

Aborigines and the 1967 Referendum: Thirty Years On*

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I WANT TO DO three things. I will begin by making some remarks about the referendum itself. I then want to consider the question of Aboriginal rights in the generation before 1967 and then in the generation after and look at the present situation. And I want to place that discussion about rights in an international context.

So I begin with the question: why was the referendum important? One could perhaps ask: was the referendum important? After all, the referendum did not, as is popularly thought, give Aborigines the vote; it did not extend social welfare benefits to Aboriginal people; it did not provide for equal pay or wage justice; it did not in itself dismantle the state systems of protection; and although it allowed the Commonwealth to legislate for Aborigines, it did not require the Commonwealth to assume full responsibility for Aboriginal affairs. And nor has any federal government subsequently. In fact the referendum failed to meet the demands which humanitarian organisations had made over and over again from the early years of the century, that Aborigines become a national responsibility. And the most pertinent question then might be why it took so long to change the Constitution and above all, the so-called race power under section 51 clause 26, given that so much effort had gone into the question in the 1920s and the 1930s. However, despite all that, the referendum must be seen as an event of central importance. A symbolic event enshrined in history because it did require a referendum and which necessitated a long and intense campaign and it called upon the whole electorate to make a decision on the place of Aborigines in Australian society. It was highly significant that the measure was passed with such commanding majorities in almost every part of the

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continent. So, the referendum does stand as an important milestone. It stands beside the equal pay decision, the 1976 Northern Territory Land Rights Act, the Mabo judgment of 1992 and the Wik judgment of 1996.

Having made those brief remarks about the referendum, I want to turn back to the 1920s and the 1930s, before then coming forward to the present.

If you look at the referendum in the context of what was going on in the 20s and the 30s amongst reformers and humanitarians, what strikes you is how modest and how conservative the agenda of the reformers was in the 1960s, compared to their counterparts of a generation earlier. To illustrate this I will compare two petitions to Parliament, that is, the 1962 petition of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders, which sought the removal of discrimination to achieve equal citizenship for Aborigines. But compare that to the petition of 1927 presented to Parliament from the Aborigines Protection League, which asked the Parliament firstly to constitute a model Aboriginal state, to be ultimately managed by a native tribunal as far as possible by their own laws. This Aboriginal state was to have representation in the federal Parliament on the lines of the situation in New Zealand. Now that was a very much different agenda to what was being proposed in 1967. But it is probably necessary to say a little more about the ideas of the main figures behind the 1927 petition and the Aborigines Protection League.

It was based in Adelaide. The two most important figures were Colonel G.C. Genders and the leading feminist Constance Cook. They thought that two things were necessary for Aboriginal advancement. One was land rights and the other was self-government. So in a League document of the early 1930s called *A Native Policy for Australia* we read:

... if the Aborigines are not to be destroyed they should not be dispossessed nor subject to a system that is alien to them but they should be secured in all their tribal territories and encouraged to adapt to new needs all that is best in their traditions under their own leaders under the form of government that they understand, the direction of their day-to-day affairs by a tribal council of their own choosing.¹

It was, in other words, an agenda of separatism, of land rights, of self-government and it was strongly against the sort of assimilation which was still talked about as a commonplace in the 1960s. Thus Colonel Genders in writing to the Anti-Slavery Society in London said assimilation could only be considered, and I quote:

when we have learnt not to discriminate between the colour of the skin—a very far cry—and when under indirect rule the Australian aborigine has achieved national pride with his own government, chiefs etc, has his own universities, colleges, and Oxford and Cambridge men, then it will be time enough to talk of assimilation.²

¹ Aborigines Protection League, *A Native Policy for Australia*, Adelaide 1932, p. 4.

² Genders to Anti-Slavery Society, no date, Anti-Slavery Papers, Rhodes House, Oxford, S.22/6.378.

So, what do we make of this seemingly radical agenda in the past? It seems to me the reformers of the 1920s were using quite another language than those of the 1960s. Their proposals were far more radical, far more wide-ranging than those proposed in the 1960s. Even today their plan for self-governing Aboriginal territories is beyond the borders of mainstream politics. I think one of the reasons for this is the international environment in which they worked, and I will point to two things, that is British imperial policy of the time and secondly the League of Nations. I will consider those each in turn.

