



Are we there yet?

Ten years on from the Decade of Reconciliation: A Reconciliation Progress Report

November 2010



Acknowledgements

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Aboriginal and Torres Strait Islander peoples have distinct cultures and heritages. The terms Aboriginal and Torres Strait Islander and Indigenous are used interchangeably throughout this report. No disrespect is intended by the authors.

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Reconciliation timeline

- 1930s:** Aboriginal activists such as William Cooper, the Australian Aborigines' League and the Aborigines Progressive Association call for citizenship rights for Aboriginal peoples.
- 1963:** Yolngu people of Yirrkala present the Yirrkala Bark Petition to the Commonwealth Parliament, protesting about mining on Aboriginal land.
- 1965:** A group of University of Sydney students (who formed the Student Action for Aborigines (SAFA) group) travel by bus around western and coastal NSW with the hope of drawing attention to the discrimination experienced by Aboriginal people. This became known as The Freedom Ride.
- 1966:** 200 Aboriginal stockmen walk off the job at a cattle station in Wave Hill in protest against poor working conditions and disrespectful treatment. This later becomes Australia's first Aboriginal land claim.
- 1967:** 92 per cent of Australians vote 'yes' in the 1967 referendum that gives the Commonwealth Government power to legislate for Aboriginal people. This enabled Aboriginal people to be counted in the census for the first time.
- 1971:** The Gove Land Rights case, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 was the first land rights claim to be considered by the courts.
- 1972:** On the 26 January (Australia Day) Aboriginal people erect a Tent Embassy outside Parliament House in Canberra highlighting the lack of legal freehold title in Australia.
- The Whitlam Government establishes the Department of Aboriginal Affairs as well as the National Aboriginal Consultative Committee. The Government also commissions the Woodward Inquiry into Aboriginal Land Rights which has a clear focus on self-determination.
- 1975:** Federal Parliament passes the *Racial Discrimination Act 1975* (Cth).
- 1976:** The *Aboriginal Land Rights (Northern Territory) Act 1976* is passed, becoming the first legal recognition of an Aboriginal system of land ownership.
- 1979:** The Aboriginal Treaty Committee is formed and the National Aboriginal Conference calls for a treaty.
- 1988:** The Barunga Statement is written and presented to the Prime Minister. The statement calls for self-management and a system of land rights. Prime Minister Hawke responds by expressing his desire to conclude a treaty by 1990, but this wish was not fulfilled.
- 1990:** The Commonwealth Government establishes the Aboriginal and Torres Strait Islander Commission (ATSIC). This evidenced a significant shift in power from government to an elected body.
- 1991:** The Report of the Royal Commission into Aboriginal Deaths in Custody is tabled. The final recommendation calls for a process of reconciliation.

The *Council for Aboriginal Reconciliation Act 1991* (Cth) is passed unanimously in the House of Representatives and the Senate. The Council for Aboriginal Reconciliation is established.

1992: The High Court hands down its decision in *Mabo v Queensland No. 2* (1992) 175 CLR 1.

Prime Minister Keating delivers his Redfern Speech, recognising the history of dispossession, violence and the forced removal of children.

1993: Federal Parliament passes the *Native Title Act 1993* (Cth) ('*Native Title Act*'). The Act establishes a process by which native title rights can be recognised.

1994: The Council for Aboriginal Reconciliation's Report *Walking Together: The First Steps* is presented to Parliament.

1995: The Council for Aboriginal Reconciliation presents *Going Forward: Social Justice for the First Australians* to Prime Minister Keating. The document recommends a variety of actions relating to land, culture, heritage, health and housing.

1996: Organisations on the Cape York sign the *Cape York Land Use Heads of Agreement*.

The first National Reconciliation Week is celebrated.

The *Wik Peoples v Queensland* (1996) 187 CLR 1 decision is handed down.

1997: The Australian Reconciliation Convention is convened in Melbourne by the Council with more than 1,800 participants.

Grassroots community action gathers momentum in support of native title following plans to amend the *Native Title Act*. Australians for Native Title and Reconciliation (ANTaR) is established.

Local Reconciliation Groups flourish with the support of the Council for Aboriginal Reconciliation, State Reconciliation Councils and ANTaR.

ANTaR's first *Sea of Hands* installation is set up in Canberra.

The Human Rights and Equal Opportunity Commission's *Bringing Them Home* Report is released.

1999: Launch of the Council for Aboriginal Reconciliation's *Draft Document for Reconciliation*.

2000: Corroboree 2000 celebrations. Hundreds of thousands of Australians walk across bridges. The Council presents the national reconciliation documents and its Final Report, including recommendations.

Reconciliation Australia is set up, as recommended in the Council's Final Report. The Council ends its term.

2003: The Senate Legal and Constitutional References Committee releases its

report *Reconciliation: Off Track*, recommending that more assistance be provided to keep reconciliation on the national agenda.

2004: ATSIC is abolished.

Reconciliation Australia launches the Indigenous Governance Awards in partnership with BHP Billiton.

2005: The Aboriginal and Torres Strait Islander *Social Justice Report* calls for Australian governments to commit to achieving Aboriginal and Torres Strait Islander health and life expectancy equality within 25 years. From the Report, the Close The Gap Campaign for Indigenous Health Equality is developed.

Reconciliation Australia convenes the National Reconciliation Workshop and commences the Indigenous Governance Research Project.

2006: Reconciliation Australia launches the Reconciliation Action Plan (RAP) program.

2007: The *Northern Territory Emergency Response Act 2007* (Cth) is passed. This legislation excludes the operation of the *Racial Discrimination Act 1975* (Cth).

Australia is one of only four countries to oppose the United Nations *Declaration on the Rights of Indigenous People*.

2008: Prime Minister Kevin Rudd delivers the National Apology to the Stolen Generations.

COAG's *Closing the Gap* policy is developed. \$4.6 billion is committed to closing the gap on Indigenous disadvantage.

2009: The National Congress of Australia's First Peoples is established.

Australia indicates its support for the United Nations *Declaration on the Rights of Indigenous People*.

2010: The Government commits to a referendum by 2013 to recognise Indigenous peoples in the Constitution.

Glossary

ANTaR: Australians for Native Title and Reconciliation (ANTaR) is the preeminent non-Indigenous national advocacy organisation dedicated specifically to the rights - and overcoming the disadvantage - of Aboriginal and Torres Strait Islander peoples.

ATSIC: In 1989, the Hawke Government created the Aboriginal and Torres Strait Islander Commission as the peak representative body for Aboriginal and Torres Strait Islander peoples. This was a statutory body with representative as well as bureaucratic functions.

Bringing Them Home Report: Report from the Human Rights and Equal Opportunity Commission (HREOC) Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families. The report was released in May 1997 and found that between 1 in 3 and 1 in 10 Indigenous children were forcibly removed from their families between 1910 and 1970 and that the effects were in many cases, negative, multiple and profoundly disabling. It suggested that these actions were racially discriminatory and genocidal in intent and, in many instances were the result of breaches of fiduciary duty and duty of care as well as criminal actions. The report recommended reparation for victims and establishment of national standards for the treatment of Indigenous children. The Government responded in 1997 with a \$43 million reform package but rejected compensation and argued that the past actions did not constitute genocide nor amount to a gross violation of human rights.

Close The Gap Steering Committee: The Close the Gap Campaign for Indigenous Health Equality calls on federal, state and territory governments to commit to a national plan of action to close the life expectancy gap between Indigenous and non-Indigenous Australians within a generation. The Indigenous led campaign is supported by more than 40 Indigenous and non-Indigenous organisations, and more than 135,000 Australians have pledged support to Close The Gap. The Close The Gap Campaign for Indigenous Health Equality was launched on 4 April 2007 at Sydney's Telstra Stadium by Olympic champions Catherine Freeman and Ian Thorpe.

Closing the Gap: In November 2008, the Council of Australian Governments (COAG) committed \$4.6 billion to 'closing the gap' on Indigenous disadvantage. This money is designated for Indigenous health, housing, early childhood, economic participation, and remote service delivery. This COAG policy and funding framework is referred to by governments as 'Closing the Gap in Indigenous Disadvantage'.

COAG: Council of Australian Governments. COAG comprises the Prime Minister, State Premiers, Chief Ministers of Territories and the President of the Australian Local Government Association.

Corroboree 2000: A two-day event from the 27-29 May 2000 in which the Council for Aboriginal Reconciliation presented the *Documents for Reconciliation*. The second day saw hundreds of thousands of people walk across the Sydney Harbour Bridge in support of reconciliation.

HREOC Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families: See 'Bringing Them Home' report above.

The Inquiry was commissioned in April 1997 to:

- Trace past laws and practices regarding removal;

- Examine principles which might be applied to matters of compensation and;
- Examine current laws and practices affecting the placement and foster care of children.

Australian Local Government Association: The Australian Local Government Association was founded in 1947 and provides a national voice for 560 local Councils throughout the States and Territories. It is represented on the Council of Australian Governments.

Mabo: 'Mabo' is shorthand for the judgement of the High Court of Australia in *Mabo v Queensland No. 2 (1992)* 175 CLR 1 handed down on 3rd June 1992. The judgement came after ten years of litigation. The Court ruled that the claim of Indigenous people to land rights (native title) stems from continuation under common law of rights over land predating European colonisation. In the absence of extinguishment by the Crown, native title gives the original occupants the right of possession of their traditional lands. The case against the Crown was brought by Eddie Koiki Mabo of Murray Island in the Torres Strait.

Makarrata: A resolution from the Second National Conference of the NAC in April, 1979 requested that a Treaty of Commitment be executed between the Aboriginal Nation and the Australian Government. The NAC decided that the agreement should have an Aboriginal name - the Makarrata.

NAC: The Federal Fraser Government set up the National Aboriginal Conference as an elected advisory body to enable Indigenous people to have some influence over government policy. On November 12 in 1977, election of NAC members took place resulting in 35 elected representatives of electorates throughout Australia.

Native Title: See 'Mabo' above. Native Title refers to the rights and/or interests of Indigenous people in relation to lands or waters to which they have a connection according to their traditional law and custom. Native Title is recognised under Australian common law. While a successful land rights claim (under the *Aboriginal Land Rights Act 1976*) usually delivers a grant of freehold title or a perpetual lease from the government, native title rights do not provide title to land but instead represent a bundle of rights related to land or waters which vary between native title groups.

Reconciliation Australia: Reconciliation Australia is an independent, not-for-profit organisation that was established in 2000 by the Council for Aboriginal Reconciliation. It is the peak national organisation building and promoting reconciliation between Indigenous and non-Indigenous Australians.

Royal Commission into Aboriginal Deaths in Custody (RCIADIC): The RCIADIC investigated Aboriginal deaths in custody. In March 1991, the Commission released its Final Report on the deaths of 99 Indigenous people in custody. The RCIADC made 339 recommendations which covered a wide range of issues including reform to prison, courts, education, housing and the media.

Terra Nullius: Terra Nullius is a Latin term meaning 'land belonging to no-one'. Under international law, it describes land that has either never belonged to a State or previously belonged to a State that has relinquished sovereignty. In its Mabo judgement (see above), the High Court overturned the application of terra nullius to Australia, instead finding that native title may exist in common law, its source being traditional connection to and occupation of the land. The

Court also found that Governments may extinguish this right.

