

THE SOCIAL JUSTICE COMMISSION'S VIEW OF A TREATY

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Human Rights and the Equal Opportunity Commission

The Social Justice Report this year takes up the theme of reconciliation . Ultimately what the report is setting out is what we call the human rights framework for reconciliation or for unfinished business

The report starts with the question: 'What have human rights got to do with reconciliation?' It seeks to address some of the more controversial, more difficult and conceptual issues as they relate to the reconciliation process. Following the introduction we were looking at right wing critiques of reconciliation from the Paddy McGuinnesses right through to the Ron Brunsons and, dare I say it, the Prime Minister's office – the sort of critiques they were putting up about various aspects of rights protection and reconciliation.

Some people say that equality, for example, means treating everybody absolutely the same and that everything different from that is tantamount to creating a regime of separate rights for Indigenous peoples. Some of these same people say that self determination equals secession. We answered these assertions in a fairly legalistic manner, demonstrating that they really have no basis in international law and in fact are quite wrong. Then we set out two principles which form the basis of a human rights approach to reconciliation. The first is the principle of non-discrimination and equality before the law; and the second is of effective participation and self-determination.

Essentially there are two aspects to equality. The first one is what we call special or remedial measures, which is in many ways an acknowledgement of historic disadvantage. Historic discrimination has meant that the position of people today is not equal and there's a necessity to take steps to guarantee that sort of equality. The second aspect of equality, which then folds into the effective participation arguments, revolves around what we call protective measures – the idea that equality is not simply about addressing a disadvantage so you have the same sort of treatment and in effect have sameness.

Instead, in this sense equality is actually being able to incorporate Indigenous cultures and cultural characteristics so that they are able to live on, I'd guess you'd say, by enabling a space for them to continue to exist. Essentially what we're saying in the report is that a rights basis for reconciliation or for a treaty process does not provide additional benefits or protections to Indigenous people or a privileged place in Australian society. On the contrary, what it does is remedies deficiencies that have existed for much of the period of contact between Indigenous and non-Indigenous peoples and provides acknowledgement of the fact that, much like multiculturalism, we're a richer nation for valuing Indigenous cultures and traditions on their own terms and making them the fabric of our whole society.

To give you an example of what we're talking about, we looked at the response of the government to the declaration of reconciliation that the Council for Reconciliation put out fairly early last year. The original declaration said, 'We desire a future where all Australians enjoy their rights, accept their responsibilities and have the opportunity to achieve their full potential'. The government's wording was, 'We desire a future where all Australians enjoy equal rights, live under the same laws and share opportunities and responsibilities according to their aspirations'.

The Minister for Reconciliation said that the government had reservations about the strategy to promote recognition of Indigenous rights over and above those enjoyed by other Australians. We feel that these reservations are quite wrong. What we say in the report is, 'This view of equality, however popular, does not reflect reality. The view that everyone should be treated the same overlooks the simple fact that throughout Australia Indigenous people never have been treated the same.' As I highlight in the earlier parts of this chapter, Indigenous people have been treated as racially inferior and as a consequence have been dispossessed, marginalised and excluded. In later years, we were allowed to participate in mainstream society if we behaved like white people. Similarly, prior to 1967, we were not counted as Australians for the purpose of the census and denied basic entitlements, such as welfare, that were available to other Australians. We say, 'The failure to provide us with the same opportunities as the rest of society in the past means to now insist on identical treatment will simply confirm the position of Indigenous peoples at the lowest rungs of Australian society. Demands for identical or sameness of treatment are tantamount to keeping us in our place.'

Also quite important is the whole notion of practical reconciliation and obligations to address disadvantage. The government says its focus is on health, housing, education, employment and such practical outcomes. We say this is quite inadequate in that it conceives this as beneficence in the sense of good intentions by government

On the other hand, we would place disadvantage within a human rights framework, within a treaty process that provides a human rights obligation to address this disadvantage, particularly through the through the International Covenant on Economic, Social and Cultural Rights which has the requirement to take steps to progressively realise a non-discriminatory environment. There are also relevant obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.

