DEMOCRACY, ETHICS AND POWER – REBUILDING THE COMMON GOOD

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THE LONG WAY HOME

I have come a long way to be with you today, home in Melbourne. I don't just mean from the most isolated capital city in the world, where I am acting Commissioner for Equal Opportunity for a few months: I have travelled 32 years.

I came to Australia from New Zealand as a teenager. Reluctantly. I graduated in Western Australia where I set up my own law firm and then practiced as a barrister, until I was appointed Commissioner/Chairman of the Law Reform Commission. I went on to be Commissioner for Equal Opportunity in Victoria, a position abolished in 1994 by Jeff Kennett who regarded Victoria's only domestic human rights regime as an obstacle to his plans for the perfectly managerial state, untroubled by the rule of law - or, indeed, rules.

From there I became a consultant to the national law firm Dunhill Madden Butler (now Deacons) where I gave industrial and anti discrimination law advice for the firm's institutional and corporate clients.

I left in 2000 to establish the Office of Children's Rights Commissioner for London. We were appointed by the Advisory Board of children and worked with children and the new regional government of London to raise children's status and get them

involved in public decision-making, including developing London's Children's Strategy.

I came back to Australia at the end of last year because of family illness, and to live with and help look after my ageing father. This is the kind of career choice women make. My career is the kind of career women make: rarely do women get on the career path and head straight for the top of the tree. There is always a personal choice, and often a personal issue, that interferes with the guidance mechanism.

Everything I've done has focused on one simple premise: unless people are involved in the decisions that affect them, we don't see them as moral equals or their interests are necessary to accommodate or protect.

I started off my legal career in the Children's Court 30 years ago, where I argued unsuccessfully that a toddler should not be separated from her 'mildly intellectually disabled' parents unless there was no option. By the time the case came on, there certainly wasn't. The parents had not even seen the baby for eight months. In those days there were no options, because the right of a child not to be separated from their parents was something that hadn't been put into words. It took until 1989 for the United Nations to do this, when the UN Convention on the Rights of the Child passed into the realm of international law.

If we don't have the language for rights, we don't recognise wrongs done to them.

My London work was about making sure that the rights of children were respected. We started where it matters, in our own work. The Advisory

Board of the office of the Children's Rights Commissioner is entirely made of children aged from 9 to 16, and it is genuinely responsible for its direction. The children have to approve the business plan and everything that was published from the Office, and they spoke for us to seminars, the media, and to government. Children as young as 4 were directly involved in the preparation of the new Children's Strategy for Greater London, to which the Mayor has committed his government, and in all his other strategies too, because Ken Livingstone promised that in all its work the Greater London Authority would respect the rights of children to protection, provision and to participation – in public transport, housing, safety, environment, culture, economic and spatial development and waste disposal – not just in education or 'child protection'.

We were demonstrating that children must be taken seriously, in our own work. He listened. Our job was to promote the voice of the child, not to speak for them.

I am now the advocate for an Act that says equality before the law is so important that it has to be statutorily protected. When I sat down with my new staff, a few weeks ago, I realised too that all the issues that that isolated office has are exactly the same as those I faced in Victoria 12 years ago.

No children ever come to our office for help. 81% of the users of the Commission's services, whom we regularly survey, say that we are doing a good job, but children and non-English speakers and people with intellectual or psychiatric disabilities or homeless people don't send back survey forms. Refugees don't approach us for our protection or advocacy. Nearly 60% of all the complaints made by Aboriginal people since 1996 have 'lapsed' – they haven't been sorted. The systemic issues that we know exist are not coming to the Commission

for attention. The big changes in attitudes and beliefs so confidently proposed in the 1970s, have not come to pass.

So it makes me ask a difficult question of myself. Are 'rights' the best way to change the world? Has 'equal opportunity' been its vehicle?

IS 'EQUAL OPPORTUNITY' THE RIGHT LANGUAGE?

I am happy to be described as a human rights advocate. I believe that our anti-discrimination law is the only way Australia addresses our ethical responsibilities to vulnerable people, protected by international human rights treaties. But after more than 25 years of equal opportunity debates and policy I believe that 'equal opportunity' language needs a new vocabulary. It has not achieved substantial and sustainable changes to our culture. This is, I regret to say, very evident from the kind of work I've been doing over the last 15 years.

