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TRIBUTE TO JOHN MARSDEN

On 4 March 2005, the NSW Council for Civil Liberties (NSWCCL) held a dinner ceremony to formally award John Marsden AM life membership of NSWCCL. A full report of the dinner will be in the next issue of *Civil Liberty*. The following is an edited version of the appreciation of John Marsden written by Ken Buckley.

In his recent autobiography,¹ John Marsden himself emphasises one aspect of his character as central to his being: he is homosexual and proud of it. The difficulties and discrimination encountered by gay men, led to his passionate concern for justice and civil liberties, not only for gays, but also other minority groups such as Aborigines and refugees.

Beginning as a solicitor in the outer Sydney suburb of Campbelltown in 1966, John Marsden's drive and ability brought him into prominence in many fields, notably in legal practice and as a successful businessman. In the 1980s, Marsden exercised considerable political influence, bolstered by his generosity and flair for lavish entertainment. John used his influence to support gay rights campaigns, in demonstrations and in legislative reform to establish equality before the law. It was a long fight, but it resulted in some major changes.

As a solicitor with a heavy criminal law practice, Marsden had a strong commitment to social justice, helping many people who could not afford legal assistance. From 1978, he was an active member of our Council for Civil Liberties, and was President of NSWCCL from 1984 to 1986, until he stood down due to his growing involvement in the NSW Law Society. He was elected as President of the Law Society for the year 1992.

In that capacity, Marsden was unique in the Law Society's history, pressing for modernisation of its approach and speaking out publicly on issues such as

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JOURNAL DEADLINE DATES

Material Deadline: 4th May 2005

We may not be able to accept documents that are not sent on disk or by email attachment. Digital images will be accepted.

Articles: 1000–2000 words, reviews 500 words and letters 200–300 words.

¹ Marsden, J 2004, *I am what I am*, Penguin/Viking.

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Meetings are usually held at 6.30pm on the fourth Wednesday of the month, at the Council's office, 149 St Johns Rd, Glebe. Members are welcome to attend as observers.

SUBCOMMITTEE MEETINGS

Subcommittees usually meet monthly. For further information, please contact the Executive Secretary who can put you in contact with the relevant convenor.

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TRIBUTE TO JOHN MARSDEN (cont')

accessible justice, Legal Aid funding, and equality before the law. From his experience as an advocate, Marsden knew that some lawyers were 'in bed' with the police, and that there was a considerable degree of corruption in the Police Force, together with excessive police violence, and false 'verballing' of evidence in court.

This personal experience came in handy when Marsden was appointed a member of the NSW Police Board in 1992—against the opposition of the Police Commissioner. The Board was the only civilian check on the Police, one of its main functions being to decide upon promotions to senior police positions. Marsden knew that certain applicants did not favour discrimination against Aborigines and minority groups. This could not be said about other applicants, and Marsden asked searching questions at interviews. He made enemies in the process, and this was probably reflected later when Marsden came under police investigation himself in the 1990's.

After his one year service as President of the Law Society, Marsden returned to work in the NSWCCCL and he was again President between 1993 and 1997. He is remembered with fondness as a dedicated fighter and a first class organiser. He used his many connections to the full. For example, at the beginning of one parliamentary term, he arranged a meeting between himself and Attorney General Jeff Shaw, with six major issues of civil liberty on the agenda. A whole morning was spent in fruitful discussion between John Marsden with four other members of the NSWCCCL Committee, and Jeff Shaw with four members of his staff.

John was also a magnificent fundraiser for NSWCCCL. Using his connections and staff force, and putting his drive into full throttle organisation mode, he made thousands of dollars for NSWCCCL through large, well attended functions, including breakfasts and dinners in Sydney and at the Berowra

Waters Restaurant. On many occasions, he also made his own home available for enjoyable fundraising barbeques for NSWCCCL members.

In 1995–96, Channel 7 television aired defamatory allegations about Marsden to the effect that he was a paedophile. John's homosexuality was never in doubt, but the assertion that he had sexual relations with young boys was untrue and highly damaging to his reputation. So Marsden decided to take court action against Channel 7, brushing aside urgings from some friends that it would result in a lot of mud being thrown at him.

Despite his ultimate victory in court, the trauma that John went through, takes up about half his autobiography, and the affair absorbed all his energy for years. In 1997, he was given leave of absence from his position as President of NSWCCCL. For different reasons, he was not reappointed to the Police Board, which was itself abolished soon after—to the delight of the Police Service.

Marsden's friends at NSWCCCL never forsook him. In 2003, he was unanimously voted a life member. This honour is not bestowed lightly. Indeed, in the 40 years since it was established, only two other living persons¹ have been made life members of NSWCCCL, and both of them gave character evidence for Marsden in his court ordeal.

Ken Buckley Committee Member

¹ NSWCCCL Life members: Ken Buckley, Mary McNish.

REPORTS

CRIMINAL JUSTICE SUBCOMMITTEE

The NSW Premier, Bob Carr, is at it again. On a visit to the Mulawa women's prison in mid-January, the Premier boasted that the prison population in NSW had risen above 9000 for the first time ever. According to the *Sydney Morning Herald* (14 January 2005, p. 4), Mr. Carr believes that law-abiding citizens should be 'comforted' by the fact that so many offenders are 'off the streets and behind bars'. Premier Carr attributes the record figures to longer sentences, tougher bail laws and higher police numbers.