The Australian humanitarian reformers of the 1920s and 30s referred to the policies being pursued elsewhere in the Empire. Australia was still seen as part of the Empire, and the Aborigines were therefore seen as a colonial people. The then progressive policies of indirect rule appeared to be relevant to Australia. So too was the emphasis in the 1920s and 30s on protecting native land ownership and both of these provided powerful models to which Australian activists could refer. The 1930s saw a great deal of discussion about providing land rights particularly in east Africa and this was what Australian reformers referred to. Thus Colonel Genders, who constantly referred to colonial policy in Africa, explained in 1930 that it was coming to be recognised throughout the world that non-Europeans should have legal property in their land. In discussions going on overseas he said one principle predominated: the recognition that colonised people should have land in inalienable possession. So they referred then to what was happening in other parts of the Empire because at the time, that seemed relevant.

They also referred to the League of Nations. Now the League, as you may know, was deeply involved with the problem of minorities. The creation of new states out of the ruins of the Turkish and Austro-Hungarian empires produced the situation where many national minorities found themselves imprisoned within the new countries dominated by majorities which were, as often as not, traditionally hostile to them. So the League of Nations negotiated a whole series of minority treaties to ensure the cultural survival of the minorities. They were about groups, not about individuals. They were about minority rights. Equally, in the case of Germany's overseas colonies a system of mandate was created and Australia accepted the mandate for territories in the Pacific which committed the federal government to promote to the utmost the material well being and social progress of the inhabitants of the territory. It was an international commitment, a sacred trust of civilisation which Australian reformers could demand as well for Aborigines. They argued: if we now have these international responsibilities for Papuans and New Guineans and other peoples of the Pacific, surely we must also have international responsibilities for Aboriginal Australians. And so in the 1920s and 1930s the destiny of Aborigines and New Guineans was seen as trending in the same direction. Policies adopted in the mandated territory seem to be directly relevant to Australia.

Well that, very briefly, is a consideration of some of the radical reformers' thought of the 1920s and the 1930s. But you will remember I began with 1967. I want now to pass back towards 1967 on my way to looking at the present. Let us consider why things were different in 1967 than they had been in 1927 when that petition was presented to Parliament.

In the 1960s there was little British Empire left and few Australians thought of themselves as being part of that Empire. Colonial policies, or what was left of them, no longer seemed relevant to Australia. The sense that the Aborigines were in a similar situation to other colonized people had been lost. The only reference point seemed to be Australia itself. The consciousness of there being a fourth world, a world-wide movement of indigenous people,

had not yet emerged. Papua New Guinea, for instance, was, by 1967, heading one way, and the Aborigines another. That is, New Guineans were to be citizens of an independent country, whereas Aborigines thought that they would become equal citizens of Australia.

There is also a strong contrast between 1927 and 1967 when we consider the position of the League of Nations, as opposed to the United Nations, particularly in relation to minority policies. Whereas the League had thought a lot about minorities, the United Nations put the emphasis on the rights of individuals on the one hand, and the rights of states on the other. There was no other body between the individual and the state that could be assumed to have rights. That is, the emphasis was on the protection of individuals rather than of minorities against discrimination. The whole thrust of UN policy and documents was until recently assimilationist. This will be seen most apparently in the ILO (International Labor Organisation) Convention 107 of 1957. It was in some ways an important convention because it was the first post-war document that dealt with the rights of indigenous people. But it was strongly assimilationist in tone. 'These populations', the document declared, 'shall be allowed to retain their own customs and institutions where they are not incompatible with the national legal system or the objectives of integration programs'.³ So in 1927 it was possible to consider separatism as a serious consideration. By 1967 the emphasis was on assimilation and integration.

Despite the change of international scene, there is no doubt that the international situation was still significant for Aboriginal policy. In their book on the 1967 referendum, Atwood and Marcus write 'the 1967 referendum was initiated by a government keenly aware of the likely impact on Australia's image overseas of a successful deletion of the discriminatory clauses in the constitution'.⁴ And so, it is to that question that I now wish to turn, that is, to the present and the international climate in which current policies are unfolding.

