

## Indigenous Labor Network – 13 July 2005

**Professor Larissa Behrendt<sup>♥</sup>**

I.

Yesterday saw the release of the Productivity Commission's report, *Overcoming Indigenous Disadvantage 2005*. This report, commissioned by the Council of Australian Governments – COAG, is a statistical snapshot of our community and provides a form by which to assess the effectiveness of government policy on alleviating the disparity in living conditions between Indigenous and non-Indigenous Australians. The Productivity Commission's findings make for an interesting report card since we have already had almost ten years of “practical reconciliation” and that would be enough time to see some improvement in the data that forms a benchmark for government performance.

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<sup>♥</sup> Larissa Behrendt is the Professor of Law and Indigenous Studies at the University of Technology, Sydney. She is the author of *Achieving Social Justice: Indigenous Rights and Australia's Future* (The Federation Press, 2003). The part of this paper that deals with Indigenous land and mandatory leasing is indebted to the work and analysis of Jason Behrendt.

While the report noted improved data in relation to Indigenous employment rates (mostly for CDEP and part-time as opposed to full-time work) and education outcomes, particularly with increases in literacy rates, the report still predominantly highlights the differences between the situation of Indigenous people, their families and their communities and all other Australians. Of particular note is the difference in life expectancy, still a difference of 17 years.

And while there are many alarming trends within this statistical snapshot – including the increase in over-representation in the prison population, and the 42% of Indigenous people aged between 18-24 were neither studying or employed compared to 13% of all other Australians, it is the issue of health that is the greatest cause of shame for governments. There is the difference in life expectancy, twice as many low birth weights and infant mortality rates 2-3 times higher and in a first world country, this remains a source of embarrassment at both the state and federal levels.

These figures are not just numbers; they reflect the lives and experiences of Aboriginal and Torres Strait Islander people and for this reason, debates about policy for Aboriginal people are important. And they are debates that must include Aboriginal people.

Although I intend to focus on two policy matters tonight, I would preface these remarks by saying that one of the key impediments to improving the statistical snapshot is that in the key area of health, a report commissioned by the Australian Medical Association estimated that basic Indigenous health needs were underfunded by over \$450 million.

With such under-resourcing, when the government fails to take responsibility for the provision of basic services to the most disadvantaged sector of the Australian community, it is difficult for those in the field and in the front line to adequately address the pressing and urgent issues of Aboriginal health. And it remains difficult to believe that the government has Aboriginal health as a key concern, even though it has been highlighted as a focus for its

“practical reconciliation” policy. There was no consideration given to addressing this under-funding in the lead up to the last election and there was certainly no talk of addressing it at the last budget when the government coffers were swimming with surplus.

So, as a preliminary position, the ALP – at both the state and federal levels – must make a commitment to ensuring that part of their policy and focus is to ensure that key areas, particularly basic health needs, are adequately resourced. 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.

I do not want to dwell on the issue of the National Indigenous Council other than to briefly note, in this context, that the Australian Labor Party has a policy of supporting Indigenous self-determination and this is consistent with the policy of supporting an elected representative body for Aboriginal people, which is also part of the ALP platform. I have written elsewhere on the research both here and overseas that documents the fact where there is a

strong, representative government structure and community involvement in the development of policy and program delivery, those policies and programs are more effective.<sup>1</sup> And I have also written elsewhere on the devastating impact that Mark Latham's inept attempt at political opportunism had on Aboriginal people by ensuring the destruction of ATSIC rather than its reform.

Instead, I want to spend the short time I have to deal with two issues that are key parts of the government's new arrangements and agenda and where there needs to be a strong alternative vision laid down:

- shared responsibility agreements, and
- Indigenous land issues.

## **II.**

The ideologies of assimilation and mainstreaming have re-entered the approach to Aboriginal issues at the national level. The

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<sup>1</sup> A paper on a national representative body for Indigenous people can be found on the Jumbunna IHL research site: [www.jumbunna.uts.edu.au](http://www.jumbunna.uts.edu.au). A paper on Shared Responsibility Agreements is also on the site. Papers are being developed by Nicole Watson and Norman Laing on land issues a further paper on Shared Responsibility Agreements is being written by Ruth McCausland. They will be available on the site soon.

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 who 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, language. 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. It should also be added that the approach to Indigenous policy should not be ideologically led, it should be directed by research-based policy so we are not the perpetual guinea pigs for government. The ALP must adopt a research-based, evidence-based approach to the development of its policy agenda.

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 measures, especially amongst Aboriginal people.

In theory, negotiation with Aboriginal people in order to develop priorities, policies and programs should deliver better outcomes for Aboriginal people through the proven principle that Aboriginal involvement in solutions provides better results.

However, the way in which shared responsibility agreements are entered into do not reflect that principle.

Firstly, there has been no consultation process with communities to set priorities and agendas.

