

**Newman College
University of Melbourne**

Archbishop Daniel Mannix Memorial Lecture

**A Failure in Leadership? The reluctance to enforce
human rights requirements in Australia**

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I am honoured to be asked to deliver this lecture commemorating a man whose leadership occupies a special place in Australian history.

If I had been told as a young man that I would one day be asked to deliver such a lecture, I would have thought the person making the suggestion was deluded, not only because of my modest skills as a speaker but also because of the gulf that then loomed between Roman Catholics and Protestants in Australia. My educational background was at Scotch and Ormond Colleges and my religious upbringing was Presbyterian. It says much for the development of a spirit of religious tolerance and understanding in this country that I should now be asked to deliver this address and I hope that I shall do so without further straining that spirit.

I will advance some controversial propositions which may not be in accord with the views of some in this audience, but I stress that in doing so, I nevertheless have considerable respect for the human rights work of the Catholic Church.

I have had the opportunity to view a small part of that work first hand as a member of the Board of the Lasallian Foundation, both in India and Papua-New Guinea, which I have had the privilege of visiting with Brother Paul Smith AM, the CEO of the Foundation, who is a legend in his own right. In India I saw the great work done with children either orphaned by or suffering from HIV AIDS and with families and children suffering extreme poverty, particularly by the extraordinary Brother James Kimpton. In Papua New-Guinea it was inspiring to see that the opportunity for a secondary education for children lay very much in the hands of the church and its orders, particularly the Lasallian Brothers.

As a judge I have had extensive experience working with ex prisoners where I have worked alongside such inspiring people as the late Father Brosnan and Father Peter Norden (both ex chaplains at Pentridge, he then metropolitan jail) and Sister Clare McShee AM who works with the Australian Community Support Organisation (ACSO).

While it is not my purpose to debate areas of difference I have with the Church in the human rights area tonight, I must make it clear that I do differ strongly from its doctrines on homosexuality and gay marriage, the role of women and contraception and abortion. I mention these matters because I see them as human rights issues and I feel that it would be hypocritical for me not to do so.

There are however many other areas where I do support its human rights approach.

In the remarks that I make about Archbishop Mannix, I have been greatly assisted and considerably enlightened by reference to the first of this series of Memorial Lectures, delivered by the late BA Santamaria on 9 October 1977.¹

It is of course true that Santamaria was an unabashed admirer and confidant of Mannix, which means that some of his more adulatory comments must be treated with caution, but on the other hand, his very closeness to Mannix provides an unparalleled insight into a complex man. However, in order to counterbalance Santamaria's views, I have also had regard to a much more critical article by James Griffin.² I must say that I found Griffin to be so negative about Mannix that his article also lacked objectivity. It is not of course my intention to discuss these conflicting views in detail, but I found both articles helpful in considering Mannix's life and contribution to Australia.

To me as a young man, Archbishop Mannix was a controversial figure, who as you can imagine, was not highly regarded in the Presbyterian circles where I received my education. He was very well known to the media and to the public and there was always a degree of respect shown for him, even by his enemies, who appeared to be numerous. The latter fact did not appear to worry him.

It is proper that he should be remembered by this lecture, for he had a profound effect upon Australian history. Santamaria comments that had Mannix been appointed Archbishop of Dublin instead of Melbourne (which was a real possibility), "that the history of Catholicism in Australia - and of Australia itself - would have been entirely different" and Griffin, as a detractor, nevertheless expresses a similar view.

Much of the enmity towards Mannix came from the largely Protestant establishment which Mannix called the Ascendancy, whose values included an unquestioning allegiance to Britain and to the Crown. Those values involved a cultural cringe and a degree of fear as to what might happen to Australia if it was to assert itself as an independent nation; a fear which lingers to some extent today in the continued need felt by some for international 'great and powerful friends'. Santamaria compares it to the British Ascendancy in Ireland, similarly bolstered by the products of the major public schools and University Colleges and having control of business, the professions, the land and the public service;

areas from the higher echelons of which most Catholics were historically excluded.

The approach of many leading Australians to all things British was neatly encapsulated by Prime Minister Robert Menzies in announcing Australia's Declaration of War against Germany on 3 September 1939 when, without referring the issue to the Parliament, he said:

“It is my melancholy duty to inform you officially that in consequence of a persistence by Germany in her invasion of Poland, Great Britain has declared war upon her and that, as a result, Australia is also at war”.³

There was no question here of Australian independence or any concern that as grave a subject as a declaration of war should be referred to Parliament. These Menzian attitudes persisted for at least as long as he remained Prime Minister. Twenty four years later, when welcoming Queen Elizabeth to Canberra in 1963, Menzies was to say at the end of his fawning speech, that every man woman and child who saw the Queen even in passing would remember it “—*in the words of the old seventeenth century poet who wrote those famous words: ‘I did but see her passing by but I will love her till I die’.*”⁴

The attitude of Mannix to Britain, affected as it was by almost 50 years as an Irish patriot before he came to Australia in 1913, was rather different. He would never have expressed himself in the terms that Menzies did.

His position was that Ireland and Australia were separate nations to Britain with separate interests. It was for this reason that he, somewhat unwillingly became one of the leaders of the Australian anti-conscription movement in 1917, some four years after he arrived in Australia. He was drawn into this position against the wishes of the Church hierarchy by the attacks made upon him by Prime Minister Hughes following his mild expression of opposition to the first conscription referendum. However he also saw more clearly than our then leaders that it was not necessarily in the interests of Australia or the Australian people to feed more young Australians into the charnel house that was Europe and was ultimately successful in assisting in the defeat of the 1917 conscription referendum.

In an anti-conscription speech delivered in that campaign he said:

“The question of conscription here is not a Catholic question, nor an Irish or English question; it is purely and simply an Australian question. When I speak from this platform on public questions – on this question of conscription or any other question – I do not speak as a priest or as an archbishop, but simply as an honest, straight and loyal citizen of Australia.”⁵

In this sense he became one of the first Australian twentieth century leaders to embrace Australian nationalism.

However as a result of his anti-conscription activities he earned the undying enmity of Australian and British conservatives which was exacerbated further by his support of the cause of Irish nationalism. He was under threat of deportation from Australia following his success in the anti-conscription referenda. In 1920, while travelling from Australia to Ireland, he was arrested and taken on board a British warship. He was then refused entry to Ireland except on terms offered by the British Government, which he rejected. He returned triumphantly to Australia. His actions over this issue indicated that he was prepared to take a stance on what appears to be an unpopular cause and pursuing it regardless of the consequences; a test of true leadership.

He also faced a second difficulty and one that I can sympathise with in that he was frequently attacked for speaking out on public issues on the basis that as an archbishop he had no right to do so. I experienced similar difficulties as a judge and received similar criticism. I took the view, as he did, that the fact of the office that I held did not deprive me of citizenship nor the right to speak on issues that greatly concerned me.

His second great cause and one in respect of which he was ultimately successful, was the obtaining of State support for the Catholic school system.

I think that to understand his position on this issue, it is essential to look at Irish history. I do not need to tell this audience that this involved the proscription of the Catholic religion and the imposition of a school system in Ireland that was designed to destroy Catholicism. It also involved a situation in Australia where the only way in which Governments would accept the role of State support for Catholic schools was to cede them to the State; an unacceptable solution so far as Mannix was concerned.

