Making A Difference: Reconciling Our Differences

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Introduction

It is a considerable honour to be invited to deliver the 2001 Sir Ninian Stephen Lecture in Law. It is even more of an honour in view of the fact that all previous lecturers have been "their Honours" – distinguished justices or former justices of the superior courts of the land. For an obscure academic to be invited to follow in their footsteps is something of a challenge, and I thank the Dean of the Faculty of Law, Professor Anne Finlay, for the invitation.

Sir Ninian Stephen

It is a particular privilege to present a lecture in the name of Sir Ninian Stephen. It was his role in one particular High Court decision, *Koowarta v Bjelke-Petersen*[1], which led me to a key theme for my remarks this evening – "Making a Difference".

In addition, I have the greatest admiration for the path that Sir Ninian has followed since his retirement from the High Court.[2] From 1982 he occupied the position of Governor-General with great warmth and distinction. During that period he displayed a particular interest in issues

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This article is an edited version of the 2001 Sir Ninian Stephen Lecture. The Sir Ninian Stephen Lecture was established to mark the arrival of the first group of Bachelor of Laws students at the University of Newcastle in 1993. It is an academic event that is to be delivered by an eminent lawyer at the commencement of each academic year.

1 (1982) 153 CLR 168.

2 I draw from the draft entry for Sir Ninian in the forthcoming *Oxford Companion to the High Court.*

concerning Indigenous Australians, and, in 1985, participated in the ceremonial handback of Uluru to its traditional owners.

In 1989 Sir Ninian was appointed Australia's first Ambassador for the Environment. In 1992 he accepted invitations from the governments of the UK and the Republic of Ireland to chair talks on Northern Ireland. He has served as a judge on the International Criminal Tribunal for the Former Yugoslavia, and on the appeal division for that Tribunal and for the International Criminal Tribunal for Rwanda. He also served on the International Court of Justice, as *ad hoc* judge nominated by Australia, in the *Case Concerning East Timor* in which Portugal proceeded against Australia, claiming that its treaty with Indonesia concerning the resources of the Timor Gap was invalid. He has chaired a commission on dealing with war crimes in Cambodia, at the request of the United Nations Secretary-General. And, as Justice Michael Kirby pointed out, in the 5th lecture in this series[3], he has served as President of the Constitutional Centenary Foundation.

All of this indicates that retirement from the High Court of Australia does not necessarily indicate the termination of a career of distinguished public service .

The inaugural lecture in this series was delivered in 1993 by Sir Ninian Stephen himself. The occasion marked the commencement of teaching for the Bachelor of Laws degree in the Law Faculty at the University of Newcastle. His topic was "Our Demotic Constitution" – from the Greek word *demos*, meaning the people. The year, 1993, marked the centenary of the Corowa Conference which Sir Ninian described as critical to the forward movement of the separate colonies towards Federation. This current year, 2001, marks the centenary of the successful outcome of that process.

Sir Ninian gave an account of the Corowa Conference and, in particular, of the role of Sir John Quick in developing proposals for the active and direct involvement of the people of the colonies in the development of the Commonwealth Constitution. Sir Ninian said:

> "[A]n equally significant aspect of Quick's motion was the extent to which it would involve the people in the constitution-making process. Unlike the first convention, members of the second convention would be directly elected, not selected by the colonial parliaments, and the Constitution Bill which they ultimately adopted would be finally put to the people for approval before being transmitted for enactment to the Parliament of the United Kingdom."[4]

The contrast involved in this constituent phase of the evolution of the Australian nation was "the difference between representative and popular democracy".

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[3] "The Constitutional Centenary and the Counting of Blessings" (1997) 2 (1) *The Newcastle Law Review* 1.

[4] (1994) 68 ALJ 706 at 709.

This legacy of a direct role for the electors was continued within the Constitution itself. Section 128 requires that proposed amendments to the Constitution be approved at referendum by a majority of the voters overall, and by majorities in a majority of the States. Not many proposals for constitutional change have met these requirements.

Two years ago was the most recent occasion. Two proposals were put to the electors, one for an Australian head of state, and the other to insert a new preamble to the Constitution which would, among other things, acknowledge the First Peoples of Australia – the Aboriginal peoples and the Torres Strait Islanders. Neither proposal was accepted.

Historically, by far the most successful proposal was that put forward and accepted in 1967 to amend the Constitution by deleting section 127 (which had provided that Aborigines were not to be counted in reckoning the population) and by amending section 51 (xxvi) which had denied the Commonwealth Parliament power to pass laws with respect to people of "the aboriginal race in any State".

Democracy, Minorities and Indigenous Australians

Here I note a potential weakness in both forms of democracy, representative and popular. While they give power to the people, directly or indirectly, they do so in terms of *majorities*. Australia has also developed sophisticated systems of voting – proportional, preferential etc - which are designed to ensure that our elected representatives *do* have the support of majorities.

But entire categories of people have not always been included in these processes. The right to vote has, in the past, often been confined to property owners. Women were allowed to vote earlier in Australia than in most other countries, but only in some of the colonies were women able to participate in the development of the federal Constitution.[5] Not many Aborigines or Torres Strait Islanders would have had the right to vote at that time.

Indigenous Australians and their supporters needed to wage a major and extended political campaign to reach the position that was eventually achieved in the 1967 referendum. The outcome of that was limited. Contrary to popular belief, it did not give them the right to vote.[6] Effectively, it gave the Commonwealth Parliament clear power to pass laws with respect to Aborigines. But it left the legislative powers of the States largely intact. And history has shown that it requires considerable political will for a Commonwealth Government to use the power against the

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[5] Of course, women played a major role in the various Federation Leagues that supported Federation.

[6] Bain Attwood and Andrew Markus, *The 1967 Referendum, or when Aborigines didn't get the vote*, (AIATSIS, 1997).

strongly expressed opposition of one or more State governments[7] in matters such as land rights or native title, or mandatory sentencing.

Furthermore, although the massive electoral support for the 1967 referendum was motivated by a desire to benefit Indigenous Australians, a High Court majority has read the power in section 51 (xxvi) as not being confined to a power to enact laws for their benefit, at least when the legislation in question is an Act which amends or repeals a prior Commonwealth Act.[8]

The point is that even the strongest democracies need something in addition to democratic processes in order to ensure the human rights of particular minorities within the society. To quote Dr Imtiaz Omar: "Whatever may have been the position in the early days of the federation, the inefficacy of representative government in modern times to adequately protect individual rights cannot be denied".[9]

The same point was made by Sir Gerard Brennan in the 8th Lecture in this series.[10] He said: "The free exercise of majoritarian power in a democracy may trample on the freedom of minorities". He went on, later to say: "And, as the acquisition and retention of political power requires only majority support, the power may be exercised to advantage the majority at the expense of a minority".

In the case of Australia, the most significant group whose human rights are not adequately protected are Aborigines and Torres Strait Islanders. Justice Michael Kirby, in his 5th Lecture in this series, reflected on their situation at the time that our Constitution was being formed:

> "The Aboriginal and other indigenous peoples of the continent were generally regarded as uncivilised nomads. Their land was taken without compensation. Their culture was ignored or belittled. If they were not killed, they were all too often marginalised or promised complete assimilation."[11]

This situation has substantially altered over the subsequent century. This has necessarily required that the minority have some political support within the majority. The Law has also played a significant part in this process, as have particular individuals working with the Law. But there is still some way to go in achieving full Reconciliation, and political support within the non-Indigenous community will continue to be critical.

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7 Frank Brennan and James Crawford, "Aboriginality, Recognition and Australian Law; Where to from Here?" (1990) 1 (1) *Public Law Review* 53.

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

9 "Towards a Meaningful Discourse on Rights in Australia", (1996) 1 (2) *The Newcastle Law Review* 15 at 19.

10 "Principle and Independence: The Guardians of Freedom" (2000) 74 ALJ 749.

11 "The Constitutional Centenary and the Counting of Blessings" (1997) 2 (1) *The Newcastle Law Review* 1 at 3.

Making A Difference

My two themes for today's lecture have in common the word "difference". The first theme is about "making a difference"; the second theme is about "reconciling our differences". In beginning, I propose to refer to a number of people working in Australian law. They range from High Court justices, to practitioners, to academics, to law students. What they have in common is that each, in his or her own way, has made a difference. The arena in which they have made a difference relates to issues of racial justice in Australia, and to the reconciliation of our differences.

When I studied Law, and again when – some years after graduating – I first became a law teacher, there was only one Law School in the State. (Contrast 1993, when the University of Newcastle commenced its LLB program, and Sir Ninian Stephen commented on the proliferation of Law Schools). During my seven years as a teacher at Sydney University Law School, I got to know and to work with some remarkable students who made a difference. Let me mention three.

One of them became closely associated with the first Aboriginal to graduate from Sydney University – or, indeed, from any Australian University – the late Charles Perkins. He served as Secretary, and Perkins as President, of an organisation called Student Action for Aborigines. I remember that he brought Perkins to speak to a lunchtime meeting of students in the Law School. In 1965 he was a leader, with Perkins, in the "freedom rides" through northern NSW. Perkins died last October, and the tributes indicated the importance of those freedom rides in raising awareness of the extent of discrimination against Aborigines[12]. As to the law student, from such "rabble-rousing" beginnings, he went on to a distinguished career and, indeed, delivered the 1999 Lecture here in this series as Justice James Spigelman, Chief Justice of NSW.

