Where are the Human Rights?

Jeff McMullen

With an Australian Government and a Federal Parliament of dubious legitimacy our Ship of State sails on its crazy course. Absorbed with self-interest, deceit and the sheer incompetence of those who have flouted the Constitutional requirements to be a Member of Parliament, captain and crew ignore the most fundamental challenges this nation is facing. One thing guaranteed about this political crew is that they will cling to all their power and privilege until the ship is sinking.

Do they care about the 600 refugees maintained under a cruel system of mandatory detention on Manus Island or the new arrivals who may be imprisoned in degrading conditions on Nauru? Are they troubled by the Royal Commission's widespread investigation of the torture of Aboriginal kids in detention? Another Indigenous man or woman dead in custody, another life wasted through suicide or broken by police brutality and yet for over two centuries this political system has failed to guarantee the human rights of the First Peoples of this land. In fact, Australian politicians have failed to create a Charter of Rights or a Constitutional protection of human rights for any Australian.

This weakness at the heart of our Democracy shows out in the lack of protection for many of our most vulnerable people:

As many as half of all women suffer sexual harassment and the toll of violence at the hands of their partners is so great it is the leading cause of preventable death or injury for women between the ages of 18 and 44.

Australian children have been sexually abused at rates prompting another Royal Commission.

Aboriginal children are removed from home at rates rivalling or exceeding the Stolen Generations.

Our health system frequently discriminates against Indigenous people.

Racism is a persistent cause of damaging discrimination and inequality round the nation.

Some police display racism of such virulence that they cross the line to brutality.

Australia's judicial system, constrained by the injustice of mandatory sentencing, incarcerates Indigenous adults at a rate 15 times higher than non-Indigenous adults. Indigenous children are incarcerated at a rate 25 times higher than the rate of non-Indigenous youth.

Think about this lack of human rights for Australian children. The UN Special Rapporteur on the Rights of Indigenous Peoples concluded in this year's report that Incarceration of Indigenous people was a "major human rights concern', that 'Indigenous children are essentially being punished for being poor and in most cases, prison will only aggravate the cycle of violence, poverty and crime." The Special Rapporteur said the 'routine detention of

very young Indigenous children' was the 'most distressing aspect of her visit' to Australia.

I can report to you about another gravely disturbing aspect of this lack of human rights, especially towards Indigenous children. A new study of children incarcerated in the Banksia Hill Detention Centre in Western Australia indicates that as many as 40% of them have brain damage impairment as a consequence of Foetal Alcohol Spectrum Disorder. These children should never have been sent to gaol. They have a disability that impairs memory, emotional functioning, learning, hearing and normal behaviour. They require special education, not prolonged incarceration, that as the Special Rapporteur argues will only aggravate the cycle of violence, poverty and crime.

The same line of criticism must be directed at the ten years of Federal Government Intervention into the lives of Aboriginal people in some 73 remote communities in the Northern Territory. Think of it this way, a child born in 2007 when Prime Minister John Howard's Government launched the Northern Territory Emergency Response (NTER) will spend the first fifteen years of life living in a kind of occupied territory, subjected to control provisions and blatant discrimination.

For a decade I have stated that the Northern Territory Intervention is the single most damaging assault on Aboriginal people since the Stolen Generations policy. Both most political parties will be shamed in history for permitting this grievous abandonment of the protection of the Racial Discrimination Act. Remember on all three occasions when the RDA has been bypassed, it is Indigenous people who have lost this protection. Let me repeat, there are no human rights for Indigenous Australians.

Renaming the Howard Intervention's suffocating mix of control, discrimination and assimilation as Labor's *Stronger Futures Legislation* is another dishonest tactic. **The truth is that after the five-year emergency phase of the Intervention and the faux reinstatement of the Racial Discrimination Act, another decade of controls continues to discriminate and damage the human rights of these people living in terrible poverty.** The evidence gathered by a large coalition of NGOs, the Government's own ABS statistics and even the Prime Minister's annual report on the Close the Gap strategy confirm my own assessment over this decade. The abuse and neglect of Aboriginal children, suicide and self-harm, alcohol and drug abuse, incarceration and all of the other metrics of pain and punishment show the Intervention is an on-going human disaster.

The discrimination is contemptuous of our own and international human rights values. The UN Special Rapporteur this year states that the continuing impact of the *Stronger Futures* controls stigmatises Aboriginal people in these communities by subjecting them to compulsory income management, forcing them to work for far less pay than average wages and then subjecting them to an array of fines and penalties. In a detailed analysis, Professor Jon Altman of Deakin University shows how this involuntary servitude is akin to the very terms of 'modern slavery' being targeted by parliamentary inquiry and the

righteous condemnation of the likes of mining magnate, Andrew Forrest. This is the double standard displayed in our attitude to human rights. Australia takes a seat on the UN Human Rights Council but blatantly and brazenly flouts the covenants we helped the world draft, all the while condemning the human rights shortcomings of other nations. No wonder some see Australian Government as hypocritical.