Wik: This refers to the High Court decision in *Wik Peoples v The State of Queensland (1996)* 187 CLR 1. The Court found that native title rights could co-exist with pastoral leases but that, in the case of conflict, pastoralists' rights would prevail. The subsequent outcry led to the passage of the *Native Title Amendment Act 1998* in 1998 after the longest debate in Senate history. The Act gives legal effect to the 10 Point Plan introduced by John Howard which extinguished Native Title on land held 'exclusively' before 1994 and limited the right to be heard in issues such as mining leases.

Reconciliation Action Plans (RAPs): Reconciliation Australia developed the Reconciliation Action Plan (RAP) in July 2006 to maintain reconciliation momentum. Organisations are guided in developing an individually tailored plan towards reconciliation that is achievable and has measurable goals.

Executive summary: *Are we there yet?*

December 2010 marks the tenth anniversary of the Final Report of the Council of Aboriginal Reconciliation (the Council) and the culmination of the formal reconciliation process. It is timely therefore to reflect on how far we have come on the reconciliation journey.

The formal Decade of Reconciliation began when the Keating Government legislated to create the Council for Aboriginal Reconciliation (the Council) in 1991. The effects of this legislation and the work of the Council extended far beyond mainstream political institutions. The processes and organisations established under the legislation ensured widespread public participation and created community awareness and some level of ownership of the reconciliation process.

However, though offering a reconciliation 'blueprint' on its cessation in 2000, changes in the political climate meant that reconciliation momentum within the political sphere stalled for some years.

With the exception of a few high-points - including the National Apology and the bipartisan commitment to Close the Gap - in many ways, the 'noughties' represent a 'lost decade' in Australia's reconciliation history.

However, a new political climate is now emerging which offers a unique opportunity to address some of the 'unfinished business' of reconciliation. In particular, we appear to be closer than we have ever been to achieving recognition of Aboriginal and Torres Strait Islander people in our nation's Constitution.

The report analyses recommendations handed down in the Council's Final Report and concludes that, although some movement has been made in Government policy, particularly in relation to addressing Indigenous disadvantage, many of the Council's recommendations have not been addressed or advanced. As a response to this, the report argues that a series of rights-based policies and actions be undertaken by all levels of government. The report makes a series of recommendations to address the 'unfinished business' of reconciliation and to genuinely reset the relationship between Indigenous and non-Indigenous Australians.

Recommendations

ANTaR recommends that:

Resetting relationships and respecting rights

- The Australian Government develop a broad agenda to reset the relationship with Indigenous and non-Indigenous Australia, in negotiation with Aboriginal and Torres Strait Islander peoples. Negotiations should be based on the principles contained in the UN Declaration on the Rights of Indigenous Peoples, and have reference to the Council for Aboriginal Reconciliation's *Roadmap and Declaration*. (Recommendation 7)
- The Australian Government fully and explicitly implement the UN Declaration on the Rights of Indigenous Peoples in domestic law and policy. In addition, and as a priority, clear protocols and guidelines on the implementation of the right to free, prior and informed consent should be negotiated with Indigenous peoples. (Recommendation 8)

Towards a negotiated agreement

- By 2013 the Federal Government and Opposition, the National Congress of Australia's First Peoples, Reconciliation Australia and peak Aboriginal and Torres Strait Islander organisations and leaders from urban, regional and rural communities begin the process of roundtable negotiations in relation to an agreement-making process. (Recommendation 9)

Constitutional recognition and reform

- The Federal Parliament honours its commitment to hold a referendum to recognise Aboriginal and Torres Strait Islander people in the Constitution by the 2013 election. In the process leading to this referendum:
 - The Expert Panel should be empowered to consult broadly and given scope to develop options for reform both to the preamble and text of the Constitution.
 - Aboriginal and Torres Strait Islander leaders, organisations and communities should be fully consulted regarding the wording of amendments to the Constitution. The National Congress of Australia's First Peoples, as well as Aboriginal and Torres Strait Islander peak bodies throughout Australia, should have a significant role in this process. (Recommendation 4)

Resourcing reconciliation

- The Federal Government increase funding to Reconciliation Australia to extend its work to cover large-scale community engagement strategies promoting reconciliation. (Recommendation 5)
- All State Governments commit to a minimum three-year funding agreement with their relevant state reconciliation council to ensure that these councils can continue to provide resources for reconciliation activities involving Indigenous and non-Indigenous peoples and communities. (Recommendation 6)

Beyond 'Sorry'

- The Government implement the *Bringing them Home* recommendations in full, through a comprehensive government response developed in partnership with Stolen Generations groups, as well as Link-Ups and other service providers, including restitution, rehabilitation and compensation. (Recommendation 1)

Close the Gap

- In line with the Federal Government's commitments to closing the life expectancy gap, the Federal Government implement a long term National Aboriginal and Torres Strait Islander Health Action Plan that addresses all the determinants of health. This must be done in consultation with the Close The Gap Steering Committee and Aboriginal and Torres Strait Islander health organisations. (Recommendation 2)
- The Federal Government enhance the capacity of Aboriginal Community Controlled organisations to deliver culturally appropriate services through increased funding and consultation in the development of policy. (Recommendation 3)

Background: Understanding reconciliation in Australia

Contested meanings

*Broadly speaking, Reconciliation is about recognition, rights and reform. It is recognition of Aboriginal and Torres Strait Islander peoples as the original peoples of this land, and it is recognising the Aboriginal history of this land, both the long Aboriginal history before the invasion, and the shared history since. Reconciliation is recognising the rights that flow from being the First Peoples, as well as our rights as Australian citizens in common with all other citizens. It is about reforming systems to address the disadvantages suffered by Indigenous peoples and, as I have said, it is about changing the frame of reference of all Australians to include Aboriginal Australia.*¹
Linda Burney

For the purposes of this report the term 'reconciliation' is used to refer to the process through which non-Indigenous and Indigenous Australians enter into a dialogue with one another with the intention of agreeing on ways in which to mitigate the disadvantage that Indigenous peoples experience. Core to this is the resetting of the relationship between Indigenous and non-Indigenous peoples with a view to an agreement or settlement that rights the historical injustice (the settlement of Australia without consent) that Aboriginal and Torres Strait Islander peoples, the First Australians, have experienced.

In Australia, the term 'reconciliation' is beleaguered in its variety of definitions, meanings and implications. The definition and interpretation of the term is murky not only because of the inherent confusion regarding its meanings and ramifications, but also because of the complexity of the political, economic and social relationships between Indigenous and non-Indigenous peoples. These relationships are 'complicated by historical injustice... (and) compounded by institutional legacies'.²

Reconciliation policy in the late 1980s and early 1990s emphasised a rights-based agenda of self-reliance and self-determination and sought to recognise past injustices as well as acknowledge the intrinsic human rights of Indigenous peoples. However, in the late 1990s, the Government's reconciliation policy shifted to an almost exclusive emphasis on service delivery.³ This approach sought to distinguish itself from earlier so-called 'symbolic' approaches. 'Practical reconciliation' (as this approach was described by government) was to be principally delivered through government and mainstream non-government agencies and was aimed exclusively at addressing the social and economic disadvantage that Indigenous peoples experience. Practical reconciliation did not seek to address other historical and cultural systemic factors that underpin Indigenous disadvantage.

Many reconciliation advocates, including ANTaR, advocate a rights-based approach to reconciliation. This approach to reconciliation is one that recognises the rights of Aboriginal and Torres Strait Islander peoples and delivers tangible benefits to them

¹ Linda Burney, 'Reconciliation and Citizenship; Not Just a Challenge – an Opportunity for all Australians' Conference Paper presented at the 50th Anniversary of Australian Citizenship Conference, University of Melbourne, Victoria, 1999, Available: www.law.unimelb.edu.au/events/citizen/burney.pdf, Accessed on 16 November 2010.

² Larissa Behrendt, *Achieving Social Justice: Indigenous rights and Australia's future*, Federation Press, Annandale, 2003, p. 7.

³ Ibid.

by virtue of that recognition. Rights-based reconciliation blends both practical and symbolic reconciliation. It appreciates that the only way to achieve real change is to work in partnership with Aboriginal and Torres Strait Islander communities to overcome the inequalities that exist. In practical terms, this means accepting the rights of Indigenous people to the same services as everyone else (one of the key themes in 'practical reconciliation' approaches). It also means that Indigenous people are empowered, in partnership with government, to determine what their communities need and how services should be delivered. This approach is based on the principles of self-determination. Rights-based reconciliation also focuses on creating institutional changes – constitutional, legislative and jurisprudential to bring about a more equitable and just society.

Background to the formal reconciliation process

A number of processes and inquiries informed or shaped the formal reconciliation process. These events are set out in the reconciliation chronology on page 4.

The National Aboriginal Conference (NAC) 1979, the 1987 Royal Commission into Aboriginal Deaths in Custody, the Human Rights and Equal Opportunity Commission Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (HREOC Inquiry) and *Bringing Them Home Report 1997* and the recognition of land rights and native title rights helped shape and inform public understandings of the reconciliation process and Government policy responses.

The NAC was established by the Federal Government in 1977. The Conference was intended to provide a forum for the expression of Aboriginal views and advanced agreement making and recognition proposals with which the Federal Government engaged. Although it was dismantled in 1984, the NAC played a role in ensuring calls for a treaty remained before Government and in doing so helped inform reconciliation policy and legislation in the 1990s.

The 1987 Royal Commission into Aboriginal Deaths in Custody provided important recognition of Indigenous peoples' unequal position in society and called for a systemic response to address disadvantage. The Royal Commission sought to analyse the 'underlying causes' of increased rates of incarceration for Indigenous peoples; finding that

From...history many things flow which are of central importance to the issue of Aboriginal over-representation in custody. The first is deliberate and systematic disempowerment of Aboriginal people starting with dispossession from their land and proceeding to almost every aspect of their life...Decisions were made about them and for them and imposed upon them...Aboriginal people were made dependent upon non-Aboriginal peoples. Gradually many of them lost their capacity for independent action and their communities likewise. With loss of independence goes a loss of self esteem...The damage to Aboriginal society was devastating.⁴

The Royal Commission was a highly significant public inquiry, not only for its specific findings regarding Aboriginal people and the criminal justice system, but for the broader legacy of disadvantage and systemic discrimination which it highlighted. It also indicated that discrimination and injustice are both historical and continuing

⁴ Royal Commission into Aboriginal Deaths in Custody, *Final Report of the Royal Commission into Aboriginal Deaths in Custody*, Royal Commission into Aboriginal Deaths in Custody, 1991, p. 6.

realities for Indigenous peoples.