One of Spigelman's contemporaries became concerned about the planned 1971 Australian tour by South Africa's Rugby Union team. He managed to locate several Australian rugby internationals who had toured South Africa, and had come to the conclusion that the system of *apartheid* was such as to make it no longer defensible to play the Springboks. He borrowed my office to record an interview with these former Wallabies which he published in the student magazine, *Blackacre*. And he released the story in advance to a national newspaper. The tour went ahead, against a backdrop of noisy protests, and it proved to be the last time we played against the Springboks while *apartheid* lasted. That former student is still making a difference in these and other arenas as Geoffrey Robertson QC. Last month he successfully argued constitutional issues in the Fiji Court of Appeal.

Another Law student, the late Peter Tobin, wandered into my office

[12] See, for example, *Walking Together,* Number 30, January 2001, (Council for Aboriginal Reconciliation) pages 12-14.

one day and wanted to know whether I had ever read Queensland's laws for Aborigines and Torres Strait Islanders. I confessed that I hadn't. So he brought me the Acts and the regulations and the by-laws. I read them, and my hair stood on end. Eventually, I completed a human rights analysis of Queensland's laws[13] for the Australian Section of the International Commission of Jurists.

By that time I had moved from the University of Sydney to help establish the State's second law school at the University of New South Wales. We commenced teaching in 1971, 30 years ago this month. The Foundation Professor and Dean of Law was a distinguished barrister, J H (Hal) Wootten, QC. He had accepted the appointment in 1969, and set out to brief himself as to what a good Law School might be for the late 20th century. It was an exciting time, working with a clean slate to design a new Law School. The Faculty of Law here would have gone through a similar heady period in 1993, and I understand that the creative spirit lives on.

Aboriginal Legal Service

Before our first students had arrived at UNSW, Wootten was approached by a group of Aborigines and others who were concerned about police treatment of Aboriginal people in the Redfern area. They had in mind the possibility that some lawyers might take on a few cases so as to "teach the police a lesson". Wootten had recently returned from the United States where the poverty law movement was in full sway, with an emphasis on accessible shop-front law offices. He recommended that there be established a body with broader aims, and a committee was established involving a mix of Aboriginal and non-Indigenous people. We called it the Aboriginal Legal Service.

Hal contacted the State's solicitors and barristers inviting them to make themselves available for *pro bono* work advising and representing Aboriginal people who were arrested by the police. The response rate was very gratifying. So the service was to operate on the basis of a small roster of volunteers who agreed to be available for particular periods of time to answer calls from police stations and to deploy the volunteer lawyers to assist.

At that stage Hal Wootten had a phone call from the then Minister with responsibility for Aboriginal Affairs, the Hon W C Wentworth. He had heard about the scheme and offered some funds. With those funds we were able to appoint a solicitor, an Aboriginal field officer and an Aboriginal secretary-administrator. They were actually accommodated in the Law School huts until premises were found for them in Redfern. In

[13] *Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law* (1973, ANZ, Sydney); the analysis was later updated as *Victims of the Law. Black Queenslanders Today* (1981, George Allen & Unwin, Sydney).

1973, the committee became an all-Aboriginal body. With the election of the Whitlam government at the end of 1972, funding was made available for the establishment of a network of Aboriginal legal services across Australia. In turn, they provided the model for other Aboriginal-controlled, government-funded service delivery organisations in such fields as health, child care, housing, and so on.

This has been one of the notable Australian developments in relations between the State and Indigenous people. One person, in particular, working in a Law School, made a difference.

Hal Wootten was not alone, of course. Among the people he enlisted to the first committee for the ALS was the then president of the NSW Bar Association. He went on to became a Justice of the Court of Appeal and, more recently delivered the 6th Sir Ninian Stephen Lecture for 1998[14] in his capacity as Governor of NSW, His Excellency the Honourable Gordon Samuels, AC.

Aboriginal Admissions to University

Hal Wootten made another, related contribution during his time as Dean at the UNSW Law School. He learned from Aboriginal people engaged with the establishment of the ALS that many Aborigines had such interrupted educational backgrounds that they were unable to gain admission to University. He managed to persuade the Council of the University to resolve that Aboriginal people might be admitted to degree programs, regardless of the then prevailing quota system, if the student counselling service and the faculty concerned were satisfied, on such evidence as might be available apart from formal academic records, that they had a reasonable prospect of succeeding in the course. In our first intake in 1971 the Law School admitted two Aboriginal students. We produced the first Indigenous law graduates, starting with Pat O'Shane and Bob Bellear, both of whom now hold judicial office. For many years UNSW had produced more Indigenous law graduates than other law schools, though other schools have narrowed the gap by now.[15] Of course, the University of Newcastle played a comparable pioneering role in facilitating access to medical education for Indigenous Australians.

With the funding and spread of Aboriginal Legal Services around the country during the '70s, I assumed that there would be little need for academic and other lawyers to need to focus on Indigenous legal issues.

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[14] "No More Cabs on the Rank? Some Reflections About the Future of Legal Practice", (1998) 3 (1) *The Newcastle Law Review* 1.

[15] A recent survey by Heather Douglas (not yet published) showed that, for the period 1991-2000, UNSW graduated 25 Indigenous law students, the University of Western Australia graduated 16, the University of Melbourne graduated 14 and Australian National University graduated 11.

Indigenous people now had their own salaried lawyers to provide all the legal advice and representation that they might need. I was wrong.

The ALSs and their lawyers tended to be heavily committed representing individuals in the court system, particularly the criminal justice system. The new crop of ALS lawyers were also minded to turn old ways of doing things on their head. I mentioned the late Peter Tobin, who had drawn my attention to Queensland's laws. When he started as an ALS lawyer in rural NSW, he adopted the revolutionary practice of advising clients generally to plead not guilty. The ALSs also undertook some civil litigation in such areas as torts, workers' compensation and so on. But there was limited capacity to put time into "big picture" issues, such as land rights.

Land Rights

The modern movement for recognition of Aboriginal land rights is largely attributable to two major Aboriginal campaigns in the Northern Territory. The first of these campaigns commenced in August 1966 when the late Vincent Lingiari led members of the Gurindji people off the Wave Hill cattle property, owned by Lord Vestey, and established camp on part of their traditional lands at Wattie Creek (Daguragu). Their campaign lasted some seven years and gathered substantial non-Indigenous support, until, in August 1975, then Prime Minister, Gough Whitlam, ceremonially handed back to Lingiari and his people title under Australian law to some of their lands.

There is now a series of Vincent Lingiari Memorial Lectures delivered (generally in the anniversary month of August) at the Northern Territory University. The Inaugural lecture in that series, in 1996, was delivered by the current Governor-General, Sir William Deane. Under the title "Some Signposts from Dagarugu", His Excellency gave an account of the seven year struggle culminating in the handover which he described as "an event of limited but true reconciliation". He went on to distil from that experience some eight "aspects of the settlement at Daguragu which can be seen as at least signposts on the way" to true national reconciliation.[16]

The other major campaign in the Northern Territory involved the people of north-eastern Arnhem Land. During the 1960s they attempted to assert their land rights in the face of the grant by the Commonwealth Government to Nabalco Pty Ltd of bauxite mining leases. Eventually the clans went to court to argue that Australian common law should recognise and protect their communal native title. The Gove Land Rights Case[17] was not successful, in the Supreme Court of the Northern Territory. But it

[16] (1997) 8 *Public Law Review* 15.
[17] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

was followed, under the newly elected Whitlam Government, by the Woodward Commission[18] which led to the enactment under the Fraser Government of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). (This led the way to the enactment of land rights legislation in some States). Another Woodward recommendation led to the establishment of an Aboriginal Land Fund and a Commission with power to purchase land anywhere in Australia for Indigenous Australians.

On several occasions during the 1970s, people contacted me or colleagues at UNSW seeking advice on such issues. For example, under the Fraser government the Northern Land Council came under very heavy pressure to persuade the traditional owners to agree to uranium mining in Arnhem Land, at Ranger, in particular. NLC advisers sought specialist advice from colleagues in our law school on several aspects of the proposals.

Then came the Koowarta affair.

Koowarta

The late John Koowarta was a leader of the Winchinam people of western Cape York, in Queensland. He became aware that the holders of a pastoral lease on his people's traditional land were willing to sell it, and he persuaded the Aboriginal Land Fund Commission to buy it. However, the Queensland Minister for Lands had an "absolute discretion" whether or not to approve transfer of a pastoral lease, and he declined to approve it. He did so on the basis of a State government policy which did not favour the acquisition of any large areas of land by or for Aborigines. The Aboriginal Land Fund Commission sought our advice. I enlisted some students to assist, and we advised that the Queensland Government appeared to be acting in breach of the *Racial Discrimination Act, 1975* (Cth) (the RDA).

The RDA at that time required complaints to be lodged with the Commissioner for Community Relations. He was required to settle such complaints by conciliation. Only if such attempts were unsuccessful could he issue a certificate authorising court proceedings for breach of the Act. Al Grassby was the Commissioner, and his attempts to get Queensland Ministers and officials to attend conferences were unsuccessful. So he issued the first ever certificate authorising court proceedings.[19]

The papers eventually went to the office of the Aboriginal and Torres Strait Islander Legal Service (ATSILS) in Cairns. There, a newly appointed solicitor from Western Australia, Greg McIntyre, was referred the file by

[18] Aboriginal Land Rights Commission, *First Report* (1973) and *Second Report* (1974) (AGPS, Canberra).

[19] Garth Nettheim, *Victims of the Law. Black Queenslanders Today*, (1981, George Allen & Unwin, Sydney), pages 9-10, 128-138.

one of the criminal lawyers, because Greg was known to have an interest in land rights and related issues. Greg decided that the Koowarta case needed to be pursued. He made a difference.

