More Than Sorry: Constructing a Legal Architecture for Practical Reconciliation

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> Reconciliation is an obligation of justice, not a manifestation of benevolence ... 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.[1]

1. Introduction: Making Reconciliation Practical

It is now well over a year and a half since the 'People's Walk for Reconciliation', a day which saw around a quarter of a million Australians walk quietly and peacefully over Sydney Harbour Bridge to show their support for reconciliation between indigenous and non-indigenous Australians.[2] Despite similar mass demonstrations of support for reconciliation around Australia, no significant governmental action has been taken to create a legal framework to house the formal process of reconciliation. With the mandate of the Council for Aboriginal Reconciliation having expired,[3] reconciliation is increasingly perceived as a 'people's movement',[4] best left to individuals in their daily lives, and not a matter for governmental initiative.[5]

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1 The Honourable Gerard Brennan, 'Reconciliation' (1999) 22 *UNSWLJ* 595.

2 See, for example, Debra Jopson & Tony Stephens, 'Long Walk to Freedom', *The Sydney Morning Herald* (29 May 2000) at 1, and other articles available at <http://smh.com.au/news/0005/29/pageone/>.

3 The mandate of the Council expired on 1 January 2001, under s32 of the *Council for Aboriginal Reconciliation Act* 1991 (Cth).

4 See, for example, Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge: Final Report* (Canberra: Commonwealth of Australia 2000): <http://www.austlii.edu.au/au/orgs/car/finalreport> (1 October 2001) at ch 6, Appendix 1 (hereinafter *CAR Final Report*).

5 Reconciliation Australia, an independent, non-profit body established by the Council for Aboriginal Reconciliation to provide a continuing national focus for reconciliation after the expiry of the Council's mandate, is a private body, with no formal public role in the reconciliation process.

A number of elements for a public legal architecture designed to foster the reconciliation process are, however, emerging. Three reports discussing some of these elements have, in the time since the People's Walk, been presented to the Commonwealth Parliament: the Report of the Senate Inquiry into the Stolen Generation,[6] the Final Report of the Council for Aboriginal Reconciliation,[7] and the *2000 Social Justice Report* of the Aboriginal and Torres Strait Islander Social Justice Commissioner.[8] These elements have not, however, been synthesised into a comprehensive proposal for a home for reconciliation.[9] No comprehensive, officially-sanctioned architecture has emerged which will provide the spaces needed to nurture practical measures for reconciliation.

In this piece, I propose a design for an institutional home for the reconciliation process. As my primary building materials, I use three legal-institutional forms discussed in these reports: tribunals, truth commissions and treaties. I argue that each of these legal-institutional forms identifies and addresses a particular problematic — responsibility, truth and sovereignty — dictating a particular practice to achieve reconciliation. Each practice mandates a unique praxiological space. I suggest that these three spaces — Reparations, Healing and Treaty Chambers — should together constitute a Reconciliation Commission, providing a home for reconciliation.

By creating these spaces, we foster a reconciliation through practice, a practical reconciliation. In writing of practical reconciliation in this way, I am attempting to subvert current notions of 'Practical Reconciliation'. The term, made popular by the Howard Government,[10] focuses on practical — as opposed to symbolic — measures of reconciliation between indigenous and non-indigenous Australians. Proponents of 'Practical Reconciliation' aim to make a 'real difference' (as

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6 Senate Legal and Constitutional References Committee, *Healing: A Legacy of Generations: The Report of the Inquiry into the Federal Government's Implementation of Recommendations Made by the Human Rights and Equal Opportunity Commission in Bringing Them Home* (Canberra: Senate Printing Unit, 2000) (report hereinafter '*Healing*'; inquiry hereinafter 'Stolen Generations Inquiry').

7 *CAR Final Report*, above n4. The Draft Legislation contained in Appendix 3 of the *CAR Final Report* has since become the Reconciliation Bill 2001 (Cth) (Second Reading) (hereinafter 'Reconciliation Bill 2001') tabled as a private member's bill by Senator Aden Ridgeway. At the time of writing, this Bill had completed a first reading in the Senate.

8 William Jonas, *2000 Social Justice Report of the ATSI Social Justice Commissioner* (21 December 2000): <http://www.hreoc.gov.au/social_justice/2000_report.html> (1 October 2001) (hereinafter '*2000 Social Justice Report*').

9 The proposals in the *CAR Final Report* Draft Legislation and the Reconciliation Bill 2001 (see above n7) leave the process of designing institutions for the practice of reconciliation to later consultation at a National Reconciliation Convention. See Reconciliation Bill 2001, draft s6.

10 See, for example, *Speech of the Hon John Howard* (26 August 1999): <http://www.atsia.gov.au/content/apology/apology_speech260899.html> (1 October 2001); the Hon John Howard MP, *Transcript of the Prime Minister The Hon John Howard MP Menzies Lecture Series Perspectives on Aboriginal and Torres Strait Islander Issues*: <http://www.pm.gov.au/news/speeches/2000/speech587.htm> (13 December 2000); the Hon John Howard MP, *Transcript of the Prime Minister The Hon John Howard MP at the National Launch Indigenous National Literacy and Numeracy Policy*: <http://www.pm.gov.au/news/speeches/2000/address2903.htm> (1 October 2001).

opposed to a symbolic gesture) in the improvement of indigenous lives.[11] They seek to achieve reconciliation by providing 'practical' measures such as improved service provision. This 'Practical Reconciliation' approach denies the utility of practising reconciliation by treating indigenes as a distinct group with specific rights distinct from other Australians; to accept such distinct rights, to accept this difference, is perceived as tantamount to accepting the division of Australian 'unity'.[12] Practical Reconciliation becomes a way of denying indigenous difference and its social and legal consequences. In contrast, proposals attempt to construct a practice of reconciliation which deals with the differences between indigenous and non-indigenous Australians, and to transform those differences from sources of division into assets.[13] The central question I address is: what legal spaces are needed to foster those practices?

2. *Dealing with Responsibility: From Tribunal to Reparations Chamber*

In November 2000, the Senate Legal and Constitutional References Committee, in which non-government Senators were in the majority, reported on its inquiry into the Howard Government's (non)implementation of the recommendations in HREOC's 1997 *Bringing Them Home* Report[14] ('BTH'). This 'Stolen Generations Inquiry' inquired into the practical and symbolic measures taken by the Howard Government to address the results of past governmental practices of forcible removal of indigenous children. While the Inquiry addressed a wide range of potential and existing measures, I am going to focus on the Committee's call for 'the establishment of a "Reparations Tribunal" to address the need for an effective process of reparation, including the provision of individual monetary compensation' to members of the stolen generations.[15] In this section, I focus on the practical implications of such a Tribunal, examining how it identifies the issue of responsibility as a central problematic of reconciliation, and the extent to which a Tribunal would provide a space for the fostering of new practices of reconciliation which could resolve that problematic.

