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Reparations, Human Rights, and the Challenge of Confronting a Recalcitrant Truth

Chris Cunneen
University of Sydney

REPARATIONS, HUMAN RIGHTS AND THE CHALLENGE OF CONFRONTING A RECALCITRANT GOVERNMENT

Chris Cunneen*

I. INTRODUCTION

This paper is about the relations between Indigenous people and the non-Indigenous majority in Australia. It is about achieving reconciliation through reparations and the problems which are encountered when there is a Federal Government which has no commitment to ensuring remedies for past human rights abuses or preventing contemporary human rights abuses.

More specifically this paper is about the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, its recommendations for compensation and reparations, and the development of a proposal for a national reparations tribunal by the Public Interest Advocacy Centre (PIAC). It is about the failure of Government to respond to the recommendations for reparations and its trivialisation of the effects of past colonial policies. Government failure to respond to past wrongs is contextualised by its current inaction in preventing contemporary human rights abuses particularly in the area of criminal justice policy.

II. THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (NISATSIC) (THE STOLEN GENERATIONS INQUIRY)

The terms of reference of the Inquiry required it to trace the laws, practices and policies which resulted in separation of Indigenous children from their families by compulsion, duress or undue influence; and the effect of those laws, practices and polices. The Inquiry was required to examine the adequacy of services available for those affected by separation, including access to records and assistance in reuniting families, and to examine the principles relevant to compensation. Finally, the Inquiry was required to examine current laws, practices and policies with respect to contemporary separations, and advise of changes required taking into account the principle of self-determination.

As a result of the evidence brought to light, the Inquiry made a number of findings. These findings also directly shape the recommendations of the

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* Associate Professor and Director of the Institute of Criminology, University of Sydney.

Inquiry. The Inquiry found that basic safeguards which protected non-Indigenous families from forced separation of their children were cast aside when it came to Indigenous children. After careful consideration of the evidence it found that the forced separation of Indigenous children from their families and communities constituted genocide.

In relation to international human rights the main obligations imposed on Australia and breached by a policy of forced removals were the prohibitions on racial discrimination and genocide. The policy continued to be practiced after Australia had voluntarily subscribed to treaties outlawing both racial discrimination and genocide, from the mid 1940s onwards (NISATSIC 1997:266).

The legislative regimes created for the removal of Indigenous children were different and inferior to those established for non-Indigenous children. They were racially discriminatory and remained in place until 1954 in Western Australia; 1957 in Victoria, 1962 in South Australia, 1964 in Northern Territory and 1965 in Queensland. In addition, Government officials knew they were in breach of international legal obligations (NISATSIC1997:270). The Inquiry found that the policy of forcible removal of Indigenous children could be properly called genocide and breached international law at least from December 1946 when the UN General Assembly adopted a resolution declaring genocide already a crime under international law (NISATSIC1997:275).

The Inquiry also identified breaches of common law rights including breach of guardianship duties, abuses of power, deprivation of parental rights, and deprivation of liberty. In addition there were a range of specific victimisations including sexual and physical abuse.

III. RECOMMENDATIONS

The Inquiry made 54 recommendations and these centre around the principle of reparations. This is a much broader concept than simply compensation. In line with submissions to the Inquiry, the approach was to consider international provisions for responding to and redressing gross violations of human rights (NISATSIC1997:278-280). Specifically the Inquiry considered the van Boven principles which had been accepted by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities as a synthesis of international practice (Pritchard 1997:28). Van Boven recommended that the only appropriate response to people who have been the victim of gross violations of human rights is one of reparation involving a range of methods of redress. The Inquiry agreed with the van

Boven position and recommended a broad ranging response to the stolen generations (recommendation 3). Reparations are to include five components: acknowledgment and apology; guarantees against repetition; measures of restitution; measures of rehabilitation; and, monetary compensation.

