So Sad About Us

My intention in writing this paper is to discuss the social and legal disadvantage of Indigenous Australians and the collective failure of Australian society--the *"us"* of the title--to recognise and address this disadvantage.

By talking of *"us"* I do not intend to create an *"us"* and a *"them"*. That thinking is already common enough. I have deliberately chosen to discuss "*us*" to be embracive of both the Indigenous minority and non-Indigenous majority. I intend the "*us*" of my title to be Australian society as a whole, the collective "*us*" if you will.

I am non-Indigenous, something which makes me part of the majority Australian society and, irrespective of where one might sit within the social hierarchy of that majority, "*privileged*" as compared to Indigenous Australians.[3]

Whilst my voice is not an Indigenous voice it is a voice informed by 30 years of legal practice. It is a voice informed by some years as a Judge of the Federal Circuit Court hearing family law matters where Indigenous litigants are rare –in sharp contradistinction to the dramatic over representation of Indigenous litigants in the NSW Children's Court sitting across the road where one matter in every ten involves Indigenous children. It is a voice informed by years of practice in State Magistrates Courts where Indigenous defendants are frequent. It is a voice that speaks from the experience of visiting the holding cells of the Alice Springs Magistrates Court filled to standing room only capacity with Aboriginal men.

We in the present day inherit the consequence of the inhumane treatment of Indigenous Australians with which our collective history is littered. It is our responsibility to recognise these wrongs. It is also our present day responsibility to do more than apologise for the past. We must address and remedy wrongs and their

[3] I do not refer to privilege in any context but statistically and by reference to the statistics and comments with respect to them that are referenced herein. I do not suggest that Indigenous culture is, in any way, inferior. In fact, there is so much that a genuine approach to reconciliation might gift to society, such as respect for land and water.

consequences and ensure that they are not allowed to continue let alone repeated. Yet these wrongs continue.

I have also selected the title as it is the title of a song[4] one lyric of which has great relevance and poignancy to the past, present and, (unless present attitudes of denial and apathy towards the disadvantage of Indigenous Australians changes immediately and fundamentally), future disadvantage of Indigenous Australia, namely:

"Apologies mean nothing once the damage is done"

This is a paper commenced on the day (24 October, 2014) that the Secretary of the NSW Department of Family and Community Services appeared before the Federal *Royal Commission into Institutional Responses to Child Sexual Abuse* and offered an "*apology*" to a group of Indigenous Australians abused in State care[5].

The secretary's apology to those abused in State care is not the first apology to Aboriginal people simply the latest. It is unlikely to be and should not be the last.

That there have been a string of apologies, (to which I will shortly turn) and yet no change in the experience of Aboriginal Australians (other than for the worst) would, understandably, cause scepticism, if not further hurt, amongst some, principally the Indigenous Australians to whom the apologies are directed. For others, principally those in the non-Indigenous majority, such apologies are often dismissed as "*hand wringing*", a politically correct "*black arm band view of history".* From any perspective apologies are hollow, are "*ashes in the mouth*" of the speaker, unless they are accompanied by demonstrated commitment to change and action to achieve it.

In the words of Paulo Freire[6]:

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[4] "So Sad About Us" Copyright Pete Townshend

[5] The week in which this paper was commenced is also in the week of leaked emails by a University academic referring, whether in jest or otherwise, to Indigenous Australians as "abbots" and making offensive and disparaging remarks regarding Adam Goodes and his place as a proud role model for Indigenous Australians and all Australians (and through that criticism a stereotyped offence to Indigenous Australians generally) and the unnecessary death in custody of a WA Aboriginal woman Ms Dhow arrested for unpaid fines (fines that were always beyond her capacity to pay)

[6] "Pedagogy of the Oppressed" Chapter 3 ISBN:PB: 978-0-8264-1276-8

"An unauthentic word, one which is unable to transform reality, results when dichotomy is imposed upon its constitutive elements. When a word is deprived of its dimension of action, reflection automatically suffers as well: and the word is changed into idle chatter, into verbalism, into an alienated and alienating 'blah'. It becomes an empty word, one which cannot denounce the world, for denunciation is impossible without a commitment to transform, and there is no transformation without action"

This paper will argue that very little has changed for Indigenous Australians since the 2008 Rudd apology. In fact, things have gotten much worse.

