

ANU Reconciliation Lecture

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Respect for human rights, equality and justice must be at the heart of reconciliation. When the British settled Australia, they used their laws to dispossess and oppress the indigenous people of this country. Two centuries later, growing acceptance of human rights principles has enabled Australia to turn its back on earlier oppression and to use its laws to promote equality and justice for indigenous people. This process is far from complete, and it must be a goal of reconciliation to achieve fully for all Australians the equal enjoyment of all human rights, civil and political as well as economic social and cultural by all Australians.

Introduction

I would like to acknowledge the Ngunnawal people, the traditional owners of the land on which we are gathered.

It is a privilege to be invited to give this address on the topic of reconciliation, and in doing so to mark the 40th anniversary of the 1967 Constitutional referendum (May 27th 1967). We also remember the 1997 Report *Bringing them Home*, and yesterday's 15th anniversary of the *Mabo* decision.

A week ago it was reported that Emily Kngwarreye's magnificent painting "Earth Creation" had been bought at auction for more than \$1 million dollars to be put on display in Alice Springs.

In another part of Alice Springs, on the same day, the Aboriginal Tangentyere Council, representing the town camps, was involved in an angry stand off with the Commonwealth government, about control of its housing.

What do these events tell us?

On the one hand, that Aboriginal art is highly respected and admired, in Australia and around the world, as presenting a unique cultural vision of immense significance to this country. To Emily "her culture was her life."

On the other hand, the first peoples of Australia, (guardians of their unique traditional culture), are struggling to adapt to modern society, with many living lives of disadvantage in overcrowded and sub-standard housing, with poor education, poor health,ⁱ low life expectancy and high levels of unemployment.

Some Aboriginal communities are being brought down by alcohol and drug abuse, by endemic violence, sexual abuse, high rates of murder and suicide.ⁱⁱ

Their rates of imprisonment are as high as ever and there are increasing rates of indigenous women in prison.

Children in these communities do not have the life chances they should have, in one of the richest countries of the world. We are shamed by this.

This is not what the voters of 1967 envisaged.

If the reconciliation process was meant to address these problems, it seems to have stalled.

Why?

Different approaches to reconciliation

I believe it is because current approaches do not get to the heart of the problem.

The Prime Minister recently asserted the nation's need "to recapture the spirit of the 1967 referendum in a contemporary practical fashion."ⁱⁱⁱ This means something he calls "practical reconciliation", fixing up health, housing, education, employment, etc.

No one can disagree with the need to put these things right.

It would certainly be a good move to improve living conditions and to encourage economic independence of communities, where that can be done.

Some good things are being done. But it is not enough.

And something is missing.

I am not speaking about criticisms of particular programs, about the lack of participation of indigenous people in their design, or about the resistance and disagreement in some communities about their implementation.

My concern is that current policies recognise no distinct role or status for Aboriginal people in our political, social and economic life.

The issues are addressed on assimilationist lines. Only the other day, I heard the Prime Minister say that the best way for indigenous people to gain access to the bounty and good fortune of Australia was for them to be absorbed into the mainstream.

The Government's response to the Reconciliation report in 2002, took a similar approach in rejecting

action which would entrench additional, special or different rights for one part of the community.^{iv}

Carried to its end, this essentially assimilationist approach would mean the eventual disappearance of Aboriginal tradition and culture - their knowledge and spiritual connections to this land built up over tens of thousands of years. Surely it cannot be the goal of reconciliation, to merge one group into the other.

We should say no to this approach.

It leaves unanswered the role of Aboriginal people in the Australian polity, as the first people of Australia with a unique and valuable culture. It takes no account of their right to autonomy and self-determination.^v Leaving these issues out of consideration is, in my view, a real impediment to the efforts to “fix problems”.

human rights can provide a legal framework for reconciliation

Contrary to what many may think, the 1967 referendum did not itself bring about any immediate change for indigenous people. It removed a discriminatory provision relating to the census from the Constitution and enabled the Commonwealth to legislate in respect of Aboriginal people. But the Commonwealth was in no hurry to use this power.

Progress for indigenous people moved along when ideas about human rights began to influence decisions. I have no doubt that the desire to restore rights to Aboriginal people influenced the Northern Territory land rights legislation, which recognised Aboriginal traditions and customs.