In an article in the *German Year Book of International Law* in 1992, the author, B.R. Howard, observed that, 'over the course of the past twenty years a new and urgent voice has reached the international arena, the voice of the world's indigenous people'.⁵ The rights of minorities have received far greater international attention in the last ten years than at any time since the end of the Second World War. In 1992 the UN General Assembly passed without dissent the declaration of the rights of persons belonging to national or ethnic religious and linguistic minorities. Article one of that declaration urged states to protect the existence and the national or ethnic cultural, religious and linguistic identity of minorities within their respective territories and to encourage conditions for the promotion of that identity. The idea that there should be international protection for the identity of minorities is now clearly on the world agenda.

Meanwhile, the draft declaration on indigenous rights continues its slow progress through the United Nations. Drafting began in 1985 and it was presented to the Commission on Human Rights in July 1994. The forty-five articles of the draft constitute what are considered to be in

³ P. Thornberry, *Minorities and Human Rights Law*, Minorities Rights Group, London, 1991, p. 14.

⁴ B. Atwood and A. Marcus, *The 1967 Referendum*, AIATSIS, Canberra, 1997, pp. 35–36.

⁵ B.R. Howard, 'Human rights and indigenous people', *German Year Book of International Law*, vol. 32, 1992, p. 105.

the words of the document itself, 'the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'.⁶ But in the meantime the most important international document concerning minority rights is the Covenant on Civil and Political Rights which was endorsed by the General Assembly in 1966 and which came into effect early in 1976.

Without doubt the Covenant is the world's single most important international human rights document. It maintains the emphasis of the UN on individual rights, but in one article, that is article 27, the situation of minorities is addressed. Individual members of ethnic, religious and linguistic minorities, 'shall not be denied the right in community with other members of their group to enjoy their own culture, to profess and practice their own religion or to use their own language'.⁷ The British international jurist, Patrick Thornberry, observed that the article is the only expression of the right of an identity in modern human rights conventions intended for universal application.⁸ It is in fact the first real attempt in the history of international law to provide such a universal right. As such, it bears a considerable burden. And as such, it is particularly significant for Australia and for the situation of indigenous people within Australia. The Covenant itself has inbuilt provisions to encourage observance by states. Under article 2, they bind themselves to implement the provisions. States are obliged to report to the Human Rights Committee, and as a result of the so-call optional protocol, to which Australia is a signatory, aggrieved individuals can take their case to the Committee, provided they have exhausted legal remedies in their own country, as we saw in the case of the Tasmanian laws concerning homosexuality.⁹

What is the significance to indigenous Australians of the Covenant? I suppose the most important statement about significance was made in the Mabo case by Justice Brennan with Mason and McHugh concurring, when they declared that the opening up of international remedies for individuals pursuant to Australia's accession to the optional protocol, of the Covenant, brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.¹⁰

What international standards can be found in article 27 which can be assumed to apply to indigenous Australians? It was quite quickly assumed that article 27 implied more than a passive role for the state in actually protecting minority rights rather than just leaving minorities alone. One of the important documents is by a special rapporteur, Franco Cappelletti, who conducted a study on the rights of people belonging to ethnic, religious and linguistic minorities. He insisted that implementation of the rights in question called for

⁶ Unpublished draft of U.N. Declaration on Indigenous Rights, ATSIC, Canberra.

⁷ Thornberry, *Minorities and Human Rights Law*, op.cit.

⁸ P. Thornberry, *International Law and the Rights of Minorities*, Clarendon Press, Oxford, 1991, p. 142.

⁹ W. Walker, 'The remedies of law of the International Covenant of Civil and Political Rights', *New York Journal of International Law and Politics*, vol. 20, 1988, pp. 525-555.

¹⁰ Mabo v Qld, no. 2, 175 CLR, 1992 p. 42.

active and sustained intervention by states, because a passive attitude would render rights inoperative.

But what rights come under the rubric of enjoying culture and practicing religion? That in a way is the most important question. To answer this I will consider two things. I will look at a statement of general principles by the United Nations Human Rights Committee on this question and then I will consider a number of cases that were taken under the optional protocol relating to indigenous rights.