Aboriginal people are still being controlled through a state sanctioned apparatus that of course once influenced South Africa's former brutal regime of apartheid. The consequence of today's control system is that hundreds of thousands of Australia's Indigenous people are trapped in the poverty within this rich nation.

The collapse of life is disturbing to witness at close hand. There is despair, suicide and an endless procession of early funerals for lives cut terribly short.

That terrible phrase, 'the smoothing of the dying pillow', the paternalistic acceptance of cultural genocide, is not a period from our past but an on-going characteristic of Australia's relationship with Aboriginal and Torres Strait Islander peoples.

The glaring weakness at the heart of the political system, the lack of human rights protection, permits all of these grave injustices towards Aboriginal and Torres Strait Islander people. It confounds all efforts to recognise the legitimate rights of the First Peoples which, viewed with impartiality, stand in stark contrast to the questionable political legitimacy of Australia's 'House of Discards'.

The Turnbull Government's contemptuous rejection of serious proposals for reform of an anachronistic Constitution deeply stained by racism and ignorance is a smokescreen for the brutal truth. Australian Government wants to control and assimilate the First People, exploit their lands and waters, marginalise them to the far fringe of political life and complete the project of dispossession.

To understand the bewildering twists and turns of the federal political leadership on Indigenous Constitutional recognition, you need to penetrate the disinformation, the outright lies, the broken promises and political treachery that accompanies almost all major policy-making impacting the lives of the First Peoples. As we move through just some of the major issues, keep note of the constants. Assimilation, control and rejection of any shift of trust and power to Indigenous people are ruthlessly maintained.

When John Howard asked Australians to vote on the question of Indigenous Recognition in a Preamble to the Constitution in the 1999 Referendum it was easily defeated. Indigenous people have never sought minimalist constitutional recognition and all honest attempts to capture a consensus have put sovereignty and Treaty making at the forefront of Indigenous concerns.

The underlying political problem is that the Commonwealth has shown no interest in recognizing Indigenous sovereignty and no meaningful, sustained interest in Treaty making. Referendums that propose explicit guarantees of the rights of Indigenous peoples and non-discrimination clauses that are viewed by Conservatives as a one line Bill of Rights are likely to be always vigorously opposed by constitutional conservatives. Those opposing such changes include Greg Craven, monarchist David Flint, the Institute of Public Affairs and many others. This opposition too is part of a long and clear historical pattern revealing much about the political class, the power of special lobby groups and their thinking about Indigenous people.

Despite these political hurdles, a long line of Indigenous leaders have attempted to engage Australian Prime Ministers and other politicians on means of genuine constitutional and legal reform. This reflects the unquenchable desire of the First Peoples to live with their own identity, their own values, controlling their destiny in what is after all their land.

The likes of William Ferguson, Fred Maynard, William Cooper, Jack Patten and Pearly Gibbs focussed on equality and full citizenship rights as early as the 1930s. In the 1960s the central demand was for Land Rights as the expression of Indigenous Sovereignty. Vincent Lingiari's patience in turning down the bribery offer of a Vestey's payoff while waiting for a restoration of the Gurindji Land Rights expresses the eternal patience and good will of Indigenous people. They look for the best in the rest of us and hope eventually we will trust them to lead the way in addressing their own priorities. Clear thinking strategists and visionaries like the Aboriginal writer, Kevin Gilbert drafted brilliantly clear formulations of Aboriginal sovereignty and templates for Treaty making. From Charles Perkins to Patrick Dodson and Noel Pearson, Indigenous men and women also have tried to reform by influencing the machine from the outside and inside. In my view they are always betrayed by the treachery of politics.

Noel Pearson had his own vision when he approached John Howard facing near certain political defeat in 2007 arguing that Constitutional Recognition of Indigenous people as well as a bold Federal intervention into Aboriginal policy would set the Ship of State on a new and positive course. A few of the same group of Aboriginal people put the same trust in Tony Abbott as Prime Minister. For all of Abbott's professed support for Indigenous people, he too recently supported Prime Minister Malcolm Turnbull's rejection of a Constitutionally enshrined Indigenous Advisory body. How telling. The one thing these two could agree on lately in their state of mutual loathing was a determined opposition to Indigenous 'Voice' in the constitution. Noel Pearson called Turnbull's response a 'dog whistle', meaning a subtle political message that could only be understood by one political group, namely the arch-conservatives opposed to Constitutional reform. Patrick Dodson put it more bluntly. It was a "kick in the guts".

