Reconciliation: challenges for Australian law

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Truth and reconciliation

In November 1999, Archbishop Desmond Tutu delivered a public lecture at the University of Sydney. He had come to Australia to be awarded an honorary Doctorate of Laws and the Sydney Peace Prize. He is probably best known for his chairmanship of South Africa's Truth and Reconciliation Commission. He described the process in his Sydney lecture as one:

> ... where perpetrators, often of some of the most gruesome atrocities, received amnesty in exchange for truth.
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> We have chosen quite deliberately a costly path, the costly path of confession, of forgiveness and reconciliation. Without this provision, our peaceful, miraculous transition would not have happened. It does not encourage impunity. Quite the contrary, for only those who admit accountability are eligible for amnesty on an individual basis ...
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> They tell their story in an open hearing, in the full glare of media publicity. So the perpetrators have in fact paid a heavy price through public humiliation ... There is justice here even if you think only of retributive justice.
>
> But we believe there is another kind of justice, restorative justice, based on something that we find difficult to put into English. *Ubantu* is the essence of being human. It speaks of compassion and generosity, of gentleness and hospitality and sharing, because it says: 'My humanity is caught up in your humanity. I am because you are.' A person is a person through other persons.
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> An offence breaks a relationship, ruptures an inter-connectedness, a harmony so essential for a full human existence. *Ubantu* does not give up on the perpetrator and sees him with a capacity to change for the better and so *ubantu* seeks to heal a breach, to restore relationships, to forgive and to have reconciliation.[1]

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1 Tutu D 'Taking the costly path to peace' edited extracts from the public lecture *The University of Sydney Gazette*, Issue One April 2000 pp 12-13.

South Africa provides the best known example of a truth and reconciliation commission. But it is not the only instance of such a body in recent times. The occasion arises particularly (but not exclusively) when a nation is in a transition to democracy. An associate of mine, Victoria Coakley, recently distilled written accounts of these processes in a valuable paper. In considering the context for truth commissions, she writes:

> Truth commissions are bodies set up to investigate a past history of human rights violations in a particular country — which can include violations by the military, other government forces, or by armed opposition forces. Countries which have established official commissions of inquiry include: Bangladesh, Uganda, Israel, Argentina, Guinea, Uruguay, Chile, Chad, Czech Republic, Germany, Romania, Poland, El Salvador, Guatemala, Mexico, Nicaragua, Togo, Niger, Ethiopia, Malawi and South Africa.
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> Truth commissions have generally included the following four elements. First, the focus is on the past rather than the present. Second, the commission attempts to paint the overall picture of certain human rights abuses over a period of time as opposed to focussing on a specific event. Third, the commission usually exists temporarily and for a pre-defined period of time, ceasing to exist following the submission of a report on its findings. Finally, a commission is always vested with some sort of authority, by way of its sponsor, that allows it greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report than existing institutions.[2]

Coakley cites the South African experience in particular in support of the proposition that '[I]n order to alleviate the suffering associated with memory, the process of truth-telling is seen as an essential component of any attempt of healing and reconciliation'.

> Without the truth being told, forgiveness and reconciliation will be difficult if not impossible — full knowledge of whom and what to forgive is of foremost importance. This process can help heal society's wounds and restore dignity to the victims ...

She goes on to quote Margaret Popkin and Naomi Roht-Arriaza:

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2 Coakley V 'Reasons for establishing truth commissions in societies coming to terms with substantial legacies of gross human rights violations, and the complex issues of accountability in moving forward to establish or re-establish a decent and just society' (not yet published). Coakley cites Hayner P 'Fifteen Truth Commissions – 1974-1994: A Comparative Study' (1994) 16(4) *Human Rights Quarterly* 600; also in Kritz N (ed) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (United States Institute of Peace Press, Washington DC, 1995) p 226.

> [I]f the state does not make the commission's conclusions and recommendations its own or publicly accept responsibility for the harmful acts of its agents, an essential part of the process of acknowledgment and subsequent healing may be lost. Thus, it is not simply the compilation of the report that matters; equally important to success with respect to redress for victims is how, and by whom, the report is presented and how the state receives it'.[3]

What is the link between truth and reconciliation? Coakley writes: 'All major religious and philosophical traditions address the subject of reconciliation, and most place it above punishment, which focuses on choosing which party should be penalised and how.' Aung San Suu Kyi envisages a truth and reconciliation process for Burma. Xanana Gusmao (who was the recipient of the 2000 Sydney Peace Prize) is committed to a similar process for East Timor.

Punishment of wrongdoers is sometimes seen as preferable and, in some cases necessary, as in South Africa in respect of perpetrators who decline to admit to abuses. When the abuses are long past, prosecution may no longer be an option. But inquiry into the truth, and acknowledgment of that truth, appear to be pre-conditions to any genuine reconciliation.

Truth and reconciliation in Australia

Truth

Historians

The true history of what happened to Aboriginal people in the course of British colonisation of Australia has not been widely accessible to Australians. And yet it is of fundamental importance that this history be known. As Edward Said has written:

> Appeals to the past are among the commonest of strategies in interpretations of the present. What animates such appeals is not only disagreement about what happened in the past and what the past was, but uncertainty about whether the past is really past, over and

3 Popkin M and Roht-Arriaza N 'Truth as Justice: Investigatory Commissions in Latin America' (1995) 20(1) *Law and Social Inquiry;* also in Kritz, above note 2, p 276.

concluded, or whether it continues, albeit in different forms, perhaps. This problem animates all sorts of discussions — about influence, about blame and judgement, about present actualities and future priorities.[4]

Bain Attwood provides the following account of how the history of this nation was presented to generations of Australians:

At the turn of the [20th] century historical narratives in Australia were coalescing into a myth which could be summarised thus: following its discovery by Captain James Cook in 1770, Australia was founded by the British in 1788 when Governor Phillip declared British sovereignty and took possession of the entire continent. This was in accordance with legal convention because prior to the coming of the white man the continent was inhabited by a relatively small number of nomadic savages whose culture was simple and unevolved and who did not cultivate the land and who therefore forfeited any right to it. The process of colonising the new land was, by and large, peaceful, and although Aboriginal society was more or less destroyed this was largely an unforeseen consequence of introduced diseases and tribal conflict, and inasmuch as there was any conflict between settlers and Aborigines the latter were treated in accordance with British justice and their suffering was alleviated by humanitarian endeavour. Besides, the Aborigines' decline was inevitable because they were a weak, inferior, archaic unprogressive race which was incapable of adapting to the presence of the white man — in short a dying race who would pass away. By contrast, British settlers, drawing on the knowledge of intrepid explorers, settled upon the strange and alien continent, and with enormous courage, fortitude and hard work came to possess it by transforming it into flourishing pastures and the like, so that the countryside prospered, great cities were created, and the Australian colonies became a working man's paradise. Not only British people, but also British values such as equality, liberty and justice, and venerable British institutions, especially political and legal ones, were successfully transplanted. In time a new nation was born.[5]

Jan Pettman commented in 1992 that:

Australian history was until recently winners' history, within which Aborigines were absent or rendered occasionally visible for national authenticity or exotic purposes.[6]

4 Said E *Culture and Imperialism* (Vintage, London, 1993) p 1.

5 Attwood B 'Mabo, Australia and the End of History' in Attwood B (ed) *In the Age of Mabo* (Allen & Unwin, Sydney, 1996) pp 101-2.