In 1994 the UN issued general comments on article 27 in which it was emphasised that the article, although expressed in negative terms, (people shall not be prevented from enjoying their culture etc.) put the governments in question under an obligation, 'to ensure that the existence and the exercise of this right was protected against denial or violation, particularly against acts of the state, whether through its legislative, judicial or administrative authorities'.¹¹ The right to enjoy a culture was not just an empty one but had real practical implications. The capacity to enjoy that culture might well consist 'in a way of life which is closely associated with territory and the use of its resources'. This may particularly be true of members of indigenous communities constituting a minority. Culture, the enjoyment of a culture, might well depend on access to territory and the right to pursue a particular way of life. In the general comments the Committee observed:

... that culture manifests itself in many forms including a particular way of life associated with the use of land resources especially in the case of indigenous people. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.¹²

Apart from this statement of general principle, particularly about the importance of land and traditional ways of life for the enjoyment of culture, the Human Rights Committee has elaborated its attitude in response to cases brought before it by individuals under the optional protocol.

Four cases heard between 1977 and 1992 are particularly relevant to the matter at hand. Two concern Canadian Indians and two Sami from Scandinavia, from Finland and Sweden. I will talk about them each in a moment, but in general it was determined that the right to enjoy one's culture could not be determined in abstract but had to be placed in its local context. The right could be threatened by being denied access to traditional communities, to traditional land, or by being denied the right to engage in traditional economic activities or by traditional life-styles being disrupted by mining or logging. But let me turn to the four cases in question. I will just say something about them briefly.

The first one, decided in 1981, was the one of Sandra Lovelace versus Canada. Very generally, it turned on her right to return to her reservation, having married a non-Indian, and the Human Rights Committee determined that indeed she was being denied her right under article 27 to enjoy her culture. Her capacity to enjoy her culture was dependent on her ability

¹¹ General Comment, no. 23 (50), Human Rights Committee, 1994, C. A. Supplement (A49/40), pp. 108–109.

¹² *ibid.*

to actually live on the reservation in a specific place where her culture, and not a generalised Indian culture, her specific culture, was practised. She could only enjoy her culture in that particular place.

The second case was decided in 1985, the case of Ivan Kitock versus Sweden. Kitock took his case to the Human Rights Committee because, he said, a government regulation prevented him from reindeer-herding and he was therefore not able to enjoy his culture as Sweden committed itself to under article 27. The decision in this case came out in favour of Sweden, but both sides of the argument accepted, as did the Committee, that reindeer-herding was a critical factor in being able to enjoy Sami culture and that although government regulation tried to prevent Kitock, he was able to hunt and herd, if he wished, and therefore, the critical factor in allowing him to enjoy his culture had not been completely denied.

The third case, in 1990, was that of the so-called Lubicon Lake band of Indians in northern Alberta versus Canada. This turned on the question of whether economic development in the tribal territory threatened the right to enjoy culture—whether article 27 included the right of persons to engage in economic and social activities which are part of the culture to which they belong. Now in this, the UN decided that indeed economic developments of the sort that were being proposed for the area would cause irreparable damage to the traditional way of life of the Indian band and Canada therefore felt obliged to take remedial action.

The fourth case, of 1992, was another Sami case, of Larndsmann versus Finland, when Larndsmann (of course individuals have to take cases) said that quarrying in his territory interfered with reindeer-herding and thereby prevented him from enjoying his culture. The Committee concluded that at present the quarrying in question was not large enough to threaten enjoyment of the culture, but if it expanded it could well do so, in which case such economic activity could be seen as directly threatening the right to enjoy traditional culture.

