

Introduction

Human rights and the imperative of 'reconstructing ourselves as human beings': the challenge for East Timor and beyond

Melinda Jones*

There is overwhelming evidence that East Timor has seen a deliberate, vicious and systematic campaign of gross violations of human rights. ... To end the century and the millennium tolerating impunity for those guilty of these shocking violations would be a betrayal of everything the United Nations stands for regarding the universal promotion and protection of human rights.¹

Events in East Timor — first the euphoria of the 30 August United Nations (UN) ballot, and then the destruction of the society and attempted genocide of the East Timorese people, and once again the euphoria of Xanana Gusmao's return — have overshadowed all other human rights concerns in Australia and the Asia-Pacific region. While others in the region are rebuilding their society from zero, and themselves as people, most of us are fortunate enough to not have trauma to overcome and a destroyed identity to rebuild. Yet, human rights abuses continue to be the daily experience of many Australians, and as a community we should take the turn off the century as an opportunity to reconstruct ourselves and our country in a manner which builds equality and respect for all members of our society. This must include children, indigenous people and people with disabilities, the most vulnerable and disadvantaged members of the community. This issue of the *Australian Journal of Human Rights* canvasses some of the issues of concern.

East Timor

It is too soon to offer a measured assessment of the situation in East Timor, but there are two tasks of enormous magnitude currently occupying the minds and time of many human rights activists. The first is to deal with the reality of the recent past.

* Director, Australian Human Rights Centre. The quotation in the title is from Xanana Gusmao: 'We know that we have a very, very difficult future. We know we will start from zero to reconstruct not only our country, but also ourselves as people, as human beings', 12 October 1999 cited at <<http://www.motherjones.com>>.

1 Report to the Special Session of the United Nations High Commission for Human Rights by High Commissioner for Human Rights Ms Mary Robinson cited by Pat Walsh 'Changing Relationships: East Timor, Australia and Indonesia' *Tasmanian Peace Trust Annual Lecture* 10 October 1999.

Testimony of massacres, brutality, rape, torture and trauma are being collected to provide a true picture of what has happened. The second task is to rebuild a civil society out of the remnants of East Timor. What infrastructure remains is still unclear, but it is likely that every aspect of social and civil life is in need of repair. There is the further task of bringing back those East Timorese who are dispersed in Indonesia and the region as refugees. The need for safe passage of return, and support services for those returning who are the victims of torture and trauma, makes the refugee crisis the issue which brings together the problems of the nation.

On testimony and tribunals

The taking of testimony of victims and witnesses have three distinct purposes. The first is to establish a record of what happened. The second purpose is to help victims overcome the trauma, by the process of recounting and legitimising the truth of their experience. The third purpose is distinct from the other two. It is to establish evidence that may be used in the trial of war crimes and crimes against humanity. In each case there is a need to ensure that the people's well-being is the first and foremost consideration. This means that it is crucial that there is a co-ordination between the various non-government organisations (NGOs) taking witness statements, such that individuals are only interviewed once and that the victims are not asked to relive the trauma. In the case of testimony taken as evidence, the International Commission of Jurists are in the process of training lawyers to ensure that the testimony is such that it will hold up in court.

Whether the evidence collected will be presented to a court established by the Indonesian Government or to a UN War Crimes Tribunal, such as those established for dealing with the fallout from civil war in Yugoslavia and Rwanda, is yet to be seen. At this point of time the only decision has been to establish an international commission of inquiry. The inquiry was established by a Resolution of the UN Commission for Human Rights, which took the unusual step of convening a Special Session on East Timor in Geneva from 23 to 27 September, 1999.² Australia does not currently have voting status at the Commission for Human Rights, but has given an express commitment to assist the people of East Timor and to actively aid the inquiry.

The Resolution which found the inquiry does not itself establish a War Crimes Tribunal or make any reference to a tribunal as such. Rather, the purpose is purely investigative, and the powers of the Inquiry are decidedly limited in their scope. Investigations will be

2 This was only the fourth time the Commission for Human Rights has held a Special Session (the previous two occasions were to consider the crises in former Yugoslavia and Rwanda).

limited to the period since the time of President Habibie's announcement of a vote in January 1999 — that is, there will be no reckoning with events of the last 25 years. Further, the researchers are required to complete their work by the end of this year. This will inevitably result in superficiality. But perhaps the most important aspect of the Resolution is that it is concerned with the activities of the militias, rather than the actions of the Indonesian military. Finally, the Resolution gave a primary role to the Indonesian Commission (KomnasHAM) in the international inquiry.