6 Pettman J *Living in the Margins: racism, sexism and feminism in Australia* (Allen & Unwin, Sydney, 1992).

It was as recently as 1968 that W E H Stanner criticised 'the great Australian silence' on these matters which he described as 'a cult of forgetfulness practised on a national scale'.[7]

Since then the silence has been broken, firstly by Charles Rowley,[8] then by Henry Reynolds in a series of influential and accessible books.[9] Other historians have also produced significant studies which start to fill in the mosaic of the history of relationships between indigenous and non-indigenous Australians. They include Bain Attwood, Andrew Markus, Ann McGrath, Heather Goodall, Tim Rowse, Peter Read and others.

Their work does not produce a uniform picture, and it is fair to say that there are differences among the historians. Some indeed have expressed strong criticism of what they see as a one-sided, negative account of the past. Geoffrey Blainey, for example, has coined the phrase the 'black armband' approach to Australian history. (Henry Reynolds has responded by describing the alternative as the 'white blindfold' approach.)

Commissions of inquiry

Given the work of historians over recent decades, and the spread of the knowledge of their work, does Australia need any sort of institutionalised inquiry such as a Truth Commission?

In fact, Australia has had important commissions of inquiry. None has been named a Truth Commission, but the two inquiries which I single out for special mention had the four elements referred to by Coakley.[10]

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7 Stanner W *After the Dreaming* (ABC, Sydney, 1968) pp 24-5.

8 Rowley C *The Destruction of Aboriginal Society* (ANU Press, Canberra, 1970).

9 Reynolds H *The Other Side of the Frontier: Aboriginal resistance to the European invasion of Australia* (Penguin, Melbourne, 1982); *Frontier: Aborigines, settlers and land* (Allen & Unwin, Sydney, 1987); *The Law of the Land* (Penguin, Melbourne, 1987); *Dispossession: black Australians and white invaders* (Allen & Unwin, Sydney, 1989); *With the White People* (Penguin, Melbourne, 1990); *Fate of a Free People* (Penguin, Melbourne, 1995); *Aboriginal Sovereignty: reflections of race, state and nation* (Allen & Unwin, Sydney, 1996); *This Whispering in our Hearts* (Allen & Unwin, Sydney, 1998); *Why Weren't we Told?* (Viking, Melbourne, 1999).

10 See text for note 3.

Royal Commission into Aboriginal Deaths in Custody

The work of the Royal Commission into Aboriginal Deaths in Custody (the Commission) began in 1987 as an inquiry into the large number of Aboriginal people who had recently died in prison or police custody. The Commission quickly established that the rate of Aboriginal deaths in custody was not much different from the general rate of deaths in custody. What *was* disproportionate was the number of Aboriginal people who were in custody in the first place: 'Too many Aboriginal people are in custody too often'.[11]

The Commission found that, nationwide, Aborigines were 27 times more likely to be in police custody than non-indigenous Australians, and 15 times more likely to be in prison. It set out to investigate not only aspects of the criminal justice system which led to this massive over-representation, but also the 'underlying causes', namely, 'the disadvantaged and unequal position in which Aboriginal people find themselves in the society — socially, economically and culturally'. It found the primary causes in the history of the colonisation and settlement of Australia, of which contemporary disadvantage is the legacy.

> That Aboriginal people were dispossessed of their land without benefit of treaty, agreement or compensation is generally known. But I think little known is the amount of brutality and bloodshed that was involved in enforcing on the ground what was pronounced by the law. The loss of the land meant the destruction of the Aboriginal economy which everywhere was based upon hunting and foraging. And the land use adopted by the settlers drastically reduced the population of animals to be hunted and plants to be foraged. And the loss of the land threatened the Aboriginal culture which all over Australia was based upon land and relationship to the land.
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> But the facts of later policies and their effects are even less well known to the general population. Having reduced the original inhabitants to a condition, in many places, of abject dependency, the colonial governments decided upon a policy of protection which had two main thrusts: Aboriginal people were swept up into reserves and missions where they were supervised as to every detail of their lives and there was a deliberate policy of undermining and destroying their spiritual and cultural beliefs. The other aspect of that policy as it developed was that Aboriginal children of mixed race descent — usually Aboriginal mother and non-Aboriginal father — were removed from their family and the land, placed in institutions and trained to grow up as good European labourers or domestics. Those outside the reserves were usually to be found camping on river banks or on the outskirts of country towns where they were under the eye of the non-Aboriginal police.

11 Royal Commission Into Aboriginal Deaths in Custody *National Report* (AGPS, Canberra, 1991) Vol 1 p 6.

> The theory was that the 'full blood' Aboriginal people would die out and they should be provided with a little care while they did so; and that the 'mixed blood' would be bred out. When these expectations proved ill-founded, another policy was tried, that of assimilation.
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> The whole aim was now to assimilate the Aboriginal people by encouraging them to accept the Western culture and lifestyle, give up their culture, become culturally absorbed and indistinguishable, other than physically, from the dominant group. For a short time, integration replaced assimilation as the policy option with little change in any practical way.
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> From that history many things flow which are of central importance to the issue of Aboriginal over-representation in custody.
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> The first is the deliberate and systematic disempowerment of Aboriginal people starting with dispossession from their land and proceeding to almost every aspect of their life. They were made dependant upon government or non-Aboriginal pastoralists or other employers for rations, clothing, blankets, education, living place and living conditions.
>
> Decisions were made about them and for them and imposed upon them. It was thought to be bad for an Aboriginal woman to be living with a non-Aboriginal man so that was outlawed; and when Aboriginal women disguised the fact by dressing in male costume that too was outlawed. Aboriginal people were made dependent upon non-Aboriginal people. Gradually, many of them lost their capacity for independent action, and their communities likewise. With loss of independence goes a loss of self esteem.
>
> The damage to Aboriginal society was devastating. In some places, it totally destroyed population. In others, dependency, despair, alcohol, total loss of heart wrought decimation of culture. So it was on the Aboriginal side.[12]

The Royal Commission saw, as central to its recommendations, the restoration to Aboriginal people of some control over their lives.

