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You Do Not Inherit; You Hold On Trust

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The concept of sustainability has always been central to indigenous cultures. Native Americans believe that you have to consider the impact of your actions on the next seven generations. And in Australia there is a world view among Indigenous people that says that you do not inherit land, you hold it on trust for future generations.

I.

This interconnectedness is seen in the totemic systems. In the Eualayai/Gammillaroi nations, we have three totems. There is always special responsibility towards the totem, like not being able to eat it. We have a personal totem that reminds us that we are connected with our environment; we have a clan totem that reminds us that we are connected to other people; and we have a spiritual totem that reminds us of our connection to the spirit world and our ancestors.

There are other wisdoms within Aboriginal culture that I want to share with you:

- The first is that we are all connected to our environment and we have a responsibility to protect it. There are heated debates about climate change and while I am personally persuaded by the science, it has always puzzled me that people require scientific proof before they feel there is a need to protect our environment. We have that responsibility

because we need to ensure that the air we breath and the water we drink are clean. We need to make sure that our ecosystems are strong. Whether we live in the country or live in the city, everything we eat comes from nature and we owe it, when we take from it to sustain ourselves, the respect to work to make sure ecosystems are vibrant, strong and cared for.

- The second lesson is to listen to the wisdom of our elders. We are often focused on what we learn at school or university. We are tested on that, graded on it and those grades determine our future. Aboriginal people understand that older people are the custodians of our culture, and through their life experience have wisdom that can be invaluable as we take our own journeys.
- The third lesson is that women are not inferior. Despite the popular accounts in the press of Aboriginal culture as violent and tolerant of violence against women, that does not reflect my experience within the Aboriginal community, or of the values in my traditional culture. Where violence is endemic in the Aboriginal community it is usually because the traditional values have been undermined, the traditional role of women has been ignored, and the social fabric has unravelled, leaving in its place the dysfunction that stains some Aboriginal communities today. But in the Eualayai and Gamillaroi nations, women had separate roles to men but these were not subordinate in the way they are in Western culture. There was women's business and men's business but, while these were separate, one was not seen as inferior to the other. In our culture, women had the primary control over the spiritual life of people in the community. Women decided where a child would be conceived and born — a decision that would affect the child's spiritual responsibilities throughout their lives. In our culture, the creation spirit was female, so god really was a woman. And decision-making was not gendered. Greater weight was given to the wisest elders, whether they were male or female.

- The fourth lesson is that we should give all we can to others and expect that others will help us when we need it. This is the notion of reciprocity. I find that I often have much, because of my education and position of privilege, that I can give others that are less fortunate than me. This notion of reciprocity compliments the important responsibility that I think we have, if we have been given benefits and advantages within the community, to think about matters of social justice.

These wisdoms are part of the value system that I grew up with. They are values I believe in and I am proud to be part of a culture that embraces these ideals as part of their world view.

But these Aboriginal cultures in Australia are not sustainable without protection. While happy to see Cathy Freeman win, hang Indigenous art in their homes or offices, comfortable with cultural performances at the beginning of events such as the opening of the Olympic games and even happy to acknowledge Aboriginal people at the beginning of a social event with a 'welcome to country', there is little support for the protection of land, cultural heritage and languages, or any other right that would assist in supporting and sustaining Aboriginal culture.

Yet the concept of human rights are more pervasive and universal than the parochial debates about rights in Australia would indicate. From the American and French revolutions to the anti-slavery movement, from the works of Vattel and Vittoria to those of Thomas Paine and John Locke, notions of inherent rights had been developing around the world. They developed into their contemporary form after World War II as Europe reeled from the aftermath of the excesses of the darkest sides of human nature.

In fairness, it is not just Indigenous rights that make many Australians uncomfortable. Similar anxiety is expressed about the talk of human rights in relation to any minority — especially Muslims and asylum-seekers. This is the legacy of an

impoverished culture of rights within the Australian community and this culture has a long history.

II.

My father was five when he was placed in a home. He grew up in a time and place where he was made to feel ashamed of his heritage and darker skin. These attempts to make him feel ashamed of himself only made him feel more Aboriginal, not more white.

