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Can the end ever justify the means? Achieving equality for Aboriginal & Torres Strait Islander peoples & the Northern Territory intervention

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The 2007 Don Dunstan Oration, Adelaide, South Australia

Distinguished guest, Vice Chancellors, my Indigenous brothers and sisters, friends and supporters,

I would like to begin by acknowledging the Kaurna people, the traditional owners of the land where we meet today, and to pay my respects to their elders. And thank you Aunty Judy for your walm welcome.

I would also like to thank the Don Dunstan Foundation and Oxfam Australia and in particular Bill Cossey AM, the Foundation Chair, for inviting me to give the Don Dunstan Human Rights Oration today.

Thank you also for the introduction to the Hon John Von Doussa – the Chancellor of the University of Adelaide and my colleague, the President of the Human Rights and Equal Opportunity Commission. Our busy roles within the Commission rarely result in us being in the same place at the same time, so it is a pleasure to be with you this evening.

In absentia I would also like to pay my respects to Lowitja O'Donoghue tonight. Lowitja has been a mentor to me, particularly in my younger days. As I am sure you all know, Lowitja has been, and continues to be, a great champion for the rights of Indigenous peoples.

Last Thursday was a highly significant day for Indigenous peoples worldwide with the adoption by the General Assembly of the United Nations of the Declaration on the Rights of Indigenous Peoples. Lowitja played a key role in the Declaration's advancement during her time as Chair of ATSIC and I want to acknowledge that role. It has taken a while, but we have finally achieved important recognition on the world stage for the rights of Indigenous peoples.

It truly is an honour to deliver this oration in tribute of a great Australian; Don Dunstan.

It is almost 30 years since Don Dunstan held the Office of the Premier of South Australia. His stature as a leader and a visionary, and as a great humanitarian and friend of Indigenous peoples in this country has only grown in this time.

Don fought hard for multiculturalism, diversity and tolerance. His legacy remains a beacon of hope to the forces of progress; a man for whom all South Australians, and indeed Australians, should be justifiably proud.

Let me summarise just some of his achievements:

- In the mid 1950s, Don joined the Aborigines Advancement League in Adelaide and worked with Charles Perkins, John Moriarty, Gordon Briscoe and other Aboriginal activists to improve the lot of Aboriginal peoples and abolish laws which discriminated against them in South Australia, and indeed across Australia. An early victory was to get the consorting provision in the SA *Police Offences Act* removed. Under this provision it had been illegal for Aboriginal and non-Aboriginal people to socialise in any manner.

- In 1960, Don Dunstan became the third president of the Federal Council for Aboriginal Advancement (later FCAATSI, to include Torres Strait Islanders), advocating for the rights of Indigenous Australians and for greater Commonwealth involvement in Aboriginal affairs. FCAATSI would play a key role in the 1967 referendum campaign over the course of more than a decade. Don was in fact the last non-Indigenous president of the Federal Council for Aboriginal Advancement, and was determined to pass the mantle to an Indigenous person the following year. This he did when my kinsmen, Uncle Joe (Pumeri) McGinness, was elected to the position in 1961.

- In 1965 he authored the *Prohibition of Discrimination Act* which was designed to prohibit all forms of discrimination on the grounds of race, colour or country of origin in South Australia. This was the first anti-discrimination legislation in this country. It prohibited racial discrimination (including by skin colour and country of origin) in providing food, drink, services or accommodation, terminating employment and controlling land. He was ten years ahead of Australia as a nation. It was not until 1975, when the *International Convention for the Elimination of all forms of Racial Discrimination* came into force, that the Commonwealth *Racial Discrimination Act* was enacted.

- In 1966 Don also introduced Australia's first Aboriginal Lands Trust and secured title to a large amount of what had previously been Crown Land. He also set in place separate legislation for a Pitjantjatjara Land Rights Bill, which was finally passed several years after his retirement by the Tonkin government. This legislation gave freehold title to over 100,000 square kilometres of land to the Pitjantjatjara and Yankuntjara peoples. He also supported and funded the teaching of Pitjantjatjara for teachers and departmental officers.