What the Premier fails to mention is that the rate of recidivism in NSW is running at about 45%—far above the national average. Rehabilitation, it seems, is not a priority for the NSW government, nor is addressing the underlying social issues. As Dr. Eileen Baldry of the University of NSW points out, the increased prison population is more accurately characterised as a 'failure on the part of the government to deal effectively with serious social problems'.¹ There has been a failure to provide adequate affordable public housing; a failure to support people with mental health issues post-deinstitutionalisation; and a failure to address the unemployment, poor education and lack of services in long-deprived communities.

On the government's own figures only about 7% of prisoners are classified as 'serious offenders' (628 out of 9000). The vast majority of prisoners are people who cannot get bail and people on short-term sentences of six months or less.

¹ 'Prison boom will prove a social bust', *Sydney Morning Herald*, 18 January 2005, p. 13.

On the topic of short-term sentences, in November 2004 the NSW Sentencing Council released its report into short sentences. The Council cautiously supports the consideration of abolishing short-term sentences, but only after trialling it throughout NSW for indigenous women. There is the danger that the reform will *increase* the length of prison sentences, rather than decreasing them, so the Council's cautious support for the idea is welcome. You can read more about the report on the NSWCCCL website (<http://www.nswccl.org.au/>).

Another report that has finally seen the light of day is Justice Jane Matthew's report on the Carr government's proposed changes to the rule against double jeopardy. It is, generally, a good report. However, her Honour surprisingly supports the retrospective effect of the legislation. You can also read more about this report on the NSWCCCL website.

December 2004 saw a rush of legislation through both the Federal and State Parliaments, affecting the way criminal justice operates in NSW. The federal Attorney General now has the power to determine who can and who cannot see evidence in a criminal trial, if that evidence affects national security. In NSW, the penalties for child pornography offences have been increased, and Corrective Services have taken over the running of the Kariong Juvenile Correctional Centre.

Finally, one issue the subcommittee will be keeping a close eye on is the proposal for covert search warrants in NSW. The idea that police could search premises without notifying its occupants is outrageous. It is an invitation to abuse and corruption.

If you're interested in joining the subcommittee, please contact the NSWCCCL office to register that interest. All members are welcome.

Michael Walton
Convenor

LEGAL PANEL REPORT

As the journal goes to press, NSWCCCL is involved in, or monitoring the following matters:

1. *Universal Music and Ors v Sharman Licence Holdings and Ors*

As reported in the last journal issue, NSWCCCL is seeking to appear in this matter as *amicus curiae*, together with the Australian Consumers Association and Electronic Frontiers Australia. The civil liberties issue involved is the ability to promote peer-to-peer file swapping software for legitimate purposes (for example, political campaigns), without onerous requirements for extensive monitoring to ensure that private copyright interests are not infringed.

NSWCCCL's application was deferred by the Court until after evidence from the parties was complete. The *amicus curiae* submission has now been made. NSWCCCL was legally represented by the Communications Law Centre, and preparation of submissions was assisted by a team of volunteers, and senior counsel appeared pro bono.

2. *Australian Wool Innovation Limited v People for Ethical Treatment of Animals Inc (PETA) and Ors*

PETA, a large lobby group based in the US, is presently organising a boycott of Australian wool because of its objections to common farming practices in the Australian wool industry and live sheep exports.

Australian Wool Innovation and numerous wool growers have commenced proceedings under section 45D of the *Trade Practices Act* against PETA, the NSW branch of Animal Liberation and various individuals associated with those bodies, seeking an injunction to prevent organisation of the boycott.

The case raises the extent of the freedom to promote commercial boycotts in aid of ethical positions. NSWCCCL issued a media release in support of PETA when the matter was first in Court in December 2004.

In March, the Federal Court struck out Australian Wool Innovation's pleadings, but did not dismiss the proceedings leaving the way open for an amended statement of claim to be filed.

3. *Prosecution of refugee activists for false passport applications*

In December 2004, four people associated with refugee activism were charged with offences in connection with false passport applications, after a series of raids conducted by the Australian Federal Police. The allegations against the people charged include that the passports were for escapees from immigration detention.

These charges seem to represent a further extension of the government policy of mandatory detention. If the passports were for escapees from detention, then surely the government's objective of the removal from Australia of unlawful non-citizens has been promoted by any assistance rendered by refugee activists.

The charges are being vigorously defended. To date, charges against two of the four individuals involved have been dropped after the Commonwealth DPP recognised that there was no substance in them. NSWCCCL is supporting the campaign for charges against the remaining two to be dropped, and has arranged legal representation for them.

Stephen Blanks
Convenor

THE RED ROOM COMPANY

POETRY CRIMES PROJECT

LIVE! Featuring Australian poets at the
 Justice and Police Museum
 (part of the 2005 Sydney Writers' Festival)

May 2005

<http://www.redroomorganisation.org/>

Twelve emerging poets have been commissioned to write about crime and justice, and be interviewed and recorded. Poems range from ballads about Roger Rogerson & Neddy Smith, domestic violence, indigenous communities to daytime attacks at ATMs. Poems are satirical, freaky and highly imaginative.

Photo 1: Protesters outside the Downing Centre calling for the passport charges to be dropped (11 January 2005).



