Response to the Senate Legal and Constitutional Reference Committee Inquiry into the

Anti-Genocide Bill 1999

A Joint Submission from the Uniting Aboriginal and Islander Christian Congress; Covenanting; and National Social Responsibility and Justice[1].

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February 2000

[1] Agencies of the National Assembly of the Uniting Church in Australia.

1. Introduction

The National Assembly of the Uniting Church in Australia, which is a church made up of both indigenous and non-indigenous people, welcomes the opportunity to make a submission to the Senate Legal and Constitutional References Committee Inquiry into the *Anti-Genocide Bill 1999.*

This submission has been written in consultation with the association of indigenous people within the Uniting Church in Australia, the Uniting Aboriginal and Islander Christian Congress.

We are particularly concerned with terms of reference (1) (a), (b), (d), (e), (f) and (g): that is:

> *"(1) The adequacy of Australia's implementation of the Convention for the Prevention and Punishment of the Crime of Genocide and other relevant international obligations, with particular reference to:*
> *(a) the formulation of an appropriate definition of genocide;*
> *(b) the status of the convention under Australian law, particularly with reference to the decision of the High Court in Ethnic Affairs v Ah Hin Teoh;*
> *(d) the appropriateness or otherwise of the retrospective application of the provisions of the bill;*
> *(e) the implications of the Federal Court decision on 1 September 1999 in Nulyarimma v Thompson;*
> *(f) the extraterritorial application of Australian law, particularly as it may relate to East Timor; and*
> *(g) the relationship between Australian and international criminal law enforcement mechanisms for bringing perpetrators of genocide to justice."*

In this submission we contend that:

1.1 The United Nations definition covers the key aspects of genocide and focuses on the discriminatory nature of the act. It is broad enough to include political, social and cultural systemic means of attacking a particular group.

1.2 It is ambiguous as to whether genocide is currently a crime in Australia and therefore the Australian Federal implementation of the *United Nations Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention)* is inadequate.

1.3 Introduction of the *Anti-Genocide Bill* will provide credibility to our legal process by removing the ambiguity and confusion and belatedly giving effect to our ratification of the *Genocide Convention 1948.*

1.4 Introduction of the *Anti-Genocide Bill 1999* will assist the process of reconciliation because it removes a legal ambiguity which may disallow prosecution of genocidal acts of which Indigenous people are the victims.

1.5 The ability of the Bill to be implemented retrospectively will further aid healing within this nation in relation to reconciliation and National identity; and removes fears for the potential for repetition.

1.6 The importance of considering the implications of this legislation in International situations particularly relating to Australian involvement in East Timor and Indonesia.

We therefore support the introduction of this Bill.

2. Genocide and Indigenous People in Australia.

The term 'genocide' often evokes images of Nazi death camps, Cambodian killing fields or fleeing Tutsi tribe's people. Most people associate 'genocide' with mass slaughter alone. But 'genocide' as understood by international law is more than mass slaughter. It also refers to social and cultural harm and mistreatment to a defined group's bodies and minds.

Of the five categories of 'genocidal' behaviour defined by the international convention, four may be identified in terms of the mistreatment of Indigenous people by the Colonial and Commonwealth Australia. This is reflected in the findings behind recommendation 10 of *Bringing them home, 1997.(p297:1997)*

As a means of understanding why the *Genocide Convention* has relevance for Indigenous people we present some examples of genocidal behaviour as they relate to each of the four relevant categories.

2.1 Section (a) Killing members of a group

a) Systematic and intentional killing of Indigenous people in Tasmania from 1806. Including the declaration of martial law in 1828 and the so-called 'black line'.[2]

b) Systemic and intentional killing of 10000 Indigenous people in Queensland between 1824-1908.[3]

c) Hundreds of massacres in Western Australia between settlement and 1926.[4]

2.2 Section (b)Causing serious bodily or mental harm to members of the group;

a) It could be argued that State/Colonial Government 'protection' legislation from 1869-1912 was based on the presumption of racial extinction. 'Protection' in most cases meant enforced dispossession from land and separation from the rest of the world. In many situations 'protection' meant loss of control, particularly in terms of leaving or entering the missions/reserves, labour, rights to marriage, traditional religious practice and wages[5]

2.3 Section (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

a) It could be argued that many of the missions or reserves upon which Indigenous people were forced to live provided conditions which would lead to physical destruction.

