Is reconciliation in Australia a dead end?

Elizabeth Moran*

Since World War II, the idea of political reconciliation has become an increasingly authoritative discourse in international politics, an idea that many assume should be implemented in post-conflict situations. The rhetoric of reconciliation has also gained increasing force in countries seeking to reconcile with their Indigenous population, such as Australia, Canada and the USA. While some of these cases of political reconciliation, in particular South Africa, have been studied extensively, questions about the success and shape of reconciliation remain controversial. This article seeks to contribute to this debate by examining the case of Australia and what it highlights about the underlying assumptions implicit in the very idea of political reconciliation.

In considering the case of Australian reconciliation, this article places a particular emphasis on the way law has influenced the reconciliation process. Through this exploration, it becomes clear that both law and reconciliation are concerned with organising and shaping collective memory, history and identity. Both assume, at the very least, the ability on the part of the parties to share an agreed language or common cultural understandings of terms such as 'apology' and 'compensation' and a rough parity to speak and debate issues of history, collective memory and identity. In the case of Australian Aborigines, such assumptions are deeply flawed: Aborigine and Torres Strait Islander peoples do not participate in public life on an equal basis: they have not been provided with the same access to basic amenities and opportunities, such as health and housing, nor have they been afforded sufficient recognition of their special rights as the original inhabitants of Australia.

Thus, as it stands, reconciliation should be acknowledged as a dead end for Australian Aborigines — unless and until there is a major rethink of the kind of social transformation that would be needed before reconciliation could truly be a process of social, legal and political change in Australia.

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* Elizabeth Moran has undergraduate degrees in arts and law from the University of Queensland and has a master of science degree in sociology from the London School of Economics. An earlier version of this article was submitted as part fulfilment of the MSC degree. The author thanks Dr Clarie Moon (LSE) for her assistance in the development of ideas for the work.

The rise of reconciliation

The idea of political reconciliation has become increasingly popular in international politics since World War II. Many countries undergoing periods of political transition, including South Africa and Chile, have sought to achieve reconciliation in the wake of mass atrocities and state repression. Indeed, some commentators have argued that there is a growing industry of reconciliation experts and international organisations — for example, the Centre for Transitional Justice (see Moon 2004, 185). The language of reconciliation has also gained force in other countries, such as the USA, Canada and Australia, which have sought to achieve reconciliation between their Indigenous and non-Indigenous populations.

But while the rhetoric of reconciliation has become increasingly prevalent worldwide, the meaning of reconciliation remains unsettled and disputed. In order to appreciate the extent to which reconciliation remains a contested concept, one should be aware of a number of points about the existing literature on reconciliation. First, there exists a number of different perspectives or frameworks of reconciliation. The three most relevant frameworks for reconciliation in Australia are a religious model of forgiveness (Volf 2000; Phillips 2005); a political model of reconciliation (Bennett 2003; Digeser 1998; Derrida 2001); and a legal perspective on reconciliation (Balint 1996; 2001). Each of these perspectives presents a different image of reconciliation. Second, even within each of these separate frameworks, there are deep rifts over the meaning of reconciliation. At this juncture, it is useful to sketch briefly some of the disagreements surrounding each of these perspectives, as these issues have affected the practice of reconciliation in Australia.

Religious model of reconciliation

Probably the most significant difference within theological literature on reconciliation is whether forgiveness should be construed as a gift, to be freely given by the injured party, irrespective of any act of penitence on the part of the wrongdoer, or whether it should only be given once the wrongdoer has expressed remorse or has repented. Phillips (2005, 116–18) suggests that this debate roughly reflects the difference between the Thomist Catholic and Reformed Christian or New Testament reading of reconciliation. The Catholic tradition links reconciliation to penance or the sacrament and envisages forgiveness as taking place once a person has confessed their sins. Whereas, according to the Reformed Christian reading of reconciliation, it is linked to the work of Christ who died so that humanity could be reconciled to God. Thus, reconciliation was a gift from God to humankind, given as an unconditional act of grace and love. Phillips (2005, 119) argues that this disagreement over the meaning of reconciliation in theology is reflected in the current debate in Australia.

He contends that those who advocate a form of reconciliation linked to justice see the two concepts as intimately linked. In contrast, Phillips believes that those who supported the government's policy of practical reconciliation perceive forgiveness as being about transcending past differences in the interests of national unit and equality.

Political model of reconciliation

This issue is also explored within a political context, albeit at a very different level. Commentators such as Digeser and Bennett disagree about whether reconciliation is conditional upon justice (for example, trials or truth commissions), or whether forgiveness should be separated from issues of justice. Bennett (2003, 69), on the one hand, believes that forgiveness should only take place on a national level once the wrongdoers have been punished, as he believes it is the action of punishment and, subsequently, repentance that repudiates the earlier undemocratic action. It is at this point that both parties can again occupy the same civic space in which they can begin to establish new relationships. Meanwhile, Digeser (1998, 707) dismisses this approach, pointing out that it is based on a faulty assumption that perfect justice is possible. Therefore, Digeser proposes that forgiveness without conditions may be the only means of renewing relationships between citizens and the state without forgetting past wrongs.

However, the level at which Bennett and Digeser discuss this issue is quite different from that of most theologians, as these authors are specifically concerned with how reconciliation can operate between citizens and the state after the state has committed human rights violations and mass atrocities. For example, Digeser (1998, 701) notes that in order to construe forgiveness as taking place on a state level, one must begin by accepting the proposition that a 'state' or nation can be held accountable for the actions of its citizens. This distinction is significant as it highlights yet another outstanding and unanswered issue about the nature of reconciliation: whether forgiveness is inherently apolitical. In other words, can any attempt by the state to engage in processes of reconciliation really be equated with forgiveness as constructed in theology? Derrida (2001), in particular, looks at this distinction, making a strong argument that political forgiveness or reconciliation is a fundamentally different process to pure forgiveness — in fact, it distorts it. Political forgiveness, unlike pure forgiveness, is regularly mediated or even imposed by the state and seeks to normalise and thereby close off acts, such as crimes against humanity, that should remain extraordinary. Yet, at the same time, political forgiveness invokes and relies on the idea of pure forgiveness in order to operate. Thus, Derrida believes that the conundrum of political forgiveness is that it is irreducible and yet indisassociable from pure forgiveness (2001, 45).

Legal framework for reconciliation

Some observers, such as Teitel (2000) and Hayner (2000), believe that reconciliation operates outside traditional legal institutions and principles of retributive justice. However, in the context of Australian reconciliation, much of the process has taken place in legal institutions or frameworks, and it is therefore important to appreciate how law ties in to projects of reconciliation. This issue has been addressed by a number of critical legal theorists who have sought to link law to social and political processes and in particular the process of reconciliation, including Shklar (1986), Balint (1996; 2001) and Kerruish (2001).