I think that there is a new way.

What I propose is a simple semantic and philosophical shift. Eva Cox recently wrote in favour of changing the language of equal opportunity, using the developing discourse about civil society in corporate life and ethics in organizations. We talk a lot about values and community spirit. If Equal Opportunity were seen as part of an ethical framework, ethical communities would by definition be responsive to discrimination issues. It would be unethical to fail to take them into account. By moving from 'rights' to ethics, she says, we might move the debate from an emphasis on the rights of specific groups to be included at the levels of other more privileged groups, to asserting that a duty to consider the effect of what we say and do on 'stakeholders' includes giving attention to those stakeholders who have not had sufficient opportunities to articulate their claims and interests – and who thus don't get the same outcomes as we do.

Eva defined an ethical organization as one that tries to improve how it does things by considering how its policies and processes might affect stakeholder needs and conscientiously seek out the information to find better solutions. Ethical processes she defined as making decisions, encouraging relationships and taking actions that can both achieve the purposes of the organization, and take into consideration the sometimes conflicting needs of stakeholders, their differential access to and hold on power, and questions of the common good. There may be winners and losers, because there are always conflicting interests, but if processes are ethical in this sense, damage should be minimised, and the risks and effects can be tested against principles of fairness.

I would like to take that argument to the heart what matters. As Dorothy Hewitt said recently, that the only thing that really matters in life is human relationships. Our feelings matter. Our responsibilities to one another and our fellow creatures and the environment that sustains us. The reason I care about democracy, children's rights, international human rights treaties and anti discrimination law, is because of the ethical imperative, to value every human being equally.

We have all too easily assumed that the language of commerce and industry is appropriate for voluntary organisations, for community groups and for government. I would like to suggest that, instead, commerce and industry have something to learn from the voluntary sector.

For a commercial business, making good products and profits for shareholders is obviously important, but so should be the rights and happiness of workers, suppliers and other stakeholders. A community or welfare group is more likely to think of this, because of its origins and its clientele. But that should not relieve them from the duty to think and act ethically as they seek to achieve a greater good. A community group needs to find out and deal with possible conflicts among client

needs, funding body demands and member expectations as well as its responsibilities to its own employees and volunteers. All organizations need to factor in 'the common good' as well as their limited organisational outcomes. The business of our parliaments, ministers, government departments and judiciaries is the 'peace, order and good government' of its people. It is not about fighting off competitors so that we can be preselected for appointment as a parliamentary candidate, or putting party loyalties ahead of our responsibilities.

Communities are about: finding and supporting the necessities of life for all of their members, and using power to develop and protect essentials of a decent life.

We have recently seen what can happen to a woman who tries to succeed in politics. Despite all the rhetoric about 'rights' and equal opportunity for that most vocal of disadvantaged groups, women, there has been only limited change to the culture of political organisations, senior management and government practices over the last quarter century. Women are different, and they are swimming in a pond which sustains others more easily. The language has changed, but though 'rights' language has been used - to justify affirmative action programs for Aboriginal people, or child protection laws and interventions in families, for instance - it is my experience that Aboriginal people have never had a lower status or protection of children's 'rights' to a decent life a lower priority – indeed, children remain a consumer product or a forensic object or a financial obligation.

A child's most important right is to be taken seriously, as a child. They are people, now, not the citizens of tomorrow, and the quality of a child's life now is the only thing that matters.

GROWING A RIGHTS CULTURE

I want to try and say something about growing a rights culture. I have always, unapologetically, used the language of rights as the basis for the moral argument that including people in decision –making is not an option but a requirement. But does this help us build a culture where 'rights' are really respected?

In the corporate world, 'rights' – and mechanisms like diversity policies and programs, Affirmative Action reporting and the threat of equal opportunity complaints – have not diminished the old competitive individualism and macho patterns of career advancement has flourished.