His long battle in this regard culminated in the acceptance by the Menzies Government of State Aid in 1963, the announcement being made a few days

after the death of Mannix. Santamaria suggests, probably correctly, that this change of heart had a lot to do with the fact that the Menzies Government was returned with only a one seat majority in 1961.

I have some reservations about the flow on effects of this decision to wealthy schools and schools conducted by small and divisive fundamentalist religious organisations. I feel that it enables the latter to effectively conduct education within a closed enclave, partially at public expense. I must say that I am also troubled by the Victorian government's recent decision to allow religious schools to discriminate against employees on the basis of sexual preference or married status. I fully support the concept of freedom of religion but I do not think that discrimination upon these grounds has anything to do with freedom of religion.

Having said this, there is no doubt of the justice of the decision to grant aid so far as the Catholic system was concerned, given the huge contribution made by Catholic schools to education in Australia at all levels, nor is there any doubt about the significant and largely beneficial effect that it had on education in Australia.

Again this was an unpopular cause and one that required great persistence and courage to be ultimately successful and Mannix showed great leadership in persisting with this campaign over so many years.

His third great cause was the setting in train of events that led to the split in the Australian Labor Party of 1955 and the birth of the Democratic Labor Party (DLP), which had the effect of keeping Labor out of office federally until 1972 and in Victoria until 1981. The purpose of defeating what was seen to be a Communist threat to Australia was genuinely held and the result was again a triumph for Mannix's leadership. While this is not the place to discuss the rights and wrongs of those events, I feel that the perception of the Communist threat in this country was exaggerated and that the country suffered as a whole by the long perpetuation of conservative leadership that resulted. This is not to detract from Mannix's skills as a leader because leaders can be wrong on occasions.

I have dwelt upon these matters, not only because this is a lecture in honour of Mannix, but because he provided the very type of passionate leadership in support of causes in which he believed that has been lacking in this country in recent years and the absence of which lies at the heart of a disgraceful period in Australian history so far as human rights are concerned.

This address will suggest that it has been this failure of leadership that has led to Australian reluctance to embrace and enforce human rights. In order to develop this theme it is necessary to briefly discuss what I mean by leadership and human rights.

There are innumerable definitions of leadership, but to me the important aspect of good leadership is that it has a purpose that is morally and ethically sound. In this regard I am attracted by a definition advanced by the former American president, Harry S Truman when he said:

“Men make history and not the other way around. In periods where there is no leadership, society stands still. Progress occurs when courageous skilful leaders seize the opportunity to change things for the better.”⁶

I stress the importance of the last few words. Anyone can lead but unless there is a clear object to change things for the better, it ceases to be good leadership. I would also suggest that change must be brought about within a proper ethical and moral framework and set of principles. In short it must not be a case of the end justifying the means, which we have seen so much in recent years.

Another feature of leadership, as I mentioned in relation to Mannix, is persistence and the willingness to take unpopular positions and to pursue them fearlessly, despite the apparent weight and strength of the opposition. This is often a true test of leadership. It is always easy to pander to popular opinion, but quite another thing to change it.

In relation to human rights, it must be remembered that a ***universal*** regard for human rights is a comparatively modern development. I am conscious that many of the principles enshrined in modern human rights conventions have their roots in the teachings of Christianity as well as other mainstream religions. However the rights so recognised differ as between religions and nations and therefore lack universal acceptance.

An example of this difficulty can be found in the Cairo Declaration on Human Rights in Islam of 1990. This was an instrument signed by foreign ministers of 45 Islamic countries. While it uses conventional human rights language, all human rights conferred by the instrument are stated to be subject to Islamic Sharia law. That would be as unacceptable to a non Islamic country as would a declaration conferring human rights subject to the Bible would be to countries

not associated with the Christian tradition. It is apparent that mutually acceptable statements of human rights must transcend religious principles.

The first step in the direction of universal human rights recognition was the initiative of Henri Dunant following the battle of Solferino in 1859, which led to the formation of the Red Cross Movement, the development of International Humanitarian Law and the eventual passage of the subsequent Geneva Conventions embodying its principles and *inter alia*, dealing with the proper treatment of the wounded, prisoners of war and civilians affected by war. Red Cross continues today as a standard bearer for human rights throughout the world.

However it was the aftermath of the horrors of two World Wars that gave impetus to the movement for a broader universal recognition of human rights. This was largely achieved through the United Nations Organisation following World War 2 and was embodied in international treaties such as the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, the Convention on the Elimination of all Forms of Discrimination against Women, (CEDAW) and the United Nations Convention on the Rights of the Child (CRC).

It has been said that with the sole exceptions of humanitarian interventions such as the Geneva Conventions, nothing even came close to an international system of protection of human rights before the founding of the United Nations.⁷

The strength of these human rights instruments is their universality and their broad acceptance by the nations of the world. For example the Convention on the Rights of the Child has been ratified by all countries except the United States of America and Somalia.

It is too easy to deride the United Nations as being ineffective and the Conventions as being unenforceable. We have heard this criticism regularly from conservative commentators and writers in recent years.

It is true that the UN is not always as effective as it should be, but the critics seem to forget what it is, namely an association of nations. It is the nations themselves, or some of them, and not the institution itself, that render it ineffective, usually because major powers are unwilling to surrender what they see as an advantageous position for the greater good.

Similarly, the Conventions are disregarded by some countries, as the history of the world from 1945 to the present reveals. However they remain a strong force for good and are observed by many countries, either wholly or in part. They form part of the law of a significant number of countries, provide a measuring stick against which the conduct of nations can be judged and assist those who would wish to overcome breaches and bring about change in their own countries and others.

What needs to be addressed by the critics of the UN and of the international human rights conventions is what value system they would use to replace them. In the case of the UN, I think it fair to say that its absence could only exacerbate the chaotic situation of the world. Indeed it was the collapse of its predecessor, the League of Nations, which was a harbinger of the Second World War.

The real question is, or should be, what is left once we step outside the UN Charter and the Human Rights Conventions? Where do we turn for guidance in international affairs?

It seems to me that the only answer to those questions is to adopt the doctrine that might is right; effectively the law of the jungle. This is the ultimate position of the neo-conservatives and it was just such an approach that led us into Vietnam in the 1960's, Iraq in the 1990's and arguably Afghanistan in 2001.

Turning to Australia, the troublesome aspect about human rights enforcement is that Australians generally and Australian political and religious conservatives in particular, seem to be afraid of human rights and particularly afraid of providing any mechanism for their enforcement. In my view Australia displays a hypocritical stance over these international human rights conventions in that they are rarely enacted or incorporated into domestic law. This means that Australia can freely engage in serious breaches of them domestically, while posing as a good international citizen.

As I argue throughout this address, I consider that the best way to enforce human rights norms is by means of a constitutionally protected Bill of Rights, which would incorporate these conventions.

Australia increasingly stands alone in not providing any of its citizens with the protection of a Bill of Rights. Its opponents adopt what I consider to be an outmoded approach that Australians do not need the protection of a Bill of

Rights as they are adequately protected by the courts and the operation of the common law.