The question of the adequacy of the government's response to the BTH Recommendations is really a derivative of the larger question of governmental responsibility for past practices of forcible removal. The perceived nature and extent of present-day governmental responsibility for past governmental practices

11 See Senate Legal and Constitutional References Committee, *Dissenting Report of Government Senators to the Inquiry into the Stolen Generation* (Canberra: Senate Printing Unit, 2000) at para 1.6 (hereinafter *Dissenting Report of Government Senators*).

12 Compare *2000 Social Justice Report*, above n8 at 18.

13 Compare Antjie Krog, *The Country of My Skull* (1998) at 449.

14 Human Rights and Equal Opportunity Commission, *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Canberra: Commonwealth of Australia, 1997) (hereinafter '*BTH*').

15 *Healing*, above n6, Recommendation 7. See also Recommendation 8.

will shape what is perceived to be adequate to discharge that responsibility. The Howard Government's approach of 'Practical Reconciliation' suggests that present-day responsibility for past practices, or for their present-day effects, may be wholly denied:

> Now of course we treated Aborigines very badly in the past, but to tell our children whose parents were no part of that mistreatment, to tell children who themselves have no part of it, that we are all part of a racist, bigoted history is something that Australians reject.[16]

This approach suggests that the past is past, and does not create any special rights — such as to compensation — in the present, either for victims of past practices, or for their relatives or communities. Any ill effects from the past which linger in the present should be treated by improved service provision, such as by providing family reunion services, and do not give rise to distinct rights or responsibilities.

This denial of responsibility has a number of important implications for the kinds of practices which are seen as appropriate to develop reconciliation, and for the choices of spaces in which those practices flourish. First, the denial of responsibility mandates a reliance on a strict legal positivism denying liability for practices undertaken pursuant to prior, formally valid laws. Second, it validates a strategy minimising access to legal remedies for past governmental conduct. Accordingly, the Howard Government argues that the taxonomy of potential claimants suggested in BTH[17] and in submissions to the Stolen Generations Inquiry[18] raises the question of 'who, if anyone, is *not* entitled to compensation'.[19] It argues that to establish a statutory reparations scheme would only open the floodgates to demands for compensation for other historical injustices or perceived

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16 Prime Minister Howard, Radio 2UE, 1996, quoted in Sue Stanton, 'Time for Truth: Speaking the Unspeakable — Genocide and Apartheid in the "Lucky" Country' (1999) July *Australian Humanities Review*: <http://www.lib.latrobe.edu.au/AHR/archive/Issue-July-1999/stanton.html> (1 October 2001). It is interesting to note that the same forebears that Mr Howard disowns also used this same argument: 'The raking up of atrocities that may have occurred in the early days of settlement in Australia and the featuring of them as an indication of the state of affairs existing today is not only unfair to the Governments of to-day, but is extremely detrimental to the good name of Australia.' (Prime Minister Lyons quoted in *The Sydney Morning Herald* (20 July 1933) quoted in Andrew Markus, *Governing Savages* (1990) at 141–142.)

17 *BTH*, above n14 at 304–305. Those proposed to be eligible included: individuals who were forcibly removed as children; family members who suffered as a result of their removal; communities which, as a result of the forcible removal of children, suffered cultural and community disintegration; and descendants of those forcibly removed who, as a result, have been deprived of community ties, culture and language, and links with and entitlements to their traditional land.

18 *Healing*, above n6 at 251; *Submission 68*, Public Interest Advocacy Centre at 1499, 1505 (hereinafter all references to *Submission* refer to submissions to the Stolen Generations Inquiry, as numbered by the Inquiry Secretariat; all references to *Transcript of evidence* refer to evidence given before the Stolen Generations Inquiry).

injustices.[20] Above all, this approach rejects the need for new, specially-designed spaces like a Reparations Tribunal, instead relying on the existing spaces of common law litigation as the appropriate forum for the determination of issues of responsibility.[21]

The Stolen Generations Inquiry Report identifies a number of ways in which this reliance on common law spaces places obstacles in the path of stolen generations claimants. Recent cases such as *Cubillo*[22] highlight how these obstacles work to minimise governmental liability for past practices of forcible removal, but also how they work to ensure that the wounds of the stolen generations go unhealed. These cases demonstrate that modern Australian court processes require individuals to take on the entire body of the law alone,[23] with their outsiders' knowledge and their limited resources.[24] They demonstrate how heavy the onus of proof on stolen generations claimants can be, demanding the provision of evidence as to the consent and intentions of individuals in times now far removed, in cases where records are often scant. They show how difficult it is for claimants to establish causal connections between their removal and detriments suffered.[25] Many claims are barred outright by limitations periods, which otherwise have the effect of squeezing claims into suits they plainly do not fit. All of these difficulties often lead to what appear, from claimants' perspectives, to be

19 *Healing*, above n6 at 250; *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs at 617. PIAC numbered potential claimants under its proposal at 17,000. (See Alexis Goodstone, 'Redressing Harm: A Proposal for the Establishment of a Stolen Generations Reparations Tribunal' (2000) 4 *Indigenous Law Bulletin* 10 at 12 n12.) The dispute over numbers of potential claimants is closely related to the question of the cost of such a Tribunal. The Government has estimated that Tribunal would cost $3.9 billion (see *Healing*, above n6 at 233; *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs at 570, 622–623). Others have suggested the costs would be much lower (see *Healing*, above n6 at 253–254; *Transcript of evidence*, Sir Ronald Wilson at 748–750; *Transcript of evidence*, Senator Ridgeway, Croker Island Association at 513–515; *Transcript of evidence*, Mrs Rene Powell at 387–388; *Submission 56*, Victorian Aboriginal Legal Service at 1101). The cost of defending common law litigation needs also to be considered. The cost of defending the *Cubillo* and *Gunner* cases (see below n22) alone has been placed at $10–11 million (*Healing*, above n6 at 234).

20 *Healing*, above n6 at 250; *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs at 617.

21 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs at 612.

22 *Cubillo and Gunner v Cth* [2001] FCA 1213 (Full Federal Court, Sackville, Weinberg & Hely JJ, 31 August 2001); *Lorna Cubillo and Peter Gunner v Cth* (2000) 103 FCR 1. See also *Williams v Minister, Aboriginal Land Rights Act 1983 & Anor [No 2]* [1999] Aust Torts Reports 66,338.

23 *Healing*, above n6 at 230.

24 *Minority Report by the Australian Democrats* in *Healing*, above n6 at 305 (hereinafter *Democrats' Minority Report*).

25 *Healing*, above n6 at 231; *Democrats' Minority Report*, id at 305; *Submission 56*, Victorian Aboriginal Legal Service at 1101; *Submission 68*, Public Interest Advocacy Centre at 1503.

'arbitrary' and 'inequitable' results.[26] As a result, the reliance on common law spaces is seen as a perpetuation of a practice of more than two centuries, using common law spaces to disempower, dispossess, disenfranchise and colonise indigenous Australians.[27]

A just resolution of the claims of the stolen generations requires the adoption of practices which do not perpetuate, or even appear to perpetuate, the practices of the past, but instead create a discontinuity between past practices and present ones. The appropriate forum to hear these claims is a forum which fosters new practices, and does not recall and validate old ones.