- He appointed an Aboriginal clergyman, Pastor Doug Nicholls, as Governor of South Australia in 1977, another first.

And beyond his concern for Indigenous peoples' rights, Dunstan brought profound and positive change to South Australian society. His progressive reign saw homosexuality decriminalised - a first in Australia; and the first female judge appointed to the bench. He is also of course recognised for his role in reinvigorating the social, artistic and cultural life of South Australia during his nine years in office, remembered fondly by most as the Dunstan Decade.

Don Dunstan set a standard for public service; for the commitment of those in power to the rights and well-being of those marginalised in society. His achievements and his vision for a just society provide a challenge for all of us who follow, and a benchmark against which we can measure progress today.

If we are to truly honour this legacy, then we must take stock of where we stand as a society and challenge ourselves, collectively, to strive for continual improvement. For Don Dunstan was not a man to rest on his laurels.

In South Australia, this legacy requires that attention be devoted to the state's anti-discrimination legislation. This legislation was high on Don Dunstan's agenda.

After such an inspiring start it is sad to see that South Australia has fallen so far behind. The Equal Opportunity Act has not had significant amendments since 1984 apart from adding provisions on age discrimination in the early 1990's. Every other State, territory and Federal Government have done major overhauls of their equivalent legislation.

There is no protection under S.A. legislation for people discriminated against because of mental illness or caring responsibilities - both grounds covered in every other State and territory. And in two states we now have a Bill of Rights, which significantly increases the protections of human rights and the role of the equivalents of the SA Equal Opportunity Commission. Processes are also underway in two other states and territories to consider introducing a Bill of Rights. So South Australia is now starting to lag significantly behind on these issues.

The previous government had introduced a bill to update the Equal Opportunity Act in March 2001, which lapsed when the election was held. When the current government came to power in 2002 they promised to modernise the Equal Opportunity Act. There is a Bill currently before Parliament, first introduced in October 2006, But nearly a year later, no action has resulted.

So I begin this oration with a challenge to the people of South Australia and its Parliament – it is time to renew the strong commitment of South Australia to equality through updating the State's equal opportunity legislation as a matter of priority.

In the title for this oration, I ask a question: Do the **ends ever justify the means?**

It is a very broad philosophical question, and I want to consider it in light of two main issues. The first is the growing support for the *Close the Gap* campaign to achieve equality of Indigenous life expectancy within a generation. And the second is to consider it in light of the federal government's intervention into the Northern Territory.

I chose this title when reflecting on the legacy of Don Dunstan and in particular his commitment to promoting equality for all Australians and to removing racial discrimination from our legal system.

I asked myself, if he were alive today, what would Don Dunstan make of the Northern Territory intervention currently underway? Would he concede that there is a benefit to be achieved that may justify introducing elements of program delivery that discriminate against a group of people on the basis of their race? Or is the idea of discriminating against a group of people in order to achieve a benefit for that same group a fundamental contradiction?

I believe that the answer to these questions is unequivocal: he would not support the introduction of discriminatory measures and he would not believe that the ends can justify the means. I will expand on this point shortly.

In the same vein I wondered also, what would Don Dunstan make of the *Close the Gap* campaign?

Some of you would be aware that my *Social Justice Report* to Parliament in 2005 had set out a plan for achieving health equality within a generation. In the eighteen months since that report was released I have worked with a growing coalition of organisations to advance this goal. It has come to be known as the *Close the Gap* campaign – with Oxfam Australia and the NACCHO taking a lead role in this process.

Indeed, today is the first National Close the Gap day and a range of 0activities have occurred nationally – of which this is one - to promote this objective.

My report argued that by adopting a human rights based approach to Indigenous health, it is feasible for the life expectancy rates for Indigenous men and women to be raised to a standard equal to that of non-Indigenous Australia within a generation.