It requires first deliberate, concrete steps specifically targeted to overcome disadvantage within the shortest possible time with the maximum of available resources. What we say about practical reconciliation is that it simply does not elevate Indigenous disadvantage to a sufficient level of priority. We ask the sort of questions that ought to be asked from a human rights perspective, 'What's the gap between Indigenous and non-Indigenous people? Is it closing or are we merely managing the inequality that exists rather than taking all steps to overcome it?' An illustration of the inadequacy of practical reconciliation is seen in an approach taken by the Canadian Royal Commission into Aboriginal Peoples of what they called social cost.

They basically said that the social cost of not addressing disadvantage comes down to two key areas. The first level of costs are the costs of marginalisation. In conventional economics the first costs of marginalisation are things like foregone income, foregone tax due to high unemployment, or welfare benefits for social assistance for people who are more disadvantaged.

The second set of costs are the remedial programs that you need to cope with the social problems that come up as a consequence of disadvantage. For example, some of the health programs would probably not exist if the communities were healthy to begin with. Over the long term this social cost will just keep rising and the programs will not ultimately overcome disadvantage.

The Canadian Royal Commission's model projects the effects of large amounts of money being spent to overcome disadvantage over a 20 year period. Their modelling shows a decline of costs over time as that disadvantage is actually overcome, rather than merely being managed. As we mention in the report the Centre for Aboriginal Economic Policy Research has done a lot of work on this concept of social cost, particularly employment strategies. Their results are quite disturbing, I think, and reveal the inadequacy of the programs that exist.

In this chapter we also look at self determination and effective participation. As I mentioned earlier we are addressing those concerns that self determination amounts to secession or the creation of separate states. We also dispell the contention that Indigenous peoples don't have a right to self determination. I think we show very clearly that they do.

Second, self determination does not amount to an automatic right of secession. In fact it is about incorporating full and effective participation within society. This necessarily involves some sort of change in the way society operates, incorporating Indigenous values and structures into the institutions of society. But it certainly does not amount to the creation of new states, an argument which is a very alarmist approach really.

In the next section of the report we move on to ask, 'Well, if you need a human rights basis, how are we going on human rights?' I will be brief in talking about this. I think the answer in three words is a very clear, 'Not so well.'

The things that we highlight in the dialogue between the Australian government and the Committee on the Elimination of Racial Discrimination in March last year were the cause of quite a lot of action here and quite a lot of abuse heading the way of that committee. We go through each of the areas on which the committee made findings about Indigenous issues. We present what the government actually argued, what their submissions were, quoting from both their written and their oral submissions quote the members of the committee expressing their concerns. Then we provide an evaluation of whether we think that what the committee found was appropriate or not.

Some of the issues that are highlighted come up later again within a human rights framework, like the lack of an entrenched guarantee against racial discrimination in the Australian legal system which would override subsequent legislation. An example of that

is the Native Title Act to which racially discriminatory amendments have been passed. The effect of such a guarantee at best is the repeal of the Racial Discrimination Act and removal of the protection of the this over parts of the Native Title Act.

Related to that is the failure of the Commonwealth to exercise its powers to ensure conformity of state and territory governments with human rights obligations, despite there being in many cases very clear powers to do that. The clearest example of this failure to ensure conformity is mandatory detention laws in the Northern Territory. We looked at those mandatory detention laws and the government's arguments about why they don't consider them to be discriminatory despite issues of over representation in the criminal justice system and of disadvantage both of which were squarely placed by the CERD Committee as issues of racial discrimination and human rights as well. Ultimately, the government's responses, putting it brutally, were wholly inadequate, without any basis in law and simply not sustainable.

So then, if we have an internationally accepted basis for human rights, and if we know how we're performing on these rights, then we can ask, 'Well, what does it mean to have a rights basis? How do you achieve it and how do you address the concerns that have been raised in the last year by international committees and which have been raised for years by Indigenous people and organisations?'

