

Human Rights Month 2019 Speaker Series: “Cultural rights for Aboriginal and Torres Strait Islander people”

Presented by Shane Duffy, CEO of the Aboriginal and Torres Strait Islander Legal Service.

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SHANE DUFFY, ABORIGINAL AND TORRES STRAIT ISLANDER LEGAL SERVICE:

Good morning, everyone. Good luck people trying to keep up with the way I talk. Just want to put my timer on if I may. I want to acknowledge country, first and foremost, give myself a sense of place; acknowledge former colleagues here, and acknowledge those I'm yet to meet and in the future work with on this important issue around the Human Rights Act in Queensland. I hope a lot of you aren't expecting legal jargon, because that's not my intent today to get into legalities, because that's still the unknown quantity around how the courts interpret any breaches of the Human Rights Act into the future. What is important, of course, is the connection between poor legislation, broken public policy, not only within agency, but across broader agencies. I'm talking about a global approach to looking at Aboriginal and Torres Strait Islander people, to look at how the Act impacts, addresses or inadvertently or disproportionately impacts in a bad way against Aboriginal and Torres Strait Islander people.

Some of the challenges - and from time to time when we talk around human rights or even basic service delivery when I talk with multiple public servants over many years - I was a black-ocrat once - is people say, "That's not my responsibility it's the responsibility of another agency or department." I'm saying it's everybody's responsibility. Look outside, take a global view and the Human Rights Act will be able to support you, your peers and colleagues in the public sector and not only the public sector, but those funded by the Queensland Government, the broader NGO social community and community services sector. So, it really is looking at what you do not only within your agency and area of responsibility but think more broader to look outside your traditional framework of doing business and to make way for new learnings.

So, what are basic rights? Human rights are basic rights and freedoms that belong to every person in the world from birth until death. These basic rights are based on shared values like dignity, fairness, equality, respect and independence. So, these values are defined and protected by law. What about international law? Without getting bogged down and there are many international covenants between the United Nations and States, the State in this case being Australia and Queensland being a state within the nationhood. So, there was one instrument that I recommend to look at and we haven't even looked at ourselves and that's the United Nations Declaration on the Rights of Indigenous People, UNDRIP. Is the legislation at this current point in time compatible with UNDRIP? Some key instruments in the articles contained within, there are two key points: one is self-determination, and one is free and informed consent. Irrespective of what you do within your professional environment and you have a personal responsibility within a civil society is to be able to try to match what

you do to fit in with the Human Rights Act and more importantly, how do we make sure that Aboriginal and Torres Strait Islander people are front and centre at the very beginning of the process as opposed to the back end after everything has been printed and mailed out? So, that's a challenge for all of us. The 46 articles contained within the United Nations Declaration of the Rights of Indigenous People - we didn't have time to go over it and look at compatibility with the current legislation, remembering that legislation is stagnant for a while, but over a period of time one would think it will be looked at and adjusted to suit the citizens in Queensland.

So, Queensland law to focus on where we are today. So, what are human rights? The rights inherent to all human beings regardless of race, sex, nationality, ethnicity, language, religion or any other status. Human rights include the right to life and liberty, freedom from slavery and torture and freedom of opinion and expression, the right to work and education and many more. So, everyone is entitled to these rights without discrimination. Now, as I'm speaking I get to click that in your minds, you're thinking this relates to Aboriginal and Torres Strait Islander people. The next step is how do we fix what we do, build upon current successes and challenges to get better outcomes? Part of the equation of course is working with Aboriginal and Torres Strait Islander people right at the very beginning of the process rather than as an afterthought or at the end. And those processes that are external to the department and are focused out in community on country. So, what are cultural human rights? The economic, social and cultural rights include the human right to work, the right to an adequate standard of living including food, clothing and housing. The right to physical and mental health, the right to social security and a right to a healthy environment and a right to education and this is why we defend the right to culture.

So, why defend the right to culture? Culture is fundamental to human dignity and identity and understanding the link between cultural rights and human rights and is, therefore, essential to the safeguarding and promotion of culture as well as the rights of people. So cultural rights forces us to take into account the rights of individuals and communities in relation to culture and in particular, to connect cultural heritage and expressions with people who produce them. Accessing and enjoying culture is an important part of being a citizen, a member of a community and more widely, a member of society. At a time when artists, cultural minorities, cultural heritage and cultural expressions are increasingly under attack, defending the cultural rights of individuals and communities has never been more important. Do human rights depend on culture? International human rights are universally recognised regardless of cultural differences, but their practical implementation does demand sensitivity to culture. Human rights are inherent and inalienable in human beings simply by the fact of them being human. Culture is fundamental to human dignity and identity. So, what's meant by "cultural rights"? Cultural rights are the rights that are vested in groups of people in relation to their art and culture. Cultural rights are the human rights that guarantee people and communities the freedom to access and participate in the culture of their choice. Is culture a human right? Well, cultural rights are, therefore, I make reference to an international mechanism in several different human rights; it's recognised in article 5 of the 2001 UNESCO declaration on cultural diversity and can be defined as a right of access to participation in and enjoyment of culture. Culture is fundamental to human dignity and identity. I wanted to go further and Scott, I'm not too sure if it sits within the Act - I read it, but like many people I don't read everything from front to back - but I want to touch on the social rights that are relevant to everyone, in this case Aboriginal and Torres Strait Islander people.