Some of the worst offenders in opposing this development have been those lawyers and judges who have done so, not because they say that there is anything intrinsically wrong with the proposition that human rights should be enforced and protected, but rather because it is too difficult to do so. They point to all sorts of pitfalls that are said to stand in the way of such an approach and suggest either piecemeal protection or that the common law provides adequate protection.

As to the former, a piecemeal approach has so far yielded the Racial Discrimination Act in 1975 and more recently, Charters in the ACT and Victoria; a very limited start. It has done nothing to protect the rights of many innocent people in this country as I will demonstrate.

The effectiveness of the protection provided by the common law can be judged by reference to the decision of the High Court of Australia in *Al Khateb's* case⁸, where the court held by a majority that it was within the power of the Commonwealth to hold an asylum seeker in detention indefinitely; a decision that runs entirely contrary to all previous common law principles about the power of the Executive to detain an individual without trial.

Similarly, in *B v Minister for Immigration and Multicultural and Indigenous Affairs*⁹ the High Court held that the Family Court, or by implication any other court, lacked the power to order the Minister for Immigration to release children held indefinitely in detention despite evidence that they were suffering grievous harm as a result.

It is my contention that the reason Australia has failed to embrace human rights is excessive timidity combined with a failure of political leaders to provide the leadership that is necessary. This failure has been primarily that of our political leaders but it is not confined to them. In a sense they reflect what the community wants, although this again reflects their failure to lead community opinion rather than follow it.

Other areas in which leadership has failed include the media, business and the law and of course the community as a whole.

In order to illustrate my broad argument I propose to refer to three issues as examples of where we have been found wanting and in which we continue to be

found wanting; these being our attitudes towards the Indigenous people of this country, immigration and children. It will be my contention that had there been a mechanism for human rights protection extant in Australia, many of the problems now discussed would not have occurred. In its absence, Australians will continue to suffer in the future.

Indigenous people

“The establishment of a new society for Aboriginal people cannot go forward without just and mutually recognised agreements with regard to these human problems, even though their causes lie in the past. The greatest value to be achieved by such agreements, which must be implemented without causing new injustices, is respect for the dignity of the human person”¹⁰(Pope John Paul II)

It would be far beyond the scope of this lecture to attempt to deal with all of the wrongs that have been done to Indigenous people in Australia. Indeed the very discussion of these wrongs was until recently denigrated as taking a ‘black armband’ view of our history. The reality is that any study of our historical treatment of Indigenous peoples more than justifies the wearing of a black armband, as Waleed Ali graphically pointed out in delivering this lecture in 2008 in the unlikely area of Australian Rules Football.

I propose to deal with recent events which at best either demonstrate a lack of leadership and at worst a cynical manipulation of problems of Indigenous children for political advantage.

First a brief history. The successful 1967 referendum to change the Constitution was the first serious attempt by any Federal Government to advance the lot of Indigenous people in Australia. It was a referendum initiated by the Liberal Government and supported by the Labor Opposition that received a 90% yes vote in six states.

It did not confer the vote upon Indigenous people as is popularly believed. However, it did require Indigenous people to be counted in the census and it also conferred power upon the Federal Government to make laws with respect to Indigenous people. The Federal Government has rarely exercised this power, but the fact that it possesses it and could use it to override State as well as Territory law is important. Regrettably, the most significant exercise of this power was to misuse it in connection with the Intervention of 2007.

The referendum was also important in that it showed that Australians could be persuaded to pay regard to the problems of Indigenous people and were well disposed towards them. It provided a great opportunity to build upon the goodwill generated.

Such was the lack of leadership at the time that nothing significant happened for the next five years; a great opportunity lost.

The Whitlam Government of 1972-75 took a fresh approach. It appointed a Minister solely responsible for Aboriginal Affairs, the late Gordon Bryant, set up a Department of Aboriginal and Torres Strait Island Affairs and a National Aboriginal Consultative Committee. Significant spending programs and innovations followed.

From a policy point of view the Government rejected the former doctrine of assimilation and endeavoured to include Indigenous people in the process of Government. In 1975 it introduced the Racial Discrimination Act, a landmark in addressing racism in Australia.

Following the return of the Fraser Government in late 1975, the momentum slowed to some extent, although Fraser himself always took a keen interest in Indigenous affairs as did the Hon Fred Chaney AO, a highly talented Minister for Aboriginal Affairs from 1978-80 and later a Vice President of the Native Title Tribunal and Co-chair of the Reconciliation Australia.

Successive administrations took a broadly encouraging approach to issues relating to Indigenous people until the advent of the Howard Government in 1996. During the period prior to 1996, there were significant milestones including the setting up of ATSIC by the Hawke Government in 1987, the High Court's ground breaking decision in *Mabo v Queensland No 2*¹¹, the setting up of a Reconciliation Council and the passage of land rights legislation by the Keating Government.

The decision in *Mabo* and the concept of Indigenous land rights generated unprecedented hysteria, not only on the part of conservative politicians but also on the part of many senior lawyers. The concept that there might have been a law extant prior to white settlement was denounced as unprecedented and dangerous and the High Court majority were roundly criticised and condemned. This was a sad commentary on their attitudes to Indigenous people.

As Melissa Castan has said:

“Whilst the Mabo decision had a resonating effect on real property doctrines considered fundamental to the structure of legal principles applied by Australian courts, the rights recognised in Mabo were seen as a normal part of the common law in every other nation state that had emerged from British colonial heritage in the 19th and 20th century. It has been pointed out by Noel Pearson that ‘the Mabo case in the United States happened in 1823. New Zealand 1859. Canada 1971.’¹²”

The Royal Commission into Deaths in Custody of 1991 provided a graphic highlight of the extent of Indigenous disempowerment and misery and the 1997 “*Bringing them Home Report*” by the Human Rights and Opportunity Commission, then headed by former High Court Judge Sir Ronald Wilson. The Report threw new light upon the effect of the tragic policies of assimilation that had been pursued right up until the advent of the Whitlam Government and recommended a formal apology to Indigenous people on behalf of the Federal Government. Those in favour of reconciliation similarly began to call more strongly than ever for an apology from the Prime Minister on behalf of Australians. However the Commission report was again attacked strongly by conservatives and these attacks fell on willing ears.

One might reasonably have thought that these events would have galvanised a new Federal Government into action. The opposite was the case. The Howard Government effectively threw the situation into reverse. Despite unprecedented shows of solidarity, including a huge march across the Sydney Harbour Bridge in which some Government Ministers including the then Treasurer, Peter Costello participated, the Prime Minister steadfastly refused to apologise. ATSIC was later abolished and virtually nothing was done for Indigenous people until the election loomed in 2007.

The Northern Territory Intervention

On 21 June 2007, the Prime Minister and the Minister for Indigenous Affairs announced an intervention in the Northern Territory, ostensibly to protect Indigenous children from sexual and other abuse. The announcement was made in response to the *Ampe Akelyernemane Meke Mekarle, “Little Children are Sacred”* Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse of 30 April 2007. That report revealed a shocking situation in relation to the abuse of Indigenous children in

the Northern Territory and clearly called for urgent action by the Northern Territory Government.