ARTICLES

RECONCILIATION AND HUMAN RIGHTS: THE CHALLENGE FOR ALL AUSTRALIANS¹

Larissa Behrendt²

The welcome to country is a protocol of the Aboriginal community and it did, throughout the decade of reconciliation, find itself become a part of the protocols in more and more pockets of the wider community. It is prevalent in local council chambers, Universities, meetings and corporate functions. It is more than just an acknowledgement of prior ownership; it is a reminder of the importance of symbols—how paying respect and giving dignity are important values within any community, a sign of tolerance for difference. It is also a small but important way in which the acknowledgement of Aboriginal people has been incorporated into the psyche of Australians.

But this protocol needs to be viewed in a broader context of assessing where we find ourselves for those of us who still believe in the importance of working towards a reconciled Australia. For me, 'reconciliation' is a vision of Australia in which the unfinished business between Aboriginal and non-Aboriginal Australia are resolved. It's an ambitious agenda, an aspirational one. It is a pathway that seeks to eliminate the difference between the socio-economic status of Aboriginal people and those of the rest of Australia. It seeks to encourage economic development within Aboriginal Australia to stimulate Aboriginal economies. It seeks to enshrine and protect the rights of Aboriginal people—including the rights to access services, to be free from discrimination, to have languages and cultural heritage protected. And a reconciled Australia imagines a changed community mind-set that facilitates partnerships with Aboriginal people and sees an Australia that acknowledges and embraces Indigenous presence, experience, culture and history.

The official decade of reconciliation is over and it feels that we are perhaps further away from taking that path to reconciliation. It was true to say that there has been a sustained commitment to reconciliation in sectors of the Australian community and through bodies such as Reconciliation Australia, Australians for Native Title and Reconciliation, and local reconciliation groups. But, it is also true to say that this vision of Australia is not one that is shared by the majority, or at least one that the majority of Australians feel is important enough to make a national priority.

Aboriginal issues were absent from the election. Some would say that it is a good thing when elections are not run on race issues that highlight the intolerance and racism of Australian society. But it is also hard not to feel sorrow that the issues of Aboriginal Australia are something that divides the nation rather than unites it.

¹ This address was given to a luncheon held by the NSWCCCL on 26 November 2004, in the President's Private Dining Room, NSW Parliament House, Sydney (headings added).

² Larissa Behrendt is the Professor of Law and Indigenous Studies at the University of Technology, Sydney and the Director of the Jumbunna Indigenous House of Learning.

The ideological thrust of 'Indigenous specific funding' and 'practical reconciliation'

From the very beginning of his Prime Ministership, John Howard distanced his government from the broad vision of reconciliation. He rejected the notion of rights, the notion of self-determination and stated that his government's approach to Aboriginal policy would be one he labeled 'practical reconciliation'. With seductive political rhetoric, Howard stated that this policy would focus on the issues that were most important to Aboriginal people—health, housing, education and employment. The government claimed that its commitment to these issues would be shown by its commitment to greater funding for what it referred to as 'Indigenous specific programs'. But like most seductive political rhetoric, 'practical reconciliation' needed closer scrutiny.

Every one interested in bettering the position of Aboriginal people in Australia would also highlight the importance of health, education, housing and employment as key socio-economic matters to be addressed. However, the funds that made up the \$2.2 billion-plus spending on 'Indigenous specific programs' included the amounts spent attempting to defeat native title claims and money spent opposing the plaintiffs in the stolen generations test case of Gunner and Cabillo. So 'Indigenous specific funding' includes the money spent defeating Indigenous issues and Indigenous claims.

But there are some more fundamental problems with this approach. It seeks to draw a false distinction between the protection of rights and a policy agenda. The plethora of issues that face Aboriginal Australia will require a more sophisticated approach than simply targeting problem areas with policy, and a more sophisticated approach than simply relying on the rhetoric of rights. The false either/or dichotomy of policy and rights fails to appreciate the link between the need for effective policy and the need to protect the inherent rights of Aboriginal people from violation. The false division between the socio-economic issues—family violence, substance abuse, socio-economic disparity—and the rights agenda, 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 can identify problems in the short term. Similarly, long-term strategies are ineffective unless the strategy for achieving them includes considered and targeted policy.

This approach always reminds me of something that Roberto Mangabiera Unger, the world-renown critical legal scholar, wrote:

It is true that we cannot become visionaries until we become realists. It is also true that to become realists we must make ourselves into visionaries.

It is this mix of pragmatism and forward vision that needs to unite in the approach to Aboriginal issues.

There has been an ideological force driving the policy of 'practical reconciliation'. The ideologies of assimilation and mainstreaming have re-entered the approach to Aboriginal issues at the national level. The pursuit of these ideologies has seen the agenda to dismantle the national representative structure that was part of the Aboriginal and Torres Strait Islander Commission (ATSIC) and it has seen the major programs for Aboriginal people shifted from Aboriginal and Torres Strait Islander Services into mainstream departments. No doubt these moves will appease the constituency which has always resented the attention to

Aboriginal issues and has interpreted the need for targeted programs as 'welfare bludging' or 'getting something for nothing'.