The involvement of KomnasHAM is problematic from the point of view of many East Timorese people, who see it as part of the Indonesian State. However, much of the vital evidence and many of the perpetrators are in Indonesia and, to the extent to which KomnasHAM is playing a role in the renewal of a culture of human rights in Indonesia itself, its role may serve more than one end. Nonetheless, on 15 September, over 60 Indonesian NGOs who make up the International NGO Forum on Indonesian Development (INFID) called for the creation of an international tribunal. Their call was part of a wider INFID critique of the Indonesian military, with a particular focus on the abolition of the military's 'dual function'.³

It is unlikely that the case of East Timor will be heard by the new International Criminal Court, which was formed in 1998. The Statute of the International Criminal Court will not function until it has been ratified by 60 states, a process which may take several years. Australia is keen to be among the first 60 ratifying states, and is moving as quickly as bureaucratic processes allow.

The other possibility, a specialist tribunal such as established to deal with War Crimes arising in Yugoslavia and Rwanda, is not very likely to happen. The UN had relatively few difficulties establishing those tribunals, but an East Timor tribunal confronts the problem of Asian solidarity with Indonesia, demonstrated by the division in the Commission for Human Rights where the opposition to the Resolution was along regional grounds. Further, the establishment of a special tribunal will require the support of the Security Council, where there is the likelihood of a veto.⁴

Building a civil society

At the same time as coming to terms with the recent past, the East Timorese people, with

3 Walsh, above, note 1.

4 Walsh argues that the number of steps and diversity of players does not bode well for the establishment of a tribunal. He particularly refers to the issues of Asian solidarity and the possibility of Security Council veto, given that two permanent members have already opposed the establishment of an inquiry.

the help of international agencies, have the daunting task of re-establishing their communities. This will involve demanding the safe return of refugees currently held hostage in West Timor and on some of the islands of Indonesia. It will involve rebuilding the water supply, the electricity system and sources of food. It will involve re-establishing a system of justice, which vests control in the authority of courts and police, operating under the principles of the rule of law. It will involve developing the education system, from preschools to universities, in order to address illiteracy at all levels of the society. It will involve reintroducing an economic infrastructure as the basis for civil society. In all these process, a human rights framework is essential to the future of the society.

Refugee crisis

Timor is now being thought of as a major humanitarian crisis. East Timorese have dispersed widely. Many have sought sanctuary in refugee camps in West Timor, particularly in the border towns of Atambua and Kupang, where the numbers are estimated to be in the range of 250,000 people. The dispersion has spread across the Indonesian islands, to Darwin, where there is a sizeable community, as well as to other locations in Australia, where the people are significantly safer than they would be elsewhere in the region. The issue of militia terrorisation in the camps, as well as the problems of food and medical supplies, have created an acute situation. Access to the camps by NGOs has been limited, and the issue of safety extends from the East Timorese to aid workers. The churches are playing a major role in responding to the needs of those in refugee camps. The attempts to resettle the dispersed peoples is a task of enormous magnitude, and requires attention to both the desires of the individuals concerned as well as to the safety of any relocation process. Further, for those returning to East Timor, there is the additional problem that the place they are returning to has been devastated by the war, has no economic, social or political infrastructure, and a shortage of clean water, food and medicine.

Other human rights issues

While the human rights community is preoccupied with East Timor, other abuses of rights nonetheless continue to occur. As suggested above, the turn of the century offers a space for taking seriously international human rights, and the centenary of Federation offers the opportunity for introspection about Australian national identity. The debate about an Australian Republic was disappointing. The opportunity presented itself for real and substantial constitutional change. It created the opportunity to redress the problem of the nonexistence of a Bill of Rights. There was a chance to make a clear commitment to equality and justice in Australian society. Yet all that was argued about, at great expense to collective energy and emotion, is some minor structural adjustment. This, perhaps, is yet another example of the characteristic complacency of Australians

about rights — a belief that Australia offers bounty and equality to all its citizens.⁵ With this goes the assumption that complaints about discrimination are mainly unfounded and that the major problem is that those demanding rights do not take sufficient responsibility for the oppression.