Australian legal practice provides a number of examples of the creation of such forums, which, moreover, have attempted to overcome the same types of practical difficulties the stolen generations face. These spaces include the Commonwealth War Veterans' Tribunal and tribunals in each State providing compensation to victims of violent crime.[28] In these Tribunals, Australian legislatures have created altered legal practices intended to overcome practical difficulties and to provide compensation in the absence of common law liability. The schemes involve strict liability and lowered (or even reversed)[29] burdens of proof, all construed to the benefit of claimants, down to standing and the establishment of causation.[30]

These Tribunals accommodate the acceptance of responsibility even where that is not demanded by law, even where the Government *could* rely on the legal positivism it relies on in relation to responsibility for the stolen generations. As Regina Graycar has noted '[w]hat is, or is not, compensable at law is more a matter of political judgment and government policy than it is a matter of any inherent legal understanding of compensability.'[31] As manifestations of a political choice to accept legal responsibility, these Tribunals create a discontinuity between previous and present policies, present and past practices. They act as a 'public recognition of the event and of society's obligation to rectify the injury'.[32] They

26 *Submission 68*, Public Interest Advocacy Centre at 1495; *Transcript of evidence*, Catholic Commission for Justice, Development and Peace at 241–242; *Democrats' Minority Report*, above n24 at 305.

27 Compare Goodstone, above n19 at 10–11; Sam Garkawe, 'Compensating the "Stolen Generation"' (1997) 22(6) *Alt LJ* 277; Tony Buti, 'Removal of Indigenous Children from their Families: the National Inquiry and what Came Before — the Push for Reparation' (1998) 3 *Australian Indigenous Law Reporter* 1; Justice Catherine Branson, 'More than Money' (2000) 24 *Fordham International Law Journal* 9 at 20–24.

28 *Submission 59*, Human Rights Committee of the Law Society of New South Wales at 1131; *Submission 68*, Public Interest Advocacy Centre at 1503; *Submission 4*, Women's Legal Centre at 29–30; *Democrats' Minority Report*, above n24 at 316–320.

29 See Regina Graycar, 'Compensation for the Stolen Children: Political Judgements and Community Values' (1998) 21 *UNSWLJ* 253 at 257; *East v Repatriation Commission* (1987) 16 FCR 517 at 518–524; *Repatriation Commission v O'Brien* (1985) 155 CLR 422; *Healing*, above n6 at 253.

30 *Democrats' Minority Report*, above n24 at 318–319.

31 Graycar, above n29 at 254.

32 *Healing*, above n6 at 239; *Submission 4*, Women's Legal Centre at 30.

provide not merely symbolic, but practical apologies which, through careful design, ensure that legal forms and technicalities do not obstruct the provision of substantial justice.[33]

Unless we create a similar space for the reparation of members of the stolen generations, we will not be able to heal the injustices wrought by these past practices of forcible removal. Without such a space, there will be no home for reconciliation.[34]

The proposed Stolen Generations Reparations Tribunal attempts to provide such a space, and to resolve issues of responsibility in a number of ways: by ensuring that all those affected by the practices of forcible removal receive a share of limited funds; by providing a scheme for financing a range of reparation measures; by creating finality and certainty by containing the potential for litigation; and by offering an effective mechanism for providing social justice.[35] In its form and design, it would contain a number of distinct breaks with past, common law legal practice. As in common law litigation, successful claimants would receive a lump sum payment; but claimants would also be eligible to receive other forms of reparation, where they could establish that, in addition to being forcibly removed, they suffered particular specified types of harm or loss.[36] Reparation would extend to acknowledgement and apology, guarantees against repetition, measures of restitution, and measures of rehabilitation.[37] Claimants, rather than an adjudicative authority, would identify for themselves which mode of reparation was most appropriate.[38] The Tribunal would adopt relaxed rules of evidence,[39] including accepting both oral and written evidence, both individual and group evidence,[40] and evidence in the claimant's own language,[41] all modifications which aim at overcoming inherent barriers to stolen generations participation in common law litigation. Both as an administrative aid, and as a symbolic acceptance of responsibility, in certain categories of removal claimants

33 *Democrats' Minority Report*, above n24 at 318–319; compare *Veterans' Entitlement Act* 1986 (Cth) s119.

34 See *2000 Social Justice Report*, above n8 at 133; Robert Manne, 'Right and Wrong', *Sydney Morning Herald* (31 March 31 2001) at 1, 10s.

35 *Healing*, above n6 at 240; *Submission 68*, Public Interest Advocacy Centre at 1496. For a brief but comprehensive overview of the PIAC proposal by one of its authors see Goodstone, above n19.

36 Goodstone, above n19.

37 *Submission 68*, Public Interest Advocacy Centre at 1506–1510. See also *Healing*, above n6 at 240–245; *Submission 56*, Victorian Aboriginal Legal Service at 1100; *Transcript of evidence*, Catholic Commission for Justice, Development and Peace at 241–242; *Transcript of evidence*, Liberty Victoria at 282; *Submission 54A*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation at 2740.

38 *Healing*, above n6 at 256; *Transcript of evidence*, Public Interest Advocacy Centre at 121–124.

39 *Healing*, above n6 at 242; *Submission 68*, Public Interest Advocacy Centre at 1511.

40 *Healing*, above n6 at 241; *Submission 68*, Public Interest Advocacy Centre at 1511. See also *Submission 6*, Jiljia Nappaljarri Jones at 42; *Submission 11*, Retta Dixon Home Aboriginal Corporation at 188.

41 *Healing*, above n6 at 242; *Submission 68*, Public Interest Advocacy Centre at 1511–1512.

would be required to present only specific types of evidence to establish liability.[42] In order to give victims the chance to weigh for themselves the pain of public testimony against its utility, there would be the option in each case for public hearing or assessment on the papers.[43]

The space this proposed Tribunal would provide is not an antithesis of common law spaces, but a space within it. Accordingly, the practices and institutions which constitute the space draw from the common law system, and also maintain important links to it. Formal legal representation would sometimes be permissible;[44] there would be a right of appeal to the Federal Court on questions of law[45] and a time limit for bringing claims after the establishment of the space in question;[46] and any success in common law litigation would foreclose Tribunal proceedings on the same matter.[47]

The space this proposed Tribunal would provide for the reparation of members of the stolen generation is crucial to the provision of reconciliation; but reconciliation itself is a larger project, a project with problematics not all best resolved by the adjudicative practices envisaged for this Tribunal. Accordingly, the Tribunal proposal should form the basis of only one Reparations Chamber of a larger home for reconciliation, a Reconciliation Commission. Moreover, because the arguments above relating to the obstacles encountered in common law litigation apply not only to the reparation of the stolen generations, but also to dealing with other indigenous victims of human rights abuses allegedly perpetrated by public authorities in Australia, this Reparations Chamber should provide a space in which all these alleged victims can bring their claims. It should be empowered to hear all such claims using the modified practice outlined above.