In a similar way, the HREOC Inquiry highlighted in a powerful and personal way the history of Indigenous disadvantage and legacy of dispossession. On the issue of the removal of Indigenous people from their families, the Inquiry concluded that:

For the majority of witnesses to the Inquiry, the effects have been multiple and profoundly disabling.Psychological and emotional damage renders many people less able to learn social skills and survival skills. Their ability to operate successfully in the world is impaired causing low educational achievement, unemployment and consequent poverty. These in turn cause their own emotional distress leading some to perpetrate violence, self-harm, substance abuse or antisocial behaviour.⁵

The *Bringing them Home Report 1997*, presented to the public following the HREOC Inquiry, contained hundreds of submissions from Indigenous people describing their own experiences around forced removal. One submission told:

I was at the post office with my Mum and Auntie [and cousin]. They put us in the police ute and said they were taking us to Broome. They put the mums in there as well. But when we'd gone [about ten miles] they stopped, and threw the mothers out of the car. We jumped on our mothers' backs, crying, trying not to be left behind. But the policemen pulled us off and threw us back in the car. They pushed the mothers away and drove off, while our mothers were chasing the car, running and crying after us. We were screaming in the back of that car. When we got to Broome they put me and my cousin in the Broome lock-up. We were only ten years old. We were in the lock-up for two days waiting for the boat to Perth.⁶

In bringing these realities to light, both the Royal Commission and the HREOC Inquiry made significant contributions to the reconciliation process.

The official reconciliation process was also influenced by judicial decisions including the *Mabo* and *Wik* decisions.⁷ In June 1992, the High Court of Australia handed down the *Mabo* decision. In this decision, the High Court recognised the existence of native title and quashed the myth of *terra nullius*. Native Title rights, although markedly slow in coming, represented a critical historical advance of profound symbolic and practical importance.

The *Wik* case in 1996 and the prolonged parliamentary debates in relation to amendments to the *Native Title Act*, also provided a backdrop to the reconciliation process, with the *Wik* amendments signifying a change from bipartisanship to partisanship in relation to Indigenous affairs policies.

As at May 2010, 129 determinations of native title (many of them by agreement) and 430 indigenous land use agreements had been registered with the National Native Title Tribunal.⁸

⁵ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Human Rights and Equal Opportunity Commission, Australia, 1997, p. 178.

⁶ *Ibid*, Introduction.

⁷ *Mabo v Queensland No. 2 (1992)* 175 CLR 1 and *Wik Peoples v Queensland (1996)* 187 CLR 1.

⁸ *Ibid*.

In some cases, the native title claims processes has played a role in advancing the reconciliation process by recognising the rights of Indigenous peoples, alleviating the disadvantage in some communities and encouraging the formation of relationships between Indigenous and non-Indigenous people. During National Reconciliation Week 2010, the National Native Title Tribunal President Graeme Neate explained that:

*Relationships are developed between diverse groups of people who come together because they have interests in particular areas of land or waters. By recognising and respecting each other's rights and interests, they reach agreements and then make those agreements work well into the future.*⁹

However, the potential of native title rights to deliver social, cultural, spiritual and economic benefits to Indigenous peoples has not been fulfilled. This is partly due to the litigious nature of the native title system, which involves long delays and high costs, and the limitations on the use of native title land.

ANTaR supports moves towards negotiated native title outcomes. However, we believe that governments have a key role to play in creating a level negotiating field to enable fair and equitable outcomes to be achieved for Indigenous communities.

For this reason, we have called for additional funding for Native Title Representative Bodies and Prescribed Bodies Corporate, to ensure they are, respectively, adequately resourced to represent Indigenous peoples in native title negotiations and to fulfill their responsibilities in managing land.

The Council for Aboriginal Reconciliation

The formal reconciliation policy process began with bipartisan support in Federal Parliament. In 1991, the Report of Royal Commission into Aboriginal Deaths in Custody identified the need for a formal reconciliation process and, partly of consequence, the *Council for Aboriginal Reconciliation Act 1991* (Cth) was enacted by the Federal Government. This Act established the Council for Reconciliation, and empowered it to 'consult Indigenous and non Indigenous Australians on whether reconciliation would be advanced by a formal document or documents for reconciliation' and then to report and make recommendations to the Minister for Aboriginal Affairs.¹⁰ The enactment of the legislation and the development of the Council acknowledged the need for dialogue between government and Indigenous leaders.¹¹

The Council began work in 1991. It was a national body with 25 members, with a majority of Indigenous members and others drawn from the business, union, religious, media and community sectors. The Council had three terms (1991-1994, 1995-1997 and 1998-2000) with some members being involved for more than one term. The initial development of the Council 'implicitly acknowledged the currency of a treaty or "makarrata" in recent debates',¹² referring to the NAC, where a *makarrata*

⁹ National Native Title Tribunal, 'Native Title Process Supports Reconciliation' Talking Native Title, Newsletter, May 2010, Available: <http://www.nntt.gov.au/News-and-Communications/Newsletters/Talking-Native-Title/Pages/Nativetitleprocesssupportreconciliation.aspx>, Accessed on 16 November 2010.

¹⁰ Garth Nettheim, 'Reconciliation and Unfinished Business in Australia', in *Reconciliations*, eds. A. Toth & B. Hickey, API Network, Perth, 2005.

¹¹ Robert Tickner, *Taking a Stand: Land Rights to Reconciliation*, Allen and Unwin, St. Leonards, 2001.

¹² Sean Brennan, 'Reconciliation in Australia: The Relationship Between Indigenous People and the Wider Community', *Brown Journal for World Affairs*, vol. XI, issue. I, 2004, p. 151.

was high on the agenda.

The Council's vision statement guided its functions and core business throughout its decade-long work. Its vision for reconciliation was:

*'A united Australia which respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all.'*¹³

The Council began designing strategies to engage the broad Australian community in the formal reconciliation process, negotiating with all levels of government to seek commitments to the reconciliation process and to overcoming the disadvantage experienced by Indigenous peoples.

The Council's work had three goals: addressing disadvantage in partnership with Aboriginal people (through a national commitment from all levels of government and ATSIC to address Indigenous disadvantage), public awareness and education (aimed to educate non-Indigenous Australians about Indigenous histories, cultures and dispossession) and a process of consultation on the need for a formal reconciliation document (involving a unanimous parliamentary commitment to thorough consultation regarding a formal document).

The CAR Act 'recognised the need for education about 'history', culture, dispossession and disadvantage of Aboriginal and Torres Strait Islander people and the need to address disadvantage'.¹⁴ This was coupled with the underlying notion that reconciliation should allow for Indigenous and non-Indigenous people to have equal bargaining positions. The establishment of the 1991 legislation provided an acknowledgment and recognition that the treatment of Indigenous peoples and the injustice that they experience was not simply an historical experience, but is an ongoing lived reality that needed to be addressed within the political sphere.¹⁵

The Council identified eight key issues which would frame its work. The issues were, and continue to be, critical to the success of the reconciliation process. They also provided reference points by which to measure the success of the process of reconciliation. The key issues were:

- Understanding Country
- Improving relationships
- Valuing cultures
- Sharing histories
- Addressing disadvantage
- Responding to custody levels
- Agreement on a document for reconciliation
- Controlling destinies.¹⁶

These key issues were complementary to the three goals of reconciliation, outlined above.¹⁷ 'Controlling destinies' encapsulated the desire for self-determination.¹⁸

¹³ Andrew Gunstone, *The Australian Formal Reconciliation Process Unfinished Business*, Australian Scholarly Publishing, North Melbourne 2007, p. 56.

¹⁴ Tickner 2001, p.318.

¹⁵ Mark McKenna, 'Metaphors of light and darkness: the politics of 'Black armband' history', *Melbourne Journal of Politics*, vol. 25, 1998, pp. 67-85.

¹⁶ Council for Aboriginal Reconciliation, *Walking Together: the First Steps – Report of the Council for Aboriginal Reconciliation to Federal Parliament 1991-1994*, Commonwealth of Australia, Canberra 1994, p.17-18.

¹⁷ Tony Duke, 'Reconciliation...who reckons what', in *Voices of Aboriginal Australia: Past Present*

In the beginning of the Council's second term, it released the *Together we can't lose* report. The report concentrated on the first two goals (addressing disadvantage and educating the public), and only very briefly mentioned the third goal (developing a formal reconciliation document). The report highlighted some of the Council's achievements in its first term and explored the need to advance the reconciliation process through an equal rights and opportunities agenda. In its second term, the Council directed its efforts to community engagement and action in support of reconciliation. It identified key performance indicators linked to the three goals of reconciliation including:

'...substantial progress towards constitutional recognition of the unique position of Aboriginal and Torres Strait Islander peoples...[an] improvement in all indicators for Indigenous participation in Australian social, economic and political life and an improvement in awareness and positive attitudes to reconciliation'.¹⁹

While there was fairly bipartisan support for the Council's agenda in its first term, there was a significant shift in the second and third terms of the CAR. Political attitudes towards reconciliation and Indigenous Affairs became more partisan, illustrated through heavy criticism of ATSIC by the Coalition Government, as well as by the divergent party responses to the *Mabo* and *Wik* decisions.

The *Bringing Them Home* Report and the *Wik* Amendments became 'critical tests for the reconciliation process'.²⁰ It became clear that the bipartisan commitment to the formal reconciliation process had come to an end. Continued attacks on ATSIC, as well as broader attacks on self-determination in the late 1990s, reinforced these political fractures. The new Coalition Government rejected the Social Justice Package that the previous Labor Government had proposed to implement in response to the *Mabo* judgement. The Package had been hoped, by organisations including CAR, ATSIC and HREOC, to include constitutional reforms as well as legislation around negotiating with Indigenous peoples.²¹ In 1998, Alexander Downer requested that the term 'self determination' be removed from the UN Draft Declaration on the Rights of Indigenous Peoples.

In the Council's third term, its primary focus was on supporting the people's movement for reconciliation to ensure its continuing life beyond the Council. The Council focussed its work on communications and public awareness, to engage decision-makers as well as the general public in a reconciliation dialogue. This was 'a part of its "hearts and minds" approach to reconciliation'.²² It was also an approach that was necessary as the attitude of the Government at the time was one that defined reconciliation largely in terms of basic service provision, rather than a continuing and lasting dialogue between Indigenous and non-Indigenous Australians and a rights agenda. The Council supported the people's movement through communication, awareness-raising, community resources and consultation, 'particularly as it moved towards its final statutory obligation of assessing the desirability and the potential content of documents of reconciliation'.²³

Future, ed. I. Moores, Butterfly Books, Springwood, 1995, pp. 282-283.

¹⁸ Council for Aboriginal Reconciliation 1994, p.17-18.

¹⁹ Council for Aboriginal Reconciliation 1995, p.5-6 in Gunstone, 2007, p. 69.

²⁰ Gunstone 2007, p.74

²¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Australian Human Rights Commission, Sydney, 2002, p. 94.

²² Brennan 2004, p.152.

²³ *Ibid*, p. 153.

The Council developed a number of goals in order to assist the process of continuing the reconciliation process beyond the life of the Council. These included;

- Develop a document of reconciliation which would be acknowledged in the Australian Constitution;
- Assist in forming partnerships between the Indigenous and the wider community to achieve socio-economic equality for Indigenous peoples; and
- Assist the development of the people's movement in order for reconciliation to continue past 2000.