Malcolm Turnbull's cabinet ministers have conveyed very mixed and misleading signals to the Indigenous people on the government appointed Referendum Council. Professor Megan Davis, who has been part of this

political process for a decade from the Government's Expert Committee on Indigenous Recognition through to the consultations leading to the Uluru statement, has condemned the treacherous political behaviour displayed by those supposedly seeking the considered recommendations of Indigenous people for Constitutional reform.

The pattern of raising Indigenous hopes, promising trust and then betraying them with treachery is indelible, part of that historical pattern displayed by Australia's ruling class. Australia may have stopped classing Aboriginal people as flora and fauna but we forget that they are human when we remove their children from their families, creating the ongoing Stolen Generations. Similarly, the 1967 Referendum, with a rare national consensus of 92% support across the nation, was presented as a vote for Aboriginal equality. However, in giving the Commonwealth the power to count them into the census and also make laws on behalf of any race, meaning Indigenous people too, the politicians created the mechanism for ongoing discrimination. There is no human rights protection to ensure that those laws will benefit Indigenous people, as they or anyone reasonable would see it.

Here is a fundamental challenge to improving relations. International legal covenants including the UN Declaration on the Rights of Indigenous Peoples insist on the right to self-determination and that Indigenous people must give free, prior, informed consent to government interventions aimed at these groups of people. Yet Australia does not bring into full effect these international norms. This is the case with the use of Special Measures, the international legal concept that is meant to allow a version of affirmative action to address the deep disadvantage of the most vulnerable groups in society. The Howard Government claimed outrageously that the Northern Territory Intervention's discriminatory provisions were 'Special Measures' yet Aboriginal people who overwhelmingly opposed the Intervention had never given their free, prior, informed consent. Some Constitutional lawyers contend that Australia's *Racial Discrimination Act* 1975 (Cth) does not import the 'duty to consult' in its explanation of 'Special Measures'. Ultimately the Australian Government does as it pleases.

It was the long pattern of lack of genuine consultation that led Patrick Dodson to propose a Dialogue process that involved South African style truth-seeking. The Reconciliation process that Senator Dodson championed before entering politics was always constrained by the limited knowledge most non-Indigenous Australians have of the history, politics, cultural values and world-view of the array of First Nations perspectives in this land. Revealingly, Government displayed the same ambiguous degree of feigned interest but limited support for the Dialogue as it has towards all consultations with Indigenous people including those after the NT Intervention, before the *Stronger Futures* legislation and those throughout the curious bandwagon known as the *Recognise* movement.

Having attended many Indigenous yarning circles, conferences and forums on the local, regional and national level over the past fifty years, my own belief is that their strongest priorities are Indigenous Sovereignty, Treaty-Making and a

meaningful Voice on policies affecting their lands, languages, health, education, human rights and cultural life in general.

It is significant that the Government's terms of reference always manage to marginalise or totally neutralise these prevailing Indigenous concerns. Indigenous people are instructed to come up with a proposal that the Government will find acceptable, not what Indigenous believe will lead to a truthful reconciling of historic and contemporary grievances and inequality. This too follows the historical pattern.

While it took Australia almost two centuries to recognize Aboriginal ownership of the land, as fast as they could the political conservatives unpicked the Wik and Mabo High Court judgements and appealed against the Native Title settlements. We always treated Aboriginal people like lowly servants and then quibbled over their stolen wages for decades. We paid lip service to the right of Indigenous people to speak their languages and pursue what are the world's longest unbroken systems of cultural knowledge but relentlessly many politicians and much of the media has waged war on the value of Aboriginal Culture.

Our nation is stuck with this 'deficit discourse' viewing Indigenous people as the cause of their own problems. The great danger of this relentlessly negative assault by one party against the other in the Australian black-white relationship is that it avoids the truth. One side is blindly refusing to look at the evidence. One side is still refusing to listen. As Rosalie Kunoth-Monks so eloquently declared, "I am a cultured person…don't try to supress me and don't call me a problem. I am not the problem."

If we want to look deeper into our history to see the start of the problem I wish we could send Captain Turnbull and his crew on that Ship of State back through time to the year 1770. It was on the jewel of an island, Bedanug, as the Kaurareg people had called their home for thousands of years, that Lt James Cook and his trigger-happy Marines, hoisted the English flag. They fired a volley from the Endeavour's cannon and thereby claimed half a continent for King George III without ever carrying out the Royal orders to negotiate with the First Peoples of this land. From those events on what is now called Possession Island, through the violent dispossession of the Frontier Wars and the failure to negotiate treaties with the First People who never surrendered their ancient rule of traditional law and custodianship over their country, Australians have continued to deny the full merit of Indigenous law that has existed here for 65,000 years or more.