The Racial Discrimination Act 1975, based on the International Convention on the Elimination of Racial Discrimination (CERD), and the ratification of the International Covenant on Civil and Political Rights (the Covenant) in 1982 were significant in the Mabo litigation and in the decision to overrule the doctrine of terra nullius and to recognise native title as part of common law.^{vi}

But in recent years, the momentum seems to have been lost.

Further progress, in my view, would be advanced by paying greater attention to human rights principles which are already binding on Australia. These can provide a solid foundation for the restoration of dignity and equality to Aboriginal people, by ensuring that they have a responsible and committed role in the solution of current issues/problems.

Self-determination as part of human rights agenda for reconciliation

Perhaps the most important right for indigenous people and for the reconciliation agenda^{vii} is the right of self-determination, protected by both the ICCPR and the ICESCR in these terms:

All peoples have the right of self-determination. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development. (Article 1 (1))

In addition,

all peoples may, for their own ends, freely dispose of their natural wealth and resources . . . (Article 1 (2)).

This is a collective right of peoples, not a right of individuals.^{viii}

In its application to Australian indigenous peoples, the right of self-determination is not a charter for secession, separation or break up of the State.^{ix} It ensures the *autonomy* of distinct “peoples” within an existing State entity.

Australia’s indigenous peoples have never had an opportunity to exercise the right of self determination. They never consented to the settlement of their lands, to their dispossession and displacement and the destruction of their cultural ties to land and heritage. They had no opportunity to choose whether they wished to be included in Commonwealth of Australia – in fact they were excluded from it.

When the UN human rights Covenants were being drafted in the 1950s, Australia made an effort to prevent the inclusion of the right to self-determination.^x Ever since, Australia has ever been wary of recognising this right for its own indigenous people.

Consistent with its dislike of the concept, the Government explained to the Human Rights Committee in 2000 that rather than "self-determination" [the actual words of the Covenant] it prefers terms such as "self-management" and "self-empowerment" to express domestically the principle of indigenous peoples exercising meaningful control over their affairs.^{xi}

The Committee was not satisfied, and wanted a stronger role for indigenous people in decision making.^{xii}

The new Declaration on the Rights of Indigenous Peoples (article 3) recognises the right of self-determination in identical terms to those of the Covenants, with further elaboration in other articles. The Declaration is waiting adoption by the General Assembly after 10 years of difficult negotiations. However, the Australian Government has done its best to derail it, by joining with other like minded States to have its final adoption deferred. One reason for this is that it wants a new formulation of self-determination, or even its removal. The outcome hangs in the balance.

Giving effect to self-determination

Australia should, indeed is **bound** by its adherence to the Covenants to recognise that Aboriginal people and Torres Strait Islander people are entitled to the right of self-determination, the right “to freely determine their political status” within Australia in free negotiation with the Government.^{xiii}

They are entitled to this right as the first peoples of Australia, the original owners and custodians of this continent.^{xiv} They have never entered into any form of agreement setting out the basis of their relations with white community, or the terms on which white people would colonise these lands. And there is little doubt of the consistent demand by Aboriginal people to have a major role in mediating their own relationship with the dominant society through an agreement.^{xv}

As I said, this is not a charter for secession or for separate statehood. Nor can the clock be turned back to 1788. The right to self-determination requires free negotiations between the Government and the freely chosen representatives of indigenous people for an agreement about their status, about the ways in which their autonomy is to be exercised and the principles for the future relationship between indigenous Australians and the wider community.

Giving effect to self-determination would require a representative voice for indigenous people to negotiate unresolved issues.

I do not think, for a moment that it would be an easy task to find the voice or voices that would be accepted by all as representative of the indigenous community. The new Declaration calls for “representatives chosen by themselves in accordance with their own procedures” (article 18). It is up to the indigenous community to come up with a blueprint for the selection and membership of such a national body and to ensure that it was properly representative in accordance with cultural processes.^{xvi} It should, of course, recognise the principle of gender equality.

The National Indigenous Council, which replaced ATSIC is not a representative body. ATSIC itself was an imposed model, with specific functions in the area of policy and advice, rather than a negotiating role.

The potential for **any** national body to have a mandate to represent all indigenous people is anathema to the Prime Minister. His opposition to ATSIC from the start was that it would divide the nation, create a black nation within our nation, whereas his goal was unity - “absorption into the mainstream”.