In June 1999, the Council released its Draft Document for Reconciliation, and carried out a nine-month process seeking feedback. At *Corroboree 2000*²⁴, the Council released the final *Documents for Reconciliation*. The *Documents for Reconciliation* consisted of two documents – the *Australian Declaration Towards Reconciliation* and the *Roadmap for Reconciliation*. The two documents were largely aspirational, acknowledging that the goals of reconciliation were not fully achieved during the Council's lifetime.

After the Council: the lost decade?

Government policies and rhetoric shifted markedly after the election of the Howard Government and the cessation of the Council. Reconciliation policy from the mid-1990s to the mid 2000s employed what has been described as a 'mainstreaming' approach, with a heavy emphasis on the 'practical' steps to overcome the disadvantage experienced by Indigenous peoples and the participation of Aboriginal people in the mainstream economy. This era of 'practical reconciliation' framed traditional citizenship rights, like access to services, within a reconciliation agenda. While no one denied that adequate access to health services, housing and education were undeniably essential in achieving improvements in Indigenous socio-economic status, critics questioned the lack of consultation with Indigenous peoples and the seeming lack of respect for distinct identities, cultures and economies. They also questioned the assumption that 'practical action' rendered more symbolic actions unnecessary, rejecting the practical/symbolic distinction as 'simplistic, arbitrary and extremely artificial'.²⁵

The Council's work came to an end in 2000 at the conclusion of its legislative term. The Council acknowledged, at this time, that it had fulfilled the barebones of its mandate, which was to 'promote a formal process of reconciliation in the Australian community, and advise Parliament about whether or not a document for reconciliation would help advance the process'.²⁶

The Council made very clear, however, that the process for reconciliation was far from complete. It had, during its term, initiated the establishment of State and Territory Reconciliation Committees (SRCs) and Local Reconciliation Groups to continue promoting reconciliation at the State, Territory and local level. Finally the

²⁴ Corroboree is a Darug word and is defined as a group of ceremonies, including public performance of songs and dances, which cover the whole of social, economic, legal, political, religious and cultural life. 'Corroboree 2000: Sharing our Future' was the theme for National Reconciliation Week 2000, the final National Reconciliation Week during the Council's term.

²⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner 2001, p.23 in Jon Altman et al, 'Monitoring 'practical' reconciliation: evidence from the reconciliation decade, 1991-2001', *Centre for Aboriginal Economic Policy Research*, No. 254/2003, 2003, p.14.

²⁶ Council for Aboriginal Reconciliation, *Sustaining the Reconciliation Process*, Commonwealth of Australia, Canberra, 2000, Available: <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/11/pg01.htm>, Accessed on 16 November 2010.

Council spearheaded pressure for the establishment of a new national body that would continue to promote and monitor the reconciliation process at a national level.

Reconciliation Australia was established as this independent, non-government, not-for-profit foundation in January 2001 and it continues to build on the work of the Council for Aboriginal Reconciliation today. It does so, however, without the Council's statutory basis and with only a fraction of its funding.

Since the Council's end, Australian Governments have had a fairly poor record of achievement on reconciliation. The Howard Government failed to advance key aspects of the reconciliation agenda, rejecting calls for constitutional reform, recognition of Indigenous rights, sovereignty, self-determination and 'structured processes for negotiating 'unfinished business''.²⁷ It was not until the 2007 election campaign that Prime Minister Howard finally committed to constitutional recognition of Indigenous people.

In 2009, the Rudd Government endorsed the United Nations *Declaration of the Rights of Indigenous Peoples*.²⁸ The endorsement, although long coming (having been passed by the General assembly in 2007) provided a framework for addressing the 'unfinished' business of reconciliation. This included articulating the importance of self-determination for Indigenous peoples, the importance of Indigenous peoples and communities exercising control and ownership of lands and resources, ensuring that Indigenous peoples are free from discrimination as well as maintaining and strengthening Indigenous peoples' distinct political, legal, economic, social and cultural institutions. The Declaration provided a framework to guide the development of domestic law and policy affecting Indigenous peoples. The endorsement, although not being a formal ratification, signalled that there was interest in resetting the relationship between government and Indigenous peoples in recognition of international human rights developments.

Organisations such as Australians for Native Title and Reconciliation (ANTaR) have continued to advocate for the reconciliation process to be sustained and advanced. In particular, ANTaR has continued to pressure government and decision makers to develop policies that have embedded principles of self-determination, enabling Aboriginal and Torres Strait Islander peoples to freely determine their own political, economic, social and cultural development. ANTaR has consistently advocated for policies that address the historic and contemporary exclusion experienced by Indigenous peoples. ANTaR and other non-government organisations have also worked to promote reconciliation and the resetting of relationships between Indigenous and non-Indigenous peoples in the public sphere.

Similarly, State Reconciliation Councils are engaging in ongoing work with a range of groups and organisations to address the 'unfinished business' of reconciliation, specifically focusing on the rights of Indigenous peoples, advocating for principles of social justice and promoting economic independence. This work is done with very limited funding.

²⁷ Brennan 2004, p.157

²⁸ United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), 2007, Available: www.un.org/esa/socdev/unpfii/en/declaration.html, Accessed on 16 November 2010

The National Apology

In 2008, the newly elected Labor Prime Minister Kevin Rudd made a formal apology to the Stolen Generations. This was a critical historic moment in the reconciliation process, coming as it did after a long struggle and uniting the nation in a moment of historical reflection and recognition.

The importance of a formal apology was highlighted by the Human Rights and Equal Opportunities Commission, following its Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families in 1997. The Inquiry found that:

*The first step in any compensation and healing for victims of gross violations of human rights must be an acknowledgement of the truth and the delivery of an apology.*²⁹

Similarly, when New South Wales Premier Bob Carr extended an apology to Aboriginal people in NSW Parliament in 1996, he acknowledged the apology as 'an essential step in the process of reconciliation'.³⁰

Prime Minister Rudd's apology on the 13th February 2008, at the first sitting of the new Federal Parliament, was a powerful and emotional moment, watched and listened to by millions of people across Australia and overseas. Thousands of people, both Aboriginal and non-Aboriginal, travelled to Canberra to gather on the lawns of Parliament. Some had travelled by bus from the other side of the country to be in the capital for a moment many had believed would never happen in their lifetime.

Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, called the day 'historic'. He explained the significance of the day as such:

*It's the day our leaders – across the political spectrum – have chosen dignity, hope and respect as the guiding principles for the relationship with our first nations' peoples. Through one direct act, Parliament has acknowledged the existence and the impacts of the past policies and practices of forcibly removing Indigenous children from their families. And by doing so, has paid respect to the Stolen Generations. For their suffering and their loss. For their resilience. And ultimately for their dignity.*³¹

Aboriginal leader and co-chair of Reconciliation Australia, Mick Dodson, declared that he was 'inspired by this apology as an act of true reconciliation towards indigenous Australia'.³²

²⁹ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Human Rights and Equal Opportunity Commission, Australia, 1997, Chapter 14, Available: <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/> Accessed on 10 September 2010

³⁰ Parliament of New South Wales, Legislative Assembly, 14 November 1996, Available: <http://www.parliament.nsw.gov.au/prod/parliament/hanstrans.nsf/V3ByKey/LA19961114>

³¹ Tom Calma, 'Let the healing begin' *Response to government to the national apology to the Stolen Generations*, Member's Hall, Parliament House, Canberra, 13 February 2008, Available: http://www.hreoc.gov.au/about/media/speeches/social_justice/2008/20080213let_the_healing_begin.html Accessed on 22 October 2010.

³² Misha Schubert et al 'Sorry. We'll never let it happen again', *The Age*, February 13 2008, Available: <http://www.theage.com.au/news/national/sorry-well-never-let-it-happen-again/2008/02/12/1202760300867.html?page=fullpage#contentSwap2> Accessed on 22 October 2010.

While most saw the apology as extremely important for reconciliation, some still felt that without an offer of compensation the apology did not go far enough. Former Reconciliation Australia chair Jackie Huggins, for example, made this point:

I'd ask any Australian if they had their children taken away from them forcibly by the mere fact that they were Aboriginal in this country, would not they seek some compensation? I think every decent Australian would say, 'Yes I would want compensation'.³³

The National Apology occurred more than 10 years after the Human Rights and Equal Opportunity Commission's Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, and the release of the *Bringing Them Home Report 1997*. The Apology was just one of the 54 recommendations in the report. Thirteen years on, significant issues identified by the Inquiry remain unfinished business.

Specifically, there remains a continuing lack of monetary compensation as well as inadequate measures of rehabilitation and restitution and guarantees against repetition. The Aboriginal and Torres Strait Islander Social Justice Commissioner highlighted this unfinished business in the *Social Justice Report 2008*. The report noted, for example, that *Bringing Them Home* counselling programs and organisations such as Link-Up are chronically under-resourced and that Indigenous children today are removed from their families under child protection care orders at a rate 6 times that of non-Indigenous children and enter juvenile justice detention centres at a rate 23 times that of non-Indigenous children.³⁴ Despite the National Apology, the Tasmanian Government remains the only government to have offered monetary compensation to Stolen Generation members.

ANTaR recommends that:

1. The Government implement the *Bringing them Home* recommendations in full, through a comprehensive government response developed in partnership with Stolen Generations groups, as well as Link-Ups and other service providers, including restitution, rehabilitation and compensation.

³³ Shubert et al 2008.

³⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission, Sydney, 2008, p 159-160.

The Council for Aboriginal Reconciliation Documents for Reconciliation

The Council produced two Documents for Reconciliation– the *Roadmap for Reconciliation* ('the Roadmap') and the *Australian Declaration Towards Reconciliation* ('the Declaration').

The *Roadmap* outlined four key strategies to achieve reconciliation and 'proposed practical and symbolic actions to make reconciliation a reality'.³⁵ The strategies included:

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

The *Roadmap* outlined ways that a variety of sectors (including government and community groups, as well as individuals) could implement the principles embedded in the *Declaration*. A number of actions were proposed under each strategy, including:

National Strategy to Sustain the Reconciliation Process:

- Fostering leadership for reconciliation from governments, businesses and community organisations
- Establishing Reconciliation Australia (a not-for-profit, non-government reconciliation peak body, which, unlike the Council, has no statutory power)
- Addressing the low levels of Indigenous Members of Parliament
- Educating the wider community about racism
- Establishing symbols of reconciliation
- Passage of formal motions of support for the Documents towards Reconciliation by all levels of government

National Strategy to promote recognition of Aboriginal and Torres Strait Islander rights:

- Fostering awareness of distinct cultures, rights and status as first peoples
- Protecting the intellectual property of Indigenous peoples
- Incorporating customary laws into Australian legal processes
- Enacting legislation on issues such as Indigenous rights and self-determination within the life of the nation and constitutional reform
- Removing Section 25 of the Constitution and introducing a new section that prohibits racial discrimination

National Strategy to Overcome Disadvantage:

- Ensuring the socio economic conditions of Indigenous peoples are similar to the wider community and that Indigenous people should not lose cultural identity in the process
- Establishing benchmarks in relation to overcoming disadvantage through COAG and providing an annual report on these benchmarks

³⁵ Council for Aboriginal Reconciliation, *Reconciliation - Australia's challenge* 2000, p 74.