For example, Balint (1996, 105) claims that alongside the rise of reconciliation in international politics and theory, there has also been a concomitant expansion of the role of law in international politics. She terms this the 'juridiciation' of politics. Hence, rather than assuming that law is separate to reconciliation, Balint argues that law is frequently regarded as the foundation for reconciliation. At a minimum, it can provide official acknowledgment of, and account for, past harm — for example, via criminal prosecutions of past harms. However, Balint is cautious about the role law can play in societal reconstruction and the creation of new institutional and social frameworks. In some cases, law can assist in this reconstruction: one example she gives is the case of *Mabo* in Australia in 1992, in which the High Court rejected the hitherto accepted foundational idea that Australia was *terra nullius* (Balint 2001, 133). In that moment, the law recognised a new official history, acknowledging the place of Aborigines as the first inhabitants of Australian land. On the other hand, she believes that law can significantly hinder reconciliation, as it tends to funnel reconciliation into existing legal frameworks and legal language. Balint concludes:

> Law cannot provide an all-encompassing narrative framework. Rules about jurisdiction can leave much of the harm perpetrated unaddressed; rules of legal procedure can preclude much of the telling. Significantly, the law will also of necessity define the kinds of harm it investigates. [Balint 2001, 136.]

While Shklar (1986) does not deal with reconciliation, her thesis about legalism as an ideology[1] rather than a set of institutions is particularly useful in this discussion, as she argues that the key to understanding law is to focus not on institutions but rather on the ideology of legalism. According to Shklar, legalism is a set of attitudes and beliefs or an ideology, which acts as a code of conduct for Western legal and quasi-legal institutions and personnel. More specifically, legalism is an 'ethical

1 In using the term 'ideology', Shklar (1986, 4) distinguishes 'total ideologies' such as Marxism, which she argues seek to establish grand theories or blueprints for action, from her use of the phrase, which is simply intended to refer to political preferences.

attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules' (Shklar 1986, 1) and, in particular, according to legalism, law is neutral, objective and separate from and superior to politics. Legalism is also an inherently conservatising ideal; it tends to assess claims to the extent that they fit within legal language and precedent, prioritising agreement and stability over change (Shklar 1986, 10). This understanding of law echoes the concerns Balint raises about the ability of law to operate as a creative reconciliatory mechanism (an issue that will be returned to in the conclusion to this article).

These concerns are significant to the case of Australia, given that one of the current outstanding issues is the failure of the federal government to agree to any document of reconciliation or to give legal recognition to various Indigenous rights, such as the right to cultural property or to Aboriginal customary law. While these rights are important, as the work of both Shklar and Balint highlights, law can also close off or shut down as much as it opens up — therefore, discussions about using legislative means to advance reconciliation should proceed with caution.

A working definition of 'reconciliation'

This article has already highlighted the significant disagreement which exists over the parameters of reconciliation, a problem that has had significant ramifications for the process in Australia. But while it is important to acknowledge these disagreements and the ambiguities surrounding the term 'reconciliation', it is also important to be aware that most authors who write about reconciliation — including Digeser (1998), Bennett (2003) and Balint (2001) — appear, either explicitly or implicitly, to agree that it tends to involve certain basic features, such as acknowledgment of past harm, compensation and the creation of new visions of society.

A useful working definition of reconciliation is provided by Hamber and Kelly (2004), who argue that reconciliation consists of five basic themes or components: developing a vision of an interdependent and fair society; acknowledging and dealing with the past; building positive relationships; significant cultural and attitudinal changes; and substantial social, economic and political changes.

This working definition is useful, as it provides a basic yardstick against which Australian reconciliation can be assessed. It is also a way of considering whether reconciliation is the 'right' process for Australia at this juncture. As is discussed in the following sections, official acknowledgment of past injustice committed against Australian Aborigines has been limited. Further, the extent to which compensation has been provided, social or political change has been affected or new relationships

between Indigenous and non-Indigenous Australians have been achieved is debatable. But, most importantly, the idea of creating a public space for debate about the past, or the vision of a new society, has not only not materialised in practice but, in the case of Australia, is deeply problematic.

Reconciliation in practice

In any discussion of reconciliation, it is also essential not to over-generalise or to assume that each case is identical to the next. Each process of reconciliation takes place in its own context, and this context significantly influences the institutions and ideas of reconciliation in that particular situation. Accordingly, to build up a better understanding of both individual cases and general principles, it is important to study each case individually. This article therefore concentrates on reconciliation in Australia and provides a detailed overview of the history, institutions, disagreements and, finally, success of the project to date.

Definitions, institutions and principles of reconciliation in Australia

Council for Aboriginal Reconciliation

The year 1991 is generally regarded as the official starting point for reconciliation in Australia (Short 2003, 291). This was the year that the federal Parliament unanimously voted for the creation of the Council for Aboriginal Reconciliation (CAR) pursuant to the *Council for Aboriginal Reconciliation Act 1991* (Cth) (CAR Act). Thus, from the outset, reconciliation was, in the main, a federal government policy rather than a popular movement or a movement driven by Aboriginal communities.[2]

Before examining the work of CAR, I begin with some important preliminary observations. First, it should be noted that CAR's inception was, to some extent, a political compromise: the reconciliation process was partly borne out of the debates about the possibility of the federal government signing a treaty with the Aboriginal and Torres Strait Islander peoples. The possibility of Australia signing such a treaty

2 However, while 1991 is regarded as the 'official' starting point for reconciliation, it is important to note that this legislation did not come out of the blue: it was preceded by a number of influential inquiries and reports, including the 1986 Australian Law Reform Commission Report, *The Recognition of Aboriginal Customary Laws;* the reports of the Royal Commission into Aboriginal Deaths in Custody; and the HREOC report, *Bringing Them Home.* Moreover, there was important Indigenous input into these inquiries and reports.

was first raised in 1979 by the National Aboriginal Conference and gained prominence during the 1980s, when the federal Labour Government made land rights for Aborigines one of its election promises. Once in power, the government focused on creating a document of understanding or treaty. However, the suggestion of a treaty or legal document or agreement was opposed by the conservative opposition, including John Hewson and John Howard. They argued that such a document would be divisive, separatist and likely to have damaging legal implications (Brennan 1992, 58–59). Partly in response to this ongoing opposition, the Labour Government of the time shifted its discussions from talk of treaties to proposals for an agreement or compact. Another reason for this shift in focus was the result of a Senate Standing Committee Report in 1983 that argued that societal 'attitudes' lay at the heart of the Aboriginal problem (Short 2003, 292). Thus, by 1991, the discussion had moved to reconciliation. This background is significant, as it highlights some of the unacknowledged parameters within which CAR was to operate — in particular, the emphasis in CAR's work on education and attitudinal change, rather than legal rights and remedies.

Second, while CAR included prominent members of the Aboriginal community and sought at various stages, such as the Australian Reconciliation Convention in 1997, to consult with Aboriginal people, Aborigines were not directly involved in the establishment of CAR — it was a federal government policy passed by a federal Parliament.[3] This lack of representation was not new. It was not until 1967 that Aborigines were counted 'in reckoning the numbers of people' of the Commonwealth, states and territories in census data.[4] Since that date, numerous critics have observed the ongoing lack of democratic representation of Aboriginal and Torres Strait Islander communities in Australian politics generally, and even in respect of decisions that directly affect those communities.[5] A complicating factor is demographic: Aborigines represent a very small minority of the population, which

3 This is not to suggest that CAR was a stand-alone entity; there was also significant activity by state and territory Reconciliation Committees, as well as a number of local communities, at the same time that CAR operated.