Social rights include the rights to an adequate standard of living, affordable housing, food, education, an equitable health system and a social security based on respect and not sanctions, and there is evidence that they may improve the lives of individuals and communities. I had someone say to me earlier that you people are up with the Act, I mean you've been talked at I suggest. You need to get hungry and move on to the next phase and that's how we move on and implement it at local level. Not only local or how it starts in the regions, but how it starts with head office, how it starts with Parliament, how decisions are made and more importantly how they impact upon Aboriginal and Torres Strait Islander Queenslanders.

So, the purpose of the Human Rights Act is to, as it states, recognise the inherent dignity and worth of all human beings, founded on the principle that human rights are essential in a democratic and inclusive society that respects the rule of law - one would question whether the rule of law applies to black fellas in this country, particularly in this state. Get the opportunity to touch on the rule of law we live with every day - and it recognises the special importance of Aboriginal and Torres Strait Islander people in Queensland. The main objects are about protecting and promoting human rights, to help build a human rights culture in the Queensland public sector and promote a dialogue about the nature, meaning and scope of human rights. Part of the aim is to protect and promote human rights through a dialogue model that establishes a number of mechanisms that requires all arms of government to consider human rights as part of the decision-making process. What I refer to this as is a litmus test. It goes one step further, because any decision that you make, and any decisions that people funded in the community and other NGOs make, have to be well and truly documented. There will be challenges, because we have a high turnover in community services particularly when you move to remote areas such as Mount Isa. Everybody gets their black experience and moves on, because they think, "Is life meant to be this bloody hard?" There are issues that prevail in relation to government working with NGOs and procuring services, services providing services and getting outcomes. So how does that relate to you as an individual and how you fit within a larger system? So, the Parliament passes laws after assessing them for compliance with human rights. In exceptional circumstances, the Parliament can overrule the Human Rights Act in passing legislation, responds to declarations made by the Supreme Court. The challenge that is paramount right at this very point in time is the role that the courts play in determining down the track, so we can have our mediation and our peace-making processes, but how do the courts determine a breach of the Act? I have a lot of different things, particularly DV legislation, a lot of really good legislation that was well-intended, but it has unintentional consequences on a day-to-day basis. One as a group of lawyers - I'm not a lawyer, I'll make that clear - a group of lawyers and how they interpret the law in their submissions and two, how the magistrate or judge interprets the laws that they're given by government. So, the change for me is that legislative process across the whole of government but just as importantly, public policy and the flexibility within the public policy to be able to localise it depending on where you are geographically. What we particularly notice over time is policy is bastardised, misinterpreted and misunderstood because people are challenged by the way they've been socialised, their own internal prejudices, so on and so forth. So an opportunity for yourselves to be able to look at how you play a very important role - you might see yourself as an ant in a large nest, but you're critical in making the Human Rights Act work in your professional capacity and as a member of the society and the community you live in every day.

As I said before, it's going to be interesting where possible to interpret the law to be compatible to the Human Rights Act and as I said, the Supreme Court can make a declaration that a law is not consistent with the Human Rights Act, and the purpose is to build human rights standards into policy and practices. You know, I've said - I've known Scott for a long time. I don't envy your job brother, it's like Ken Wyatt having the Aboriginal portfolio in the Morrison Government. I know where you sit, the challenge is how we work with you as external stakeholders and service providers, how we support our community and obviously just as importantly not only within the commission but also working with you as public servants I'd suggest across a wide and varied range of agency and portfolio responsibilities.

I've got some key messages, and may I suggest you're already familiar and work with many human rights laws and concepts unbeknown to you, that the Human Rights Act enshrines basic principles of good policy, decision making and service delivery. However, the Human Rights Act is a relatively weak form of statutory protection, dialogue, so it's a model aimed at prevention not litigation. We don't want to get to litigation, but what we need to do is when a law's unfair is challenge it, not saying the scope is within this Act. But it's really important that when you're getting the same result from the same approach, something's got to change. We need to rely more on the allure of human rights, the evidence and sophisticated legal analysis is required over a period of time. I'm glad you're a lawyer, Scott and leading your team, and I know through sitting with the Legal Assistance Forum a lot of agencies are struggling in trying to be compliant as at 1 January. This is a generalisation, but all the money in the world is sitting in Treasury, you're a public servant and you're getting paid - if you're struggling, how are we going to be out in the not-for-profit sector about making sure our services are compliant from day one? That's why I'm saying it's really important for us to be able to deal with it internally, but more importantly make sure that we engage on the ground with Aboriginal and Torres Strait Islander people before we head off to the printers.

Human rights law leads to increased consideration of human rights and development of laws and policies, improvements in the public service design, delivery and outcomes and remedies for a change of individual and systematic injustices. At the end - how are we going for time? I meant to put my clock on. 20 minutes is never enough - I wanted to go back and really focus on what you can do in considering the Human Rights Act in your daily decision making.