National Strategy for Economic Independence:

- Promoting the need for Indigenous people to have the same level of economic independence as the wider community
- Proposing actions in areas of employment, education, banking and business and the protection of Indigenous peoples intellectual property.³⁶

The *Declaration* was drafted with the hope that it would be affirmed by governments as an official policy statement. For this reason, it was an aspirational document that contained no substantive commitments to issues like land rights or the development of a treaty. It referred to self-determination in general terms without outlining a detailed plan to support self-determination in the Australian political and policy contexts (see Appendix 1).

Former Prime Minister Howard at the time raised objections to a number of phrases within the document, including reference to 'original owners', the phrase 'settled without consent' and the term 'self-determination' and as a result of these objections the Government refused to support the *Declaration*. It also refused to endorse the *Roadmap*. The Commonwealth Government's response to the Documents for Reconciliation (in September 2002) remained true to their emphasis on practical reconciliation:

*Although there was significant agreement between the government and the Council for Aboriginal Reconciliation, in several areas it has not been possible for the Government to give its full support to the document finally adopted by the Council...the areas of difference relate to customary law, the general application of the laws of Australia to all citizens, self determination and a national apology as distinct from an expression of sorrow and sincere regret.*³⁷

The Council's final report, presented to the Commonwealth Parliament in December 2000, highlighted the unfinished nature of the reconciliation process, stating:

*The Parliament's unified decision to launch a formal reconciliation process was the right decision at the right time. Cross-party support for the process and for Council's work was and remains an essential element of success. The time was right for the process to begin, and all Australians can take heart from the positive outcomes so far. Nevertheless, a decade was a short time to address the legacies of 200 years of history, and much remains to be done.*³⁸

The Final Report made six recommendations including recommendations to support the Documents of Reconciliation, to overcome Indigenous disadvantage, prepare legislation for a referendum to recognise Indigenous people as First Peoples, remove Section 25 of the Constitution and include a section making it unlawful to adversely discriminate against people on the grounds of race and negotiate a process for agreement or treaty making (see Appendix 2) as well as proposed legislation to give effect to the Documents of Reconciliation. The proposed legislation had four sections. The first recognised the unique status of Indigenous peoples, the second outlined a process to resolve issues for reconciliation, the third was a negotiation and agreement process to resolve reconciliation issues between Indigenous peoples and the Government and the final section was a process for reporting on reconciliation.

³⁶ Council for Aboriginal Reconciliation *Roadmap*, 2000.

³⁷ John Howard, 'Reconciliation Documents' Media Release, 11 May 2000 in Gunstone, 2007, p.266.

³⁸ Council for Aboriginal Reconciliation, *Reconciliation - Australia's challenge* 2000, p.99.

The recognition provisions within the draft legislation incorporated the *Declaration* as a Schedule to the Act. The reconciliation process proposed by the Council included establishing a series of National Conventions to identify, debate and make recommendations to address unresolved issues.

Negotiations between Indigenous peoples and the Government focused on mechanisms of engagement between the Government and the Aboriginal and Torres Strait Islander Commission (ATSIC) and the development of a formal agreement between these two parties. The reporting and monitoring mechanisms set out included a yearly progress report from the Aboriginal and Torres Strait Islander Social Justice Commissioner as well as a National Report on the Progress Towards Reconciliation every three years by an independent body. It is important to note that neither annual reporting by the Social Justice Commissioner on reconciliation nor triennial National reporting on the Progress Towards Reconciliation has occurred. This section within the proposed legislation also made reference to the development of a Parliamentary Joint Committee to monitor progress towards reconciliation.

The draft bill included a 'requirement that the Prime Minister commence negotiations with ATSIC to develop a process by way of a treaty or an agreement to address the unresolved issue of reconciliation'.³⁹

Successive governments have failed to systematically address issues raised in the Council's Final Report and have not implemented measures to effectively and appropriately deal with the 'unfinished business' of reconciliation. This is evident in the following analysis of progress to date against the six recommendations of the final report.

³⁹ William Jonas, *Social Justice Report 2001*, Human Rights and Equal Opportunities Commission, Canberra 2001, p.198.

Ten years on: Are We There Yet?

This section explores the extent to which the Council's recommendations have been implemented or advanced in the decade since its Final Report.

Recommendation 1: Addressing Indigenous disadvantage

Of the six recommendations made by the Council, its recommendation to address disadvantage through COAG has been the most comprehensively addressed. This has primarily been done through the *Overcoming Indigenous Disadvantage* framework and the *Closing the Gap* policies. The Council recommended that:

The Council of Australian Governments (COAG) agree to implement and monitor a national framework whereby all governments and the Aboriginal and Torres Strait Islander Commission (ATSIC) work to overcome Aboriginal and Torres Strait Islander peoples' disadvantage through setting program performance benchmarks that are measurable (including timelines), are agreed in partnership with Aboriginal and Torres Strait Islander peoples and communities, and are publicly reported.

The Council's recommendation recognised the need for a collaborative approach by all levels of government in order to successfully overcome the disadvantage experienced by Indigenous peoples. In doing so, it acknowledged that services to Indigenous peoples are fragmented between Commonwealth and State Governments. It also, very importantly, recognised the essential role that Indigenous leaders and organisations need to play in this process, in identifying issues and in developing solutions that are culturally appropriate and therefore likely to be more successful.

COAG's Overcoming Indigenous Disadvantage framework

In a 2000 COAG communiqué, the Commonwealth, State and Territory Governments committed to addressing the socio-economic disadvantage of Indigenous peoples through a nationally coordinated reconciliation framework. The focus of COAG was on local communities and outcomes, partnerships and shared responsibility and coordination between various government agencies.

At the April 2002 COAG meeting, governments agreed to trial a whole-of-government approach, with the aim of improve the interaction of various levels of government with each other and with Indigenous communities. COAG also agreed to commission the Steering Committee for the Review of Commonwealth/State Service Provision (SCRCSSP) to produce regular reports on indicators of Indigenous disadvantage. The focus of this reporting was to identify key indicators to measure the effectiveness of program and policy interventions.

In 2003, at the request of COAG and in collaboration with ATSIC, the first *Overcoming Indigenous Disadvantage Report* was prepared. Its function was to provide key indicators of the disadvantage experienced by Indigenous peoples 'that are of relevance to all governments and Indigenous stakeholders, and that can demonstrate the impact of program and policy interventions'.⁴⁰ The aim of the report

⁴⁰ Productivity Commission, 'Report to COAG on Indigenous Disadvantage Media Release', 13

was to highlight key areas for policy development and track the impacts of policy over time on addressing Indigenous disadvantage.

The three overarching priorities of the *Overcoming Indigenous Disadvantage* framework included:

- Safe, healthy and supportive family environments with strong communities and cultural identity;
- Positive child development and prevention of violence, crime and self-harm; and
- Improved wealth creation and economic sustainability for individuals, families and communities.

Following on from these broad goals were a series of 'headline indicators' that sat within the four areas of wellbeing – individual capacities, material/economy, spiritual/cultural and family and community. The indicators included life expectancy, labour force participation and unemployment, Year 10 and 12 school retention rates and imprisonment and juvenile detention rates. The report itself did not include specific targets in terms of addressing these long-term goals. Targets have really only been applied to the third level of the *Overcoming Indigenous Disadvantage framework*, where strategic areas for action are noted.

Third level indicators, the 'strategic areas for action', include:

- early childhood development;
- early school engagement;
- positive childhood and transition to adulthood;
- substance use and misuse;
- functional and resilient families and communities;
- effective environmental health systems; and
- economic participation and development.

The Productivity Commission has justified the identification of these areas on the basis of 'their demonstrated potential to have a lasting impact on (higher level) disadvantage, and for their potential to respond to policy action within the shorter term.'⁴¹ These strategic areas focus on quality of life and wellbeing and were developed through collaboration between governments and ATSIC.

The development of a reporting framework, like the *Overcoming Indigenous Disadvantage* framework, was essential in addressing the Council's 'addressing disadvantage' recommendation. The Report has provided an important source of data on Indigenous disadvantage and exposed areas where urgent action is needed. It is now essential for governments to integrate the *Overcoming Indigenous Disadvantage* reporting framework into policy development and evaluation processes.

November 2003, Available:

<http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2003/mediarelease>, Accessed on 16 November 2010.

⁴¹ Gary Banks, 'Overcoming Indigenous Disadvantage in Australia', address to the Second OECD World Forum on 'Statistics, Knowledge and Policy', *Measuring and Fostering the Progress of Societies*, Istanbul, 27-30 June 2007. p. 13

Closing the Gap

ATSIC, the peak body for Aboriginal and Torres Strait Islander Peoples, was abolished in 2004 under the Howard Government. Since then there has been very limited formal consultation between COAG and Indigenous representative bodies in the formulation of government policies affecting Indigenous peoples, particularly in the *Closing the Gap* policy approach.

The *Closing the Gap* policy approach was championed by the Rudd Labor Government. In its first term, the Labor Government allocated a large funding package of \$4.6 billion - a significant investment. This investment focused on health, housing, early childhood services, economic participation and remote service delivery. Successive COAG meetings during this time 'adopted and expanded the 'generational commitment' to working with Indigenous communities to achieve the target of 'closing the gap' on Indigenous disadvantage'.⁴² A number of targets were proposed during these meetings including:

- To close the life-expectancy gap between Aboriginal and Torres Strait Islander people and other Australians within a generation;
- To halve the mortality rate between Aboriginal and Torres Strait Islander children and other children under age 5 within a decade;
- To halve the gap in literacy and numeracy achievement between Aboriginal and Torres Strait Islander students and other students within a decade;
- To halve the gap in employment outcomes for Aboriginal and Torres Strait Islander people within a decade;
- To at least halve the gap in attainment at Year 12 schooling (or equivalent level) by 2010; and
- To provide all Aboriginal and Torres Strait Islander four year olds in remote communities with access to a quality preschool program within five years.

The *Closing the Gap* policy direction emphasises the need to improve service delivery, to address under-investment in infrastructure, to improve outcomes in health, education and early childhood and to increase economic opportunities and participation.

During the 2010 Election campaign, the ALP also committed to implementing a new *National Framework on Alcohol and Substance Abuse* through COAG, promising \$20 million to support the Framework and associated initiatives, including the development of community-led Alcohol Management Plans and local community youth prevention programs.

Nevertheless, there has been criticism of the *Closing the Gap* framework on the basis that it lacks comprehensiveness and presents a 'formal equality approach based on mainstream values and encapsulating the shorthand of life expectancy, educational achievement and employment opportunities'.⁴³ It has also been criticised for the lack of significant Indigenous participation, consultation and negotiation in its development and implementation.⁴⁴

The *Closing the Gap* policies should address the health and wellbeing of Indigenous peoples in a respectful manner that acknowledges principles of self-determination

⁴² David Cooper, 'From 'Close the Gap' to the Rudd Government's 'closing the gap on Indigenous disadvantage': what gap are we closing?', *CAEPR Seminar Series*, 1 April 2009, p. 1

⁴³ *Ibid*, p.3.

⁴⁴ *Ibid*.