IV. Acknowledgment and Apology

The Inquiry recognised the need to establish the truth about the past as an essential measure of reparation for people who have been victims of gross violations of human rights. Recommendation 1 calls for the recording of the testimonies of Indigenous people affected by the forced removal policies. Indigenous organisations such as Link-Up called for a Aboriginal Oral History Archive modeled on the Shah Foundation. The recommendation requires Australian Governments to provide adequate funding to Indigenous agencies to conduct the project of recording testimonies. The Commonwealth Government has allocated $1.6 million for an oral history project. However, the money has been allocated to the National Library and the Government demand is for a 'comprehensive', 'rounded' oral history project which would also collect the 'stories' of missionaries, administrators, police, adoptive and foster parents. The Commonwealth Government response misses the point of the recommendation - both in terms of Indigenous organisations collecting the stories and in the need for prioritising the telling of Indigenous stories as part of the reparation process.

The Inquiry was told of the need for acknowledgment of responsibility and apology. Further, the Inquiry also recognised that commemoration was an important part of the reparation process. Commemoration allows both mourning and the memory to be shared and to be transformed into part of the national consciousness.

Recommendation 5 was that parliaments and police forces apologise, and that parliaments agree to make appropriate reparations as outlined in the report (NISATSIC1997:285). The Commonwealth has still not specifically apologised on behalf of the nation to the stolen generations. The Prime Minister, in responding to the release of the National Inquiry's Report at the 1997 Reconciliation Convention commented,

> In facing the realities of the past, however, we must not join those who would portray Australia's history since 1788 as little more than a disgraceful record of imperialism, exploitation and racism. Such a portrayal is a gross distortion and deliberately neglects the overall story of great

> Australian achievement that is there in our history to be told, and such an approach will be repudiated by the overwhelming majority of Australians who are proud of what this country has achieved although inevitably acknowledging the blemishes in its past history.

Genocide becomes a blemish. And there has still been no official national apology to Aboriginal people for the policies of forcibly removing children.

V. Guarantee Against Repetition

The Inquiry recognised that guarantees against repetition were an important part of the reparation process. Recommendations in three areas deal specifically with this issue. These include recommendations for compulsory educational modules in school education and the role of Commonwealth funding to develop the modules. The Commonwealth completely ignored that part of the recommendation concerning Commonwealth funding and simply responded that the issue was not 'primarily' a Federal matter. Secondly there was a recommendation that the Commonwealth legislate the Genocide Convention for effect in domestic law (NISATSIC1997: 295). The Commonwealth indicated that it had no intention of carrying out the recommendation, which, if effected, would create a criminal offence of genocide within Australia.

A further political guarantee against repetition is the recognition of Indigenous human rights - in particular the right to self determination. There were several recommendations particularly impacting on the contemporary juvenile justice and welfare laws where self-determination as principle and practice needed to be implemented. None of the state or Federal responses to the Inquiry indicated a willingness for any substantial shift in decision-making towards Indigenous control.

VI. Measures of Restitution

According to the Inquiry 'the purpose of restitution is to re-establish, to the extent possible, the situation that existed prior to the perpetration of gross violations of human rights' (NISATSIC 1997: 296). The Inquiry recognised that 'children who were removed have typically lost the use of their languages, been denied cultural knowledge and inclusion, been deprived of opportunities to take on cultural responsibilities and are often unable to assert their native title rights' (NISATSIC 1997: 296).

As a result the Inquiry made a number of recommendations concerning support for people returning to their land and the communities receiving

them (Recommendation 11), the expansion of funding to language, culture and history centres to ensure national coverage, and funding for the recording and teaching of local Indigenous languages where the community determines this to be appropriate (Recommendation 12). The Inquiry also made recommendations to assist in re-establishing Indigenous identity and funding for Indigenous community-based family tracing and reunion services (Recommendations 13 and 30).

The Inquiry made recommendations aimed at Governments concerning the preservation of records (Recommendations 21 and 22), Indigenous access to records (Recommendations 23-26), and the opportunity for Indigenous community management over their own records (Recommendations 27-29). Similar recommendations to church and non-government agency controlled records were also made (Recommendations 38-39). The Federal Government has allocated some money in this regard, but not nearly the amount required (Kinley 1998).

VII. Measures Of Rehabilitation

Measures for rehabilitation are an important component of the reparations package. The Inquiry was made very aware of the problems caused by forcible separation. It made significant recommendations in relation to mental health care and assistance in parenting and family programs.