> 1.7.6 ... [R]unning through all the proposals that are made for the elimination of these disadvantages is the proposition that Aboriginal people have for two hundred years been dominated to an extraordinary degree by the non-Aboriginal society and that the disadvantage is the product of that domination. The thrust of this report is that the elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands ...

12 Royal Commission Into Aboriginal Deaths in Custody, above note 11, Vol 2 Pt C.

> 1.7.34 ... [T]he whole thrust of this report is directed towards the empowerment of Aboriginal society on the basis of their deeply held desire, their demonstrated capacity, their democratic rights to exercise, according to circumstances, maximum control over their own lives and that of their communities; that such empowerment requires that the broader society, on the one hand, makes material assistance available to make good past deprivations and on the other hand approaches the relationships with the Aboriginal society on the basis of the principles of self-determination.[13]

The Royal Commission devoted chapters 20 and 27 of the national report to the principle of self-determination, a topic to which I shall return.

The Royal Commission's account has been contested by some commentators. For example, Ron Brunton writes:

> Despite protestations that the message of the National Report is 'Aboriginal people must accept responsibility for their own destiny', the dominant theme is 'it is the larger non-Aboriginal community that bears responsibility for the circumstances that give rise to Aboriginal disadvantage'. The importance given to the role of racism is just part of a protective structure of alibis which Aborigines are encouraged to resort to in the event of any failures. Such alibis help to corrode the sense of individual responsibility that is almost certainly a prerequisite to overcoming Aboriginal disadvantage ...
>
> There can be no quarrel that Australians ... need to have a better knowledge and understanding of traditional and contemporary Aboriginal life, and ... history ... But it is also possible to have serious misgivings about the way that many intellectuals are trying to remedy the wrongs of the past ... Many of the materials ... are highly tendentious, preoccupied with discrediting Australia.[14]

Coakley makes the point that equally important to the material reported by a Commission is how the State receives it. Australian governments expressed their decision that all but one of the 339 recommendations of the Royal Commission would be accepted and acted upon. In practice, the degree of implementation has been quite inadequate, and the massive over-representation of indigenous Australians in the criminal justice system continues. Indeed, it is aggravated in two jurisdictions by provisions for mandatory sentencing which have a disproportionate impact on indigenous people.

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13 Royal Commission into Aboriginal Deaths in Custody, above note 11, Vol 1, pp 12-16.

14 Brunton R *Black Suffering, White Guilt? Aboriginal Disadvantage and the Royal Commission into Deaths in Custody* (Institute of Public Affairs, Perth, 1993) pp 37, 41-42.

Implementation of recommendations has been as disappointing as governmental responses to the 1986 recommendations of the Australian Law Reform Commission relating to recognition of Aboriginal customary law.

Human Rights and Equal Opportunity Commission

The other principal national inquiry in recent times was that of the Human Rights and Equal Opportunity Commission (HREOC) into the Separation of Aboriginal and Torres Strait Islander Children from their Families. That inquiry produced the report *Bringing Them Home*.

HREOC also explored history. It did so, of course, on the basis of the customary documentary sources. More compellingly, it also took testimony from indigenous Australians who told the Commissioners their own stories of what had happened to them and their families, and how they had been affected.

This sort of testimony, like the personal evidence given to the Royal Commission in relation to particular deaths in custody, has the potential to discharge pain and to lead to healing — provided that it is listened to, and responded to, with respect. This would seem to require at least a public acknowledgment of past errors, assurances that the errors will not be continued, and other forms of reparation as appropriate.

The response from the Commonwealth Government to the *Bringing Them Home* report has been criticised on various grounds. One is that there has been no formal apology on behalf of the nation to those affected by the removal of Aboriginal children from their families; by contrast, apologies have been given by State and Territory legislatures. Indeed, the Commonwealth Government has even quibbled as to whether the numbers of children removed are sufficient to constitute a stolen 'generation'. Another criticism of the Commonwealth response has been the rejection of the recommendation that a tribunal be set up and funded to provide monetary compensation in appropriate cases. Instead, it is left to individuals to seek redress through the difficult processes of legal action in the courts. A further criticism is that even the funds promised for particular purposes by the Commonwealth Government have not been forthcoming at the levels indicated.

So in this instance, the national response to the telling of the 'truth' has not taken this issue further towards the goal of reconciliation.

Courts

The 'new history' has been influential to developments in the law, commencing with the land rights campaigns in the 1960s and 1970s. Heather Goodall writes:

> The battle over history was central ... Crucial to the demands of Aboriginal people was a reclaiming of the right to tell their history. Many of these political struggles were fought out in the courts, or became engaged in legal forms of inquiry ... The law was the testing place for both the new politics and the new interpretations of the past ...
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> The results of historians' interventions have often been valuable in the practical sense of strengthening Aboriginal arguments before the courts, in convincing judges and juries of the presence, and indeed weight, of the past in shaping present conditions and actions ... [15]

The influence of history in the courts has been most notably illustrated, in recent times, by the High Court of Australia in its decisions in *Mabo v Queensland* [16] and *The Wik Peoples v Queensland*.[17] In *Mabo*, Justice Brennan (with whom Chief Justice Mason and Justice McHugh agreed) referred to historical legal statements, and said:

> According to [the line of cases which denied the existence of native title] the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provided, vested the land in [the Crown] without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilized standard, such a law is unjust ... [18]
>
> The theory that the indigenous inhabitants of a 'settled' colony had no proprietary interest in the land ... depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs.[19]

Justices Deane and Gaudron considered not only prior legal statements but also general historical material. They said that the doctrine of *terra nullius* and the denial of native title:

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15 Goodall H '"The Whole Truth and Nothing But ..." Some Intersections of Western Law, Aboriginal History and Community Memory' in Attwood B and Arnold J (eds) *Power, Knowledge and Aborigines* (La Trobe University Press, Melbourne, 1992) pp 106-7.

16 *Mabo v Queensland* (1992) 175 CLR 1.

17 *The Wik Peoples v Queensland* (1996) 187 CLR 1.

18 *Mabo v Queensland*, above note 16 at 29.

19 *Mabo v Queensland*, above note 16 at 40.

> ... provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands. The act and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remained diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.[20]

Again, the court's interpretation of historical material has been contested on the basis that the court had improperly taken judicial notice of history and, in any event, had got the history wrong.[21] However, in contrast to recommendations from an inquiry, the decisions of courts can have constitutive effect in declaring the law. A government that dislikes a particular decision is then left to seek legislation to overturn it.

There were some who sought to persuade the Commonwealth Government that this should be its response to the *Mabo* decision. But the Government chose a different course. The then Prime Minister, Paul Keating, in his Redfern Address on 10 December 1992 said:

> By doing away with the bizarre conceit that this continent had no owners prior to the settlement of Europeans, Mabo establishes a fundamental truth and lays the basis for justice ...
>
> Mabo is an historic decision — we can make it an historic turning point, the basis of a new relationship between Indigenous and non-Aboriginal Australians.[22]

The eventual outcome was an Act of Parliament, the *Native Title Act 1993* (Cth) (the NTA) which provided legislative underpinning for native title and (for the most part) reinforced the *Mabo* decision as part of Australian law.