(where Indigenous peoples can freely determine their political status and pursue their economic, social and cultural development⁴⁵), the importance of resourcing of Indigenous led solutions and addressing cultural misunderstanding and racism in the general community. These are core social and cultural determinants of health.

Addressing the cultural and social determinants of health within a comprehensive national plan is critical in achieving social justice in Indigenous health. The *Closing the Gap* framework has largely overlooked issues of community control, the impact of racism and marginalisation on individuals and communities, connection to culture and country and the interconnectedness of these issues with health outcomes. Similarly, there remains a need for the development of a national Aboriginal and Torres Strait Islander health plan with recognition and understanding of the social and cultural determinants of health in consultation and negotiation with Indigenous peoples, communities and peak bodies

The development of a comprehensive, long-term health plan must be a priority for government if it is serious about addressing the health disparity that Indigenous peoples experience. A sustained investment in Indigenous health services and infrastructure over the coming years is essential in addressing this recommendation of the Council.

ANTaR recommends that:

- 2. In line with the Federal Government's commitments to closing the life expectancy gap, the Federal Government implement a long term National Aboriginal and Torres Strait Islander Health Action Plan that addresses all the determinants of health. This must be done in consultation with the Close The Gap Steering Committee and Aboriginal and Torres Strait Islander health organisations.**
- 3. The Federal Government enhance the capacity of Aboriginal Community Controlled organisations to deliver culturally appropriate services through increased funding and consultation in the development of policy.**

Recommendation 2: Motions of support for Documents of Reconciliation

All parliaments and local governments pass formal motions of support for the Australian Declaration Towards Reconciliation and the Roadmap for Reconciliation, enshrine their basic principles in appropriate legislation, and determine how their key recommendations can best be implemented in their jurisdictions.

The Commonwealth Government has not passed formal motions of support for either the *Declaration* or *Roadmap*. At the time, the Howard Government rejected specific commitments to Indigenous rights made in the *Declaration*, and instead proposed a different version, retaining six of the paragraphs of the *Declaration*, however,

⁴⁵ United Nations, *International Covenant on Civil and Political Rights*, 1966. Available: <http://www.hrweb.org/legal/cpr.html>. Accessed on 16 November 2010.

excluding paragraphs 4, 8, 9, 10 and 11 (see Appendix 1). Notably these paragraphs referred to self-determination, justice, equity and recognising customary laws. Conservative commentators at the time expressed their concern regarding supporting such documents as 'the documents advocated separatism within the Australian nation'.⁴⁶ As with the *Declaration*, the Howard Government refused to pass a formal motion in support of the *Roadmap*.

At a COAG meeting in 2000, some level of support of the *Declaration* and the *Roadmap* was articulated by the Federal Government (as well as by State and Territory Governments and the Australian Local Government Association). Broad recognition of the importance of reconciliation was discussed within a communiqué as well as broad commitments to work in partnership with Indigenous communities to address disadvantage, specifically relating to 'areas of domestic violence and substance abuse, encouraging community leadership, [and] facilitating improved relationships between Indigenous communities and business to assist Indigenous economic independence.'⁴⁷ This communiqué was not an official response to the *Declaration* or *Roadmap*.

Although significant moves have been made more recently by the Federal Government which reflect the principles embedded in the *Declaration* and *Roadmap* (such as the formal apology to the Stolen Generations) the Federal Government has not passed formal motions endorsing the *Declaration* and *Roadmap*.

By contrast, State Governments have responded to this recommendation. Many State Governments, although not formally passing motions to support the *Declaration* and *Roadmap*, enshrined the principles of these Documents in other motions. Some State and Territory Governments (such as South Australia, Victoria and the ACT) moved motions in Parliament acknowledging receipt of the Documents of Reconciliation. All State Premiers provided in principle support for the principles embedded in the *Declaration* and *Roadmap*, with many outlining whole-of-government frameworks, partnership models, consultative methods, symbolic commitments to key Aboriginal and Torres Strait Islander events, Parliamentary ceremonies and official events, incorporating reconciliation principles into strategic planning and delivering a variety of measures to overcoming disadvantage.⁴⁸

In addition, many local governments have adopted reconciliation statements and have undertaken comprehensive strategies to address the principles embedded in the *Declaration* and *Roadmap*. In Victoria, for instance, about half of the state's local councils have established some form of written commitment to reconciliation, whether in the form of a statement or a plan. Local Government Associations have taken a leading role in this, providing individual local governments with tools and overarching policies. The Australian Local Government Association committed local governments to implementing some of the National Strategies within the *Roadmap*, including addressing disadvantage and sustaining the reconciliation process. Many have also shown initiative in:

- establishing appropriate cultural protocols;
- engaging with community leaders on reconciliation;
- developing cultural heritage, language, economic development and land management policies;
- providing accessible services;
- setting up advisory and consultative committees; and

⁴⁶ Peter Howson, 'Assimilation the only way forward' *The Australian*, 24 May 2000, p. 15.

⁴⁷ Gunstone 2007, p.273

⁴⁸ Council for Aboriginal Reconciliation, *Reconciliation - Australia's challenge* 2000 p.121-154.

- employing Aboriginal Liaison and Community Development Officers.⁴⁹

Many Councils have also passed motions committing to reconciliation principles.

Local Government Case Study

In 1998, Warringah Council in NSW adopted its first reconciliation strategy. Since then the Council has revisited and reinvigorated its commitment to reconciliation and has most recently undertaken a Reconciliation Action Plan.

The Council has developed commitments to;

Specific consultation and negotiation processes

- Service provision and development
- Recognition of the unique status of Aboriginal and Torres Strait Islander peoples
- Equal Employment Opportunities for Aboriginal peoples
- Working with Aboriginal people on natural resource, land management and heritage issues; and
- Cultural awareness training for non-Indigenous staff and Councillors.

The Council has developed comprehensive strategies to address principles within the *Declaration* and *Roadmap*. Within the Council's plans there is recognition of Indigenous peoples as First Peoples, as well as reference to the history and distinct cultures of Aboriginal people in the Warringah area. Aboriginal heritage is acknowledged with specific reference to the Guringai or Kuringgai people through the development of an Aboriginal Land Working Group.

The Council has set up an Aboriginal and Torres Strait Islander Advisory Committee as well as providing various support and liaison roles for local reconciliation groups and working collaboratively with other Aboriginal organisations in the area such as the Local Aboriginal Land Council and the Aboriginal Heritage Office.

Recommendation 3: Constitutional reform

The Commonwealth Parliament prepare legislation for a referendum which seeks to:

- a. *recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution; and*
- b. *remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.*

In the 2007 election, both the Howard Government and the Rudd Opposition committed to Constitutional reform to recognise Indigenous people. The Rudd Government did not advance this commitment in its first term, despite Prime Minister Rudd restating this commitment as part of his National Apology address.

However, in the 2010 election campaign, both major parties and the Greens

⁴⁹ Local Government Association of NSW, *Engaging with local Aboriginal communities: a resource kit for Local Government in NSW*, 2007.

expressed a commitment to a referendum to recognise Indigenous Australians by 2013. This presents us with an historic opportunity and a great challenge.

The Labor Party has recently announced a process to establish an Expert Panel including Indigenous leaders, representatives from the major political parties, community representatives and constitutional experts to develop and consult on options for constitutional reform. Minister Macklin indicated in the Labor Party election policy platform that the process would initially focus on reform of the preamble 'in light of the need for majority support at a referendum'.⁵⁰ However, at this stage, neither of the major parties has ruled out substantive reforms to the text of the Constitution such as those recommended by the Council.

In addition to the need for Constitutional recognition of the distinct identity and status of Australia's First Peoples, there are a number of discriminatory provisions in the Constitution which the Council highlighted should be addressed, including:

- Section 25: which gives the States the power to exclude Aboriginal people from voting;
- The race power: which has been interpreted as allowing the Commonwealth to make laws for the benefit *or detriment* of Aboriginal and Torres Strait Islander peoples.

In ANTaR's recent Election Priorities Statement and reflecting the Council's recommendations, we called on all the major parties, in consultation with Indigenous peoples, to introduce legislation for a Constitutional Referendum which seeks to:

- Prepare a new preamble to the Constitution which recognises the status of the First Australians; and
- Remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of any race.

Cross-party commitment to Constitutional reform is significant and will be essential to build broad community support. The Labor Party's stated commitment to consultation and negotiation with Aboriginal people is important. Substantive changes must not be ruled out prior to negotiations with Indigenous people and consultation with constitutional experts and the broader community. This should be a robust process, the outcome of which should not be predetermined by Government.

The challenge is now to mobilise support in the wider community for change. The challenge of mobilising support is further discussed in response to Recommendation 6.

⁵⁰ Jenny Macklin, *Address to the Garma Festival, North East Arnhem Land*, Speech, 9 August 2010, Available: <http://www.alp.org.au/federal-government/news/speech--jenny-macklin,-address-to-the-garma-festiv/> (Accessed on 12 August 2010).

ANTaR recommends that:

4. The Federal Parliament honours its commitment to hold a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution by the 2013 election. In the process leading to this referendum:

- **The Expert Panel should be empowered to consult broadly and given scope to develop options for reform both to the preamble and text of the Constitution.**
- **Aboriginal and Torres Strait Islander leaders, organisations and communities should be fully consulted regarding the wording of amendments to the Constitution. The National Congress of Australia's First Peoples, as well as Aboriginal and Torres Strait Islander peak bodies throughout Australia, should have a significant role in this process.**

Recommendation 4: Continuing and sustaining the reconciliation process

*Recognising that the formal reconciliation process over the last decade has achieved much and has helped bring Australians together, all levels of government, non-government, business, peak bodies, communities and individuals commit themselves to **continuing the process and sustaining it** by:*

- a. affirming the Australian Declaration Towards Reconciliation and actioning the Roadmap for Reconciliation;*
- b. providing resources for reconciliation activities and involving Aboriginal and Torres Strait Islander peoples in their work;*
- c. undertaking educational and public-awareness activities to help improve understanding and relations between Aboriginal and Torres Strait Islander peoples and the wider community; and*
- d. supporting Reconciliation Australia, the foundation which has been established to maintain a national leadership focus for reconciliation, report on progress, provide information and raise funds to promote and support reconciliation.*

This recommendation has been partially implemented, although mainly by local government, non-government organisations, peak bodies, individuals and communities. Recommendations b., c. and d. have been the most comprehensively addressed, with recommendation a. not being formally affirmed at federal or state levels (except in the case of SA and Victoria). Nevertheless many state and local governments have affirmed general commitments to the reconciliation process, but not specifically the *Declaration* and the *Roadmap* (although there are references to general principles of the *Declaration* towards Reconciliation within these commitments and affirmations).⁵¹

State Reconciliation Councils remain the peak bodies for promoting reconciliation. These bodies are made up of both Indigenous and non-Indigenous peoples who work to 'address the 'unfinished business' of reconciliation – recognition of rights,

⁵¹ For instance the QLD Government has developed a comprehensive Reconciliation Action Plan, and local level governments such as Wollongong and Canterbury have made commitments to reconciliation.

promotion of economic independence and social justice for Indigenous peoples'.⁵² Many of the state councils were formed in the late 1990s as a part of the local, state and national structure to support the legislated process of reconciliation. When the formal legislated reconciliation process ceased in 2000, many of the state reconciliation bodies became incorporated as associations, and received funding from state governments. Reconciliation Councils have responsibility for liaising with local reconciliation groups and work at the local community level to address Indigenous rights issues and reconciliation.