Those four cases from Canada and Scandinavia do, I think, have considerable relevance for Australia. I think they have particular relevance for what is currently taking place, in this very place. If the present legislation does, in effect, extinguish or limit native title rights on pastoral leases (and I am not here to say whether it does or does not, that is not my purpose at the moment) that is, if in one way or another people are denied access to traditional lands, it will be almost certainly in direct breach of Australia's obligations under article 27 of the Covenant on Civil and Political Rights. As we have seen, the view is that the capacity to practise culture relates to specific places and specific forms of economic activity. Sandra Lovelace could only practise her culture on her own reservation. It was not enough simply to have some access to Indian culture, it had to be her own specific band culture that she had a right to enjoy. Quite clearly, in Australia, the right and the capacity to participate in the culture, relates to the traditional land and the capacity to have access to it. So too, I imagine, would the obligation to provide the capacity for people to practise their religion also be closely related to whether or not people could have access to their own traditional lands. For that matter, certainly under the Convention of the Rights of the Child, it could also be argued that if people have not access to their traditional land, if children do not have access, they cannot enjoy their culture or practise their religion.

If it is the case that access to traditional lands is going to be limited or actually taken away, compensation will have little bearing on this particular question. Compensation in itself does not allow you to practise your religion or to enjoy your culture. And the problem perhaps for

Australia is that this issue cannot be contained within Australia because of the terms of the optional protocol. So what would happen is that if Aboriginal litigants took a case to the High Court on this question and lost in the High Court and had thereby exhausted legal remedies in Australia, there is no doubt they could take a case straight to the United Nations where I am sure they would have a very sympathetic hearing. If the UN Committee was to follow precedent that has already been established, it seems to me that Australia would have great difficulty in not finding the judgment going against it. In that case, Australia would find itself in the company of countries notorious for their treatment of their peoples and notorious for their record on human rights. At its worst, that would reawaken all those suspicions about Australia, about Australian racism, which have not fully been laid to rest in other parts of the world. And what would disturb me, this would begin to undo all the credibility that has been slowly built up by the Wik case, the Mabo case, the *Northern Territory Land Rights Act 1976* and the referendum of 1967. If that was the case, then much of the progress we have seen in the last thirty years since the referendum would be seriously threatened, particularly in relation to Australia's position in the world. And that, in conclusion, is a prospect which many of us look upon with some despair.



Question — One of the problems that seems to arise in terms of talking about legal rights is that whether you talk about international bodies or domestic, we still seem to be working within a very constrained language and discourse, which seems to be all about exclusivity. It seems that the problem, particularly in the domestic case, is not so much about exclusivity of rights but the quality of access and the potentials for co-existence. Could you just comment on that?

Dr Reynolds — In the specific situation I do not think anyone would say that to enjoy culture in the terms of the Covenant, Aboriginal people have to have exclusive use of a piece of country at all. I would have thought the capacity to access the country almost in the way that was considered and designed by the imperial government in the middle of the last century, of access to the country for cultural and economic reasons, would seem to me to be sufficient to be accepted as fitting within the obligations that Australia has taken on to allow minorities to practise their religion and enjoy their culture. I do not think it at all means exclusive use of the country, it certainly means access to it for cultural and religious purposes. Now, of course, article 27 is extremely limited. I mean that was the furthestest that international treaties have gone in creating rights for minorities, and it had to be phrased in terms of individuals still, but none-the-less, its meaning has undoubtedly been expanded over the last twenty years, far beyond what was probably thought appropriate at the time. It is now a much more significant and broad right than appeared when it was first drafted. I do not at all think it means an exclusive use of country. It is access for cultural and religious purposes. There may be all sorts of other issues, but in a way I wanted to talk about it in relation to the critical point that Australia has committed itself to the most important human rights document we have, and a breach of that on a large scale would be very serious indeed for Australia's international reputation. There is no question about that.

Question — Dr Reynolds, I know you are not a lawyer, but you might be able to comment. Does that significance of access to land granted for cultural and spiritual reasons, have implications for other reasons? For example, if an Aboriginal community is given access to traditional lands but then in the course of time decided that there was attachment to the land other than simply cultural and religious reasons, and actually wanted to engage in economic practices that had nothing to do, say, with culture and religion, would that mean that they forfeit the grounds on which they gained access to the land in the first place? Does that count them out on being able to pursue any economical development?