This paper is completed on the day that Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda launched the 2014 *Social Justice and Native Title Report*, (5 December, 2014). That report includes the comment "*It is shameful that we do better at keeping Aboriginal people in prison than in school or university*". Indeed it is.

For us as a society to have been ignorant of the institutional wrongs perpetrated against Indigenous Australians in our name is shameful. To have been aware of them and done nothing is beyond shameful and introduces a degree of personal culpability to each individual. In the words of Anthony Anaxagorou "*silence is a political act*"

To illustrate the disadvantaged state of the majority of Indigenous Australia I will use readily available resources. None of the material referred to requires research skills or special access to archives. All of it is available on the internet for free. Indeed, much of it is drawn from mainstream media sources.

In discussing these matters I do not propose to write a studious, academic article[7]. This paper is being written as I cannot comprehend how so many matters of public record do not outrage every Australian[8]. I cannot understand how or why we are not collectively moved to action. That we are not speaks ill of our humanity. Perhaps the

[7] For an excellent and academic discussion of the issues raised by such disadvantage see Michelle Alexander's "*The New Jim Crow: Mass Incarceration in the Age of Colorblindness*"

[8] In fairness and whilst recently being driven home from the airport in a taxi I raised various of the aspects of Aboriginal disadvantage that will be referred to in the paper with my Islamic taxi driver who responded "*These are things I have not heard. Does the government know? Surely they do not know-they could not let this happen if they knew"*

answer is suggested by the fact that, in 2014, we can make a television program like the SBS series "*First Contact*" where the racist assumptions of "*average Australians*" are confronted (and our majority ignorance of Indigenous realities exposed). This apparent collective desire to ignore reality has moved me to record uncontroverted facts.

Present disadvantage is born of history. To avoid the realities borne of our collective history (and the present day continuation of disadvantage) we use phrases such as *"the children of today are not responsible for the sins of their fathers"* or "*they were different times*". The real issue is, perhaps, how different times really are when disadvantage remains and is increasing. That so little has been done by our society to address and change the plight of Aboriginal disadvantage reflects something "*so sad about us*".

Apologies (or the words of White Folk)

On 24 October 2014 the Secretary of the NSW Department of Family and Community Services Michael Coutter-Trotter offered the following testimony to the *Royal Commission into Institutional Abuse*:

> *I acknowledge that the terrible physical and sexual abuse inflicted upon children and young people by those entrusted to care for them has had devastating and lifelong impacts on many individuals. We as a department didn't take more decisive action in relation to the allegations made by the victims who were just girls at the time. The girls were courageous in bringing their allegations to the police. And I also appreciate the shame and embarrassment they may have felt in disclosing their stories.*
>
> *It strikes you, from the perspective of the present day, how uncoordinated, how unpurposeful the response was, how unwilling people were to listen to and believe children. How it could be that children who were regularly beaten, who then went to school - I'm sure showing signs of that physical abuse - that that*

wasn't picked up. The challenge of course is to be fair in your judgment from 2014. But it was a very different world.

The Secretary was responding to allegations by Indigenous Australians who had, as children in the 1980s, been residents at the Bethcar Home near Brewarrina. Many of those residents had, whilst residents at the home, reported abuse, physical and sexual. Nothing was done for these children in the care of and entitled to the protection of the Department. Further, when they subsequently sought compensation for their injuries the litigation was fiercely defended. The litigation cost tax-payers $3.7 million , most of which went to "*denying*" and defending the girl's claims than in compensating them (and when the number of claimants and the legal costs incurred by them is taken into account it is clear that little would have been received by any individual victim).

Perhaps more remarkable than taxpayer funds expended in defending the claims of these girls is the suggestion that one must be "*fair in your judgment from 2014".* This would suggest that the duty of care owed to children in the care of the Department (or by others such teachers, school staff and priests) in 1980 was somehow different to the present. It was not. And it was only 30 years ago-less than a generation.