Bill Jonas's press release of the reports contrasts good things and bad things that happened over the last year. The government quoted the good things that are listed in that paragraph and said, 'We're really pleased that the Social Justice Commissioner agrees with our policies.' About those bad things that he mentioned, they said, 'They're not new, we've heard them all before'. Understandably, there was an element of frustration in Bill's press conference at which he said, 'Well, if they're not new, then you know about them, so when are you going to do something about them?' I think that relates to the international criticism; these issues have been raised, they've been raised every year, and the question is when will they be dealt with. If there were adequate mechanisms within Australian law to act on these criticisms, rather than simply putting out fairly deceptive press releases that say they that they agree with us when they clearly do not, then maybe we would get a bit further.

The key chapter of the report really is Chapter 4 which is called 'Achieving Meaningful Reconciliation'. It's about implementing a human rights framework and is centrally related to treaty debate. That chapter presents three inter-related areas that must be addressed. We highlight that they are integrated; you can't have one without the others. The first area is about addressing disadvantage and ensuring adequate government accountability and transparency for processes and outcomes. The second area is about effective participation of Indigenous people, particularly strengthening Aboriginal governance. The third area involves the adequate protection of rights. The first area, Indigenous disadvantage and progressive realisation, highlights one of the principal arguments which has been put forward by many committees, even those stacked by the government. They point out that there is really not a lot of accountability of government

for Indigenous programs. Curiously, I think some of the programs that have the least accountability are the most recent ones like the Indigenous Employment Program.

We say that there are five integrated requirements that have to be addressed to overcome Indigenous disadvantage. The first one calls for an unqualified national commitment to addressing disadvantage. The second aims to facilitate the collection of sufficient data to support decision making and reporting and to develop appropriate mechanisms for independent monitoring and evaluation of progress. The third requires the adoption of appropriate benchmarks to redress disadvantage, negotiated with Indigenous peoples, state/territory governments and other service delivery agents which have clear time frames for achieving both the longer and short term goals. The fourth calls for the provision of national leadership to facilitate increasing the co-ordination between governments to reducing duplication and overlap. Finally, the fifth requirement aims at ensuring full participation of Indigenous organisations and communities in designing and ultimately in delivering those services. At the end of that report are 10 recommendations that relate to these commitments. Central to these recommendations is a call for the federal government to adopt whole of government, long-term policies to identify overcoming Indigenous disadvantage as a national priority and that the government take steps to target progressive reduction of this disadvantage from both a deprivation and an inequality perspective and to negotiate with opposition parties for cross party support for a long-term strategy. This is not going to happen within the life of one government's three year term.

Second, the Council of Australian Governments should be used to get the agreement of states, territories and local government to also identify this as a national priority and to revisit the COAG 1992 national commitment to improved outcomes and delivery of programs for Indigenous people as a framework for providing accountability for that commitment. Similarly, that there be benchmarks set at the national, regional, local levels by COAG with the agreement of ATSIC and service delivery agencies and Indigenous organisations.

Next are reporting obligations which have the Commonwealth, state and territory governments reporting through COAG to Reconciliation Australia on a number of things – the recommendations in this report, the recommendations of the Council for Reconciliation, the actions that are identified by the Council for Reconciliation in their four strategies.

Finally, this commitment must be put on the international stage, updating Australia's National Action Plan on Human Rights with this commitment being a central in that document with benchmarks and targets and monitoring and evaluation mechanisms identified in that document on the international stage.

At this point we present a range of recommendations on improving data collection, looking at the adequacy of current data collection particularly in the light of the Commonwealth Grants Commission's recent inquiry. We took advice from the Commonwealth Grants Commission, the Bureau of Statistics and ATSIC as to what is

required to ensure adequate data collection and to increase co-ordination and national consistency of data collection. We recommended that the ABS actually address these and are negotiating with COAG for a national commitment to improve co-ordination and standardisation of data.

In relation to those monitoring and evaluation mechanisms we proposed that inquiries into Indigenous funding be part of the reconciliation convention in the Council for Reconciliation's Reconciliation Bill which Aden Ridgeway introduced to Parliament last week and that the Commonwealth Grants Commission continue its inquiries into Indigenous funding on a more expansive basis, actually looking at this inequality perspective of absolute need rather than simply relative need. The next aspect of that framework revolves around governance and participation.