The report contained some 97 recommendations to address the issue and runs to 376 pages. It recorded significant and extensive consultation with Indigenous people, including children, and was a far sighted and genuine attempt to address the problems of child abuse.

The Report was made public on 15 June 2007. It emphasised the need for real consultation with, ‘and ownership by the communities of those solutions’. Significantly, the authors said:

“In the first recommendation, we have specifically referred to the critical importance of governments committing to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities, whether these be in remote, regional or urban settings. We have been conscious throughout our enquiries of the need for that consultation and for Aboriginal people to be involved.”¹³

Some six days later came the Federal Government intervention. It came entirely without consultation with the Indigenous people and ignored the substantive recommendations of the Report to which it was purportedly responding.

It is quite obvious that the Report was used as a trigger to further the Government’s Indigenous policies without regard to the interests of the children concerned, but with a view to the forthcoming election. The Government had been in office for eleven years at the time of the launch of this initiative and had done little or nothing for Indigenous people. Its real commitment to them can be gauged by its opposition to signing the UN Declaration on the Rights of Indigenous Peoples, a stance that has since been reversed by the Rudd Government.

Despite considerable public protest, the *Northern Territory National Emergency Response Act 2007* was passed by Parliament without amendment and came into effect on 18 August 2007. It is an Act of some 500 pages in which the word ‘children’ does not appear and the responsible Minister, Mr. Brough, admitted that he had not read it before it was passed.

Pat Dodson wrote

“The tragedy of the Howard Government’s eleven-year hold on power is that Indigenous policy has focused on destroying the potential for this nation to respect and nurture the cultural renaissance of traditional Indigenous society. Public policy that celebrates Indigenous culture has been shunned.

We are left with a vague sense that the problems of the present-day crisis have no history and that the way forward is for Indigenous people to abandon their identity and be absorbed into European settler society”.

He continued:

The extinguishing of Indigenous culture by attrition is the political goal of the Howard Government's Indigenous policy agenda. Our nation is confronted with a searing moral challenge."¹⁴

I wrote in late 2007:

*"The breadth of the legislation is frightening and it significantly overrides the rights of many Indigenous people in ways that would not be tolerated by the ordinary Australian community. It is discriminatory and racist and bundles all Indigenous people together as potential pornographers, child molesters and persons habitually addicted to the excessive consumption of alcohol."*¹⁵

Some of the many objectionable aspects of the legislation involved:

- The suspension of the Racial Discrimination Act.
- The removal of social security benefits (inter alia) where a child is considered to be in need of protection, where the parents reside in specified areas of the Northern Territory, or where a child has an unsatisfactory attendance at school.
- Preventing a court from taking into account Indigenous customary law or practices in sentencing offenders.

It takes only a moment's thought to appreciate the injustice of most of these measures so far as the Indigenous community in the Northern Territory is concerned.

The suspension of the Racial Discrimination Act involved a direct attack on the meagre rights and freedoms of Indigenous people and should never have been countenanced.

The interference with judicial discretion on sentencing to prevent a sentencing judge taking matters of customary law or practice into account was disgraceful. Such an approach does not apply for example to Jewish or Islamic people or to the people of many nationalities that have come to Australia to live who have come from places where there are different customs and practices. It is unjust for judges to be prevented from taking these matters into account in determining the degree of criminality of the offender and the appropriate punishment. It is nothing more than a Government over-reaction to media publicity about certain sentences that have been imposed by particular judges and magistrates and is highly discriminatory towards Indigenous people.

The power to restrict payment of social security benefits because a person lives in particular areas of the Northern Territory was clearly aimed at forcing Indigenous people to live in areas that the Government determines, rather than where they determine. This seems more directed to forced relocation of people to where the Government wants them to live. Such a measure would never be tolerated by the broader Australian community.

Similarly, benefits may be withdrawn in the event of unsatisfactory school attendance. Again this would be unacceptable in the wider community. Further, it involves a complete lack of appreciation of Indigenous culture.

The legislation was based upon a nuclear family assumption, which has little or no relevance to many Indigenous communities. It also ignored the fact that through years of neglect of basic services to Indigenous communities, many children would be living in situations where the provision of education services is inadequate and unattractive.

The real problem is that the Government acted in a precipitate way without consultation with the Indigenous people or with people with child protection expertise.

By treating the Indigenous people in this way, it demonstrated a clear lack of respect for them and as such, their co-operation could hardly be expected. The situation was exacerbated by the then Government's inability or failure to give any or any sufficient explanation as to why all of these measures were necessary to protect the children.

Professor Raymond Gaita has commented:

“Could this disrespect be shown to any other community in this country? The answer, I believe, has to be no. If that is true, then it betrays neither cynicism nor insufficient love of country to suspect that, to a significant extent, Aborigines and their children are still seen from a racist denigrating perspective. From that perspective, the (sincere) concern for the children is concern for them as children of a denigrated people, just as it was when the children whom we now call the Stolen Generation were taken from their parents.”¹⁶

From the point of view of the then Opposition and now Government, one of the most shameful aspects of this affair was its failure to oppose this legislation. One would seriously question the leadership that this stance displayed. It clearly took this approach to avoid giving the Government an election issue but the consequence has been that in Government, its position is compromised, to the point where it has felt unable to dismantle this legislation.

It is important to make the point that in the presence of a Bill of Rights most of the objectionable aspects of the legislation and much of the legislation underpinning that social policy would be liable to be struck down. It would thus act as a real protection against the unwarranted seizure of power that has been involved.

I now turn to subsequent events.

The advent of the Rudd Government brought new hope to those who would advance the position of Indigenous people. The Prime Minister delivered an elegant and heartfelt apology for past wrongs, which was well received throughout Australia and the world.

The new Government also indicated that it proposed to now support the UN Declaration on the Rights of Indigenous peoples.

Unaccountably however, progress seemed to slow thereafter. The Intervention was not abandoned, although several of its aspects were alleviated. It has proved to be a costly failure in achieving the object of protecting Indigenous children. There can be little doubt that it has continued because of the Government's support for the original Howard legislation. None of the recommendations of the original report that sparked it have been put into effect.

The plight of both Indigenous adults and children remains serious, despite countless reports and other interventions.

The 2009 Indigenous Disadvantage Report of Reconciliation Australia¹⁷ found that across virtually all indicators, there continues to be wide gaps in outcomes between Indigenous and other Australians.

The following examples from the report's findings are telling:

“Imprisonment rates for Indigenous men increased by 27% for men and 46% for women between 2001 and 2007. Indigenous adults are 13 times more likely to be imprisoned than non-Indigenous adults.

Indigenous juvenile detention rates increased by 28% over the same period. Indigenous juveniles are 28 times more likely to be detained than non-Indigenous juveniles.

Suicide death rates were higher for Indigenous people. Indigenous people aged 25–34 years had particularly high suicide rates (between 26 and 100 per 100 000 people). Suicide rates were significantly higher for Indigenous males (between 19 and 76 per 100 000) than for non-Indigenous males (between 13 and 24 per 100 000), and for Indigenous females (between 7 and 17 per 100 000) than non-Indigenous females (between 4 and 5 per 100 000).

