

Speech at the launch of a campaign for a NSW Human Rights Charter
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By Professor Larissa Behrendt*

While the experience of Indigenous people in modern Australia offers many examples of the infringement of basic human rights – dispossession, genocide, cultural genocide, lack of access to services, racism in the provision of services – the policy of removing Aboriginal children from their families is one that also leaves a legacy in Aboriginal communities today.

In 1997, our High Court considered a case brought by several members of the “stolen generation” and a mother who had lost her child to the policy. The Aboriginal plaintiffs argued that the policy of removing children infringed on some of their basic human rights including the right to due process before the law, equality before the law, freedom of religion and freedom of movement.

That the High Court found that Australian law did not protect any of those rights is as instructive as it is sobering. It tells us that many of the rights that Australians would believe are protected by the laws of this country are actually not protected at all.

And the decision in the Kruger case also tells us that where there are gaps in rights protection in Australia, breaches of human rights are most likely to be experienced by the culturally distinct, socioeconomically disadvantaged and the historically marginalised.

Chief Justice of the High Court Murray Gleeson has referred to these gaps in protection of human rights as ‘constitutional silences’ and a Bill of Rights is an important mechanism in seeking to remedy the harshest impacts of those omissions.

When undertaking the community consultations as part of the work of the ACT Steering Committee on a Bill of Rights, I was struck by a view that, since the legal system works well enough, there is no need to tinker with it. Such a view applies a very narrow test of the success of Australia’s laws. It certainly excludes the experience of Indigenous people from that analysis.

Aboriginal people – who see their cultural rights eroded, native title interests extinguished, are over-represented in the criminal justice system and experience racism in the delivery of basic services – do not share such an uncritical view of the performance of our legal system in protecting rights.

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 minorities of that above 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.

This notion that our human rights record is an important benchmark for our society understands what Martin Luther King meant when he wrote,

“Injustice anywhere is a threat to rights everywhere.”

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 neighborhood 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.

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 creates “a lawyers’ 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. And as an Aboriginal person, I like the idea that policy makers and lawmakers will have to reflect on the impact of what they are doing on the members of my community.

And that is why I support a Charter of Rights for New South Wales. Creating a Bill of Rights in legislative form means that the debates about how to balance the rights protected against other priorities remains in the public domain. It means that, when government’s debate the balancing of rights or propose to over-ride aspects of the Charter, this is a discussion that takes place in the public realm and allows citizens to become actively involved in that public debate about the way in which we balance and protect rights.

The effect of this can be seen in Canada where the experience of a legislative Bill of Rights, that preceded the Constitutional enshrinement of certain rights, led to a more heightened awareness amongst Canadians that they held certain rights against their government.

While such a Charter should have particular mind to the issues of Indigenous people, it is also important to recognise that all rights that will be given greater protection by the Charter will have a special importance for Aboriginal people. Many of the rights suggested in the draft Human Rights Act will provide protection for vulnerable members of the Australian community.

Rights to due process before the law, rights to education and work and rights to a fair trial are fundamental human rights that have not been protected adequately under Australian law to date and that failure has impacted on Indigenous people the most.

For the members of the stolen generation who could not get redress from the High Court for the breaches of their human rights in the Kruger case, the protection of freedom of movement, freedom of religion, equality before the law and the protection of the family will have particular resonance and significance.

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 governments 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.

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.

Why should we be less worried about an Aboriginal child experiencing third world levels of health care in Australia than for the child actually living in the third world. And secondly, 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.

As has been attributed to Thomas Paine:

“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."

A Human Rights Charter will bring New South Wales a little closer to being able to boast of its constitution and its government.

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* Prof. Larissa Behrendt is Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning at the University of Technology, Sydney. Larissa is a Judicial Member of the Administrative Decisions Tribunal, Equal Opportunity Division and the Alternate Chair of the Serious Offenders Review Board. She has published on property law, indigenous rights, dispute resolution and Aboriginal women's issues. Her book, *Achieving Social Justice: Indigenous Rights and Australia's Future* was published by The Federation Press in 2003. She won the 2002 David Uniapon Award and a 2005 Commonwealth Writer's Prize for her novel *Home*. Larissa is a Board Member of the Museum of Contemporary Art and a Director of the Sydney Writer's Festival and the Bangarra Dance Theatre.

This speech was condensed into an Opinion Piece in the Sydney Morning Herald, 17 April 2007 "Rights shouldn't rely on government whim" by Prof. Behrendt: <http://www.smh.com.au/news/opinion/rights-shouldnt-rely-on-government-whim/2007/04/16/1176696754129.html>

For further details on the NSW Charter of Rights group: <http://www.nswcharterofhumanrights.org/>

Civil Liberties Australia
Box 7438 FISHER ACT 2611 Australia
Phone: 02 6288 6137 International: + 61 262 886 137
Email: <mailto:secretary@cla.asn.au>
Web: <http://www.claact.org.au/>