Dr Reynolds — No, I do not think so. The Covenant talks specifically about culture and religion and language, but as thinking about it has developed, it is clearly apparent that the relevant UN bodies now see that you cannot talk about culture without considering the economic life on which that culture is dependent, so that reindeer-herding has been judged as being critical for the survival of Sami culture, that quarrying might well threaten Sami culture if expanded. So in that sense it is most significant where people say a particular mining project is threatening our way of life, and it occurs to me that if a case was lost in the High Court, and you have to exhaust your domestic legal possibilities, then that would certainly be a case that would be considered and would have a reasonable chance of succeeding. As you say, I am not a lawyer, that is quite true, but, if you read the evolution of the jurisprudence of the Human Rights Committee, then that seems to be the way it is heading. Of course you cannot predict what would occur, but there is no question in my mind that it is in that sort of area where economic activity is important. I cannot see that this in any way would prevent people from using their land in other ways. It simply is not about that sort of thing. It is about a state, in this case Australia, promising to not prevent people from enjoying their culture. That is the critical point.

Question — I am interested in the issue you raised about compensation, being almost beside the point in relation to international human rights, because domestically just say the legislation, the bill before Parliament, is constitutional under the racist power, one of the issues is when property is acquired by the commonwealth just compensation has to be given. The question of ‘just’ I think is becoming increasingly complex in light of international human rights discourse and the impact of international human rights on the High Court’s interpretation of the Constitution. I actually did not know you were not a lawyer, but I am sure you can answer this question: do you have a sense of how the High Court will consider the word ‘just’ in the Constitution, in terms of international human rights, and stopping people’s access to culture etcetera, and how it is possible that the bill itself will again be unconstitutional on the grounds that ‘just’ compensation when a culture is being potentially eradicated, cannot be given?

Dr Reynolds — There are sometimes advantages in not being a lawyer. You do not have as much respect for the law which is probably often a good thing. There seem to be two issues. One is the question which clearly no one really knows and let alone the AG’s department I imagine, as to what compensation would actually mean on just terms in relation to this issue of it also having important cultural and religious implications. After all, it seems to me now, there is a growing international sense that states are responsible for the survival of cultural minorities within their boundaries and that survival as the UN Committee now sees, is related to access to land. So, you would suppose that compensation would have to be considered on a much larger and different scale to simply the economic value of the land. Now, where it would go is very very difficult to predict, but I suspect compensation would probably have to

take into consideration those things. In terms of the extent to which the High Court would take into consideration the international law on this, once again it is hard to say, but as we saw with the Mabo judgment, Brennan and others said that because Australia has opened up its law by the optional protocol, by allowing people to go out of Australia in a sense to take their cases beyond the High Court to the UN, then this offers a conduit by which international law can flow into Australia and clearly affected the judgment in Mabo. Whether that view would prevail in the High Court now is very difficult to say. But undoubtedly all of these things would have to be considered with what result I do not think anyone can predict and quite clearly there are all sorts of people doing sums around Canberra as to what it might cost.

Question — So you do not agree with our leader that Wik is just a land management issue?

Dr Reynolds — I think it was quite possible in the nineteenth century for people to say: ‘Look, these people do not really own the land they just wander across it and it does not matter whether they have this bit or the next bit, we can push them off. They are simply nomads’. We now know beyond question, that particular pieces of land are of critical importance for Aboriginal groups, not just economically but also deeply important for their cultural and religious life. We know that. We cannot say now, we do not have the excuse of the pioneers, ‘We did not know’. We do know, so we cannot possibly consider it a matter of land management only. It is clearly something of far greater significance and indeed may well determine the cultural survival of some groups, that is, if they are permanently denied access to their own country, then that seems to me to have serious implications. Not just for Australia, but for the whole world. I think the whole world is concerned in the cultural survival of these very small groups, indigenous groups, and it is not enough to say they have access to a generalised Aboriginal culture. I think that is quite clear.

Question — The High Court and the government have so far limited native title to crown land and leasehold land. Given what you are saying about the United Nations, would Aboriginal people be able to use the United Nations to extend native title claims and/or compensation claims to freehold land and, God forbid, leasehold land in the ACT?