4 The 1967 Referendum also removed the exclusion of 'Aboriginal people in any state' from the Commonwealth's 'race power' in s 51(xxvi) of the Constitution, thereby allowing both the Commonwealth and states to legislate in respect of Aborigines.

5 In 1990, the federal government established the Aboriginal and Torres Strait Islander Commission (ATSIC), which was intended to be such a representative body for these communities. However, while it had a consultative role and consultative structures in Aboriginal communities, its leaders were not democratically elected. It was abolished in 2004 and replaced by the National Indigenous Council. However, the commissioners of this body are directly appointed by the government.

the Australian Bureau of Statistics places at 2.4 per cent of Australia's total population (Trewin and Madden, 2003). Furthermore, Aborigines are geographically dispersed across Australia and tend to live in very remote rural areas rather than urban centres — for example, Aborigines constitute only 1 per cent of the total population living in major cities, compared to 45 per cent in very remote areas. Also, Aborigines tend to be significantly younger than the non-Indigenous population (the median age of ATSIs was 20 years, compared to 36 years in the non-Indigenous population). Not only does this lack of representation call into question the work of CAR, but it also raises serious objections to the very process of reconciliation in Australia.

Now, examining CAR and its enabling Act, reconciliation was not defined either in the Act or by CAR in any of its reports. However, s 5 of the CAR Act, which established CAR's objectives, set the parameters of its work. Section 5 states:

> … the object of … [CAR] is to promote a process of reconciliation between Aboriginal and Torres Strait Islanders and the wider Aboriginal 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 Aboriginal 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.

Thus, under this Act, reconciliation was conceived of as a process between Aboriginal and Torres Strait Islander people and the 'wider community', rather than between Aborigines and the state, or even Aborigines and their history of dispossession and settlement.

In some regards, CAR could be likened to the role played by truth commissions in transitional regimes such as South Africa and Argentina. Like other reconciliatory bodies, such as the truth commissions, CAR was a liminal body;[6] it was a temporary

6 The phrase 'liminal body' is used by Wilson (2001, 19) to explain the status of the TRC in South Africa. In short, it is an institution that exists betwixt and between existing institutions, and therefore tends to operate outside existing structures and logic. It should be noted that CAR was replaced by Reconciliation Australia (RA) in 2001 as the main body for reconciliation. While CAR's status was ambivalent, RA is clear but limited: it is a non-governmental, non-statutory body, which is dependent upon outside funding. Concerns have been expressed about the extent to which this body can therefore carry on the work of CAR; see, for example, the HREOC report, *Aboriginal & Torres Strait Islander Social Justice Commissioner Social Justice Report 2001*.

institution[7] that was intended to encourage social dialogue and projects rather than operating within existing formal or legal structures — for example, its functions as set out in s 6 of the CAR Act, included undertaking initiatives (particularly at a local community level); promoting leadership; education and discussion of Aboriginal history, culture, past dispossession and ongoing disadvantage; and promoting forums for discussion about reconciliation. The only legalistic task that CAR was set was to consult and then advise the minister on whether 'reconciliation would be advanced by a formal document or documents of reconciliation' (CAR Act, s 6). However, even this function was not strictly a legal function — it was simply to consult and advise; it had no powers to implement its recommendations; and its task related to 'documents', rather than treaties or legally binding agreements.

Comparing CAR to truth commissions also highlights some of the actions usually associated with the process of reconciliation that CAR did not undertake. Unlike truth commissions, it did not produce a final report that officially acknowledged the harm suffered by Aborigines. Each of CAR's reports (as required under its Act) was a strategic plan that listed its accomplishments and goals in respect of each of its statutory functions. Even in its final report, CAR did not seek to provide an official history of British settlement and its impact on Aboriginal communities, but instead focused on recommendations and future actions.

Also, while one of its functions was to create forums for discussion, in practice these forums seemed to be limited to community consultation on particular issues, such as whether CAR should recommend to the government that it agree to a formal document of reconciliation. What it didn't create was a public space, either nationally or at a local level, in which both Aborigines and the wider community could tell their stories. Instead, CAR was a strategic body that focused on research, submissions and partnerships to provide practical results.

This was an odd and problematic place to begin the process of reconciliation in Australia — there had been no informal process or societal debate, no recognition of past harm. Indeed, there was no formal treaty or legal foundation for the process. Instead, it was almost as if CAR was trying to find 'solutions' without having identified either in the Aboriginal or wider community what the problems were that need to be 'solved'.

On a more conceptual level, CAR's statement of objectives reflects some of the tensions that emerged in Australia surrounding the very discourse of reconciliation.

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7 Section 30 of the CAR Act provided that CAR would go out of existence on 1 January 2001.

One of its key concerns under the Act was 'Aboriginal disadvantage'. In the preamble in its Act, and many of its policy documents, such as its 1997 Strategic Report, disadvantage was construed in broad terms as including issues relating to land, law and justice, cultural heritage, education, employment, housing and health. The problem with this frame of reference is that it meant that, from the outset, these issues were constructed in terms of *disadvantage* rather than as rights, which Aborigines were entitled to as citizens and Indigenous people of Australia. Further, over time, in particular the government but even CAR in its Final Report, separated and prioritised the latter concerns (of education, employment, housing and health) over the former, an approach that has been widely criticised.

Also, conceptualising reconciliation as taking place between Aborigines and the 'wider community' had assimilationist overtones implying that the key objective of reconciliation is to achieve equality — for example, overcoming disadvantage, such that Aborigines can join wider society. This is more apparent in CAR's vision statement: 'to build a *united* Australia which respects this land of ours, values the Aboriginal Torres Strait Islander heritage and provides justice and equity for all!' Both Short (2003, 293) and De Costa (2000, 280), who analyse the work of CAR in some detail, argue that CAR was essentially another colonialist nation-building project that sought to appropriate Aborigines and Aboriginal culture into mainstream Australian society.

In its defence, it could be argued that, within its objectives and also its various strategic plans, CAR also appeared to embrace an alternative understanding of reconciliation that recognised diversity and difference. For example, Short (2003, 299) points out that although CAR included the idea of Indigenous rights, these were consistently defined in ways that undermined any notion of self-determination or land rights. For example, in the Introduction to its 1995 report *Going Forward: Social Justice for the First Australians,* CAR defined 'Indigenous Rights' in the following terms: 'covering such things as the protection of indigenous art, music, stories and dance, and rights related to indigenous knowledge of the medicinal and food values of native flora and fauna' (CAR 1995, 17).