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[2] See Lyndall Ryan, *The Aboriginal Tasmanians*, Brisbane: Queensland University Press, 1981.
Henry Reyolds, *Fate of a Free People*, St. Leonards, NSW: Allen and Unwin, 1995.

[3] See Raymond Evans, Kay Saunders and Kathryn Cronin, *Exclusion, Exploitation and Extermination: Race Relations in Colonial Queensland*, Sydney: Australia and New Zealand Book Company, 1975.
Rosalind Kidd, *The Way We Civilise*, Brisbane: University of Queensland Press, 1997.

[4] See Anna Haebich, *For Their own Good: Aborigines and Government in the Southwest of Western Australia 1900-1940*, Perth: University of Western Australia Press, 1988.
Neville Green, *Broken Spears: Aborigines and Europeans on the Southwest of Australia*, Perth: Focus Education Services, 1984.

[5] Eg. Rosalind Kidd, *The Way We Civilise*, Brisbane: University of Queensland Press, 1997.

2.4 Section (e) Forcibly transferring children of the group to another group.

a) We believe that there is a case to be answered concerning the removal of children as documented in the *Bringing Them Home* report.[6] We commend that report to this committee.

The issue which arises concerning all of the above examples of genocidal behaviour is whether or not there was intent to destroy in whole or in part Australian Indigenous people on the basis of their being indigenous.

Academic Colin Tatz is useful on this point:

> "Australia is guilty of at least three, possibly four, acts of genocide: first, the essentially private genocide, the physical killing committed by settlers and rogue police officers in the nineteenth century, while the state, in the form of the colonial authorities, stood silently by (for the most part); second, the twentieth century official state policy and practice of forcibly transferring children from one group to another with the express intention that they cease being Aboriginal; third, the twentieth century attempts to achieve the biological disappearance of those deemed 'half-caste' Aborigines; fourth, a prima facie case that Australian's actions to protect Aborigines in fact caused them serious bodily or mental harm. (Future scholars may care to analyse the extent of Australia's actions in creating the conditions of life that were calculated to destroy a specific group, and in sterilising Aboriginal women without consent)"[7]

These are all issues which the nation needs to deal with. **The possibility that these actions could re-occur because 'genocide' is not punishable under Australian law is a very real hindrance to the process of reconciliation between the Indigenous and non-indigenous communities in Australia.**

3. Response to specific terms of reference.

3.1 Terms of Reference :

1 (a) The formation of an appropriate definition of genocide

Currently, Article II of the *Genocide Convention* defines 'genocide' as occurring when "any of the following acts [are] committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

a) Killing members of a group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group."

According to Article III of the *Genocide Convention* "conspiracy to commit", "incitement to commit", "attempt to commit" and "complicity in" genocide are also acts which are criminal and subject to the Convention.

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[6] See pages 270-275.

[7] Colin Tatz, *Genocide in Australia*, Canberra: AIATIS Research Discussion Paper No. 8, 1999, p. 6

We believe that there is much wisdom in the *Genocide Convention*'s definition of 'genocide' and that there is no need to add to or, particularly, detract from its definition. The key factor which distinguishes genocide from other crimes is its focus on acts against particular "national, ethnical, racial or religious" groups. It occurs through a combination of an abuse of power and the extremity of racism. To limit the definition of 'genocide' to mass slaughter ignores the political and hegemonic issues of discrimination and the democratic principle of liberty and protection of minorities. **The current international definition should be incorporated into the proposed Bill.** Any watering down by way of amendments to the proposed Bill by the Australian Parliament would raise questions as to why any aspects of the international definition were being altered.

The inclusion in the definition of groups based on 'gender, sexuality, political affiliation or disability' reflects particular concerns of discrimination within Australia. We believe that these are legitimate concerns particularly in relation to the systematic exclusion and abuse of some of these groups. Eg. Sterilisation of persons with intellectual disabilities. We would question however the appropriateness of the inclusion of these categories within Anti-Genocide Bill as it detracts from the specific intent of the international convention. While these are critical issues we would encourage that such concerns be addressed in other legislation, and many are already addressed in Anti-Discrimination Legislation.

3.2 Terms of reference:

(b) The status of the convention under Australian law, particularly with reference to the decision of the High Court in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh.*

(e) The implications of the Federal Court decision on 1 September 1999 in *Nulyarimma v Thompson*

(g) The relationship between Australian and international criminal law enforcement mechanisms for bringing perpetrators of genocide to justice

In the Teoh Case High Court Judges Mason and Deane stated in paragraph 25 of their judgement:

> "The provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and alteration of the law fall within the province of Parliament, not the Executive. So a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law."