3. *Dealing with Truth: from Truth Commission to Healing Chamber*

The Reparations Chamber would offer a space with modified adversarial practice for victims of governmental human rights abuses to bring their claims. My proposed Reconciliation Commission also incorporates another space, a Healing Chamber, empowered to resolve indigenous claims relating not to human rights abuses, but to claimants' status and rights as indigenous people and as original occupiers of the land, through a process based on truth commission practices.[48] In

42 *Healing*, above n6 at 242.

43 *Healing*, above n6 at 242–243; *Submission 68*, Public Interest Advocacy Centre at 1511–1512.

44 *Healing*, above n6 at 243.

45 Ibid; *Submission 68*, Public Interest Advocacy Centre at 1512; see also *Submission 54A*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation at 2741.

46 *Healing*, above n6 at 244; *Submission 68*, Public Interest Advocacy Centre at 1513; *Transcript of evidence*, Public Interest Advocacy Centre at 133.

47 *Healing*, above n6 at 255–256.

this section I discuss the usefulness of a space based on the experiences of overseas truth commissions, and attempt to explore how this space addresses the problematic of truth as a central dynamic of the practice of reconciliation.

Both BTH and the Stolen Generations Inquiry considered overseas truth commissions as a source of experience for dealing with the issue of the reparation of the stolen generations.[49] However, neither report dealt in any great depth with the complexities and consequences of the wide diversity of truth commission experience[50] in the broader context of Australian reconciliation.[51] Both reports emphasised the cathartic nature of 'truth-telling', the opportunity truth commission practices provide for victims to tell their own stories in their own words in a non-threatening, validating environment.[52] Truth commission spaces provide useful forums for healing the victims of human rights abuses not only because they provide an opportunity for truth-telling, but also because they provide the opportunity for victims to have their truth acknowledged by both the state and society generally.[53] They provide a space inside the law where victims and outsiders can 'go and say, "This is my story. Please listen to it"',[54] a space for their truth to be acknowledged and their identity affirmed.

In Australia, a truth commission space could sense as a space free from the colonising practices of the law discussed earlier, a space in which indigenous Australians could practise self-determination, telling their own stories, in their own way, validating their aboriginality. By authorising indigenous voices to speak

48 This proposal draws on the discussions in *Healing* of overseas truth commissions (above n6 at 262–274, 411–416), as well as the Submission of the National Sorry Day Committee (*Submission 25* at 427), and the proposal in *Healing* for a 'clearing-house' providing a whole-of-government approach to reparations issues (*Healing*, above n6 at 277).

49 *Healing*, above n6 at 256–257. See also *Submission 31*, Anyinginyi Congress Aboriginal Corporation at 496; *Transcript of evidence*, Central and Northern Land Councils at 487; *Submission 68*, Public Interest Advocacy Centre; *Transcript of evidence*, Anglican Social Responsibilities Commission at 319.

50 See generally Priscilla Hayner, 'Fifteen Truth Commissions — 1974 to 1994: A Comparative Study' (1994) 16 *Human Rights Quarterly* 597; Margaret Popkin & Naomi Roht-Arriaza, 'Truth as Justice: Investigatory Commissions in Latin America' (1995) 20 *Law and Social Inquiry* 79; Rose Bell, 'Truth Commissions and War Tribunals 1971–1996' (1996) 25(5) *Index on Censorship* 148.

51 Compare Richard Lyster, 'Why a Truth and Reconciliation Commission? Some Comments on the South African Model and Possible Lessons for Australia' (2000) 12 *Current Issues in Criminal Justice* 114.

52 *Healing*, above n6 at 257, 271; *Submission 25*, National Sorry Day Committee at 429; *Submission 30*, Conflict Resolution Network Mediation Services at 487.

53 See *Transcript of evidence*, Central and Northern Land Councils at 487; D Orentlicher, 'Addressing Gross Human Rights Abuses: Punishment and Victim Compensation' in Louis Henkin & John Hargraves (eds), *Human Rights: An Agenda for the Next Century* (1994) at 457; Jorge Correa, 'Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship' (1992) 67 *Notre Dame Law Review* 1455 at 1478; Jose Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43 *Hastings LJ* 1425 at 1433.

54 *Transcript of evidence*, Anglican Social Responsibilities Commission at 319.

directly for themselves, a truth commission space could offer the possibility of overcoming the oppressive practices of 'speaking for' that have underpinned removals, 'welfare', 'protection' and other colonial paternalisms.[55] That such a space would be useful for indigenous Australians is perhaps evident in the support that the BTH inquiry itself received, given that it exhibited many of the characteristics of a truth commission space.[56]

While BTH highlighted the utility of such a space, it should also serve to indicate that truth commission spaces contain hidden dangers not identified in either the BTH or Stolen Generations Inquiry reports. Although, like other truth commission spaces, BTH provided a healing process at the 'molecular, individual level',[57] it did this by providing an opportunity for reworking public discourse, public practice. In this approach, healing becomes an outcome of 'careful honest listening ... and negotiation of mutually accepted settlements',[58] a function of the shared truths created within the truth commission. There are dangers in this process: dangers of the creation of a mercenary truth, dangers that truths become political resources, and the danger that only one, official, monadic truth will be sanctioned. The violent reactions of many commentators to the process BTH process indicate that these dangers are already being felt in Australia.[59]

In designing truth commission spaces, we must be particularly careful to guard against assuming that the stories told in the space are acknowledged as true by all.[60] Even in adopting the metaphor of a truth commission space as a 'healing' space, we run the risk of privileging one truth, of assuming that 'a nation has one psyche, not many; that the truth is one, not many; that the truth is certain, not contestable; and that when it is known by all, it has the capacity to heal and reconcile.'[61]

If we *do* permit truth commission processes to become monolithic and unquestionable in this way, we may end up undermining reconciliation. We will fall into the same trap that some commissions have in the past, permitting old institutions and practices to continue 'with their legitimacy undermined but their power intact', enabling societies to 'indulge in the illusion that they [have] put the past behind them'.[62] If, as Ignatieff suggests, 'the function of truth commissions ...

55 Compare Linda Alcoff, 'The Problem of Speaking For Others' (1991) 20 *Cultural Critique* 5 at 17; Brigitta Olubas & Lisa Greenwell, 'Re-membering and Taking Up an Ethics of Listening: A Response to Loss and the Maternal in "the Stolen Children"' (1999) 15 *Australian Humanities Review*: <http://www.lib.latrobe.edu.au/AHR/archive/Issue-July-1999/olubas.html> (27 September 2001).

56 See above n14.

57 Michael Ignatieff, 'Articles of Faith' (1996) 25 *Index on Censorship* 110 at 111.

58 *Submission 25*, National Sorry Day Committee at 428–429.

59 For an overview and critique of these reactions see Robert Manne, *In Denial: The Stolen Generations and the Right* (2001).