There are several options for the form and status of a self-determination agreement. It should, in my view have legislative support at least; other options are that it be made under constitutional provision, or it could be an ordinary agreement.^{xvii} Whether the result is called an agreement, compact, framework or treaty, the process would be the same. The issues to be covered are well established.

The making of such an agreement has been discussed for many years. It seems not so much to ask for or to expect.

Regrettably the present Government has turned its back on this process, saying that it would undermine the concept of a single Australian nation, and create legal uncertainty and future disputation.^{xviii} On the contrary, I believe it could be the basis for greater unity and better understanding. The other points are just excuses.

Constitutional recognition

An important issue for negotiation is that of the Constitutional recognition of Aboriginal and Torres Strait Island people.

Their express exclusion from the Constitution was overcome by the 1967 Referendum. Forty years later, they are described in that document only as people of a "Race".

The Australian Constitution should refer expressly to Aboriginal and Torres Strait Islander peoples, and should recognise their special status as the first peoples of this nation with their traditional rights and interests. The remaining references to "race" should be removed.^{xix}

The Preamble of 1999 honouring Aborigines and Torres Strait Islanders was rejected.^{xx} It was wanting in many respects.

Canada has done better,^{xxi} Victoria has done better.^{xxii} The Maori have their treaty of Waitangi. It is high time we moved on this.

Consideration should also be given to ensuring that indigenous people, men and women, have a secure voice in the conduct of public affairs at national level. This should not be left to chance, but should be part of the self-determination agreement.^{xxiii} Would positive action be accepted as a means of achieving this end?

Autonomy issues

The autonomy of indigenous people,^{xxiv} and their right to self-management of internal and local matters requires that they participate in decisions affecting their rights and that the State consult in good faith to obtain their free and informed consent on measures that may affect them.^{xxv}

Some have suggested that a national body exercising collective self-determination could disempower local people, but that is not its aim. Under self-determination principles, issues of policy development affecting all indigenous people may be best settled nationally, while other issues may be more effectively decided at local level.

As it is, there are concerns about major national policies being developed without adequate consideration or consultation. An example of this is the new provision for 99 year leases over communal land townships on traditional land. There are competing views about the merit of these provisions. It is a real concern, however, that the legislation was stated by the government led Senate Committee to have been rushed through without sufficient consultation.^{xxvi} This shows the absence of any commitment to a genuine process of negotiation, consistent with the recognition of self-determination.

On the other hand, there are many examples of successfully negotiated regional and local agreements ranging from land use and land care to health services.^{xxvii}

The right to participate carries with it a responsibility to exercise those rights for the benefit of all indigenous people and generally in the interests of all Australians.^{xxviii}

Culture, identity and law

Australia's obligations under the Covenant require it to respect the culture of indigenous people, as a minority.^{xxxix}

The treaty bodies which oversee the Covenant and other UN human rights instruments agree that the protection of cultural rights enriches the State's cultural identity and the fabric of society.^{xxx} Negating those rights, on the other hand, is likely to lead to a loss of identity.

We ratified the Covenant in 1982, but when it was being drafted in 1961, the Australian Government observed in discussion that aboriginal people were too primitive to be considered a minority.^{xxxi} At least we have progressed beyond this shameful attitude.

Our two domestic human rights laws, the ACT Human Rights Act and the Victorian Charter of Human Rights Act both recognise cultural rights.^{xxxii} These rights are further elaborated in the new Declaration on the Rights of Indigenous Peoples.^{xxxiii}

Cultural rights extend not only to language and religion, but to sustaining traditional forms of economy (such as hunting, fishing and gathering), and the protection of sites of religious or cultural significance in determining land use.^{xxxiv} Measures of special protection should be taken where necessary to give effect to these rights.

Indigenous minorities should be free to maintain and strengthen their own unique culture and tradition, their ties with land and heritage and to live according to their own traditions,^{xxxv} provided only that this is consistent with everyone's rights.

One test of the degree of respect shown for indigenous culture is the extent to which the laws and customs of indigenous people are recognised. In Australia, native title laws, land rights legislation and heritage protection laws, despite their flaws,^{xxxvi} all recognise, up to a point, customary law and tradition of indigenous people. Native title interests in land or waters depend on those traditional laws and customs and on connection with the land.^{xxxvii}

The recognition of other aspects of customary law has had mixed progress.