Dr Reynolds — No. I do not think that is the case. What we are talking about is access to land for cultural purposes, which is the critical thing. If there was some particularly important cultural site, then I suppose people could argue that they should have access to it for cultural purposes and that indeed would have to be presumably taken through the courts. I think that it is not a question of ownership of land, it is having some access, some bundle of rights over land over which other people have other bundles of rights. That seems to me to be what we are talking about in relation to pastoral leases. The question of if there is an important cultural site which is of great cultural significance to a group of people who say the survival of our culture depends on having access to this site occasionally, then it would seem to me it is something which should be taken seriously and should be negotiated before it has to be taken through the courts. But it would seem to me there is a case that could be argued in a court on that question.

Question — What does the black armband view of history mean?

Dr Reynolds — Well, I have an investment in the black armband version of history, I mean I clearly have made my reputation by peddling it. I think it is important in Australia as a corrective to what went before, which I like to call the white blindfold version of history. And

I think it is a process of history we had to go through, as many countries in the world are going through, a process of truth-telling and reconciliation. All over the world this is happening, and it is as though the pace of these developments speed up towards the end of the century. Now I think the black armband view of history was critical in reaffirming old truths which people were quite happy to talk about in the nineteenth century. Where political correctness, it seems to me, did have an important and deleterious effect was the political correctness of the early twentieth century which wrote out much of the story of conflict and dispossession. Now, in a way, it is the problem we have that generations, including myself, grew up with a far too heroic picture of Australia's history. I think soon we should be in a position where we can throw away both the white blindfold and the black armband because I think we are getting to a stage where we can accept that there are good things and bad things and they are not mutually exclusive, they do not cancel one another out.

Question — I was wondering does the Covenant which you referred to lay down what constitutes a cultural minority and who its members are, or is that left to individual sovereign states to determine. Could the Australian government, through legislation, determine a criteria for who is a member of the Aboriginal cultural minority and who is not?

Dr Reynolds — Yes, that is a good question. The UN has had trouble in defining what exactly a minority is, although there are some fairly good definitions in some of the various studies that have been done. They certainly do not think that this question can be left to states because quite obviously states would say we do not have any minorities, as the French have done. The French signed the Covenant but added a reservation saying there are no minorities in France. When they consider France as including Polynesia, it is pretty extraordinary. The Bretons have had great trouble taking cases because they get there and the Committee says 'Oh yes, well, it looks as though French cultural imperialism (they do not use those words, but that is what they mean) is giving you a bad time, but we cannot deal with it because the French only signed with that reservation'. So, there are problems about that, but certainly the question of what is a minority, is not left to states to define and I would have thought that given that indigenous minorities have, for quite some time, been involved in the UN process, there is a clear understanding of who the indigenous minorities are and I would think there is no question in anyone's mind that the Aborigines are seen throughout the world as an indigenous minority, regardless of what any Australian government did.

Question — We have been talking a lot about the United Nations and it seems to me that in Australia we do have specific groups of people who reject the United Nations and the extremists in fact talk about it as though it is a sort of a world conspiracy. Some of that thought shows itself occasionally in some of our more conservative political parties, so what is the situation? If it does go to the United Nations, if we have signed the protocols, these are people who will say that does not matter, we do not have to honour that, we do not have to have any obligation under it because the United Nations is 'phut'; it does not mean anything.

Dr Reynolds — Yes, I am sure that would be the reaction. But in the case of the Covenant in particular, quite clearly the High Court has already determined that through the actions of Australian governments in ratifying it even if they have not actually legislated it into law. If there is a doubt in the common law then you can look at international law, and in particular in relation to article 27, it does seem to me that there is a strong argument to say that this now has to be considered as an influence at least on Australian domestic law. In terms of what would happen if Australia was called before the Human Rights Committee to justify what it