Queensland's response to the filing of the statement of claim against it was to argue that the RDA was beyond the constitutional power of the Commonwealth Parliament and was therefore invalid. It was this issue which came before the High Court in *Koowarta v Bjelke-Petersen.*[20]

One argument for the validity of the RDA was that it fell within section 51 (xxvi) of the Constitution as a law for "the people of any race for whom it is deemed necessary to make special laws". The argument failed, for the reason (as Gibbs CJ put it, at 187) that "a law which applies equally to the people of all races is not a special law for the people of any one race".

The other principal argument was that the RDA was valid under the power of the Commonwealth parliament to pass laws with respect to "external affairs" under section 51 (xxix).[21]

Three members of the court held that it was sufficient to bring an Act within the scope of the power if it was enacted to implement a treaty ratified by Australia. Four members of the court took a contrary view that it was *not* sufficient that the Act be designed to implement such a treaty - an additional requirement was that the subject matter of the Act had *itself* to be about Australia's external affairs. Three of the four said that racial discrimination among people within Australia did *not* satisfy this condition. But the fourth member of the group said that it did.

It was, of course, Sir Ninian Stephen who made the difference. In a learned judgment he took account of the development of international human rights standards dating back to the Charter of the United Nations. The prohibition of discrimination on the basis of race was not just an obligation on those States which ratified the relevant treaties; it had become generally accepted as constituting a principle of customary international law, applicable to all States. Discrimination on the basis of race within a State *was* a matter which would affect that State's relations with other States. Therefore the RDA was valid.

The Indigenous Law Centre

In 1979 the UNSW Law School appointed a Melbourne solicitor to its staff with the specific brief to develop proposals for clinical teaching in Law. His recommendations eventually led to the establishment of the Kingsford Legal Centre, the first such centre in a NSW Law School. Of

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[20] Note 1, above.

[21] Justice Deirdre O'Connor discussed the scope of the external affairs power in the 3rd lecture in this series: (1995) 1(1) *The Newcastle Law Review* 1, at 5-7.

course, he went on to other things, including the role of Foundation Dean of Law at the University of Newcastle.

Neil Rees had worked for the Victorian Aboriginal Legal Service (VALS) and had a strong interest in Indigenous legal issues. He and I became allies within the UNSW Law School in a process we began in 1979 and which continued to 1981. During this period we had a series of meetings with interested people, inside and outside the Law School, Indigenous and non-Indigenous. The question was whether there was a role for some sort of University-based "back up centre" to the "front line" law-related organisations, notably the ALSs and the Land Councils.

This was a busy time. The NT Land Rights Act was being bedded down; land rights legislation was being developed for regions of South Australia and for NSW; the debate about a treaty or Makarrata had been initiated in 1979 by the National Aboriginal Conference . . . a lot was happening. [22]

We did two mailings to front-line organisations and, at the end of 1980, Neil Rees visited every Aboriginal Legal Service and Aboriginal Land Council.[23] The response we got was a cautious Yes to our proposal to establish an Aboriginal Law Centre. So in 1981 we had it formally established by the University. This year marks the Centre's 20th anniversary.

One of the first things that Neil Rees did was to get Law Foundation funding to start a newsletter called the *Aboriginal Law Bulletin.* His experience with VALS had made him realise the importance of having such a medium for exchange of information among those working in the front line, in particular. Neil's founding co-editor, based in Melbourne, was Greg Lyons, and this proved helpful in the second year when funding was shared between the Law Foundations of NSW and Victoria. A substantial part of the editorial and layout work was done in Sydney by Neil in his "spare time". Here, as on other occasions, Neil Rees made a difference.

In 1983, the Commonwealth Department of Aboriginal Affairs (now ATSIC) began to fund the Bulletin and we were able to appoint our first full-time editor. This year marks the 20th anniversary of the Indigenous Law Centre and of the *Indigenous Law Bulletin.*

I am pleased to report that the *Bully* (as we fondly call it) last December was awarded the Human Rights Award for print media.

Now let me resume the story of land rights and, in particular, native title.

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[22] In 1978 Pat O'Shane and another colleague at UNSW, Denis Harley, initiated the teaching of an LLB elective subject, Aborigines and the Law.

[23] This was funded by the then-Director of the Law Foundation of NSW, Terence Purcell.

Native Title

During the 1970s and 1980s Queensland, under Premier Bjelke-Petersen continued to be seen as the main problem jurisdiction in terms of racial justice, including land rights. On several occasions when the Commonwealth Government under Fraser ventured to override Queensland laws, Queensland managed to sidestep "the Feds". But there was growing pressure on Queensland to overhaul its legislation for Aboriginal and Torres Strait Islander reserves. In 1981 the Government announced its intention to repeal those laws. It was not clear what legislative regime would be put in place to maintain Indigenous occupancy of the reserves or control over those lands. Eventually, the State proposed to utilise obscure provisions of its Land Act to confer Deeds of Grant in Trust on the Councils of reserve communities. The provisions were quite inadequate, though eventually, Queensland made a series of amendments which produced the result that DOGIT titles became approximately as secure as freehold.[24]

In August 1981 the Students Union at James Cook University in Townsville convened a conference on "Land rights and the future of race relations". Various people presented papers.[25] Several people spoke on the possibilities of having another go at seeking common law recognition of native title – there had been increasing criticism of the cogency of the reasoning in the Gove Land Rights Case ten years previously, particularly in the light of the jurisprudence from Canada and from other lands settled by the British. One of those speakers was Barbara Hocking, from Melbourne, who had recently completed a thesis on the topic. Another was Greg McIntyre from the Cairns ATSILS office – the same young lawyer who had run the Koowarta case.

Another speaker, based in Townsville, was Eddie Koiki Mabo. He talked about "Land rights in the Torres Strait" from which he had been effectively exiled by the Government.

During the conference several people moved into a side room to give serious consideration to the question of running a new case claiming native title. Eddie Mabo said he was willing to be a plaintiff but had no money to pay for it. I suggested that he work through the Townsville ATSILS, but he seemed to have little confidence in them. So I suggested that he might like to speak to Greg McIntyre from the Cairns office. He did. Nine months later, in May 1982, Greg issued the statement of claim in the proceedings *Mabo v Queensland*.on behalf of Eddie Mabo and four other Meriam plaintiffs in the High Court of Australia. Counsel were

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[24] Frank Brennan, *Land Rights Queensland Style* (1992,UQP).

[25] Erik Olbrei (ed), *Black Australians: The Prospects for Change*, (1982, James Cook University of North Queensland Union, Townsville).

Barbara Hocking and Bryan Keon-Cohen, led by the late Ron Castan QC.[26]

Anniversaries seem to be running through my story. Greg McIntyre, now a busy barrister back in Perth, is planning with the Law School at JCU, and the Australian Institute of Aboriginal and Torres Strait Islander Studies, to organise a conference in Townsville next August to mark the 20th anniversary of that 1981 conference which set the Mabo case on its way.

I do not intend to discuss the Mabo case in any detail. It has been amply covered elsewhere.[27] But I will refer to the legislation which Queensland enacted in an attempt to abort the entire proceedings. This happened in 1985, in the face of painfully slow progress – or non-existent progress – in the attempt to achieve an agreed statement of the facts for adjudication by the High Court. In April 1985 the single chamber Queensland Parliament enacted the *Queensland Coast Islands Declaratory Act, 1985.* The Act declared, retroactively to 1879 (when the parliament, acting under Imperial authorisation, annexed the outer Torres Strait islands) that any land rights that might otherwise have existed had been extinguished at the earlier date. Had the 1985 Act been valid, the Mabo litigation would have been dead in the water.

The issue whether the Queensland Act was valid was argued before the High Court in March 1988 in terms of the RDA, section 10. The court divided 4:3. The minority approach is exemplified by Justice Wilson who took the view that native title (assuming that such a thing might exist) was unique to the Murray Islanders, so that its removal would not deny to them rights in respect of property enjoyed by other Queenslanders. The majority took a different view, and perceived the subject in wider terms as property rights, whatever their juridical source. The Queensland Act was, therefore, invalid.[28]

Without that bare majority decision in *Mabo (No.1)*, the litigation would not have been able to proceed to the determination in *Mabo (No. 2)*[29] that Australian law does recognise native title as having survived the British takeover, subject to extinguishment or surrender.

And without Sir Ninian Stephen's crucial opinion in *Koowarta v Bjelke-Petersen* supporting the validity of the RDA, there might have been nothing to block the Mabo litigation from being killed off by Queensland.

Making a difference, indeed!

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[26] Barbara Hocking left the team which, otherwise, remained intact through the decade that the litigation took. During periods when legal aid funding was unavailable, Castan, in particular, kept the team going out of his own pocket. Keon-Cohen moved himself and his family to Brisbane for the months of the trial to determine the facts.

[27] The case itself is discussed in a number of sources including M A Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution*, (1993, UQP); Nonie Sharp, *No Ordinary Judgment* (1996, Aboriginal Studies Press); *Essays on the Mabo Decision* (1993, LBC); Richard Bartlett, *The Mabo Decision*, (1993, Butterworths). See also the film *Land Bilong Islanders*, and the CD ROM *Mabo. The Native Title Revolution* (Film Australia).

[28] *Mabo v Queensland (Mabo No.1)* (1988) 166 CLR 186.

[29] *Mabo v Queensland (Mabo No. 2)* (1992) 175 CLR 1.