I proposed that a series of targets and benchmarks be established, with longer term objectives of ensuring equal access to primary health care and equal access to health infrastructure for Indigenous peoples within ten years. It is shocking for many people to realise that we still don't have this equal access in Australia in 2007.

If this is done as a matter of urgency and with a long term commitment, then I argued the life expectancy gap can be closed within a generation.

This vision has been embraced by just about every peak health organisation in the country, as well as the non-government and community sectors, and reconciliation organisations. It is a vision that is evidence based and that is achievable.

So what would Don Dunstan make of this challenge?

Well he might be a bit antsy about the length of time proposed – a generation is, after all a long time to accept the continuation of inequality based on race. But I suspect he would also be pleased by the intention of ensuring that the inputs, the resourcing, and the community engagement was targeted to ensure that there was a realistic chance of achieving the end result – equalised life expectancy rates and everything that they represent, such as an equal chance at life for an Indigenous child born tomorrow.

And I am sure that he would have been dismayed that at present, despite the development of complex national health policies and abundant commitments to overcoming Indigenous disadvantage, the programs of all Australian governments are not capable of achieving this important result.

Put differently, at present the means are not capable of producing the intended endgame.

In Australia we are very good at making commitments in relation to Indigenous issues, and not very good at implementing them. We have world class performance monitoring systems for Indigenous health. We have comprehensive national frameworks for Indigenous health. And yet

we have seen only marginal improvements on some indicators and no clear overall positive direction on Indigenous health outcomes.

I think that there has for some time been a lethargy about addressing Indigenous issues in general. We don't expect success, and even worse, we don't even aim for it most of the time. Most of you will know the statistics about Indigenous disadvantage across all areas of life – and many people have come to expect these disparities as a fact of life. So we no longer get outraged by them and we tend to forget that each statistic is a life cut short, or a potential champion lost, or a family broken.

One of the key aims of the Close the Gap campaign is to highlight that current health policy lacks the necessary long term vision about what we want to achieve in Indigenous health. And it is about making it clearly known to all governments that this situation is not acceptable and must change by ensuring that health programs are funded in such a way that they are capable of addressing need or redressing the existing inequalities in health delivery.

It is also about drawing together the connections between health status and the social determinants of health. Improving life expectancy will require improvements across all areas of life – education, housing, employment etc. It will require a more holistic approach to government service delivery that recognises these inter-connections and doesn't restrict the response to the 'health challenge' solely to actions within the health sector.

Overall, the Close the Gap approach seeks to create a relationship between the means and the end, rather than simply allowing what is clearly an unacceptable situation to simply percolate along with no endpoint.

So when it comes to the Close the Gap campaign, my 20 year vision is one that I think would be considered worthy by Don Dunstan: it is for a country where the current state of Indigenous disadvantage will be as incomprehensible to future Australians as the 'White Australia policy' is to the present generation.

After 18 months of solid work, the Close the Gap campaign is starting to build significant momentum. For instance, yesterday in the Senate, a motion put by the Australian Greens was agreed to without dissent – i.e., by all political parties. That motion read that: "The need to act to 'Close the Gap' to achieve health equality for Aboriginal and Torres Strait Islanders within a generation is a matter of urgency".

We need to continue to build on this statement of fact to put into place the necessary action to close the gap.

Now it may surprise you to hear me say that the NT intervention may provide the breakthrough for this malaise in Indigenous policy that I am describing.

While I have some significant concerns about the NT intervention, I think that the federal Minister has put some of the biggest challenges facing us as Australians on the table, squarely and firmly.

The great challenge we now have is to ensure that this is not an opportunity squandered and that the significant resources – financial and manpower – being devoted to the Territory are able to achieve something valuable.