60 See *Healing*, above n6 at 271–272, citing Centre for the Study of Violence and Reconciliation, *'Tell No Lies, Claim No Easy Victories': A Brief Evaluation of South Africa's Truth and Reconciliation Commission*: <www.wits.ac.za/csvr/artrcyal1.htm> (27 September 2001) at 1.

61 Above n57 at 111.

62 Ibid.

is ... to narrow the range of permissible lies',[63] then the only way to guard into the future against the re-emergence of old lies is to ensure that the lies are disbelieved by many, and not simply suppressed by a few. Reconciliation must, indeed, be a 'people's movement', in the sense that it must be owned by the people that must live it. Healing occurs organically, from inside; it cannot be imposed. The truth commission spaces we design must not foster autocratic truth-telling practices, but place a premium on participatory practices and democratic narratives.

In the context of Australian reconciliation, we can contemplate such a space. It would be a space valued not for the opportunity it provided for the creation of privileged histories,[64] but for the intrusion of non- and under-privileged histories into the official record. It would be a space for the practice of reconciliation, where 'ordinary' Australians — and not government officials — were brought together to share in a process of transformation through dialogue. That such a transformation amongst 'ordinary' Australians is a real, practical possibility is highlighted by the recent three day forum held in Old Parliament House, Canberra, led by Issues Deliberation Australia. A random sample of over 300 'Representative Australians' were polled on their attitudes to reconciliation before and after engaging in discussion and sharing experiences with a panel including members of the stolen generations. The perception amongst these 'Representative Australians' of reconciliation as an important issue facing the nation rose dramatically from 31 per cent to 60 per cent. Similarly, perception of the disadvantage of indigenous Australians in relation to other Australians rose from 52 per cent to 80 per cent. Attitudes to the appropriate way to move forward also appeared to change markedly. Those in favour of formal acknowledgement that Australia was occupied without the consent of indigenous Australians rose from 68 per cent to 81 per cent; and, strikingly, those in favour of an apology to the stolen generation rose dramatically from 46 per cent to 68 per cent.[65]

What this suggests is that a dialectic, participatory truth commission space could generate not only shared truths, but shared solutions. It would provide an architecture for not only attitudinal, but also social transformation. This social transformation must be at the heart of any project of practical (as opposed to symbolic or theoretical) reconciliation. As President Thabo Mbeki of South Africa has noted, 'true reconciliation can only take place if we succeed in our objective of social transformation. Reconciliation and transformation should be viewed as an interdependent part of one unique process of building a new society.'[66]

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63 Id at 113.

64 See Daniel Nina, 'Panel Beating for the Smashed Nation? The Truth and Reconciliation Commission, Nation Building and the Construction of a Privileged History in South Africa' (1997) 13 *Australian Journal of Law and Society* 55 at 66–71.

65 See Issues Deliberation Australia, 'Project Description': <http://www.i-d-a.com.au/recon_description.htm> and Issues Deliberation Australia, 'Results Media Conference. Australia Deliberates: Reconciliation — Where from Here?': <http://www.i-d-a.com.au/recon_press.htm#results>.

66 Above n13 at 167.

The truth commission space we design must recognise that the importance of truth, as a problematic of reconciliation, lies in the basis it provides for individual and collective transformation. It must be a space which provides a forum for the negotiation of both new truths and new outcomes, new identities and new institutions. It must be a space which fosters 'empowerment, confrontation, pain, dialogue, exchange, experimentation, risk-taking, the building of common values and identity transformation'.[67] At the same time, that space must not become the sole site and symbol of reconciliation,[68] the arbiter of official truths. It must be a space for Australians, indigenous and non-indigenous, to negotiate their own truths.

The Reparations Chamber, based on adjudicative practice, does not provide that space. What is needed is a forum which addresses issues far beyond the reparation of the stolen generations, far beyond past human rights abuses, into the fundamental issues which divide indigenous and non-indigenous Australians, issues of identity and difference. It must be a forum which addresses these issues not through an adversarial process, but through a process of dialogue, the sharing of (hi)stories, and the negotiation, between the relevant parties, of new practices. This role would be played, within my proposed Reconciliation Commission, by a Healing Chamber.

The Healing Chamber would be empowered by statute to resolve all indigenous claims relating to the central legal elements of indigenous truth and identity: claimants' status and rights as indigenous people and original occupiers of the land,[69] including the right to self-determination.[70] Where the Reparations Chamber sought only to deal with past injustices, the Healing Chamber attempts to create new practices in the present, recognising rights flowing not from

67 *Healing*, above n6 at 271, citing Centre for the Study of Violence and Reconciliation, *The Truth and Reconciliation Commission: A Foundation for Community Reconciliation?*: <www.csvr.org.za/articles/artrch&1.htm> at 2.

68 See further Jonathan Allen, 'Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission' (1999) 49 *U of T LJ* 315 at 349.

69 See Lowitja (Lois) O'Donoghue, 'Past Wrongs, Future Rights' (1997) 4(1) *Indigenous Law Bulletin* 18.

70 See Frank Brennan, 'Agreeing on a Document: Will the Process of Reconciliation be Advanced by a Document or Documents of Reconciliation?' *CAR Issue Paper No. 7* (1994). For the type of subject matter this is likely to encompass see above n4 at Appendix 3, Draft Legislation: Preamble, Draft Section 3, '*unresolved issues for reconciliation*'. See also the proposal for an 'Aboriginal Recognition Commission' in Frank Brennan & James Crawford, 'Aboriginality, Recognition & Australian Law: Where to from Here?' (1990) 1 *PLR* 53 at 74–78. In empowering the Healing Chamber to hear these claims, a distinction would need to be made between indigenous rights and indigenous title, similar to the way it is in Canada. Absent such a distinction, the Healing Chamber would have jurisdiction over native title claims. In order to avoid such an outcome, either native title claims must be excluded from the jurisdiction of the Healing Chamber, or the National Native Title Tribunal (NNTT) must be brought within the Reconciliation Commission architecture, either as a fourth Chamber with cross-referencing powers to and from the other Chambers, or as a subsidiary of the Healing Chamber. The affinity between the work of the Healing Chamber and the NNTT, and the success of the NNTT process serves to highlight the feasibility of the Healing Chamber process.

historical interactions between indigenous and non-indigenous Australians, but from indigenous identity. By empowering the Healing Chamber to deal with all rights issuing from the central features of indigenous identity, we create a space for dealing with our common and different truths — a central problematic of reconciliation — by negotiation and consent.[71]