had done, it would be very difficult for Australia not to go, because it has agreed that it will go under the optional protocol, in a set time period, it cannot just ignore it, and I think Australia would feel obliged to put up a case. Now it depends just how much Australia wants to continue to see itself as a major player in the question of human rights in the world. We may, in fact, be receding from that—I do not just mean this government at all—we may be receding from that view of ourselves. It is as though we feel our current environment is no longer conducive to those sort of ideas. If that is so, that is distressing, but for the moment Australia values its reputation and a simple refusal to do anything about this question would have a very serious effect on our reputation, and in a way, because of our situation, we have to be above suspicion. We carry around with us the legacy of the white Australia policy. After all, Australia was professedly a racist state for sixty years of this century. We have made admirable changes at a remarkable rate; that does not mean the legacy does not remain, so we are constantly in the world battling against those perceptions and if we make a mess of this, if we simply say the UN can go and jump in the lake in Geneva, then I think that would have very serious implications, and that affects all sorts of practical things, as we have seen. Tourism, education, trade, all of these things get bound up with the way the world sees Australia and on this question we cannot avoid international attention. There has always been international attention on the position of indigenous Australians, right from the nineteenth century, and now, that is much more formalised. The world takes an interest in the fate of indigenous people. We may well say well that is nothing to do with them, this is our business, but the rest of the world will not accept that as an argument so it does matter to our reputation, if we still believe that is important.

Question — There have been some suggestions in the High Court and elsewhere that the commonwealth government can only use the racist power in the Constitution to pass laws which are beneficial for Aboriginal people rather than discriminatory laws. I was wondering if you could comment on that?

Dr Reynolds — Yes, the argument that you can discriminate but only in favour of people. Well, that is an argument which I find persuasive but quite clearly it is not by any means certain what the High Court would do. That seems to be a consensus of legal opinion. But that would be one of the questions which we cannot be certain about until there is a definite judgment.

Question — Is John Howard correct when he says that without the amendments Aborigines have power of veto over seventy-eight per cent of Australia?

Dr Reynolds — No, I do not think that is true. That is a question for other people, of which there would be many around here. I do not think that is the case, but I do not want to go into that sort of detail.

Question — Is it an easy way out to give compensation to the Aborigines and not give them their culture, to try to influence them by offering them something more than their culture should give them? To offer the Aborigines money or whatever, as compensation, is not giving them the right to go through the land the way they should be able to do, to do with their culture. Is that a fair assessment of what is being offered?

Dr Reynolds — If it is a case where people do not have access now, or will lose access to their country, as we have said, compensation would certainly be required and it may turn out

to be compensation of a considerable magnitude; but that really begs the question of whether or not the capacity to enjoy your culture and practise your religion depends upon having access to that particular place on the surface of the earth. If that is the case, then denial of access to country is using the power of the state to prevent people from enjoying their culture, and that seems to me to directly contravene the Covenant. In the nineteenth century when they profoundly believed in Christianity and that there really was an after-life, they were convinced that that was more than compensation enough. We may have taken your land but we are going to give you the secret to eternal life. But most of us do not, unfortunately, feel that is compensation, otherwise it would be easy. Simply say, look, your compensation is to have our religion and that will ensure that you will live forever.

Question — Dr Reynolds, I would like to get your reaction, to a fact that I happened upon myself only last week, and a fact which is probably little known throughout this country, which is that nearly all the people, or at any rate most of the people, who end up in gaol for not voting, in Australia, are Aboriginal people. In other words, people gaoled for the offence, if you call it an offence, of not participating in the political affairs of Australia.

Dr Reynolds — Well, this in a way touches on much of what I was talking about in the paper. This takes us back to the time when enlightened opinion both Aboriginal and non-Aboriginal, seemed to want that Aborigines should have all discriminatory measures against them removed. Amongst that clearly was the right to vote and then to be like all other Australians, and to be required to vote was seen as a necessary and progressive reform. But as you say, there are now people who say by voting we concede that we are citizens of Australia and we do not think we are and therefore we will not vote. So, indeed it is a dilemma of very considerable dimensions. The only way around it, it would seem to me, would be ultimately to put the question to the Aboriginal community itself and see whether they want to vote, and maybe go back to voluntary voting. But then that discriminates. We would be held up as being discriminating against Aborigines by not requiring them to have the same provisions about voting as everyone else has. We have compulsory voting. So we are, you see, dealing with two quite different intellectual traditions. The tradition of 1967 and the tradition of the model state petition of 1927 which was going off in quite a different direction. So that is not an answer, but that is maybe an elaboration of your question.