His mother had been taken from her family when she was twelve and never found her way back. Dad said no-one ever confirmed he was Aboriginal but he always knew. When he found with his extended Aboriginal family he learned our language, cultural stories and the kinship relationships. His Aboriginality became a source of great pride for him and it defined who he was and how he felt about himself. I don't think he was comfortable in the company of other Aboriginal people until he knew who he was and where he was from.

Through my father I was born into the Eualeyai and Kamillaroi nations. Of a different generation, I inherited his knowledge about our Aboriginal culture. And I inherited his politics.

My father was not at the Tent Embassy. We lived in Cooma in 1972 so we were not far from Canberra. I wonder now what he thought about it, whether he was secretly drawn to it but too ashamed or uncomfortable to go.

He told me it was when Neville Bonner was elected to Parliament that he first realised that being Aboriginal was not a bad thing. Actually, he said that it was when someone at the pub said that they thought Neville Bonner was a great bloke that he realised that being Aboriginal could be acceptable. Bonner came into Parliament in 1971 and was elected in his own right the year of the Tent Embassy.

My father believed in rights to land, language and culture and, like every Aboriginal person I know, he also believed that education was the key. He worked tirelessly with the Aboriginal Education Consultative Group and the Aboriginal

Studies Association. He set up the Aboriginal Research and Resource Centre at the University o NSW. Dad was forced to leave school at the age of 14, so to end his career running a university research centre shows his determination and the depth of his knowledge. He also became heavily involved with Link-up, the organisation that reunited Aboriginal families affected by the policy of removing Aboriginal children from their parents.

And in all this work — of assisting Aboriginal people to find their families, of encouraging them to study, on working to ensure that more non-Aboriginal people were educated about Aboriginal issues — he defined his experiences and aspirations using the language of rights; and he believed better protection of human rights for Aboriginal people was a key part of political struggle.

Watching my father's practical devotion to his work while he used the language of rights, and seeing him articulate a vision that included a stronger framework of rights protections is perhaps what always made me sceptical about the false dichotomy that began to develop in the Howard era that argued that you either had practical things (health, housing, education, employment) or you had big-picture rights issues. This oversimplification completely misrepresented the way that Aboriginal people framed their political aspirations. There was no divide between 'rights' and what would come to be known as 'practical reconciliation'. Instead, there was a desire for equal rights and also a claim to rights that flowed from the unique position of Indigenous people — rights to land, culture, language and political and economic autonomy. There was also the belief that the recognition of rights would transform the playing field on which Aboriginal people interacted with the rest of Australia.

But despite all the progress made between my father's generation and mine in terms of access to education and other rights, many Australians, while perhaps agreeing with the assertion that Aboriginal people are entitled to the same things as

other Australians, are uncomfortable — even suspicious — about the language and concept of rights.

III.

When the framers of our Constitution sat down to draft our Constitution they looked at the way that other countries – particularly the United States and France – had included rights within their legal systems. They decided that the decision-making about rights protections – which ones we recognise and the extent to which we protect them – were matters for the Parliament. They discussed the inclusion of rights within our Constitution but decided to leave it silent on most human rights.

A non-discrimination clause that would have included rights to due process before the law and equality before the law was debated but was rejected. It was decided that entrenched rights provisions were unnecessary and it was determined that Australian states would have the power to continue to enact laws that discriminated against people on the basis of their race. As testament to this, the first legislation passed by the new Australian Parliament were laws that entrenched the White Australia policy.

In 1997 the High Court heard a case — *Kruger v Commonwealth* — that considered the legality of the formal government assimilation-based policy of removing Indigenous children from their families. Children who had been removed under the Northern Territory Ordinance, which permitted the removal of Indigenous children from their families on the basis of their race and one mother who had lost her child under the same provision, claimed a series of human rights violations. These included 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. The decision of the court highlighted the general lack of human rights protection in our legal system, and also emphasised how,

when those rights are not protected, there is a disproportionately high impact on the vulnerable.

It is not true, of course, to say that Australians are always indifferent to the plight of Indigenous people. In 1967, after a grass roots campaign of over 20 years, a referendum was passed by an overwhelming majority — just over 90% voted for the change — driven by a campaign that asked Australians to say 'yes to Aborigines'.

Some people still believe that the referendum gave Aboriginal people citizenship or the right to vote. In fact, it allowed for Indigenous people to be included in the census and it allowed the Federal Parliament the power to make laws in relation to Indigenous people.