Women's rights, human rights, and reconciliation

Because the Republic debate has avoided taking seriously the question of human rights in Australia, we do not delve into it here. However, the question of the Preamble to the Constitution has raised possibilities for placing human rights on the agenda, and it is therefore appropriate to present perspectives on it. Greta Bird, a white woman, and Loretta Kelly, an indigenous woman, present alternative responses to the Preamble proposal. They argue that two things are lacking in the current processes. We need more indigenous people in positions to influence the process of government; and we need a real commitment to the process of reconciliation. The Preamble is not seen as a move forward, but as another strategy to cover up the 'unutterable shame' of Australia's past.⁶ Just as the people of East Timor have to come to terms with what has happened, Australians cannot heal wounds and move forward if we do not come to terms with our history. Further, we need to take our place in the international community. The obligations, which are part and parcel of membership of the international community, remind us of what our Constitution lacks. We need a commitment to equality — between genders, between races, between religions, between ages — and a commitment to achieve equality through inclusion. Instead, at the turn of the century, our Constitution is a document of exclusion, which leaves many people out of the picture.

Stolen generation

Members of the stolen generation have still not been offered comprehensive compensation, and attempts to recover damages through the courts continue. Despite the circulation of the Draft Document of Reconciliation, and of the Prime Minister getting closer to a position of 'saying sorry', there have been a number of set-backs. In 1997 the High Court established that the *Aboriginals Ordinance 1918* (NT) which authorised the removal of children from their parents, did not infringe the Constitution of Australia. It also held that the Constitution could not be interpreted as prohibiting genocide.⁷ This year, the High Court has held that there is no common law basis for

5 Ignoring, of course, the issue of non-citizens who are also entitled to rights.

6 *Mabo (No 2)* (1992) 107 ALR 1 at 79.

7 *Krugger & Ors v Commonwealth of Australia; Bray & Ors v Commonwealth of Australia* (1997) 146 ALR 126.

prosecuting acts of genocide⁸ leaving resort to international law as the only legal strategy for addressing the attempted genocide of indigenous Australians.

Moves by the stolen generation to find legal remedies for the wrongs they have suffered were dealt a blow in NSW Supreme Court. The attempt to establish that the removal of indigenous children by the state constituted a breach of the government's fiduciary obligations to indigenous citizens failed.⁹ Abadee J dismissed Ms Joy Williams' claims because, in his judgment there was no common law duty of care and no fiduciary duty. He continued that even if a common law duty could be found, there was no connection between Ms Williams' 'injury' and any act or omission of the Aborigines Welfare Board or any of the people or institutions that had been entrusted with her care.¹⁰

The issue of the stolen generation is discussed by Pamela O'Connor, in 'Squaring the Circle: How Canada is Dealing with the Legacy of its Indian Residential Schools Experiment'. O'Connor compares the situation of Australia's stolen generation with the experience of Canada's First Nations people. From the 1950s, both countries saw segregation policies give way to integration as the preferred means of assimilating indigenous children. For both countries the 1970s saw a change of policy in the direction of self-determination; and the 1990s have brought demands for acknowledgment of past wrongs and reparation for the victims as a pre-requisite for reconciliation of indigenous and non-indigenous people. O'Connor argues that, given the similarity of experience, it is surprising that so little is known of the Canadian experience and how the Canadian government's apology of January 1998 had so little influence.

The treatment of Australia's indigenous people was comparatively worse than that of Canada's First Nations people. Here, there was forcible seizure of children, often in traumatic circumstances, and the separation from parents and family was mostly permanent. However, as the First Nations children found on returning to their communities that they had lost their native language and culture, and had been taught to despise their traditional beliefs and practices, the children were, like Australia's stolen generation, stranded between two cultures.

8 In *Nulyarimma & Ors v Thompson* [1999] FCA 1192 claims by members of the Aboriginal community that certain Commonwealth Ministers and MPs had engaged in genocide were rejected by the Federal Court.