Recommendation 32 calls on the Commonwealth Government in consultation with the national Aboriginal and Torres Strait Islander Health Council and NACCHO to develop research to identify emotional and well-being effects of forcible removal. Recommendation 33 stresses the role of Indigenous definitions of health and well-being; recommendations 34-35 relate to health professional training on history and effects of forced removals and Indigenous mental health worker training through Indigenous run organisations. Recommendation 36 requires adequate funding for Indigenous organisations to run parenting and family well-being programs. Recommendation 37 requires adequate funding for preventive mental health programs in prisons and detention centres.

The Inquiry also recommended that churches and non-government agencies who provide counseling services to those affected by removal ensure that the services are culturally appropriate and that they assist Indigenous organisations who are supplying such services (Recommendation 40).

The Commonwealth has allocated $39.15 million for 50 counselors, research, clinical support and parenting programs.

VIII. Monetary Compensation

The Inquiry recognised on the basis of the submissions it received that the loss, grief and trauma experienced by those who were forcibly removed can never be adequately compensated. However, the submissions to the Inquiry also demanded some form of monetary compensation for the harm that had been suffered - particularly as a form of recognition of the responsibility for the causes of that harm.

The Inquiry recommended that 'monetary compensation should be payable for harms and losses for which it is not possible to make restitution in kind' (NISATSIC 1997:303). Following both the van Boven principles and submissions to the Inquiry, it recommended 10 heads of damage for compensation: racial discrimination; arbitrary deprivation of liberty; pain and suffering; physical, sexual and emotional abuse; disruption of family life; loss of cultural rights and fulfillment; loss of native title rights; labour exploitation; economic loss; and loss of opportunities (Recommendation 14).

The Inquiry recommended the establishment of a National Compensation Fund (Recommendation 15). Such a statutory body would provide an alternative to litigation, and inequity between States as to their approach to compensation. The Inquiry recommended a Board to administer the fund and that it be comprised of a majority of Indigenous people (Recommendation 16).

The Inquiry noted that the procedural principles applied to the Compensation Fund should be culturally appropriate, expeditious and non-confrontational. The Inquiry recommended that the following procedural principles should be applied: widest possible publicity; free legal advice and representation for claimants; no limitation period; independent decision-making including participation of Indigenous people; minimum formality; not bound by rules of evidence; and cultural appropriateness (Recommendation 17).

The Inquiry argued that credible claims of forced removal should be compensated for by a minimum lump sum. The burden of proof should be on Government to rebut otherwise credible claims and a defense should be that the removal was in the best interests of the child (Recommendation 18). Further compensation should be available where claimants can prove on the balance of probabilities that particular harm or loss was suffered

(Recommendation 19). Finally, the Inquiry recommended that the National Compensation Fund would not displace claimant's common law rights to seek damages in the courts. However, a claimant who was successful in one forum would not be entitled to proceed in the other (Recommendation 20).

The Commonwealth has consistently refused to consider monetary compensation. Furthermore it has consistently trivialised the issue of compensation. Part of this trivialisation has occurred by way of arguing that there is no comparable area of awards of compensation from which to argue a quantum of damages from first principles, and secondly by way of the argument that no amount of compensation can make-up for the mistakes of the past. Both the Inquiry itself and more recently Graycar have provided an effective critique of the Government position on these issues (Graycar 1997:24-27).

First, what is compensable at law is a matter of politics and Government policy rather than any inherent legal principles applicable to compensation. Graycar notes that in the case of war veterans seeking compensation for injuries or illness caused by war service, the normal standard and burden of proof are reversed. Governments have to prove beyond reasonable doubt that the injury was not caused by war in order for a veteran to be refused compensation (Graycar 1997:26). The compensation statute for veterans reflected a political choice about the right to compensation for a particular class of people. Similarly, the refusal to consider compensation for Aboriginal people removed from their families as a result of Government policy reflects a political choice by Government about another class of people's lack of entitlement. The Government position reflects a denial that Indigenous people in Australia have suffered from an abuse of human rights, and that abuse was based specifically on government policy towards a particular governmentally-defined 'race' people.