Thus, while CAR instituted various important educational and strategic initiatives, it was beyond its remit to provide compensation and (arguably) official acknowledgment of the history of past dispossession and harms committed against Aboriginal and Torres Strait Islander peoples. However, its remit did provide the possibility of creating forums of discussion and debate and changing attitudes and relationships. Yet CAR appeared to interpret this as limited to discussion over particular issues, rather than opening up public space for debate about reconciliation and Australia's history. Moreover, as some commentators such as Short and DeCosta

have argued, it is clear that CAR's enabling Act and its own strategic reports framed the reconciliation debate. Indeed, the latent tension over the meaning and direction of reconciliation in CAR's report has developed into a major rift in the public debate, as the federal government has seized upon the notion of social justice, or what it terms 'practical reconciliation', creating a divide between those who accept this priority and others who feel that reconciliation must be joined to Indigenous rights or justice.

The federal government's notion of practical reconciliation

In my outline of the history of CAR, I noted that during the 1980s conservative leaders — including John Howard, then leader of the Opposition — were opposed to a treaty arguing that it was divisive, separatist and might lead to legal claims against the current government. No such opposition has been raised to the process of reconciliation. Instead, it has been redefined and restricted in such a way as to sideline the possibility of a treaty or the acknowledgment of any Indigenous rights.

In its Final Report before it went out of existence, CAR made a number of recommendations, including a submission that the government should adopt and pass its 'Declaration of Reconciliation' as an Act of Parliament.[8] The federal government refused and instead presented a revised Declaration to Parliament on 11 May 2000.[9] Key areas of difference between CAR's Declaration and the government's version include the government's refusal to endorse an approach in which customary law would be taken into account — for example, in criminal proceedings (the government argued that all Australians must be equally subject to a common set of laws); a refusal to accept any reference to self-determination in the Declaration (because it implies the possibility of a separate Indigenous state); and a refusal to formally apologise to Aborigines (it was argued that this implies that the current generation is somehow responsible or accountable for those past policies). Finally, the government refused to pass either this Declaration or any other form of legislation that could be considered a 'document of reconciliation', as it argued that such legislation opens up contestation about the past, rather than achieving closure

8 CAR's Australian Declaration Towards Reconciliation was accompanied by four national strategies (to Sustain the Reconciliation Process, Promote Recognition of Aboriginal and Torres Strait Islander Rights, Overcoming Disadvantage, Economic Independence), collectively referred to as the Roadmap to Reconciliation, which was also intended to assist the ongoing process of reconciliation.

9 The federal government under which CAR was established was an ALP government (led by Bob Hawke and later Paul Keating), whereas a Coalition government (led by Howard) came to office in 1996 with a very different approach to these issues.

(Commonwealth Government 2002, 8).

Instead, the government has concentrated on what it terms 'practical reconciliation', or overcoming disadvantage in what the government has determined are priority areas — namely, education, health, housing and employment (Legal and Constitutional References Committee of the Senate 2003). For example, in its formal response to CAR's Final Report, the government stated: 'Achieving sustainable improvements in outcomes for Indigenous people — that is, better health, better education, and a better standard of living — is the true test of reconciliation' (Commonwealth Government 2002, 1). The various arguments used by the government to justify this approach all reflect an assimilationist agenda on the part of the government: for example, the government argues that Australians are a practical people (singular) who want to see practical results (Commonwealth Government 2002, Executive Summary) and that it is currently concentrating on those areas on which everyone is in agreement, rather than delving into issues that are still contested and divisive (Commonwealth Government 2002, 8).

The government's notion of practical reconciliation has been roundly attacked by various community leaders, authors and politicians. Some seek to challenge the government's 'success' in the areas of 'practical reconciliation'. For example, Professor Mick Dodson, former Aboriginal and Torres Strait Islander Social Justice Commissioner of the Human Rights and Equal Opportunity Commission (HREOC), maintains that the government's notion of practical reconciliation is myopic, as it focuses on issues such as health and housing, which Dodson notes Aborigines are already entitled to as citizens of Australia (quoted by the Legal and Constitutional References Committee of the Senate 2003, 11). Hence, what is now being dressed up as 'reconciliation' is little more than what was previously basic government policy delivery. Other critics, including Dr William Jonas, have said that reconciliation must go beyond these rights, which imply 'sameness' and instead recognise the particular characteristics of Aborigines in terms of Indigenous rights (reported in Legal and Constitutional References Committee of the Senate 2003, 12).

The fundamental concern that I have with the program of 'practical reconciliation' is that it imposes an artificial separation between materialist and symbolic aspects of reconciliation, when it is clear from other cases — such as South Africa, Argentina,

and Chile — that such aspects should not be separated.[10] Also, by defining the material component as limited to improved access to housing, health, education and employment, all other issues are relegated in terms of government spending, but also in the discussion on reconciliation, to falling under the banner of 'symbolic reconciliation'. While the importance of symbolic aspects, such as commemorative spaces, should not be underestimated, effectively to place outstanding legal issues and civil rights — such as land rights, compensation for dispossession, self-determination and so on — in the category of 'symbolic' is deceptive. For example, Dr Jonas in his roles as HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner said in his 2001 report:

> The list of symbolic issues that fall outside the focus of the government on priority areas keeps growing. It includes issues such as an apology and reparations for those forcibly removed from their families, a treaty or the facilitation of agreement-making processes to deal with the unfinished business of reconciliation, and invariably almost any issue concerning human rights which does not meet with governmental approval. One of the main concerns with this approach is that it clearly misconceives, or misrepresents the purpose of a number of initiatives. Agreement-making processes and a treaty are not symbolic measures — they are about a fundamental realignment of the relationship between Indigenous people and the State. [HREOC, Aboriginal and Torres Strait Islander Social Justice Commissioner 2001, ch 6.]

In addition, this notion of 'practical reconciliation' separates both types of reconciliation from the idea of rights — civil rights, such as self-determination or land rights, are now construed as merely symbolic, and social and economic rights, such as the right to health, become questions of disadvantage rather than rights. As Dr Jonas has commented:

> Talk of 'practical reconciliation' asserts moral authority to shut down debate about the importance of proceeding to address disadvantage on the basis of rights by presenting them as something that are merely desirable or aspirational, but not connected to the real issues at hand. Rights are seen as a distraction from the real task on which the government

10 For example, both the Chilean truth and reconciliation commission and the South African truth and reconciliation commission in their respective reports emphasised this point, arguing that both were needed to achieve reconciliation. Material components of reconciliation usually refer to monetary compensation — for example, for 'victims' or their families, or service packages, such as access to health care and counselling. Symbolic aspects tend to involve the creation of commemorative spaces, such as the opening up of Villa Grimaldi (a former detention centre under Pinochet's regime) as a commemorative park in Chile.

is focussed. [HREOC, Aboriginal and Torres Strait Islander Social Justice Commissioner 2001, ch 6.]