In 1987, the Australian Law Reform Commission recommended ways in which the Australian legal system might recognise the customary law of Aboriginal people, following a ten year review.^{xxxviii} It emphasised that any such recognition would have to be consistent with international human rights principles, including equality and non-discrimination provisions,^{xxxix} and so far as possible given effect within existing legal structures.

The Commission recommended an Aboriginal Child Placement principle, under which Aboriginal children should be placed with their own family or community and in a way consistent with the child care traditions of that

family and community. Non-recognition of those traditions had led to violations of rights, such as the excessive intervention by child welfare agencies. The principle has now been accepted and implemented in virtually all jurisdictions.

Another outcome of the Commission's report was the amendment of the Commonwealth Crimes Act in 1994, to list cultural background among the factors to be considered in sentencing a federal prisoner.^{xi} This seemingly modest provision has recently become the subject of controversy. (I will come to the reasons for that).

In the intervening years Aboriginal culture and customary law have been brought to bear on legal procedures and sentencing decisions in a number of State and Territory jurisdictions, and in indigenous community justice groups.^{xii} Examples are circle sentencing, Nungah Courts, and Koori courts. These are generally considered successful and as contributing to self-governance and empowerment.^{xiii}

However, the proposal of the Council for Aboriginal Reconciliation that State and Territory courts be given discretion to take account of traditional laws in sentencing was rejected by the Government. Under its monocultural approach, it refused to support any action which would entrench additional, special or different rights for one part of the community.^{xliii}

The Government's attitude hardened last year after a case in the Northern Territory, where a magistrate had relied on a customary marriage in mitigation of a carnal knowledge offence, though the NT legislation on that point had been changed. The Northern Territory Government had appealed and the sentence was increased. The High Court refused to consider the defendant's further appeal, and did not deal with recognition of customary law.

The Government moved to repeal the 1994 reforms of the Crimes Act, which listed cultural background as a factor to consider in federal sentencing. At the same time, it prohibited any reference to customary law as a justification or aggravation of criminal behaviour.^{xliv} The legislation was rushed through, despite the plea of the Senate Committee for delay.

Once again, the agenda is monocultural, and over simplistic in attempting to solve problems by a formal equality approach. The issues relating to customary law and its recognition are complex and need careful consideration, especially when marriage is involved. The peremptory and dismissive approach taken is regrettable. It ignores the long history during which law was used against the interests of Aboriginal people, to dispossess them and vest their lands in the Crown.

Even when discriminatory laws no longer applied, the 1991 report of the Royal Commission on Aboriginal Deaths in Custody showed clearly that despite the formal equality of the law there was inherent racism and discrimination built into the criminal justice system.^{xlv}

It has to be accepted that some Aboriginal communities have high rates of dysfunction, violent crime, family violence and sexual abuse of children.

There is also a disproportionately high percentage of Aboriginal people both in the prison population, and as victims of violent crime.

The underlying factors contributing to this situation are the same now as those identified by the Royal Commission 15 years ago. They include the living conditions of the Aboriginal communities, and the effects on them of dispossession and social breakdown. We all know that there are no simple answers to these problems. The way forward recommended then, and still valid, is to break the cycle of deprivation, to respect human rights principles and to encourage empowerment and self-determination of Aboriginal society. (para 1.10.10)

By suggesting that the blame for sexual abuse can be on cultural background and customary law, a further insult is thrown to the indigenous community, while leaving the underlying problems unaddressed.^{xlvi} It implies, contrary to the truth, that customary law condones sexual abuse. No one condones or seeks to excuse this conduct or to assert that it is acceptable according to Aboriginal cultural values.^{xlvii}

The claim for recognition of customary law has always been made within the framework of respect for the rights of indigenous women and children and for all victims of violence to be protected by the law.^{xlviii}

The approach of the Commonwealth Government is in stark contrast to the report of the Western Australian Law Reform Commission last year on Aboriginal Customary Law.^{xlix} Its view was that the high rates of violent crime and of over-representation of Aboriginal people in prisons were symptomatic of a decline in cultural authority. It recommended ways to further empower Aboriginal communities, and their authority figures, by adopting culturally appropriate methods to deal with crime, for example, through community justice groups and Aboriginal courts.

The report comprehensively rebuts the argument that permitting courts to take into account the cultural background of an offender is contrary to the principle of equality before the law. It recommends the introduction of provisions into sentencing and bail, similar to those which have just been removed from Commonwealth Act.