Secondly, judges and sometimes juries are regularly required to assess economic and non-economic losses and arrive at an amount of money suitable for compensation. Such an assessment 'involves speculation about a range of imponderables'(Graycar 1997:25), particularly in determining damages for non-economic losses such as pain and suffering and loss of amenities of life. Courts have specifically dealt with the assessment of damages for injuries sustained to Indigenous people which have lead to loss

of cultural fulfillment. These cases were canvassed in the *Bringing Them Home* report.[1]

In addition the Inquiry noted international examples where courts have been required to assess compensatory damages for victims of human rights violations. In Switzerland, Swiss Romany victims of forced child removal policies were awarded lump sum compensation (NISATSIC 1997:307). In Canada, the Royal Commission on Aboriginal Peoples recommended a reparations package including monetary compensation for Inuit people who were forcibly relocated by Government during the 1950s (NISATSIC 1997:282).

The Commonwealth also argued that there were difficulties in identifying persons eligible for compensation and that there were gaps and deficiencies in records which render identification difficult. The Inquiry was of the view that the Commonwealth overstated the problem of identifying individuals who may have suffered loss. The Inquiry also argued that it would be unjust to exclude because of inadequate records individuals who have suffered harm, given that records were the preserve of Government, the churches and other carers.

The final area of trivialisation of the need for compensation by the Commonwealth Government relates to the view that compensation would have damaging effects for the community because it is only one example of laws which were later discredited. As the Inquiry noted such a position trivialises the impact of forced removals by failing to draw any distinction between poor public policy and the gross violation of human rights (NISATSIC 1997:307). Again the Commonwealth position essentially denies the fact that Aboriginal people have been the subject of gross human rights abuses.

IX. LITIGATION

The Federal Court's decision in *Cubillo v the Commonwealth of Australia* again raises the issue of the appropriateness of reparations for Indigenous people who were forcibly removed from their families. An estimated $10 million has now gone into the *Cubillo* case and we can expect substantially more money to be expended in further appeals. Other cases in the Northern Territory and New South Wales have also been in progress. The *Kruger* case

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[1] Napaluma v Baker, Dixon v Davies, and Namala v Northern Territory of Australia (see NISATSIC 1997:303; Graycar 1997:25-26).

went as far as the High Court of Australia and is the only one which has been resolved - with an adverse finding for the plaintiffs. In New South Wales the *Johnson* case has been set for hearing and the *Williams* case is proceeding on appeal. We can expect further cases in most Australian jurisdictions.

It has been well established why the current process of litigation is unlikely to lead to satisfactory results for Indigenous people who were removed, and why a Reparations Tribunal is more likely to provide a just and expeditious resolution to these issues. In summary the limitations of the current process are

- the problems Indigenous people have in overcoming statutory limitation periods, when these events occurred many decades ago
- the difficulty of locating evidence, particularly when governments were lax in recording matters involving Indigenous people
- the trauma experienced in the hostile environment of an adversarial court system
- the enormous financial costs involved
- the length of time involved in the cases (the *Williams* case has still not been finalised after 10 years of litigation)
- the problem of establishing specific liability for harms that have been caused

Justice O'Loughlin found against the plaintiffs in the *Cubillo* case. Yet, perhaps ironically, he provides a clear indication of the necessity for a reparations tribunal. He found that Lorna Cubillo had been 'viciously assaulted' while held at the Retta Dixon home, although records as to the actual reason for removal could not be located. He found that the thumb print on documents of Peter Gunner's mother indicated consent of removal. Gunner was later the victim of sexual assault while he had been detained at St Mary's Home.

X. Reparations Tribunal

As noted above, the Stolen Generations Inquiry recommended, among other things, a national compensation tribunal.

More recently the Public Interest Advocacy Centre (PIAC) has, in consultation with Indigenous people, developed a proposal for a Reparations

Tribunal. In cases where Indigenous people can establish that they were forcibly removed they should be entitled to a minimum lump sum payment. In addition people forcibly removed and their families, communities and descendants should be entitled to reparations. Reparations might include a range of remedies determined by the Tribunal. They could potentially include such things as acknowledgments and memorials, cultural and language centres, the provision of counseling services and so on.