Some Reconciliation Councils, such as NSW, QLD and SA, receive sustained funding from their respective state governments while others, like Victoria, do not. The withdrawal or inadequacy of government funding for bodies who resource and support local reconciliation activities and groups and undertake education and public awareness activities undermines the local and state level reconciliation process. These state level peak organisations are not only working with and supporting Indigenous led activities, but also crucially engaging with the non-Indigenous community to ensure that the reconciliation process is sustained.

Many non-government organisations, as well as state and local reconciliation groups, address recommendation c. by undertaking educational and public awareness activities. ANTaR's Sea of Hands is an example of successful public engagement and education activity. The participation-based installation of hands in the Aboriginal and Torres Strait Islander flag colours symbolises co-existence and solidarity – aimed at the wider community in terms of increasing broad understanding of Indigenous rights issues.

Peak Reconciliation Councils, local reconciliation groups and NGOs like ANTaR have focused on broad mobilisation for a collective purpose - the promotion of reconciliation. Reconciliation Australia has been successful in both providing resources for reconciliation activities and undertaking awareness and public engagement activities (for example the recent 'Unfinished Oz' campaign). State bodies also support these kinds of activities. Arguably, Reconciliation Australia's greatest success is its engagement with the business sector and the implementation of Reconciliation Action Plans (RAPs). RAPs have a number of aims including:

- Building positive relationships between Indigenous and non-Indigenous people and organisations;
- Providing a format for exploring how reconciliation can advance business and organisational objectives; and
- Formalising businesses contributions through the identification of actions and targets.⁵³

RAPs have been developed by local governments (such as the City of Melbourne, Adelaide City Council and Warringah Council), governments (all State and Territory Governments have developed RAPs and the federal government and related agencies have also developed RAPs), universities, schools, peak bodies (such as ACTCOSS, the Australian Nursing Federation and Principals Australia), community organisations (such as Oxfam, the Fred Hollows Foundation and Mission Australia) and the corporate and business sectors. Reconciliation Australia has engaged more than 400 organisations in the process of developing RAPs.

⁵² NSW Reconciliation Council, 'About NSW Reconciliation', Website, Available: <http://www.nswreconciliation.org.au/about-us>, Accessed on 16 November 2010.

⁵³ Reconciliation Australia, 'What is a RAP?', Website, Available <http://www.reconciliation.org.au/home/reconciliation-action-plans/what-is-a-rap->, Accessed on 16 November 2010.

RAPs require a commitment to publically report and refresh annually. This is a significant contribution to the success of RAPs and is a mechanism for organisations to review their achievements and identify challenges.

Reconciliation Australia was established as the peak reconciliation body after the dismantling of the Council. However, it was established as a not-for-profit foundation with no statutory powers and an initial one-off funding grant of \$5 million. Further funding of \$15 million over 4 years was received in 2004 and the organisation was granted \$10.8 million over three years in July 2010. This funding was designated specifically for the RAP program, the Indigenous Governance Program and to support engagement with the corporate and academic sector. The nature of its funding has meant that Reconciliation Australia has had limited capacity to conduct large-scale community engagement campaigns.

While the RAP program has had a significant impact in driving organisational and cultural change, there remains a need for large scale community education campaigns to adequately address the Recommendation 4.

ANTaR recommends that:

5. The Federal Government increase funding to Reconciliation Australia to extend its work to cover large-scale community engagement strategies promoting reconciliation.

6. All State Governments commit to a minimum three-year funding agreement with their relevant state reconciliation council to ensure that these councils can continue to provide resources for reconciliation activities involving Indigenous and non-Indigenous peoples and communities.

Recommendation 5: Towards a negotiated agreement

Each government and parliament:

- a. *recognise that this land and its waters were settled as colonies without treaty or consent and that to advance reconciliation it would be most desirable if there were agreements or treaties; and*
- b. *negotiate a process through which this might be achieved that protects the political, legal, cultural and economic position of Aboriginal and Torres Strait Islander peoples.*

Some State Governments and Parliaments have attempted to partially address point a. of this recommendation, however, no state or Federal government or parliament has addressed both points within this recommendation. A number of States have made an attempt at recognising Indigenous people in their Bills and preambles to their constitutions, but broadly speaking governments and parliaments have neglected the formal process of agreement and treaty making to date.

In 2004, the Victorian Government enacted a Bill to amend the *Constitution Act 1975 (Vic)*. Amendments included inserting the following section:

1A. Recognition of Aboriginal people

- (1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.
- (2) The parliament recognised that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established –
 - a) Have a unique status as the descendants of Australia's first people; and
 - b) Have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
 - c) Have made a unique and irreplaceable contribution to the identity and well-being of Victoria
- (3) The Parliament does not intend by this section –
 - a) To create in any person any legal rights or give rise to any civil cause of action; or
 - b) To affect in any way the interpretation of this Act or of any other law in force in Victoria.

The Victorian amendments to the *Constitution Act* are perhaps the most comprehensive recognition of Aboriginal people of any state or federal parliament in Australia. Nevertheless, the amended Act does not make reference to the need for a negotiated agreement.

In 2008, the Queensland Government committed to the addition of a preamble to its constitution. The preamble was designed by the Government to be an 'aspirational statement for all Queensland – and which gives due recognition to Aboriginal and Torres Strait Islander peoples as the first peoples of our state'.⁵⁴ The *Constitution (preamble) Amendment Act 2010* (Qld) was passed in February 2010 and seeks to:

Honour the Aboriginal peoples and Torres Strait Islander peoples; the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community.

Unlike other preambles, Section 3A of Queensland's Constitution exempts the preamble from acting as an aid for interpreting the Constitution or any other law. This limits the recognition of Aboriginal and Torres Strait Islander peoples to being simply aspirational. The Queensland Government or Parliament has not pursued any action regarding a negotiated agreement or treaty.

The WA Parliament has failed to recognise Indigenous peoples within their governance documents. In 2006, the Western Australian Law Reform Commission recommended 'constitutional recognition of the unique status and contribution of Aboriginal people to WA'.⁵⁵ There has been no progress in relation to this recommendation from the WA Government or Parliament.

On 8 September 2010, the NSW Parliament introduced a bill for an Act to amend the NSW *Constitution Act 1902* to provide for the recognition in that Act of the Aboriginal people of New South Wales (*Constitution Amendment (Recognition of Aboriginal People) Bill*).

⁵⁴ Premier Anna Bligh, quoted in 'Activists welcome Indigenous preamble for Constitution', ABC Online, 5 December 2008, accessed at <http://www.abc.net.au/news/stories/2008/12/05/2438520.htm> on 16/11/2010.

⁵⁵ New South Wales Department of Aboriginal Affairs, *Constitutional Recognition of Aboriginal People Discussion Paper*, 2010, Available: www.daa.nsw.gov.au/data/files/cab%20min%20discussion%20paper.pdf, Accessed on 22 October 2010, p. 3.

The amendment read:

- 1) *Parliament, on behalf of the People of New South Wales, acknowledges and honours the Aboriginal people as the State's first people and nations.*
- 2) *Parliament, on behalf of the People of New South Wales, recognises that Aboriginal people as the traditional custodians and occupants of the land in New South Wales:*
 - (a) *have a spiritual, social, cultural and economic relationship with their traditional lands and waters and*
 - (b) *have made and continue to make a unique and lasting contribution to the identity of the State.*
- 3) *Nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales.*

The Premier Kristina Keneally, Opposition Leader Barry O'Farrell, the Chairperson of the NSW Aboriginal Land Council Bev Manton and Ministers Linda Burney and Paul Lynch all acknowledged that the recognition of Aboriginal people in the Preamble of the NSW Constitution was only a small step in the broader reconciliation process. The NSW Parliament has not pursued any formal treaty process.

Comprehensively addressing the Council's fifth recommendation on a negotiated agreement remains a critical aspect of the 'unfinished business' of reconciliation. Constitutional reform is now a short to medium term goal, but a process for protecting the legal, cultural and economic rights of Aboriginal and Torres Strait Islander peoples through a negotiated agreement should also be sought and pursued in the longer term.

Achieving support for Constitutional change in Australia is difficult, with very few successful referenda in Australia's history (only eight of the 42 referenda have succeeded). Reflecting on this, Sean Brennan has noted that:

*A generation of young Australians have lived their entire lives without constitutional change. For them Australia is constitutionally speaking...the frozen continent.*⁵⁶

Australia's most recent referendum, in November 1999, asked the Australian public to decide whether Australia should become a republic as well as whether a preamble recognising Indigenous people should be inserted into the Constitution. The 'yes' vote attracted less than 40 per cent of the national vote, in part due to the form of words put forward by Prime Minister Howard.

Ensuring bipartisan support is the first factor that is critical to the success of any form of Constitutional reform. Significant public education and engagement strategies will also be essential. As discussed, Constitutional change is a complex and difficult process to achieve in Australia. Reform to the Constitution can only be achieved when the amendment is passed by an absolute majority of both Houses of the Federal Parliament, or by one House twice and when the amendment is then passed at a referendum by a majority of the people in a majority of the states (that is by a majority in at least four of the six states).⁵⁷ Public understanding of the context of proposed amendments, their implementation process and possible implications is therefore essential. Nation-wide education, awareness and engagement campaigns, run by bodies such as Reconciliation Australia as well as non-government organisations such as ANTaR, are a significant way to ensure the success of Constitutional reform.

⁵⁶ Brennan et al 2005, p.142.

Strong leadership is also important in influencing the public response to Constitutional reform. Political and public figures must actively engage in education and reasoned discussion regarding Constitutional reform to recognise Indigenous peoples as First Peoples. This has the potential to inform public perceptions of the importance and implications of any form of Constitutional reform prior to them exercising their right to vote at a referendum in 2013.

Of significant importance to this process is the engagement of Aboriginal and Torres Strait Islander peoples in identifying the way in which they would like to be recognised in the Constitution. Negotiation and consultation regarding any proposed wording will be essential in ensuring recognition is real and appropriate. This is potentially a lengthy process and should begin in a timely manner. Organisations such as Reconciliation Australia and the National Congress of Australia's First Peoples must be adequately resourced to undertake this in a thorough and holistic way. The Aboriginal and Torres Strait Islander Social Justice Commissioner should also be engaged in this process as should peak State and Territory Land Councils and Local Aboriginal Land Councils (where they exist) as well as other Aboriginal and Torres Strait Islander peak bodies and organisations.

ANTaR recommends that:

7. The Australian Government develop a broad agenda to reset the relationship with Indigenous and non-Indigenous Australia, in negotiation with Aboriginal and Torres Strait Islander peoples. Negotiations should be based on the principles contained in the UN Declaration on the Rights of Indigenous Peoples, and have reference to the Council for Aboriginal Reconciliation's *Roadmap and Declaration*.