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

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

There is no evidence to show that the ideologies of mainstreaming and assimilation that failed so dismally in the past, will work now. This new shift in the delivery of Aboriginal policy and programs does not offer any new insights or any promise of more effective policy-making and program delivery. In fact, it must be emphasised that there is nothing 'new' about this ideological thrust that will shape the thinking behind Aboriginal affairs in the next few years.

The language of responsibility

There is, however, new language that has crept in to this policy approach, and that is, the language of 'responsibility'. The notion of 'responsibility' is also seductive political rhetoric that appeals to the section of the community that resents welfare dependency, especially amongst Aboriginal people. Reports in the National Indigenous Times this last week of leaked cabinet documents show the extent to which this approach runs the risk of turning into punitive and paternalistic policy. According to those reports, suggestions were made that would see communities rewarded with DVD players and pools for good behaviour—turning up to school or cleaning up their rubbish—and punished for bad behaviour—smart cards if there is poor financial management.

The language of 'responsibility' was lifted from the approach that Noel Pearson has taken to addressing issues that face Aboriginal communities in Cape York; but in that context Pearson was not arguing for the abolition of welfare—as some conservative critics declared—but for the reform of the welfare system to enhance the economic self-sufficiency of Indigenous communities. That is, rather than seeing 'responsibility' as a concept where poor people were rewarded or punished by government, Pearson's main aim was to ensure decision-making power was returned to a regional community level. It is through this arrangement that the specific and pressing needs of the Indigenous community can be more adequately met. He has also expressed frustration at the focus on broader rights issues at the expense of the very real and urgent, life and death issues that face Indigenous communities in his area of Cape York.

In expressing that frustration, Pearson does not appear to reject a rights agenda—though some conservative commentators credit him with doing so. That is, Pearson understood in

this strategy that targeted policy needed to be linked with structural change, with a rights agenda. What is also noticeable in Pearson's approach is that he understands that the most effective policies and programs will be developed from the community level up. This is so because communities are better at identifying their needs and priorities, they are better at knowing what mechanisms for service delivery will suit the people in their community; and the policies and programs will work better if communities feel some ownership of them. That is, these programs and policies work better if they are based on recognising the principle of self-determination.

Issues relating to the provision of services

During this time of masking 'mainstreaming' and 'assimilation' as 'new' policy initiatives, there has been notably no substantial increase in funding commitments to the key socio-economic areas that were supposed to be the focus of 'practical reconciliation'.

Take the example of Aboriginal health. During the free-spending promises of the election from both major parties, there was no increase in funding to Aboriginal health. Access Economics, in a report titled Expenditures on Aboriginal and Torres Strait Islander Health, estimated that Indigenous health needs were under-funded by \$452.5 million a year. When it is remembered that over \$60 billion is spent on health by governments each year, this under-funding would require less than a 1% increase in that spending. As Australians for Native Title and Reconciliation have noted, the Federal budget for 2004/2005 allocated only an additional \$10 million for primary health care, 40 times less than what was needed.

There is another factor that complicates service delivery and policy-making in this era. Evident in the policy released by the Liberal Party in the lead up to the election, was the romanticism of remote Aboriginal communities as being more needy than those in urban and rural areas. There is no doubt, and research supports the finding, that remote communities are, relative to other Aboriginal communities more in need of support and services. However, only 24% of the Aboriginal community live in remote areas and many of the government's policies only target those communities. This leaves out communities in Walgett, Redfern, Framlingham, Brisbane, Melbourne and Sydney. When looking at the poverty in areas like Mount Druitt and the Redfern Block, and the range of socio-economic issues that face those communities, a policy that states that these are issues just as easily tackled by mainstreaming, as opposed to targeted policy and program delivery is not convincing.

While it is perhaps easier politically to gather support from the broader Australian community for dealing with problems in Aboriginal communities where the population looks more like 'real' Aborigines, it is irresponsible, and in the end, bad policy, to ignore the other 76% of the Aboriginal community. Australian Bureau of Statistics data consistently holds that these communities—whether urban or rural—also suffer from lower education, higher unemployment, poorer housing and poorer health than all other Australians. To leave them out of policy focus will only lead to more social problems later on.

One of the key challenges to the delivery of health and education in particular is that they are areas in which responsibility is shared between federal and state/territory governments. There was one initiative by the Howard government that promises to shed some light on the cost shifting between governments and the poor communication and co-ordination between government departments at both levels.

This promise was held in the Council of Australian Government trials in seven Aboriginal communities that sought to experiment with what would be a 'new' and coordinated, whole-

of-government approach to service delivery. Unfortunately, these trials have yet to be thoroughly evaluated and information on them is hard to obtain. They are important because, whether they succeed or fail, they will provide insights into a coordinated approach to service delivery and this could, if used honestly, openly and properly, provide the basis for research-based policy—and that would be a ‘new’ approach to policy making for Aboriginal communities.

Protection of basic rights

However, against the current but ‘old’ thinking of assimilation and mainstreaming, the Howard government’s approach continues to marginalise the rights agenda. It denigrates as ‘elite’ and ‘out-of-touch’ those who seek to invoke the principles of human rights and who use the language of self-determination. This has been a device that has appealed to the anti-intellectualism that is too prevalent in Australian society, and it is a sly way to silence advocates for Aboriginal people, who usually employ the rhetoric of rights to explain the claims and aspiration of Aboriginal people, their families and their communities—the claim for native title rights, the desire to engage with the economy, the right to enjoy language and culture, the right to a family.