Reconciliation and rights

This critique of the notion of practical reconciliation is not new: various commentators, Aboriginal spokespersons and politicians have made similar points at various stages of the debate (see O'Shane 1997; Jonas 2001; Australians for Native Title and Aboriginal Reconciliation website; Behrendt 2001). Indeed, some commentators, such as Phillips (2005, 121), suggest that these critiques form an alternative model of reconciliation in Australia, termed 'reconciliation and justice' or 'reconciliation and rights'. There are three essential differences between this alternative model of reconciliation and the one presented by the federal government. First, under this alternative model, rights are seen as integral to the progress of reconciliation and the extent to which new relationships can be forged between Aborigines and white Australians (Dodson 1997b). Second, the concept of rights in this model is sufficiently broad so as to encompass both the rights of Aborigines as citizens of Australia and their special rights as the Indigenous people of Australia (Behrendt 2001, 7). These rights are often asserted by reference to international standards, such as the International Convention on the Elimination of All Forms of Racial Discrimination or the United Nations Draft Declaration on the Rights of Indigenous Peoples, rather than existing domestic protection (O'Shane 1997). Third, the role of law in reconciliation is emphasised as important within this model, as it is generally argued that these Indigenous rights should translate into legislation or constitutional amendments, such as revision of the preamble of the Australian Constitution, to recognise Aborigines as the original owners of Australia (Dodson 1997a and 1999).

Some of the advantages of adopting a more rights-based approach include the fact that these human rights standards then become a 'language' that can be used by all parties to communicate harms suffered. It also establishes minimum standards by which future programs — such as health, housing and land rights — can be implemented and monitored. Finally, the language of human rights has an aspirational side, which may inspire people within the movement (Behrendt 2001).

However, there are also limits to this model, as it still operates within the 'reconciliation' framework. In particular, Short (2003, 305) expresses concern that any attempt to define reconciliation as liberal reciprocity, in which the parties seek to discuss and understand each other, still suffers from a tendency to assimilate Aborigines within mainstream society and the existing legal and political

frameworks as it appropriates and subsumes Aborigines and their culture within mainstream institutions and frameworks.

Therefore, although the direction and meaning of reconciliation has been the subject of extensive debate in Australia, the rhetoric or idea that such a process is beneficial and appropriate to Australia has mostly been taken for granted. In fact, some of the people who have, even implicitly, challenged this discourse — for example, by returning to discussions of treaty rights rather than reconciliation — have been attacked for challenging the discourse of reconciliation.[11] In the conclusion to this article, I revisit this assumption and contend that the application of *any* model of reconciliation to Australia at the moment is fatally flawed and should be rejected.

Success of reconciliation in Australia

While many agree that the reconciliation process is, as the Senate Committee Report on Reconciliation concluded in 2003 (HREOC 2003; McMullen in Reconciliation Australia 2004, 10), 'off-track', there has not yet been any systematic study of the success of reconciliation in Australia.

Initially, I questioned whether it was appropriate to analyse the process of reconciliation at this point. My reservation was primarily a theoretical one: how exactly can one measure the 'success' of reconciliation and when should such an evaluation take place? However, if one wishes to determine whether reconciliation is the right process for Australia, and in particular for Australian Aborigines, any answer should be based on a realistic appraisal of the achievements of reconciliation to date.

In this article I have devised three criteria broadly based upon the issues that have been identified by the government, CAR and Aboriginal groups as crucial steps in the road to reconciliation. I first look at what the government has referred to as the 'litmus test of reconciliation' — namely, Aborigines' access to health, housing, education and employment opportunities. However, in light of the criticisms of this construction of reconciliation, I have adopted two other criteria: acknowledgment and compensation for past harm; and, finally, changing attitudes and relationships. Both of these criteria are more difficult to assess, and no attempt is made to proffer a

11 Behrendt (2001) gives one example: ATSIC chairperson Geoffrey Clark at the CAR's Corrborree 2000 called for a treaty, thereby implicitly rejecting CAR's Declaration. He was accused of hijacking the event. A parallel may be drawn with South Africa, in which those families that challenged the legality of the truth commission's work, notably Steve Biko's family, were branded 'anti-reconciliation'.

comprehensive study of these criteria. Instead, particular examples are used that highlight some of the complexities surrounding Australian reconciliation.

Social justice

While the idea of practical reconciliation is deeply problematic, it serves as a useful starting point in evaluating the effectiveness of reconciliation in Australia, as it will be shown that even against this criterion there has been limited progress.

In its formal response to the CAR Report, the government maintained that its program of practical reconciliation was already producing positive results in the key areas of health, housing, education and employment. For example, the government noted that the number of Aborigines commencing secondary school had increased from 29 per cent in 1996 to 36 per cent in 2001; that there had been a decline in infant death rates by a third between 1992 and 1999; and that there had been a decline in deaths from respiratory illness from between seven and eight times to four times that of the non-Indigenous population from 1992–94 to 1997–99. The government had also increased its budget on Indigenous spending to a record $2.5 billion in 2002–03 (Commonwealth Government 2002, 5).[12]

However, various other bodies monitoring the government's performance, including both the Social Justice Commissioner of HREOC and the Legal and Constitutional References Committee of the Senate (2003, 10), which reported on reconciliation in 2003, have contested the success of this program. In stark contrast to the assertions made by the federal government in its formal response, HREOC indicated in a media release on 9 October 2003 that between 2001 and 2003, various key indicators — including Aboriginal life expectancy — had actually worsened, and that others — for example, health — had shown only marginal improvements (HREOC 2003).

One attempt to chart systematically progress in these areas is now being undertaken by the Federal Productivity Commission on behalf of the Council of Australian Governments. In its second report released in July 2006, the Commission noted that there had been mixed results since its first report in 2003. In particular, it noted improvements in relation to home ownership, labour force participation and

12 However, this 'record expenditure' should not be taken at face value: for example, Senator Ridgeway (2002) has pointed out that some of the 'increased expenditure' included money spent on the Commonwealth defending native title claims and the stolen generation cases. Furthermore, these policies tend to encourage duplication and bureaucracy, and they continue to reinforce an 'Aboriginal welfare' industry that regards Aborigines as victims or passive beneficiaries, rather than allowing Aborigines an active role in decision-making.

education results for Aboriginal and Torres Strait Islander populations. However, it also acknowledged that there had been worsening results in relation to incarceration rates for Aboriginal men and women, as well as increasing rates of violence and crime within their communities (ABS 2005, 20). The Commission also acknowledged that in all areas there was still a substantial gap between Aborigines and Torres Strait Islanders and the wider Australian population.

Therefore, a consideration of the government's own 'litmus test of reconciliation' (namely, the extent to which reconciliation leads improved access to health, housing, education and employment for Aborigines and Torres Strait Islander communities) makes it plain that reconciliation is failing to produce substantial results for the communities in Australia.[13]

Justice, acknowledgment and compensation

The second criterion employed in this article is based upon the 'rights and reconciliation' model[14] and considers the extent to which Aborigines and Torres Strait Islanders have received substantive justice in relation to land rights and the claims of some members of the 'stolen generation'.