The rate of substantiated notifications for child abuse or neglect increased for both Indigenous and non-Indigenous children from 1999-2000 to 2007-08, with the rate for Indigenous children more than doubling over this period:

- the rate for Indigenous children increased from 16 to 35 per 1000 children*
- the rate for non-Indigenous children increased from 5 to 6 per 1000 children.*

Indigenous children were more than six times as likely as non-Indigenous children to be the subject of a substantiation of abuse or neglect in 2007-08.”

These figures are of enormous concern, as Prime Minister Rudd has accepted. Obviously much more money, time and effort needs to be expended to address these issues. Accepting that the present Government is sincere about addressing them, this provides no guarantee that subsequent governments will do so or even that State and Territory governments will co-operate.

If there was some Constitutional recognition of a meaningful nature, which could include a formal treaty with the Indigenous people, this might provide an impetus for further and appropriate action to remedy this situation.

In 2008 the Rudd Government conducted what was known as the 20-20 Summit, a gathering of people with significant expertise from around Australia. I attended and was allotted to the Indigenous stream, which comprised about 80% Indigenous people, including significant community leaders and the balance white.

It is fair to say that a strong theme amongst the great majority of those taking part in that stream favoured the introduction of a treaty between the government and Indigenous people, coupled with appropriate constitutional recognition.

This was not however reflected in the communiqué from that stream. Following the summit three of us (including an Indigenous expert on Constitutional Law) wrote a letter to the Prime Minister with a copy to the Minister for Aboriginal Affairs, pointing out that this was the feeling of the group and urging that the time was ripe for promoting the treaty initiative and Constitutional change to the Australian people. I received a reply several months later couched in bureaucratic terms from a junior staffer in the Minister's office. Nothing further has happened and the treaty issue and the issue of constitutional change seems to have fallen off the agenda.

In relation to the issue of constitutional recognition, the former Prime Minister had something of a death bed conversion and expressed the intention, if elected, to support an amendment to the preamble to the Constitution in order to specifically recognise Indigenous people. The problem with this approach is that it is entirely symbolic and without legal effect.

It would be much more effective and appropriate to recognise the rights of Indigenous people and Indigenous children in the Constitution itself, or in a Bill of Rights.

In the Vincent Lingiari Lecture delivered in 2000¹⁸, the former Prime Minister of Australia Mr Fraser said in relation to a Bill of Rights:

“Through much of my political life I accepted the view of noted lawyers, that our system of law, derived from Britain and the development of common law best protected the human rights of individuals. I now believe that our own system has so patently failed to protect the “rights” of Aboriginals that we should look once again at the establishment of a Bill of Rights in Australia.

The circumstances of Australia's indigenous population provides a powerful argument for such a change. The need for an Australian Bill of Rights would be broadly based to guarantee basic rights to all individuals and minority groups.”

I am conscious that the Rudd Government has appointed a Committee chaired by Father Frank Brennan to report upon the issue of human rights recognition, but its charter is very limited and specifically excludes the possibility of any rights so conferred being justiciable in the courts. A Bill of Rights has long been part of ALP policy. Why it was thought necessary to appoint such a Committee

is beyond me. This is a long way removed from any concrete recognition of the position of Indigenous people upon which they would be entitled to rely.

I conclude this portion of my address by quoting from the joint judgment of Justices Deane and Gaudron in *Mabo*:

“An early flash point with one clan of Aborigines illustrates the first stages of the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame.”¹⁹

It is to be hoped that the Rudd Government will continue to show the leadership on this issue that it did in relation to the apology.

Immigration

I doubt that anyone even as late as the 1980's could have contemplated an Australian Government using mandatory detention against innocent men, women and children who had committed no crime other than entering this country seeking succour and assistance.

However all that changed in the 1990's, when the Labor Government set up what I then described as a virtual concentration camp at Port Hedland and commenced incarcerating men women and children in most unsatisfactory circumstances.

In a speech that I made on 19 July 1995 when a Labor Government was in power, I said (inter alia):

“It would be an extremely retrograde step if Australia's endorsements of Conventions came to be seen domestically and internationally as a mere token gesture. That would do all Australians a disservice.

Australia's treatment of asylum seekers is a case in point. It has been the subject of stinging criticisms by Amnesty International, former Human Rights Commissioner Brian Burdekin, the Joint Standing Committee on Foreign Affairs and Trade and the National Children's and Youth Law Centre. Like them, I simply fail to understand why so many children and their parents are, in effect, interned, while issues as to the legality of their entry to this country are determined. They are held in virtual concentration camps in the wilderness as though they were a danger to Australian society.”

After questioning why they are held in such remote areas I continued:

“I seriously question the value systems which, quite rightly, reserve imprisonment as a last resort for convicted criminals, but perversely, impose imprisonment as a

first and necessary measure for asylum seekers. It is inflicted upon them no matter how young, vulnerable and innocent they may be. Claims for refugee status can take years to process and meanwhile these people and their children languish in custody.”²⁰

I took considerable political flak from the Labor Government over this, in particular from the Minister for Immigration, Senator Bolkus.

That policy was seized upon with enthusiasm by the incoming Howard Government in 1996, which refined the cruelty associated with the policy to new depths until public opinion eventually swung against the policy of incarcerating children, leading to a change of approach in 2003. However there appears to be no end to the enormities that the former Government was responsible for in relation to these largely helpless people.

Who can forget the disgraceful affair of the Tampa? The then Government derived great domestic political capital from its xenophobic behaviour, particularly in the shadow of 9/11 and in late 2001, won an election that it had been expected to lose as a result.

Meanwhile the Labor Opposition, because of its doubtful record in this area adopted a craven position of support and compliance, also for political advantage.

To that sorry episode can be added the Children Overboard affair and the appalling losses suffered with the sinking of the SIEV X. The circumstances of how that boat came to sink with such a huge loss of life will hopefully receive further detailed examination in the future. However there are no signs of this happening under the Rudd Government. Whatever the circumstances were, I doubt that they will reflect credit upon Australia.

In May 2001, Marion Le delivering the Alfred Deakin Lecture had this to say:

“In the overall global context of mass movement of people across borders and international politics we have allowed the arrival of a few desperate survivors of war and torture to bring about a return to what George Dibbs identified in 1888, as “a sudden spasm of fear and panic”.

Our reception of the refugee on our borders is the measure of our maturity as a nation. How sad that we now appear to have entered upon an era of the mean- spirited and punitive response to those who arrive

here largely the victims of international politics and the realignment of power within their homelands.

Sadly, as a country, we have become reactive, rather than proactive, in a world which desperately needs sound, compassionate, moral leadership on the issues of human rights and free speech in order to cope with the overwhelming abuses perpetuated on so many people in the world today.

We need to creatively embrace the international dilemma of dispossession and respond practically and humanely. A Government which does not listen to the voices of the human rights advocates has got it wrong.”²¹

What has changed following the election of the present Government?

There has clearly been a significant change for the better in the treatment of asylum seekers. Their period of detention before either deportation or the grant of visas has been reduced from years to a matter of months and about 90% of boat people are accepted as genuine refugees. Their treatment while in detention has greatly improved in the sense that they are no longer treated as criminals. The visa system has been greatly improved. With the support of one courageous member of the Opposition in the Senate, the ludicrous system of charging detainees for their detention has ceased. The degrading system of temporary protection visas which prevented holders from working or accessing Medicare or Centrelink has been abolished.

