



CATHOLIC COMMISSION FOR
**JUSTICE,
DEVELOPMENT
& PEACE**
MELBOURNE

Occasional Paper No. 1 - February 1998

THE CHALLENGES AHEAD - 1998 AND RECONCILIATION

Summer time brings with it a time for warming of the spirit, reflection and relaxation. 1997 has proved to be a year of great difficulty for the indigenous community. 1998 presents some new and some old challenges.

In August 1995, the former Commonwealth Attorney General, Mr Michael Lavarch commissioned the Human Rights and Equal Opportunity Commission (HREOC) to inquire into "the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence and the effects of those laws, practices and policies." After nearly two years the Inquiry handed down its recommendations. The HREOC findings were made public, ironically, at the Reconciliation Convention in Melbourne in May 1997. During the two years the Inquiry travelled the country hearing painstakingly the evidence of Aboriginal people, non-indigenous Australians and governments about past policies of removal and their impact on the Aboriginal and Torres Strait Islander peoples.

In the ensuing debate surrounding the Report, the focus has been on the need for a national apology and concern by government over a possible claim for monetary compensation. Two important features of the report have been overlooked or been lost in the debate. The first is that the impacts of the separation of aboriginal children from their families still reverberate in their lives today in the loss of esteem, sense of isolation and difficult family life for many who were separated and their siblings. Secondly, the actual stories that were told by the aboriginal people often at great personal cost have been almost forgotten.

The stories of these people were some of the most profound and stirring reminders of the realities and human side of the separation policies. Extracts from these people include:

" I run into my sister at the school and I just happened to know that it was her because of the same family name. And that's when I found out about

my Dad being sick. I didn't get to see Dad. He passed away a couple of weeks after I found my sister. I went back for the funeral. I took the kids."¹

" I now understand the way I am and why my life is so full of troubles and fears. I find it hard to take my children to hospital for fear of being misunderstood and those in authority might take my children away as I was."²

Arguments asserting that separation policies are a thing of the past and dwelling on them is not the way forward, conveniently overlook the difficulties experienced by Aboriginal people today in dealing with and overcoming past experiences. Human beings of their nature are not machines, we are unable to disconnect ourselves from personal trauma. Some people are sensitive, and others are more resilient. This has been shown by the capacity of many Aboriginal people to survive, but others have not fared so well.

As a society we must be humane. We must rise above our own experience and have a capacity to empathise and to ensure that all people are treated with respect and dignity. The Commonwealth has responded to the report by recognising that efforts need to be made to deal with the fallout of the separation of children. The government is to spend \$63 million as a response to the Inquiry. Of this amount \$45 million is to be spent bringing separated families together. This is encouraging but a national apology was still not forthcoming. Comparisons with the recent Canadian apology to the Indians which focussed on the impact of past policies strongly contrast the governments response. Jane Stewart, Canada's Minister of Indian Affairs and Northern Development stated,

"As a country, we are burdened by past actions that resulted in weakening the identity of aboriginal peoples, suppressing their languages and cultures and outlawing spiritual practices.... The government of Canada today formally expresses to all aboriginal people in Canada our profound regret for the past actions of the Federal government which have contributed to these difficult pages in our relationship together."³

Work still needs to be done to ensure that the spending is culturally appropriate and respects the rights of self determination and is directed to areas of need

¹*Bringing Them Home, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, HREOC, April 1997 p235

² *Bringing Them Home, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, HREOC, April 1997 p224

³ *Guardian Weekly* 18 January 1998 p 10. Accompanying the apology was a "healing fund of \$250 million.

outlined in the HREOC report. Money is not a solution on its own.⁴ Although talking of aboriginal health, the comments of Arnold Hunter, Chairperson of the National Aboriginal Community Controlled Health Organisation can have a broader application to the rights of Aboriginals to be self-determination. He states,