Matters as diverse as ceremonial protocol and criminal sanctions, adoption practices and indigenous intellectual property would all fall within the Healing Chamber's jurisdiction, and could all form the basis of truth-telling and negotiated outcomes. The Healing Chamber would be designed to foster participatory, dialectic practices. Indigenous claimants would bring an application to the Chamber, setting out their claim and nominating potential respondents, providing reasons for those nominations. Claimants could include natural persons, corporations, and representatives of groups. Respondents would include these same persons, as well as any association, statutory body, government agency or department, or other person, as determined by the Chamber. The Chamber would review this claim and determine whether it fell within its terms of reference or jurisdiction. If it so determined, the Chamber would then review the list of nominated respondents, and amend the list as it saw fit, giving reasons. Next, it would invite respondents from this amended list to attend a hearing at a later date, in an appropriate setting. If possible the Healing Chamber should travel throughout Australia, as the South African Truth and Reconciliation Commission travelled throughout South Africa conducting hearings. Where necessary, the Chamber could *compel* attendance or representation by respondents, providing reasonable travel costs. Non-attendance in such cases would incur a fine. At this hearing, claimants would tell their stories in a non-adversarial setting, in their own language, assisted and perhaps questioned by the Chamber, and respondents would be called upon (but not compelled) to respond. Hearings would be public, unless claimants (but not respondents) requested otherwise, and that request was approved by the Chamber. If, through this process of truth-telling, common ground was found and both parties consented, the Chamber would begin a private, *in camera*, negotiation process between the parties aiming at facilitating negotiations for shared outcomes. Settlements negotiated under its auspices would then be endorsed by an Order of the Chamber in the same way as settlements out of court are given the force of law.

The Chamber would be made up of equal numbers of indigenous and non-indigenous commissioners.[72] Its terms of reference would be broad enough to provide 'a holistic and robust approach' to the negotiation of settlements.[73] Both the Reparations Chamber and the Healing Chamber could refer claims to each other. No claim could be brought in both Chambers; in the event of overlapping claims, the Reparations Chamber would determine finally in which Chamber the claim should be heard.

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71 See above n48.

72 *Submission 25*, National Sorry Day Committee at 427. Compare *BTH*, above n14 Recommendation 16b.

73 Above n51 at 121.

4. *Dealing with Sovereignty: from Makaratta to Treaty Chamber*

In this final section, I deal with the third Chamber of the Reconciliation Commission, the Treaty Chamber, which complements the Reparations and Healing Chambers. The Reparations Chamber provides a space for dealing with the consequences, in the present, of indigenous and non-indigenous Australians' common past. The Healing Chamber provides a space for the negotiation of the practical meaning of indigenous differences, in the present. In the Treaty Chamber, this process of negotiation is turned towards the future, learning from the lessons of the past in the Reparations Chamber, and the present in the Healing Chamber.

A formal 'treaty', compact, agreement or *makaratta*[74] between indigenous peoples and the Commonwealth of Australia has been considered, for over 20 years, as a possible form for the settlement of the future of indigenous/non-indigenous relations.[75] The Prime Ministership of John Howard has seen the proposal fall out of favour, but it has recently been revived, particularly through the Council for Aboriginal Reconciliation's call for 'a process which will unite Australians by way of an agreement or treaty through which the unresolved issues for reconciliation can be resolved',[76] and, more recently, Recommendation 11 of the *2000 Social Justice Report*.[77]

The central problematic the treaty proposal seeks to address is the question of the ongoing relationship between indigenous and non-indigenous Australians, and the question of the *legal* implications, into the future, of the differences between them. The use of the 'treaty' signifier immediately suggests a particular type of legal relationship, based on the difference between two sovereign entities, which many Australians find profoundly disturbing. At best, these people suggest, 'treaty' is a misnomer, since it is not a treaty in international law which is contemplated, but 'an umbrella document providing direction and perspective to all areas of policy, including land rights, self-management, customary laws and

74 A Yolngu word signifying the end of a dispute and the resumption of normal relations.

75 Department of Prime Minister and Cabinet, 'Aboriginal Reconciliation: An Historical Perspective' in *Annual Report, 1990–91* (1991): <http://austlii.law.uts.edu.au/au/special/rsjproject/rsjlibrary/depts/historical/>; Judith Wright, *We Call for a Treaty* (1985); Frank Brennan, 'Is a Bipartisan Approach Possible?' (1989) 14 *Legal Service Bulletin* 66; Brennan & Crawford, above n70; Stewart Harris, *It's Coming Yet ... An Aboriginal Treaty Within Australia Between Australians* (1979); Judith Wright, 'What Became of that Treaty?' (1988) 1 *Aust Ab Studies* 40; James Crawford, 'The Aboriginal Legal Heritage: Aboriginal Public Law and the Treaty Proposal' (1989) 63 *ALJ* 392; Garth Nettheim & Tony Simpson, 'Aboriginal Peoples and Treaties' (1989) 65(12) *Current Affairs Bulletin* 18; Bain Atwood & Andrew Markus, *The Struggle for Aboriginal Rights: A Documentary History* (1999).

76 Above n4 at ch 10: Recommendations, Recommendation 6, and Appendix II, Reconciliation Bill 2001 Draft Section 8(1).

77 Above n8 at 106. See also Michelle Grattan, 'Strong Backing For Treaty: Poll', *The Sydney Morning Herald* (6 June 2000) at 1.

recognition of Aboriginal culture and religion ... a national declaration of shared principles and common commitments'.[78] At worst, the use of the term is seen as a deliberate 'recipe for separatism',[79] a ploy to be 'used internationally to suggest that there are within Australia the seeds of a separate nation state'.[80]

By including a space for the consideration of a treaty in our legal architecture for reconciliation, we create a space to address one of the central legal problematics of indigenous difference: sovereignty. To understand what role such a space might play in nurturing new practices of reconciliation we must address the relationship between the treaty proposal and the problematic of sovereignty.

It is important to acknowledge that the absence of treaties between the British Crown and Australia's indigenous inhabitants is an anomaly within not only British but broader contemporaneous European colonial practice.[81] While history offers an *explanation* for this absence in the absence of European competition for possession of Australia,[82] the law struggles to provide a *justification.* The orthodox legal justification has asserted that there was no need for treaty making, because there was no sovereign in Australia.[83] However, early authorities, including both the first NSW Attorney-General, Saxe Bannister, and later Governor Arthur of Tasmania, argued there was a need for treaty negotiation.[84] In 1837 the British House of Commons Select Committee on Aborigines intimated similar sentiments, noting the absurdity of treating Australian aborigines as British subjects.[85] In *R v Bonjon* in 1841,[86] Willis J held that a group of Port Jackson aborigines had 'not surrendered' their legal capacity and, adopting the language of the United States Supreme Court when it recognised native American Indian

78 Robert Hawke, 'A Time for Reconciliation' in K Baker (ed), *A Treaty With the Aborigines?* (Canberra: Institute of Public Affairs, 1988) at 7.

79 John Howard, 'Treaty is a Recipe for Separatism' in K Baker (ed), *A Treaty with the Aborigines?* (Canberra: Institute of Public Affairs, 1988) at 6–7.

80 Senator Chaney, Commonwealth of Australia, Senate, *Parliamentary Debates (Hansard)* 23 August 1988.

81 Department of the Prime Minister and Cabinet, above n75 at: <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/depts/historical/2.html> (5 October 2001).