In the Nulyarimma Case Federal Court Judge Wilcox stated in paragraph 22:

> "If genocide is to be regarded as punishable in Australia, on the basis that it is an international crime, it must be shown that Australian law permits the result. There being no relevant statue, that means Australian common law."

Leaving aside the issues of the merits of the latter case, the problem is that the case was dismissed by the majority of the judges on the basis that there was no legal basis for hearing the case. In other words, no legal competence. While the judgements suggest that there is nothing definitive in Australian law to say whether or not international law can be incorporated into common law, it is a question of allowing the ambiguities to continue, particularly given the different State/Territory laws.

If Australia is to be true to the convention it needs to give legal force to it so that genocide is in fact punishable in Australia. To avoid the issue through a legal loophole raises questions as to Australia's moral standing in the minds of the international community.

This issue is of particular concern to Indigenous members of the Uniting Church in Australia because of the history of relationships between Indigenous and non-indigenous members which lead to many concluding that there have been acts of genocide committed in this country. It would be of great assistance to the process of reconciliation in this nation if it could be said that genocide is no longer an act which falls between several legal 'stools' and which is now clearly a criminal act within Australia.. **The introduction of this legislation signals Australia's commitment to the acts of our history never recurring .**

3.3 Terms of reference:

(d) The appropriateness or otherwise of retrospective application of the provisions of the bill.

As stated by Tatz "Australia is guilty of at least three, possibly four, acts of genocide". This assertion needs to be seriously considered. **Reconciliation can only occur when we take full responsibility for past actions**. Acknowledgment of history does not dismiss it. Clear provision needs to be made of the retrospective application of this Bill.

3.4 Terms of reference:

(f) The extraterritorial application of Australian law, particularly as it may relate to East Timor

In addition to our domestic commitment to genocide legislation, there has never been a more important time to have our understanding of Genocide clear as we consider the international and local ramifications of East Timor and ongoing unrest in Indonesia. In demanding just outcomes and accepting displaced persons we have publicly declared that systematic removal of persons based on ethnicity is unacceptable. It will be therefore critical that the Anti-Genocide Legislation 1999 clearly addresses Australia's commitment to international conventions relating to exposure and prosecution of acts of genocide by persons residing in Australia.

4. The Need for an *Anti-Genocide Bill* .

It is clear that it is ambiguous as to whether genocide is a crime in Australia and therefore the current Australian Federal implementation of the *United Nations Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention)* is inadequate. The introduction of the *Anti-Genocide Bill* will provide credibility to our legal process by removing the ambiguity and confusion and belatedly giving effect to our ratification of the *Genocide Convention 1948.*

The commitment of the Australian government to the fulfilment of international obligations, and in promoting open prosecution of genocidal acts will increase public confidence in the commitment of Australia to the painful process of reconciliation and recognition that genocide is unacceptable in the hearts of Australians.

The enactment of the Anti-Genocide Bill 1999 will assist Australia to guarantee against the repetition of gross violations of human rights as outlined in the *van Boven Principles*.[8]

5. Other Concerns

The provisions of Section Nine of the Anti-Genocide Bill 1999 relate to "a person". We wish to express our concern that provision be made relating to communal action. It should be clear that acts of Genocide carried out as a result of legislation eg. Policy of Forced Removal, by agents and organisations; are equally considered. Retrospective application of this legislation needs to provide for consideration of offences by government and agencies as opposed to "individuals". Corporate or community definitions need to be considered in terms of the principles of criminal responsibility; prosecution and punishment.

We hope that this submission will assist the Committee's deliberations.

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[8] p294, Human Rights and Equal Opportunity Commission 1997 *Bringing them home National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Commonwealth of Australia.

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10 February, 2000

Ms. Pauline Moore
Secretary,
Senate Legal and Constitutional References Committee
Parliament House
Canberra,
ACT 2600

Dear Ms. Moore,

Herewith, the Joint Submission of the Uniting Aboriginal and Islander and Christian Congress, Covenanting and National Social Responsibility and Justice to the Senate Legal and Constitutional References Committee concerning the Inquiry into the *Anti-Genocide Bill 1999.*

If possible we would welcome the opportunity to appear before the Committee to speak to this submission. Could you advise us of hearing dates once they are determined.

Thank you for your assistance in this matter.

Yours sincerely,

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