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## **Standards and Policies for Conflict Resolution, Truth, Transitional Justice and Reconciliation**

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\* The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.

## **Truth and Reconciliation Processes – Australian Perspectives**

### **Historical Context**

Australia was colonized by the British in 1788 in Sydney New South Wales and although the official narrative has long been one of ‘peaceful settlement’ this was not the case. Aboriginal people were violently dispossessed by the British who claimed Indigenous lands without any Treaty contrary to the Law of Nations and many Indigenous peoples assert that British colonisation was more akin to ‘invasion’. This frontier warfare was fundamental to the colonization processes, as was widespread enslavement and incarceration, a history not officially recognized, although increasingly now documented.

According to the then Law of Nations, colonial powers could acquire the lands of Indigenous Peoples through declared war and conquest, or agreement and cession by way of Treaty agreement. Instead, the legal doctrine of Terra Nullius ‘Empty Land’ was used but of course the lands were not empty – but as the ICJ explained in the case of Western Sahara this legal doctrine was used in a wrongful manner to include the lands of Indigenous Peoples.

Therefore, due to this historical context, Indigenous peoples maintain that the colonial acquisition by the British was unlawful, and that Indigenous people’s sovereign status remains, having never been ceded. There is, moreover, an active sovereignty movement today.

The significant challenge is that the High Court of Australia in the Mabo decision of 1992 while denouncing the expanded doctrine of Terra Nullius, refused to consider Indigenous sovereignty, although recognizing Indigenous peoples ongoing interest in lands.

Indigenous peoples cannot seek an opinion on British colonization before the ICJ because we do not have the standing as only states can bring matters before the ICJ.<sup>1</sup>

### **Aboriginal Rights and Human Rights**

Our people always resisted colonization, but our history of Aboriginal civil rights leaders has been much neglected. This is not ancient history, Aboriginal people of my own parents and grandparents’ generation were forced to live on reserves or missions, segregated with apartheid like conditions imposed by government appointed Native Protectors, such as the notorious A. O. Neville in West Australia (1915-1940) who in 1937 posed the question:

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<sup>1</sup> See further Hannah McGlade, ‘Aboriginal Sovereignty, Treaty and Self Determination’ in Treaty, Let’s get It Right, ASP, 2003.

*Are we going to have a population of 1,000,000 blacks in the Commonwealth, or are we going to merge them into our white community and eventually forget that there ever were any aborigines in Australia?*

The colonial government claimed to be the legal guardian of all Aboriginal children of mixed ancestry and was given legal power to remove them from their families and communities. The children were sent to live in harsh conditions in children's homes and missions, experiencing physical, emotional, psychological, and sexual abuse as children.

In 1928 William Harris from the Noongar people formed the Native Union to protest the treatment of Indigenous peoples, my peoples, and seeking a meeting with the Premier where they argued that Indigenous peoples should not be subject to different laws, that they should be allowed entry into Perth, that the Moore River Settlement be abolished, that Aboriginal children should not be taken from their parents, and that the practice of forced relocation should be stopped. The Native Union, described as the first organized Indigenous political group in Australia, warned these laws and practice would result in the 'extermination' of Noongar people.<sup>2</sup>

### ***Implementation of UN Conventions in Australian Law***

Australia was a founding member of the UN and very much in support of the Universal Declaration on Human Rights (UDHR) adopted in 1945 which called for respect for the equality of all peoples. But equality for Aboriginal people was not what our colonial government had in mind. Indigenous peoples were denied citizenship, treated as second class citizens at this time and subjected to inhumane policies such as segregation and assimilation, indeed widespread removal of children to end the Aboriginal people as a race.

The discriminatory laws against Aboriginal people such as the *Native Welfare Act 1905 (WA)* continued in place until the 1960's (1964) and it was not until the historic Constitutional referendum of 1967, campaigned for by Aboriginal leaders, that our people were counted in the national census as part of the Australian population and the Commonwealth granted power to make laws for Aboriginal people.

It was clear that the states were especially discriminatory and oppressive to Aboriginal people and the Commonwealth needed to intervene and show leadership.