And this rights rhetoric has the intention of making real changes to the lives of Aboriginal people, namely, their access to education, their employment opportunities, their standard of living (including housing), and improving their health. Rights are entitlements and they are a call for structural change, for an evening out of the playing field. But they are only relevant if we remember their importance to our everyday lives.

Eleanor Roosevelt once said:

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 neighbourhood 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.

This quote is a reminder of how important it is to remember the impact of laws and policies on people and to remember the effect when their basic rights are not protected.

Indigenous people are obvious examples of this failure to protect human rights, but there is another example, early this year, that I thought reflected on how low our human rights standards have fallen in Australia. At the Australia Day ceremony in the Australian Capital Territory (ACT), the Chief Minister, Jon Stanhope, gave an address in which he mentioned that he was ashamed, as an Australian, of the policy that saw the locking up of the children of illegal immigrants and refugees. As a result of these statements, his power to officiate over these ceremonies was revoked by the Federal Government. There were two questions for me about this: first, if the Chief Minister of the ACT cannot enforce his rights of free speech and political expression, what hope is there for a single Aboriginal mother with four children in Wilcannia? And second, why weren’t Australians outraged about this blatant breach of Mr Stanhope’s basic human rights?

This has been an era for the silencing of voices. As an Indigenous woman I feel it acutely with the dismantling of a representative national voice, but this is reflected in other trends: the cutting of the budget to the Human Rights and Equal Opportunity Commission, the increase in powers to ASIO under the guise of national security, and the silencing of many

charitable organisations who were social commentators until the job network contracts they signed forbade public comment.

This trend in silencing on public comment comes at a time when social commentators have observed that Australian society is becoming more visibly racist, xenophobic and introverted. The direction and shaping of Australia seems to be informed more by the fear of the unknown and the desire for security, rather than an understanding that a growing divide between rich and poor where the poor are subjected to punitive conditions and the attempts to regulate their behaviour is the formula for an unstable, unsafe and intolerant community. A large part of this fear of others, particularly refugees, Arabs and Aboriginal people, seems to be related to an 'us' and 'them' mentality within an increasing sector of the Australian population.

I have seen this hardened opinion in the work I undertook as a member of the ACT Bill of Rights Consultative Committee. During the community consultation processes in our inquiry as to whether there should be a Bill of Rights in the nation's capital, there appeared a strong reluctance to recognise the rights of minorities. Feedback from those consultations included comments such as 'if a Bill of Rights includes the protection of Indigenous people, it will not be for the benefit of all Canberrans', and 'if a Bill of Rights mentions Indigenous rights and the rights of other minorities, it will have no legitimacy.'

An 'us' and 'them' mentality and the equal playing field

What is noticeable in this example, is the meanness of spirit about the possible protections that a democratic society can offer. This mentality protectively guards the rights and benefits that are given to citizens within a community and seems to assume that if those rights are extended to the poor, the culturally distinct and the historically marginalised that they—middle-class, Anglo-Celtic, Christian—will be worse off. This world view sees the recognition and protection of the rights of the disadvantaged and culturally distinct as being in direct competition with their own position. It is this 'us' and 'them' mentality that psychologically separates one sector of the community from the other.

It is perhaps easy to understand the tenacity to which middle Australia clings to its position in a time of economic uncertainty and change. When middle Australia feels vulnerable about its own economic position, it is no wonder that the fear of change and the fear of the unknown is unsettling. But this explanation does not forgive the way in which the fear of uncertainty and the desire for security translate into racism and xenophobia. And it should not forgive the failure to recognise rights nor to endorse their breach.

If we are to have a society that values fairness, equality and justice, we must 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 a historically marginalised, culturally distinct and socio-economically 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 'win-win'.

This shift is a huge challenge at this time in our history. It was hard enough for Indigenous people to affect change through a representative body that was integrated into the federal bureaucracy, and had a system of regional councils to provide advice and policy direction. With that body being replaced by a group of hand picked Howard government advisory-only appointees, who have no responsibility to Aboriginal communities, it will be difficult; and with a Coalition controlled senate, it will be almost impossible.

But it is worth remembering at times like these something that Martin Luther King once said, 'In the end, we will remember not the words of our enemies, but the silence of our friends'. In a similar vein he commented, 'Our lives begin to end the day we become silent about things that matter'.

The power to make changes

I have reflected a lot on that sentiment in the last few years and perhaps, in light of the increased power that has been given to the Howard government, it is easier to feel that such sentiments do not hold out much hope, that something more is needed to provide inspiration. And for that inspiration, I look in two places.

We must always remind ourselves that we are more powerful than the institutions that we created. We have more power as thinkers and speakers than the paper on which policies are written, and the bricks which make up our houses of government. Always we must remember that we, as people, have the power to make changes.

Secondly, I take hope from the fact that I have seen so much of that agency in the people around me. I look to the resistance and commitment from those who participated in the Bridge Walks for reconciliation, who took part in the Sea of Hands, who signed the 'Sorry' books and who joined Australians for Native Title and Reconciliation and their local Reconciliation groups. These were powerful displays from broad cross-sections of the Australian community, who said, in their own way, that the government policies on the stolen generation, native title and reconciliation did not represent their views.