In many other parts of the world where some 370 million First Nations people live today, a Treaty is viewed as an effective legal agreement to define certain important rights and relationships, a starting point for negotiations, and a powerful expression of the meaningfulness of those Indigenous laws and customs.

The retired Chief Justice of the High Court, Robert French, has made it perfectly clear that such a Treaty in Australia could be settled because it

would recognize traditional law and custom. It would not bring down the nation. Quite the opposite, it would erect for the first time a just and lawful foundation for the modern nation.

Australia's political unwillingness to recognise the sovereign-to-sovereign relationship with our First Peoples through a Treaty creates our 21st Century reality.

Our First Peoples, overwhelmingly remain dispossessed of their human rights, deeply disadvantaged, disempowered in all of the political decision-making that impacts their lives and discriminated against in so many tragic ways. As a consequence, our modern Australian nation is weakened, standing shakily on hollow legal foundations as Professor Mick Dodson once put it. This holds us back from genuine equality and from embracing the full strength of the world's most ancient multicultural diversity. It holds us back from realising the full strength and priceless value of custodianship, which could guide many different people from different places to co-exist with respect and a unified, long term vision of how to preserve the land for future generations. A Treaty, you see, is about the common good.

Treaty is not about separation, superiority of any culture or about white or black supremacy in terms of power. Indeed it was such racist thinking that created the space between us in the first place, an exclusion of the First People that has lasted for almost two and a half centuries. Treaty is simply one of the best legal options, based on global evidence, to recognize the rights of First Peoples on the road to making things better.

Of all British Commonwealth nations with First People, Australia stands alone with a racist Constitution that permits discrimination and in the absence of a Treaty historic injustices continue unchecked. What a contrast to other democracies with First Nations.

In Canada, Section 35 of the Constitution recognizes their Aboriginal people and reaffirms their Treaty rights. Canada also has an Assembly of First Nations compromised of some 600 First Nations, an advisory Council of Elders and a structure of regional Chiefs. In Australia our political leaders need a heart transplant. We need far more courageous and visionary Prime Ministers of the calibre of Canada's Prime Minister, Justin Trudeau to see that genuine relationships require structures of genuine representation.

The Saami parliaments representing the Indigenous people of Norway, Sweden and Finland show another more successful approach to the most fundamental human rights of the First Peoples. All three nations have distinct Sami Parliaments but they also unify as a Saami 'Voice' on international affairs affecting their cultural group. This highly significant influence over their destiny is expressed in the legal and constitutional arrangements for Saami people in Norway, Sweden and Finland.

In Norway, the only First Nations place where I have observed the genuine healthy equality of Indigenous people, the legal arrangements are clearly

expressed in the Constitution. The world's second oldest constitution, written in 1814, includes a Bill of Rights powerfully defining human rights for all people. Norwegians perhaps show us the way because they did manage to find national unity in 1988, the year of Australia's Bicentennial and massive demonstrations by Aboriginal people seeking genuine land rights and recognition of their sovereignty. Norway amended its constitution in 1988 to guarantee that the Saami have cultural and language rights. Their Saami Parliament is an elected advisory body.

Here is the parliamentary inter-face. 'Voice' is not about vetos of parliamentary power but constructive influence, an auditing and advisory role. Similarly, in Sweden and Finland the Saami Parliaments are elected advisory bodies and both of these nations have a Bill of Rights included in their Constitutions.

The Maoris have reserved seats in the New Zealand Parliament. They also have an elected Maori Council with a political structure reaching down to regional and local levels.

Finally, in the United States, we see Recognition of First Nations expressed through some 350 Treaties and the concept of sovereign dependent nations. The benefits of the American style, sovereign-to-sovereign relationship, are underscored by more than thirty years of evidence gathered by Professors Stephen Cornell and Joseph Kalt in the Harvard Project on American Indian Economic Development.

As well as interviewing numerous Native American leaders and studying closely the Harvard University evidence, I have witnessed the transformation of the lives of millions of Native Americans. They do not have equality but they have made considerable progress compared to Australia stuck with the status quo.