However the picture still remains unclear. It is quite obvious that there are still legacies of the Howard years extant in the Government's policy. In particular it has maintained the policy of exclusion zones whereby parts of Australia are declared to be not parts of Australia for immigration purposes to prevent access to the Australian court system.

As Julian Burnside QC pointed out recently, we are actually warehousing refugees in Indonesia, where we pay for their upkeep. He commented:

“-- through the continued use of Indonesia for warehousing people, Rudd and Evans are emulating the darkest, meanest and most cynical practices of Howard and Ruddock.”

He quotes from the observations of Australian lawyer and refugee advocate Jessie Taylor as follows:

“She met more than 250 people, in 11 places of detention across the country. There were infants and young children in maximum security jails, with faeces and fungus in their drinking water. There were rodents, spiders and cockroaches in their living areas. Skin diseases, vomiting, diarrhoea, dramatic weight loss and unidentified tumour-like growths are fairly common. Despair is universal.”²²

People are spending years in this situation and we in Australia seem to be oblivious to it. We are quick to respond to natural disasters overseas but our compassion seems to desert us when it comes to refugees.

Similarly the Rudd Government still seeks an offshore solution with the housing of asylum seekers on Christmas Island. This effects the dual purpose of preventing them from seeking the protection of the Australian court system and keeping them well out of the purview of the Australian public or any support systems that might be present in Australia. The cost of this exercise is prohibitive and it could be done far more cheaply and efficiently on the mainland. One can only assume that it is done to pander to Australian paranoia about the arrival of ‘boat people’.

The absurdity of what is being done there is well captured by David Marr in a recent essay.²³ The facilities are already overstrained and more refugees are arriving. In late 2008 the government was forced to open the \$400M centre at North West Point, described by UNHCR as having ‘all of the characteristics of a medium security prison’ and described by Marr as having the ‘feeling of a deranged holiday camp’.

A troublesome aspect of the immigration issue is that despite the above shortcomings there have been improvements when compared with the shameful policy of the previous Government. However most of these improvements have been administrative and there is nothing to stop either this government or a conservative successor from reverting to the policies of the past.

Already we have the Opposition spokesperson on immigration calling for such a reversion, including the reintroduction of temporary protection visas. The *de facto* leader of the National Party, Senator Barnaby Joyce is busy labelling the asylum seekers as ‘economic refugees’, an argument effectively destroyed by

David Manne in a recent article, but which will no doubt continue to be peddled on the right of politics.²⁴ Manne points out that the need for refugee protection is not confined to the weak and the poor and that to make this distinction ‘risks trivialising if not denying, grave abuses and trauma faced by refugees fleeing here’.

I suggest that again the real problem lie in the absence of enforceable human rights protection in Australia and that unless and until we have such protection, preferably in the form of a Bill of Rights, we are likely to see a repetition of these problems in the future.

Marr in his Monthly article asks the question as to why we are so afraid of refugees arriving in boats. I have often pondered the same question. At their highest point their numbers arriving in Australia have been miniscule by contrast to the numbers crossing the borders of other nations or even the numbers arriving here by air. We seem to be unworried by those who arrive by air and yet the reality is that they are far less likely to be genuine refugees than those who embark upon a dangerous and uncertain voyage in leaky boats.

In fact about 90% of boat people are found to be genuine refugees and there are reasons for thinking that others have been unfairly excluded. Most of these people are Afghan Hazaris as Burnside points out, and some 95% of them have succeeded in establishing refugee status. They have everything to fear from the Taliban, whom we are fighting and yet we seem determined to treat them with grave suspicion.

Marr suggests that it is an ingrained fear in the Australian people stemming from old myths involving the arrival of hordes from Asia in boats. If this is so, and it may be, it says little for the leadership of those in Australia who would pander to such fears in the hope of either gaining or not losing votes. It seems that both of our major parties suffer to varying degrees from this lack of leadership.

It has been said that there is a dark pool of racism that lies beneath the Australian psyche. I dispute this. There is no doubt there are racists within our community, but I believe that when a leader appeals to the Australian people to reject racism they will do so. It is only when our leaders are too pre-occupied with opinion polls or when they wish to create a climate of fear that this vein of racism emerges, as occurred with the rise of Pauline Hansen. At present, when

we have a Prime Minister enjoying unprecedented popularity, there is a significant opportunity to strike a blow against it.

Children

The final example I give, as indicating the need for the provision of human rights guarantees, relates to children. It is surprising how often politicians state a concern for the position of children and it is equally surprising how little they do about it.

The words “child” and “children” are not mentioned in the Constitution. The word “family” appears once. It appears in the grant of legislative power in section 51(xxiiiA) to the Commonwealth Parliament to make laws with respect to the provision of *inter alia* “family allowances”, (and that provision was only introduced in 1946).

2009 represents the 30th anniversary of the promulgation by the UN of the Convention on the Rights of the Child (CRC). Australia played an active part in its drafting and quickly ratified it, but has never enacted its provisions into domestic law. Accordingly, there is no statutory or constitutional protection of the rights of children in this country.

On many occasions since ratifying CRC, Australia has acted in direct breach of it, to the detriment of children. It has done this with impunity and almost without criticism.

I propose to deal with this topic under four sub-headings, namely, children and immigration, children and mandatory sentencing, children and physical punishment and the exploitation of children in advertising and by the media. There are many other areas I could develop, such as children and homelessness, children in care, child protection and the mistreatment of Indigenous children, but time prevents me from doing so.

Children and Immigration

Some of the worst examples of mistreatment of children in Australia have occurred in the immigration area, which I have already discussed in a different context. For present purposes I need go no further than the 2004 HEREOC report on this issue.²⁵

On 14 June 2004, Dr Sev Ozdowski, the Commissioner who prepared the HREOC report, had this to say in a Press release released by the Commission:

“There is a 14 year old boy still in detention in the Port Augusta residential housing project. Between April 2002 and July 2002, the boy (then detained at Woomera) attempted to hang himself four times, climbed into the razor wire four times, slashed his arms twice and went on hunger strike twice. The boy’s mother was hospitalised due to her own mental illness during this whole period. There is a 13 year old child who has been seriously mentally ill since May 2002. This boy has regularly self-harmed. Mental health professionals have made more than 20 recommendations that this child be released from detention with his family. But he is still there.

The Human Rights and Equal Opportunity Commission report chronicles the experiences of children in detention in exhaustive detail. The Department of Immigration and Multicultural and Indigenous Affairs has not disputed the incontrovertible evidence of the devastating impact that indefinite detention has on the mental health of children and their families. Some children have been diagnosed with clinical depression, post traumatic stress disorder and developmental delays. Many children have showed symptoms like nightmares, bed-wetting, muteness, lost appetite and suicidal ideation. The report documents, beyond any doubt, that the longer children are in detention the more likely it is that they will develop serious mental health problems.

