Mind, Body and Spirit: Pathways Forward for Reconciliation

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During this year of the Centenary of Federation – this 100 year birthday of our Constitution – it is timely to reflect upon the ways in which the structures of the Australian state have worked against reconciliation and how they might be changed to improve the relationship between Indigenous and non-Indigenous people.

One of the themes I want to explore tonight is the connection between these institutions of the state and the individuals – the people – who make up our society. When this connection is remembered, reconciliation becomes not just a journey for the nation but a journey for individuals.

Regardless of the age of our Constitution, it is always the right time to look into our hearts and reflect upon our commitment to the people we co-exist with, those with whom we share our land, our country, our environment, our families and our community.

Tonight, I want to share a vision of where the reconciliation process should lead. It is a vision that embraces substantive and real changes in

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The Morpeth Lecture has been a free public lecture presented by the University of Newcastle and the Anglican Diocese of Newcastle since 1967. In the past, speakers have often been visiting church leaders with a strong religious thrust in their chosen topics. In recent times speakers have chosen to explore a variety of interpretations of spirituality. With less emphasis on the theological perspective, religious issues have been examined in the context of the social, cultural and moral issues facing contemporary society.

the way our laws and governments deal with Indigenous peoples. It is a vision that understands that these goals cannot be achieved without the education, tolerance, heart and spirit of individual Australians.

I want to begin by canvassing the current state of Indigenous rights protection in Australia as a way of objectively assessing the degree to which our state institutions – that is, our laws and governments – facilitate reconciliation. As many of you will be aware, the United Nations Committee on the Elimination of all forms of Racial Discrimination recently issued a report that was very critical of Australia's record.[1] It found that our country, and our government, had failed to meet certain obligations that we, as a nation, have agreed to uphold under the *Convention to Eliminate all forms of Racial Discrimination* (CERD). The CERD Committee's report expressed concern about the absence of any entrenched law guaranteeing against racial discrimination, provisions of the *Native Title Amendment Act 1998* (Cth), the failure to apologize for the stolen generations and its refusal to interfere to change mandatory sentencing laws.

The Federal Government's response to the report was one of outrage. The report, though in no way untrue, was labeled as unbalanced and unfair. We are not, the Federal Government told us, bound by the United Nations.[2] Indeed, a country like ours is capable of looking after our own affairs and, they added sincerely, we have a good record on human rights "butt out" was the response of John Howard, Alexander Downer, John Herron and Phillip Ruddock: "We are capable of determining our own appropriate standards of human rights, we do not need the international community to do it for us."

I use this as the starting point tonight because not only does the CERD Committee report point to some of the issues that continue to impede true reconciliation – mandatory sentencing, erosion of native title rights and failure to protect from racial discrimination – but the official reaction to the report contains two assumptions that I wish to reject, namely:

- Our "good" record on human rights and
- Our own "appropriate" standards to assess our human rights.

I want to implicitly challenge this notion that Australia's human rights record is good enough to make us immune from international scrutiny by bodies designed to monitor human rights. And I want to do that because I believe we need to, as a nation, understand that these failures to meet accepted human rights standards are a fundamental barrier to reconciliation.

Many Australians sincerely do believe that we have a system of government and a set of laws that treats all Australians equally. On the face

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1 CERD/C/56/Misc.42/rev.3, 2000.

2 See Press Release by Alexander Downer, 30 March 2000: Government to Review UN Treaty Committees.

of it, our Constitution may not seem to discriminate against Indigenous Australians and we have the *Racial Discrimination Act 1975 (Cth)* to prevent bias on the basis of race. Indeed, the 1967 referendum was a symbolic act of recognition that raised Indigenous hopes for the beginning of a new, inclusive relationship in which Indigenous peoples would enjoy, on the face of it, the same rights and protections as everyone else.

The 1967 referendum was not the first time that Indigenous people had sought symbolic inclusion with the hope that neutral, formal equality would lead to an improvement in circumstance and treatment. The political struggles for citizenship and the right to vote were predicated on this same belief.