I shall not go into the evolution of the *Native Title Act, 1993* (Cth), or the detail of that legislation, or the amendments enacted under the Howard Government in 1998.[30] For the purposes of this discussion, my purpose, and my trajectory, has been to work through some of the landmark developments over the past 30 or so years in the law concerning the relationship between Indigenous and other Australians, and to identify some individuals who have made a difference to these developments. The Indigenous names include Vincent Lingiari, Charlie Perkins, John Koowarta and Eddie Mabo. The non-Indigenous lawyers range from law students such as Jim Spigelman, Geoffrey Robertson and Peter Tobin, to practitioners such as Bryan Keon-Cohen, Greg McIntyre, Ron Castan QC and Barbara Hocking. The lawyers working at the time in law schools include Hal Wootten and Neil Rees. The judges include, notably, Sir Ninian Stephen.

I now propose to look at the challenges that lie ahead in completing the task of Reconciliation. Here there remain plenty of opportunities for individuals to make a difference.

Reconciling Our Differences

I have made several references to anniversaries, including the current Centenary of Federation. Now I refer to decades. Few people here will be aware that we are currently part way through the UN Decade for Indigenous Peoples which ends in 2004: it has received negligible emphasis from Government in this country. Most people *will* probably know that we have recently come to the end of another decade, namely, the lifespan of the Council for Aboriginal Reconciliation: the "sunset clause" in the *Council for Aboriginal Reconciliation Act 1991* (Cth) took effect on the last day of Year 2000. The Council (which had been re-constituted at 3-yearly intervals) presented its Final Report in Parliament House, Canberra, on 7 December 2000.

Aborigines and the Australian Polity

The Brennan/Crawford proposal. The idea for a body composed largely of people other than politicians had been proposed by Fr Frank Brennan and Professor James Crawford in their paper presented to the Australian

[30] See, for example, Murray Goot and Tim Rowse (eds) *Make a Better Offer. The Politics of Mabo* (1994, Pluto Press); M A Stephenson (ed) *Mabo: The Native Title Legislation* (1995, UQP); Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues: Commentary and Materials* (2 ed, 1997, LBC) , chapters 5 and 6; Richard Bartlett, *Native Title in Australia* (2000, Butterworths).

Law Convention in the Bicentennial Year, 1988.[31] Frank Brennan is another Australian lawyer who, working mainly within the church, has made a difference on a number of occasions, particularly in influencing the Queensland Government to develop reasonable proposals for the future of reserves. James Crawford, as an academic lawyer, steered the work of the Australian Law Reform Commission through its critical period in developing moderate and well-considered proposals for the recognition of Aboriginal customary laws.

The authors began by noting that there had been no agreement sought from Aborigines and Torres Strait Islanders at the time of Federation, that the only references to them in the Constitution were negative, and that, despite the outcome of the 1967 referendum, there remained the underlying issue as to "the broader question of the relationship between Aboriginal people and the Australian polity from which they seemed to be excluded in 1900".[32] They noted the failure of, or the political division created around, a series of proposals over the years to address this fundamental issue, and others, notably:

- proposals for a treaty in the period 1979-1983 and again in 1988;
- the joint parliamentary resolution debated as the first motion put to the vote in the new Parliament House in the bicentennial year, 1988;
- the debate over the preamble proposed for the legislation establishing ATSIC;
- the 1986 recommendations of the Australian Law Reform Commission for recognition of Aboriginal customary law;[33]
- recommendations of the Constitutional Commission and its committees.[34]

(The itemised examples of failure and divisiveness reflected the then-recent historical record under Prime Ministers Fraser and Hawke. By way of update, one could note an important departure from the pattern under Prime Minister Keating when, in 1993 - and after important negotiations with Indigenous leaders - the Commonwealth secured enactment of the *Native Title Act 1993* (Cth) against the strong opposition of the Coalition parties and of some State governments and industry groups. By way of offset, however, one should note the substantial reduction of Indigenous rights under the legislation when the Howard Government secured

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[31] "Aboriginality, Recognition and Australian Law: Where to from Here?", (1990) 1 *Public Law Review* 53.

[32] Ibid, p. 54. One can note that the failure to establish constitutional relations with Aborigines can be dated back to 1770 when, Captain Cook, in declaring possession for the Crown of the eastern half of Australia, failed to do so "with the consent of the natives", as had been required in his instructions: Garth Nettheim, "'The Consent of the Natives': Mabo and Indigenous Political Rights" (1993) 15 *Sydney Law Review* 223; also in *Essays on the Mabo Decision* (1993, LBC, Sydney) 103.

[33] *The Recognition of Aboriginal Customary Laws*, Report No. 31, (1986, AGPS, Canberra).

[34] Constitutional Commission, *Final Report*, (1988, AGPS, Canberra).

enactment of its *Native Title Amendment Act 1998* (Cth). In terms of the disappointing record in implementing the recommendations from major inquiries, one could add reference to the Royal Commission into Aboriginal Deaths in Custody[35] and the National Inquiry into the Separation of Aboriginal and Torres Strait islander Children from their Families.[36])

Brennan and Crawford suggested two primary reasons for this dismal record. The first was the political restraint on any exercise by the Commonwealth Parliament of its 1967-derived legislative mandate against the wishes of States. As to the second,

> "[r]elated to this Federal reticence about relying on the mandate of 1967 is the prevailing myth of "equality", the idea that "different" means "separate", that "equal" excludes "distinct". In a very subtle but very significant way the notion of "equality" has been an obstacle to developments in Aboriginal affairs".

But they found some hopeful signs in regard to such thinking in the High Court majority's approach to the issue of equality in *Mabo (No. 1).* They went on:

> "What alternatives are there to this apparent impasse, with the Government repeatedly raising Aboriginal hopes by promising action, then watering down – and even withdrawing – its proposals to meet opposition which, nonetheless, remains intransigent and unappeased? Arguably the present situation has all the disadvantages of bipartisanship (in terms of compromises and lowest common denominator decision-making) with none of its advantages (in terms of results achieved, legislation passed, etc). If decisive action cannot be taken by the Government on its own initiative, if the fear of opposition, of alienating public opinion by too-progressive measures, and of alienating the States through the exercise of an expressly-granted power, are always to be decisive, perhaps the time has come for a different direction, a step back to the longer term, a policy combining careful preparation for the future with less in the way of grandstands and bandwagons."[37]

Brennan and Crawford perceived the need for a national agreement to accommodate Aboriginal aspirations which they saw as "usually described in terms of land-rights, self-management and self-determination".

> "We accordingly suggest the establishment of an Aboriginal Recognition Commission. The Commission would have the general task of drawing up a Charter of Aboriginal Recognition, and the particular function of reviewing governmental action which may be in conflict with the principles to be contained in that Charter. In conjunction with the Commission, and as the culmination of its work, we suggest a new preamble to a patriated constitution at the turn

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[35] *National Report*, (1991, AGPS, Canberra).

[36] Human Rights and Equal Opportunity Commission, *Bringing The Home: The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).

[37] (1990) 1 *Public Law Review* 53 at 71.

of the century – which is also the centenary of the Constitution."

"The Commission should consist of seven members, should be chaired by a prominent Australian, and (unlike the Constitutional Commission) should be set up by statute with bipartisan support. The Government should consult with the Opposition, State premiers and Aboriginal groups about membership. . . .

". . .the long-term aim of the Commission would be to present a draft Charter for Aboriginal Recognition to all governments at a Conference of Prime Minister and Premiers in 1999, allowing 18 months for a referendum of approval. . . .

". . . If we do not attempt to hammer out an agreement providing Aborigines with a secure foundation for their future, we will be left dependent on a legal regime which – as a historical matter – excluded the original Australians from the process of agreement to unite in an indissoluble Commonwealth, and which gives no permanent, assured, formal recognition of their continued entitlement to choose to maintain their traditional lifestyle under the law. Such a failure will maintain the fictional character of the constitutional basis for the continued subjection of Aborigines to our laws without their consent."[38]

Detmold. Professor Michael Detmold has also written: "No entry has been made by Aborigines into the new legal order . . . The Australian Commonwealth will not be a just commonwealth until the nature of the Aboriginal entry and its legal consequences are recognised".[39] Subsequently he addressed the possibility that Indigenous peoples may have entered the Australian polity implicitly, if not explicitly:

"It is clear how in contract, difference comes together in lawful reconciliation. The coming together of Aboriginal and European on the continent of Australia in 1788 was not in any obvious sense contractual. Of course it might have been – there might have been a treaty – but political philosophy has long seen that the contractual basis of community is more often implicit than explicit . . . [I]t is not that there was actually an implicit treaty establishing the relation between Aboriginal and European. It is simply that when a society becomes minded to lawfulness (the opposite of tyranny) it is able to look back at the coming-together and reconstruct it so as to treat the parties with that lawful equality of difference of which contract is a paradigm. That time of course for Australia arrived in *Mabo (No. 2).*"[40]

But Detmold regarded the Mabo decision as inadequate "to constitute an Australian community in the matter". While the High Court "recognised Aboriginal difference in the matter of a different conception of title, they imposed the European value of it in the matter of the conditions of its extinguishment".[41]

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[38] Id, at 74-76.

[39] *The Australian Commonwealth. A Fundamental Analysis of its Constitution* (1985, LBC, Sydney), 62-66.

[40] M J Detmold, "Law and Difference: Reflections on Mabo's Case" (1993) 15 *Sydney Law Review* 159 at 165; also in *Essays on the Mabo Decision* (1993, LBC, Sydney) 39 at 45.

[41] Ibid, at 166;46.

