

# A crossroads of conscience

Henry Reynolds

## *Native title, international law and Australia's integrity.*



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I want to begin by saying something about reconciliation, and then consider the question of land self-determination and international questions.

### The reconciliation movement

My views about reconciliation have changed considerably over the last few years. Initially I felt some doubt about the process. I felt it was wrongly named. By being called 'Aboriginal Reconciliation' it suggested that it was Aboriginal people who had to reconcile. And reconciliation itself of course can mean two things: it can mean two people reconciling with one another, or it can mean people reconciling themselves with dispossession and all the consequences that follow it.

I also wasn't quite sure what was expected of what we have to call 'white Australians', for lack of another generic term. So I had some doubts about the process. And, as I say, it seemed to be asking much more of Aboriginal Australians than it was of white Australians.

There was also in my mind some suspicion that the reconciliation process of ten years was putting off the question of a treaty or a document. After all, the idea of a treaty was quite commonly dealt with in the 1980s — you'll recall that at one stage Prime Minister Hawke signed the Barunga Statement which suggested that a treaty would be negotiated. We never heard anything more of that.

It was a process I had some doubt about, and of course one has to have some doubt about it now, for different reasons. It was, after all, a process which the Howard government inherited, an idea it felt it couldn't jettison with any degree of safety. They had to go on with it — but with how much conviction, of course, remains to be seen.

One of the problems, I think, is that by next year there will have to be some form of document, some form of words which I suspect, of necessity, will be some form of compromise between what the Reconciliation Council wants and what the government, or more particularly the Prime Minister, is willing to accept.

The danger is that such a compromise will satisfy only relatively few people. It will divide the reconciliation movement between those who say, 'well, some words are better than none'. And it may also of course deeply divide the indigenous community, between those who accept the compromise and those who say 'this is just words and it isn't going to lead anywhere'.

That may be unduly pessimistic — I am sure the government will very much want some agreement to hold up to the world during a year of intense scrutiny from overseas.

So my original doubts about the official process of reconciliation have to some extent remained. However, I regard myself as a convert to the idea of reconciliation, or the popular movement. Let me explain why this has come about.

In the last 18 months I have spoken to many, many audiences all over Australia. Almost everywhere I went, no matter how large or small the community, whether it was lunchtime or at night or whenever, I was on almost every occasion impressed by the size of the audience, whether it was a meeting in a small country hall or the Melbourne City Hall. But there was something else about the audiences and that was their deep concern, their intensity, their obvious concentration on the subject, their clear sense that this was an important thing they were being involved in. The significant thing is that the reconciliation process has spread widely right across Australia. It is no longer just a movement of educated middle class people. It is no longer just an urban movement. There are reconciliation groups all over the country.

These groups are doing many, many interesting things. They are meeting together with local indigenous people, and let me say that this is not just a white movement. The degree of indigenous participation varies widely, but in some places it is very, very substantial. In communities right across Australia, there are people meeting, thinking, researching, talking and coming up quite often with extremely interesting and creative proposals to try and reach reconciliation there in their own communities.

If reconciliation is to achieve anything, it has to happen at both the local and the national level, and I think that probably the local level in the long run is the most important. Even if the process at the national level doesn't lead to anything of great consequence, the local movement will go on, because I am certain that those hundreds and thousands of people who turn out to meetings are determined that something will happen now, in their lifetime.

Quite a lot of those talks I gave related to a book I published last year called *This Whispering in Our Hearts*, a book which people widely read and commented on. The book, incidentally, is about the humanitarians going right back to the 1820s. Many, many people were extremely interested and even inspired by the story of all of these people in the past who stood up and demanded changes to what was happening around them; people who were not willing simply to go along with the rhetoric of colonisation, with the easy moral justification of colonisation and settlement. These people were often isolated one from another. Sometimes they may have had no idea that there were other people who might have thought like them in other districts of Australia. And they often had no idea there was a history of this sort of concern. And yet all over the country there were people who made themselves unpopular, who were boycotted for standing up and saying 'No this is wrong, we should not go on like this'.