*Nine out of 10 of asylum seeker children in detention end up calling Australia home - because they are eventually found to be genuine refugees”.*²⁶

I had personal experience of dealing with a case in this area. The following extract from a psychologist’s report of the effect of incarceration upon particular children appears in the joint judgment of O’Ryan J and I in that case:

*“The impact of the experience to which [these] children have been subjected within the Woomera Detention Centre have been superimposed on previous trauma. Within a child protection framework these experiences can be described as psychological maltreatment defined by Hart, Brassard and Karlson as behaviours that “convey to the child that (she/he) is worthless, flawed, unloved, endangered or only valuable in meeting someone else’s need”. Psychological maltreatment alone, that is without the components of sexual or physical abuse can be the most powerful influence and best predictor of the development outcomes of other forms of child abuse and neglect. Against the six major forms of psychological maltreatment [the children] demonstrate the effects of such abuse and neglect in terms of undermined attachment relationships with their parents, disrupted peer relationships, unhappiness and depression and an undermining of their ability to achieve their developmental milestones to mention but a few”.*²⁷

This report was produced in the context of a case where the then Minister was strongly defending an attempt to have the relevant children freed. He was eventually successful in doing so in the High Court on jurisdictional grounds and the court's interpretation of the Migration Act.

This is but one of many examples of the mistreatment of children that took place under the system administered by the previous Government. I think it fair to say, not only that it showed malevolent leadership and also showed the indifference of the media and the public at large to the plight of the children. It provided a frightening example of how government was able to behave in a manner more appropriate to totalitarian regimes. It had successfully demonized asylum seekers and even their children to the point where the general public could not care less about the crimes being committed against them in their name. It perhaps gives some insight into the often asked question as to the awareness of the German public as to what was happening to the victims of the Nazi regime.

Mandatory Sentencing

If it be thought that concerns in relation to children relate only to non-Australians, one needs only to look to the legislation in the Northern Territory and Western Australia relating to mandatory sentencing, which not only impacted upon Australians but upon the most vulnerable of our citizens, namely young Indigenous people.

It was universally condemned by criminologists, lawyers, judges and even the then Federal Government. However while the latter had the constitutional power to over-ride the Territory legislation (and the State legislation using the external affairs powers contained in the Constitution), it chose to do nothing. It took a change of Government in the Northern Territory to produce its repeal there.

The Western Australian Government first introduced mandatory sentencing laws in 1996 and these laws remain in force. The Western Australian laws provide that when convicted for a third time or more for a home burglary, adult and juvenile offenders must be sentenced to a minimum of twelve months' imprisonment or detention regardless of the gravity of the offence. Again the evidence is that the primary victims of this law have been juveniles, including a great over representation of Indigenous juveniles. There is little or no evidence to suggest that this law has had any effect in reducing such crimes.

The newly elected Liberal government recently introduced further laws which provide that adults who assault and cause bodily harm to police officers, ambulance officers, transit guards, court security officers or prison officers face a minimum of six months' jail, while juveniles aged between 16-18 will go to jail for three months.

A Senate inquiry conducted in 2002 was highly critical of the 1996 laws and conceded that the federal government probably had the power to strike them down, but did not recommend that this happen.²⁸

A minority report by the Australian Democrats had this to say:

“It is not the job of politicians to tell judges and magistrates what must be done in each and every case. But when politicians do interfere in the proper administration of justice in a fashion that clearly breaches international human rights conventions, particularly as they relate to children, we must respond as a nation through our Federal parliament. Under the Commonwealth [Constitution](#), it is the duty of the Commonwealth to ensure that our international obligations are observed. It is not only proper that we respond with Federal intervention, it is our humanitarian duty.

We consider that this legislation is important not only to override the laws that apply in Western Australia, but also to ensure that similar laws are not enacted elsewhere in Australia in the future. The Democrats consider that there has been more than enough debate and deliberation on this issue and that Parliament should take prompt action to eliminate mandatory sentencing. The Bill should proceed forthwith”.

The majority report indicates the weakness of politicians when facing major breaches of human rights. These provisions are clearly in breach of Australia's human rights obligations and the failure of successive federal governments to strike them down is evidence, if more evidence is needed, of the lack of concern of politicians to protect the human rights of Australians.

I am unaware of any suggestion that the Rudd Government is likely to act to strike down this legislation. It is therefore obvious that the democratic process provides virtually no protection to Australians and in the absence of a Bill of Rights, no such protection is available.

Physical Punishment of Children

Further evidence of the timidity in this country towards human rights issues is to be found in the public reaction that accompanies any suggestion for the prevention of the physical punishment of children.

The fact is ignored that in Scandinavia and now in many other countries, including New Zealand, this has been successfully achieved. At the same time politicians and the media rightly criticise the level of child abuse in this country, without realising that it is often disguised or justified as reasonable discipline of the child.

Children remain the only members of the community who are liable to physical assault with impunity. At least women are now protected from this indignity.

Interestingly enough all that happened in Norway and Sweden was the removal of the “reasonable chastisement” defence. No particular offence was prescribed and the legislation was accompanied by a public education campaign. No one was prosecuted for tapping a small child on the hand when they put their hand near some dangerous object. What was intended was to produce a revulsion against the concept of chastisement of children and to educate people that there were better methods of disciplining children. One asks why this sort of suggestion produces such a knee jerk reaction in this country. I have been informed by many police and child protection experts that the existing law in this country positively endangers children.²⁹

There is also evidence that it encourages bullying³⁰ and family violence³¹ in later life on the part of perpetrators.

Despite all of this evidence it remains highly unlikely that Australian politicians will display enough courage to act to protect our children.

The Protection of Children from Exploitation by the Media and Advertisers

Article 19 of CRC requires Governments to take all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.

Against this background we can reasonably ask the question as to what has been done by Governments to protect children from being exploited by the print and electronic media and by commercial advertisers. The answer is very little. The

Prime Minister's National Child Protection Framework released on 1 May 2009 made no mention of media except in the context of the Internet.

We are faced with a situation in this country where the media is more than happy to accept advertising that sexualises children, including advertisements from some of the most respected retail institutions in the country and where inappropriate and often degrading billboards are displayed almost unchecked, along with prominent advertising of 'cures' for sexual dysfunction of males.

There is no system of vetting the content of advertising billboards although the Advertising Standards Board will act if it receives complaints. One might well ask how many members of the public are aware of this. One might also ask why it needs a complaint to act.

Some retailers do not hesitate to exhibit and sell grossly pornographic magazines and offensive articles as part of their normal stock in trade and often in places frequented by children.

Magazines aimed at young people that fall readily into children's hands discuss not just sexual intercourse but cunnilingus, fellatio and anal sex as if it was normal and expected behaviour for young people. Porn stars have become celebrities and young girls in particular, are encouraged to think that there is something wrong with them if they do not engage in sexual activity. Likewise boys are given the impression that girls exist for their satisfaction. There is rarely any mention of the age of consent or the fact that sexual activity with a child under the age of consent may leave the person convicted branded as a sex offender for life.

An insidious response that is often heard to criticisms of this form of sexual licence is to accuse people who express them as being wowsers or killjoys. Other responses assert that regulation or restriction denigrates from democratic principles such as freedom of speech. The law has however long recognised that here are limits to freedom of speech, particularly where it harms people.

Here we are talking about children, who are immature and often confused about their burgeoning sexuality. They have a right and need for nurture and protection which we are markedly failing to give them.