However, today, over 35 years after the 1967 Constitutional amendment, Indigenous people are still the most socioeconomically disadvantaged within Australian society and are still vulnerable to systemic discriminatory practices. Indigenous Australians continue to be the poorest sector of the Australian community. In many respects, Aboriginal Australia is a typical profile of a conquered and colonized people in the world as the following statistics highlight[3]:

- The life expectancy of Indigenous people is 15-20 years less than the general population.
- Indigenous mortality rates of still more than 3 to 5 times higher than that for other Australian children.
- Infectious diseases are 12 times higher than the Australian average.
- Diabetes affects 30% of people in Aboriginal and Torres Strait Islander communities.
- Hospital admissions for Aboriginal men are 71% higher and for Indigenous women is 57% higher than for their non- Indigenous counterparts.
- 2.2% of Indigenous people have tertiary degrees compared with 12.8% of all Australians.
- The unemployment rate is 38% for Indigenous people, compared with 8.7% for the general population.
- The mean individual income of an Indigenous family is 65% of that of the general population.
- Indigenous peoples are 17.3 times more likely to be arrested; 14.7 times more likely to be imprisoned; and 16.5 times more likely to die in custody than non-Indigenous Australians.

These statistics highlight the undeniable socio-economic disparity between Indigenous people and all other Australians in every measurable service sector: access to medical treatment, education, employment and economic development. The processes of dispossession and colonization

[3] Aboriginal and Torres Strait Islander Commission. *Indigenous Australians Today*. Canberra: ATSIC,1999; Australian Bureau of Statistics, 2000; Federal Race Discrimination Commissioner. *Face the Facts*. Sydney: Federal Race Discrimination Commissioner, 1997.

have placed Australia's Indigenous communities in a cycle of poverty – a cycle of poor health, low levels of education, high rates of unemployment, low incomes, and poor access to essential services. Perhaps the biggest condemnation is that many of these disparities occur in areas that are considered to be unquestioned rights of all other Australians.

With the benefit of hindsight, we can read these socio-economic disparities and conclude that formal equality has allowed socio-economic disadvantage to continue and has done nothing to stop the erosion of Indigenous rights, particularly property interests in the form of native title. It is becoming increasingly evident that the formal structures and institutions within Australia are not addressing the socio-economic position of Indigenous peoples enough to equalize - let alone reverse - the socio-economic impact of colonization and past government policies and practices.

I want to look at two reasons why this is so. I want to look at how our seemingly neutral structures, like our Constitution, can contain and therefore perpetuate inequality. And I want to look at the part Indigenous people play in the psyche of all non- Indigenous Australians because I believe that it goes a long way towards explaining why formal equality doesn't work and why seemingly neutral institutions produce and perpetuate unequal results.

I will start with this second issue first. In 1988, the year of Australia's Bicentennial and a time of heightened awareness of Indigenous issues, Hugh Mackay, who delivered the last year's Morpeth lecture, produced a report detailing the responses of Australians to a range of issues including immigration and Indigenous people. Typical of the responses to Australia's Indigenous people that Mackay recorded was the following:

> "Some of them are top blokes, but most of them don't seem to be too happy to do things our way."[4]

> "When they hang around our towns, they are hopeless drunken lazy slobs. And filthy. It makes you realize that they would probably be happier living in the primitive way they used to. Perhaps they should all be given land where they can go off and do their own thing. Then the trouble seems to be that they want the alcohol, they want the money, they want the houses ... They want the best of both worlds." [5]

There is a clear perception about the inferiority of Indigenous culture and the superiority of white Australia with comments like:

> "They are so primitive. You can't imagine that we can learn from them."[6]

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[4] Hugh Mackay. *Mackay Report: Being Australian: March 1988*. NSW: Mackay Research Centre for Communication Studies, 1988. At p.44.
[5] Mackay, 1988. At p.45
[6] Mackay, 1988. At p.46.

Yet Australians believe that they are more than fair in their treatment of Indigenous people. For example:

> "If other people had settled here, the aborigines might have got a much rougher deal than they got from the Brits. From one point of view, they are quite lucky that it's us who came here, and not someone who would have been much harder to get on with."[7]

Mackay's work recorded suspicions of the legitimacy of claims to land and a firm belief that Aboriginal people should not be singled out for special treatment.

It seems that at the root of the inability and resistance for many Australians to understand the position of Indigenous people is contained in the rhetoric of not wanting to 'feel guilty' about the past. The recognition that Indigenous people were here first undermines the myths based on the belief that it was the British who 'discovered' Australia and tamed its mysteries. It also avoids asking questions about the decreased Indigenous population and it ignores questions about the validity and morality of British claims to property and sovereignty.