Second, the negotiation with “communities” is occurring at the same time that the Regional Council structures are being abolished so the issues of authority and mandate have not been clearly established.

Thirdly, there is no clear logic to the benefits that flow from behavioural changes. Why is cheaper petrol linked to a hygiene program?

Fourthly, there are anecdotal accounts of where the agreements have not been thought through properly, for example, promising a market garden to a community who does not have enough water to sustain it and a community who had all it’s children turn up to school as part of their agreement only to find there were not enough teachers.

And, there is also the fact that previously successful programs, such as CDEP projects, now have additional burdens

attached through them via the imposition of SRA's. They didn't need to have these coercive aspects to them before? Why now?

There are also questions about what measures are in place to make sure that government's do not include essential services that they should be providing anyway – such as infrastructure, basic health and enough teachers – through these agreements. There are questions about what mechanisms are in place to make sure that human rights are not breached by these agreements. And there are the issues of monitoring and implementation. Who decides if people's faces are clean enough? And who comes and takes the petrol away if they are not? And what happens if it is the government who breaks their side of the agreement? What redress to Aboriginal communities have then?

In this era of shared responsibility agreements, the ALP needs to be diligent in monitoring the procedures and substance of these agreements, particularly where there are elements of duress and breaches of human rights. And it's own policy should focus on

the principle of negotiation about priorities, programs and principles consistent with the party's support of self-determination.

### **III.**

The final issue I will touch on is that of land. The recent Liberal Party convention in Canberra re-endorsed the original Wik 10 point plan and although some punters are saying that Howard won't move on native title, I think we are naïve if we are complacent and trust John Howard on an issue that has been an ideological passion. And the main concern about the revisiting of that plan is that it will again reduce the capacity for Aboriginal people to negotiate.

Aboriginal people have long advocated for reform of native title and land rights. And one of our primary complaints has been the way in which those regimes do not give adequate benefit to Aboriginal people. But privatising communal land will not achieve this. The experience in other jurisdictions such as Canada and the United States has shown that this only sees the communal asset

being lost out of community control in a relatively quick period.

And it should not be done through a scheme of mandatory leasing.

I want to examine why that notion of mandatory leasing, as proposed by the NIC is dangerous, racist and flawed. The NIC recently delivered five ‘principles’ to the Inter-Departmental Taskforce on Indigenous Affairs. In this submission to government, the following principles were proposed in points 1-3.

1. The principle of underlying communal interests in land is fundamental to Indigenous culture.
2. Traditional lands should also be preserved in ultimately inalienable form for the use and enjoyment of future generations.
3. These two principles should be enshrined in legislation, however, in such a form as to maximize the opportunity for individuals and families to acquire and exercise a personal interest in those lands, whether for the purposes of home ownership or business development.

Principles 1 and 2 are unproblematic. While comment could be made in relation to Principle 3, it is the fourth and fifth Principles that I will comment on.

Principle four advocates a concept of mandatory leasing of land. It states:

“Effective implementation of these principles requires that:

- the consent of the traditional owners *should not be unreasonably withheld* for requests for individual leasehold interests for contemporary purposes;
- *involuntary measures* should not be used except as a last resort and, in the event of any *compulsory acquisition*, strictly on the existing basis of just terms compensation and, preferably, of subsequent return of the affected land to the original owners on a leaseback system basis, as with many national parks.”

It is through this principle that the NIC has raised the issue of mandatory leasing of Aboriginal land. The principle itself refers to

“*involuntary measures*” and the potential for the government to achieve those goals through ‘*compulsory acquisitions*’.

Jason Behrendt has noted that a number of points can be made in relation to Principle 4:<sup>2</sup>

- Firstly, the concept of mandatory leasing, as it has been raised by the NIC, is fundamentally discriminatory. It would not be contemplated that the Commonwealth would compel non-Aboriginal property owners, whether they be joint tenants, tenants in common, or joint beneficiaries of a trust, to enter into a lease of their property against their wishes - even if it was to one of the other interest holders. Nor would such an imposition be tolerated by non-Aboriginal people.
- Secondly, by creating an interest in a particular individual or family, it is depriving any other person with an interest of their enjoyment of that land. This can only lead to

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<sup>2</sup> This analysis by Jason Behrendt was presented at a seminar at the University of Technology on 6 July 2005. His full paper is currently being prepared for publication.

providing wealth to one individual at the expense of another. This is a colonists response to economic development and wealth creation if ever there was one.

- Thirdly, while there is general acceptance in the Australian legal system of a need to compulsory acquire land for public purposes, the notion of compulsorily acquiring land so that a private property interest can be created in another individual is extraordinary. It is not a principle that the Commonwealth would impose on any other property holder.
- Fourthly, if compensation is to be payable for a compulsory acquisition, there will be an interesting question as to who will pay for the compensation.
- Fifthly, an obligation to obtain consent of traditional owners is a basic requirement in respecting the human rights of Aboriginal people. There is no reasonable basis for the NIC to propose principles that depart from the need to obtain the consent of traditional owners of land.