In the world of politics, outsiders who shove their way in – such as Pauline Hanson, Neville BonnerIn the world of children – the family, child care, school and the streets – children are a liability, a nuisance, a responsibility, a problem, or a photo opportunity. They are not welcome. They are not part of ordinary, adult, important life. Why else do we expect all women to work, but not provide a system of affordable high quality child care in place?

How do we build cultures that include the powerless? Once we thought that a 'critical mass' of women in senior positions would change the culture of organizations. We now know that the very process of advancement removes the ethical edge from the women who made it to the top. The 'flavour' of difference is gradually removed until, as High Court Justice Mary Gaudron pointed out when she launched the Australian Women Lawyers Association more than five years ago, the women lawyers who succeeded, ended up being just the same as the men, part of the culture we originally fought against: subsumed and practising law just as males did, but without the rewards or recognition.

What does it take to change a culture? World-renowned psychologist Professor Edgar Schein says that organisations don't change and don't

learn unless we create both guilt and anxiety. In an interview published in BOSS magazine (April 2002, Page 25) the author of Organisational Psychology, 1965, who began his career by examining the effect of their incarceration and treatment on US prisoners of War released after the Korean war, said that organizations cannot change and learn – at least in the short term – because it is painful to replace something that you already have with something new. Learning and cultural development typically doesn't start at the top, but with a small group, and gradually spreads across the organization, and then up. When these individuals begin to innovate, the organism responds with anxiety and rejection.

We need, therefore, to build communities that do not stifle creativity and innovation.

Schein says that:

> '[Corporate culture] factors in the underlying assumptions that people take so much for granted that they don't even think about discussing them – for instance, assumptions about the organisation's goals and what the company has learned from its successes and failure over the years. It is at this level that the term begins to have meaning.

> Clearly, when we speak of cultural change in organizations, we are referring to transformational learning. The current fads include creating an environment of genuine trust and openness; building flat organizations where employees are truly empowered; and creating self-managed teams. Changes of this magnitude require people to give up long-held assumptions and to adopt radically new ones. This kind of unlearning and relearning is unbelievably painful and slow. Corporate culture can be changed. A new charismatic leader, for example, can

>sometimes come in with a message that change the culture very quickly. But major cultural change usually takes a long time - ……… - an imposed cultural change either needs to start with whole new populations of people who already hold the desired new assumptions or it will require painful periods of coercive persuasion'

I'm not sure I agree with him. He sounds very like a politician who didn't get elected, sacking the people. We must work with the relationships and assumptions we have. It sounds as though all you need is a law and a sanction firmly applied and a culture will change. On that basis, all you would need to eradicate child abuse, is to introduce mandatory reporting and lock up a few doctors. It doesn't work, actually, though we continue to play with this as a nice little satisfactory political response to child abuse.

<u>Compliance with a law because we fear he consequences of its breach is not enough</u>. To build ethical cultures, we must <u>want</u> to obey the law. That depends on trust, belief, and a willingness to do more than merely comply. It means building social capital – which is not a value-free term. It means agreeing on ethical standards and processes of decision-making. It means considering the effect of our decisions on 'stakeholders' without excluding the 'under-classes', as Greek democrats did (only property owning men actually voted: women and slaves weren't even citizens).

<u>We must want to obey the law, which is both a personal choice and an ethical position</u>. Just a few weeks ago I drove in to work hearing the voice of one of Clayton Utz partners on radio talking about the British Tobacco case – 'We have done nothing illegal'. However the court criticizing partners who either took refuge in the technicalities of the law of disclosure, or who gave strictly truthful evidence that was crafted to mislead the court, or which revealed that the partner concerned chose

not to ask questions had a different view about the advice that led to a 'document retention policy' which was in fact designed to destroy documents that a Plaintiff might seek to rely upon, and mislead a court as to the existence and availability of others. The end result was the denial of a fair trial to the plaintiff, which resulted in the denial of a fair trial or any trial at all to the defendant that had behaved not ONLY unethically, but ALSO (as the court found) illegally. We need to have an ethical edge about us, so that it warns against technical compliance with law, and understands the underlying purpose.