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<sup>2</sup> <https://overland.org.au/2018/11/early-aboriginal-civil-resistance-in-wa-the-untold-story-of-william-harris/>

This is still the case in Australia where states to varying degrees, have acted consistently in violation of the rights of Indigenous peoples, failed to uphold and show respect to the UN Declaration on the Rights of Indigenous Peoples and binding Treaties such as UNCERD.

Today the WA government is subject to a communication by UNCERD in relation to the systematic destruction of Aboriginal cultural heritage sites, through the *Aboriginal Heritage Act 1975* (WA) which grants the Minister the right to approve destruction of cultural sites for mining and development. In only a small handful of decisions has the Minister ever refused, the state acts at the behest of the mining industry and Aboriginal peoples most sacred sites, such as Juukan Gorge, are destroyed for mining and state profits.<sup>3</sup>

Aboriginal children are also at risk and criminalized from the mere age of 10 years, notwithstanding a serious UN complaint by the Committee on the Rights of the Child and many nations under the UPR process, our governments have failed to act. Children in detention in my state (WA) are kept in solitary confinement for months on end, risking their physical and mental health and increasing risk of suicide even. We have not signed the Optional Protocol to the Convention which would assist children who are now even being incarcerated in adult maximum security prisons. In fact, we still have a reservation in place in relation to this provision of the Convention which prohibits children being placed in adult prisons.

Children are even attacked on streets, can even be killed as happened recently in my city, as victims of hate crimes while the state engages in public attacks on them as criminal, aggravating public opinion against them and increasing risk of white vigilante violence.<sup>4</sup>

## **Truthtelling**

There has never been a formal process of Truth Telling or a Truth and Reconciliation Commission as such in Australia. However, Indigenous peoples have always been active in highlighting and documenting the impact of colonization and racism, for example through writing of biographies and life stories, where the history of assimilation and genocide was clear. As peoples, we have also long protested the denial of our rights to land and protested official holidays and commemorations such as Australia Day and Bicentenary, that celebrate colonization and its violence to our people. We have led the way in exposing the history that non-Aboriginal Australia has preferred to hide,

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<sup>3</sup> <https://www.auspublaw.org/2021/12/western-australia-after-the-juukan-gorge-inquiry-little-solace-for-aboriginal-people/>

<sup>4</sup> <https://www.theguardian.com/australia-news/2022/nov/11/its-racial-profiling-aboriginal-families-fear-social-media-is-driving-vigilante-attacks-on-young-people-in-perth>

the history of slavery and killings of our people, visiting massacre sites in memory of our Ancestors.

PM Keating in his famous Redfern speech, launching Worlds indigenous Peoples Day 1993 appeared to be the first PM to expressly acknowledged the importance of Truth and Reconciliation. This is what he said:

“It begins, I think, with that act of recognition Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the diseases. The alcohol. We committed the murders. We took the children from their mothers. We practiced discrimination and exclusion. It was our ignorance and our prejudice. And our failure to imagine these things being done to us. With some noble exceptions, we failed to make the most basic human response and enter into their hearts and minds. We failed to ask how would I feel if this were done to **me**? As a consequence, we failed to see that what we were doing degraded all of us.”<sup>5</sup>

Never had non-Aboriginal leadership acknowledged the historical violence and underpinning of colonization and Indigenous grievances and claims.

In 1997 the national human rights body table in federal parliament the ‘Bringing Them Home Report’ into the removal of Aboriginal children from their families and communities

Hearing from Aboriginal survivors of the Stolen Generations across the country, and examining official government reports and laws, the Inquiry concluded that Australia had through this process committed the international crime of genocide against Aboriginal people. It was recommended that a national apology by government be made, that survivors be compensated, and that the system of child protection today be reformed to address discrimination against Aboriginal children and families.

The then Prime Minister Howard refused to accept the findings of the independent national inquiry, he refused to make an apology and reparations as was required. Subsequently Prime Minister Rudd made an official apology in parliament, which was very powerful. However, his government did not ensure that survivors were compensated and that a guarantee of non-repetition was made.