Kalkaringi and Batchelor. It is not only non-Indigenous lawyers who have raised these issues. Indigenous Australians have done so on a number of occasions and in a number of ways. They did so, forcefully, as recently as 1998. The Northern Territory Government convened a Constitutional Convention early in that year. The Convention produced a draft Constitution, on the basis of which the Government hoped that the Territory would be admitted to Statehood in the Commonwealth. First, it was to be put to a referendum of Territorians.

Aborigines in the Territory found the terms of the draft Constitution inadequate, and convened their own discussions. In Central Australia, some 800 people came together as the Combined Aboriginal Nations of Central Australia in a single convention at Kalkaringi (near Daguragu). After several days of discussion, the convention produced a statement[42] and selected delegates to attend a Territory-wide Aboriginal Constitutional Convention to be held at Batchelor. The Indigenous Constitutional Convention held at the end of the year at Batchelor adopted and endorsed the Kalkaringi Statement and developed its own set of supplementary "Resolutions of the Northern Territory Aboriginal Nations on Standards for Constitutional Development". As I commented soon after:

> "The starting position adopted by the delegates to both Conventions is reflected in the several references to the Aboriginal "Nations" of the Northern Territory. The opening paragraph in the preamble to the Kalkaringi Statement declares:
>
> > 'The Aboriginal Nations of Central Australia are governed by our own constitutions (being our systems of Aboriginal law and Aboriginal structures of law and governance, which have been in place since time immemorial). Our constitutions must be recognised on a basis of equality, co-existence and mutual respect with any constitution of the Northern Territory'.
>
> "The Kalkaringi Statement goes on to declare, simply, that 'we do not consent' to the establishment of a new State on the terms set out in the draft Constitution and that 'we will withhold our consent' until there are good faith negotiations with the Northern Territory Government leading to 'a Constitution based upon equality, co-existence and mutual respect'. It declares that such a constitution must recognise and protect Aboriginal peoples' right of self-government. To this end, there should be a framework agreement 'setting out processes for the mutual recognition of our respective governance structures, the sharing of power and the development of fiscal autonomies'."[43]

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[42] Sarah Pritchard, "Constitutional Developments in the Northern Territory: The Kalkaringi Convention" (1998) 4 (15) *Indigenous Law Bulletin* 12; Garth Nettheim, "Aboriginal Constitutional Conventions in the Northern Territory" (1999) 10 *Public Law Review* 8. For the text of the Kalkaringi Statement, see (1998) 4 (15) *Indigenous Law Bulletin* 14; (1998) 3 (4) *Australian Indigenous Law Reporter* 587.

[43] Garth Nettheim, "Aboriginal Constitutional Conventions in the Northern Territory" (1999) 10 *Public Law Review* 8 at 9.

In the event, when the draft NT Constitution was put to the electors, on 3 October 1998, 51.3% of those who participated voted "No".[44]

It appears then, that a leading item of "unfinished business" is the issue of Indigenous Australians' participation in the constitutional polity (or polities) of Australia. This is the sort of fundamental issue that might have been dealt with in a treaty (as pointed out by Detmold) but has not – to date.

But, as Brennan and Crawford indicated, there are many other items of "unfinished business".

The Council for Aboriginal Reconciliation

Brennan and Crawford had called for an Australian Recognition Commission of seven members to be set up by statute with bipartisan support. Its long-term aim would be to draft a Charter for Aboriginal Recognition and to present it to all governments in 1999, allowing 18 months for a referendum to approve it - not a constitutional referendum, but a referendum aimed at gaining community endorsement. Thereafter the Commission would be able to receive complaints against governments for breach of the Charter, and would be empowered to report its findings and make recommendations to the relevant Parliament and Minister.

When he became Minister for Aboriginal Affairs, Robert Tickner developed proposals to establish a new body. He succeeded in working with the then-Shadow Minister, Dr Michael Wooldridge so as to be able to produce draft legislation which gained bipartisan (and, indeed, cross-party) support.[45] The outcome was rather different from that proposed by Brennan and Crawford.

In the first place the operative term became, not "recognition", but "reconciliation".[46]

Tickner, in his second reading speech, described the object of the Council as beingto promote a process of reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community, based on an appreciation by the Australian community as a whole of Aboriginal and Torres Strait Islander cultures and achievements and of the unique position

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[44] Alistair Heatley and Peter McNab, "The Northern Territory Statehood Referendum 1998" (1999) 10 *Public Law Review* 3. The Aboriginal vote was insufficient to defeat the proposal, and enough non-Indigenous Territorians were unhappy with the draft Constitution to defeat it.

[45] The *Council for Aboriginal Reconciliation Act 1991* (Cth). Tickner devotes a chapter to this matter in his account of his years in the portfolio, *No Turning Back* (forthcoming, 2001, Allen & Unwin, Sydney). For brief recent comments by both Tickner and Wooldridge, see *Walking Together*, Council for Aboriginal Reconciliation, Number 30, January 2001, pages 16-17.

[46] Professor Henry Reynolds wrote: "What of the process of reconciliation? It is manifestly a worthy objective but it is not completely clear who is to be reconciled to what or to whom". *Aboriginal Sovereignty*, (1996, Allen & Unwin, Sydney) at 183.

of Aborigines and Torres Strait Islanders as the indigenous peoples of Australia, and by means that include the fostering of an ongoing national commitment to co-operate to address Aboriginal and Torres Strait Islander disadvantage.

As to a "product", the Council was to consult Indigenous and non-Indigenous Australians on "whether reconciliation would be advanced by a formal document or documents of reconciliation". The Council would report to the Minister whether such a document or documents "would benefit the Australian community as a whole", and, if so, would make recommendations "on the nature and content of, and manner of giving effect to, such a document or documents".[47] There was no reference to a Charter of Aboriginal Recognition, let alone any use of "the T- word".

The initial reaction from many Indigenous Australians and their supporters was sceptical. An editorial in a special Reconciliation issue of the *Indigenous Law Bulletin* commented:

> "'Reconciliation', partly as a result of its ambiguous nature, has been controversial since its legislative birth in late 1991. Aboriginal people are justifiably sceptical of the reconciliation process as a consequence of it being imposed after limited consultation, of the seemingly superficial bi-partisan approach of the Liberal and Labour parties, and because crucial issues such as sovereignty have been conspicuously absent from the agenda. Aboriginal people are well aware of the failure of successive Australian governments to fulfil a number of promises to redress past wrongs. National land rights and a treaty are but two of these."[48]

The Council was also established with a larger membership than contemplated by Brennan and Crawford – 25 (13 Indigenous and 12 non-Indigenous), selected with the aim of achieving balance on a variety of matters, such as geography, gender, different sectors of society or the economy, etc. Three of its number were to be politicians from the major political parties – ALP, Liberal-National Coalition and the Australian Democrats. It gained initial credibility among Indigenous Australians and their supporters when Patrick Dodson accepted the chairmanship. It met first in early 1992. It was partially reconstituted for its second 3-year term, and more substantially reconstituted for its third and final term when Dodson ceased to be Chair and was replaced by Evelyn Scott.

Early in its existence it formulated its Vision: "A united Australia which respects this land of ours, values the Aboriginal and Torres Strait Islander heritage, and provides justice and equity for all". It identified eight key issues for its information and consultation activities:

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[47] Second Reading Speech, Parliamentary Debates, 30 May 1991, pages 4498-4504; excerpts reproduced in Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues: Commentary and Materials* (2 ed, 1997, LBC, Sydney) at 454-455.

[48] (1993) 3 (61) *Aboriginal Law Bulletin* 3. This special issue of the ALB contained Prime Minister Keating's Redfern Park speech, and articles by Patrick Dodson, Loretta Kelly, Noel Pearson and Frank Brennan.

- Understanding Country
- Improving Relationships
- Valuing Cultures
- Sharing Histories
- Addressing Disadvantage
- Responding to Custody Levels
- Agreeing on a Document
- Controlling Destinies.

It gained a powerful boost during its first term from the High Court's decision in *Mabo (No. 2)*. The Council also became actively engaged (with ATSIC) in consultations and in developing recommendations for Keating's proposed "social justice package", which was to be the third phase of the Government's response to the Mabo decision.[49]

The political divisions which followed the Mabo decision and the evolution of the *Native Title Act 1993* (Cth) led to the establishment of a number of citizen groups around the country, such as Australians for Native Title and Reconciliation (ANTaR) which became natural allies in the Reconciliation movement. The agenda for such groups acquired further intensity during the Council's second term, after the *Wik* decision of the High Court late in 1996[50], and in connection with the Howard Government's proposals to reduce Indigenous rights under the NTA.

During the Council's second term it furthered the work of building local reconciliation groups around Australia, and fostering the establishment of State and Territory Reconciliation committees. A high point was the Australian Reconciliation Convention held in Melbourne in 1997, which brought together people actively engaged in the Reconciliation movement from around Australia. It was at the time of the Convention that the *Bringing Them Home* report was released.

It was in its third and final term that attention focussed particularly on the question of a "document or documents" and, indeed, on the future of Reconciliation after the Council ceased to exist. It was generally acknowledged that Reconciliation was not going to be achieved by 31 December 2000, and that even the foundations would not be laid by that date. As Chairperson Evelyn Scott wrote:

> "An agreed document of reconciliation would not represent the end of Australia's search for genuine reconciliation between its Indigenous and non-Indigenous peoples. Too many things remain to be done before we can say we have achieved genuine reconciliation. . . . But, as a crucial step on the journey

[49] The first stage response was the *Native Title Act, 1993* (Cth) and the second stage was the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (Cth) designed for those Indigenous Australians who were unable to recover land under native title law. The "social justice package" was intended to identify and address non-land aspirations. The report from the Council for Aboriginal Reconciliation was entitled *Going Forward. Social Justice for the First Australians* (1995, AGPS, Canberra).

