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INDIFFERENCE AND NEGLECT

A charitable interpretation of the relationship between the Australian legal system, post 1788, and the indigenous Aboriginal people of the continent is that it is a tale of indifference and neglect. A less charitable interpretation is that it represents a cruel assertion of power: sometimes deliberate, sometimes mindless, resulting in the destruction of Aboriginal culture, unparalleled rates of criminal conviction and imprisonment and massive deprivation of property and land.

As we approach the Bicentenary, most Australians are, I fear, bored with the Aboriginal issue. Yet a moment's reflection on the extent of our problem will leave the thinking Australian profoundly depressed.

In the field of criminal law and punishments, the inescapable statistics demonstrate, as is now well accepted, that the rates of Aboriginal imprisonment far exceed those of non-Aboriginal Australians. Indeed, the figures display a gigantic disproportion which seems to call out for attention and remedies. We can take comfort from the establishment in the last decade of Aboriginal Legal Aid Services and the due process they now assure most Aboriginal defendants in the courts. We can glean satisfaction from the belated recognition

by the judges of the special disadvantages which Aboriginal defendants face when under interrogation by police. We may comfort ourselves with the thought that the courts may actually be particularly lenient with Aboriginal accused. But the haunting statistical disproportion continues to confronts us. How can we possibly justify a society and a criminal justice system which seems to condemn a high proportion of the descendants of the original inhabitants of this continent to a life of recurring imprisonment, with all the anti-social consequences which that entails?

THE LAW REFORM AGENDA

In almost a decade in the Australian Law Reform Commission I was confronted, virtually daily, with the issues raised in adjusting the Australian legal system to the reality of Aboriginal Australia. In the first project, which dealt with criminal investigation, the Commission made special recommendations relating to interrogation of Aboriginal suspects by Federal Police. In a later project on sentencing reform, the Commission identified and quantified the special disadvantages suffered by Aboriginals in the application of Federal criminal laws. That report also called attention to a particular, and disturbing, problem relating to the terms under which Aboriginals were kept in lock ups in Western Australia on a per diem fee basis.

In a further report on reform of the laws of evidence in Federal and Territory courts, the Law Reform Commission gave particular attention to the way such laws, in effect, may sometimes discriminate against Aboriginal witnesses. Most recently, the Commission has delivered a major report on the recognition of Aboriginal customary laws.

If the Federal Government and Parliament were to implement, to the letter, the various suggestions and recommendations of the Law Reform Commission the result, sadly, would simply scratch the surface in removing the major sources of injustice presented by the Australian legal system to the Aboriginal people of Australia. That is not, of course, a reason for wringing our hands, despairing about our puny endeavours and doing nothing. The lesson of reform in a society such as ours, are that patience is sometimes rewarded, that revolutionary change is rare and that interstitial steps, on the path to improvement, are more likely to achieve results than waiting for sudden, dramatic departures from what has gone before. The very history of Australia, with its absence of revolution, the continuity of its constitutional law, and the want of a civil war of any magnitude all teach the lessons of gradualism.

These lessons are intensely frustrating to those who see the continuing destruction of a unique and precious culture happening before their eyes. They are profoundly depressing to those who see the denegration of thousands of young people caught up in the practical, and sometimes unintended, discrimination inherent in the operation of the law. They are irritating in the extreme to those who view what they see as the inherent perfidy of a system which can punish people for theft of a motor car ("a man's second most precious possession") whilst usually providing no compensation whatsoever for the initial usurpation of Aboriginal land and erosion of the traditional rights that once went with it. The realisation of these things provokes denunciation for the

failure to honour political promises of effective land rights legislation, sacred site protection, mining royalties for Aboriginals and the regulation of a Treaty between representatives of Aboriginal Australia and representatives of those who came later.

For all this, boringly enough, the way ahead may lie in the step by step removal of injustice and the provision of institutions and laws which tackle, one after another, the causes of injustice.

Although in the last twenty years we have witnessed, remarkable shifts of attitude in the Australian community towards the reconciliation of the majority community with the Aboriginal minority, we are now going through a rather discouraging period. In part, this reality may be yet another unfortunate consequence of the economic ills which beset Australia just now. In part, it may be a passing phase. Impatient with the apparently slow progress in the economic advancement of Aboriginal Australians and jealously sensitive in comparing their perceived preferential treatment against the burdens borne by other disadvantaged groups, the Australian today might prefer to put the "Aboriginal problem" out of sight, out of mind.

ADAPTING GENERAL RULES AND PRESERVING EQUAL JUSTICE

But any fair Australian will have a sense of disquiet, and even shame at the way the Australian legal system has operated in relation to Aboriginal Australia. The fine qualities of neutrality and independence, of equality before the law, and adherence to the Rule of Law, have resulted, all too often, in the universal application of legal rules,

appropriate for general operation, in a way that prove unjust when they are applied to the descendants of the indigenous culture of Australia. Their social organisation, though truly a government of laws and not of men, was, nonetheless, so profoundly different from that of the European settlers that the merger of the two has not been very successful.

Because of its infatuation with neutrality and even-handedness, it may sometimes overlook the occasional needs for special treatment of minorities. These needs are presented most vividly by the interaction of the general law with Aboriginal Australia.

The faded idea of a national Treaty, such as has occurred in Canada, New Zealand and other Dominions of the Crown, should be revived and life should be breathed into it. Some thoughtful commentators on the current Australian scene warn that unless national initiatives are taken, there may be the danger that Australia could follow South Africa as a pariah of the international community. The brave hopes of enlivening the national conscience in time for action to co-incide with the Bicentenary seem to be fading. But is it too late to use that national celebration as an occasion for national reconciliation upon terms which are practical and just and remove the blight of two centuries of injustice and neglect?

These words "injustice and neglect", when spoken, seem a severe verdict on nearly two hundred years of officials, most of whom would have conceived themselves as working diligently and fairly, with integrity and impartiality towards all races. But it is the lesson of our history that the result of two hundred years of high minded officials, and the society they

governed, has been the destruction of the cohesiveness of Aboriginal society, its replacement with widespread economic and social dislocation - with drunkeness (a common problem of the old) and petrol sniffing (a common problem of the young). These symptoms of despair display their outward manifestations in the intolerable levels of criminal convictions and imprisonment and in the rates of child care orders which are so high in the case of Aboriginal children.

THE LONG HAUL BACK

The long haul back to a law respecting Aboriginal community in Australia, lies upon a road in which many of the unequal laws have been reformed, to ensure that they apply appropriately and justly to the Aboriginal people. Moreoever, it is a road which points to self respect and economic equity for the Aboriginal people.

Notwithstanding the current mood, the Bicentenary may yet stimulate the national conscience simply because it focuses attention upon our origins (which, from the first, amounted to a typical denial of Aboriginal Australia) and our history since (which has repeatedly reinforced that denial).

Ahead of us lies an agenda for change in attitudes, laws and policies. These ideas deserve the attention of a nation, claiming adherence to legality, boasting of a commitment to an economic fair go and pretending to spiritual values and a civilised order.

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