When he announced the Commonwealth government's plans for the NT the Prime Minister said:

the full power and resources of the Commonwealth will be directed to making lasting change, where we can, in the daily lives and future prospects of the most vulnerable fellow citizens in our nation. It goes without saying that Mr Brough and I take full responsibility for the success or failure of this plan.1

The Prime Minister also spoke of "the overriding responsibility and duty of care" that the government has "for the young of this country (which) justifies the scale, the breadth and the urgency of our response."2

The extent of the government's commitment was also made very clear by the Minister for Indigenous Affairs on ABC TV's *7.30 Report* on 27 June. Kerry O'Brien asked the Minister about the implications of conducting health checks in communities. He asked:

If screening throws up eye disease, kidney disease, asthma, threat of diabetes, any one of a number of generic health problems throughout the Indigenous population you've undertaken to provide them all with on going treatment. Is that right?

The Minister's response was unequivocal. He stated:

That's absolutely correct… We do understand the magnitude of this. We are saying if Australian kids are not healthy, then we have a duty of care to make them healthy… We are prepared to do this and break the cycle once and for all and we have no illusions about (a) the cost or (b) the time lines.3

It is perhaps the first time that a government has spoken of its duty of care towards Indigenous peoples. And an optimist might say that this commitment is not far removed from my call for health equality for Indigenous peoples within a generation!

HREOC has strongly and publicly supported the aims of the NT legislation, namely to improve the well-being of Indigenous people in the NT. I believe it is important that all governments acknowledge the serious challenges that our communities face in dealing with child abuse and family violence. To the extent that the NT measures put this issue on the table, and commit to addressing these issues within our communities – the measures are to be welcomed.

However, we have also emphasised that the legislation and the action taken under it must seek to achieve its objectives consistent with fundamental human rights, and in particular the right to racial equality.

I am troubled by how the measures being introduced relate to Australia's human rights obligations. There are four major concerns from my perspective.

First, I am concerned at the suggestion that by stating that the measures are intended to advance the rights of the child, this somehow makes it permissible to discriminate on the basis of race.

There can never be a justification for racial discrimination. It is a per empt ory norm of international law, meaning that it is a principle that cannot be violated under any circumstances.

In August this year, HREOC made submissions to the Senate Standing Committee on Legal and Constitutional Affairs on the NT legislation. And President Von Doussa and I appeared before the Committee to present our views. We stressed in that submission that all measures should be consistent with the right to racial equality.

HREOC commented on the provisions of the NT legislation that stated: a) that the measures contained within constitute a special measure; and b) that if they don't, then they are valid regardless.

When we appeared before the one-day Senate Committee examining the NT emergency legislation, we argued that because the legislation would impact significantly – almost entirely – on Indigenous communities - it is inevitable that there will be discriminatory effects.

We noted that the mere fact that you state that something is a special measure does not make it so. You must justify that you meet the criteria of a special measure, as laid out in the International Convention on the Elimination of All Forms of Racial Discrimination.

The only way to make sure that the legislation does not breach the RDA is if the government can show that it is a 'special measure' – a type of affirmative action that is *necessary*, and has the *sole purpose* of providing a *benefit* to a group of people defined by race – in this instance Indigenous communities in the NT.

These are not easy legal tests to meet.

Our submission noted that for the measures to constitute 'special measures', effective consultation with Indigenous people is required.

We also recommended to the Committee that a review mechanism be established to ensure proper monitoring and reporting and to avoid a range of potential unintended negative consequences arising from the measures. This is again essential for special measures, which must remain under review at all times, and only in place for as long as the need can be justified.

The Commission also noted its opposition to the NT measures being exempt from the RDA. Put simply, if they cannot be justified as non-discriminatory or a special measure then the proposed actions are inappropriate and should not be enacted.

Second, many of the provisions of the Convention on the Rights of the Child have been cited by the government and the NT Taskforce as underpinning the intervention.

However, I am also yet to see a description of that Convention that relates the intervention to the fundamental principles that underpin all of the rights recognised in the Convention. In fulfilling the rights of the child, the following principles must be addressed at all stages: that the measure is non-discriminatory in its impact; recognition is provided for the role of the family as the fundamental unit of society; the best interests of the child are a primary consideration; and where appropriate, the child and family are involved in the decision-making process.