82 European colonial powers often used treaties to legitimise their overseas claims vis-à-vis other European sovereigns according to European legal standards. See Miguel Alfonso Martinez, *Study on Treaties, Agreements and other Constructive Agreements Between States and Indigenous Populations: First Progress Report* (Geneva: UN, 1992) at 23.

83 See *R v Murrell* (1836) Legge 72; *Cooper v Stuart* (1889) 14 AC 286 at 291 (Lord Watson); *Coe v Commonwealth* (1979) 53 ALJR 403 at 408 (Gibbs J); *Coe v Commonwealth* (1993) 118 ALR 193 at 206 (Mason CJ).

84 Department of the Prime Minister and Cabinet, above n75 at: <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/depts/historical/3.html> (5 October 2001).

85 House of Commons Parliamentary Paper No 425, 1837 at 84, quoted in Crawford, above n75 at 393.

86 *Port Phillip Gazette*, 18 September 1841.

sovereignty a decade earlier,[87] recognised the group as a 'dependent tribe' under the British Crown.[88] It remains arguable that, under both the British and international law of the time, indigenous Australians exhibited the characteristics of sovereignty:[89] ownership of a defined territory; a distinct, permanent population; the capacity for international relations; and identifiable forms of government.[90]

This does not, however, mean that indigenous sovereignty continues to exist, particularly as indigenous groups appear now to have been deprived of the characteristics that underpinned their putative original sovereignty.[91] Nor, more fundamentally, does it mean that any Australian court will — or *can* — recognise that sovereignty. While Australian courts might challenge the orthodoxy that there was no indigenous sovereign in Australia at the time of 'settlement', they have consistently ruled that the process of colonisation was effected by non-justiciable 'acts of state', rendering the question of the continuing existence of indigenous sovereignty unanswerable.[92]

It is this non-justiciability of indigenous sovereignty which makes a space for a negotiated, political settlement so fundamental to the larger achievement of reconciliation. Without such a space, the central question of the legal status of indigenous groups in the past, and the effects of that status into the future, will remain unanswered.

The arguments for this space are not, however, only pragmatic ones. There are two legal arguments suggesting that even the possibility of original indigenous sovereignty has important contemporary ramifications. First, a UN Special Rapporteur has recently suggested that if there was original indigenous

87 *Cherokee Nation v State of Georgia* (1831) 5 Pet 1 at 16–17.

88 *Port Phillip Gazette*, 18 September 1841. This approach was rejected in *R v Murrell*, above n83, and again in *Coe* (1979), above n83, and *Coe* (1993), above n83 at 206 (Mason CJ). See also Barbara Hocking, 'Aboriginal Law Does Now Run in Australia', in *Essays on the Mabo Decision* (1993) 67 at 72–4; Garth Nettheim, '"The Consent of the Natives": Mabo and Indigenous Political Rights' in *Essays on the Mabo* (1993) 103 at 110–112.

89 Henry Reynolds, 'After Mabo, What About Aboriginal Sovereignty?' (1996) April, *Australian Humanities Review*: <http://www.lib.latrobe.edu.au/AHR/archive/Issue-April-1996/Reynolds.html> (5 October 2001); N L Wallace-Bruce, 'Two Hundred Years On: A Re-Examination of the Acquisition of Australia' (1989) 19 *Georgia J Int'l Comparative L* 87; Martinez, above n82 at 24; Greg Marks, 'Sovereign States vs Peoples: Indigenous Rights and the Origins of International Law' (2000) 5(2) *Australian Indigenous LR* 1; Charles H Alexandrowicz, *An Introduction to the History of the 'Law of Nations' in the East Indies (16th, 17th and 18th Centuries)* (1967).

90 See Christian Wolff, *The Law of Nations* (1934) at 15; Emerich de Vattel, *The Law of Nations* (1916); John Austin, *Lectures on Jurisprudence* (4th edn, 1873) at 239; Henry Wheaton, *Elements of International Law* (1964) at 32; Jeremy Bentham, *A Fragment on Government* (1894) at 141; William Blackstone, *Commentaries on the Laws of England* (18th edn, 1823) vol 1 at 351; John Salmond, *Jurisprudence* (1902) at 185. Compare *Cooper v Stuart*, above n83 at 291.

91 On this process of 'retrogression' see *Study on Treaties, Agreements and Other Constructive Agreements Between States and Indigenous Populations: Final Report* (Geneva: UN, 1999).

sovereignty, any deprivation of that sovereignty not consented to must be unlawful.[93] If this is correct, a treaty space nurturing a negotiated settlement will belong at the heart of an architecture of reconciliation, since it will provide a forum for the seeking and giving of the hitherto absent indigenous consent to co-exist within the sovereignty of the Commonwealth of Australia. Without such consent, the moral *and legal* integrity of modern Australian sovereignty must continue to be doubted. Second, recent developments in Australian land law also point to a notion of indigenous difference which must, some argue, be tantamount to a vestigial form of sovereignty. This argument points to the recognition of native title in *Mabo No 2*[94] and demands that the logical conclusion be drawn: if the common law can recognise the legal systems of land tenure which existed prior to British 'settlement', it must also be able to recognise the sovereign authority from which that tenure issued.[95] Legal title — including *native* title — cannot exist in a vacuum of sovereignty. Henry Reynolds has asked rhetorically, 'Why should property and sovereignty be treated so differently and can such inconsistency be maintained? Can the retreat from injustice be halted halfway along the track?'[96]

A space for a negotiated treaty settlement permits us to answer these questions; it acknowledges in practice that while property rights may be justiciable before courts whose authority issues from the Crown, indigenous sovereignty is itself an inherently political problematic which can only be resolved by negotiation.

Historically, treaties have provided particularly effective legal forms for documenting such negotiations, both securing indigenous rights and establishing practical mechanisms for implementing those rights.[97] But they are by no means a cure-all. Similarly, just as the Reparations and Healing Chambers had pitfalls which only careful construction could avoid, so too a Treaty Chamber must be carefully fashioned. A Treaty Chamber risks becoming an enclave for political

92 *R v Murrell*, above n83; *Cooper v Stuart*, above n83; *Milirrpum v Nabalco* (1971) 17 FLR 141; *New South Wales v Cth* (1975) 135 CLR 337 at 388 (Gibbs J); *Coe v Commonwealth* (1979), above n83; *Mabo No 2* (1992) 175 CLR 1 at 15 (Mason CJ & McHugh J), 31–32, 69 (Brennan J), 78–79 (Deane & Gaudron JJ), 122 (Dawson J), 179–180 (Toohey J); *Coe v Commonwealth* (1993), above n83 at 207 (Mason CJ). See generally Henry Reynolds, *Aboriginal Sovereignty: Reflections on State, Race and Nation* (1996); see also Michael Mansell, 'The Court Gives an Inch But Takes Another Mile' (1992) 2(57) *Aboriginal Law Bulletin* 4 at 5. The question of indigenous Australian sovereignty in fact has *no* forum in which it is justiciable, since it is almost certainly non-justiciable before the ICJ (see Frank Brennan, 'Mabo and Its Implications for Aborigines and Torres Strait Islanders' in Margaret Stephenson & Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993) at 25–27).