In recent years, particularly due to the process of reconciliation, there has been an increased awareness of aspects of the experience of Indigenous people in Australian society. The Royal Commission into Aboriginal Deaths in Custody's *National Report*[8] and the Human Rights Commission's *Bringing them Home*[9] report have brought to the attention of the public issues of which impacted on Indigenous families.

Yet even in the face of evidence of historical injustices and their link to contemporary situations, Australians in many quarters seem widely resistant to the idea that they should acknowledge the treatment of Indigenous people at the hands of the settlers and subsequent government policies. Whilst some Australians may be prepared to face some historical facts, others are still not prepared to think about how these historical facts undermine the national self image nor the extent to which these myths created an institutional legacy.

This sentiment was reflected in the comments by Prime Minister John Howard after the report on the removal of Indigenous children was first made public. He said:

> "So far as the public is concerned, they don't believe in intergenerational guilt and they do believe that this country has a proud history... Some of the past practices, although they might be condemned now, were done with the best

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7 Mackay, 1988. At p.46.

8 Royal Commission into Aboriginal Deaths in Custody. *National Report: Overview and Recommendations*. Canberra: Australian Government Publishing Service, 1991.

9 Human Rights and Equal Opportunity Commission. *Bringing Them Home: A Guide to the Findings and Recommendations of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*. Canberra: Australian Government Publishing Service, 1997.

> motives and intentions and many people were in fact cared for in warm and loving homes." [10]

There is a strong ground swell of support for the recognition of past injustice against Indigenous Australians. This was evident in the number of people and organizations that did apologize for the removal practices, who signed the 'sorry books' and who do feel a personal commitment to incorporating Indigenous perspectives and experiences into Australian society. However, those labeling recognition of past injustices as the "politics of guilt" fail to understand that revising Australia's past is not about generating guilt, it is about generating understanding. The ability to understand history allows lessons to be learnt rather than myths and fallacies to continue.

These racist nationalist conceptions, far from being harmless, have had profound impacts on Indigenous people. I want to use the following example of native title.

On January 22, 1997 the front page of the *Sydney Morning Herald* had news of a tragic fire in Melbourne. The photographs showed flames licking a house, charred bicycles and men fighting to save property. The newspapers were able to play an angle which evoked sympathy from Australians. The loss of property was emphasized in its human elements. On th left of the news of the fire was another news item. It was headed 'Aborigines set strong demands for Wik talks'. At that time, the 'Wik talks' were the latest battleground in the fight by Indigenous people for the recognition of their property rights.

The media coverage of the Wik case was cloaked with a politically loaded perspective. The *Sydney Morning Herald* ran the headline that the Wik decision was "A decision for chaos." It printed a photograph of a farmer, a Mr. Fraser, looking forlornly down at his land under the headline "Family's land dream turns into nightmare." Although he claimed to be a strong supporter of the Aborigines and said he believes in reconciliation, Mr. Fraser was 'confused' by the decision. His reaction was on of bewilderment:

> "I can't believe these judges made that decision. It's not a decision. I can't see that we have made very much progress. We are obviously going through another period of indecision and I am not sure how much of that sort of punishment people can take."[11]

What the media coverage showed was three *contemporary* perceptions in the public consciousness:

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[10] *Sydney Morning Herald*. May 28, 1997.

[11] James Woodford. 'Family's land dream turns into nightmare'. *Sydney Morning Herald* December 24, 1996.

- That the loss of property - houses, bicycles, cars - was seen as a tragedy when (non-Indigenous) people lost their homes, but when Indigenous people lose a property right it does not have a human aspect to it.
- Indigenous people, in getting recognition of a property right, were seen as gaining something (making 'strong demands') rather than having recognized something that already exists and should be protected.
- Indigenous property interests were seen as threatening the interests of white property owners. The two cannot co-exist. Recognition of Indigenous rights leads to 'uncertainty' and 'indecision'.

These three perceptions - that there is no human aspect to Indigenous property rights, that Indigenous people are getting something for nothing and that non-Indigenous property interests are more valuable than black ones - are not just played out in the headlines of city newspapers. These contemporary perceptions assist in the rewriting and revising of Australia's historical treatment of Indigenous peoples, allowing a sanitized, temporal re-imagination.

Yet, from a lawyer's perspective, property rights are central to the English legal system and are protected tenaciously. Australian law has an expansive interpretation of the notion of a property right, extending to "every species of valuable right and interest,"[12] including "any tangible or intangible thing which the law protects under the name of property."[13] Property receives Constitutional protection under s.51(31) which allows the Federal Government to make laws with respect to the acquisition of property on just terms.