Historical evidence was also influential in the 1996 *Wik* decision that pastoral leases in Queensland did not necessarily extinguish native title rights and interests. Such rights and interests might co-exist with the rights of the pastoral lessee, though, in the event of conflict, the pastoralist's rights would prevail.

On this occasion the response was different. The Howard Government had already drafted substantial amendments to the NTA, and responded to the decision by

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20 *Mabo v Queensland*, above note 16 at 109.

21 Some of these critiques are referred to in McRae H, Nettheim G and Beacroft L *Indigenous Legal Issues* (2nd ed) (LBC, Sydney, 1997) pp 213-18.

22 McRae et al, above note 21, pp 220-1.

further amendments. The entire package was eventually enacted as the *Native Title Amendment Act 1998* (Cth) which substantially eroded the rights of native titleholders.[23]

So it might be said that through the work of scholars, the reports of national commissions of inquiry, and judgments of the High Court, important truths, long unknown by most Australians, have now been revealed. The next stage is to proceed to reconciliation.

Reconciliation

Meanings of reconciliation

The 1987 version of *The Macquarie Dictionary* offers the following definitions:

> to render no longer opposed; bring to acquiescence (fol.by *to*): *to reconcile someone to his fate.*
>
> to win over to friendliness: *to reconcile a hostile person.*
>
> to compose or settle (a quarrel, difference, etc).
>
> to bring into agreement or harmony; make compatible or consistent: *to reconcile differing statements.*

Most of us would regard the second and third of these definitions, and possibly the fourth, as the relevant meanings in the context of the current reconciliation movement. I wonder, however, if some people understand the term in the first of these senses, such that it is for indigenous Australians to reconcile themselves to their fate!

Where did the idea come from in the Australian context?

In the first instance we could trace the idea back to 1768 when the Admiralty's secret instructions to Lt James Cook said that, in the event that he should find the Great South Land, he should, 'with the consent of the natives', take possession of 'convenient situations' in the name of the King; otherwise, if he found the country

23 Nettheim G 'The Search for Certainty and the *Native Title Amendment Act 1998* (Cth)' (1999) 22 *University of New South Wales Law Journal* 564.

uninhabited, he should 'take possession for His Majesty'.[24] In the event, having sailed up the eastern coast of Australia, during which voyage he encountered 'natives', he took the later course and claimed the eastern half of the continent, without 'the consent of the natives'.

Given the initial failures to establish terms for British colonisation, we can trace the modern movement for addressing relationships between the first peoples and the settler society back to 1979 when the National Aboriginal Conference (NAC) proposed a treaty to settle outstanding issues. The NAC was supported in this initiative by the Aboriginal Treaty Committee led by Dr HC (Nugget) Coombs, Judith Wright and others. The Fraser Government promised to consider the idea, provided the proposed outcome was not described as a 'treaty'. The NAC substituted a Yolgnu word, 'Makarrata' which, it seems, refers to the settlement of differences after a dispute. Discussions proceeded until around 1983. In that year, the Senate Standing Committee on Constitutional and Legal Affairs published a useful report on the proposal.[25]

In September 1987 Prime Minister Hawke resuscitated the idea of a treaty. The following year, he responded positively to the Barunga Statement from the Northern Territory Aboriginal Land Councils seeking recognition of indigenous rights. Around this time the then leader of the Opposition, Mr Howard, made it clear that he could not accept anything called a treaty within Australia.

The 1980s were a period of some difficulty in relation to indigenous Australians' rights. During the 1970s, the move towards legislative recognition of land rights had been supported for the Northern Territory on a largely bipartisan basis by Whitlam and Fraser. Land rights laws had been enacted in some of the States, but the move petered out in WA. Opposition from WA's Burke Government led Hawke to abandon plans for national land rights legislation in 1984. Even in the Northern Territory the land rights act was under siege, and was eventually amended in ways which weakened the legislation. The major political parties seemed bitterly opposed on indigenous issues.

It was in this context that in the Bicentennial year, 1988, Professor James Crawford and Fr Frank Brennan proposed a new approach:

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24 McRae et al, above note 21, p 33.

25 Senate Standing Committee on Constitutional and Legal Affairs *Two Hundred Years Later – A Report on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People* (AGPS, Canberra, 1983).

> A national declaration of shared principles and common commitments will be worthless unless it attracts bipartisan support in the Parliament ... Bipartisan support seems impossible while the Government retains carriage of the matter ...
>
> If the final document (whatever it is to be called) is to 'be accepted as a valued and significant statement by all Australians' as the Prime Minister hopes, the process of consultation and negotiation will have to be under the verifiable supervision of citizens respected by Government and Opposition, by Aborigines and non-Aborigines. The timetable and process will have to be immune from Government error and Opposition derailment.
>
> [T]he process should be removed from the party political forum and entrusted for the time being to some independent body which can carry forward a process of consultation and negotiation, on which, at least, the major parties may be able to agree. In our view this means that we need an independent statutory commission, with power to convene an annual meeting of Federal and State governments, major political parties, and Aboriginal groups.[26]

They went on to suggest a 'signing date of 1 January 2001, the first centenary of our Federation ...' Their suggestion was for:

> ... the establishment of an Aboriginal Recognition Commission. The Commission would have the general task of drawing up a Charter of Aboriginal Recognition, and the particular function of reviewing governmental action which may be in conflict with the principles to be contained in the Charter.[27]

They also suggested a new preamble to the Constitution at the turn of the century. They went on:

> If we do not attempt to hammer out an agreement providing Aborigines with a secure foundation for their future, we will be left dependent on a legal regime which — as a historical matter — excluded the original Australians from the process of agreement to unite in an indissoluble Commonwealth, and which gives no permanent, assured, formal recognition of their continued entitlement to choose to maintain their traditional lifestyle under the law. Such a failure will maintain the fictional character of the constitutional basis for the continued subjection of Aborigines to our laws without their consent.[28]

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26 Brennan F and Crawford J 'Aboriginality, Recognition and Australian Law: where to from here?' (1990) 1 (1) *Public Law* 53 at 68-9.

27 Brennan and Crawford, above note 26 at 74.

28 Brennan and Crawford, above note 26 at 76.

Council for Aboriginal Reconciliation

The idea of a non-government, representative body to preside over the resolution of outstanding issues was picked up by the then Minister for Aboriginal Affairs, Robert Tickner. He managed to establish a positive working relationship with the then Shadow Minister, Dr Michael Wooldridge. With the additional support of the Australian Democrats, the *Council for Aboriginal Reconciliation Act 1991* (Cth) was enacted with cross-party support. It was to consist of 25 members, 13 indigenous and 12 non-indigenous. The Council has been constituted or re-constituted three times, and the third Council completed its term at the end of 2000 when the Act's sunset clause became operative.