“Issues in Aboriginal health cannot be understood in isolation from the social, cultural, and economic context in which Aboriginal people lived in the past and live today. It is about working towards the social, emotional and cultural well-being of the whole community in which each individual is able to achieve their full potential as a human being.”⁵

Australia must resolve the broader issues concerning aboriginal health and opportunities. In Victoria, the Aboriginal population is imprisoned at 15.6 times the rate of non-Aboriginal people. In Western Australia at 20.8 times and in South Australia 21.4 times the rate of non-Aboriginals⁶ The reasons for these high rates are multifarious but include visibility, penalties imposed for offences non-Aboriginals would receive a caution for, early encounters with police, economic and social disadvantage in remote areas, and in rural areas a diminished legal and corrections capability.

The fact is, that for some Aboriginal communities, the dilemma of separation may not just be a thing of the past. While on the one hand governments recognise the need to respect aboriginal people⁷ policies are implemented with little consideration of their likely negative impacts upon those communities.

This has been demonstrated not only by an increase in aboriginal deaths in custody over the years since the Royal Aboriginal Deaths in Custody Report⁸ but by policies enacted as recently as December 1997. Governments continue to be unable to allow the rhetoric to match the reality. The introduction of mandatory sentencing in the Northern Territory and Western Australia and of propensity

⁴ In the 1996 Budget the Aboriginal and Torres Strait Islander Commission's budget was cut by \$470 million. The amount of discretionary funding in Regional Council budgets was also reduced significantly. As a consequence flow on effects are now being felt in the indigenous community with many of their co-operatives having to either reduce services or close. See "Balancing Our Interests", by Gatjil Djerrkurra ACOSS Impact Supplement, October 1997

⁵ See "Aboriginal Health and Community Control", ACOSS Supplement October 1997

⁶ *The High Rate of Aboriginal Imprisonment* Uniya Focus No. 22, December 1997

⁷ *Victorian Government Response to the Report of the National Inquiry Into the Separation of Aboriginal and Torres Strait Islander Children From Their Families*, 17 November 1997

⁸ In the years 1995-1996 there were 19 Aboriginal deaths. This was the highest level recorded since the Royal Commission in 1991. Amnesty states that preliminary national figures for 1997 indicate high levels of deaths in custody, particularly amongst Aboriginal prisoners. Amnesty International, Press Release, 30 January 1998

evidence legislation introduced in December in Victoria are only likely to exacerbate the problems of high incarceration rates. Aboriginal children in the care and protection system are still at risk. The HREOC Inquiry into "Children and the Legal System" released in November 1997⁹ noted that despite the Aboriginal Placement Principle there is continuing concern about racist attitudes among welfare department workers, a lack of consultation with communities and insufficient consideration of cultural child rearing practices.

Another example of the diminishing of rights of indigenous people occurred in May 1997, when the Commonwealth government put forward its proposal on Native Title in the form of a "ten point plan". It supposedly is to bring about greater "certainty" and "workability" for pastoral and mining leaseholders. The plan did so (as was acknowledged by members of the government) at the expense of Aboriginal Native Title holders whose interests were to suffer extensive procedural extinguishment and a rigid physical connection test that largely ignores any cultural or spiritual connection Aboriginal people might have with the land. Despite being marketed as a Bill which will bring about certainty and workability for pastoralists the weight of legal opinion would appear to indicate that the Bill will not have the desired effect of creating certainty and will bring about protracted litigation.

One of the major misunderstandings in the community has been the belief that native title will threaten freehold. This is an incorrect assumption as the entire bench of the High Court has ruled that Native Title cannot exist on freehold title. The National Native Title Tribunal has also indicated that such a claim would not be upheld. So this furphy should be dispelled.

Concern has also arisen that Native Title claimants, if successful, could take over the pastoral lease-holders home and sheds and businesses. This is unfounded. The High Court decision in *Wik* stated clearly that native title co-exists with the lease unless the pastoral lease comes into conflict and if such a conflict arises then the pastoral lease will prevail over native title. This of course would presume that the pastoral lease-holder is acting in a manner consistent with the lease that has been granted.