There is a strange paradox about the fact that the very media that is perpetuating this sort of conduct is often loud in its condemnation of paedophilia, child prostitution and the like and is constantly calling for heavier sentences to deter

this type of behaviour. What the media does not appear to realise is that it forms part of the problem.

The question for all of us is what we should do about it?

In my view the primary responsibility lies with government to enact and enforce laws proscribing the sort of conduct described. The tendency in recent years has been to relax controls on the media rather than to impose them and we are experiencing the results of this approach today.

Television and radio licences used to be regarded as a privilege that carried with them certain responsibilities and we used to have a broadcasting tribunal that had real powers to enforce them. Now we have a much weaker Authority whose limp responses to incidents like the recent one involving the Sydney broadcasters, accord with other such responses by it in the past, a notable example being the cash for comment scandal. At the same time it is apparent from the nature of the advertisements that appear that self regulation in the area of advertising has failed.³²

Conclusions

I have endeavoured in this lecture to draw attention to serious problems facing our country in the area of human rights. We are always quick to condemn human rights breaches that take place elsewhere, but we are far too complacent about what occurs in our own backyard. In particular we have failed our Indigenous people and our children.

There are a number of steps that I believe should be taken.

First we should encourage and vote for leaders and political parties who are prepared to lead on human rights issues, rather than follow what they perceive to be public opinion, which is often manipulated by the mass media.

Secondly and most importantly, we should strengthen the democratic process by the passage of a meaningful Bill of Rights that is justiciable at the instance of individuals. Had we done so in the past we would have avoided the abuses that took place in relation to asylum seekers, the Northern Territory Intervention and mandatory sentencing to name but a few. Such a Bill should include the provisions of the present Racial Discrimination Act to protect it from governments that seek to amend or weaken it for populist purposes as we saw in connection with the Northern Territory Intervention.

Thirdly we should pass legislation and act upon it to protect our children from those, including governments that would act to their detriment. A first step would be to incorporate the CRC into domestic law, preferably as part of such a Bill of Rights. The Federal Government should appoint a Minister and set up a Department with specific responsibility for children and youth and finally an office of Children's Commissioner at Federal level should be set up as a watchdog on behalf of children.

It is time that we overcame torpor and complacency and addressed some of the real issues that confront us in the area of human rights.

¹ B A Santamaria; *Archbishop Mannix; His Contribution to the Art of Public Leadership in Australia*; Melbourne University Press 1978

² James Griffin, *Mannix, Daniel (1864-1963)*; Australian Dictionary of Biography. Online Edition Australian National University, accessed at <http://adbonline.anu.edu.au/biogs/A100391b.htm>

³ R G Menzies; *Menzies Virtual Museum* The Sir Robert Menzies Foundation (accessed on 19/9/09) <http://www.menziesvirtualmuseum.org.au/1930s/1939.html>

⁴ R G Menzies, *Speech Welcoming Queen Elizabeth to Canberra*; 18 February 1963, from *Well May We Say*, ed. Sally Warhaft, (Black Inc, Melbourne)

⁵ Archbishop Daniel Mannix, *Speech on the Second Conscriptioin Referendum at the Stadium, Melbourne*, October 1917, from *Well May We Say*, ed. Sally Warhaft, (Black Inc Melbourne)

⁶ Accessed on 27 September 2009 at <http://home.att.net/~howingtons/dem/truman.html>

⁷ Marc Bossuyt, *International Human Rights Systems: Strengths and Weaknesses* K. E. Mahoney and P. Mahoney (eds) *Human Rights in the Twenty-First Century* 47-55; Martinus Nijhoff Publishers, Dordrecht, The Netherlands (1993)

⁸ *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562; 208 ALR 124; 78 ALJR 1099 (6 August 2004)

⁹ [2004] HCA 20; 219 CLR 365; 206 ALR 130; 78 ALJR 737 (29 April 2004)

¹⁰ Pope John Paul II, "*The time has come for you to take on new courage and new hope*", Speech at Alice Springs, 29 November 1986, from *Well May We Say*, ed. Sally Warhaft, (Black Inc Melbourne)

¹¹ *Mabo v Queensland No. 2* [1992] HCA 23; (1992) 175 CLR 1
F.C. 92/014

¹² The High Court, Human Rights, and the New Jurisprudence of Denial; Melissa Castan, Senior Lecturer, Law Faculty, Monash University Castan Centre for Human Rights Law Conference, "Human Rights 2003: The Year in Review, 4 December 2003

¹³ www.nt.gov.au/dcm/inquiryasaac_final_report.pdf

¹⁴ *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* published by *Arena Publications*, is a series of essays edited by Jon Altman and Melinda Hinkson and is the first book to cover the Northern Territory Intervention. These extracts are from a section of an essay written by Pat Dodson published in *Crikey.com* on 13 September 2007

¹⁵ Alastair Nicholson; *Australia's Children: Does the Law Offer Them Sufficient Protection?* 27th Lionel Murphy Memorial Lecture 2007, accessed 4/10/2009 at http://lionelmurphy.anu.edu.au/memorial_lectures.htm

¹⁶ Raymond Gaita, *Comment*; The Monthly, August 2007, The Monthly Pty Ltd, Melbourne

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- ¹⁷ Accessed on 2/10/09 at <http://www.reconciliation.org.au/home/reconciliation-resources/qa-factsheets/overcoming-indigenous-disadvantage-report>
- ¹⁸ <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/2408.html>
- ¹⁹ Ibid, *Mabo v Queensland no 2* at Para. 50
- ²⁰ Alastair Nicholson,
- ²¹ <http://www.abc.net.au/rn/deakin>
- ²² Julian Burnside, "Australia's ugly secret: we still warehouse asylum seekers" National Times, 16 June 2009; accessed 4/10/2009 at <http://www.nationaltimes.com.au/opinion/politics/australias-ugly-secret-we-still-warehouse-asylum-seekers-20090916-fqqe.html>
- ²³ David Marr, *The Indian Ocean Solution*; The Monthly, September 2009, The Monthly Pty Ltd, Melbourne
- ²⁴ David Manne, *The Real Story of Refugees is Complex*; The Age, Melbourne, 3 October 2009
- ²⁵ National Inquiry into Children in Immigration Detention; Human Rights and Equal Opportunity Commission 13/5/04; http://www.humanrights.gov.au/human_rights/children_detention_report/index.htm
- ²⁶ Human Rights and Equal Opportunity Commission Press release 10 June 2004
- ²⁷ *B and B v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451 at Para 294
- ²⁸ <http://www.austlii.edu.au/au/journals/AILR/2002/19.html>
- ²⁹ Alastair Nicholson, *Choose to Hug, Not Hit*, Family Court Review (2008) Vol 41, No 6 at 11
- ³⁰ Helen McGrath and Toni Noble (eds), *Bullying Solutions*, Pearson, 2006
- ³¹ Debra Pepler and Ken Rigby, *Bullying in Schools*, (Peter K Smith ed. Cambridge University Press 2004)
- ³² The discussion under this heading first appeared in an article by Alastair Nicholson *Media Sexualisation of Young Children: What about their Rights?* in the Age, Melbourne, 4 August 2009.