13 In making this point, I am not suggesting that the federal government is responsible for this gap. Indeed, the reason for the gap is a major debate in Australia — for example, see Neill (2002). However, what I am arguing is that the fact remains that the federal government made improvements in these areas its 'test' for reconciliation in Australia, and if reconciliation is assessed on this basis, it is clear that it has not achieved the hoped-for results.

14 The rights and reconciliation model could give rise to other indicators, such as treaty rights and the recognition of cultural and heritage rights. However, as absolutely no progress has been made in relation to these areas, a point made by both the Senate Committee and the HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner, these criteria are not used in this article. This article limits its discussion to these two cases because, first, both are commonly regarded by the general public as tied up with reconciliation. Second, at least at first glance, they provide a contrast: *Mabo v Queensland* is usually regarded as an example of law and reconciliation opening up new possibilities, whereas in the cases of *Kruger v Commonwealth* and *Cubillo and Gunner v Commonwealth*, the courts effectively shut down the possibility of recognition and compensation for forced removal and separation. However, upon closer analysis both examples are more complex.

Mabo

In 1992, the High Court of Australia upheld Eddie Mabo's claim for legal recognition of his traditional native rights.[15] In recognising the existence of native title, the High Court also overruled the notion of terra nullius (that is, that the land belonged to no one prior to colonisation). In response to this decision, native title legislation was passed by the federal government, as well as by each Australian state and territory regulating these new 'native title rights', and, among other things, schemes were established under which areas of Crown land were vested in Aboriginal and Torres Strait Islander corporations for the use and benefit of their local communities.[16]

Most commentators, including Balint (2001, 133), see this as a foundational moment in Australia's history, as it was the first official acknowledgment of Aboriginal and Torres Strait Islander peoples as the first owners of Australian land. It also recognised the possibility of Aborigines reclaiming certain Crown land, provided that native title had not already been extinguished — for example, by the grant of freehold.

However, others — for example, Dodson (1999), Ridgeway (2002) and Short (2003) — while not downplaying the significance of this decision, have pointed out that there are still noteworthy limitations to the extent to which Aboriginal rights were recognised in *Mabo*. Importantly, the High Court in its decision did not challenge fundamental ideas about sovereignty, which Short argues created an odd result: the High Court, on the one hand, accepted that the land was not empty prior to British settlement, but, on the other hand, did not accept that Aborigines still possessed any type of sovereignty over the land, in the absence of any formal treaty between Aborigines and British settlers (Short 2003, 298). Furthermore, even those Aborigines who could make claims for native title over areas of still-vacant Crown land have had to fit their relationship and history with the land into traditional legal procedure and language. They have also been subjected to the delay that sometimes accompanies legal decision-making — for example, as at 31 December 2005, there had only been 80 final native title determinations (reported by the Native Title Research Unit of the Australian Institute of Aboriginal and Torres Strait Islander Studies, 2005). To highlight these limitations is not to downplay this momentous

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15 There has been extensive discussion and writing about this landmark decision and its impact upon Australian law. This section does not even begin to try to outline all of these controversies, but instead focuses upon the key issues raised by that decision in the context of reconciliation. For a fuller discussion of the case and its consequences, see, for example, Bryan Cohen 'Indigenous land rights: some things remain the same' (1999) 24(3) *Alternative Law Journal* p 121.

16 From 1996 to 1998, the Howard Government made various attempts to implement native legislation that would curb these new 'rights'. It succeeded in curbing native title rights in 1998.

decision or its impact on not only Australian law, but also Australian business, history and culture. Instead, it is intended to draw attention to the fact that changes in the law not only create opportunities for reconciliation and change, but also, often at the same time, can restrain and limit those changes.

Stolen Generation Report and cases

Another area that has been linked to questions about justice, reconciliation and recognition is the claims of the Stolen Generation.[17] It, too, highlights the complexities of 'legal recognition' of rights in laying the foundation for reconciliation.

In 1995, the Commonwealth Parliament established the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, which was mandated to trace past laws, practices and policies which resulted in the separation of Aboriginal children from their parents; examine the adequacy of and the need for change of laws for people affected, including laws of access to records and assistance reuniting families; and consider the principles relevant to determining the justification for compensation (HREOC 1997, Introduction). The central finding of the *Bringing Them Home* report is that the policies of removal constituted genocide, systematic racial discrimination and a crime against humanity (HREOC 1997, Pt 4).

In response, the federal government set aside $63 million to address the needs of the Stolen Generation in terms of mental health counselling, family reunion services and archiving Aboriginal oral history. However, the federal government (unlike most of the state governments) has consistently refused to apologise, arguing that such an apology by the current government, which was not responsible for these past policies, is inappropriate and may also lend itself to legal liability. The federal government has also refused to offer any compensation — for example, in the form of reparations (Journey of Healing 2002, 12).

Subsequently, various claims for compensation have been made against the Commonwealth and other states and territories. In the case of *Kruger v Commonwealth,* the appellants alleged that the law enabling the removal of Aboriginal children from their parents was unconstitutional, as it was contrary to various implied immunities, including the right to legal equality, freedom of movement and protection against genocide. Whereas in the case of *Cubillo and*

17 For example, De Costa (2000, 277) argues that the issue of the stolen generation was 'quickly to become a centre piece of the movement for reconciliation'.

Gunner v Commonwealth, the appellants limited their claims to common law actions for wrongful imprisonment, breach of duty of care and fiduciary duties. All of these claims failed.

The reason for this failure is the subject of a polarised debate in Australia. Some commentators, such as Cuneen and Grix (2004, 25–26), regard these cases as the 'valorisation of a colonial account of history'; others, including Neill (2002, 139–43), have argued that these cases failed because the complainants simply did not have sufficient evidence to support their claims.

But whichever explanation is accepted, the cases highlight some of the difficulties in seeking reconciliation within the existing legal framework. In the case of *Cubillo and Gunner,* some of the difficulties encountered by the appellants in proving their claims included technical issues of evidence and procedure. For example, the Federal Court concluded that the application of the limitations statutes barred their proceedings, as it would be unfair to the Commonwealth to extend time because of the difficulties for the Commonwealth in finding witnesses who still remembered the events and were still alive, in light of this time lapse. The other main reason why the actions of Cubillo and Gunner were dismissed almost appears in contradiction to this determination: the court made an adverse evidentiary finding against the appellants, which more or less overlooked the fact that the appellants faced these same problems of providing witnesses at that point. It also failed to recognise the grave difficulty that the appellants faced in proving that their removal was forcible, given that at the time of their removal, as young Aboriginal children, it was most unlikely that they would have kept written records; the people most likely to keep these records were officials (who were very unlikely to view the policy as forcible). The application of formal legal rules about procedure and evidence seemed to sit uncomfortably with the apparent injustice to the appellants, who had clearly suffered harm as a result of their removal. This point was acknowledged by the court, which commented that these actions had taken place as the result of a policy decision and therefore the best solution to the concerns raised about the Stolen Generation may be a political one.