The Reparations Tribunal should adopt procedural principles that enable the victims of these abuses to have their matters heard in a dignified and sympathetic manner. These should include informal procedures, relaxed rules of evidence, legal representation and interpreters where required and the capacity to determine group or representative claims. The Tribunal should have a majority of Indigenous members and a life span of ten years.

In many respects the PIAC proposal for a reparations tribunal substantially develops the earlier proposal by the Stolen Generations Inquiry for a compensation tribunal. While some its procedural recommendations are the same, it expands the notion of what the tribunal might achieve into a reparations package. It both broadens the concept of the tribunal from compensation to reparations, and fills out in more detail the earlier recommendations. The PIAC proposal consciously draws on the experience in other countries, including the South African Truth and Reconciliation Commission.

More recently support for a national reparations tribunal has been forthcoming from the Senate Legal and Constitutional References Committee. The Committee began an inquiry into Government implementation of the recommendations from the Stolen Generations report in November 1999. The Committee released its own report in November 2000. The Committee recommended that a Reparations tribunal be established to address the need for a process of reparations including monetary compensation (recommendation 7) and that the PIAC proposal be used as a general 'template' for the recommended tribunal (recommendation 8).

XI. The Withdrawal from Human Rights

The political context in which the demand for a reparations tribunal is being conducted in Australia is not helpful. The problems arise from a number of related issues. I will refer to three issues in this context. Firstly the denial of the right to self-determination for Indigenous peoples. Secondly a Conservative rewriting of history which denies responsibility for the

outcomes of the colonial process. Thirdly a denial of the legitimacy of the application of international human rights standards to western democracies like Australia.

A. Self-determination

Broadly speaking the Conservative Government's approach to Indigenous affairs has been one which denies the right of self-determination and generally favours assimilationist assumptions. Within this context, Indigenous people are not seen as a people possessing specific group rights which derive directly from the effects of the colonial process. Within the contemporary ideology of Government, Indigenous people are seen as a disadvantaged minority deserving of some assistance to reach the standards of the dominant society. Equality is essentially defined as 'sameness'.

A respect for the equality of Indigenous peoples requires their recognition on a collective basis. This right to collective recognition is grounded in the original sovereignty of Aboriginal peoples. It is a public and group right to retain and develop indigenous communities' political and cultural identity. To describe principles of self determination as falling within political or emotive rhetoric, and as a distraction, as Senator Herron, the Minister for Aboriginal and Torres Strait Islander Affairs, did at a United Nations forum of Indigenous peoples in July 1999 (the Working Group on Indigenous Populations), is to fail to understand the difference between individual and group rights.[2] Senator Herron's speech reflected the official abandonment of self-determination as part of Government policy for Indigenous people in Australia.

B. Truth and History

The 1999 Federal Parliament's 'Motion of Reconciliation' and statement of regret by the Prime Minister shows again the inability to apologise on behalf of the nation. The statement also reflects the conservative view on issues of responsibility and the outcomes of specific historical processes.

The Prime Minister stated, when speaking to the motion,

> I have frequently said, and I will say it again today, that present generations of Australians cannot be held

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[2] Dr. John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, Statement on Behalf of the Australian Government, 17th Session, United Nations Working Group on Indigenous Peoples, 29 July 1999.

> accountable, and we should not seek to hold them accountable, for the errors and misdeeds of earlier generations. Nor should we ever forget that many people who were involved in some of the practices which caused hurt and trauma felt at the time that those practices were properly based. To apply retrospectively the standards of today in relation to their behavior does some of those people who were sincere an immense injustice . . .
>
> The Australian people do not want to embroil themselves in an exercise of shame and guilt. The Australian people know that mistakes were made in the past. The Australian people know that injustices occurred. The Australian people know that wrongs were committed. But for the overwhelming majority of the current generations of Australians, there was no personal involvement of them or of their parents.[3]

Rather than a 'statement of regret' the speech reads as a self-justification for the *refusal* of regret and apology for past wrongs. Indeed the past wrongs are so inconsequential that need not be named and can be referred to within a 'generic' expression of regret. Within this context there is little opportunity for a reparations tribunal. Indeed in the Prime Minister's view there is nothing which the current generation has the obligation to repair.