We have instead been given a rather strange interpretation of the Convention that I don't believe will hold up to international scrutiny. The link between removing permits and compulsory acquisition of land and the rights of the child, for example, has been tenuous at best. I cannot see how weakening the property title of Indigenous peoples, and no one else, is consistent with these principles.

We need to be wary of the rights of the child – legitimate, important rights - being used as a shield to deflect *any* criticism of the NT measures, regardless of how sensible or important those criticisms are.

My third concern is a simple one – human rights law places a high value on rights to participate in decision-making. The lack of consultation on these measures is extremely concerning.

It is also not consistent with democratic principles – I note that some members of the government admitted that due to the size of the legislation, they hadn't had time to read it prior to voting for it! And yet it was passed without any real chance for input, particularly from Indigenous peoples and with undue and unnecessary haste.

It is polite of me to put this right as one of 'effective participation'. I really should be talking of it as a right of self-determination, and of requiring the free, prior and informed consent of Indigenous peoples. This is what the Declaration – not the Draft Declaration, but the Declaration – on the Rights of Indigenous Peoples states.

As I noted at the beginning, That Declaration was adopted last Thursday by the UN General Assembly after more than 20 years of deliberations. And it was adopted with just 4 countries opposing it. That is an extraordinary result – I think it is worth recalling that the Universal Declaration of Human Rights did not enjoy such broad support when it was enacted.

Articles 18 and 19 of the Declaration state:

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

And Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The NT measures fall well below this standard.

And finally, my fourth concern relates to the description of the NT measures as an 'emergency' or 'crisis'. This does not overcome the need for the government to comply with human rights obligations.

- I think that it is worth looking at the terms of Article 4 of the International Covenant on Civil and Political Rights which sets out strict criteria to be adopted in times of public emergency.

- In brief, this provision enables some of the human rights obligations set out in that Covenant to be not met, in the following circumstances:

    - where it involves public emergency which threatens the life of the nation;
    - the emergency is officially proclaimed;
    - the restrictions on rights imposed is strictly required by the situation;
    - the restrictions must not be inconsistent with other provisions in international law;
    - they may not involve discrimination solely on the basis of race;
    - they must not breach certain provisions of the Covenant; and
    - the intention to enact emergency measures must be communicated to all other members of the treaty, via the UN Secretary-General.

These provisions which justify restrictions on rights apply to crisis situations such as natural disasters and wars. They clearly do not apply to the situation in the NT, despite the seriousness of the issues being addressed. And yet the claim of an 'emergency' is being used to justify restrictions across a broad range of human rights. It would be inappropriate to make such sweeping claims in time of war or natural disaster – and it is inappropriate to claim it in the NT situation.

These shortcomings of the NT intervention are serious. It is certainly times like these that we could benefit from the wisdom and the commitment of Don Dunstan.

The Government's intervention in the NT has led a lot of people to go back to the Constitution, and to think hard about what the change to section 51(26) – the so-called races power – has really delivered for Indigenous Australians.

Even though the objective of the 1967 referendum was to remove discriminatory references to Aboriginal people from the Constitution and to allow the Commonwealth to take over responsibility for our welfare – arguably it didn't do justice to either.

Instead the referendum put in place the legal ambiguity about whether federal or state governments are ultimately responsible for providing Indigenous Australians with adequate housing, quality education for our kids, and access to primary healthcare. This has allowed decades of buck-passing between the various levels of government, and the only ones to loose out here have been Indigenous Australians. The legacy we carry is the 17-year life expectancy gap as compared to non-Indigenous Australians.