Returning to Shklar's analysis of legalism, these cases involved judges being asked to adjudicate complex historical and social controversies within the narrow confines of legal language. In each case, the courts emphasised that they were not entering into the debate about the Stolen Generation but were deciding the issues before them on a case-by-case basis. However, inadvertently, these cases exercised a conservatising influence over the debate, shutting down another avenue for official acknowledgment of the harm caused by these policies of removal and separation.

Australian attitudes and relationships

This aspect of reconciliation tends to be regarded as one of the great achievements of reconciliation, as most people assume that the overwhelming majority of Australians support reconciliation. For example, in its Final Report, CAR stated: 'Reconciliation has begun to enter the hearts and minds of the Australian people creating one of the most determined and vibrant people's movement even seen in the history of the nation' (CAR 2000a, ch 6). Similarly, Howard has said: 'there can be no doubt that the mood of the Australian community is overwhelmingly in favour of reconciliation' (reported by Legal and Constitutional References Committee of the Senate 2003, 7).

The most common evidence pointed to in support of this contention is the vibrancy of the people's movement for reconciliation or a grass roots popular movement of support for the process. Some examples of the people's movement in Australia include popular participation in the events of National Sorry Day and the establishment of various community groups, including Australians for Reconciliation and ANTAR (Australians for Native Title and Australian Reconciliation).

However, in 1997 CAR carried out a qualitative study of attitudes to reconciliation held by both Aboriginal and non-Aboriginal Australians, which reveals a more complicated and mixed reaction of the wider population to reconciliation.

First, in relation to the survey of non-Indigenous Australians, most participants agreed that the history of Aborigines is a tragedy and that the current position of Aborigines is unfortunate. Yet, many do not believe that the current government or generation of non-Indigenous people should apologise. One respondent said: 'I kept my daughter out of school the day they signed that sorry book. Why should my eight-year-old daughter say sorry for something that she had nothing to do with? She doesn't know what they are talking about' (Irving Saulwick & Associates 2000a, 71).

Another ambivalence expressed by many of the non-Indigenous respondents related to the place of Aborigines in Australian society today. Many of the respondents believed that Aborigines do not play by the rules, as they are regularly given unfair special treatment by the government and are allowed to engage in anti-social behaviour, such as public drunkenness, that would not otherwise be tolerated. Thus, while many Australians believed that Aborigines have suffered in the past, they still believed these basic thresholds or 'rules' of Australian society should apply to Aborigines but don't. For example, one respondent said: 'There are two different standards: there are Aboriginals and there's us. Take Austudy for example. Why is there an Abstudy? Why are we treating them different? These shouldn't be a difference' (Irving Saulwick & Associates 2000a, 57).

This ambivalence and even resentment is closely linked to the way many of the respondents constructed Australia's identity. Many believed that Australian society could be characterised as multicultural and egalitarian, where everyone is given a 'fair go'. In return, people should be treated the same and play by 'our rules'. This also translates into intolerance for those who don't and are therefore 'bludgers'. One person said:

> Well, every other nationality does. The Italian community, the Greeks, the Asians. Why can't Aboriginals? They seem to make life hard for themselves and for everybody else. They have a chip on their shoulder … Something needs to be done to help them blend in with our society, or stick their own and act civilly. Fair enough, when we first came here we made mistakes, but we've progressed and they seem to want to stick there, holding a grudge. What do you do? [Irving Saulwick & Associates 2000a, 58.]

In contrast, in the survey CAR commissioned of Aboriginal and Torres Strait Islander peoples, the notion of identity was linked to their 'Aboriginality' rather than their membership in mainstream Australian society. Most believed that Aborigines suffered from discrimination and were marginalised members of mainstream society. Another important difference between the two groups was that Aborigines and Torres Strait Islanders who participated in the survey argued that acknowledgment — for example, an official apology — was an essential part of the reconciliation process (Irving Saulwick & Associates 2000a).

Interestingly, both groups displayed a limited knowledge of the process of reconciliation, what it meant and what activities had been undertaken by CAR. Both groups also believed that the process was not for them — Aborigines tended to see it as a sop to make white Australians feel better, and white Australians saw it as aimed at Aborigines. Both expressed some concerns about the contents of the draft document and whether it translated into local action. One Aborigine who was asked about this issue said: 'I have no idea, totally no idea what reconciliation is about because it is not visible, these so-called achievements by reconciliation over the last 10 years have not been visible' (Irving Saulwick & Associates 2000b, 42).

These differences expose a huge but unsurprising gap between the two different groups' reactions to questions about acknowledgment, identity and reconciliation. It is clear from these surveys that these groups do not even appear to have the same understanding of what is meant by crucial terms such as 'apology' (Aborigines tended not to link it to compensation, whereas non-Indigenous people assumed this link). Moreover, these groups appear to have different ideas about where Aborigines should 'fit' within Australian society. If, as is argued below, reconciliation is about creating public space, then these diametrically opposed understandings of identity

and belonging will make any 'discussion' about reconciliation difficult, if not impossible. Finally, neither group appeared to 'own' the process of reconciliation, which makes the idea of a people's movement also problematic.

Some conclusions about reconciliation in Australia

Irrespective of which understanding of Australian reconciliation one adopts, it is plain that it has not achieved the desired results.

First, in relation to the key indicators of 'practical reconciliation' — namely, access to health, housing, education and employment — there have been only limited improvements. Furthermore, it seems that Aboriginal and Torres Strait Islander communities still have little input into how this money is spent.

Similarly, little progress has been made in terms of Aboriginal justice and rights. Many Indigenous rights, such as the right to self-determination, have been repeatedly rejected by the government as divisive and unrealistic. Moreover, official acknowledgment of past harm has been problematic, as reflected in the story of the Stolen Generation and even in the case of *Mabo.*

Finally, while there appears to be a budding grass-roots movement or 'people's movement' for reconciliation, the attitudes of individuals, whether Indigenous or non-Indigenous, remain deeply ambivalent.

Thus, it is apparent that reconciliation has not achieved any of the outcomes that people in Australia had hoped for and advocated.

The next question is who is to blame for this failure. In its Report in 2003, the Legal and Constitutional References Committee of the Senate concluded that the primary reason that the process was 'off-track' was because of the federal government's failure to show adequate leadership in relation to reconciliation, and in particular its refusal to adopt many of the measures suggested by CAR, including passing a document of reconciliation or implementing legislative reform in relation to areas such as Aboriginal intellectual property and cultural rights.

There is no doubt that this critique is correct: as this article has made clear, Australian reconciliation to date has been state-driven and therefore the federal government's re-interpretation of reconciliation as 'practical reconciliation' has had major ramifications for Australian reconciliation. This policy of practical reconciliation has not only limited the types of measures that the government has been prepared to implement over the past few years, but has also moved the goal posts of

reconciliation in Australia. As one commentator has described, this policy ultimately seeks to ameliorate the anomalous Aboriginal statistics in relation to health, housing, education and employment in order that they can integrate (read assimilate?) into broader Australian society.

However, I am of the view that this critique does not go far enough. In Australia's current political climate, the idea of reconciliation is both unsuitable and potentially damaging.