Such apologies, with caveats attached such as be "*fair in your judgment from 2014"* are how we dismiss wrongdoing as though to say "*It was another time and we knew no better*". We did know better. One cannot help but think that the race and gender of the victims dictated the absence of protective response. A response was warranted. And the failure to respond with compassion and empathy when compensation was sought simply amplifies the disregard.

There is only one way that the behaviour that occurred in the 1980s can be viewed "*from 2014*" and that is harshly, judgementally and with revulsion. Such behaviour cannot, on the one hand, be apologised for and on the other hand historically justified. Child abuse is and has always been both morally and legally wrong. It is no less wrong because the child victim is Aboriginal or child is abused in the 1980s.

One matter not addressed by the Secretary's "*apology*" was the removal of these Aboriginal girls and their placement in the home in the first place. Whilst the specific facts and circumstances leading to each removal is not clear the historical context of such removals can be gleaned from the "*Bringing them Home*" report and the Federal and State apologies that followed.

On 13 February 2008 the newly elected Rudd Government delivered the Federal Parliament's apology to Australia's Indigenous peoples. In speaking with Indigenous elders regarding their feelings towards the Apology the most common reaction is to the effect "*How many more generations before it stops*? *When will they stop taking our kids?*" That is a theme to which I will return.

So prosaic and carefully crafted is the apology that it is worth setting it out in full:

> *That today we honour the Indigenous peoples of this land, the oldest continuing cultures in human history. We reflect on their past mistreatment.*
>
> *We reflect in particular on the mistreatment of those who were Stolen Generations - this blemished chapter in our nation's history.*
>
> *The time has now come for the nation to turn a new page in Australia's history by* ***righting the wrongs of the past*** *[emphasis added] and so moving forward with confidence to the future.*
>
> *We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians.*
>
> *We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country.*
>
> *For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry.*

To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry.

And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.

We the Parliament of Australia respectfully request that this apology be received in the spirit in which it is offered as part of the healing of the nation.

For the future we take heart; resolving that this new page in the history of our great continent can now be written.

We today take this first step by acknowledging the past and laying claim to a future that embraces all Australians.

A future where this Parliament resolves that the injustices of the past must never, never happen again.

A future where we harness the determination of all Australians, Indigenous and non-Indigenous, to close the gap that lies between us in life expectancy, educational achievement and economic opportunity.

A future where we embrace the possibility of new solutions to enduring problems where old approaches have failed. A future based on mutual respect, mutual resolve and mutual responsibility. A future where all Australians, whatever their origins, are truly equal partners, with equal opportunities and with an equal stake in shaping the next chapter in the history of this great country, Australia

Following the apology the Prime Minister stated *"I want to be blunt about this. There will be **no** [emphasis added] compensation."*

On the same day as the apology the then leader of the opposition Brendan Nelson rose and delivered a separate apology on behalf of the opposition. It was, in many ways, a

similarly beautiful speech. There are fragments of that apology which give some pointer to the past and present perpetuation of Aboriginal disadvantage:

> *It is reasonably argued that removal from squalor led to better lives: children fed, housed and educated for an adult world which they could not have imagined….*
>
> *There is no compensation fund for this—**nor should there be** [emphasis added]. How can any sum of money replace a life deprived of knowing your family? Separation was then, and remains today, a painful but necessary part of public policy in the protection of children…*

Nelson's speech ends with a John F Kennedy like appeal:

> *I challenge anyone who thinks Aboriginal people get a good deal to come to any of these communities and tell me you wish you had been born there*

One might ask "*if you know the communities are as they are why do you do nothing?"*

Six years later on 22 September, 2014 former Prime Minister John Howard gave an interview to a Channel Seven journalist touching on the treatment of Indigenous Australians in which he stated that 'there was no *genocide of Indigenous Australians during the stolen generations era' and that '... modern governments should not be expected to apologise for the sins of their predecessors"* (then cite the Guardian article)

Before going further I make clear that I have the greatest of respect for each of the speakers as men of integrity and ideals. There are, however, a number of issues which arise from Rudd and Nelson's words:

- What is being done to "*right the wrongs of the past*" and what is being done to ensure they are never repeated?
- Why is it "*reasonable*" to argue that "*removal from squalor led to better lives"* when we know that it did not and why is that argument still being used?