For most Australians, the right to own property and to have property interests protected is a central and an essential part of their legal system. The protection given to Indigenous property rights provides a stark contrast to these fundamental principles. For Indigenous people, Australian law has operated to deny property rights through the doctrine (*terra nullius*), acknowledge them sparingly (the *Mabo* case), and then extinguish them again (the *Native Title Act 1993 (Cth)* and *Native Title Amendment Act 1998 (Cth)*). For a society in which all members were supposed to be equal under the law, an analysis of the way in which property rights have been treated with such different standards shows that a dual system of laws has operated in Australia since 1788.

Even though legal recognition of native title interests had taken so long, the decision to finally afford them legal protection was controversial. Modern Australia is a country that is built on the land of Indigenous people, land that made the country rich through pastoral and mining industries. Advocates for mining and pastoral interests have resorted to scare tactics that have maliciously misled and unnecessarily frightened

[12] *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, per Starke J. At 290.
[13] Ibid, per Mc Tiernan J. At 295.

many Australians. By stating that the High Court's decision made freehold land vulnerable to native title claims lobbyists and mining companies fed, contributed to and exploited an ignorant fear amongst the general public by warning that the *Mabo* decision could lead to the confiscation of private property.

From the beginning Prime Minister John Howard's government made it clear where their loyalties lay on the issue of native title. The Howard government's response to the *Wik case* was laid out in their proposal to implement a '10 point plan'. The Federal Government tried to gain popular support for its' 10 point plan by portraying pastoral leases as small, family run farms, evoking the image of the farmer battling on the land. The Prime Minister continued to push an approach informed by the ideologies of white Australian nationalism and a psychological *terra nullius*, playing into "settlement" myths of Australia's land being tamed by brave men who struggled to make a living off the land. In a speech reported in *The Age* on 1 December,1997 Howard stated:

> "Australia's farmers, of course, have always occupied a very special place in our heart. ... They often endure the heart break of drought, the disappointment of bad international prices after a hard-worked season and quite frankly I find it impossible to imagine the Australia I love, without a strong and vibrant farming sector."[14]

This is an emotive response that in no way mirrors the way Mr. Howard feels about Indigenous Australians. They take up no such romanticized, nationalistic ideals in his heart, consciousness, or image of Australia.

The Federal Government's approach also ignored the fact that what the *Mabo* and *Wik* cases found was that a legitimate property right vested in Indigenous peoples; and Howard's rhetoric brushed over the historical context in which dispossession took place. He used the rhetoric of "equal laws for all Australians" to justify his political stance claiming that there should not be special laws for one section of the Australian public:

> "... We have clung tenaciously to the principle that no group in the Australian community should have rights that are not enjoyed by another group."[15]

This rhetoric ignored the fact that property laws in Australia had not been applied equally to all Australians; this "equal law" had facilitated the dispossession of Indigenous Australians, something that *Mabo* and *Wik* were seeking to rectify.

In fact, Howard attempted to block any objection to his decontextualised reasoning by raising the alarm that talk of the historical context is only the "politics of guilt:"

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[14] The Age. *'The sooner we get this debate over the better for all of us'*. December 1, 1997.
[15] Sydney Morning Herald. *Racing Towards an election.* April 11, 1998.

> "Australians of this generation should not be required to accept the guilt and blame for the past actions and policies over which they had no control."[16]

Howard's rhetorical approach to Indigenous property rights in Australia shows how institutional discrimination is married to a psychological *terra nullius* rooted in a romanticized version of history. His lack of historical context - massacres, dispossession, government policies of assimilation and removal of children - allow him to view recognition of native title in a vacuum. It is not that he is without any appreciation of history. In fact, conversely, while unlocking native title from the historic events that have failed to recognize and respect those rights, Howard claims that any historic wrongs are historic; they should not affect our contemporary thinking and policy making.

Howard's rhetoric highlights the same three *contemporary* perceptions in the public consciousness that I identified earlier:

- That when Indigenous people lose a property right it does not have a human aspect to it. Farmers can evoke an emotive response; Indigenous people cannot.
- Indigenous people, in getting recognition of a property right, are seen as gaining something rather than having recognized something that already exists and should be protected. Indigenous property interests are seen as a "special right."
- Indigenous property interests are seen as threatening the interests of white property owners. The two cannot coexist and one must be extinguished.