Its recommendations for the recognition of Aboriginal customary law and justice processes, are made firmly within a framework of respect for international human rights standards, and in particular the rights of women and children.^l

So, in this area of law and criminal justice, a battle ground has been staked out by the forces of assimilation and monoculturalism standing against those who seek to empower indigenous people, to reinforce self-determination and autonomy by enabling customary law and customary processes to play a role in resolving problems.

Stolen generation – the sorry story

The human rights agenda is nowhere more important than in regard to the Stolen Generation. This is an issue which should not be left to individuals to pursue in the courts.

The case for reparations is unanswerable. Leadership from the Commonwealth Government is needed to ensure appropriate reparations programs are introduced throughout the country. So far only Tasmania has taken a lead in setting up a process for assessing claims by members of the stolen generation for ex gratia payments.ⁱⁱ

The Commonwealth Government has supported family link up counseling, cultural maintenance and other programs. But it has steadfastly refused to accept the recommendations for compensation, or reparation or for an apology.

The child removal policies carried out under State and Territory laws over many years were intended to cut off children from their families, culture and language on the spurious ground that they would be better off. They were racist and assimilationist. Many children were subjected to harsh treatment and abuse. The effects on those children and their families were disastrous and long lasting.

Bringing them Home opened the eyes of many Australians to these abuses. The Inquiry had no difficulty in concluding that the forcible transfer of children violated rights and was an act of genocide,ⁱⁱⁱ as it aimed at the destruction of the culture and distinct identity of Aboriginal people.

The States and Territories have responded with apologies and other action.

But reparations are lacking. Individual attempts to seek compensation through the courts have resulted in expensive litigation with little outcome. Law and the lapse of time has been against individual claimants.ⁱⁱⁱ

While the actions may have been authorised by law at the time, that is no answer to the violation of international human rights principles involved in these removals. It is up to the national Government to ensure redress.^{liv} The new Declaration calls for this.^{lv}

The hypocrisy of the Commonwealth's position is emphasised by Anne-Marie Devereux's research, which shows that in 1962 the Commonwealth was reluctant to have children's rights included in the Covenant because it was aware that there would be difficulties over the treatment of Aboriginal children.^{lvi} Clearly it knew at that time that the policies were incompatible with human rights.

Then there is the question of a national apology. Wilcox cartoon last week posed the question: "*what if, just maybe, saying sorry did help?*" I cannot see Reconciliation making real progress without it.

To keep on saying that we are not personally responsible for wrongs done in the past by others ignores the role of the national government as the only

representative body able to apologise for all of us. While it takes credit for the glories of the past, it must also be accountable for the wrongs.

An apology may be largely a symbolic act. But it is an act which has assumed huge importance for all those affected, and would convey huge symbolism to them. There are many, many families affected. It. Because of its overwhelming importance to indigenous people it should be important to all of us - if reconciliation means anything. There is everything to gain for white Australia and nothing to lose.

Stolen wages

The story of the stolen wages is a further reminder of how the lives of Aboriginal people were controlled in almost every detail under state “welfare” laws, even their earnings and other entitlements.

These practices ended only in 1969 in NSW and later in Queensland. The amounts involved are estimated to be in the tens of millions of dollars.

This is largely, but not wholly an issue of economic rights.

Queensland and NSW now have schemes for reparation.^{lvii} But why is the loss of money deemed worthy of reparation, while the splitting up of families, with the misery and dysfunction that this gave rise to is not

The priorities here may need reconsideration.

Economic social and cultural rights

Equality in the enjoyment of economic, social and cultural rights remains an elusive goal for the indigenous community.^{lviii}

Two recent reports caught my attention.

The AMA identified “institutionalised racism” among the factors contributing to poor health outcomes.^{lix} The report called for greater involvement of the indigenous community in the design and control of culturally appropriate services, and for the extra funding necessary to close the gap, \$400 million per annum or more.

The Productivity Commission in its Report on *Overcoming Indigenous Disadvantage: Key Indicators* was frank in acknowledging that “Culture plays a significant role in Indigenous well being, and must be recognised in actions intended to overcome Indigenous disadvantage”. It identified as “success factors” a co-operative approach, community involvement in designing programs, together with good governance and government support.

These observations support the argument that progress will be expedited by giving full recognition to the right of self-determination and autonomy, with all that entails.

Entrenched rights?