- What "*squalor*" where Indigenous Australians being removed from? Was it their lack of possessions? Or was it the squalor of the missions into which Indigenous Australians were herded "*for their own protection and betterment*" when their land was appropriated without consideration?
- Why is there no compensation and why is it not open to discussion? After 200 years of acknowledged mistreatment is there not some compulsion to contribute to the address of the consequences of such mistreatment?

Irrespective of subsequent shortcomings in action the Federal apology was eloquent. The greatest tragedy is that nothing has changed. Indeed, things have gotten worse. The apology may have meant something even with the damage done but it is hollow and meaningless when damage continues to be done and has escalated since.

The NSW Parliament had previously issued an apology (18 June, 1997) in which then State Premier Bob Carr had on behalf of the NSW Parliament:

"apologise[d] unreservedly to the Aboriginal people of Australia for the systematic separation of generations of Aboriginal children from their parents, families and communities" and *"acknowledges and regrets Parliament's role in enacting laws and endorsing policies of successive governments whereby profound grief and loss have been inflicted upon Aboriginal Australians*

In 2008 the NSW Department of Family and Community Services "*apologised*" to Indigenous Australians. The apology by the then Director-General Jennifer Mason is in the following terms

> "*We are deeply sorry for the pain and suffering separating children from their families has caused and Community Services involvement in these separations.*
>
> *Sadly we cannot undo past wrongs. We cannot make up for the childhoods lost and the damage caused to families and cultural connections.*
>
> *In looking to the future we need understand how we arrived at where we are today. Aboriginal over representation in child protection, out of home care,*

juvenile justice and adult prison systems, higher infant mortality and shorter life expectancy are just some of the disadvantages Aboriginal families face today.

Community Services has a significant role in protecting children and young people and we are committed to doing our very best to influence and improve the long-term outcomes for Aboriginal children in NSW"

In NSW the rate of removal of Aboriginal children from their families has increased significantly since these apologies.

The predominant basis for removal of Indigenous Australian children in NSW is not abuse of children but section 71 of the *Children & Young Persons (Care and Protection) Act 1998* being when a child's *"basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents or primary care-givers"* – a wholly subjective determination.

In any dialogue regarding Indigenous disadvantage the issue of generational disadvantage arises of necessity. Generational disadvantage is not an excuse for aberrant behaviour. It is, however, recognition of and a rational explanation for the disadvantage that successive generations inherit and continue to experience through that which has been experienced by preceding generations as a consequence of past government legislation and [past and present] practices including though:

- Dispossession and removal from land as well as the fundamental failure to comprehend, let alone acknowledge, an attitude to the land that did not involve the land being "*owned*"
- Suppression and removal of language, culture and tradition
- Institutionalisation of both adults and children
- Removal of children from family and community
- Deficient, inadequate or abusive "*parenting*" of children by non Indigenous Australians given the responsibility for their care (including both individuals and institutions)

- The creation and perpetration of poverty within communities (including through withholding wages[9] up and until the 1970s)
- A failure to acknowledge or respect "*difference*" in such matters as parenting practices and the conception of family such that difference is stigmatised and used as the basis for removal of children or in defining criminality
- Apathy and inaction when complaint is raised or inadequacy is exposed
- Promulgation of laws and policies including those which have inflicted disadvantage or which focus upon the consequences of that disadvantage (such as criminal offences which focus upon people experiencing poverty).
- The historical and ongoing over representation of Indigenous Australians in Out of Home Care and Prison populations.

These generational disadvantages have a significant role to play, (though not the only relevant factor), in the over representation of Indigenous children in out-of-home care populations each generation experiencing further, entrenched disadvantage.

