

Treaty and Health: It's not either/or

Larissa Behrendt¹

There has been a tendency to create a false divide between rights issues like a treaty and socio-economic issues like health. Issues of poor health in the Indigenous population that are evident in our higher infant mortality and lower life expectancy rates can only be combated with a holistic approach. This involves interventions through policy making to address problems as they arise and structural and institutional changes to prevent those problems from arising in the first place.

I have argued elsewhere that the most effective way to develop policy is to ensure that it is linked to an agenda for broader structural and institutional change and that discussions of human rights will seem irrelevant if they do not work with strategies that target socio-economic disadvantage.²

In other words, rather than seeing policy making and rights as an “either”/“or” dichotomy, the relationship should be seen as a trajectory with effective and targeted policy at one end, long term institutional change at the other and a strong connection developed between the two.

¹ Larissa Behrendt is Professor of Law and Indigenous Studies and the Director of the Jumbunna Indigenous House of Learning at the University of Technology, Sydney.

² I expand on this argument in my book, *Achieving Social Justice*. (The Federation Press, 2003).

In the 1997 case of *Kruger v Commonwealth*³, the High Court heard a claim from Aboriginal people who had been affected by the policy of removing Aboriginal children as part of an attempt to assimilate them into Australian society. The claims by the plaintiffs in that case were termed in breaches of basic fundamental human rights such as the right to due process before the law, equality before the law, freedom of movement and freedom of religion. The High Court held that none of these rights were protected.

What is telling in the *Kruger case* is that this was not a case that focussed on what we might call Indigenous rights but on rights that all people would assume that they enjoyed – the right to due process before the law, freedom of movement, equality before the law and freedom of religion.

The Australian legal system as a whole has scant protection of any human rights and this failure to protect rights falls hardest on the poor, the marginalised and the socio-economic disadvantaged. That is, they fall hardest on Indigenous people, families and communities.

Human rights are not abstract concepts. When young children in Redfern get picked up and driven around in the back of a paddy wagon for no reason other than that they are black, that is a breach of their human rights. When a women receives a custodial sentence because the Bail Act

³ *Kruger v. Commonwealth*(1997) 190 CLR 1.

disproportionately disadvantages Indigenous people, that is a breach of her human rights. When Aboriginal men are turned away from hospitals for being drunk when they are actually suffering an epileptic fit, that is a breach of their human rights.

The challenge is to provide a framework so that people who feel the impact of policies like over-policing, the impact of racism in the provision of services and the impact of racist legislation have more avenues of redress than the members of the stolen generation have had.

I believe that the key to that framework is empowering Indigenous people to take the primary role in creating directions and developing policies and delivering programs. One example of this empowerment is the negotiation processes that see Indigenous communities exercise agency through their participation in native title agreement making.

Another is the way in which we see Indigenous people every day making a difference in our own communities through their commitment, through their work, through community controlled organisations, when they are under-funded and under-appreciated.

These are sovereign acts. And it is this agency that needs to be harnessed to set a clear strategy for Indigenous policy and program delivery that links to a broader, rights-focused framework.

No-one would say that a treaty, in and of itself, would solve the broad range of socio-economic issues facing Indigenous communities today. But I would argue that achieving better protection of rights, including the effective input and control of Indigenous policy and program delivery is one important strategy that we need to consider on any holistic approach to socio-economic well-being, Indigenous empowerment and protecting our ability to live our lives as Aboriginal people, that is, our sovereignty.

A treaty's ability to assist in that project will depend on our answers to the following questions:

- Will a treaty be merely symbolic or will it promote substantial change? Could it do both? What will a treaty mean?
- What rights and processes will a treaty protect and enshrine? What will a treaty do?
- How will a treaty allow for flexible approaches to self-government, policies and programs to be built? How will a treaty work?
- How will a treaty assist in making the fundamental link between policy and structural change? How will a treaty stop racism? How will a treaty be effective?
- What other mechanisms, processes and changes do we need to ensure that cost-shifting between state and federal governments

and ineffective and under-funded projects do not continue to define approaches to Indigenous issues? Do we need a Bill of Rights as well as a treaty? How do we ensure that a treaty will be protected?

We cannot continue to rely on government benevolence. We must underpin policy, resourcing and alliances with an authoritative framework. What is needed is the certainty of the recognition, protection and implementation of our basic human rights.

Otherwise, as the *Kruger case* shows, Aboriginal people remain as vulnerable to the benevolence (or lack thereof) of governments when they make policy for us.