When I arrived in the U.S.A. as an ABC foreign correspondent in 1972 I met up with the American Indian Movement at Wounded Knee in 1973. Russel Means, that brilliant lawyer and activist of the Oglala Sioux told me that Native American life expectancy was 12 to 16 years behind the mainstream. Today some First Nations have closed their 'gaps' to about 3.5 to 5 years but revealingly, on that Pine Ridge Reservation where Russel Means and his AIM group captured the attention of the nation, we still see one of the lowest life expectancies, more than ten years less than the national average. The poverty trap is related to powerlessness.

During my 14 years living in the United States and many filming forays over my 50 years in journalism I witnessed how many but certainly not all First Nations groups have made rapid gains compared to our Australian pattern of national inaction. The key, the Harvard evidence shows, is self-determination expressed through sovereign control of development decisions, a relationship and a negotiation process formulated through Treaties. President Obama's Administration delivered US 3.3 billion dollars in compensation to tribes that

had lost their just entitlement for the resources taken from their lands over the past century alone.

This leads me to my major proposal. To end the continuing tragedy of the poverty and widespread inequality endured by our First People in their own land, a national Treaty should recognise Indigenous law and custom, immediately settle the remaining Native Title claims stuck in the courts and also guarantee Aboriginal and Torres Strait Islander people the sub-surface mineral rights to the wealth of their lands. My logic is that the depths of poverty, welfare dependence, chronic illness, housing shortages, unemployment, over-incarceration and suicide impacting so many of Australia's 750,000 Indigenous people, can only be overcome through a transformational shift of some of the bounty of this land that is rightfully theirs. Currently there are vast tracts of Commonwealth land that can be acquired by State Governments and sold off as they please. Although Indigenous people are viewed in Australian law as having title to about 30% of the landmass, in most cases they are not able to benefit through just compensation for the mining and other uses of their land and waters. Instead of another century of welfare dependency and poverty we need a transformational Treaty that empowers the First People and establishes a democratically elected body that represents their interests, advises Governments and works on a collaborative plan for a brighter future.

Various Indigenous Sovereignty and Treaty groups in Australia have put forward a variety of models that usually involve regional Treaty-making between Indigenous Nations progressing to a legal agreement with the Federal Government. In Victoria, South Australia and the Northern Territory there are well advanced discussions about Treaty making on a State level. New South Wales could create momentum for progress by facilitating regional and State treaty making. What needs close analysis is the kind of legal agreement being sought.

There are similarly diverse proposals for Indigenous representative bodies ranging from local structures recognised by the Constitution to a single elected advisory body. The importance of Indigenous 'Voice' is unquestionable, but we must all be warned that the Australian government has repeatedly undermined all Indigenous political bodies from the National Aboriginal Councils of the 1980s, through to the Aboriginal and Torres Strait Islander Council (ATSIC), the National Congress of Australia's First Peoples and various Indigenous Advisory Councils appointed by Prime Ministers. Indigenous people may continue to offer a hand of friendship and trust, but history says beware of the treachery of politics, not 'white' politics or 'black' politics. Beware of the politics that has no interest in the common ground or the common good.

Finally, I suggest that mopping up the stain of racism on the Constitution should not be the primary responsibility of Indigenous people. This is a task for all Australians, including the political class, who through silence allow ongoing policies of child removal, institutional child abuse, the brutality of the prison system and the misery of dilapidated housing and wretched health.

Yes, Australians should erase the anachronism of Section 25 that is a hang-over from Edward Barton's racist view that some human beings are just not fit to have the right to vote. Professor Megan Davis is probably right that it would never be used because if a State government did rashly exploit that power to deny the vote to any group, it would lose a proportion of its national representation.

I also believe that we need to abandon the ambiguity of Section 51 (xxvi) that allows our Government to enact clearly discriminatory and damaging policies against any 'race'. Do we really want one of the world's only constitutions with race powers?

After the Turnbull Government's rejection of the Indigenous Voice proposal, the joint parliamentary committee will pick up the pieces after a decade or more of constitutional arm-wrestling. It pains me to say this, but I hope these MPs have better luck than the Parliamentary Joint Committee on Human Rights. In their 2016 report on the ongoing disaster of the Intervention policies dressed up as the *Stronger Futures* legislation, the Joint Committee on Human Rights found what I have shared with you tonight, namely that the blanket application of discriminatory policies, the lack of genuine consultation including provision of translators and the lack of any 'Voice' or review mechanisms for Aboriginal people clearly puts Australia in breach of human rights. As Rosalie Kunoth-Monks from Utopia might say, this is the real problem.

If Aboriginal and Torres Strait Islander people want us to take to the streets over the months ahead I say, march with them. Surely after more than two centuries it is time to make this nation listen.

Jeff McMullen's address to Aboriginal Support Group for Manly Warringah Pittwater. Mona Vale Memorial Hall. 13th November 2017.