Most states have now established compensation regimes, however West Australia and QLD have not. Most of the people impacted by these polices have now passed away.

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<sup>5</sup> <https://pmtranscripts.pmc.gov.au/sites/default/files/original/00008765.pdf>

Research evidence the serious ongoing impact on their children and grandchildren. We also know that not one family escaped these genocidal policies.<sup>6</sup>

### **Reconciliation, Uluru and ‘Voice Treaty, Truth’**

Our people have always fought hard for our rights, including by establishing an Aboriginal Embassy in Canberra to protest racism and dispossession. However, Government never agreed to a process of reparations for this genocidal history.

The Mabo decision held that all Indigenous land acquired before the *Race Discrimination Act of 1975* (CTH) implementing CERD was not able to be legally challenged. We were promised a Social Justice package reform that has not properly materialized.

The Council for Aboriginal Reconciliation (CAR) was established by government in 1991 and for a decade, supported reconciliation and a more truthful understanding of history. Many thousands of Australians engaged in a Reconciliation process, taking part in reconciliation meetings and walks to acknowledge the past and express their remorse.

Reconciliation has been accepted by all governments, endorsed by the federal ALP party currently in government, supported throughout the government and business sector.

Reconciliation Australia oversee the adoption of Reconciliation Action Plans (RAPs) adopted by such bodies to improve reconciliation. However, there is no monitoring or capacity to monitor it seems and Indigenous peoples aggrieved by racism and systemic discrimination at the hands of such bodies have little recourse to any formal process.

This year in 2022 Reconciliation Australia asked people to ‘Be Brave Make Change’ and address systemic racism affecting Aboriginal people.

Last year they suspended the mining giant Rio Tinto from their program, following the destruction of the sacred site Jukaan Gorge failing to listen to Indigenous custodians.

In their final report to government in 2001 the Council for Aboriginal reconciliation recommended Australian enter Treaty and Treaties with Indigenous Peoples and that the Australia Constitution be amended to prohibit racial discrimination.

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<sup>6</sup> <http://classic.austlii.edu.au/au/journals/AUIndigLawRw/2008/6.pdf>

These key recommendations were not implemented by the Australian government.

However, the process of Treaty making, and Constitutional reform have continued under the leadership of Aboriginal people.

Several states are now engaged in Treaty Making process, Victoria, and Northern Territory in particular, with Queensland most recently.

Victoria has established the Yoorook Justice Commission to oversee a formal process of Truth Telling to break this silence to ‘establish an official public record based on First Peoples’ experiences of Systemic Injustices since the start of Colonisation’ to contribute to realising Indigenous rights by developing a shared understanding not only of the individual, collective and inter-generational impacts of systemic injustice on First Peoples since colonisation, but also of the diversity, strength and resilience of First Peoples’ cultures, knowledge and traditional practices. It will contribute to building a new relationship between the State of Victoria and the First Peoples, ‘based on truth and justice and to prevent recurrence of injustice’.

Aboriginal people also met at Uluru in the heart of the country, some 5 years ago in a process of constitutional reform and adopted the Uluru Statement from the Heart, which calls for a national political Voice to be established within the Australian Constitution.

We have no Aboriginal representative body since they were disbanded by government. A Voice in the Australian constitution cannot suffer this same political fate. A Voice will allow for national Aboriginal representation and advocacy on all issues affecting us.

The current Prime Minister Anthony Albanese on the eve of his election this year endorsed a constitutionally protected Aboriginal Voice and Referendum. The process of Voice, Treaty and Truth endorse at Uluru some 5 plus years ago is now official government policy.

We are at a turning point in our nation with commitment to a Makaratta Commission to also oversee the process of Truth Telling and Treaty making. Our country we hope is changing, there is a reckoning taking place.

Indigenous peoples are calling for implementation of the UN *Declaration on the Rights of Indigenous Peoples*, freedom from discrimination and state sanctioned violence.

We will always Resist colonization, our elders and peoples fight for justice will never end.