9 *Williams v Minister, Aboriginal Land Rights Act 1983 (Williams [No 2])* [1999] NSWSC 843.

10 See Batley P 'Stolen Children' in Jones M and Marks LA *Children on the Agenda: the Rights of Australia's Children* (Prospect Media, forthcoming 2000).

Offering 'therapeutic' measures to promote healing and reconciliation and to interrupt the iterative cycle of abuse, suicide and family breakdown affecting former inmates and their families is important — but without an apology the chances of success are limited. Further, in both Australia and Canada, refusing compensation will, inevitably, lead to costly battles through the courts.

Australia's condemnation by CERD committee

Indigenous NGOs have resorted to international fora in hope of achieving the justice that has eluded them at home. In 1998, the United Nations Committee on the Elimination of Racial Discrimination (CERD) requested information from the Australian government concerning the *Native Title Act 1993* (Cth), the change to land rights policy and the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner. The CERD Committee, which reported on 18 March 1999, recommended that Australia 'suspend' the implementation of the infamous 1998 amendments to the *Native Title Act 1993* and that the government negotiate with indigenous groups in order to find a resolution consistent with CERD. This is the subject-matter of Shane Hoffman's 'The United Nations Committee on the Elimination of Racial Discrimination: Consideration of Australia under its Early Warning Measures and Urgent Action Procedures'.

Hoffman discusses the content of the CERD Committee's report and the process under which it came about. He responds to the Australian Government's view that the CERD Committee's findings are inappropriate. The Government's position is that the report reflected a serious misunderstanding of our parliamentary system and failed to give a balanced response to the material and oral evidence presented to the CERD Committee. (The Government is currently preparing a formal response to the Committee's report.) Hoffman argues that the strategy of pursuing rights through international bodies has already born fruit for indigenous people. Further, as more people turn to international bodies seeking justice, the jurisprudence of those bodies will develop and this, in turn, will aid the cause of Australians as it will be able to be used by Australian courts in interpreting domestic laws.

Communications with UN bodies

A regular feature of the *Australian Journal of Human Rights* is an account of complaints from Australia lodged with UN treaty bodies. Jane Hearn and Kate Eastman focus their report 'Human rights issues for Australia at the United Nations' on the four new applications lodged with the Torture Committee. Each of the four cases allege violations by Australia of its *non-refoulement* obligation under Article 3 of the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*.

The position with respect to other communications is as follows. There have been a total of 34 communications involving Australia: of these 24 have been lodged with the Human Rights Committee; four complaints have been lodged with the Committee on the Elimination of Racial Discrimination; and six cases to the Committee Against Torture. The General Assembly of the United Nations is expected to adopt the Draft Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination against Women*. This Optional Protocol, which provides for an individual complaints process as well as a special inquiry procedure, will come into operation three months after being ratified by the 10th state.

Refugees and unauthorised arrivals

The humanitarian crisis of refugees across the globe is highlighted each time civil war or military occupation becomes world news. In the wake of the East Timor crisis a number of refugees have arrived in Australia in the hope of finding sanctuary. Refugees from East Timor represent only a small percentage of those globally fleeing for their lives. However, Australia has not been particularly welcoming, despite being a party to various international conventions including the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.

In her article, 'Should unauthorised arrivals in Australia have free access to advice and assistance?' Savitri Taylor argues that unauthorised arrivals in Australia have a need for access to independent and competent advice and assistance. For Taylor, the consequences of this not being provided is that some unauthorised arrivals are being removed from Australia in breach of Australia's international protection obligations. Further, Taylor argues, the failure to treat refugees with equal concern and respect should be of great concern to Australians, as this is indicative of a general lack of respect for rights. This has the potential consequence of endangering the substantive rights of every person subject to Australian law.

Amnesty International has issued a Rapid Response Action in relation to regulations signed into law in mid-October which introduce 'tough' measures to deal with 'people smuggling' and 'illegal immigration'. These changes relate to illegal entrants who arrive with false documentation, and are mandatorily detained on arrival, but are subsequently accorded refugee status. Instead of being given a permanent place of sanctuary, the refugees will now face detention for one or two years and liberty for up to three years to be followed, in most cases, by deportation. This temporary protection of refugees is clearly contrary to international law.