Note the change of name: reconciliation rather than recognition.

In his second reading speech, Tickner indicated that he had in mind no narrow sense of the term: 'The process of reconciliation has as its objective the transformation of Aboriginal and non-Aboriginal relations in this country'.[29]

The object of the Council, according to the Minister,

> ... is to promote a process of reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community, based on an appreciation by the Australian community as a whole of Aboriginal and Torres Strait Islander cultures and achievements and of the unique position of Aborigines and Torres Strait Islanders as the indigenous peoples of Australia, and by means that include the fostering of an ongoing national commitment to co-operate to address Aboriginal and Torres Strait Islander disadvantage.
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> Consistent with this object, the main functions of the Council will include:
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> - to undertake initiatives for the purpose of promoting reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community;
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> - to promote by leadership, education and discussion a deeper understanding by all Australians of the history, cultures, past dispossession and continuing disadvantage of Aborigines and Torres Strait Islanders and of the need to redress that disadvantage;
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> - to provide a forum for discussion by all Australians of issues relating to reconciliation with Aborigines and Torres Strait Islanders and of policies to be adopted by Commonwealth, State, territory and local governments to promote reconciliation;

29 Minister for Aboriginal Affairs, *Second Reading Speech*, Parliamentary Debates 30 May 1991 (AGPS, Canberra, 1991).

- to consult Aborigines and Torres Strait Islanders and the wider Australian community on whether reconciliation would be advanced by a document or documents of reconciliation; and

- after that consultation, to report to the Minister on the views of Aborigines and Torres Strait Islanders, and of the wider community, as to whether such a document or documents would benefit the Australian community as a whole, and, if the Council considers there would be such a benefit, to make recommendations to the Minister on the nature and content of, and manner of giving effect to, such a document or documents.[30]

That was the task. The first Council was constituted with Pat Dodson as Chairman and Sir Ronald Wilson as Deputy Chairman. The Council established early as its vision 'A united Australia which respects this land of ours, values the Aboriginal and Torres Strait Islander heritage, and provides justice and equity for all'.[31]

The *Mabo* decision was handed down by the High Court during the Council's first term, and was welcomed by the Council as providing a major boost to reconciliation. This was clearly correct, insofar as it meant that the recognition of land rights was not just dependent on the goodwill of governments, but was also a matter of inherent and continuing legal right. But misunderstandings of the impact of the decision in relation to 'backyards' and so on, created a volatile political climate and some antipathy to indigenous aspirations. Several 'ambit' native title claims did not assist — for example, claims to central Brisbane and a claim to one-third of NSW.

There was a similar outbreak of hysteria after the 1996 *Wik* decision, continuing during the extended process of amending the NTA.

Regrettably, during these crucial years, the degree of cross-partisanship which had supported the enactment of the *Council for Aboriginal Reconciliation Act 1991* (Cth), evaporated. Indigenous issues became a battleground between Governments and Oppositions. The vision of transcending politics, advocated by Brennan and Crawford, and by Tickner and Wooldridge, failed.

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30 Minister for Aboriginal Affairs, above note 29.

31 Council for Aboriginal Reconciliation *Walking Together: The First Steps. Report to Federal Parliament, 1991-1994* (AGPS, Canberra, 1994) pp xi-xiii.

People's movement

One thing which the Council for Aboriginal Reconciliation was able to achieve over the years was some degree of decentralisation of its own program. Today, there are State and Territory Reconciliation Committees and hundreds of reconciliation groups operating at a community level throughout the country.

Again, it is, in retrospect, a pity that the move towards a peoples' movement did not get under way sooner. There were precedents. After 1975, when the *Racial Discrimination Act 1975* (Cth) was enacted, the first Commissioner for Community Relations, Al Grassby, made a point of establishing local groups all around Australia.

It is at the local level, where people live and work together, that reconciliation initiatives may best be developed, and it has been particularly valuable to enlist local governments to the cause.

When the first major national reconciliation event was held in 1997 — the Australian Reconciliation Convention in Melbourne — people from reconciliation groups from all over Australia gathered in what became an extraordinarily powerful event. In NSW, a State Reconciliation Convention was held in Wollongong in 1997 and also helped to energise people from groups around the State. The 'Corroboree 2000' event held in Sydney on 27 May, and followed on the 28 May by the mass walk across the Sydney Harbour Bridge, provided a major boost to the reconciliation cause. In the meantime, at the end of 2000, the work of the Council for Aboriginal Reconciliation was handed on to a new, non-government body, Reconciliation Australia.

Document Towards Reconciliation

The major focus for 'Corroboree 2000' was the unveiling of the final version of the Council's Document Towards Reconciliation. Drafts of this document had been widely circulated for discussion at meetings around Australia. Before the event, newspapers published what appeared to be the Council's final wording of the document together with the current Prime Minister's preferred alternative language.[32]

This document is a relatively short statement of broad principle. It has no teeth, in terms of the Brennan-Crawford vision of a Charter of Aboriginal Recognition. But it is connected with four national strategies which do, at least, propose guidelines for more substantive commitments.

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32 *The Sydney Morning Herald* 11 May 2000 p 6.

National strategies

The national strategies are:

- National Strategy for Economic Independence;
- National Strategy to Address Aboriginal and Torres Strait Islander Disadvantage;
- National Strategy to promote Recognition of Aboriginal and Torres Strait Islander Rights; and
- National Strategy to Sustain the Reconciliation Process.

The last of these strategies can be considered first. It involves a new organisation to take over the role of the Council for Aboriginal Reconciliation. It will not have Government support on anything like the scale of the Council, modest though that has been, and will need to raise funds where it can. It should also have direct linkages to the State and Territory Reconciliation Committees which, themselves, need to have structural links to local community groups.

The National Strategy for Economic Independence is partly self-explanatory. And it links to the National Strategy to Address Aboriginal and Torres Strait Islander Disadvantage. It is interesting that, at the same time as these national strategies are being developed, the Australian Government is preparing a new version of its National Action Plan for Human Rights.

Australia's National Action Plan

Australia first developed proposals for a National Action Plan for Human Rights at the time of the World Conference on Human Rights held in Vienna in 1993. The idea won considerable support at the Conference, and the first Australian National Action Plan was unveiled not long afterwards. The example has been followed by some other nations.

On the subject of indigenous disadvantage, the statistics continue to disclose that Aborigines and Torres Strait Islanders are markedly worse off than other Australians on such socio-economic indicators as relate to health, housing, education and employment. (Such matters have been referred to in successive annual Social Justice reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner, and in other reports.)