Those who advocated for a 'yes' vote to alter the Constitution to allow the Federal Government to make laws for Indigenous people thought it was going to herald in an era of non-discrimination for them. There was an expectation that the granting of additional powers to the Federal Government to make laws for Indigenous people would see that power be used benevolently.

Consideration as to whether the races power can be used only for the benefit of Aboriginal people, as the proponents of the 'yes' vote had intended, was given some residual attention by the High Court in *Kartinyeri v Commonwealth (the Hindmarsh Island Bridge* case).[1] The case was brought after Federal heritage protection law was repealed specifically so it no longer applied to the contested area in the Hindmarsh Island area. Only Justice Kirby argued that the 'races power' did not extend to legislation that was detrimental to or discriminated against Aboriginal people. The majority of the court held that the power could be used to withdraw a benefit previously granted to Aboriginal people and thus to impose a disadvantage.

The 1967 referendum did not produce a new era of equality for Aboriginal people as its proponents had hoped. It left unchanged the two choices made by the framers of the constitution — that the Australian legal system should have the

power to make racially discriminatory laws and that it should be left to parliament to make the decisions about human rights unfettered or unencumbered by benchmarks or frameworks.

Within this legal framework, one without human rights benchmarks, policies are made that impact on the lives of Aboriginal and Torres Strait Islander people for which there is no ability to challenge or seek redress for any negative impact. This framework has permitted the destruction of cultural heritage and language, taken away rights to land, fishing and hunting and resources and it permitted the policy of removing Aboriginal people from their families.

IV.

There are several ways in which, blinded by ideology, policy-makers continue to make about the Indigenous affairs. They continue to overlook and dismiss the knowledge that Aboriginal people have about solving their own problems.

We need to look at the successes. In the face of government neglect and failed policy, many Indigenous communities continue to flourish, creating successful and viable institutions and continuing to keep their cultural values strong and their children safe. We could learn much from what it is that successful organisations and communities do to ensure their effectiveness and viability in this climate and use that information as a basis for developing similar conditions in the communities that fail.

The research in Australia and in Indigenous communities in North America shows consistently that the best way to lessen the disparity between Indigenous and non-Indigenous people is to include Indigenous people in the development of policy and the design and delivery of programs into their communities. Apart from sounding like common sense, the research shows that this engagement assists with ensuring the appropriateness and effectiveness of those policies and programs and ensures community engagement with them therefore better ensuring their success.

This actually requires a commitment to something that policy-makers often overlook: the need to invest in human capital. If participation by Indigenous people is a central factor in creating better policy, program and service delivery outcomes, there needs to be more to build up the capacity for that kind of engagement. This would include:

- rebuilding of an interface between the government and the Aboriginal community through representative structures so that governments can more effectively consult with and work with Aboriginal people
- focusing on the provision of training and education in ways that improve the capacity of Aboriginal communities. This means moving away from simple solutions of simply removing children into boarding schools but looks at a range of strategies that build the skill sets and capacities of adults as well as younger people who need to retain contact with their families if they do leave for better schooling opportunities.
- increasing the number of Aboriginal people in the public service and who are engaged with developing and delivering Aboriginal policies and programs; and
- looking at flexible employment arrangements that take into account that in many Indigenous communities there is no viable job market or there are barriers to entering the workforce. Such schemes can assist with the provision of services and infrastructure in the community at the same time as they build capacity and skills within the community itself.

Indigenous policy is always targeted at intervention, at emergency. It rarely seeks to look at the underlying issues. Addressing disadvantage requires long term solutions, not just interventions. Rather than always reacting to a crisis, a long-term sustained approach requires addressing the underlying causes of disadvantage. This means resourcing adequate standards of essential services, adequate provision of infrastruc-

ture and investment in human capital so that communities are developing the capacity to deal with their own issues and problems and have the skill sets necessary to ensure their own wellbeing; there are no shortcuts, quick fixes or panaceas here.

Whatever the perceptions of the electorate, the fact is that there is not enough money spent on Aboriginal housing, education and health. The pot is too small and no government will fix the problems while all they do is engage in trying to redirect the scarce resources to one pressing need at the expense of others.

V.