Mere compliance is ineffective. Compliance with anti discrimination law is not enough to achieve the purpose of anti discrimination laws, to ensure 'equality of opportunity.' In the same way, compliance with mandatory reporting laws does not do anything to deal with the attitudes and circumstances that expose children to the risk of child maltreatment. 'Consulting' with disadvantaged children does not improve the quality of their lives, if what they say and want does not drive the decisions. Why ask children how they feel about their city if, for example, they tell you that adults are bad-tempered with them and they don't feel that public buildings or spaces are 'child friendly' or that shopping centres don't provide space for kids to hang out – and do nothing about it? Why commission research into why women don't have enough babies to replace the existing Australian population, when you leave family-friendly work practices to the charitable impulses of individual employers?

We need a culture that respects the experience of people who are not powerful and can't impose their decisions or choices on other people. How do we create an ethical culture?

CASE STUDY - HOW TO CREATE A DISCRIMINATORY CULTURE
There is now a quarter century of evidence about the conditions in which discrimination complaints thrive. Perhaps we could look at this evidence and see what to avoid and what to change in our culture.

Discrimination complaints blossom in cultures where conformity is the unspoken norm, and the dominant culture does not value difference, does not respect the experience of others and, indeed, where its 'social glue' is based on excluding other people. Lois Bryson of Newcastle University (now RMIT) reviewed the existing research a few years ago[1] and reported that discrimination is most likely to be found <u>in particular environments</u>

- In traditionally masculine workplaces where women have entered relatively recently,
- Where working standards, practices, values, materials and tools were developed for men's skills and strength,
- The new recruits are resented because they need 'help' to use them, or because they are perceived as benefiting from conditions won by the men.
- There are strong ties and loyalties in the workplace, often with no clear delineation between social and working relationships (I recently dealt with what was virtually a closed society where at least half of the workforce was either related or married to or sleeping with one another), making it very difficult to enforce 'proper' standards of work behaviour.
- Such a workplace is often hierarchically organised, with a powerful male network, and
- Commonly somewhat isolated from central management overview.
- There are acknowledged workplace leaders' personal attitudes that have a powerful influence on work behaviour and values. They set the moral tone of the group.

It also flourished where perpetrators enjoyed real power:

- usually higher in the pecking order than the complainant, and
- often in a position to prevent or deter complaints, who
- might never have worked with women as colleagues before, and tried to relate to them as to the women they have known - mothers, girlfriends, wives or daughters

And the kind of person who is likely to be a victim was

- always in a minority group, and
- Usually relatively subordinate;
- Expected to and often tolerate offensive behaviours for a long time,

When someone raisesd a discrimination complaint:

- <u>Typically,</u> the offensive conduct gets worse,
- <u>The person who</u> complained was targeted for punishment by the group, as 'disloyal', and
- Quickly becomes isolated, unsupported and ostracised - and
- Usually leaves that workplace, whatever the outcome of the investigation.

This shows us something about the working of a discriminatory culture. It is rarely an issue of personal criminality or misconduct: discrimination is a manifestation of a culture which tolerates bullying, and the misuse of power. Bryson did this research at the Navy's request, to help them deal with sexual harassment problems, and advised them to use the Navy's own hierarchy of power and authority to address the misuse of power that is the essence of sexual bullying.

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[1] Lois Bryson, *The Issue of Sexual Harassment in the Workplace* (1994) AGPS.

We, too, need to use the existing power relationships of society to change the way we live now. I believe, that bullying – the misuse of power – with a sexual element comes down, in the end, to a culture in which there are winners and losers and which the organisation does not deal with this in an ethical way.

The other piece of research evidence Bryson draws upon in her report is that the most effective preventative for all kinds of discrimination - race, disability, religious and political as well as sex discrimination - is a workplace culture where women and men are <u>genuinely</u> equal: respect for the other, where merit is earned and objectively ascertainable.

BUILDING ETHICAL COMMUNITIES

I have been working with law for 32 years. <u>We do need laws to build ethical communities, but we have to want to obey them.</u>

For the last twelve years I've been working with employers who have begun to address these cultural issues because the cost of dealing with them has been unacceptably high, from lost work productivity to insurance claims, legal costs and workplace wretchedness. Mostly, there is plenty of evidence that problems had been long-standing, and that the workplace culture had been such that its management simply failed to recognise and respond to it appropriately. The culture was part of, if not the cause of the problem. The same could be said of those governments that have high profile legal and public relations disasters, with allegations about conflicts of interest, unfair dismissals, spying and dishonesty. The culture enabled them to thrive.