Australia has ratified the International Covenant on Economic, Social and Cultural Rights. That Covenant requires States Parties to 'take steps' to meet the obligations

under the Covenant. It also requires that the rights under the Covenant should be exercised without discrimination based on race or other grounds. The markedly disparate statistics for indigenous Australians would seem to indicate that Australia is in breach of its obligations, and that it needs to 'take steps' to address such matters. The obvious place to take such steps is in a National Action Plan.

Accordingly, the National Strategy to Address Aboriginal and Torres Strait Islander Disadvantage should be drafted so as to be capable of direct incorporation in the new National Action Plan.

The National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights first requires definition of what those rights are.

Indigenous rights

Over the years there have been many opportunities for indigenous Australians to identify what they claim to be their rights. Since the 1960s, the major focus has been land rights, and most Australians will be aware that a restoration of available lands is a high priority for many indigenous Australians, for cultural and spiritual reasons, as well as economic reasons. Recognition of continuing native title as a legal right has been a highpoint for indigenous peoples in this area.

Not all Aborigines and Torres Strait Islanders will be able to claim native title in respect of their traditional country. Some will have retained too little of their cultural connection with the land to be able to establish their claims: Justice Olney held this to be the case in relation to the Yorta Yorta claim,[33] though his judgment has been appealed. Some indigenous people will not be able to claim their lands on the ground that acts of governments have extinguished their native title rights: differing judicial views about what is sufficient to extinguish native title rights will need to be resolved by the High Court.

The Keating Government developed a three-stage response to the Mabo decision. Stage 1 was the *Native Title Act 1993* (Cth). Stage 2, the establishment of the Indigenous Land Corporation with funding to purchase land which is otherwise unavailable for Aborigines and Torres Strait Islanders. The third stage was intended to address the non-land aspirations of indigenous Australians in what was referred to as the 'Social Justice Package'.

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33 *The Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] 1606 FCA (18 December 1998); (1999) 4(1) *Australian Indigenous Law Reporter* 91.

The Government asked the Council for Aboriginal Reconciliation and ATSIC to consult widely and to prepare submissions to the Government. They did so. So did the Aboriginal and Torres Strait Islander Social Justice Commissioner. Peter Jull writes of these 1995 reports:

> First of all, it is unlikely that as full and ambitious a national policy development process has ever taken place in any country, and certainly never under the control of indigenous people themselves ...
>
> [S]econd ... the three reports reach down into the deep layers of indigenous ethnopolitics for their strength and purpose. These are no mere lists of goodies or earnest platitudes. Rather, they are fundamental expressions of the will of indigenous peoples to survive and express themselves as distinct communities. They are also a principled and generous attempt to work out a relationship with contemporary Australia, in which both indigenous and non-indigenous peoples can live side-by-side in mutual respect and goodwill.[34]

ATSIC's draft Principles for Indigenous Social Justice were designed 'to guide all future relationships between the Commonwealth and indigenous peoples'. Major structural changes would include 'constitutional recognition, regional autonomy ... Treaty ... compensation, improved service delivery ... protection of rights ... opportunities for economic development'.[35]

The draft Principles would require Commonwealth acceptance of the fundamental rights of Aboriginal and Torres Strait Islander peoples to:

(a) recognition of indigenous peoples as the original owners of this land, and of the particular rights that are associated with that status;

(b) the enjoyment of, and protection for, the unique, rich and diverse indigenous cultures;

(c) self-determination to decide within the broad context of Australian society the priorities and the directions of their own lives, and to freely determine their own affairs;

(d) social justice and full equality of treatment, free from racism; and

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34 Jull P 'An Aboriginal Policy for the Millennium: the Three Social Justice Reports' (1996) 1 *Australian Indigenous Law Reporter* 1.

35 ATSIC *Recognition, Rights and Reform* (ATSIC, 1995) pp ix-x.

(e) exercise and enjoy the full benefits and protection of international covenants.[36]

Like ATSIC, the Council for Aboriginal Reconciliation put, at the forefront of its report, overcoming socio-economic disadvantage. It referred to such matters as 'citizenship rights'. It distinguished these individual equality rights from what it described as 'Indigenous rights', by which it referred to the collective and distinctive rights of indigenous peoples in relation to land and waters, culture and so on.[37]

The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, concentrated on processes for achieving structural changes. He argued the need for a transition 'from the administration of Indigenous welfare to the recognition of Indigenous rights'.[38] He focused on constitutional reform, regional agreements, reform of the funding of citizenship services for indigenous peoples, and international connections.

ATSIC made 113 specific recommendations, and the Council for Aboriginal Reconciliation 78.

Commissioner Dodson said:

> [T]hose who fear that the full recognition of our unique place in modern society will be divisive, or that it violates principles of social equality, are dead wrong. Australia is divided already.
>
> There is a black, oppressed, imprisoned Australia dispossessed from its home but increasingly unwilling to tolerate this injustice. And there is another Australia which believes that it was the first and only Australia, and insists that our ancient cultures are, if anything, decorative curiosities.[39]

This was written only five years ago. What progress has been achieved since then in closing this divide?

First, let me expand on the suggested distinction between 'citizenship rights' and 'indigenous rights'.

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36 ATSIC, above note 35, p 10.

37 Council for Aboriginal Reconciliation *Going Forward. Social Justice for the First Australians* 1995 pp 22, 26-7.

38 *Indigenous Social Justice. Strategies and Recommendation* 1995 pp 1, 5, 7.

39 Above note 38, Vol 1, p 8.

Citizenship/equality rights

The demand is that standards of health, housing, education, employment and the like for Aboriginal people and Torres Strait Islanders should be comparable to those enjoyed by non-indigenous Australians. This aspiration has been endorsed by successive governments, including the Howard Government which speaks of it as 'practical reconciliation'.

How is the goal to be achieved? The socio-economic indicators are so bad for many Aboriginal people and Torres Strait Islanders that the achievement of approximate equality will require a commitment of resources over some period of time. The problem is that the provision of additional levels of per capita funding for indigenous Australians is seen by many other Australians as offending principles of equality.

The fallacy in this position is that it insists on 'formal equality' of treatment, when the emphasis needs to be on achieving 'substantive equality' of outcomes. Aristotle pointed out that injustice arises both when equals are treated unequally and when unequals are treated equally.

There is another dimension to overcoming disadvantage to which Commissioner Dodson referred. Recognition of this may serve at least to reduce the need for additional allocations of public monies. Commonwealth revenues have been distributed to States and Territories either as tied grants or as untied grants. The untied grant monies are distributed on the basis of Commonwealth Grants Commission formulae which take into account differential needs and circumstances among the several jurisdictions. Thus the Northern Territory receives much more per capita than New South Wales. (There is little reference to 'formal equality' in this context!)