Our key message is that, if your efforts are to address disadvantage alone, they're not going to be sufficient. Addressing disadvantage is really a precondition for Indigenous people to be able to enjoy those basic citizenship entitlements that everybody else enjoys. But there is another dimension to this which we would call the protective measures that I referred to earlier. These measures go beyond that simple sort of sameness and equality of opportunity to recognising and respecting Indigenous societies and cultures as living culture.

There is no great institutional change that you need in order to address disadvantage; it's a pretty straightforward exercise requiring a greater commitment. The more difficult process is this changing the role of decision making processes and service delivery so that they can incorporate Indigenous cultural aspirations and be more reflective of Indigenous societies. The core in the longer term of a reconciliation process, of a treaty process are moves to strengthen and develop governance capacity amongst Aboriginal communities. If you reflect on moving beyond welfare dependency, the question always is, 'Well, where to? From welfare dependency to what?'

We need societal structures able to handle that. Some communities are much better placed already to do that. ATSIC has done some excellent work, both through the regional autonomy discussion papers and reports that came out last year to actually develop models. We talk about a lot of the models that are there, ranging from the co-ordinated healthcare trials in the Northern Territory through to the Me-watch Regional Council, the Kimberley proposals, the Cape York Partnerships Plan and a whole range of programs which really focus on that ground up change in participation.

In the end this section of the report is very critical of what the Council for Reconciliation came up with. Ultimately it had a strategy on rights over here and a strategy on disadvantage over there, a strategy on economic independence over here but they never met anywhere. What is missing from all of them, that ties them all together, is governance, the Indigenous capacity to control their affairs in the long term. And the emphasis of the report in terms of how you do that is not to call on the government to create governance structures.

We say that governance structures really have to be developed from the ground up. There is an obvious tendency for imposed government to over regulate Indigenous people, so it has to be much more organic and developed by Indigenous people. What you really need is government committed to negotiate with Indigenous people about a whole range of matters, including service delivery arrangements, which would lead to a whole range of conclusions in relation to governance such as developing flexible funding arrangements, including transfer of block funding and arrangements for pooling funds across governments and regions, Indigenous participation in developing service delivery priorities, setting the benchmarks on a regional basis and in monitoring progress.

The final aspect of the human rights framework, following addressing disadvantage and governance, is protection of Indigenous rights. What we've shown, particularly looking at the CERD dialogue, is the inadequacy of the current level of protection. Providing adequate protection of rights really has short term and long term dimensions. When you seek to take it to a constitutional level, then you have to be taking it to a popular level because it requires constitutional endorsement of the people through referendum processes.

So what we're really suggesting at the first level is the need for improving accountability for human rights within a domestic framework and to that end we identify three options really, the ultimate priority being a constitutional Bill of Rights, but we see this as being, while the preferable option, also the longer term option and being preferable in the sense that at a constitutional level binding all governments. We say that what we see as the immediate priority is in fact a prohibition of racial discrimination at a constitutional level, again because it would bind all governments and place the commitment of government to the principle of non-discrimination on the basis of race at the highest possible level, guarantee that such commitment could never be put aside for more expedient political purposes as it has been in recent years.

The third option we identify, which we also see as a sort of a shorter term process, is a legislated Bill of Rights which would guarantee compliance by states and territories with human rights obligations and would provide the federal government with the moral authority to act consistently with human rights obligations.

What you do by having a legislative version of a Bill of Rights is that you allow people to become comfortable with what a Bill of Rights is, to understand a Bill of Rights, before it goes on to a referendum process in which red herrings could otherwise derail the entire process. And the argument that we really have there as well is that this approach would confirm that state and territory governments have an important role in setting laws. They're free to pass whatever laws they choose, subject to constraints that those laws meet minimum core standards and that this really is consistent with the purpose of a federation in which no one level of government has unfettered power to make any laws that it chooses, so it provides that additional guidance and link for governments.

We then talk about international accountability of the government for human rights, looking at the United Nations Development Program's accountability index for human

rights which is very preliminary but is very interesting in the way it does it. What they try to do is to come with an objective way of measuring how a state performs on human rights. They see three aspects of it, namely: acceptance of international treaties, co-operation through submission of reports, and responsiveness to oversight by special rapporteurs and to the views and conclusions of the committees.