There has been much confusion about the nature of native title. Just as pastoralists have indicated they want certainty, so too do the Aboriginal people. They want to hunt, fish, camp, visit sites of significance, protect their cultural heritage, undertake ceremonial activities, nurture their links with the land that for many Aboriginal people in the dreaming is "their mother/nurturer," protect

⁹ See also Draft Recommendation Paper *A Matter of Priority - Children and the Legal Process*, May 1997 p80

the land from interference which will impact negatively on that land and they also want to be allowed to the economic benefits the land can bestow. The rights to negotiate over land are an integral part of Aboriginal people being able to gain the certainty that they need. Why should their needs for certainty be subjugated to those of pastoralists. Why cannot a method be explored which provides certainty to both forms land interests.

Native Title rights of Aboriginal people were recognised by the High Court in the *Mabo* case in 1992¹⁰ and in the *Wik* case handed down in December 1996¹¹. Experts in Constitutional law and in the impact and application of the law on Australian community such as the Australian Law Reform Commission noted that the proposed legislation was not only contrary to the *Racial Discrimination Act 1975*, contrary to Australia's undertakings in the *International Convention on the Elimination of All Forms of Racial Discrimination* and probably unconstitutional but that the Bill is unlikely to lead to the promised certainty and workability. The latter issue was largely ignored. The debate over the Native Title Bill in both the house of Representatives and in the Senate at the end of 1997 became an all or nothing debate. Extinguish Native Title and ignore whether the rationale for the entire Bill was capable of delivery.

Commentators stuck to their guns there was no room for manoeuvre or negotiation. It is sad to think that in the 1990s as Australian society moves towards the Millennium and the Great Jubilee¹² words like negotiation, co-operation and co-existence could be so easily undermined. Wise suggestions about the narrowing of ambit claims to enable the use of more precise language and preservation of the common law rights of all land-holders were ignored even though the suggested compromise may have alleviated many of the fears and concerns of lease-holders.

In the lead-up to the Senate's final debate of the proposed Native Title Bill in December 1997 it appeared as if the social fabric of our community was to be put at risk. A black/white, bush/city divide was being played up by sectional interests, with fear and paranoia, as opposed to reason, compassion, justice and a fair resolution being sought.

As 1998 commences, it is hoped that the cool light of reason will emerge, the energy devoted to attacks on the Churches, community groups, the HREOC,

¹⁰ *Mabo v Qld* (No. 2) (1992) 175 CLR 1, (1992)107 ALR 1

¹¹ *Wik Peoples v Qld*, No B8 of 1996; *Thayorre People v Qld* No B9of 1996 (1996) 141 ALR

¹² The integral part or theme of the Great Jubilee is that of social justice and the need for resources to be shared fairly and to have respect for peoples' ancestral homes. Deuteronomy 15:12-18, Leviticus 25:8-13, Leviticus 25: 1-7

politicians, Aboriginal people, farmers and legal experts should now be channelled in a more constructive, conciliatory and just solution.

Certainty, workability and fairness for all parties can be achieved in a reasoned and practical way that does not significantly disadvantage any one group. In 1998 it would be timely to provide proper space for all stake-holders to explore compromise. As a nation we must be mature and prepared to listen, learn and respect each other, even if we are culturally different. We must also be prepared to learn from our history if we are to attain reconciliation that is meaningful and genuine. We must go beyond the rhetoric and act in a manner befitting a society which respects the human rights and dignity of others. Understanding and respect are a good basis for such reconciliation. Let's ensure that 1998 becomes a year that Australians can reflect upon with pride.

Author : Liz Curran. She is the Executive Officer of the Melbourne Catholic Commission for Justice, Development and Peace and a lawyer.

*Friends of social justice are welcome to photocopy and distribute this paper.