These recent developments concerning Indigenous property rights have been frustrating for the Indigenous community and the advocates and supporters working to protect those rights. Each incremental and piecemeal gain made within the judicial system has been truncated or extinguished by a legislature. For Indigenous peoples, the legacy of *terra nullius* may have been overturned by the *Mabo case* but another ideological enemy remains: while Australia has a dominant group who embraces a psychological *terra nullius*, any legal advances are vulnerable to legislative extinguishment. This psychological *terra nullius* allows Australians to separate the property rights of Indigenous Australians from those of all other Australians. It is a distinction which devalues legitimate and recognized Indigenous property rights.

If court victories offer only sporadic and episodic protections, which are limited or overturned by the legislatures political will, the constitution remains the last bastion for rights protection. But, on closer scrutiny, this area offers very few guarantees. Australia has no Bill of Rights and minimal rights are recognized in the Constitution, though some have been

[16] Svdney Morning Herald. *Mr. Howard unreconciled.* May 27, 1997.

implied. It is here, in our foundational document that we can see a powerful example of how seemingly neutral laws can contain or generate inequality.

The issue of whether the race power, which allows the Federal Government to make laws with regard to Indigenous people, could be used to deprive Indigenous people of their rights was raised by the plaintiff in *Kartinyeri v The Commonwealth* (the *Hindmarsh Island Bridge* case).[17] In that case, brought in a dispute over a development site that the plaintiff had claimed was sacred to her, the government sought to settle the matter by passing an act, the *Hindmarsh Island Bridge Act 1997 (Cth)*. That Act was designed to repeal the application of heritage protection laws to the plaintiff. The plaintiff argued, *inter alia*, that when Australians voted in the 1967 referendum to extend the federal race power (s.51(xxvi)) to include the power to make laws concerning Indigenous people it was with the understanding that the power would only be used to benefit Indigenous peoples. The court did not directly answer this issue, finding that the *Hindmarsh Island Bridge Act 1997 (Cth)* merely repealed legislation. The majority held that the power to make laws also contains the power to repeal or amend them.

However, of interest are, during the arguments in front of the High Court in this case, the following exchange took place between the Solicitor-General (Cth) and Justice Kirby:

Justice Kirby: Is the Commonwealth's submission that it is entirely and exclusively for the Parliament to determine the matter upon which special laws are deemed necessary or is there is a justiciable question for the court? I mean, it seems unthinkable that a law such as Nazi race laws could be enacted under the race power and that this court could do nothing about it.

Mr Gavan Griffith QC: Your Honour, if there was a reason why they could do something about it, a Nazi law, it would, be for a reason external to the races power....[18]

In other words, the Commonwealth argued that it could use the race power to implement Nazi style laws against Indigenous people. Many were shocked to find that Australia's Constitution offers no protection against racial discrimination but one need only look at the intention of the drafters to see why it remains this way.

In fact, a non-discrimination clause was proposed in the Constitution through the Tasmanian parliament when the instrument was being drafted. The proposed clause 110 was drafted to include the phrase:

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[17] (1998) 195 CLR 337

[18] Cited in George Williams, *Human Rights Under the Australian Constitution*, Melbourne: Oxford University Press, 1999.

> "... nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws." [19]

This clause was rejected and it was rejected for two reasons:

- It was believed that entrenched rights provisions were unnecessary, and
- It was considered desirable to ensure that the Australian states would have the power to continue to enact laws that discriminated against people on the basis of their race.

If one is aware of these attitudes held by the drafters of the Constitution then it comes as no surprise that the Constitution is a document that offers no protection against racial discrimination today. It was never intended to do so and the 1967 referendum in no way addressed or challenged those fundamental principles that remain entrenched in the document.

In a country where there is a racist Constitution, a racist *Native Title Act* and a Federal Government who cannot understand that there is a sector of the Australian community still hurting from the practice of removing children, the question of reconciliation between Indigenous and non- Indigenous is going to be difficult.

At the same time momentum gathered for the 1967 Constitutional Referendum, Aboriginal and Torres Strait Islander people began to push even harder for the recognition of their traditional property rights and assertion of sovereignty. This protest included the establishment of an Aboriginal tent embassy on the lawn of Parliament house. There were two strains of political strategy being used by Indigenous people at the tent embassy that were integral to Indigenous people's aspirations:

- Indigenous people wanted to be treated the same as all other Australians and demanded the reversal of paternalistic, racist and discriminatory practices.
- The notion of a tent embassy highlighted the fact that Indigenous people saw themselves as a distinct people, as a distinct nation or series of nations within the borders of the Australian state.