How accountable are we? If you ask if Australia has ratified or acceded to all human rights treaties and all individual communication mechanisms, we're pretty good but we're missing one – the optional protocol to CEDAW, which provides the ability for women to make complaints alleging violation of the Convention on the Elimination of All Forms of Discrimination Against Women. This protocol may well be tied to recent amendments to the Sex Discrimination Act which are currently going through Parliament.

But if you ask, 'Has the country submitted periodic reports in good time?' the answer is, 'No.' The ICCPR report was 12 years late; the CERD reports were, I think, seven, five and three years late; ICESCR reports, at least five years late. What is probably most telling about that is a lot of these reports have now been cleared because Australia appeared before all these committees last year. The CERD Committee in March last year requested Australia to submit a brief report as its next report in October last year, so we're already six months behind in our next periodic reporting obligation. Yet, we criticise the committee for being inefficient and not dealing with things on time. On an objective level we're not meeting those obligations there.

Third, "Do we provide requested information to special rapporteurs and thematic missions in co-operating with monitoring missions on other visits?". I think you could get some very different answers if you asked different people about it. Quite a lot of visits have been planned to Australia in recent years, all of which have not happened as yet. One of them will happen in the next three months when the Special Rapporteur on Contemporary Forms of Racism visits Australia. The CERD committee, of course, requested to come to Australia to consider the situation of Indigenous people, but were denied permission and then were criticised for not coming to Australia and being uninformed. So, if asked, 'Has the country responded adequately to recommendations and final views of treaty committees in relation to periodic reports and communications?' again the answer is no, generally. Reconciliation Australia's recommendations discuss how the government ought to respond more appropriately to treaty committees, to increase the priority with which they process periodic reports and treat their obligations under human rights treaties and to ratify all complaint mechanisms to provide that level of international accountability.

Then the final aspect of the rights section of this framework presents negotiating with Indigenous people over unfinished business. This section really encapsulates everything that's come before. If you have a Bill of Rights or even other forms of protection of rights in Australian society they provide guarantees of provision and treatment in accordance with human rights obligations in the future but they do not address the ongoing and historical injustices as they currently exist.

And so what we propose there is a two stage process of treaty making. The first stage is the introduction of framework agreements legislation which recognises the need to negotiate with Indigenous peoples about a range of matters, sets out the protocols and a negotiation framework within which those negotiations will take place. In effect it provides legislative force to agreements that are then made on a local, regional and national level. We recommend in the final recommendations of the report the adoption of the social justice package principles as the appropriate basis for the protocols of those agreements.

The second stage is constitutional entrenchment of those agreements. The report says:

Having introduced such framework legislation and provided appropriate resources for agreement processes to be entered into, the second stage is to work towards a commitment towards amending the Commonwealth Constitution along similar lines to the current section 105A of the Constitution to provide the Commonwealth the power to make agreements with Indigenous peoples. Section 105A provides that the Commonwealth may make agreements with the States with respect to public debts. It further provides that Federal Parliament has power to legislate any matter contained in the agreement, that such agreements can be varied or rescinded by the parties and that agreements in any variations are to bind all levels of government...

This would be a long term approach and has the benefit of protecting documents of consensus, therefore reflecting both the aspirations of Indigenous people and being acceptable to the broader community. By approaching such reforms in two stages, the mainstream society is able to come to a deeper appreciation of the need for such agreements and to have a more detailed understanding of the issues involved.

And to that extent, as I said, we recommend the adoption of the social justice principles as the basis for negotiations. We also recommend the introduction of national framework legislation to provide legislative support for the negotiation of agreements at national, regional and local levels.

In the end what the reports really propose is an integrated framework that addresses disadvantage, that addresses and strengthens Indigenous governance, that has negotiation as the basis of moving forward and that provides adequate rights protection. If you have one without the others then it will not work and it's not sufficient. What is required is absolute commitments from government to negotiate in the first place and to be accountable and transparent for the outcomes, particularly in relation to things such as disadvantage. In the long term, it requires adequate constitutional protection.

