minister for Finance when he writes:

> Together they have destroyed the capacity of the once excellent and highly professional public service, one of the best in the world, to deliver independent advice and policy in the public interest and without fear or favour.[16]

He notes that the purge of the Senior Executive Service that started in the mid-1980s saw the replacement of experienced officials with economists, accountants and people with degrees in business administration. This had the following result:

> For the most part, the new breed are extremely bright model-makers and strategic analysts, with a trained incapacity to think about society or the common interest. They are united by a common determination to give the markets primacy over the society...[17]

III. No 'Us' and 'Them': The Link Between Law and Society

In his book, *Against Paranoid Nationalism*, Ghassan Hage describes the difference between a caring society and a defensive one. He writes:

> The caring society is essentially an embracing society that generates hope among its citizens and induces them to care for it. The defensive society, such as the one we have in Australia today, suffers from a scarcity of hope and creates citizens who see threats everywhere. It generates worrying citizens and a paranoid nationalism.[18]

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[16] Michael Pusey. *The Experience of Middle Australia: The Dark Side of Economic Reform.* Port Melbourne: Cambridge University Press, 2003. At p.10

[17] Ibid.

[18] Ghassan Hage. *Against Paranoid Nationalism: Searching for Hope in a Shrinking Society.* Annandale: Pluto Press, 2003. At p.3.

If we are to have a society that values fairness, equality and justice, we must strive towards the vision of a caring society. In order to do that, we need to move from an 'us' and 'them' mentality and realise that we are, as Indigenous and non-Indigenous people, bound to each other's fate. As a colonised people, we have long understood that we are beholden to the fate of non-Indigenous Australia. But we do not as often enter into the consciousness of Australia's dominant culture the way that we should.

Far from being the special and separate sector of the Australian community, we are its benchmark. The way to measure the effectiveness and fairness of our laws is to test them against the way in which they work for the poor, the marginalised and the culturally distinct. It is not enough that they work well for the rich, well educated and culturally dominant. This measure of fairness and equity rejects an 'us' and 'them' mentality and holds that our fate and our worth as a society are measured best by how the most disadvantaged within our community fare. By valuing laws, policies and practices that work best because they achieve an equality of outcome, society begins to understand that extending the protections of a democratic society to those who are marginalised does not disadvantage another sector; it actually makes everyone better off.

Indigenous people are the best measure of the fairness of Australia's laws and institutions. As an historically marginalised, culturally distinct and socioeconomically disadvantaged sector of the Australian community, our treatment within Australian society is its success or its condemnation. Viewing Indigenous well-being in this way moves us from the periphery of society's consciousness to its centre. Not only does this erode the 'us' and 'them' mentality, it also moves to a mind-set that sees the transmission of the benefits of a democratic society to the disadvantaged as a transaction that will enrich society as a whole. A reconciled Australia would be one where Australians accept this and our institutions reflect this philosophy.

THE ABORIGINAL JUSTICE ADVISORY COMMITTEE'S REPORT ON ABORIGINAL WOMEN OFFENDERS[1]

LARISSA BEHRENDT*

> "The caring society is essentially an embracing society that generates hope among its citizens and induces them to care for it. The defensive society, such as the one we have in Australia today suffers from a scarcity of hope and creates citizens who see threats everywhere. It generates worrying citizens and a paranoid nationalism."[2]

Indigenous women are the largest rising prisoner population in the world and New South Wales has the highest imprisonment rate. A report commissioned by the Aboriginal Justice Advisory Committee, *Speak Out Speak Strong,*[3] found that 31% of all women in prison are Indigenous. They are predominantly young (average age 25), have low levels of education and high levels of unemployment. 60% of the survey had been convicted of a serious offence and 36% had their first convictions recorded between the ages of 11 and 12. 98% of the offenders had prior convictions as adults; 26% had between 15-30 previous convictions and 75% had been incarcerated previously. Most were single mothers with between two to four children of which they had the primary care. They were often also responsible for other, non-biological children and for older relatives.

Sixty-eight per cent of the women surveyed were on drugs at the time of the offence, 14% were under the influence of alcohol. One third of them said they were heroin users. Seventy per cent of the women had been sexually abused as children, 78% had been victims of violence as adults and 44% had been sexually assaulted as adults.

There are a higher number of Indigenous women on remand, which increases the numbers of Aboriginal women in prison. The AJAC study reflects an increase in a wide variety of offences, particularly those such as offences against the person that attract custodial sentences. Aboriginal people are less likely to get bail and, when bail is granted, seem to be more likely to breach conditions attached. This has a serious implication: three times more deaths in custody occur amongst remand prisoners. The study showed that of the 30% of women who had been granted bail at some stage, 67% said that they had previously breached bail conditions for a broad range of reasons, including failure to notify of change of address, failure to report to police/parole officer, failure to attend weekend detention and failure to complete drug rehabilitation. The study found that in many cases, Aboriginal women were not expecting to gain bail; they were expecting a prison sentence.