I have argued that human rights principles are important for the reconciliation process and for Aboriginal people generally. This has been expressly recognised in the two human rights laws enacted in the ACT and Victoria.^{lx}

Regrettably, apart from the issue of discrimination, most human rights principles are not directly applicable in our law, though they can be raised offshore in encounters with the UN human rights treaty bodies (such as CERD, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child).^{lxi}

If human rights were written into Commonwealth legislation, they could guide the reconciliation process and the negotiation of self-determination.

Would this be such a disaster?

Every comparable country has a Bill of Rights or the equivalent. The sky has not fallen.

Concluding remarks

Progress towards reconciliation requires a national leadership fully committed to the process. In the meantime, committed leadership of indigenous people, their consensus as to how to proceed,^{lxii} and the support offered by popular action will ensure the issues are kept alive.

I argue that respect for human rights, equality and justice must be at the heart of reconciliation. I emphasise that:

Aboriginal and Torres Strait Islanders should be recognised as peoples entitled to the right of self-determination, and to negotiate their status and autonomy and future relationships with the wider community.

The status of Aboriginal and Torres Strait Islander people as the first people of this nation should be recognised in the Constitution.

White Australia should recognise the unique culture, languages, religion, heritage and spiritual connection to land and waters of Aboriginal people, and respect and recognise their customary laws so long as this is compatible with human rights principles.

Indigenous people are entitled to exercise autonomy and to participate and give free consent to decisions which affect them.

Reparation should be provided for the stolen generation, and an apology offered.

Human rights should be entrenched in our laws.

There are many other issues I have not raised here, such as intellectual property and land rights.

Reconciliation is not just about politics, economics and leadership. It is about people meeting each other and trying to understand each other. We can't unwind the past. But we must not forget it.

I would like to see Australia as a nation whose primary objective is the substantive equality of all its people, black and white, men and women, with human rights, equal opportunity and social justice for all.

- as a nation which puts a special value on the history and culture of its indigenous people, not preserved in a museum, but as a living and breathing culture which has its roots in antiquity and is influenced by modernity.

(The story of ten canoes, the film of Rolf de Heer, represents this idea).

- as a nation in which the wrongs that have been done are acknowledged and their effects ameliorated so far as possible.

- as a nation which draws its symbols from those places, events and ideas which are common to all of us.

Twenty four years ago a Minister for Aboriginal Affairs said that

until this great issue is settled and these legacies of the past are redressed, Australians - all of us - can never be truly free, never live in harmony and with a sense of equality.

Those words remain true.

I finish with the words of Sally Morgan:

We have to find a way of living together in this country, and that will only come when our hearts, minds and wills are set towards reconciliation.

END (final text)

Note: footnotes are indicative only, and are not complete.

ⁱ Oxfam ranked Australia bottom in the league table of first-world nations working to improve the health and life expectancy of Indigenous people. The Oxfam report refers to "diseases triggered by poverty; overcrowded housing; poor sanitation; lack of access to education; poor access to medical care for accurate diagnosis and treatment; and poor nutrition." (2007)

ⁱⁱ eg, SMH 19-20 May 07; 22 May 07.

ⁱⁱⁱ PM Address, Global Foundation March 2007, "need in a contemporary practical fashion, to recapture the spirit of the 1967 referendum"

^{iv} The Government is committed to common rights for all Australians. . . . The Government supports additional measures to ensure equality of opportunity where such measures are necessary to overcome specific disadvantages experienced by Indigenous people. Neither the Government nor the general community, however, is prepared to support any action which would entrench additional, special or different

rights for one part of the community. (Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report - *Reconciliation: Australia's Challenge*, September 2002, p. 17.

^v *Social Justice (SJ) Report 2001* p 58 ff, says that Pearson's rights and responsibilities, reciprocity arguments are appropriated by government to justify policy not based on rights. It is used to argue that rights in general are not practical and do not contribute to improving the livelihoods of indigenous.

^{vi} Brennan J's opinion was that "a common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration." (p 429). His Honour considered that Australia's ratification of the Optional Protocol to the ICCPR brought to bear on the common law the powerful influence of the Covenant and the international standards it imports. "The expectations of the international community accord in this respect with the contemporary values of the Australian people". (Brennan J at p 422).

^{vii} Along with demands for a treaty and constitutional recognition of rights, it is described as flowing from an endeavour to regain recognition of the original right of indigenous people to freedom from control, which was lost with the invasion . . . and to gain a secure recognition of those rights: ATSI SJC, 1993 report, p 50. The report of the RCADIC in 1991 advocated empowerment and self-determination of Aboriginal society to eliminate disadvantage as the best way to tackle the problems of social breakdown and dispossession.