And one thing we note about this sort of proposing legislative structures is that there is also a danger with them as well, I guess, and that is that there are dangers in a purely legislative process or in processes which sort of leave things at the level of a commitment that's got no other sort of benchmarks or monitoring or other sort of mechanisms to hold governments to it - and I think the Native Title Act is a very good example of the dangers of the legislative mechanism when it got wound back quite significantly - so it has to be

seen as that two stage process where the constitutional sort of protection comes at some stage in the future as well because otherwise you leave yourself open to a lot of trouble potentially.

And, as I said, we're looking at this framework within a short term and a long term. In the short term it is a commitment to negotiate, it's commencing those negotiations, it's beginning to enhance or to develop governance capacity, it's legislative framework for agreement making and adequate rights protection, commitments to processes to overcome disadvantage.

In the longer term it is constitutional enshrinement of human rights guarantees of the agreements that are struck and actually achieving your goals of redressing the disadvantage, developing the governance capacity and so forth. What we see in this framework is a need to focus on all of these dimensions at once. You can't simply pick up one area to the detriment of the others because they are so integrated.

Acknowledging the huge nature of that task, I will leave you with a small quote from 'Nugget' Coombs from the 1970s when there was a treaty process underway; he says, 'What it requires from Australian society is an unprecedented tolerance for uncertainty.'

Discussion

Roderick Petty: I found both of those talks useful in focussing on some key issues. But, just briefly, your comments first on the international conventions, the status of which in Australia is still uncertain. One of the key ones is the Genocide Convention which was signed and ratified but not enacted as legislation. I think the two areas that were crucial – one is the discussion about what does equality mean for Aboriginal people. Obviously that's an important political area because that's where the ideological attack comes from – those who favour a policy of assimilation, so that area of discussion is really important.

There is a statement that former Chief Justice Brennan made (before he was Chief Justice) in 1985 in a case called *Gerhardy v Brown*. He made the distinction between substantive and formal equality and said, in effect, that formal equality is worthless if you don't have substantive equality or if that formal equality really reinforces inequalities that exist in the social structures in a particular society.

I don't think at that stage that Justice Brennan used the term 'disadvantaged'. I would like to express a concern about the use of that term that I first heard expressed by Nerida Blair back in 1992. She thought it was disempowering; it may also be imprecise and a euphemism. Maybe we need to think a bit more critically about what we mean when we use that term and what does the term promote literally.

It seems to promote something like, to take it at the most literal sense, in a tennis match some player, because of a mistake, is at a disadvantage. I think we need a more critical terms – simply 'inequality' or, more directly, 'oppression'. Then you start to talk about why people are unequal or haven't had their rights recognised. There was an element in the second talk where I think you got to one essential conclusion which is 'Why are Aboriginal people's rights not realised?' That is because government structures of self

determination haven't been developed. There was, perhaps, I'm not sure, a bit of ambiguity as to whether so-called disadvantaged can be addressed within current structures. I think the evidence is very clear that it cannot. And that's the lesson of the last 30 years. It is that there needs to be institutional reform before you going to address the substantive inequality.

Not just the legal absence which exists now that *terra nullius* has been exposed but the political gap that is there.

If you try to raise questions of sovereignty before the High Court they will reject it. Now, why will they reject it? Formally, they will reject it because they'll say it's beyond their power. What they're saying is not so much the abstract argument of the Act of State. All that really is just colonial nonsense. What they're saying is that under their rules that have been set up under the Constitution they cannot go into political questions like that. I think even the most radical judge has been quite clear about that.

What they did in *Mabo* was go where they could in terms of pushing the political process forward, but they're not going to make that next step in terms of recognising political rights; that has to come through a political process. Exposing the gap that exists should not be done only in terms of justification for or the lack of justification for non-indigenous property titles, but there needs to be focus on the very nature of the Constitution and the fact that there was obviously no consultation when it was drafted. I don't think it has been able to be argued in any of the native title cases but there's still the question the High Court hasn't answered which is whether the Constitution is inherently racist in terms of the so called race power. Until they say it isn't then you have to assume it is, at least potentially. Anyway, I thought they were very useful in focussing our thinking and discussion on some crucial issues.