As an interesting example of the connection between apology and action one might look to the 2012 *Apologies for the Forced Removal and Adoption of Children* (both Federal and NSW).

The NSW apology, delivered by then Premier O'Farrell in September, 2012, provided:

> *The NSW Parliament, on behalf of the people of NSW, expresses its great sorrow and remorse for the lasting damage these practices have caused in the lives of so many...Saying sorry can never change what happened. But it is our great hope that this sincere and heartfelt public apology will offer healing and comfort to those who have suffered because of the practices of the past"*

NSW Minister for Family and Community Services Pru Goward added:

> *"The NSW Government is also implementing practical measures to help people who have been affected by forced adoption practices"*

[9] See, for example, http://www.creativespirits.info/aboriginalculture/economy/stolen-wages

Shortly after this apology a discussion paper was released by the Department seeking to reinstate "*forced adoption*" in care and protection matters and that measure, (thankfully with a reservation regarding Aboriginal children), commenced as law and practice in October 2014 (during the period this paper was written). Adoption of children with respect to whom a finding has been made that "*there is no reasonable prospect of restoration*" [a judicial exercise in fortune telling] is again, in NSW, the preferred tool in "*permanency planning*" especially for children under 2 years of age.

The irony of this move compounds its cruelty - on the one hand apologising for the past damage and then reintroducing the practice. This is the reality of all of the above apologies-it is as though by apologising the behaviour is brought to an end. It is not. The behaviour continues – removal of Aboriginal children and their forced adoption and the "stolen generations" are real in 2014, in fact more real than at the time of the *Bringing Them Home* report and the 2008 apology..

Indigenous Australian Children in Out of Home Care

As you read this paper there are more Indigenous Australian children (by number and percentage) in out of home care than at any time in Australia's history. That is so notwithstanding the apologies and the reality that Indigenous Australians make up only 2.3% of the population[10]. One in ten aboriginal children (10% of all aboriginal children) presently live in out of home care. In WA and the NT it is an even higher percentage.

In the 10 years from 1998 to 2008 (ie the very period leading up to the National apology) there was a 258% increase in the number of Aboriginal children in NSW living in out of home care[11]. This is compared to the overall increase in out of home care placements of 56% in a comparable period (2000-2010)[12]: The rate of Aboriginal

[10] In 1778 (only 236 years ago) Indigenous Australians made up 100% of the population and not a single child lived in out of home care

[11] NSW Ombudsman Report "*Supporting the Carers of Aboriginal Children*" June 2008

[12] As noted by Jeremy Sammut *Between 2000 and 2010, the number of children who are unable to live safely with their parents, and are subsequently placed in 'residential care' by state and territory child protection authorities, has increased by 56% "Do Not Damage and Disturb: On Child Protection Failures and the Pressure on Out of Home Care in Australia" Centre for Independent Studies 2011*

children in out of home care is now higher than at any previous point in history including during the period when the *Office of the Protector of Aborigines* was in existence and during the eras (if they are considered historical rather than continuing) of the *Stolen Generations*.

By September, 2014 (6 years after the apology) *, there has been a five-fold increase in the number of Aboriginal children being removed since the Bringing Them Home report in 1997 in NSW alone* (citation).[13]

In 2014 the rate of child Aboriginal child removal is 5 times higher than at the time of the *Bringing Them Home Report* [released in 1997]. One third of ***all*** children removed from parents and placed in out of home care is Aboriginal. This from less than 3% of the population.

Expenditure on the removal and out of home placement of aboriginal children dwarfs expenditure on support and assistance to these children whilst with their families and communities. In the Northern Territory alone (in 2102) expenditure on surveillance and removal of aboriginal children from their family was one hundred and sixty times more than that spent on programs supporting families ($80million versus $500,000). The majority of removals are related to poverty and inequality[14].

It is not only in Out of Home Care that Aboriginal children are over represented. Aboriginal children are "*31 times more likely*" than non Aboriginal children to be incarcerated[15],. This from a group in society representing less than 3% of the population.