^{viii} Another view, not much supported now, is that it only applies to groups which are not a minority, Nowak p 22. No individual complaint can be accepted for its breach (Lubicon Lake case, HRC).

^{ix} The United States of America, Canada and New Zealand recognize limited forms of indigenous sovereignty.

^x It later voted against the second sentence.

^{xi} It reported indigenous issues under article 27 (minorities) not under article 1 (self-determination).

^{xii} It called for indigenous people to have a stronger role in decision-making over their traditional lands and natural resources (under article 1, para 2)."

^{xiii} In that context it is to be exercised on a continuing basis, Nowak, p 15.

^{xiv} Michael Mansell wants Aboriginal people to be defined as a nation, not as a minority.

^{xv} Langton, "History will record and future generations will know that Aboriginal people have continued to assert the right to negotiate just terms and conditions of the seizure of their territories and resources and the proscription of customary laws, governance and ancestral jurisdiction." See also Falk in *Rights of Peoples*, p 33: Indigenous people should play a role in determining the regime which should apply to them, a central role in defining their rights. " By failing to follow through we have also produced a record of demoralisation, where assimilation occurs only partially, leading to a loss of traditional identity without any inner adjustment to the modern circumstances."

^{xvi} Pat Dodson called for Indigenous Australians to have a National, State and Regional voice with its authenticity informed from the local level according to proper cultural protocols, Reconciliation speech, 2004.

^{xvii} Report of the Constitutional Commission, 1988. p 723 ff.

^{xviii} Government response to CAR Report, p 23.

^{xix} Section 25, which is frankly racist, could be removed, and Section 51 (xxvi) amended to remove the reference to race and make a positive reference to Aboriginal and TSI People. The Government agreed to put s 25 to referendum some time.

^{xx} It included: “honouring Aborigines and Torres Strait Islanders, the nation’s first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country”;

^{xxi} Constitution of Canada, S 35 (1)

^{xxii} Victoria has amended its Constitution Act 1975 to acknowledge Indigenous people as the original custodians of the state’s land. The WA Law Reform Commission has recommended that this model be followed.

^{xxiii} HRC General Comment 23 on Indigenous peoples, para 4 (d): “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent”.

^{xxiv} Declaration on the Rights of Indigenous Peoples, Article 4 calls for autonomy or self-government in matters relating to internal and local affairs, and for financial support.

^{xxv} Declaration, articles 18 and 19.

^{xxvi} The Senate CLA Committee wanted a commitment by the Government to undertake further ongoing negotiations.

^{xxvii} Eg, the Western Cape York Communities Co-existence Agreement; Land Care agreements; the recent agreement on the future management of Noonkanbah; the Yorta Yorta agreement; The Katherine West Health Board agreement.

^{xxviii} UDHR 29, everyone has duties to the community in which alone the free and full development of his personality is possible.

^{xxix} Indigenous people have the right to enjoy, in community with others of their group, their language, religion and culture. This right of minority members is protected by article 27, ICCPR. The new Declaration emphasises that indigenous people have the right to maintain and strengthen their own institutions, while retaining the rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State. (Article 5)

^{xxx} CERD General Recommendation No 23, para 4; HRC General Comment 23, and Concluding Observations on Australia 2000.

^{xxxi} Nowak p 485.

^{xxxii} ACT HR Act s 27 is similar to art 27 of ICCPR; The Victorian Charter of Human Rights Act recognises the distinct cultural rights of Aboriginal persons, s 19 (2). [New Matilda Bill recognises Rights of Indigenous people]

^{xxxiii} Arts 11, 12, 13; see also the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, 1992. It calls for measures to ensure “that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.”

^{xxxiv} HRC Concluding Observations on Australia, 2000.

^{xxxv} ATSI SJC 2000 report has called these “rights inherent to Indigenous peoples that flow from their prior occupation and their culture”

^{xxxvi} The Native Title Act might be considered flawed in many ways, and there is an argument that it departs from compliance with CERD and the RDA, especially since the Wik amendments. See *Western Australia v. the Commonwealth* (1995) 183 CLR 373 at 483-484; the Native Title Act states itself to be a special measure, art 1 (4)), [It is to some extent subject to RDA s 7].