Children

The 10th anniversary of the Convention on the Rights of the Child, the most widely

ratified of any international human rights convention, offers an opportunity to investigate the extent to which the rights of the child are protected in Australia. Issues of mandatory sentencing, homelessness, and paedophilia are issues that reach news headlines and which are in need of redress. Rebecca Neil, from the National Children and Youth Law Centre considers a less known abuse of children's rights — the treatment of children in schools. Neil's comment on 'Teaching Law and Order: Criminal Justice and Schools in NSW' looks at the relationship between 'law and order' debates, and the trend towards increasing criminalisation of the school environment.

People with disabilities

People with disabilities do not have the protection of a specific international convention or treaty, and although the general international bill of rights is as applicable to people with disabilities as it is to anyone else. The human rights of people with disabilities are abused in an ongoing manner, and discrimination is often as blatant (and contrary to Australian law) as excluding people from buildings with steps, excluding patrons from restaurants because of being accompanied by a guidedog, excluding children from school by insisting the cost of inclusion is prohibitive. However, establishing the disadvantages confronted by people with disabilities is not always straightforward. In 'The linguistic rights of the deaf: struggling against disabling pedagogy in education', Linda Komesaroff argues that the failure to recognise Auslan as a Deaf person's first language has dramatic educational implications. No one can be expected to perform as well in a second language than in their first. Komesaroff argues that educational policy and practice that deny or marginalise their native language, breaches the linguistic rights of Australia's deaf.

Anti-discrimination

The question arises whether anti-discrimination law can address issues of this nature. Two issues canvassed in this issue of *Australian Journal of Human Rights* are relevant to this question. The first, discussed by Mark Nolan, in 'Some legal and psychological benefits of nationally uniform and general anti-discrimination law in Australia' is the extent of difficulties arising from our federal system giving rise to both State and Commonwealth anti-discrimination legislation. He argues that this often leads to inconsistencies in the protection available nationwide. It is therefore important, in Nolan's view, to consider the advantages of adopting a uniform scheme. It is argued that the advantages are that uniform legislation would facilitate greater certainty in litigation, greater internationalisation of the rights protected, and greater national consensus about the importance of human rights protection. The model proposed is one involving legislative co-operation

between the States and the Commonwealth, where anti-discrimination legislation of identical effect is passed in all Australian jurisdictions (a legislative compact). It is suggested that while a standardised approach to discrimination is preferred, the targeted protection for specific types of discrimination is still possible. Nolan concludes that 'nationally uniform *and* general anti-discrimination law within Australia would not threaten the effectiveness of human rights protection in Australia. In fact, it may provide much better protection of human rights.'

The second issue canvassed, which addresses the question of the effectiveness of anti-discrimination law, relates to the operations of the Human Rights and Equal Opportunity Commission (HREOC). In 'Wind out of the sails — the new federal structure for the administration of human rights legislation', Sharon Offenberger and Robin Banks consider the changes brought about by the Federal Human Rights (Legislation Amendment) Bill No 1, which has been passed by both Houses of Parliament. This follows the analysis of other aspects of the changes to HREOC discussed by Dorne J Boniface in 'Does anyone really know where we're going? Changes to the Human Rights and Equal Opportunity Commission' (1999) 5(1) AJHR 235. From a disability perspective, the issue of costs is primary. Offenberger and Banks argue that the impact of the changes on people with disabilities is such that there is a serious lack of faith in the Federal jurisdiction. They are concerned that the effect of the changes is that people with disabilities will no longer use HREOC's complaints process, as the risks attendant on losing are too great for disadvantaged people to bear.

Human rights

Very different responses to the possibilities of anti-discrimination law are canvassed in respect of equal rights in employment. The human rights issues arising in the employment context are considered by Rae Norris in 'Human rights and employment: an exploration of some issues'. Ronnit Redman and Karen O'Connell, in 'Achieving pay equity through human rights law in Australia', focus on the ways in which communication between discrimination and industrial processes can highlight and strengthen human rights aspects of equal pay. In particular, Redman and O'Connell argue that HREOC has an important role here. They recommend that full use be made of the complaints process under the *Sex Discrimination Act 1984* (Cth), that HREOC should make full use of intervention powers to represent the interests of gender equality in industrial tribunals, and that at every point along the way a substantive, structural notion of equality should be argued for.