But I take even more comfort in the power of the individual to facilitate positive change for those around them when I look at the achievements within my own community.

The most energetic advocates for policy development have come from within our own communities. And here I think of people who set up the community-based initiatives and institutions, the dry-out shelters, the medical centres, the community buses when government policy fails. These successes and examples of agency are not celebrated and

instead our communities weather constant attacks on Aboriginal competence and self-determination.

It is always unpopular to argue for the rights of the poor, the marginalised and the disadvantaged. It will always be much lonelier and harder fighting to protect the rights of the minority than to protect the privileges of the majority. And so, in this climate, I think of the starfish story my father used to tell me as a child. It is a simple story. It is about an old man on a beach that is covered in starfish that have been washed up from the sea. He is picking up the starfish and throwing them back into the water. A young man walks up to him and says that there are so many starfish that it would be impossible to save them all so his hard work is being wasted because it will make no difference. The old man replies simply, 'It will make a difference to the starfish that I just threw back into the sea'.

IS THERE A RIGHT TO PALLIATIVE CARE?

Frank Brennan¹

Death is inevitable. The provision of good health care at the time of death is less so. This paper will examine a specific question: do all patients with life-limiting conditions have a right to palliative care? Necessarily this involves examining the extent of the problem of life-limiting conditions globally, and the reasons for deficiencies in the level of care. I will briefly describe the advocacy promoting the ideal of a right to pain relief. I will explore the possible legal and moral foundations of a right to palliative care, and, finally, examine the merits and difficulties in articulating such a right.

Scope of the problem

Malignancy

Currently there are 10 million cases of malignancy diagnosed throughout the world per year. It is estimated that by 2020 there will be 20 million new cases per year and that 70% will be occurring in developing countries. Up to 70% of patients with a malignancy suffer from pain caused by their disease or its treatment. In patients with advanced cancer, pain is described as moderate to severe in 40-50% and as very severe in 25-30%.

HIV/AIDS

Currently there are approximately 40 million people in the world infected with HIV. Of that figure almost three-quarters live in Sub-Saharan Africa. The majority do not have access to antiretrovirals. Approximately 60–100% of patients with HIV/AIDS will experience pain at some stage of their disease. The majority die at home with family and community as carers, leaving a vast legacy of grief, social dislocation, poverty, a growing population of orphans and, in circumstances where a substantial proportion of the productive age group are ill or who have died, famine.

¹ Frank Brennan is a Palliative Care physician, and lawyer. This article is a version of a paper given at the Palliative Care Association of NSW annual conference on 5 November 2004.

Non-malignant organ failure

Throughout the world millions of people suffer and die with end stage cardiac, respiratory, renal and hepatic failure. In developed nations the prevalence of these conditions will worsen with the ageing of the population. In addition, life-limiting neurological conditions such as dementia, Motor Neurone Disease and cerebrovascular disease contribute to the burden of end-of-life care.

How is palliative care provided globally?

Most countries do not have palliative care policies, pain policies, integrated palliative care services or hospices. Overwhelmingly, the care of people with life-limiting illnesses falls to the family. Nevertheless, there are centres of excellence and visionaries who strive to improve the provision of end-of-life care. The reasons for deficiencies in palliative care overlap with the reasons for inadequacies in the provision of health care generally—resources and a lack of political will to give priority to health. However, palliative care generally and pain relief specifically attract other major barriers—opiophobia is universal.

Culturally and historically enmeshed in societies is the fear of the use of opioids for pain—fears of addiction, of inevitable sedation and that the use of opioids will automatically shorten the life of patients. Too often opiophobia is associated with opioignorance: the inadequate teaching of undergraduate doctors and nurses in pain management. These cultural and educative barriers are compounded by significant political and legal impediments, especially in the importation, manufacture, distribution and prescription of opioids for medical use. In 1999 the International Narcotics Control Board published the per capita use of morphine for medical purposes for all countries. Ten nations accounted for 80% of all analgesic morphine consumption. In 120 countries there was little or no medical consumption for medical purposes.

Pain relief and the discourse of rights

Into this environment of inadequate pain management, a quiet phenomenon has emerged. Frustrated by the widening gap between an increasingly sophisticated knowledge of pain and its treatment and the effective application of that knowledge, academics and clinicians began to link pain relief and rights. To Somerville, 'to leave a person in avoidable pain and suffering should be regarded as a serious breach of fundamental human rights'.² To Cousins, 'the relief of severe unrelenting pain would come at the top of a list of basic human rights'.³ These statements have been followed by authoritative statements by multiple international and national pain associations articulating a right to pain relief. This advocacy has culminated in the promulgation of the inaugural 'Global Day Against Pain' in October 2004. Co-sponsored by the World Health Organization (WHO), the theme of the day was 'Pain relief should be a human right'.

Several questions flow from this. What does it mean to state that there is a right to pain relief? What is the foundation for this assertion? Is there a separate but related 'right to palliative care'? And finally, how do these rights relate to a 'right to die' as articulated by those favoring euthanasia or physician-assisted suicide?

² Somerville M 1995, *Health Care Analysis*, vol. 3, p. 12–14.

³ Cousins M J 1999, *Anesthesiology*, vol. 91, p. 541.