The formulae take into account various factors. They include the additional cost of providing services to remote communities and, especially, Aboriginal and Torres Strait Islander communities. But there are no effective mechanisms for ensuring that the State or Territory actually commits the appropriate proportion of its differential funding for the particular purpose.

Let me pose a fanciful example. A Government chooses to construct a lavish new Parliament building, instead of improving water and sanitation in remote communities. The same Government chooses to include in its record of expenditure on Aboriginal affairs the cost that the Government has incurred in opposing land claims. There is a clear need for improved accountability in these matters.

Indigenous rights

The collective indigenous rights to territory, autonomy, law and culture are distinctive

to Aboriginal and Torres Strait Islander peoples as the First Peoples. They find support in international instruments accepted by Australia. They have been recognised in a number of nations.

The Howard Government is clearly unwilling to recognise these rights, even in such a symbolic statement as the Australian Declaration Towards Reconciliation. This is evident from the Prime Minister's alternative wording for the Declaration.[40] It is also evident from actions by the Commonwealth Government which appear to represent retreats from the recognition of such rights by previous governments.

The 1967 referendum amended the Constitution with the aim of giving the Commonwealth Parliament power to pass laws with respect to Aborigines, a power which had been expressly excluded. Over 90 per cent of the voters supported the move in the belief that indigenous Australians would receive a better deal from the national level of government than they had been receiving while left to the tender mercies of State and Territory governments.

In practice, the Commonwealth has, for the most part, left matters to the States and Territories.[41] With few exceptions, Commonwealth legislation which has been of particular benefit to indigenous Australians has been based on other Commonwealth powers.

The landmark *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was based on the 'territories power' in the Constitution (s 122), and was confined to the Northern Territory (though it did inspire some States to pass land rights Acts of their own).

The *Racial Discrimination Act 1975* (Cth) was based on the 'external affairs' power (s 51 (xxix)) and was not specifically targeted to indigenous Australians. It has, of course, been of particular benefit to them: it was of critical importance to the *Mabo* litigation surviving to reach the High Court, and to the overturning of Western Australia's legislation to wipe out native title in that State.

The Commonwealth *did* use the 'races power' (s 51 (xxvi)) when it enacted the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) to provide a 'federal safety net' in the event of failure to protect indigenous heritage at State or Territory level.

But — the Parliament giveth, and the Parliament taketh away.

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40 *The Sydney Morning Herald*, above note 32.

41 Marr D 'Betrayal' *Sydney Morning Herald* 20 May 2000 p 1S.

Issues of territory

On issues of territory, the Howard Government established the Reeves Inquiry into the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The resultant report recommended substantial changes to the Act, including the break-up of the Central and Northern Land Councils. A Parliamentary Committee has recommended against many of the suggested changes, unless there is Aboriginal support, but some, at least, of the recommendations appear likely to be pushed by the Government.[42]

As to native title, the *Native Title Amendment Act 1998* (Cth) substantially derogated from indigenous rights under the original *Native Title Act 1993* (Cth) and also represented some 'roll-back' of the protections for native title under the *Racial Discrimination Act 1975* (Cth).[43]

Issues of culture

On issues of culture, the Government in 1998 proposed significant weakening of the 1984 heritage protection legislation, leading the Senate to amend the Bill in numerous ways. (The legislation is still in limbo.) In addition, the Government secured enactment of the *Hindmarsh Island Bridge Act 1997* (Cth) which amended the 1984 Act by removing its application to the Hindmarsh Island Bridge area.[44]

Issue of autonomy

On the issue of autonomy, the Government has back-tracked from the use, by a succession of previous Governments, of the language of 'self-determination'.[45]

So, the 1967 amendment to confer legislative power on the Commonwealth parliament has not provided the level of security sought by indigenous Australians.

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42 Reeves J, QC (ATSIC) *Building on Land Rights for the Next Generation. The Review of the Aboriginal Land Rights (Northern Territory) Act 1976 Report* (2nd ed). House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, (Commonwealth Parliament, Canberra, August 1999).

43 Nettheim, above note 23.

44 A challenge to the Constitutional validity of the amending Act was unsuccessful in *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

45 Dodson M and Pritchard S 'Recent Developments in Indigenous Policy: the abandonment of self-determination' (1998) 4(15) *Indigenous Law Bulletin* 4.

Challenges for Australian law

Constitutional change

If Commonwealth legislation is insufficient, as against later Commonwealth legislation, to secure indigenous rights, the next level of security must be at the Constitutional level.

Indigenous rights may also be accorded a level of enhanced security at State or Territory levels. In 1998 the Northern Territory Government put forward a draft Constitution as the basis, it was hoped, for admission of the Territory as a State. The draft did offer some protections for Aboriginal rights, but the provisions were greatly watered down from earlier proposals from the Legislative Assembly's Sessional Committee. Aboriginal Territorians proceeded to hold their own Constitutional Conventions. Some 800 delegates from Central Australia gathered for several days and produced the Kalkaringi Statement, which was later endorsed and supplemented at a Territory-wide Convention held at Batchelor.

The Kalkaringi Statement declared that the several Aboriginal Nations had long had their own Constitutions, and their own laws and authority structures. It went on to say that they withheld their consent to the proposed Constitution until there was proper negotiation with them, and adequate protection for Aboriginal land rights, laws and authority structures and culture. The forthright Aboriginal rejection of the draft Constitution for the Territory was a major factor in its rejection by a majority of the voters in a Territory referendum.[46]

At the national level, various proposals for Constitutional change have been put forward over the years.

Preamble

One proposal has been for a new preamble which would acknowledge indigenous peoples as the first peoples of Australia. Some consideration was given to this by the Constitutional Commission in 1988. It was also considered in the several 'social justice package' reports. The Council for Aboriginal Reconciliation reported that 'there was wide ranging support to have such an acknowledgment inserted in the Constitution, provided it was regarded as a first step of a broader process'.[47]

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46 Nettheim G 'Aboriginal Constitutional Conventions in the Northern Territory' (1991) 10(1) *Public Law Review* 8.

47 Council for Aboriginal Reconciliation, above note 37, p 36.

A draft preamble for the Constitution which included some acknowledgment of indigenous Australians was rejected at the most recent referendum which also rejected proposals for Australia to become a republic.

Races power

On more substantive issues, there have been proposals to amend the 'races power'. In 1988 the Constitutional Commission recommended that s 51 (xxvi) be deleted and replaced by a specific power to pass laws with respect to 'Aborigines and Torres Strait Islanders'. The interpretation of the existing provision in the *Hindmarsh Island Bridge* case[48] has led to suggestions that the power become one to pass laws 'for' or 'for the benefit of' Aboriginal people and Torres Strait Islanders.