Given these problems with Principle 4, the open-ended nature of NIC Principle 5 is of considerable concern. Principle 5 states:

“Governments should review and, as necessary, redesign their existing Aboriginal land rights policies and legislation to give effect to these principles.”

Jason Behrendt has also explained the concerns many Aboriginal people have with this proposal.<sup>3</sup> He notes that principle 5 is an open-ended NIC endorsement for the Government to rework policies and legislation. It does not identify any specific legislative change. It is left to the Commonwealth to determine what legislative change may be required.

The need or motivation for the NIC to put forward such an invitation is not apparent. It is more than probable that once the need to amend the NTA is raised, changes will not be limited to the matters that the NIC want to promote. Indeed, Aboriginal

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<sup>3</sup> This analysis of principle 5 is also taken from Jason Behrendt’s paper, referred to above.

representative bodies are of the view that the Commonwealth has already written to a number of mining industry bodies seeking their advice on what changes they would like made to the NTA.

Given this likelihood that the government will revisit the NTA now that it has a Senate majority, it is most perplexing that despite advocating legislative change, the NIC has not identified any failing of the existing NTA to provide for leases for individuals and families of native title land.

The Act sets out procedures for Indigenous Land Use Agreements. Those provisions are broad enough to provide for the creation of leases to individuals and families if they are desired. Importantly, that legislation puts in place procedures to ensure that it occurs with the consent of traditional owners. The NIC has not identified any deficiency in these provisions.

In my view, the focus on this issue of mandatory leasing ignores other more direct means by which native title holders have been denied the benefit of generating economic benefits from their country. Economic development in rural and remote parts of the

country are dependent on primary production and access to natural resources. The primary policy response of Governments since the recognition of native title has consistently been to ensure that non-Aboriginal people's exploitation of natural resources on Indigenous land can continue. The entire future act regimes of the Native Title Act is aimed at that purpose. The protections afforded to Aboriginal people under that regime are minimal. In relation to most activities they amount to no more than a right to comment on the proposal.

Despite the recognition of native title in 1992, Government policy and legislative reform in the area of land and resource management has never developed to adequately include Indigenous people. They have instead sought to maintain the *status quo* which was premised on the doctrine of *terra nullius*. In New South Wales for example, since the recognition of native title, water economies have been reformed to the exclusion of Indigenous interests. Share-market fisheries have been created without any regard to involving Aboriginal people in the industry.

National Parks have been created without regard to its impacts on Aboriginal economic activities.

The reluctance to concede any right to Aboriginal people in the ownership and exploitation of natural resources has been reflected by the approach of Governments in the litigation of the native title cases to date. Governments have strenuously opposed any right of Aboriginal people to trade in natural resources or any commercial exploitation of natural resources. Ownership of natural resources such as minerals has also been opposed. The Commonwealth has been particularly litigious and there has been more than one instance where a settlement of a native title claim has been scuttled or delayed because of the Commonwealth's mean-spirited approach to mediation.

It is notable that the NIC has not recommended that the Commonwealth rework its policy in relation to litigating native title claims. In my view, it is a pity that in purporting to develop principles for improving 'social and economic' outcomes for

Aboriginal people from their land, the NIC has chosen to ignore this important and fundamental issue.

The ALP should be focused on these issues and find a more practical, equitable and less racially discriminatory manner in which to deal with resolving the failure of native title and land rights regimes to distribute benefits to Aboriginal people. If I had more time, I would expand on these and also note that simple promises of home ownership are not the easy solution that they would appear.

#### **IV.**

In concluding, I would make the following observation to the Indigenous Labor Network and the ALP more generally. The ALP should be a natural home for the Indigenous people and there must be much soul-searching since the last election.

So I make the following observation not as a complete outsider who sees the ALP as an easy target but as someone who

has had much to do with the party, has engaged in fundraising activities and in the last election gave financial contributions to three campaigns, including that of Carmen Lawrence and I spent election day handing out material for the ALP in Bob McMullan's electorate.

As someone who has a strong and tangible loyalty to the ALP, I have found it difficult to maintain that loyalty while the party is comfortable in having an incoming President advising government on Aboriginal issues when that advice is contrary to ALP policy and contrary to the best interests of Aboriginal people. In fact, as I have said above, advice that is discriminatory and racist. And this is especially so since the policies of the NIC are getting more media coverage and therefore are more visible than the policies of the ALP.

This situation is a matter for the ALP but it is, I believe, going to be hard for the party to regain the trust and confidence of

Aboriginal people while there are questions about it's credibility  
on Aboriginal issues.