The foundations of a right to pain relief/right to palliative care

Rights may be 'a just claim whether legal, prescriptive or moral'. Clearly there is a spectrum of meaning, with varying degrees of legal enforceability. Famously, Jeremy Bentham described the articulation of rights without a legal foundation as 'nonsense on stilts'. Is the assertion that there is a right to palliative care/pain relief 'nonsense on stilts'? Legal foundations of these rights may emerge from various sources.

International Human Rights Law

The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains an express right to health.⁴ Rights articulated in this Covenant are seen as aspirational—rights to be achieved progressively over time to the maximum capacity of each signatory nation state. While there is no appeal process, signatory nations are expected to regularly report to a Committee overseeing the Covenant.

There is no express international human right to pain relief or palliative care. Nevertheless, both pain relief and palliative care fall comfortably within the general rubric of health. Therefore, a good argument can be made that rights to pain relief and palliative care can be implied from the overall international human right to health. Assuming that this is correct, the next issue is the content of this right. In 2000, the Committee overseeing the Covenant issued a General Comment on the right to health, stating what it saw as the 'core obligations' of all signatory nations, irrespective of resources. In terms of pain relief and palliative care this would oblige nations to ensure universal access to services in these areas, the provision of basic analgesic medications and the adoption and implementation of national pain and palliative care policies.

For palliative care, a further guide to minimum standards expected by the international community emerges from WHO recommendations. These include that all countries should promote awareness among the public and health professionals that cancer pain can be avoided, and should ensure the availability of morphine in all health care settings; and that all countries should ensure that minimum standards for pain relief and palliative care are progressively adopted at all levels of care. Recognising the widely divergent capacities of countries, the WHO set out general recommendations for different resource settings. For countries with low resource settings, home-based care is generally the best way of achieving good quality care. In countries with medium level resources, services should be provided by primary health care clinics and home-based care. In high resource settings there is a variety of options, including home-based care.

Constitutional rights

Many of the world's nations have written constitutions that entitle their citizens to adequate health care. None expressly articulate a right to pain relief or palliative care. In the cases of *Washington v Glucksburg* (1997) and *Vacco v Quill* (1997) the US Supreme Court expressed sympathy for a constitutional right to adequate palliative care, including pain management. Justice Breyer stated that individual States that refuse to address these issues would 'infringe directly upon...the core of the interest in dying with dignity' which involves 'medical assistance and the avoidance of unnecessary and severe physical suffering.'

⁴ *International Covenant on Economic, Social and Cultural Rights* 1966, Article 12.

Statutory rights

Various statutory models exist for pain relief and palliative care. One is an express statutory statement of the right to pain relief. The *Medical Treatment Act 1994* of the Australian Capital Territory states that 'a patient under the care of a health professional has a right to receive relief from pain and suffering to the maximum extent that is reasonable in the circumstances'.

A second model is a statutory protection for doctors. In South Australia doctors are protected, in the care of terminally ill patients, from any liability if they administer treatment 'with the intention of relieving pain and distress', providing such treatment is given in good faith, without negligence, and in accordance with 'proper professional standards of palliative care'.⁵ In California, a wider package of statutory requirements now includes a duty on all doctors to complete a mandatory continuing education in pain management and the treatment of the terminally ill, and a requirement of the State Medical Board to investigate all complaints of under-treatment of pain.

Negligence and pain

A further right to pain relief derives from the right of a patient to litigate in tort law. An unreasonable failure to provide adequate pain relief may constitute negligence.⁶ Breaches in reasonable pain care may include: an unreasonable failure to take an adequate pain history (*Giurelli v Girgis* 1980); an unreasonable failure to adequately treat the pain (*Estate of Henry James* 1991); or in the context of uncontrolled pain, an unreasonable failure to secure expert consultation (a general principle of referral is stated in *Dillon v LeRoux* 1994).

Negligence and palliative care

Similarly, a right to palliative care may derive from the law of negligence. The standard of care in palliative medicine may, in addition to the above areas in pain management, also include: taking an adequate history, examining the patient, addressing symptoms and, where reasonable, referring on to other experts.

Statements by professional bodies

As stated above, in recent years a series of major professional bodies in North America, Europe and Australasia have issued guidelines stating that pain relief is a right. Similar statements have been made in the context of palliative care. In 2002, the Cape Town Declaration, a consensus statement by a collective of experts, stated that '[p]alliative care is a right of every adult and child with a life-limiting disease'.⁷ In 2004, the International Working Group (European School of Oncology) released a position paper on palliative care internationally. It states that 'there should be free access to palliative care...for all cancer patients, as a fundamental human right'.⁸

⁵ *Consent to Medical Treatment and Palliative Care Act 1995 (SA)*, s. 17(1).

⁶ Somerville M 1993, 'Pain, Suffering and Ethics', 7th World Pain Congress.

⁷ Sebuyira L M, Mwangi-Powell F, Pereira J and Spence C 2003, 'The Cape Town Palliative Care Declaration: Home-Grown Solutions for Sub-Saharan Africa', *J Pall Med* vol. 6, no. 3, pp. 341–343.

⁸ Ahmedzai S H, et al. 2004, 'A new international framework for palliative care', *European J of Cancer*, vol. 40, pp. 2192–2200.

What are the dangers in promoting a right to palliative care/ pain relief?