Racial discrimination

There are also proposals to incorporate the prohibition of discrimination on the basis of race in the Constitution rather than leaving it at the level of statute which Parliament may amend when and if it chooses.[49]

Protection of indigenous rights

At present it appears that the only Constitutional basis for the protection of indigenous rights is to be found in the requirement that any Commonwealth law with respect to the acquisition of property must provide for 'just terms' compensation (s 51 (xxxi)). This is important as far as it goes, and receives some acknowledgment in the Native Title legislation.

There is also the possibility of broader protection of indigenous rights on the model of s 35 of Canada's Constitution which, since 1982, has recognised and affirmed 'existing aboriginal and treaty rights'.

Such Constitutional changes would help to provide for both Aboriginal recognition and reconciliation. But amendments to the Constitution are dependent on the political will of the government of the day and, ultimately, of the voters in a referendum. Present prospects for such changes at the national level are not bright. There is greater room to move at State or Territory level. (It is worth noting that the Standing Committee on Law and Justice of the NSW Legislative Council is currently considering a State Bill of Rights.)

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48 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

49 Council for Aboriginal Reconciliation, above note 37, p 38.

Participation in Government

There have also been calls from indigenous Australians to ensure the participation of Aborigines and Torres Strait Islanders in government. A NSW Parliamentary Committee recently considered the possibilities of ensuring indigenous participation in the membership of Parliament itself.[50] Precedents exist in New Zealand, the US State of Maine, and elsewhere.

Inter-governmental financial arrangements

Again, there have been proposals for an overhaul of the inter-governmental financial arrangements referred to earlier. Such proposals include suggestions that appropriate indigenous organisations be directly funded for the provision of essential services, bypassing State and Territory governments.

Regional agreements

For some time there has been growing indigenous interest in resolving such matters through the medium of negotiated regional agreements, drawing on modern Canadian experience. There have been the seeds of regional indigenous approaches to such matters in the Torres Strait, in the Kimberley and in Cape York.[51] Provisions in the 1998 amendments to the *Native Title Act 1993* (Cth) for Indigenous Land Use Agreements provide, potentially, a stronger basis for this sort of approach.

Treaty

At the national level, a negotiated agreement is envisaged by some, and was supported in the 'social justice package' reports from ATSIC and the Council for Aboriginal Reconciliation. The Constitutional Commission in 1988 reported that such a 'compact' was feasible, and that there were ways of incorporating it into the Constitution. Discussion of a 'treaty' re-surfaced after 'Corroboree 2000'.[52]

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50 Standing Committee on Social Issues, Legislative Council, Parliament of New South Wales *Enhancing Aboriginal Political Representation. Inquiry into Dedicated Seats in the New South Wales Parliament* Report No 18, November 1998.

51 Harris A (ed) *A good idea waiting to happen. Regional Agreements in Australia. Proceedings from the Cairns Workshop July 1994* (Cape York Land Council, Cairns, 1995). Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice. Strategies and Recommendations. Submission to the Parliament of the Commonwealth of Australia on the Social Justice Package* April 1995 Vol 1, chapter 3 and Vol 2.

52 Nettheim G 'We need a deal but it's best to skip the t-word' *The Australian Financial Review* 16 June 2000 p 32.

Self-government and self-determination

These 'autonomy' ideas are still relatively novel in Australian public discussion. By contrast, US law since the 1830s has long accepted the notion of a residual, if subordinate, 'sovereignty' as belonging to Indian nations, many of which have tribal governments and tribal courts. More hesitantly, Canadians have now accepted that First Nations peoples have an inherent right of self-government.

The discussion in Australia has been less explicit. But there are a number of instances here of what could fairly be described as examples of indigenous self-government. They include the role of ATSIC itself, the work of indigenous-controlled service delivery organisations, and community justice mechanisms in Queensland.

'Unfinished business'

In September 1999 ATSIC convened an important meeting of some 60 indigenous leaders to discuss future developments. That meeting developed a list of items of 'unfinished business'. Patrick Dodson, the original Chairperson of the Council for Aboriginal Reconciliation, referred to these matters in his Vincent Lingiari Memorial lecture in Darwin.[53] It is known as the Statement on Indigenous Rights which the leaders seek to have embodied in an agreement with governments. The list of matters identified in the Statement are:

- equality;
- distinct characteristics and identity;
- self-determination;
- law;
- culture;
- spiritual and religious traditions;
- language;

53 Dodson P, 4th Vincent Lingiari memorial lecture 'Until the Chains are Broken' <www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/lingiari/4dodson.html>.

- participation and partnerships;
- economic and social development;
- special measures;
- education and training;
- land and resources;
- self-government;
- constitutional recognition;
- treaties and agreements; and
- ongoing processes.

This list of topics substantially represents the main themes in the Council for Aboriginal Reconciliation's Australian Document Towards Reconciliation when coupled with the four national strategies. What the leaders are seeking are commitments by the Commonwealth Government to proceed to implement these 'citizenship' and 'indigenous' rights.

Conclusion

For the most part, the law is no longer part of the problem, at least not explicitly. Indirectly, 'neutral' Australian laws may have a disparate impact on indigenous Australians in such areas as criminal justice, juvenile justice or child welfare. Recent legislation for mandatory sentencing in Western Australia and the Northern Territory exemplifies this possibility.

The question is, to what extent the law can be part of the solution, such as to advance reconciliation?

It is clearly possible for key indigenous aspirations to be given legal recognition through legislation and even Constitutional provision. Such matters have been examined in numerous inquiries in this country. There are also helpful precedents which we can draw on from other countries.

But any such legal recognition depends on the political will to proceed in these directions. Politicians are unlikely to lead if they sense that significant numbers of Australians are unwilling to follow. Significant numbers of Australians remain unwilling to follow in the absence of leadership. Catch 22!

The segment of Australian law which is not directly dependent on the will of politicians is that which derives from the work of the courts in interpreting legislation or the Constitution, or in developing the common law. Since 1992, the High Court has provided impressive leadership in the belated discovery that the common law recognises and protects 'native title'. Currently, the Federal Court, in particular, is interpreting the consequent native title legislation as well. Judges are diverging in their approaches to particular aspects of the law, and the High Court will need to provide ultimate rulings on critical issues.

Principles deriving from the recognition of native title can be extended (as they have elsewhere) beyond matters of land alone into such areas as control of resources, indigenous heritage, and recognition of indigenous laws. The High Court's decision in *Yanner v Eaton*[54] provides an illustration.

But it remains critical that there be an informed Australian public, able to resist the hysteria which is occasionally whipped up by some politicians and some industry groups. With the Council for Aboriginal Reconciliation ceasing to exist at the end of 2000, it is important that the 'People's Movement' continue. Without it, politicians are unlikely to move ahead, and even the courts may feel the need to proceed with caution.

Law has a critical role to play in advancing reconciliation. But even more important is an informed Australian public if the 'unfinished business' is not to remain unfinished for yet another generation. ●

54 *Yanner v Eaton* (1999) 166 ALR 258.