The first one is your obligations where public entities must act and make decisions compatibly with human rights. That's a substantive obligation, so what's practical or functional as in your obligations to give proper consideration to relevant human rights when making decisions. As a public entity, for us it's about considering human rights in our decision making. There's no blanket or inflexible rules; it requires real genuine and proportionate consideration. We must act compatibly with the human rights legislation, treat people as individuals and according to their particular needs, interpret and apply laws compatibly with human rights, and also requires active consideration and a genuine attempt to comply with human rights. I know that section 58 when you're making decisions, there's a couple of questions. One, did you give proper consideration to relevant human rights? Did you act compatibly with relevant human rights and was the limitation on relevant human rights reasonable, necessary and proportionate? So, if not, the consequent action or decision is unlawful. It's not a panacea, but nevertheless it's a new way of moving forward.

I want to go in the last 5 minutes or so and talk about some real challenges particularly in relation to mental health and disability. I was listening to a Podcast yesterday and I always talk about the upstream and the downstream. As a legal assistance service that's providing services from the borders of PNG down, we have to struggle with those things we can't control - that's affordable health, housing, education, employment, training, so on and so forth. So, that's the upstream. If I can't control the upstream or have any valid input into the upstream and there are some portfolios or agencies that I mentioned then, how do we control the downstream? So, from our purpose, it's really looking at mental health, it's hospitalisation versus jail. Now I know an individual can through a mediation move into the Human Rights Act and some of these are really important. Mental health and the law, by criminalising human emotions and disproportionate adverse unintended consequences for Aboriginal and Torres Strait Islander people - so, we're talking about services, not sentences. Shouldn't be locking people up because they're sick. You shouldn't be locking people up because you've got a disability, and I'll move into foetal spectrum alcohol disorder in a minute, or FASD. I've read a lot of documents that say that over 70% of Aboriginal and Torres Strait Islander women and men that enter our correctional facilities self-identify as having psychological, psychiatric or post-traumatic stress. Yet, a prison is about security, it's not about secondary, right down the track. Security is number one. What it's about is making sure people are locked up in a secure environment, it's really not about fixing their health. I look at the costs associated from an economist's perspective, the cost of locking someone up - figures change from \$120,00 to \$170,000 depending on which state or territory jurisdiction - if I take 10 people out for one year, that's 1.7 million to reinvest straight back into front-line service delivery, so it makes economic sense not to lock people up because they're sick.

Let's talk about disability and the foetal alcohol spectrum disorder. This is really challenging. We've got the disability royal commission, everything happening at once. It's really a question, particularly I'm thinking of young people coming into youth detention centres around what's the role of the community, the family nucleus? Our family is bigger, takes into account extended family, your skin, your language, your clan. What's the role of service providers in trying to deal with someone that presents with FASD? We've talked about community, we've talked about service providers, but what's the role of the police? How do they interact with someone that may or may not present with FASD? That's where it starts. How about the role of a lawyer? As a lawyer trying to take instructions with an Aboriginal and Torres Strait Islander paralegal, trying to make sure we get it right. How are we ensuring that human rights of an individual aren't being breached? And that's a challenge for us as an organisation, to develop the tools to pass on to our staff. How are we ensuring what's being said by the client is being understood? Where yes means yes and yes doesn't mean no and no means I don't know. I don't know if you've heard of a saying called gratuitous compliance. We agree because we think it's the right thing. It's around power or perceived power as a public servant or as an individual who's struggling really hard in their life.

The other one is I think the key, and I've alluded to it a couple of times, is the role of the courts. Now, the role of the courts - there's one layer above those and it's the role of the government. So, what's the role of the government who creates the laws for the judiciary to interpret? It's challenging.

To wrap it up for questions, it's about access to justice, it's a social and economic poverty and I'm only thinking of jail as one. I could have talked about child protection, I could have been talking about the mass onslaught of people presenting with mental health issues, particularly our young people. So, we need to move away essentially - and these are some of the challenges. Do we drive in, drive out, fly in, fly out? Are we meeting people's human rights if I'm living in Doomadgee by delivering a quasi-remote service? Or do we need services on the ground? Holistic service responses across agency, policy, and obviously law. I can say that the challenge for you is transformational learning and it's going to be for us, as well. For every one of us it's new and exciting. There's precedents in other states - not so much in law - but the challenge to you is to unlearn what you've known and done before and make way for new learnings. Now that's very confrontational to us and I use my experience when I worked in - I'll call it family services, it was a bit of everything over time, it's something else today - but the challenge for me was really trying to break through the barriers of doing the same thing and getting the same result. Not just within your agency and your portfolio and responsibility, but also across government; and in all of this - DATSIP has failed us, what's important is what DATSIP does as a department to work with us to make sure that black fellas' needs are identified and put forward to strengthen our public policy and to give really good practical advice across government. That wasn't a crack at DATSIP, but an observation from the outside in, saying we need to pick up our policy and work across government, and we need to take responsibility outside of what our own roles and responsibilities are. Because for us, and I know I've got one of my staff members in here today, it isn't a job for us. Because social justice and access to justice underpin everything that we do. That's the 20. Happy to take any questions from the floor.