These seemingly competing political aims reveal the intricate relationship between claims of equal protection and special protection. They understand the false promise of formal equality and demand something more.

The situation of Indigenous people in Australia demands a resolution that considers the desirability of socio-economic equality, the importance

[19] Cited in George Williams, *Human Rights Under the Australian Constitution*, Melbourne: Oxford University Press, 1999.

of inclusion and the demands of political and cultural recognition. The challenge of improving rights protections needs to be approached by broader strategies than piecemeal court wins and band-aid welfare measures. Finding a better approach to the protection of Indigenous rights is a multifaceted process that must include the following:

- There must be acknowledgement of past wrongs committed against Indigenous people. This includes a recognition of the failure to recognize Indigenous sovereignty.
- There needs to be a better understanding of how inequalities have become institutionalized, allowing 'formal equality' to become a tool that maintains an unequal *status quo* and perpetuates injustice.
- There needs to be a thorough understanding of what Indigenous political aspirations are and an exploration of how those aspirations can be accommodated within Australia's institutions. This means understanding what Indigenous people mean when we say we want our sovereignty recognized and we want to be self-determining.
- Legal victories need to be coupled with attempts to change public (mis)perceptions about Indigenous Australians. These changes need to be coupled with changes to Australia's institutions.

This final point - the need for institutional change - highlights a very important issue. If Australia's institutions cannot protect the most vulnerable sector of the Australian community, how democratic are they? Do they embody the ideals we have as a nation if they produce and compound injustice and inequality? It is in answering this question that Indigenous rights take on a special role: they are the litmus test of how well our institutions operate and of how fair and equal our society is.

Gough Whitlam once said:

> "Australia's treatment of her aboriginal people will be the thing upon which the rest of the world will judge Australia and Australians - not just now, but in the greater perspective of history."[20]

As we see the role Aboriginal and Torres Strait Islander people play in the Australian consciousness, and see the condemnation of the CERD committee of the situation of Indigenous peoples in Australia, it is easy to see how prophetic those words were.

The way forward is not easy but there are several steps that could begin a real process of reconciliation. These lead back to the formula of recognition of past wrongs backed up by concrete legal enforcement. At a minimum this involves:

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[20] Cited in Henry Reynolds *The Law of the Land*, Ringwood: Penguin, 1992. At p.183.

(1) A National Apology

Central to the recognition of Indigenous rights is the need to recognize past injustices and past discrimination. Though this may seem tokenistic, such recognition has four consequences that could have profound effects on the relationship that Indigenous people have with the rest of Australia:

- It restores dignity to Indigenous people which is fundamental to self-respect and a feeling of acceptance;
- It understands that recognition of the treatment of Indigenous people and the true story of how Australia was invaded will have a profound effect on Australia's national identity;
- Recognition of prior ownership and sovereignty by Indigenous people could have legal implications; and,
- It also counters the psychological *terra nullius* which allows arbitrary lines to be drawn between the rights of Indigenous Australians and the rights of others.

(2) A Notion of Equality that Measures Outcomes

Australia's apparently neutral property laws operate in such a way so as to produce a result where the rights of one group of Australians are valued less than the rights of all others. It is not enough that laws be equal on their face; their application must generate equality. Equality needs to be measured not by the mere existence of a rights framework, but by assessing the end results of that framework. The focus needs to be on what happens after the institutions and ideals are placed on society, not on how it looks in the abstract. Equality needs to be substantive and must be judged on its results.

(3) Constitutional Change

There are several ways in which the Constitution could better protect Indigenous rights.