There are several potential dangers—in the first place, misinterpretation. The right to pain relief is seen as a right to demand any analgesic the patient sees fit. Another point of misinterpretation is that the right implies a guarantee that patients will never feel pain—the right to ‘total analgesia’. The right to pain relief does not mean the right to a pain free life.

Equally, when one articulates a ‘right to palliative care’ what exactly does that mean? A right to an integrated palliative care service? The right of access to a hospice? The right to a ‘good’ and dignified death? When one examines the provision of end-of-life services internationally, are we not simply talking about good health care that includes palliative care? For if we are focusing on the comfort of the patient, surely that must include water, food, a habitable environment, warmth, bedding, and sanitation, as much as symptom control. Indeed, it would be artificial to separate a ‘right to palliative care’ from a general right to health, housing, water and sanitation. All are interconnected. All determine good health, even and including at the end of life.

Finally, there is the response of the medical and nursing professions. Many within these professions may view guidelines, court rulings or statutory prescriptions as onerous, lawyer-driven and unrealistic. For courts, legislatures, medical boards and professional bodies, including specialist bodies, to assert these rights is potentially counter-productive if the entire medical profession is not part of the overall process.

The ‘right to die’ and the ‘right to palliative care’

Clearly, a discussion of rights and end of life care has a long antecedence with the debate surrounding euthanasia and physician-assisted suicide. A central tenet of those advocating euthanasia is autonomy and the ‘right to die’. In Australia, this has been and remains an area of controversy. As a potential counter-poise to an articulated ‘right to die’, is a ‘right to palliative care’. In patients requesting euthanasia, there will always be a proportion that are doing so on the basis of unmet symptom needs, now and in the future. Arguably then, for any given patient, prior to any discussion about euthanasia, patients would be better served by asserting a right to palliative care.

Conclusion

Given the enormous unmet pain relief and palliative care needs in the world, it is not surprising that advocates have promoted their provision as human rights. That provision has a strong ethical foundation. A ‘right to pain relief’ and a ‘right to palliative care’ have variable foundations in law. In terms of international human rights law, both may be implied from the right to health. The transition from the current pursuit of pain relief and palliative care as aspirations and a ‘right’ to be asserted, to a future where pain relief and palliative care are universal realities, will require much work, commitment and vigilance.

HIGH COURT OF AUSTRALIA DECISIONS

The Hon. Peter Breen MLC in the NSW Legislative Council, 10 November 2004, said (NSW Legislative Council Hansard record):

Last month the High Court of Australia handed down two decisions confirming Australia's position as the backwater of human rights in the developed world. While a United States federal court ruled that the military trial of a Guantanamo Bay prisoner is unlawful under the Geneva Conventions, the High Court in Australia decided in two cases that prisoners could be held in indefinite detention on the basis of crimes they might otherwise commit if they were not incarcerated. One case is *Fardon v the Attorney General for Queensland* and the other is *Baker v the Queen*. Justice Michael Kirby was the sole dissenting judge in both cases...

...The tragedy of the two high Court decisions in *Fardon* and *Baker* is that the majority judges are supporting an attitude to prisoners that is highly destructive of our social fabric and undermines the principles of justice and fairness they are supposed to uphold...

In the case of *Fardon*, a prisoner challenged the *Dangerous Prisoners (Sexual Offenders) Act* passed by the Queensland Parliament in 2003. The legislation was directed at Robert Fardon in much the same way as the *Community Protection Act* was directed at Gregory Kable. Fardon was judged by the Parliament to be a continuing threat to the community and an 'unacceptable risk'—to use the words in the legislation. As in the Kable case, the High Court was asked in *Fardon* whether the legislation compromised public confidence in the integrity and impartiality of the justice system. In effect, the High Court said that a State [Parliament] can pass any law it pleases, even one that intrudes into the judicial power under chapter 111 of the Commonwealth Constitution...

Earlier in the year when Bret Walker, SC, argued the *Baker* case in the High Court, I became alarmed about the direction in which the High Court is moving. Mr Walker said that it would surely be inappropriate for the New South Wales Parliament to pass a law that all red-headed prisoners are a threat to the community and therefore should remain in gaol. There was little resistance to that notion in the faces of the judges and nothing in their judgments to suggest that they would be concerned about such a law. Of course Justice Michael Kirby was the exception.

Members will recall that Allan Baker, who murdered Ian Lamb and Virginia Morse, appealed to the High Court on the basis that he was 'cemented in'—to use Premier Carr's words—by the *Crimes Legislation Amendment (Existing Life Sentences) Act 2001*. Baker will die in gaol as a result of the High Court decision even though the law at the time of his crimes meant that he could apply after eight years for a redetermination of his sentence. Indeed, Baker's co-offender, Kevin Crump, has already had his sentence redetermined to 30 years, which he has now served, but he, too, will die in gaol as a result of the *Baker* decision. The legislation was directed specifically at Allan Baker, and Premier Carr issued a number of press releases in which he promised Brian Morse, the widower of Virginia Morse, that Baker would never be released. The Premier has kept his promise and the High Court has upheld the cement law. I would describe the decisions in both *Fardon* and *Baker* as the triumph of justified indignation and outrage over commonsense and the just rule of law.

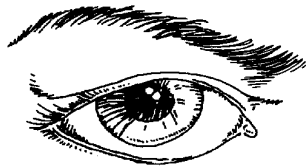
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