Trivialisation can be seen also in arguments for refusing to apologise to Indigenous people. For example, in parliamentary debate in the Northern Territory, Government members refused to apologise and noted that they were sorry about the removals, but also about many other things which had occurred. 'I am sorry the Titanic sank, I am sorry about World War 1 and I am sorry about the bombing of Darwin, but I feel no need to apologise for any of these occurrences'.[4] 'I regret the trauma that has been caused to all children and all parents who have been forcibly and wrongly removed separated. I refer of course to those thousands of people, Aboriginal,

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[3] Prime Minister John Howard, Transcript of the Prime Minister, 26 August 1999, p.3

[4] Mr. Dunham, CLP Member for Drysdale, Northern Territory Assembly, eighth assembly, first session, 17 February 1998.

European, Australian and British. I am not discriminating on the basis of the colour of people's skin'.[5]

The refusal of a national apology is part of the battle for defining the truth' over the forced removal of Aboriginal children and the history of colonial policy in Australia. The Government response to the recommendation for an Aboriginal Oral history modeled on the Shoah Foundation is indicative of its unwillingness to understand the unique experience of those who were affected by genocide and the gross violation of human rights.

> The victims interests are over-ridden in the interests of balanced history of those who carried out the policies. The new truth in Australia is the truth bestowed by denial. 'I profoundly reject the black armband view of Australian history. I believe the balance sheet of Australian history is a very generous and benign one'.[6]

> By rejection of some history. 'I sympathise fundamentally with Australians who are insulted when they are told that we have a racist, bigoted part. And Australians are told that quite regularly. Our children are taught that'.[7]

Much of the attack on the findings and recommendation of the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families degrade the level of discussion to a question of "guilt". Both the Prime Minister and the Minister for Aboriginal and Torres Strait Islander Affairs have been keen to state that some of the individuals who were involved in forced removal of Indigenous children believed what they were doing was right at the time, and that, even if it was 'horrific', 'we can't change the past'. Thus the argument that 'we should not feel guilty about the past' has two further implications: there is no necessary link between the past and the present; and therefore, there is no inherent responsibility to deal with the effects of the past. Mick Dodson, the former

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[5] Mr. Lugg, CLP Member for Nelson, Northern Territory Assembly, eighth assembly, first session, 17 February 1998.

[6] Prime Minister John Howard, House of Representatives, 30 October 1996, quoted in Dodson, 1996:6).

[7] Comments made on John Laws program, quoted in *Sydney Morning Herald*, 25 October 1996, p.1.

Aboriginal and Torres Strait Islander Social Justice Commissioner has summarised this view as follows:

> The constant reference to 'guilt' and 'black armband' versions of history are willful exaggerations of Indigenous views, designed to caricature and obscure the proper examination and comprehension of the past and to denigrate our current assertion of rights as a form of emotional blackmail. This is a divisive and dangerous game (Dodson 1996:16).

C. International Human Rights Standards

Perhaps the most conspicuous example of the inability of the current Commonwealth Government to seriously consider the implications of human rights abuses is shown in its reaction to various United Nations Committee's criticisms over mandatory sentencing. Two jurisdictions in Australia use 'three strikes' style laws. In particular in the Northern Territory mandatory imprisonment is used for minor property offences. It has been demonstrated that the laws have a racially discriminatory impact and give rise arbitrary and unjust punishments. There is widespread agreement that the laws breach Australia's obligations under the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the Convention for the Elimination of All Forms of Racial Discrimination and possibly the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment.[8]

The mandatory sentencing regimes have been the subject of recent criticism by UN human rights monitoring bodies. In October 1997 the Committee on the Rights of the Child noted in its Concluding Observations that ,

> The Committee is also concerned about the unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system, and that there is a tendency normally to refuse applications for bail for them. The Committee is particularly concerned at the enactment of new

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[8] Criticism of mandatory sentencing and its human rights implications has come from former High Court judges, serving judicial officers, the Human Rights and Equal Opportunity Commission, the Australian Law Reform Commission, the Law Council of Australia, the Senate Legal and Constitutional Committee, Amnesty International, and the Parliamentary Standing Committee on Treaties (See Cunneen 2000).