[50] (1996) 187 CLR 1.

> towards reconciliation, the Document of reconciliation will become a beacon at once proclaiming a national commitment and lighting the path ahead for all Australians and their governments.[51]"

The Council held its second national convention, "Corroboree 2000", in Sydney on 27 May 2000.[52] The centrepiece was the handing over to representatives of all Australian governments of documents which the Council had prepared after wide-scale consultations: *The Australian Document Towards Reconciliation* and *Roadmap for Reconciliation* .

The major event on the following day, 28 May was, of course, the Bridgewalk. Not only did huge numbers of people cross Sydney Harbour Bridge in support of Reconciliation; large numbers also marched in other cities and towns, on that day and subsequently. These public demonstrations served notice that "the people's movement" in support of Reconciliation was a force to be reckoned with. In the final issue of the Council's newsletter *Walking Together,* the outgoing Chairperson, Evelyn Scott wrote:

> "... I believe that the nine years of Council's work *has* made a difference in the life of this nation. About one million people in cities and towns across Australia have walked to demonstrate their desire for a just, equitable and united Australia. The Sydney 2000 Olympic Games revealed enormous pride in Aboriginal and Torres Strait Islander cultures and athletes. A strong people's movement is growing in local communities. All spheres of government, as well as the country's major institutions and organisations and organisations, are committing, in their various ways to the national reconciliation documents presented at Corroboree 2000 in May 2000."[53]

Prime Minister John Howard said in December:

> "[T]here can be no doubt that the mood of the Australian community is overwhelmingly in favour of reconciliation. It has become an unstoppable force and I believe (Australia) has been enriched and is a better, more united nation as a consequence."[54]

As on previous occasions, progress for the Indigenous minority necessarily depends on gaining substantial support from the non-Indigenous majority.

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[51] Evelyn Scott, "The Importance of Formal Reconciliation", (1999) 22 *UNSWLJ* 604. And see Sarah pritchard, "Forging New Relationships: Some Observations on the Processes of Reaching Agreement on a Document / Documents of Reconciliation", (1999) 22 *UNSWLJ* 609.

[52] This date, the anniversary of the 1967 Referendum, marks the beginning of Reconciliation Week, which concludes on 3 June, the anniversary of the Mabo decision.

[53] "Farewell, though the journey continues", *Walking Together,* Council for Aboriginal Reconciliation, Number 30, January 2001, page 3.

[54] "Perspectives on Aboriginal and Torres Strait islander Issues", Menzies Lecture, 13 December 2000, *The Australian,* 14 December 2000, page 11.

The *Australian Document Towards Reconciliation* is a relatively short statement of aspiration concerning Reconciliation. The Roadmap represents ways for achieving that goal in terms of four National Strategies:

- The National Strategy to Sustain the Reconciliation Process
- The National Strategy to Promote Recognition of Aboriginal and Torres Strait islander Rights
- The National Strategy to Overcome Disadvantage
- The National Strategy for Economic Independence.

Each of these National Strategies was expanded on in separate booklets.

Having prepared and presented these documents the Council devoted the remaining few months of its term to preparing its Final Report. This was presented in Parliament House, Canberra, at a morning event on 7 December, to Prime Minister Howard, Deputy Prime Minister John Anderson, Leader of the Opposition Kim Beazley, and Australian Democrats leader, Senator Lees. The Report begins with a brief look at the history which made the reconciliation process necessary. It goes on to summarise the main features of the experience over the decade. The final section looks to the future and makes six recommendations for continuing the process of Reconciliation, which I summarise:

1. That the Coalition of Australian Governments agree to implement and monitor a national framework under which governments, with ATSIC, work to overcome Indigenous Australians' disadvantage in accordance with measurable benchmarks.
2. That all parliaments, and local governments, pass formal motions of support for the *Australian Document TowardsReconciliation* and the *Roadmap for Reconciliation*, enshrine their basic principles in legislation, and determine how key recommendations can best be implemented.
3. That the Commonwealth Parliament prepare a proposed referendum to
   - recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution; and
   - remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.
4. That all levels of government, non-government, business, peak bodies, communities and individuals commit themselves to continuing the process of reconciliation by
   - affirming the Council's documents
   - providing resources
   - undertaking educational and public information activities
   - supporting the new foundation, Reconciliation Australia.
5. That each government and parliament
   - recognise that Australia was settled without treaty or consent and

that it would be desirable if there were agreements or treaties
- negotiate a process for achieving this that protects the political, legal, cultural and economic position of Aborigines and Torres Strait Islanders.

6. That the Commonwealth parliament enact legislation (for which the Council had prepared a draft) to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved.

These last two recommendations, in particular, are stronger than some observers had expected from the Council. Chairperson Evelyn Scott writes:

> "There will be debate about the two final recommendations, concerning some formal settlement of the issues created by the fact that Aboriginal and Torres Strait Islander peoples were dispossessed of their lands without either treaty or consent. We must continue the conversation about these issues."[55]

Sustaining the Reconciliation Process

The occasion on 7 December also marked the first public appearance of the new foundation, Reconciliation Australia. The Prime Minister committed the Commonwealth Government to providing $5.5 million by way of seed funding; otherwise the foundation needs to raise its own funds. I am not aware of any responses from the Commonwealth Government to other recommendations from the Council.

Subject to funding, Reconciliation Australia takes the place of the Council for Aboriginal Reconciliation, but on a non-government basis. It is no longer able to employ its AFR (Australians for Rreconciliation) coordinators who were key links to "the people's movement" and to the various local Reconciliation groups (LRGs) which had been established around Australia.

At State/Territory level, the several Committees have been in touch with each other and are proceeding to incorporate, both individually and as a federation. The bodies for each of the States are receiving financial support from their governments. In NSW the State Reconciliation Committee is incorporating as the NSW Reconciliation Council on terms which, it is hoped, will draw all 55 or so LRGs in the State to join in.

The relationship between the State/Territory Reconciliation Committees and Reconciliation Australia is still being sorted out. So, too, are proposals for a National Reconciliation Forum to bring together all players in the movement towards Reconciliation.[56]

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[55] Note 53, above.

[56] Post-*apartheid* South Africa has had a Truth and Reconciliation Commission, as have a number of other countries. I have suggested elsewhere that ascertaining "the truth" is

Indigenous Australians Rights and Aspirations

Things have improved markedly through the 20th century from the low baseline at the time of Federation referred to by Justice Michael Kirby. But some matters still require attention. We have a relatively clear picture of the matters that are important to Aborigines and Torres Strait Islanders today as "unfinished business".

We have known since the 1960s that Aborigines and Torres Strait Islanders have been seriously over-represented in the criminal justice and juvenile justice systems.[57] One initial response was the establishment of the Aboriginal Legal Services.[58] The ALSs have been important, and continue to be important. But over-representation continues, as we were told in 1991 by the Royal Commission into Aboriginal Deaths in Custody. The Royal Commission offered 339 recommendations, almost all of which were accepted by governments, at least in principle – but subsequent analyses show that implementation has been limited, and the statistics of over-representation remain bad.[59] Indeed, mandatory sentencing laws in the Northern Territory and Western Australia seem calculated to worsen those statistics.

We have also known since the 1960s that land rights is of central importance to Indigenous Australians. And responses through legislation and court decisions have been reasonably substantial. There are particular problems in working out the proper approach to native title cases, and to meeting the aspirations of people whose country is no longer available for return. And there are serious problems with the 1998 amendments to the *Native Title Act 1993* (Cth).

We have also learned something of the importance of cultural matters, particularly in relation to sites, though some scepticism seems still to surround these matters – witness the saga of the Hindmarsh Island Bridge. There is less awareness about the idea for a continuing role for Indigenous laws, and of the need to adjust Australian laws to accommodate Indigenous law.

There is wide recognition of the historical fact that many Indigenous Australians were removed as children from their families, and that such

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less obviously a task for an Australian Reconciliation body, because of the work of historians since the 1960s, and because of the work of inquiries into such matters as Aboriginal deaths in custody, recognition of Aboriginal customary laws, and the separation of Aboriginal and Torres Strait Islander children from their families: "Reconciliation: Challenges for Australian Law", (2001) 7 (1) *Australian Journal of Human Rights* (forthcoming).

[57] Elizabeth Eggleston, *Fear, Favour or Affection*, (1976, ANU Press, Canberra), based on her Ph D thesis commenced in 1965, was followed by other studies by other scholars, plus public inquiries.

[58] It was also a response to cultural and other problems that they experienced in getting assistance from "mainstream" sources, as were the establishment of other Aboriginal service-delivery bodies in such areas as health, child-care, housing, etc.

[59] Neva Collings and Rhonda Jacobsen, "Reconciliation with Australia's Young Indigenous people" (1999) 22 *UNSWLJ 647*.

removal has caused pain and suffering for many of them, and for the families from which they were removed. But there is considerable division as to how – and whether - the nation should respond.

There is little comprehension about claims for self-determination or self-government – the claims of people to be allowed to decide matters of importance to them, and their claims to be full participants in decisions by other levels of government that affect them.

There is perhaps least comprehension about the notion that there are constitutional matters that need to be addressed in terms of gaining belated consent to the non-Indigenous takeover of Australia.