This snapshot starts to reveal a number of themes. There are the indicators of cyclical poverty (low levels of education, high levels of unemployment), the use of drugs

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[1] This article is an edited version of an address presented to the Supreme Court Annual Conference, August 2004.

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[2] Ghassan Hage, *Against Paranoid Nationalism: Searching for Hope in a Shrinking Society*, 2003, Pluto Press, Sydney, p.3.

[3] Rowena Lawrie, *Speak out Speak Strong: researching the needs of Aboriginal women in custody*, 2003, AJAC, Sydney.

and alcohol, recidivism and institutionalism, and cycles of abuse. One revealing piece of data was that 98% of those who said they were sexually assaulted as children also had a drug problem. The study identified a clear link between child sexual abuse, drug addiction and offending behaviour. The evidence of how many children and extended family members are supported by incarcerated women starts to give a glimpse of the impact of imprisonment of Indigenous women on Indigenous families.

If there is evidence that there are elements to criminality that relate to socio-economic status, the solutions to reducing the over-representation of Indigenous women as offenders relate to breaking the cycle of poverty and the cycles of violence. Ninety-two per cent of respondents to the AJAC survey said they were not employed at the time they committed their offence. Only 52% of those who were unemployed said they were receiving benefits from Centrelink. 42% said that they had never received any benefits at all. This survey showed that 43% of the participants who had dependant children did not receive an income from employment or Centrelink payments. Approximately 70% of the surveyed participants said they were stay-at-home mothers. Thirteen per cent said that their income was from drug dealing. According to the AJAC survey, one-quarter of Aboriginal women in custody have relied on crime to support themselves and family members.

The Law and Order Campaigns

The statistics of increased Indigenous incarceration show that seemingly neutral laws – particularly those in the area of criminal justice – have an unequal impact on different sectors of the community. One of the key obstacles to finding solutions is that the populist law and order agenda is always at odds with recommendations for flexible, innovative and alternative methods of sentencing and dealing with offending behaviour. The "tough on crime" laws are impacting on many poor and marginalised people who are convicted, not of serious offences but for crimes against property or driving offences.

For example, when changes were made last year to the *Bail Act*[4], it was foreseeable, and pointed out to the government, that the changes would disproportionately impact on Indigenous people. The main mechanism put in place to counter this was to employ more Indigenous bail officers. This is an example of the episodic and ad hoc way in which the disproportionate impact on Indigenous people is dealt with in the criminal justice system. This approach tinkers around the margins rather than addressing the structural and institutional problems that have been identified as contributing to the over-representation of Indigenous people – particularly women and children – in the criminal justice system.

Suggested reforms

There are at least two ways that the NSW jurisdiction could begin to make that shift. The first is simple. When the NSW Parliamentary Inquiry rejected a Bill of Rights for this jurisdiction, it recommended that a Parliamentary Committee be established to scrutinise Bills as they come before Parliament to advise on the extent to which legislation

[4] *Bail Amendment Act* 2003 (No 22).

will breach human rights.[5] To this end, the Legislation Review Committee has been established and it is mandated to report on whether Bills trespass on "personal rights and liberties." Like similar committees in other jurisdictions, the work of the committee is not guided by reference to a document of accepted and agreed rights and is not required to pay particular attention to the impact on Indigenous people. It is within the work of such committees that the principle of using the impact on Indigenous people as the litmus test of fairness could be implemented.

The second example would require more commitment. The Aboriginal Justice Advisory Council has been running a trial in Nowra of circle sentencing, an alternative approach to dealing with juvenile offenders. The results of the trial to date have been encouraging and pilots are being undertaken in other parts of New South Wales. This is an innovative mechanism to assist with the problem of the disproportionate number of Indigenous youth who have contact with the criminal justice system. Circle sentencing deals with offending behaviour in a focused way to build a sense of personal responsibility and strengthen community ties. Part of the failure of pilot programs to provide long-term solutions, even when they are successful in their initial stages, is that they often fail to attract long-term or broad political and economic support. Circle sentencing should not just be viewed as a mechanism that benefits Indigenous people. The fact that it reduces recidivism and contact with the criminal justice system for Indigenous children should see its extension across both Indigenous communities and the broader community as well. It is a process that should be attracting the same level of commitment that has seen the construction of new prisons in New South Wales.[6]

Conclusion

Indigenous people are the best measure of the fairness of Australia's laws and institutions. As an historically marginalised, culturally distinct and socioeconomically disadvantaged sector of the Australian community, our treatment within Australian society is its success or its condemnation. The way to measure the effectiveness and fairness of our laws is to test them against the way in which they work for the poor, the marginalised and the culturally distinct. Indigenous experience currently illustrates that the recognition and protection of their rights is still vulnerable to the whims of the legislature and the ebb and flow of the tide of public opinion.

[5] Legislative Council Standing Committee on Law and Justice, *A NSW Bill of Rights*, 2001, Report 17, Sydney.
[6] For example, the Dillwynia Correctional Centre and the Mid-North Coast Correctional Centre, Kempsey opened in 2004.