Margaret Donaldson: One comment I wanted to make in relation to the distinction between formal and substantive equality in terms of native title is that the recognition of native title was in a sense a challenge to the formal equality plus special measures formula set up by *Gerhardy v Brown* in that native title can only be enjoyed by Indigenous people. Its origins are in the traditional laws of Indigenous people and can't be compared to non-indigenous title, so in that sense it's definitely different. In a sense it's not a formal equality state. Yet not to recognise native title in all its cultural difference is discriminatory, as was said in the *Mabo* decision. So in a sense the existence of native title is very much a challenge to the formal equality approach.

Mr Darling: Just following on from that. What Justice Brennan said in *Gerhardy v Brown* was, of course, not anything new. He was citing Judge Tanakain the South West African cases. Where his judgment misled so many Australian commentators is that they didn't realise that what he was doing was simply interpreting the Racial Discrimination Act. He wasn't interpreting the Convention and there's a key distinction because the Convention has a positive obligation in Article 2.2, as well the exception in Article 1.4.

He was interpreting legislation which gave effect to the exception but the positive obligation in 2.2. is not the kind of obligation that is implemented in the legislation. I

think the High Court in a footnote to the first native title case has in effect recognised that the international principle is one of substantive equality and that the proposition that threatens in *Gerhardy v Brown* would not now have followed. There was something said about the status of the Genocide Convention in Australian law not being clear. I would have thought it was perfectly clear. There's an international obligation. It is not implemented domestically and genocide is not part of Australian law in the sense that it is not an offence under Australian law, so you can't get a prosecution on genocide.

One of the themes running through both papers involves international obligations and reference was made to the decisions the Committee on the Elimination of Racial Discrimination in relation to native title. The response of the government was not to respond to the substance of the findings but to denigrate the committee in the most derogatory terms almost immediately; probably the quickest response of government to any report. Interestingly, and I think this is one of the worrying things, there was very little reaction from the opposition.

The opposition maintains, as I understand it, its substantive view that it is opposed to the amendments to the Native Title Act but it hasn't run with the line that Australia should have greater regard to the reports of the international committees. My understanding of Bob McMullan's view is that he says, 'Well, we think the legislation is wrong and that's why we think it should be changed, but we don't think it should be changed just because an international committee has said that it's wrong.' That, I think, is a different emphasis from that of the previous shadow minister and I wonder whether either speaker would want to comment on what the prospects are of increasing public awareness of the significance of the reports within the big international committees.

Margaret Donaldson: One document in which the views of the opposition are encapsulated is in the minority report of the Parliamentary Joint Committee on Native Title to their inquiry into the CERD Decision. So there is definitely in black and white a quite firm support for that decision and support for the decision that it is discriminatory in, you know, significant respects.

Mr Darling: That reflects Darryl Maunder's version, not McMullan's.

Margaret Donaldson: Well, yes, although it is the minority report, I suppose it's just part of the negotiation process. It sits there to be negotiated upon as representing a view about international law and its application to a piece of legislation. There's a certain level of objectivity in that as well and I suppose it's those aspects that, you know, we'd be seizing upon to exhort the government or the opposition towards maintaining their promises or their original position.

Mr Darling: I urge you not to use the term 'minority report'. The committee was split five-five and it was because of the terms of reference that the chairman carried a casting vote.

Margaret Donaldson: It's non-government.

Mr Darling: Yes. I think probably it's best to describe them as the non-government. As an aside to some of the general comments, is the Human Rights Commission forever having to work out new ways of messaging our formal versus substantive equality positions because they've proven to be extremely difficult. The formal equality position is such a straightforward, simple though deceptive position. For example, as you know, people think in native title that Indigenous people shouldn't have a right if miners don't have it; this is a very simplistic notion and very difficult to overcome.

One of the interesting things to observe in the international dialogues is the way the government tied itself up in knots because of its domestic interpretation of equality as opposed to its international interpretation. These are two very different arguments. In the international arena the government has committed itself to a substantive equality obligation. They have said that they take a substantive approach, though the way they've explained it – we're quite critical of this both reports – is not as a substantive equality approach at all because it lacks protective elements, the positive obligations to protect culture.