> legislation in two states, where a high percentage of Aboriginal people live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high percentage of Aboriginal juveniles in detention.[9]

In March 2000 the Committee on the Elimination of Racial Discrimination made the following comments in its Concluding Observations:

> The Committee expresses its concern about the minimum mandatory sentencing schemes with regard to minor property offences enacted in Western Australia, and in particular in the Northern Territory. The mandatory sentencing schemes appear to target offences that are committed disproportionately by Indigenous peoples within Australia, especially in the case of juveniles, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends the State party to review all laws and practices in this field.[10]

In July 2000 the Human Rights Committee noted in its Concluding Observations that:

> Legislation regarding mandatory imprisonment in Western Australia and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system, raises serious issues of compliance with various articles in the Covenant.

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[9] UN Doc Concluding Observations by the Committee on the Rights of Child: Australia. 10/10/1997. CRC/C/15/Add 79, para 22

[10] UN Doc Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia. 24/03/2000. CERD/C/56/Misc.42/rev.3, para 16.

[12] UN Doc Concluding Observations of the Human Rights Committee: Australia. 28/07/2000. CCPR/CO/69/Australia, para 17.

> The State party is urged to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected.[12]

In November 2000 the Committee Against Torture in its concluding observations on Australia

> expressed its concern about ... legislation imposing mandatory minimum sentences, which has allegedly had a discriminatory effect regarding the indigenous population (including women and juveniles), who are over-represented in statistics for the criminal justice system.[13]

The Committee recommended that,

> The State Party keep under careful review legislation imposing mandatory minimum sentences, to ensure that it does not raise questions of compliance with its international obligations under the Convention and other relevant international instrument, particularly with regard to the possible adverse effect upon disadvantaged groups.[14]

Observations by the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination and the Human Rights Committee show the incompatibility of the mandatory sentencing regimes with Australia's international human rights obligations. The Committee Against Torture was less forthright but still makes clear its concern with potential lack of compliance.

What has been the Government's response to United Nations criticism? Basically the response has been to deny the credibility of the UN Committees. For example, Senator Herron chastised the UN for the CERD Committee's criticism of Australia's non compliance with CERD. Senator Herron told the UN Working Group on Indigenous Populations in Geneva that the Government 'was disappointed that the views of the Committee did not record the substance of the Government's submission'. He further suggested that criticism by the CERD Committee which were leveled at the

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[13] UN Doc Conclusions and Recommendations of the Committee Against Torture: Australia. 21/11/2000. CAT/C/XXV/Concl.3., para 6(e).

[14] UN Doc Conclusions and Recommendations of the Committee Against Torture: Australia. 21/11/2000. CAT/C/XXV/Concl.3., para 7(h).

Australian Government would result in the validity and credibility of UN Treaty bodies suffering.[15]

The Government also went on the attack domestically against the United Nations treaty monitoring bodies. The federal Attorney-General responded to the CERD report, calling it 'unbalanced' and ruled out overturning mandatory sentencing laws (Press release, 26 March 2000). As a further response to the CERD report the Government announced a review into the operation of the United Nations treaty committee system as it affects Australia (Press release, 27 March 2000).

XII. Conclusion

There is unlikely to be progress in the near future towards the establishment of a reparations tribunal in Australia. The current Government has no commitment to reconciliation with justice. It has shown little recognition of the profound impact colonial policies have had on Indigenous people in Australia. It has not seriously understood the need for a national apology as an acknowledgment of past wrongs which would provide a stepping towards reconciliation.

Because it has no understanding of the impact of past policies, it has no idea of the need for reparations. The inability to comprehend the impact of human rights abuses is shown dramatically in its lack of response to contemporary human rights abuses affecting Indigenous people. The Government's response to United Nation's criticism has been simply to deny the validity of the criticisms and the legitimacy of the Committees, (while at the same time ignoring the domestic criticisms of every major law reform, human rights and legal professional body in the country).

The can be little progress towards reconciliation and reparations in the face of such a recalcitrant Government.

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[15] Dr. John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, Statement on Behalf of the Australian Government, 17th Session, United Nations Working Group on Indigenous Peoples, 29 July 1999.

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