The "Social Justice package"

The Keating Government proposed a three-stage response to the Mabo decision. Stage 1 was the *Native Title Act 1993* (Cth). Stage 2 involved the establishment of the Land Fund and the Indigenous Land Corporation. Stage 3 was a proposal to address the non-land needs and aspirations of Indigenous Australians. For the purposes of Stage 3, the Government asked ATSIC and the Council for Aboriginal Reconciliation to consult widely so as to identify those needs and aspirations and to recommend how they might be addressed. Both bodies produced reports during 1995, and so did the Aboriginal and Torres Strait Islander Social Justice Commissioner in HREOC.[60]

ATSIC drafted Principles for Indigenous Social Justice which were designed "to guide all future relationships between the Commonwealth and indigenous peoples". They would require Commonwealth acceptance of the fundamental rights of Aboriginal and Torres Strait Islander peoples to:

a. recognition of indigenous peoples as the original owners of this land, and of the particular rights that are associated with that status;
b. the enjoyment of, and protection for, the unique, rich and diverse indigenous cultures;
c. self-determination to decide within the broad context of Australian society the priorities and the directions of their own lives, and to freely determine their own affairs;
d. social justice and full equality of treatment, free from racism; and
e. exercise and enjoy the full benefits and protection of international covenants.[61]

The Council for Aboriginal Reconciliation also stressed the issue of socio-

[60] ATSIC, *Recognition, Rights and Reform* (1995); CAR, *Going Forward. Social Justice for the First Australians* (1995); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice. Strategies and Recommendations* (1995). Peter Jull, "An Aboriginal Policy for the Millennium: The Three Social Justice Reports", (1996) 1 *Australian Indigenous Law Reporter* 1

[61] *Recognition, Rights and Reform*, (1995, ATSIC), page 10.

economic disadvantage, and referred to such matters as "citizenship rights". It distinguished these individual equality rights from "Indigenous rights" – the collective and distinctive rights of Indigenous peoples to land and waters, culture, and so on.[62]

These categorisations of Indigenous rights are reflected at the international level in the draft Declaration on the Rights of Indigenous Peoples, currently under consideration in the United Nations' Commission on Human Rights. These claims / rights in respect of non-discrimination, territory, political rights and culture find support not only in the draft Declaration but in a number of international treaties and other instruments, most of which have been ratified by Australia.[63]

The Council for Aboriginal Reconciliation's four National Strategies also largely coincide with these formulations.

Focus 2000

In September 1999 ATSIC convened a meeting of some 60 Indigenous leaders to discuss future developments. The meeting developed a list of items of "unfinished business" as a Statement on Indigenous Rights which the leaders seek to have embodied in an agreement with governments. The list of matters is as follows[64]:

- Equality
- Distinct characteristics and identity
- Self-determination
- Law
- Culture
- Spiritual and religious traditions
- Language
- Participation and partnerships
- Economic and social development
- Special measures
- Education and training
- Land and resources
- Self-government
- Constitutional recognition
- Treaties and agreements
- Ongoing processes

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62 *Going Forward. Social Justice for the First Australians* (1995, Council for Aboriginal Reconciliation), pages 22, 26-27.

63 Garth Nettheim, "Reconciliation: Challenges for Australian Law" (2001) 7 (1)*Australian Journal of Human Rights* (forthcoming). Sarah Pritchard and Charlotte Heindow-Dolman, "Indigenous Peoples and International Law: A Critical Overview" (1998) 3 *Australian Indigenous Law Reporter* 473.

64 The list is discussed by Patrick Dodson in his 4th Vincent Lingiari Memorial Lecture

If this is accepted as the list of "unfinished business", it represents also the specific issues that need to be resolved in achieving Reconciliation. As such, the list presents interesting challenges for Australian law – and lawyers. I group them as Citizenship or Equality Rights, on the one hand, and Indigenous Rights, on the other; and I group the Indigenous Rights under the headings of territorial rights, cultural rights and political rights.

Equality/Citizenship Rights

Equality. The need here is not only to overcome overt racial discrimination. Such discrimination clearly continues. But it no longer has an express legislative basis. And we have fairly sophisticated anti-discrimination legislation and machinery at Commonwealth and State/Territory levels which, with some fine tuning, should be able to deal with the more blatant cases.[65]

The need is also in terms of what have been referred to as "citizenship rights" – the rights of Indigenous Australians to comparable levels of services as are available to other Australians, and the progressive reduction of the marked disparities in the socio-economic indicators in such matters as health, housing, education and employment. Such disparities are matters of concern in terms of Australia being a party to the *International Covenant on Economic, Social and Cultural Rights.* They are the focus for the Council for Aboriginal Reconciliation's *National Strategy to Overcome Disadvantage.*

Special Measures. But would special programs to overcome such disadvantages themselves offend the ideal of equality? This notion, "the myth of equality", was one of the reasons suggested by Brennan and Crawford for the lack of progress in attending to the aspirations of Indigenous Australians.[66] It remains politically potent in the One Nation party's attack on the "special privileges" accorded to Indigenous Australians.[67]

But, as Brennan and Crawford pointed out, the jurisprudence of comparable countries such as the USA and Canada, and of Australia itself, accepts that "special measures" to overcome disadvantage do not offend equality principles. The *International Convention on the Elimination of Racial Discrimination* expressly permits "special measures" to overcome disadvantage (Article 1 (4)) and even requires State parties to adopt such measures (Article 2 (2)). The Convention is implemented in Australian

[65] For an important assessment of the Commonwealth legislation, see Race Discrimination Commissioner, *The Racial Discrimination Act. A Review* (1995, AGPS, Canberra).

[66] See above pages 14-15, and (1990) 1 *Public Law Review* 53 at 64 – 66.

[67] Laura Tingle quoted from Pauline Hanson's maiden speech in Federal Parliament, and set out facts in response, in "Behind the Lines: The Speech that Split a Nation", *The Age,* 15 November 1996, page 19, reproduced in Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues: Commentary and Materials* (2 ed, 1997, LBC), 20 – 23.

law by the *Racial Discrimination Act 1975* (Cth), section 8 (1) of which permits such "special measures" as exceptions to the prohibition of discrimination.

On a broader view, the sort of measures under discussion do not constitute discrimination in the first place, so as to require authorisation as an exception. Differentiation as such does not constitute discrimination, and the goal of equality is less concerned with formal equality of treatment than with substantive equality of outcomes.[68]

Education and Training. Education and training are obviously an essential component of the equality agenda. Statistics continue to indicate that Indigenous Australians have markedly lower levels of education and training than the level of attainment for Australians generally. Education and training are also important to many of the other items on the list of "unfinished business". As already indicated, there is a role for Universities to facilitate access to their courses by Indigenous Australians, and to provide such academic and cultural support as may be needed to make it possible for them to succeed.

Economic and Social Development. This agenda item also links to the matter of overcoming disadvantage. The Council for Aboriginal Reconciliation's *Roadmap for Reconciliation* has a distinct National Strategy for Economic Independence which is directed to achieving for Aboriginal and Torres Strait Islander peoples and communities "the same levels of economic independence as the wider community". The Strategy lists essential actions as including access to jobs and resources, effective business practices and skills development.

Participation and Partnerships. This item links to both goals of overcoming disadvantage and economic empowerment by proposing partnerships with business and other private sector bodies.

The idea of partnership also links into the role of governments, particularly in relation to the delivery of services to Indigenous peoples and communities. So does the term "participation". I have referred to areas where such participation and partnership have been important, namely the establishment and funding of Aboriginal Legal Services, Aboriginal Medical Services, and so on.

Participation also has a wider reference to the notion that Indigenous peoples should be effective participants when governments and public authorities make decisions on matters that particularly affect Aborigines and Torres Strait Islanders. This notion of public participation takes us into the area of Indigenous political rights, discussed later.

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[68] Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review* (1995, AGPS), Chapter 9; Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues: Commentary and Materials* (2 ed, 1997, LBC) pages 322 – 332.

Indigenous Rights

The Council for Aboriginal Reconciliation's *Roadmap for Reconciliation* has a distinct National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights which addresses a number of the distinctive Indigenous rights in relation to cultural and political rights.

Territorial Rights

Land and Resources. The question of land rights and native title has been at the forefront of the demands of Aboriginal and Torres Strait Islander peoples on the Australian legal and political systems. There has been widespread (if not universal) acceptance of the case for recognising the continuing relationship of Indigenous peoples with land and waters where this can be achieved without displacing post-colonisation titles or public uses of land – and without unduly impeding "resource development" activities, such as mining. (The main developments and the key current issues have been referred to earlier).

There is also widespread acceptance of the fact that "country" is central to Aboriginal cultures.

Cultural Rights

Distinct Characteristics and Identity. Aboriginal peoples and Torres Strait Islanders have histories and cultures which are distinct from those of other Australians. Of course, many people of Indigenous descent live as part of the broader society and may have little or no knowledge of their Indigenous heritages. But for those who retain connections to their heritage, their claim is more wide-ranging than the claims of immigrant ethnic groups to multi-culturalism. It is a claim to recognition of their distinct characteristics and identity as the First Peoples of Australia. It commences with territorial rights, which are central to culture, but goes beyond territory, particularly when territory cannot be regained.

Culture. Culture has many dimensions, some of which are indicated by separate items on the list of "unfinished business". It includes art and ceremony, it includes knowledge of the properties of plants, and a range of other matters which receive inadequate protection under Australian law.[69]

[69] An analysis of the shortcomings of Australian law to protect Indigenous intellectual and cultural property can be found in a report prepared by Indigenous lawyer, Terri Janke,

Spiritual and Religious Traditions. These matters are very important to Indigenous Australians. They receive some support from the protection provided for sites and objects by Commonwealth and State / Territory laws. But there have been weaknesses in those laws,[70] and 1998 draft Commonwealth legislation was seen by many – including the Senate – as further weakening protection at national level. The *Hindmarsh Island Bridge Act 1997* (Cth) placed the area in question outside the protection of the 1984 Commonwealth Act, and its validity was upheld by a High Court majority.[71]

Language. This item on the list of "unfinished business" is largely self-explanatory. Aboriginal people are no longer forbidden to speak their languages, though many have lost their languages, and many languages have themselves been lost. Problems still arise. For example, until quite recently in Northern Territory courts, interpreters were available for a number of languages, but not for Aboriginal languages.