People felt moved by the fact that there was a history, before their involvement, which went right back to the 1820s. On the other hand they were deeply depressed that all this activity, all of these fine speeches, all of this powerful rhetoric, all these letters to newspapers and petitions to parliament, in the end had not changed all that much. In fact, you could take some of the letters written to the newspapers in the 1820s in Hobart and Launceston and Sydney (the three towns which had newspapers then); you'd have to change some of the wording because it was a bit archaic, but you could present some of those letters to a contemporary newspaper and you would think they were talking about today.

As well as a sense of continuity, there was a feeling that since these people have been trying to change things for so long, we must now make a difference.

It is that feeling, which I sense in audiences all around Australia, which converted me to be a supporter of reconciliation, that is, of the popular movement. It is a powerful social movement, and for the first time, I think, since 1967 it has given white Australians a means and an instrument to get involved in this cause.

In some places it has been very much a multi-racial movement, and sometimes in quite unlikely places. In the north Queensland city of Mackay (not you would say the most enlightened city in relation to racial matters), the local council, led by the mayor, committed itself to a great deal of expenditure to have a reconciliation convention. It was an enormous success and involved not only the indigenous community (and Mackay also has a very large population of Pacific Islanders) — the whole community became involved in that convention.

Wollongong had a very, very successful convention just recently with again the local government deeply involved, and that's true through much of Australia. But there are also other extraordinary things happening and I'll just take one example.

The Redlands Shire between Brisbane and the Gold Coast is not the place you would pick for doing new things about relations between white and indigenous Australians. It's small farming, it's outer suburban, it used to be the heartland of National Party support, and it was where Russell Hinze came from. The Redlands Shire, with an Italian-Australian ex-cane farmer as its head, has negotiated an extremely progressive land use/native title agreement with the Aboriginal community on Stradbroke Island which is a model of its kind that could be adopted profitably all over Australia.

Once again many people don't know about this and they would not expect that sort of thing to happen in that particular part of Australia, and I'm sure many of you have similar stories about what is happening elsewhere. So the reconciliation movement is I think one which is a cause for considerable optimism — at least about the popular movement.

### Land ownership

However, much of the progress in recent times has not come from politics, it has come from the courts. I speak about this with a considerable degree of sadness tonight because Ron Castan, who probably did more than anyone else to achieve these great jurisprudential victories, died prematurely today.

There is no doubt in my mind that the Mabo case was a judicial revolution and the consequences of that case will go on. One of the sad things, I think, is that so many people say 'Oh it didn't change much. It won't help us etc.' I am convinced the *Mabo* judgement will continue to be of importance in Australia for a long, long time to come.

In the judicial battles that have followed, there have been gains and losses — but nonetheless you can now list the important developments following *Mabo*. Of course the significant thing that *Mabo* did, irreversibly, was to say that all indigenous people were once the owners of Australia — the owners and the possessors of Australia. Some people, like the Meriam of Murray Island, were still the owners and possessors of their country, but other people once were

landowners. They were once landowners and they lost their land, but that is a significantly different situation to being regarded as people who never owned anything.

The significant thing is that once native title was established, then many of those things which protect property owners swung into action, though not all of them. It is a form of title which discriminates, but nonetheless there have been significant advances — for instance, in the Croker Island case, which extended native title out into the seas. There is the decision relating to the far north west of Western Australia, around the Ord River, where the content of native title was significantly expanded — although of course that is being appealed. There was a decision just recently that native title continued to exist on significant areas in and around Alice Springs. There is the case also recently about fishing and hunting rights, finding that they continue unless they have been extinguished.

There have, of course, been defeats — and often it is the people who have suffered most who are most likely to be defeated. The Yorta Yorta people lost their case but that is now under appeal — it was Ron Castan's last case and it is quite possible that the Yorta Yorta will win that appeal. Although the process is slow and cumbersome it rolls on. In the *Yanner* case dealing with hunting and fishing rights, two of John Howard's appointed judges sided with the 5:2 majority which recognised the continuation of hunting and fishing rights.

### A right to self-government?

There is, of course, much more that could be done — the sorts of things that are being done in New Zealand now, and were done in the US in a previous generation. That is, to have some process by which people could go to the court and establish where and how they lost their title and whether or not they should be compensated. The Waitangi Tribunal in NZ is doing this and the Indian Claims Commission in the US was doing this for 30 years between 1946 and 1975. So there are significant areas where we could push the issue of previous and prior land ownership and start talking about some form of recognition at least, if not compensation and reparation.