Disproportionate expenditure on interfering with rather than supporting Aboriginal families is common place as are cuts to expenditure which have the effect of silencing the voices of Indigenous Australians. Perhaps more cynical than the silencing itself is the silence of the media in reporting these decisions.

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[13] See for example https://www3.aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-c

[14] Ibid Pilger ($1,600,000 in removal as opposed to $500,000 in support and assistance of intact families)

[15] Author (YEAR) 'article name', The Guardian, date.

On 20 February Padraic Gibson as a lone media voice, wrote:

> *Tony Abbott has told Australians to prepare for pain in the upcoming May budget, with wide ranging cuts to social services anticipated....some of the cuts which have been already announced will hurt Aboriginal communities very badly – and particularly Aboriginal children (citation)*

State governments are not immune from the very same cuts to service .

On 18 September, 2014 a report[16] by the Victorian Commissioner for Children and Young People was tabled in Parliament recording that Aboriginal children in Victoria[17] are 16 times more likely than the State's other children to be in out-of-home care (such that the rate of Aboriginal child removal in Victoria exceeds that at any time since white settlement). Aboriginal people are 1% of Victoria's population.

In Gunnedah NSW an Elder[18] from *Grandmothers Against Removals* suggests that the Federal apology *"was beginning to seem hollow*". In her words:

> *[Removal] is an archaic process, historically proven not to work, it's ineffective, ill-informed – here we are in 2014, children are still being removed under these draconian laws... We are going to have the same stories in the next 10, 15 years [from Indigenous people talking about being taken from their families as children].. Who is going to apologise to them? Who's going to apologise to this generation of stolen kids? Why are we not learning from the past? Who's accountable?*

The same difficulties with the child protection system were identified by a former Departmental Case Worker as occurring without consultation, as provoking anger and frustration by families and in arbitrary circumstances.[19]

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[16] Melissa Davey The Guardian
[17] Being 1% of the State's population
[18] See the article "*Scheme to avoid 'second stolen generation' criticised for paternalism*" by Bridie Jabour The Guardian 30 October, 2014
[19] Padraic Gibson, (year) etc

This is so notwithstanding yet another apology, the Federal Government apology to the "*Forgotten Australians"* who had been abused in State care[20]. In a 2014 paper prepared by the Australian Department of Social Services it was noted that, '*children who have been placed in Out of Home Care have poorer life outcomes than other children. '*[21] Children in out of home care are hence disadvantaged across all of these areas[22].

If this is so then we can truly expect that the generational disadvantages of child removal, removal from family and country and placement in out of home care, will continue and remain for some little time to come.

Sadly, the removal of children into out of home care is replicated in Aboriginal incarceration rates. In many ways the removal of children is a transition towards Aboriginal disadvantage in adult life.

Indigenous Imprisonment and Deaths in Custody

Whilst the rate of Aboriginal and Torres Strait Islander Out of Home Care is alarming the rate of imprisonment of Indigenous Australians is truly frightening.

In 1996 Indigenous people were 17.3 times more likely to be arrested than non-Indigenous people and 14.7 times more likely to be imprisoned than non-Indigenous people[23]. By 2011 Aboriginal and Torres Strait Islander people comprised 26% of the total prison population despite making up only 2.5% of the total population. The statistics are even more alarming for juveniles (making up 80% of incarcerated juveniles in WA)[24].

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[20] See https://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/apology-to-the-forgotten-australians-and-former-child-migrants

[21] Quoting Bromfield, L., & Osborn, A. (2007), '*Getting the big picture': A Synopsis and Critique of Australian Out-Of-Home Care Research, Australian Institute of Family Studies, Melbourne*, http://www.aifs.gov.au/nch/pubs/issues/issues26/issues26. html - accessed December 2009

[22] That is not to suggest that out of home care is or is of itself responsible for these disadvantages. Trauma and neglect experienced by children prior to removal and entering out of home care have significant impact as does the nature, quality and number of placements.