Law. Some legislation has recognised Indigenous law in particular matters, such as recognition of traditional marriages, or hunting and fishing rights. Some courts have been able to provide recognition to some aspects of Indigenous laws. Considerable work was done by the Australian Law Reform Commission on the overall situation in its 1986 report,[72] but most of the recommendations have not been implemented.[73]

Political Rights

Self-Government. The starting point, of course, is that the various Aboriginal and Torres Strait Islander peoples governed themselves prior to colonisation. It is possible to express this self-government in terms of an original "sovereignty". Indeed, US law acknowledges the continuing sovereignty of Indian nations, though subject to the ultimate sovereignty of Congress, and Indian nations have their own tribal governments and tribal courts.[74] In Canada, the term "sovereignty" has largely been avoided in

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for AIATSIS and ATSIC: *Our Culture: Our Furure. Report on Australian Indigenous Cultural and Intellectual Property Rights,*(1998, Michael Frankel & Co.). For a shorter account, see Terri Janke, "Respecting Indigenous Cultural and Intellectual Property Rights" (1999) 22 *UNSWLJ* 631.

70 Elizabeth Evatt, *Review of the Aboriginal and Torres Strait* Islander *Heritage Protection Act 1984,* (1996, AGPS, Canberra); Elizabeth Evatt, "Overview of State and Territory Heritage Legislation" (1998) 4 (16) *Indigenous Law Bulletin* 4.

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

72 *The Recognition of Aboriginal Customary Laws,* Report No. 31 (1986, AGPS, Canberra).

73 Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues. Commentary and Materials* (2 ed, 1997, LBC), chapter 2.

74 Frank Brennan, "The prospects for National Reconciliation following the post-Wik Standoff of Government and Indigenous leaders" (1999) 22 *UNSWLJ* 618 at 623.

relation to First Nations peoples, but there is increasing recognition of their "inherent right to self-government". The issue has been discussed in Australia over recent decades, and it is possible to identify some instances of effective self-government on particular matters. But it would be fair to say that the notion is unfamiliar to most Australians. If it is to progress, there needs to be more public discussion.[75]

Self-Determination. This concept derives from several references in the *Charter of the United Nations* and the express language of Article 1 of both Covenants – the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights.* Both Articles commence:

> "(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Australia has, in the past, supported the use of similar language in the debates on the draft UN Declaration on the Rights of Indigenous Peoples, but has recently spoken against use of the term. [76]

Effectively, the concept of self-determination is one that asserts the right of "a people" to decide its political status. Indigenous Australians argue that, in the absence of an initial treaty or treaties, they have never been able to exercise this right, but that the right still exists. The point relates to the earlier discussion about entry to the Australian polity, and to the debate about a modern Treaty.[77]

Constitutional Recognition. Various proposals for Constitutional change in relation to Indigenous Australians have been put forward over the years.[78]

The Council for Aboriginal Reconciliation's National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights contains three proposals relating to the Australian Constitution:

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[75] See, generally, Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues: Commentary and Materials* (2 ed, 1997, LBC), chapter 3; Garth Nettheim, "'The Consent of the Natives": Mabo and Indigenous Political Rights", (1993) 15 *The Sydney Law Review* 223; and in *Essays on the Mabo Decision* (1993, LBC) 103; Jeremy Webber, "Native Title and Self-Government", (1999) 22 *UNSWLJ* 600; Sarah pritchard, "Forging New Relationships . . ." (1999) 22 *UNSWLJ at 609-610.*

[76] Mick Dodson and Sarah Pritchard, "Recent Developments in Indigenous Policy: The Abandonment of Self-Determination", (1998) 4 (15) *Indigenous Law Bulletin* 4.

[77] For a number of Indigenous statements on this issue, see Christine Fletcher (ed), *Aboriginal Self-Determination in Australia,* (1994, Aboriginal Studies Press, Canberra).

[78] Garth Nettheim, "Indigenous Australians and the Constitution", in (1999) 74 *Reform – A Journal of National and International Law Reform* (ALRC, Sydney), 29; Garth Nettheim, "Reconciliation and the Constitution", (1999) 22 *UNSWLJ* 625; Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues. Commentary and Materials* (2 ed, 1997, LBC), pages 461 – 465.

- a new preamble which recognises the status of the first Australians;
- repeal of section 25, which refers to the possibility that persons of any race might be denied the vote under State law; and
- a general prohibition of discrimination on the basis of race.

These proposals were incorporated in Recommendation 3 in the Council's Final Report.[79]

Treaties and Agreements. Recommendation 5 in the Council's Final Report[80] proposed negotiation of a process to achieve "agreements or treaties" to protect "the political, legal, cultural and economic position of Aboriginal and Torres Strait Islander peoples".

The idea of a latter-day treaty or treaties (under that name, or some other term such as "document of reconciliation") has been around for a number of years, and has been revived recently by ATSIC. It is important to distinguish such a proposal from most of the other items on the list of "unfinished business", which deal with particular issues that are said to require resolution. The proposal for a treaty of agreement is simply one possible *means* for expressing resolution of such issues.

However this general proposition should be qualified in relation to the fundamental question of entry by Indigenous Australians into the Australian polity. A treaty (again, under that or some other name) seems to be the appropriate instrument to formalise such a high level "reconciliation".

To date, the Commonwealth Government has not indicated any interest in pursuing this proposal, or in proceeding with the draft legislation which the Council referred to in Recommendation 6, and attached to its Final Report.

Ongoing Processes. The Council's Recommendation 6 contemplated a process for negotiating how unresolved issues might be identified and resolved. The Commonwealth Government has supported the ongoing process of Reconciliation in a less specific sense by committing some funds to the new foundation, Reconciliation Australia. And there is a general commitment to "practical Reconciliation", which seems to refer to the Citizenship Rights aspects of the Indigenous agenda, i.e., overcoming disadvantage. Otherwise, the list of "unfinished business" remains to be addressed.

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[79] *Reconciliation. Australia's Challenge*, (2000, CAR), page 105.
[80] Id, page 106.

Conclusion

There are many challenges for Australian law, and for Australian lawyers, on the way to Reconciliation. I would not wish to overstate the role of Law – far more critical is the role of Politics. As Brennan and Crawford pointed out, party politics have bedevilled progress in the past. They were correct, I believe, in saying that the movement towards meaningful change needed to transcend such partisanship in order for gains to be made.

That has happened to some extent. The breakthrough in regard to statutory land rights for the Northern Territory came about when legislation introduced by the Whitlam Government was (substantially) enacted under the Fraser Government. The breakthrough in regard to native title by-passed politicians altogether, coming as it did from the High Court of Australia. But the subsequent legislative framework became a political football between the major political parties.

On other matters, a remarkable degree of bipartisanship led to the establishment of the Council for Aboriginal Reconciliation. And one of the most important achievements during the Council's lifetime was the growth of "the people's movement". The maintenance of this is essential to sustain the Reconciliation process.

Law is no longer part of the problem, as it was in the case of Queensland's legislation for Aborigines and Torres Strait Islanders as late as the early 1980s, or as it was in providing for the removal of Aboriginal children from their families in circumstances where non-Aboriginal children might not be so removed. (However there are still apparently "neutral" laws which have a disproportionate impact on Indigenous Australians, such as recent mandatory sentencing legislation in the Northern Territory and Western Australia.)

Can Law be part of the solution?

It has established that it can, whether in terms of legislation for statutory land rights, or judicial decisions recognising native title. Law can be used to give legal recognition to some of the aspirations of Indigenous Australians, provided that politicians are minded to proceed to legislation. Here we come back to the problem perceived by Brennan and Crawford – the centrality of political will. If politicians are to move, they themselves need to be moved by those to whom they are ultimately responsible: the electors. Here lies the importance of "the people's movement" for Reconciliation.

There is important work for lawyers and law students to undertake in this endeavour. There is a need to provide information and analysis to the community about the various items of "unfinished business" and about possible solutions. There is a particular need to explain the items that I grouped under the heading "Political Rights", and especially the proposal for treaties or agreements, because these proposals are very susceptible to being misrepresented. Sir Gerard Brennan has written:

"As reconciliation is a matter for the heart as well as the head, the law cannot achieve reconciliation of and by itself. But it has an important role to play.[81]

. . .

"There is an inadequate public understanding of the impact of law on Aboriginal life and culture. But lawyers are well fitted to explain the close relationship between law and the declared aspirations for reconciliation. When the explanation is accurate, many of the misunderstandings which undermine reconciliation can be dispelled. Lawyers can walk on the 'new journey' which the Council for Aboriginal reconciliation asks us to begin: 'We must learn our shared history, walk together and grow together to enrich our understanding'".[82]

And, if you can establish links to local Reconciliation groups, and local Indigenous organisations, I feel sure that they would appreciate your particular skills.

There is work to be done to keep Reconciliation on track. It is, I suggest, worthwhile work, and interesting work. Through such activity we can make a difference.

[81] Sir Gerard Brennan, "Reconciliation", (1999) 22 *UNSWLJ* 595.
[82] Id, page 599.