What has been missing from the Australian discussion, I think, is the question of government and the constitutional role and position of indigenous people. Despite the fact we are currently in a significant national debate about the constitution for the new century there has been very, very little thought about the political or constitutional position of indigenous people.

This is where Australia differs significantly from Canada and the US. In those two countries that in so many ways are similar to Australia, they of course had treaties. For centuries, treaties were signed between government and indigenous people. The Canadian government has restarted that process — the whole of the prairies were settled by a series of treaties which still operate, but in 1972 there was a court case which was an exactly comparable case to *Mabo*. It was their '*Mabo* case' — about British Columbia, where there had been no treaties and where indigenous property rights were treated in the same way as in Australia, that is, they didn't exist. This was true also of the whole north of Canada, the north-west territories and the Yukon, that vast area north of the provinces.

In 1972 the Supreme Court recognised that native title existed in British Columbia, and so the Canadian governments realised that it would almost certainly be found to exist also

across the north. So they began a process of what is essentially modern treaty making. It was initiated by the question of unresolved issues in relation to land — the question of native title — but it didn't just deal with native title, because in their process of coming to settlement (and this is still going on), they negotiated about much more than land. They negotiated about control of resources, about service delivery, resource development and environmental controls, but they also negotiated about government and about the position of indigenous people in the Canadian constitution.

This led to the development of the theory that there was in Canada among indigenous people an inherent right to self-government. That is, native title existed because the land had belonged to the Indians before the Europeans arrived. In a similar way, it was argued, because these indigenous societies governed themselves and had their own laws they also inherited a right to govern themselves within the Canadian federation.

Of course, the most significant and mature example of this development was the recent establishment of a new province, in effect, of the Inuit or Eskimo people in the Eastern Arctic, called Nunavut. This is a new level of government in Canada, and in a similar way in the new treaties in British Columbia — the first one is just about to be signed or has been signed and is a great deal about government. The Nisgaa people of British Columbia are going to have very large powers of government over their home territories.

This is something we really have not talked much about in Australia. The most significant literature, the most significant discussion of this question, was produced by a Queensland taskforce of indigenous people set up to look at the government of all the Queensland Aboriginal and Torres Strait Islander communities.

They travelled across Queensland, talked in every community, and came up with a proposition that was not just something they had taken to the communities. It was more what they brought back — the opinion of the people in those communities that communities should be given the go-ahead to develop their own constitutions and run their own affairs, particularly in relation to many of those things that are now delivered by the State government. The proposition was that each community should be encouraged and helped to develop, over a period of time, their own community constitution and that they should be able to take control over the internal development of their community and in particular have control of things like education. But each community would decide which services it would take control of and which it would continue to receive from government.

Clearly this desire for self-government is powerfully present. It's most often expressed by the Torres Strait Islanders, who have for a long, long time been demanding autonomy of the sort there is in the external territories like Norfolk Island. This is an area that we have in many ways let slip, as though it isn't important, but I think it should be the new area of concern for groups like ANTaR. After all, this is in so many ways what is meant by self-determination in respect of indigenous people. This is an idea which has been talked about in Australia, but we have not got much beyond self-management, and the present government has endeavoured in international discussions to try and get self-determination taken out of the evolving Draft

Declaration of the Rights of Indigenous People (with no success).

### International issues

There are endless arguments of course as to what is meant by 'people', but it is an idea which cannot, I suggest, be deflected. It is an idea which will become more and more important, and international events recently have put Australia in a somewhat strange position about self-determination. That is, we now have almost all our viable fighting forces in East Timor under a UN mandate protecting the right of the East Timorese to self-determination.

If it is such an important principle that we commit so much to this issue just over the Arafura Sea from Australia, how can we possibly say 'but this isn't significant within Australia'? This, of course, takes us to the question of Australia's standing overseas.