The world we live in now is very different to the one that the framers of our Constitution imagined. Aboriginal people were not a dying race. We were not inferior. Australia did become a home to many races.

Since the time that our Constitution was drafted, every other Commonwealth country has modernised its legal system to incorporate our contemporary understanding of human rights through a bill of rights.

Legislative bills of rights also offer a rights framework. They require public servants to ensure that the legislation they draft is compliant with the rights in the human rights legislation. They also require Parliament to indicate that legislation is compliant with those same standards and, if not, they need to indicate in what way it is not and to justify why it is not.

Both of these processes require policy-makers and legislators to think about human rights in their decision-making processes. And while the rights in legislation can be overridden, there is greater transparency and accountability by government to the community about when and why rights are infringed.

In these ways, Australia would be enriched if there was a national Charter or Bill of Rights that required this level of scrutiny and accountability when public servants draft legislation and when parliaments pass them into law. And it would be

a positive step towards the better protection of Indigenous rights in this country.

And there is one way to overcome the concerns that Aboriginal people have about the easy suspension of human rights. This concern stems in no small part from the fact that the only three times the *Racial Discrimination Act* has been suspended were:

- as part of the compulsory welfare quarantining and compulsory acquisition of land that were part of the Northern Territory intervention
- as part of the Native Title Amendments post-Wik, and
- in the Hindmarsh Island Bridge dispute when heritage protection laws were also prevented from applying to the area in dispute.

Each time the *Racial Discrimination Act* has been suspended it has been to prevent the protection of Indigenous people from discrimination — and arguably at the times when they needed those protections the most.

And this circumstance is a reminder of the way in which the framers of our constitution decided to give parliament unfettered power in relation to deciding issues of rights and also intended to create a legal system that could pass racially discriminatory legislation. The immigration acts that entrenched the white Australia policy and were the first legislation passed by the new Australian parliament were testament to this agenda.

So the issue of Constitutional reform must still remain part of the rights agenda whether there is a bill of rights or not.

And while we could look to the Canadian constitution for inspiration on how to entrench the protection of Indigenous rights into our constitution, there is perhaps a more inclusive and strategic approach. Just three rights entrenched in our constitution would substantially improve our rights framework:

- the right to be free from racial discrimination

- the right to due process before the law
- the right to equality before the law.

There is one final area where improvement of the rights framework is possible. Australia recently endorsed the Declaration on the Rights of Indigenous People. And while policies like the Northern Territory intervention are a constant reminder that the Declaration is not binding, it does give a set of benchmarks that assist in pointing out to governments the acceptable standard of protection of Indigenous rights.

Even if all of these changes were achieved, it would not take the issue of a treaty with Aboriginal people off the table.

VI.

Toni Morrison once said that, 'the function of freedom is to free someone else'. Those words resonate deeply with me. As an Aboriginal person who is part of the emerging middle class within my own community and who understands the struggle of the generations before me to gain better rights to education and health and equal access, it sums up the obligation to fight for those less fortunate than ourselves.

The people at the Tent Embassy did not fight so that my generation would still be protesting on the lawns. They wanted Aboriginal people who could be doctors and lawyers and accountants and nurses and welfare workers and judges so that they could improve the lives not just for their own families but for others within the community. I might look middle class and assimilated to outsiders but my father and his generation did not want us growing up to be white. It was important to him that I knew my culture, my place in the world, that I understood the cultural values of reciprocity, interrelatedness to the environment, obligation to country, respect for Elders. He wanted me to know my totems and my dreamings. He knew that without this, I would not be complete.

My education, my success, my ability to be articulate are the result of the determination of the Aboriginal people the generations before me – the Coopers, the Maynards, the

Fergussons, the Pattons, the Foleys, the Mansells and the Aboriginal women who stood beside them and behind them. They did not want to surrender their Aboriginality to gain equality with non-Aboriginal people. They saw a great injustice in being treated as inferior and being denied basic rights to health, housing, education and employment. But they also wanted to protect their identity and culture. To keep Aboriginality strong. They believed that this vision could be the legacy of an improved human rights framework for Aboriginal people, one that would keep Aboriginal communities strong and healthy and Aboriginal cultures vibrant and sustainable.

Endnote

1 *Kartinyeri v. Commonwealth* (the Hindmarsh Island Bridge case) (1998) 195 CLR 337.

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