[23] Indigenous Deaths in Custody: Report Summary Australian Human Rights Commission 1997

[24] See http://www.als.org.au/index.php?option=com_content&view=article&id=185%3Aroyal-commission-into-aboriginal-deaths-in-custody-20-years-on&catid=22&Itemid=57

In 2013 around 30,000 people were incarcerated and Indigenous inmates accounted for a quarter of the prison population (7,500 inmates) yet Indigenous Australians make up only 2 per cent of the general population[25].

The *Royal Commission into Aboriginal Deaths in Custody* heard evidence regarding the death in Police custody of 99 Aboriginal people between 1980 and 1989. During the 5 weeks that I have taken to write this paper 4 Aboriginal people have died in Police custody. The Commission's report was published in April 1991 after years of hearing and over $5 million of funding. The report contained 339 recommendations. Very few of those recommendations have been implemented as changed practices, legislation or funding commitments. The rate of implementation of the Commission's recommendations across the various States varies between 27% at the lowest (Victoria) and 52% at the highest (South Australia)[26]. This is the rate of implementation some 23 years after the conclusion of the Royal Commission.

Set against this rate of change is the "*peeling back*" of the reforms that have been made. The Royal Commission had, importantly, recommended that a mandatory notification requirement be introduced which would see Police immediately contact the Aboriginal Legal Service in the event that an Aboriginal person was taken into custody. This recommendation has only been implemented in NSW and the ACT.

In June, 2014 the funding of the NSW Aboriginal Legal Service (ALS) for this service was withdrawn. This funding was $500,000 per year. (or one tenth of the cost of the Royal Commission) Since the ALS had provided this service there had been no recorded Aboriginal death in police custody[27]:

At the time of the Royal Commission into deaths in custody Aboriginal people were 8 times more likely to be imprisoned than non-Aboriginal people. A decade later Aboriginal people are 10 times more likely to be imprisoned and in Western Australia Aboriginal people are nearly 20 times more likely to be jailed than non-Aboriginal people.

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[25] See http://www.abc.net.au/news/2013-05-24/sharp-rise-in-number-of-aboriginal-deaths-in-custody/4711764
[26] See for instance www.deathsincustody.org.au
[27] For a discussion of the funding issue see Helen Davidson The Guardian 17 June, 2014

Between 2003 and 2013 the Aboriginal rate of incarceration has grown 11 times faster than the non-Aboriginal rate. The proportion of Aboriginal prisoners has almost doubled in the 20 years since the commission delivered its recommendations and, concerningly, the rate of imprisonment for offences such as fine default has grown significantly.

The reality is that the rate of Aboriginal deaths in custody has increased 150% since the Royal Commission[28].

Of the 339 recommendations made by the Royal Commission into deaths in custody 2 of the most practical and obvious recommendations were:

> ***87.*** *Arrest people only when no other way exists for dealing with a problem.*
>
> ***92.*** *Imprisonment should be utilised only as a sanction of last resort.*

These recommendations have not been implemented. If they had been then deaths in Police custody such of those of Ms Dhu would not, in all probability, have occured.

Aboriginal people are largely arrested and imprisoned for minor offences and offences connected with or arising from poverty, such as minor property offences, public order offences, none payment of fines and driving offences[29].

In 2012 a report by the Aboriginal Legal Service found that [paraphrase below in your own words, it disrupts the flow] *"Aboriginal offenders convicted of driving while disqualified in remote and regional NSW are sentenced to jail at 3 times the State average".*

Elsewhere a report by the Australian Institute of Criminology recorded[30] that [paraphrase below in **2-3 sentences** max]*"...research indicates the generally petty*

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[28] See aic.gov.au

[29] In a May 2003 report "*Driving Offences and Aboriginal people*" it was noted that *"The offence of Drive while disqualified accounted for 86% of all those Aboriginal people who were sentenced to imprisonment for driving licence offences during 2003*
http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/driving_offences_Aboriginal_people_stage1_offence_targeting_project_ajac_may2003.pdf/$file/driving_offences_Aboriginal_people_stage1_offence_targeting_project_ajac_may2003.pdf