Now, perhaps more than for a long time, our close neighbours are scrutinising Australia. Unfortunately, a thoroughly honourable commitment to East Timor, in my view, rekindles ideas of white dominance, of the old imperialism. It reawakens those suspicions about Australia, which was for so long in this century committed to 'white Australia'. There is no doubt in my mind what the critics of Australia will look at first and foremost — that is, whether our commitment to human rights, which we trumpet around the world, is actually carried out in Australia, or whether we are hypocritical. These societies in most cases, and Indonesia most notably so, spent much of the time of their existence in the 20th century fighting against colonisation and then working through the process of decolonisation. It won't be surprising if they look at Australia and say: 'You have still got a colonial situation in your country'. And if by misadventure we vote to keep the hereditary monarchy of England their convictions will be even more underlined.

This touches on a problem that has perplexed me for some time, that is our inability to look at ourselves as outsiders see us. I was very much reminded of this in respect of the document which the Australian government put out a short time ago called 'In the National Interest'. It was a document about foreign policy, but above all it talked about the domestic foundations of foreign policy. It was clearly developed as an answer to the Hanson phenomenon.

In that document Tim Fischer and Alexander Downer said that above all else, Australia was committed to human rights, and of those, the thing that mattered most to us was the question of racial discrimination. Yet at much the same time that Tim Fischer was putting his signature to that document, he was going around the country calling for bucketloads of extinguishment. That is, he was advocating the forced expropriation of the property of indigenous Australians by legislation in a way that would have been unthinkable had this been addressed to any other recognisable minority in the country. And yet, it was as though this had no relationship to the question of racial discrimination.

Tim Fischer, after all, is a person who has travelled more in Asia than almost anyone else in the Parliament. He is a person who came out very early and attacked Pauline Hanson far more vigorously than John Howard did. But the same person can adopt policies in Australia which outsiders necessarily see as racially discriminatory, and this is, of course, exactly why Australia was taken to task by the CERD Committee, the Committee that oversees the Convention on the Elimination of Racial Discrimination.

And while, on the one hand, we answered the UN's call to defend self-determination at great expense to ourselves, we, the government of Australia, simply rejected the CERD Committee, and wouldn't allow the members of the Committee to come to Australia. So it seems to me that Australia, particularly since East Timor, has to be even more careful and more scrupulous and more determined to deal fairly and justly within Australia. And to root out the remaining examples of racial discrimination in our own midst, otherwise everything we say overseas will be seen as not just lacking substance, but above all it will be seen as the mouthings of a hypocrite.

### Conclusion

I began by talking about reconciliation. I then looked at the question of land ownership and the consequences of the *Mabo* judgment. I talked about the lack of real discussion about the future constitutional and political place of indigenous communities, and I then went on to talk about the fact that Australia has to see these questions as both internal and external. They are not just internal matters. Australia has a responsibility to the world for the survival of indigenous cultures within Australia. That is the consequence of colonising a country occupied by other people, and that is a task that the world will expect us to carry out. They will see it, many of them, as the need to bring into Australia the decolonisation that swept the world in the 1950s and the 1960s.

So I think groups like ANTaR need to think about what is necessary over the next 25 and 50 years — to envisage the future, because unless you start envisaging the future it is very hard to make plans for the present.

If we don't do this, I think we will soon see a new era of radicalism amongst indigenous Australians. I think this is bound to happen sooner or later. It is surprising that indigenous Australians have been so moderate and so patient and so willing to talk and so willing to forgive. But that mood may not last, and it could cause us a great deal of embarrassment. Let us just consider, if indigenous people really wanted to put the pressure on Australia, you would not have a powerful delegation going to England to see the Queen to talk about history, you would have a powerful delegation from North Australia going to see our neighbours, going to see Dr Mahathir, where they would undoubtedly be given significant standing, almost as members of a State. They would be listened to and they would cause enormous embarrassment to Australia.

That is the new world in which we are moving. So ANTaR, I think, still has extremely significant things to do. We have to push the formal reconciliation document as far as is possible. We have to encourage the continuation of the popular movement that I mentioned earlier, we have to endeavour to see that issues like Wik are still powerfully fought for, and of course that is still unresolved, finally. In particular we have to think about government, we have to think about self-determination and we have to think about the next generation of changes that are now becoming necessary. In doing so, I think this new popular movement will play an extremely important role as one of the forces which will allow a new Australia to emerge in the next century.