According to Constitutional law experts like Professor George Williams, the referendum also left Australia with the dubious distinction of being perhaps the only country in the world whose Constitution contains a 'races power' that allows the Parliament to enact racially discriminatory laws.4 In other words, in 1967 we missed the opportunity to insert a non-discrimination clause into the Constitution, or to at least ensure that any laws made for Aboriginal people would have to be for our *benefit* and not to our *detriment.*

On two separate occasions the federal government has introduced laws that are discriminatory in their impact. The first was to amend heritage protection laws to prevent them from applying to one group of Indigenous people in relation to the building of the Hindmarsh Island Bridge in 1997.5 The second followed later that year after the *Wik* decision, when the *Native Title Act* was amended to incorporate the government's Ten Point Plan and confirm extinguish of native title in certain instances. The principle of Parliamentary sovereignty means that these two sets of discriminatory amendments prevail over existing laws, such as the *Racial Discrimination Act*, which dates back to 1975.

Our Parliament, in the course of one day and limited debate, may have now added a third example to this list of discriminatory enactments as a result of the passage of the 500 pages of emergency measures legislation for the NT. For the Northern Territory, this situation is compounded by the fact that the separate plenary power in section 122 of the Constitution provides potentially unlimited power to the Commonwealth in relation to the Northern Territory – including potentially exempting it from the requirement to pay just terms compensation as well as the limited protections of rights.

So to return to my earlier question: will the end justify the means?

Like me, I believe that Don Dunstan would have no argument with the end; that is, of the Australian government's endeavour to eliminate child abuse and family violence to create safe environments for Indigenous children, women and men in the Northern Territory, but he would take umbrage with the means. And he would certainly not have endorsed the sidestepping of the *Racial Discrimination Act* and the safeguards of non-discrimination to achieve that end.

I would suggest that the intended endpoint will never be reached, *because* of the means.

Short term, expedient solutions that potentially involve violations of fundamental human rights such as the prohibition on racial discrimination are in fact likely to work in ways that undermine the overall well-being of these communities in the longer term.

Development and human rights experience, both in this country and worldwide, shows that unless communities have the opportunity to take some level of 'ownership' of the solutions to the problems they face, the best intended initiatives will fail.

Governments must ensure that the human rights of every Indigenous man, woman and child are respected in a mutually reinforcing and coherent way. We cannot build a healthy nation on discrimination and division.

It is time however to draw breath.

We have commitments of a bi-partisan nature to work through these issues into the longer term. They are on the table and in the public eye in ways that they have never been, and the timing is right to make these commitments work.

Let me now draw the two issues discussed in this presentation together.

Earlier this year the government announced it had recorded a $17.3 billion surplus on top of record multi-billion dollar surpluses for the past decade.

Last month, out of this surplus a $2.5 billion Health and Medical Investment Fund was created that will, among other things, enable the Commonwealth to carry out more (sustainable) Tasmanian-style hospital interventions into the future.

This provides an ideal model for addressing the inequality gap for Indigenous communities – through ensuring equal access to primary health care, to address overcrowding in housing conditions and ensuring the provision of health infrastructure in communities.

We should build on the determination to address issues of family violence and abuse, and the commitments to address health inequality. The Commonwealth should put aside $2.5 billion from the next two surpluses and create an Indigenous Futures Fund to meet the current shortfall, and create the facilities and the services to provide an Indigenous child born tomorrow, the same chance in life as all other Australian children.

We will need to work with Indigenous peoples, to build on the successes that already exist and to support communities where the capacity is lacking.

It is an unprecedented opportunity that we now have to ensure that the longstanding inequality faced by Indigenous peoples is met once and for all.

Let us remember that it is people's lives, their communities and the oldest surviving continuous culture in the world that politicians are dealing with here. Let us be inspired by the vision and the courage of Don Dunstan, of FCAATSI, of the 1967 Referendum campaigners, the reconciliation movements and more recently the close the gap supporters. For we cannot afford to be discussing these same issues and dreaming of a 'better deal' for Indigenous Australians when the next referendum anniversary comes around.

Thank you

END OF TRANSCRIPT