They see substantive as allowing greater discretion to discriminate and being a lower standard than a formal measure. So there is a lot of discussion in both reports about the inadequacy of the government's position. We also acknowledge that those international dialogues have forced at least a partial change in how the government explains what they've done and how they rationalise it, which has really created a lot of problems for them because they're such inconsistent positions.

Lisa Strelein: I think that, although publicly they rested on denigrating the committee, certainly the Attorney-General's Department was obliged to try to argue the position in the international forums.

Margaret Donaldson: They seem to maintain that you could have either formal equality or substantive equality, depending on the situation.

Darren Dick: And the political expediencies it had, yes.

Margaret Donaldson: Yes. So that while they no longer deny substantive equality has relevance at international law, they seem to say they are options. This is very peculiar if you apply it to native title because under the *Mabo* decision there is no option and a formal equality approach to native title would result in discrimination, that is non-recognition.

Question: It isn't a new move for the government to put down committees, is it? They did it with the Bringing Them Home Report. I sit and listen to these things and I've read through all these reports. I don't think any of us are going to live long enough to see equality of the Aboriginals and the other people in Australia. The Lebanese are going crook now because they're being identified by the police as Lebanese. The Aboriginals have been identified by police as Aboriginals for countless years. Maybe the Lebanese might get that practice stopped. But, as I say, I sit down and I read these reports. I read the government's replies and all I can say is I feel like Eliza Doolittle, 'I get words. I'm sick of words.' Is that all they can do?

Margaret Donaldson: Yes.

Question: I wondered in terms of diminution of rights under the 1998 Community Act whether those themselves constitute future acts which are compensatory. Could somebody comment on that view?

Margaret Donaldson: Are you saying particular amendments?

Question: A statement has been made here this afternoon that the amendments to the Act have resulted in the diminution and in the region of Indigenous rights under the Native Title Act as it stood. Does that then constitute a future act which under the Native Title Act is a compensatable act?

Margaret Donaldson: Right. Our argument in relation to those provisions which we say are discriminatory is that the discrimination lies in the fact that the level of protection extended to Indigenous title to land – native title – is less than the protection that the Act extends to non-Indigenous relationships to land. Where that is most apparent is when there's a conflict between the enjoyment of those two interests. In all instances where there is a conflict in the Act the non-Indigenous interests will prevail, so that is the heart of the discrimination. When there is a loss that amounts to an acquisition of property, then that discriminatory act should be compensated for.

Under the Act itself there is no internal mechanism for that compensation. There is a constitutional mechanism for it elsewhere, but a future act under the Native Title Act is a very specific creature and certainly in terms of the statute the amendments to the Native Title Act don't constitute a future act. I don't think that's important to your question. I think where the discrimination amounts to an acquisition of property then compensation certainly ought to be available.

Lisa Strelein: The only situation where they specifically envisage that they might be extinguishing native title, where they said, you know, 'We're not extinguishing native title and the confirmation of extinguishment but, if we are, then they'll be compensable', so that situation was specifically recognised. In relation to the amendments as a whole though, the government was of the view that there would be no extinguishment of native title through that process. That's been one of the issues of debate between those opposing the amendments and the government – is this issue of whether there is substantive loss of native title through dealings under the amended Act.

Question: Now, there's a hinging point there somewhere and not coming from a legal position I'm not quite sure what. I notice you used the word 'property', but my concern is in regards to rights.

Margaret Donaldson: Yes. The use of the term 'property' comes, I think, from the constitutional base on which compensation is required to be paid. I don't think that 'property' is an adequate term for native title rights in that sense. It's something that provides an analogy, if you like, by which questions of compensation might be able to be determined but it's not an adequate analogy in the sense that, as you say, native title is a unique interest which has a cultural base. Its base is in the traditional laws and customs

of Aboriginal people and to liken it to property is to sort of fall into the same trap that, you know, *terra nullius* sort of is based on, that is, that comparison itself can be discriminatory.

Lisa Strelein: Thank you all for engaging in this today. I'd like to thank Margaret and Darren for their contributions.