My first concern about the very process of reconciliation is the uncertainty surrounding the term 'reconciliation'. This ambiguity can lend itself to disagreement and presents a real danger that the term could be misinterpreted to suit political agendas not really in keeping with the spirit of the term. One could even point to the federal government's recent policy as an example of this danger, which has allowed them effectively to dress-up increased expenditure and policy delivery as a form of reconciliation, leaving outstanding issues such as legal rights, acknowledgment of past harm and compensation for this harm to one side.

My second concern relates to the existing political and legal framework for Australian reconciliation, which I believe is a major constraint on the ability of this process to produce significant and lasting transformation. Australian reconciliation has, for the most part, been a federal government policy — initiated, implemented, limited and finally 'provided' by the various governments and governmental bodies. This has meant that much of the debate on reconciliation has taken place in legal arenas, including inquiries, reports of statutory bodies and Parliament. Ironically, however, one of the most outstanding gaps in the process is the lack of a formal legal framework recognising certain Indigenous rights, such as self-determination, or their customary law or past dispossession. Indeed, it could be argued that one of the reasons that the process of reconciliation is faltering is that there is no legal foundation upon which the process is based or can be sustained. Australia is the only Commonwealth country that doesn't have a treaty with its Indigenous people.[18] Various commentators and activists, including Brennan (1992), Ridgeway (2002) and Yamirr (1997), have argued that Australia should agree to some legislative foundation for reconciliation — such as a Reconciliation Act or Declaration, or even a Bill of Rights for Aborigines — as a starting point for achieving lasting reconciliation.

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18 Technically, Canada also does not have a treaty with its Indigenous people, but rather it has agreed a series of treaties with some but not all of those people.

However, signing treaties or agreements or passing legislation may not be the panacea that it initially appears. As various legal theorists, including Shklar (1986) and Balint (2001), argue, law is an inherently conservatising discourse that operates within a particular framework requiring social realities to be translated into the language of law, framed as claims and based upon evidence and precedents. The limiting nature of law was reflected in the decisions of *Kruger, Cubillo and Gunner* and even, to some extent, *Mabo.* In each case, experiences had to be reduced to existing legal notions of claims, evidence and procedure. Aboriginal ideas and experiences were subordinated and fitted within these categories.[19] Kerruish (2001, 196–99) takes this point further, contending that Australia's common law is based upon liberal notions of property rights. She argues that within the current legal framework of Australia, Aboriginal customary law and ideas about land and culture will always be at odds with the common law. According to Kerruish, this subordination will always undermine any process of reconciliation, as it limits the ability of the movement to bring about genuine social change.

Finally, what becomes apparent when studying the case of Australian reconciliation (which is otherwise latent in discussions of reconciliation) is that it seems to be based on the idea of the creation of a public space in which individuals can reach shared understandings and possibly even a shared vision of their national identity, history and future. This theme of reconciliation is also reflected in much of the existing literature on reconciliation (see Moon 2004, 188; Derrida 2001, 29; Tavuchis 1991; Short 2003, 305). Consequently, the discourse of reconciliation appears to assume that the parties speak the same language and are able to participate in public discussions upon which official acknowledgment of past harms and collective authoritative stories of those harms are built — assumptions that simply do not apply to Australia at this point in time. As Poole comments, 'the inequality is political and textual: their [Aboriginal] language is not the language of public debate, their history is not taught … their cultures do not enjoy the same public status' (Poole 1998, 418–37, quoted by

19 I am not suggesting that 'law' equates to litigation, or that the limitations on litigation, such as problems regarding procedure and evidence, would plague legislative reform or even agreement with Indigenous Australians (although I do have similar concerns that the 'language' of law may eventually limit the changes that can be brought about by legislation and even agreements, fitting Aboriginal and Torres Strait Islander experiences and rights into Australia's existing legal framework rather than fundamentally challenging and reforming this framework). However, the central purpose of the above discussion is simply to highlight the fact that changes in the law, via litigation, do not necessarily bring about the desired results in promoting Aboriginal and Torres Strait Islander rights, and instead have produced more chequered results.

De Costa 2000, 282). In particular, Aborigines and Torres Strait Islanders do not participate equally in Australian public life, and in particular are not adequately represented in politics or even in policy decisions about Aboriginal and Torres Strait Islander affairs. Even the CAR surveys emphasise the gaps between Aboriginal and Torres Strait Islander peoples' understandings of key concepts such as 'apology' and 'compensation' and the definition understood by the wider Australian community.

One way forward may be to adopt the model of 'reconciliation and rights', which has numerous advantages over practical reconciliation. First, it offers a common language, namely international standards of human rights based on various international agreements, including the United Nations Declaration on the Rights of Indigenous Peoples. Second, such a model explicitly seeks to empower Aborigines via the recognition of both citizenship and Indigenous rights such that they can operate within the public arena on an equal basis, while still respecting their differences.

However, whether in practice the recognition of such rights would provide a common political language that would allow Aborigines to participate on an equal, although different, basis remains to be seen. As already noted, there are always risks and concerns about the extent to which law, including the law of human rights, can create such opportunities for what would need to be a major political, historical and social shift in Australia. Furthermore, there are real risks remaining within the model of reconciliation, allowing for the type of debates and misinterpretation which have already taken place in Australia. Finally, some commentators, for example Short (2003, 305), believe that retaining the idea of reconciliation along with rights may still be a policy for assimilation, as it continues to prioritise citizenship rights (sameness) over Indigenous rights that highlight their difference.

Therefore, the assumption that reconciliation is the right process for Australia at the moment must be called into question. Not only is the term deeply ambiguous and controversial, but more fundamentally one of its key themes or assumptions is the creation or participation in a public space in which national history, memory and identity can be debated and agreed. Such an idea completely fails to recognise the political, legal and even cultural *reality* of Australia at the moment in which Aborigine and Torres Strait Islander communities still exist largely on the margins of society — often voiceless and unrepresented in public debates, their language and history still marked out as separate and subordinate to mainstream society.

Thus, reconciliation in Australia is, at present, at a dead end. In order for reconciliation to be anything else, the issues raised in this article would need to be addressed. There would need to be a critical re-examination of what reconciliation

means and what it is intended to achieve; in particular, is it seeking to create a public space in which Indigenous and non-Indigenous debate raises questions about Australia's history and identity. If this is the intended outcome, then serious thought would need to be given to questions about the ability of Aboriginal and Torres Strait Islander communities to participate in this public space: would granting Aborigines a treaty and Indigenous rights, as well as citizenship rights or even the right to self-determination, allow them to engage on an equal but different footing? Finally, thought should also be given to whether the existing political and legal frameworks would really enable these results, or whether we should also seek to transform these frameworks.

However, such discussions are very unlikely in the current political climate of Australia. Thus, as it stands, the best way forward would be to separate rights from reconciliation, leaving the latter to one side unless and until Aborigines are given substantive rights and justice such that they can be regarded as equal but different participators in any future debates about reconciliation, history and identity. ●

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