93 Above n91 at paras 194, 288.

94 Above n92.

95 See Reynolds, above n89.

96 Ibid.

97 Above n82 at 57.

posturing and factionalism; it risks presupposing a European framework insensitive to indigenous modalities of dispute resolution; and it risks essentialising the plurality of indigenous voices.

Perhaps the best way to circumvent these difficulties is to create a space based on the Canadian model. The Canadian Federal government is involved in negotiating more than 70 comprehensive claims settlements, or 'modern treaties', with indigenous groups. These treaties, dealing with outstanding claims to land rights, access to resources and protection of aboriginal rights, are negotiated by representatives of indigenous groups, provincial governments, and the federal government, in a neutral commission.[98] The Treaty Chamber of my proposed Reconciliation Commission would provide a space for the negotiation of such a 'modern treaty', by acting as an independent body facilitating this negotiation process.[99] First, it would provide resources for indigenous groups to negotiate and prepare amongst themselves common negotiating positions, and, importantly, to determine the role the treaty would play in their own law(s).[100] In this way, the plurality of indigenous voices is represented, and room is made for indigenous dispute resolution techniques. Having reached these common positions, indigenous groups would then enter into negotiations with relevant parties (including State governments), facilitated by the Chamber, to achieve regional sub-agreements. On the completion of these regional sub-agreements, the Chamber would facilitate the negotiation of an over-arching Treaty, binding together these regional sub-agreements, between indigenous representatives and the Commonwealth.[101] Ultimately, the Treaty itself could be entrenched through the creation of a Constitutional power similar to s105A, which permits the Commonwealth to negotiate binding public debt agreements with the States.[102] This negotiation process itself should not be held to any pre-ordained timetable.

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98 See Erica-Irene A Daes, *Indigenous People and Their Relationship To Land. Second Progress Report on The Working Paper* (Geneva: UN, 1999) at paras 93–95; Martinez, above n82 at 33; Miguel Alfonso Martinez, *Study on Treaties, Agreements and Other Constructive Agreements Between States and Indigenous Populations: Third Progress Report* (Geneva: UN, 1996) at para 85s; Richard C Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Ottawa: Department of Indian Affairs and Northern Development, 1980); Department of Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: Supply and Services Canada, 1986); *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Public Works and Government Services, 1997). See, Minister of Indian Affairs and Northern Development, *Agreement Between the Inuit of The Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* (Canada: 1993): <http://www.ainc-inac.gc.ca/pr/agr/pdf/nunav_e.pdf> (5 October 2001).

99 Compare Brennan, above n75 at 68.

100 See Crawford, above n75 at 401–402.

101 These regional sub-agreements would include, and supersede, current Regional Agreements such as the Cape York Regional Land Use Heads of Agreement agreed on 5 February 1996. If necessary, these negotiation processes may need to be co-ordinated with National Native Title Tribunal processes. See also above n70.

This Treaty Chamber would be at home alongside Reparations and Healing Chambers. The Treaty Chamber would play the essential role of providing an opportunity for the re-negotiation of the practice(s) of Australian sovereignty, to find space for a vestigial indigenous sovereignty. Those practices will, in turn, grow from shared experience and the processes of negotiation envisaged for the Healing Chamber.[103] Both the Reparations and Healing Chambers have the potential to tarnish the authority of Australia's public institutions; a treaty would provide a new foundational document, renewing the authority of these institutions,[104] with an enlarged mandate that would include those who, in the past, have been deliberately excluded.[105] Without such new foundations, there is no new identity, no new practice, and the past 'is not past at all'.[106] The Treaty Chamber is an integral part of a legal architecture for reconciliation.

These three Chambers — for Reparations, Healing and the negotiation of a Treaty — should be united within one administrative structure, a Reconciliation Commission overseen by two Reconciliation Commissioners, one indigenous and one non-indigenous. These Commissioners would report annually to Federal Parliament on behalf of the Commission, to ensure the accountability of the process.

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102 See *2000 Social Justice Report*, above n8 at 126–128, 132; ATSIC, *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures* (Canberra: Commonwealth of Australia, 1995) at 64; Senate Standing Committee on Constitutional and Legal Affairs, *Two Hundred Years Later: Report on the Feasibility of a Compact, or 'Makaratta', Between the Commonwealth and Aboriginal People* (Canberra: AGPS, 1983) at xii.

103 This vestigial sovereignty may find expression as indigenous self-governance and self-determination. On the relationship between indigenous sovereignty and indigenous governance see Hocking, above n88; Nettheim, above n88 at 108–109; Michael Dodson, 'Towards the Exercise of Indigenous Rights: Policy, Power and Self-Determination' in *Aboriginal Australia: Land, Law and Culture* (1994) at 65–76; Marcia Langton, 'Indigenous Self-Government and Self-Determination: Overlapping Jurisdictions at Cape York' in C Fletcher (ed), *Aboriginal Self Determination in Australia* (1994) at 131–139; Jeremy Webber, 'Native Title as Self-Government' (1999) 22 *UNSWLJ* 600.

104 Compare Ignatieff, above n57 at 112.

105 See in particular the *Constitution* Preamble, ss24, 25, 127. A more radical proposal by far would be to consider granting a form of non-territorial statehood to indigenous Australians, and thus to include them in the Federal makeup of the Commonwealth. This approach would have parallels in (though also differences to) the US situation, where the Constitution recognises three sovereign species of: the Union, the States, and the Indian Nations. More immediately, contemplating the place for any vestigial indigenous sovereignty in Australia's constitution makes us recognise that the process of reconciliation is, in many ways, a process of unification as profound as that of Federation. (See *2000 Social Justice Report*, above n8 at 5.)

106 Ignatieff, above n57 at 121.

5. *Conclusions*

Practical reconciliation is a matter for the people, individually and collectively; but the initial impetus for this transformation must come from above, from government action.[107] Without the appropriate architecture, practices of reconciliation are only stifled by existing practices, which deny responsibility, truth and sovereignty. New spaces are needed for new practices to flourish. Together, the three Chambers of the Reconciliation Commission provide these spaces. By creating spaces designed to deal with central problematics of reconciliation — responsibility, truth, and sovereignty — we create opportunities for the development of practices which embrace the differences between indigenous and non-indigenous Australians, transforming these differences from sources of division into shared assets.

This is the sort of practical reconciliation which ultimately matters: a transformed practice of individuals, and a transformed collective practice. A practical reconciliation which recognises that we are sorry, but which reflects that, to be reconciled, we must be more than sorry. Only by creating a home for reconciliation with spaces which foster new practices embracing indigenous difference can we transform the sorry of our words into a practical reconciliation.

107 See Malcolm Fraser, *5th Vincent Lingiari Memorial Lecture*, 24 August 2000: <http://www.austlii.edu.au/au/other/IndigLRes/car/20000824.html> (1 October 2001).