Bill of rights debate

The question of whether Australia should adopt a Bill of Rights goes on and off the

human rights agenda, but will remain a lurking question until the matter is finally resolved by some form of explicit and recognition being given to human rights. Soliman M Santos Jr offers an interesting contribution to the Australian debate, by outlining the experience of the Philippines. Santos, in 'Of centenaries and centennials: a Filipino contribution to the Australian debate on a Bill of Rights', argues that despite the differences between our constitutional histories and experiences, there are many lessons which can be drawn by a comparative analysis of the Bill of Rights processes in the two countries. Santos surveys the theoretical and ideological basis of bills of rights, and concludes that adopting a Bill of Rights would give depth to Australia's ideals of democracy and equality. In particular, a Bill of Rights would help the development of a jurisprudence of rights, which is beginning to take shape in Australia.

Conclusion

Australia's proposal to the 1993 Vienna World Conference on Human Rights that all countries prepare a National Action Plan was adopted by that Conference and was contained as Recommendation 71 of the Vienna Declaration and Program of Action. Australia worked quickly to be the first state to develop a National Action Plan on Human Rights, which was submitted to the Human Rights Commission in 1974. The Federal Government is now in the process of developing the second National Action Plan, and is taking a more measured approach to its development. The commitment of the government to undertake wide consultation with NGOs through both formal and informal mechanisms signals that it is the intention of the government to take human rights more seriously. Should the National Action Plan contain goals to be achieved, and mechanisms of accountability and responsibility for improving human rights across the board, then Australia will be able to stand proud among nations. Recognition of human rights abuses, and the political will to move towards rectifying wrongs, is an important step towards justice.

As a nation it is important that we can be proud of our action to respond to human rights abuses both within and outside national borders. As individuals, too, we have a responsibility to act in such a way as to improve all aspects of disadvantage. In his United Nations Day message, UN Secretary-General Kofi Annan, commented:

This year's United Nations Day is a special one. The world's population has just passed six billion, and we are about to enter a new millennium.

It is shocking to think that half of us — three billion out of the six billion — are entering the new era in abject poverty, with US\$3 a day, or less, to live on. That is one thing we

really must change. It is also shocking that people in so many places today are exposed to violence and brutality. The 20th century has been the most murderous in human history. We must make sure the 21st is more peaceful, and more humane. And it is worrying that the world's climate seems to be changing, in a way which could destroy the homes and livelihoods of millions. Controlling and managing this process may yet prove to be the biggest challenge of all.

People all over the world look to the UN to protect them — from hunger, disease, violence and natural disasters — whenever the task seems too big for nations, or regions, to handle alone. But we, at the UN, can do nothing alone, either. Our strength is the strength of our Member States, when they agree to act together for the common good.

Next year, leaders from all over the world will come to New York for the Millennium Summit. They will consider the challenges ahead, and what the UN can do to face them. Those leaders will be representing you, the peoples of the UN. It is up to you to make sure they come here firmly resolved to take decisions which can lead to a better life for all of us, and for our children. I am counting on you all ... ¹¹

Despite the fact that Australia is relatively advantaged, and the Australian people are generally very well placed, human rights abuses still take place here as well as in the Asia-Pacific region. These abuses could be directed at anyone of us at any point in time, but we are much more likely to be affected if we are indigenous; if we are people with disabilities; or if we are refugees. It is incumbent on all of us to stand up against violations of human rights. The turn of the century is a time for introspection. It is a time when not only the people of East Timor should pay heed to the words of Xanana Gusmao. The process of building a culture which respects the rule of law and values all humanity is not a one-off event — one which occurs when a nation has to begin from zero to reconstruct itself. The process of reconstructing ourselves as human beings must be ongoing. For that process offers the opportunity for us personally, and as a nation, to accord equal rights to all members of the community. ●

¹¹ This extract from Kofi Annan's address has been taken from *Unity, Weekly Summary* No 108, 2 (the national magazine of the United Nations Association of Australia).