- *A Preamble to the Constitution*: A preamble is important because it sets the tone for the rest of the document. It can be used to give assistance in interpreting the Act that follows. If recognition of prior sovereignty and prior ownership were contained in a Constitution preamble, we may find that courts would read the Constitution as clearly promoting Indigenous rights protections (something that was left unclear in the *Hindmarsh Island Bridge case*).
- *A Bill of Rights*: Although some rights have been implied into the Constitution, the few explicitly in the text of our founding document have

been interpreted minimally.[21] Many rights the High Court has found have been implied. A bill of rights that granted rights and freedoms to everyone would be a non-contentious way in which to ensure some Indigenous rights protections. As an interim step towards a Constitutionally entrenched bill of rights, a legislative Bill of Rights would be a useful option.[22]

- *A Non-Discrimination clause*: Such a clause could enshrine the notion of non-discrimination in the Constitution. However, it must acknowledge the international human rights standard that understands that affirmative action initiatives do not breach this principle.
- *Specific Constitutional Protection* an amendment could be made to include a specific provision. In Canada, a comparable jurisdiction with a comparable history and comparable relationship with its Indigenous communities, the *Constitutional Act 1982* added the following provision to the Constitution:

> "Section 35 (1): The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

These changes cannot take place without one critical thing – the support and commitment of individual Australians.

I believe that we, as people, are more powerful than our institutions, it is my eternal, optimistic hope that the actions of individuals can generate and create fundamental change. Individuals, through their willingness to listen to others and to question the things they have taken for granted, in learning their history and developing an understanding of Indigenous history, culture and perspectives, can counter Australia's psychological *terra nullius*.

Reconciliation cannot take place while there is no acknowledgement of past wrongs *and* the impact that they continue to have on aborigines today. Aboriginal people have continually stressed this by constantly underlining the importance of a national apology.

Reconciliation cannot take place while there are not legal mechanisms in place to ensure the most basic of rights held by Indigenous people are protected.

Reconciliation cannot take place while we are guided by a Constitution – a document that establishes our system of government - that is entrenched with racist ideologies including the principle that Indigenous people are a dying race and that it is acceptable to discriminate against certain sectors of the Australian community on that basis.

Individuals can also bring about these steps towards reconciliation through actions. I have two examples that I would like to share with you. The first is from my dear friend, sister Jilpia Jones. Jilpia, a member of the stolen generations who worked with Professor Fred Hollows, marched recently from the

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[21] See George Williams *Human Rights Under the Australian Constitution*, Melbourne: Oxford University Press, 1999.

[22] George Williams *A Bill of Rights for Australia*, Sydney: UNSW Press, 2000.

tent embassy to Parliament House in protest of the Federal Government's submission on the inquiry into the stolen generations. When asked by a reporter what she thought the stance taken by the government had done to the reconciliation process, Jilpia replied: "I don't understand all this talk about reconciliation. When I was nursing, we had to wipe black bums and we had to wipe white bums. It was all the same to us then."

The reporter clearly wasn't expecting this response and I don't think really understood the point Jilpia was making but I think her observation reflects the way that many Indigenous people feel about the reconciliation process. We have always lived our lives navigating our way around non- Indigenous people, non-Indigenous standards, and non- Indigenous laws. We have all had to reconcile with non- Indigenous presence.

But, with the decimation of Indigenous populations, the removal of Indigenous people, the segregation of Indigenous people and the exclusion of Indigenous people from mainstream society, many Australians have been able to live without acknowledging us. Without having to come to terms with our communities. Without having to acknowledge our history. Without having to acknowledge how we live with the legacies of those actions every day. Without having to acknowledge and protect our rights.

The second example I want to use comes from even closer to home. There are many untold examples of reconciliation and when I think of the efforts of non-Indigenous Australians, I look to my mother, who is white, who raised two Indigenous children to be human rights lawyers, strong in their culture and cultural identity. I didn't realize, until I was an adult, how difficult it must be for a mother to raise children in a different culture and to embrace something of which she was not a part. I look at her with great admiration for a generosity of heart that ensured we took pride in our heritage and took paths that would ensure that we remained strongly within the Indigenous community. It is, I think, an example of the generosity of spirit and the tolerance of heart that highlights the simple actions, the simple relationships, that grow to develop real and true understanding between Indigenous and non-Indigenous Australians. I think we need to find and to celebrate these simple actions of ordinary Australians more often. They are, I believe, as powerful as the sea of hands and the show of support in the bridge walks for reconciliation.

As well as dedication of mind – through education, open hearts and open ears – and dedication of actions and tangible commitments, there needs to be an embrace of the spirit of reconciliation. I heard this spirit best defined by Kim Beasley in a recent reconciliation dinner in Sydney when he said: "Reconciliation is looking into the eyes of someone else and seeing a little bit of yourself in them."

For me, the sentiment captures the sense of shared humanity coupled with a respect and celebration of difference that true reconciliation embodies. If we as individuals, as people, can embrace these notions, I believe that our laws and our governments will follow.