[30] "Indigenous women's offending patterns: A literature review" by Lorana Bartels July 2010

nature of most offending. The most frequent offences committed by Indigenous women are said to be fine default, drunkenness, offensive language and social security fraud (Behrendt 2000; Brooks 1996; Corbett & Paxman 1995; Payne 1993). It is conceded that although social security fraud is not necessarily petty in its magnitude, it is often a crime of necessity and driven by poverty. Hunter and Borland's (1999) analysis indicates that drinking in public was the most common reason for the most recent arrest for NSW Indigenous women (4.7%), followed by assault (2.1%) and drink driving (1.5%); similar data indicate that drinking-related arrests accounted for eight percent of the most recent arrests for Indigenous women aged 18–24 years (Hunter 2001)"

Curiously, fine default was the basis of the October 2014 arrest of Ms Dhu who died in police custody. Fine default, like so many of the petty offences that leads to the vast over representation of Aboriginal Australians in custody, might and should be seen as a *"crime of poverty"*.

With respect to arrest and imprisonment for fine default, mandatory sentencing and the imposition of fines generally the comments of Judge Martin of the Supreme Court of West Australia are apt[31]:

> *"...requiring a court to treat offenders with different characteristics who commit offences in different circumstances exactly the same is to mandate injustice or substantive inequality...Fines risked inequality because they might have no practical effect on a wealthy person but caused great hardship to a poor person and their family*

Conclusion

This paper, as made clear at the outset, is not intended as an academic discourse on cause and effect of Indigenous disadvantage. It is not an exhaustive literature review. My intent is to have the reader reflect upon the fundamental proposition, ingrained into my generation by Julius Sumner-Miller -"***Why is it so?***"

[31] West Australian 27 October 2014

I would hope that for any reader for whom the above material is news that they might ask simple, basic questions of themselves and others such as:

- *Why was I not aware of these things? Why was it not in the paper I read?*
- *What can I do about this?*
- *What will I do about this?*

All that I would then ask of the reader, having asked themselves the above questions, is to reflect upon that attributed to the 18th century orator Edmund Burke:

> "*All that is necessary for the triumph of evil is that good men do nothing"*

I would hope the same reader might then ask themselves "*will I do nothing*?"

The poet and statesman Johann Goethe remarked:

> *The way you see people is the way you treat them, and the way you treat them is what they become*

Goethe was insightful in recognising the motive, conscious or unconscious, for unjust and undignified treatment of some members of society as well as that which, in this age, is recognised and discussed as "*generational disadvantage*".

To achieve change, to attain justice for Indigenous Australians, one might reflect upon the words of US Supreme Court judge Felix Frankfurter"

> *There is no greater inequality than the equal treatment of unequals*

The counter argument is, of course, that all Australians are equal and differential treatment cannot be contemplated. That conveniently ignores the dual realities that:

- Until as recently as the latter half of the 20th Century (as late as 1975[32]) Indigenous Australians ***were*** treated differently. For example, the control of wages and income of Indigenous Australians (analogous to and perhaps rightly seen as a forerunner of "*income quarantining*") applied to Indigenous

[32] The introduction of the Federal *Racial Discrimination Act* saw the effective cessation of discriminatory legislation such as the Queensland *Aborigines Protection and Restriction of the Sale of Opium Act*

Australians. The more recent version has been trialled in Indigenous communities before others. In the era of the State *Protector of Aborigines* there were a raft of restrictive laws applying only to Indigenous Australians requiring permission to marry, being treated as "*non-citizens*" not entitled to a passport and restrictions on the supply of alcohol to Indigenous Australians (leading tragically and ironically to Albert Namajira's imprisonment). Visit Wallace Rockhole to see such laws still exist (let alone the roadside markers to show the deaths of young Aboriginal men who have died "*running the blockade*"; and,

- There is a significant over representation of Indigenous Australians in every category of disadvantage.

These facts might well support the proposition that Indigenous Australians are already (or are still) treated differently

Ultimately and by reference to Anthony Anaxagorou's words above, I would ask the reader to seriously ask themself "*will my political act be silence*?"

Joe Harman

16 January 2015