The Law acts as a Zen stick. This is what a Zen Master uses to make a very loud noise about the head and shoulders of his pupil, day dreaming during what should be meditation. It is a very noisy, but not painful, way of pulling you back into the here and now.

The best way to address an ethical problem is to build a culture where decisions are made in an ethical way, because the values are considered. The best way is to take those snapping synapses of difference and misunderstanding, and use the energy it creates in constructive way.

An ethical community exploits 'difference' in constructive ways. Respect for difference and a culture that values and rewards honesty and effective dispute resolution is a key attribute. An ethical community respects its elders, and its children and young people too. It values entrepreneurs and business leaders and respects workers and migrants and their perhaps unusual ideas. An ethical community encourages and creates opportunity, not grudgingly conceding 'equal opportunity' to avoid punishment or as a token.

Changing a culture is not easy. You can no more change a culture by announcing a "policy" and running a TV campaign than teach a bishop that children are really not responsible for sexual relationships with priests by writing letters to the Age.

You have to get the attention of both the heart and the head. Old attitudes must be broken down, before new ones grow. People must want to change, not to punish or blame someone else. Standing on rights and taking advantage of benefits is the result of a culture in which people do not trust each other. They get into the habit of avoiding the rules, of non-compliance as a norm. Their community, essentially, lacks any sense of the 'greater good'. There is no habit of courtesy or consideration or give and take and voluntary sharing, and no reason to obey rules of good conduct in the interest of the group.

How do you build an ethical culture? Not by imposing religious or moral or legal rules, but by building a culture of trust, and engagement, and thoughtfulness, and recognition of the conflicting interests.

We must do these things:

1. Commit to change – from the top, and from the heart. In the family as in the business world, hypocrisy kills all hope of change. Look at what they do, not what they say. If they use the language of right and wrong, do they treat other people decently? Consult before making decisions? Report back on what they did or didn't change as a result of consultation?

2. Allow outsiders to review our behaviours and attitudes. That is why the HREOC inquiry into detention centres and the UN inspection committees are so valuable. They make us think. It is easy to be satisfied with what we have created. We are desensitised to it. Does a fish know it's in water? The fisherman does! An in-house assessment is culturally tainted: of course we are satisfied about the way we treat asylum seekers: after all, they've broken our law. But an objective evaluation of the ethics of our behaviours and practices requires a commitment to receiving without too much defensiveness what it might find.

3. Make links. An ethical community deals with all of its members. It sees that what it does in one sphere affects another, and plans for

this. For example, a children's strategy would not be just about education or child protection, but measure the impact on children of big mainstream decisions on the environment, housing, public transport and roads and economic development. We already know from our 25 years of business practice that an equal opportunity policy that does not influence or is not reflected in the other mainstream policies – occupational health and safety; risk management; workers compensation and return to work; performance evaluation; discipline and codes of conduct – won't work, because the workplace treats one is more important than the other. <u>We must mainstream our ethical concerns. They should be 'core business'</u>.

4. <u>Communication is crucial</u>. We need to be sure that we get honest and at times anonymous commentary on what's really happening even if we don't really like what we hear. Someone who makes a complaint needs to be taken seriously, without having to launch a big court case. Communication is a two way process

5. <u>We must be accountable</u>. People in leadership and decision-making positions need to be accountable in terms of their ethical standards. Accountability includes standards – such as our international human rights obligations – and benchmarks

and report cards. Elections are not sufficient. We need ongoing evaluation.

6.   <u>We must be thoughtful.</u> An ethical community is a work in progress. It can never afford to be comfortable about itself. Sometimes this is called having an election. I think it is more about the democratic conversation between ourselves and our rulers and among ourselves.

How do we build ethical communities? By engaging in a democratic conversation where every voice should be heard and the effect of what we plan to do must be considered from every stakeholder's viewpoint. By wanting to change. By starting.