^{xxxvii} The Native Title Act of 1993 (s 223)

^{xxxviii} The terms of reference recognised the “right of Aborigines to retain their racial identity and traditional life style or, where they so desire, to adopt partially or

wholly a European life style". Issues dealt with included the criminal justice system, family law issues, community justice mechanisms, hunting, fishing and gathering
^{xxxix} Recognising culture is not, as Bill Jonas pointed out, an authority for violating the equal enjoyment of rights by women.

^{xl} ss 16A and 19B (1A), inserted in 1994 Crimes Amendment Act. The ALR Commission's report, paras 504-511, 1007.

^{xli} Qld: community justice; NT: law and justice committees, SA; the Ngunga Court; NSW: circle sentencing.

^{xlii} Calma has referred to positive developments around the country benefiting Indigenous communities, like circle sentencing, Murri Courts, Nungah Courts, Noongar Courts and Koori courts. In 2003 the Northern Territory Law Reform Commission made recommendations for the wider recognition of customary law to assist with law and justice issues in communities.

^{xliii} CAR's *National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights; Government Response* p 17.

^{xliv} The Crimes Amendment (Bail and Sentencing) Act 2006 (Cth), rejecting the amendment put forward by the Committee. (Senate Standing Committee on Legal and Constitutional Affairs, *Crimes Amendment (Bail and Sentencing) Bill 2006*, October 2006). The Committee was concerned about the haste and lack of time for consultation (advert. 19 September, for submissions by 25 Sept, hearings on 29th).

^{xlv} The application of criminal law and procedure (police interrogation methods and court procedures) was the cause of hardship, injustice and violations of rights. [*Walker v NSW* 1994 182 CLR 45, criminal statute applies to everyone.]

^{xlvi} The treaty bodies have expressed their concerns about family violence and child abuse (CRC), about substance abuse (CRC), about the high proportion of young Aboriginals in conflict with the law (CRC). Mandatory sentencing caused concern to CERD, in addition to the overrepresentation of indigenous people in prisons, and the deaths in custody.

^{xlvii} It needs programs, and will not be solved solely by the application of criminal laws. NT Courts have recognised this (In *Wurramara* (1999) 105 A Crim R 512 (Retreat 602) NT CofA).

^{xlviii} The ATSI SJC, Tom Calma, has emphasised that it does not "override the rights of women and children to be safe and to live free from violence." [See the National Indigenous Violence and Child Abuse Intelligence Task Force] The new Declaration on the Rights of Indigenous Peoples calls on States to "take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination". (art 22 (2))

^{xlix} WALRC 2006: <http://www.lrc.justice.wa.gov.au/094-FR.html>.

^l One of its basic principles was that women should have an equal voice in implementation.

^{li} Stolen Generations of Aboriginal Children Act 2006 (Tas) (29 Nov 2006)

^{lii} Contrary to the Convention on Genocide, (ratified by Australia in 1949)

^{liii} *Kruger*, and *Cubillo and Gunner* (HC 2002).

^{liv} It has been recognized by the UN human rights treaty bodies as a matter of national responsibility.

^{lv} it recognises the right of children "not to be subjected to forced assimilation or destruction of their culture." (8 (1)). It calls on States to provide mechanisms for prevention of and redress for forced population transfers which violate their rights and forced assimilation, art 8.2.d.

^{lvi} p 77.

^{lvii} *Unfinished business: Indigenous stolen wages*, 2006; the Senate Legal & Constitutional Committee wanted Queensland to follow the NSW model; they recommended that there be access to the archives, and funds for research and awareness

^{lviii} CERD (2000), CESCR 2000 and CRC 2005 were concerned about the comparative disadvantage of “the indigenous populations of Australia in the enjoyment of economic, social and cultural rights, particularly in the field of employment, housing, health and education”

^{lix} They include financial, geographic, personal and cultural issues, but also “institutionalised racism”. AMA (May 2007).

^{lx} The ACT Human Rights Act 2004 acknowledges in the Preamble the special significance of rights for indigenous people – “the first owners of this land”. The Victorian Charter of Human Rights and Responsibilities Act 2006 has a similar preamble and also recognises specifically the cultural rights of Aboriginal people

^{lxi} They have all expressed their concern about the lack of entrenched protection of rights in Australia. Their concerns have been ignored

^{lxii} Falk p 34.