8. The Australian Government fully and explicitly implement the UN Declaration on the Rights of Indigenous Peoples in domestic law and policy. In addition, and as a priority, clear protocols and guidelines on the implementation of the right to free, prior and informed consent should be negotiated with Indigenous peoples.

9. By 2013 the Federal Government and Opposition, the National Congress of Australia's First Peoples, Reconciliation Australia and peak Aboriginal and Torres Strait Islander organisations and leaders from urban, regional and rural communities begin the process of roundtable negotiations in relation to an agreement-making process.

Recommendation 6: A legislative basis for negotiating agreement

*That the Commonwealth Parliament enact legislation (for which the Council has provided a draft in this report) to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved.*⁵⁸

A treaty is a fundamental agreement between Aboriginal and Torres Strait Islander peoples, non-Indigenous people and the Australian state. It is a guaranteed legally binding agreement and should include three key elements:

- It is a starting point for substantial acknowledgement of Aboriginal and Torres Strait Islander peoples;
- It outlines a process of negotiation; and
- It has outcomes in the form of rights, obligations and opportunities.⁵⁹

At least since the *Mabo* decision, it has been fairly widely (though not universally) recognised that the British colonisers took control of the land and waters in Australia without consent from, or treaty with, the Traditional Owners. Federation continued the process of exclusion of Aboriginal and Torres Strait Islander peoples from foundational documents, with the Constitution having no reference to Aboriginal and Torres Strait Islander ownership of lands and waters and no mention of prior occupation of these lands and waters.

A treaty or other agreement-making process involves negotiation to acknowledge and address Aboriginal and Torres Strait Islander peoples' consistent exclusion from the Australian state. It also involves the acceptance of responsibilities, and acknowledgement of past injustices and policy failures.

The Council's 6th recommendation has failed to be implemented at all levels of government.

Aboriginal and Torres Strait Islander legal rights only have a weak place in the Australian Constitution and it is clear that a negotiated agreement or treaty is essential in delivering equality and justice for Aboriginal and Torres Strait Islander peoples.

A formal negotiated agreement-making process has the potential to deliver rights-based outcomes and more adequate protection to Aboriginal and Torres Strait Islander peoples. It also provides a mechanism for Indigenous and non-Indigenous relationships to move forward. In his 2005 book, *Treaty*, Sean Brennan identifies a range of substantive outcomes likely to flow from a negotiated agreement, including:

*'... genuine reconciliation, such as recognition of prior occupation, the granting of better rights protection, a fair and agreed allocation of responsibilities, a basis for regional self-government and decision making, opportunities for economic development and a redefinition and restructuring of the relationship that Indigenous peoples have with the Australian nation.'*⁶⁰

⁵⁸ Council for Aboriginal Reconciliation, *Reconciliation - Australia's challenge* 2000, p 105.

⁵⁹ Brennan et al 2005.

⁶⁰ Brennan et al 2005, p. 10-11.

An agreement-making process would move beyond mere service delivery or a rights-based model. It would encompass both of these in a holistic way – creating real and effective change in the lives of Aboriginal and Torres Strait Islander peoples. The process would revisit and restructure the relationship between Indigenous and non-Indigenous Australia. It would positively affect the socio-economic position of Aboriginal and Torres Strait Islander peoples as it would address the historic and contemporary exclusion of Indigenous peoples from the Australian state. As previously stated, evidence on the social and cultural determinants of health clearly demonstrates that addressing the exclusion experienced by Indigenous peoples, redressing power imbalances between Indigenous and non-Indigenous peoples and promoting principles of self-determination is likely to translate into direct improvements in Indigenous peoples' health and well being.⁶¹

Developing an overarching agreement-making process is essential in addressing elements of the 'unfinished business' of reconciliation. There are some key questions to be examined regarding the process and content of any negotiated agreement. These include whether a structured or more ad hoc treaty-making process is employed; whether agreements are comprehensive or incremental; and whether there is a single national treaty, or whether regional treaties should be developed.

Governments should open a dialogue with Aboriginal and Torres Strait Islander peoples as to the most appropriate form of agreement for the Australian context. There are a number of different possibilities, ranging from regional or local agreements to a national treaty framework. A combination of national agreement supported by regional and local agreements would be responsive to local conditions and issues, while providing an overall statement of recognition and acknowledgement, a framework for proper negotiation and overall implementation and legal protection. Any negotiation process is likely to be complex and lengthy, but necessary to ensuring a more holistic agreement, relevant to a variety of contexts. Local level agreements could include specific agreements on governance structures, land, service delivery, jurisdiction and authority.

It is nevertheless important to remember that any agreement-making process must be agreed upon by the various parties. A formal negotiation process, based on clear principles understood by all participants, is essential to build a framework that is inclusive and workable.

Williams and Brennan et al identify a number of strategies that could affect whether a treaty process is successful, and how to effectively advocate for a model. Core principles include:

- Focusing on the long term.

Significant public law reform is not possible without a long term plan that includes a national communication strategy with clear, focused messages and state, territory, regional and local campaigns to gain community acceptance. Short and medium term goals and benchmarks should be developed to ensure that progress is maintained over the life of the campaign.

⁶¹ Cooper 2009.

- Ensuring the model is right.

The design of the model should be determined by Aboriginal and Torres Strait Islander peoples; however, round-table negotiations should be undertaken with representatives from government, community, the National Congress of Australia's First Peoples and Reconciliation Australia as key players.

- Ensuring pragmatic appeal.

There is a direct link between better health and wellbeing outcomes of Aboriginal and Torres Strait Islander peoples and structural recognition. Articulating this link to the public is essential in gaining appeal.

- Identifying a clear process.

Again, a process would need to be agreed and articulated by key players as a part of the initial negotiation process. Williams outlines short, medium and long-term approaches to ensure that a treaty-making process is successful including:

- In the short-term, awareness-raising strategies about possible models and why such a legal instrument is appropriate for the Australian context.
- In the medium-term, formal consultation processes should be undertaken through processes such as conventions and plebiscites.
- In the long-term, the processes should focus on the drafting of an instrument as a part of the treaty making process.⁶²

- Ensuring bipartisan support.

Bipartisan support has been achieved to recognise Indigenous peoples in the Constitution. Bipartisan support would also need to be sought in relation to any agreement-making process. This may be challenging; however, the establishment of a COAG Parliamentary Reconciliation Network, similar to those that are functioning at a state level (such as the NSW Parliament Friends of Reconciliation Network) could assist with fostering bipartisan support.

- Engaging the community and fostering community ownership.

Grass roots engagement with the community is essential in the success of any agreement-making process. Community forums, events, information sessions and educational material would be essential in fostering community engagement and ownership.

- Having effective leadership.

Leadership is essential to the success of any agreement-making process. Leadership needs to be from Government and Opposition, Indigenous leaders and prominent non-Indigenous figures.

⁶² George Williams, 'Bills of rights, the republic and a treaty: Strategies and lessons for reform', in *Limits & Possibilities of a Treaty Process in Australia*, AIATSIS Seminar Series 3 September 2001, p.9.

With these core principles in mind, the key to developing a successful agreement is the mobilisation of public support from both Indigenous and non-Indigenous peoples. A treaty or agreement would essentially be a social contract. Any agreement would have legal, economic, cultural and symbolic dimensions. Acknowledgement of the past as well as some form of restorative justice could also be included in any agreements.

Rather than limiting the notion of a treaty to that of a document of agreement, a treaty or any form of agreement in the modern context should establish appropriate protocols and relationships – both legal and cultural – through which Aboriginal and Torres Strait Islander cultures and non-Indigenous cultures can engage with each other. A treaty should be more than merely a legal document. It should affirm and respect the multitude of Aboriginal and Torres Strait Islander nations, give constitutional protections to legal, cultural, economic and ecological rights and provide a basis for cross-cultural engagement and real social inclusion.

The people's movement for reconciliation: the challenge of sustaining momentum and community support

The people's movement for reconciliation is an integral part of the reconciliation movement and specifically informed public policy regarding reconciliation and Indigenous rights at the time of the Council.

When the Council came to an end, during a time of great political resistance to symbolic aspects of the agenda, the people's movement took up the agenda and campaigned for holistic ways to overcome the disadvantage experienced by Indigenous peoples that included recognition of the history of dispossession and the broader rights of Indigenous Australians. The groups that compose the people's movement are predominantly voluntary, autonomous, self-governing and provide a platform for stronger participatory democracy.⁶³

The people's movement responded to the overwhelming policies of 'practical' reconciliation by articulating a position that continued to insist on the critical importance of the recognition of Aboriginal peoples' social, political and civil citizenship rights. The ability of the people's movement to develop a political agenda has enabled it to effect political change.

While the people's movement for reconciliation has the ability to influence political decision-making, this is not its only goal. More broadly, the people's movement aims to encourage political and legal reform as well as change community attitudes and build widespread support for reconciliation within the community. This is evident in initiatives of the people's movement, such as ANTaR's Sea of Hands. The Sea of Hands campaign enabled members of the community an opportunity to express their opposition to government policies (such as to the native title 10 point plan) and had a clear advocacy and legislative goal. The Sea of Hands installations have since become a statement for supporting Indigenous rights and reconciliation more broadly.

The people's movement for reconciliation played a key role in the celebrations in Corroboree 2000, which offered people a positive and non-confronting opportunity to engage in the reconciliation process.

The people's movement undertakes a rich and diverse range of activities to advance the reconciliation process. Organisations such as ANTaR have developed education resources, engaged with grass-roots groups including local reconciliation groups to promote reconciliation and Aboriginal rights, and undertaken a wide range of public engagement strategies including forums and events as well as the development of social networking pages and websites promoting reconciliation. Importantly these organisations also keep Indigenous rights and reconciliation on the political agenda, holding governments accountable for decisions that they make in relation to rights and reconciliation through lobbying, advocacy, submission writing and the monitoring

⁶³ Jan Van Deth (ed), *Private Groups and Public Life: social participation, voluntary associations and political involvement in representative democracies*, Routledge, New York, 1997.

of policy developments and changes.

The following case-studies highlight the capacity of the people's movement to engage the community in the reconciliation movement and generate attitudinal change. Engaging the public in the reconciliation process is essential in the current context as significant public support will be crucial in the success of the referendum in 2013 to recognise Aboriginal and Torres Strait Islander peoples as First Peoples.

Case Studies:

National Rugby League (NRL)

The NRL has played a significant role in activating community engagement and support in relation to reconciliation. The NRL has actively supported increased levels of Aboriginal and Torres Strait Islander participation in all facets of the game with a particular focus on youth, women, referees and administrators. The code has supported pathways for young Aboriginal and Torres Strait Islander people with an increased emphasis on mentoring programs. They have also developed support programs and proposals to build community capacity.

The NRL has undertaken a number of community engagement activities, including:

- Implementing two Reconciliation Action Plans that focused on relationship building, respect, opportunities and progress in relation to principles of reconciliation
- Undertaking a Close The Gap round, including a Reconciliation Cup game
- Undertaking an Indigenous All Stars game
- Implementing cultural awareness workshops for players
- Developing an Indigenous Council
- Developing an Indigenous players advisory group

The NRL All Stars Game

The NRL Indigenous All Stars game was played on the second anniversary of the National Apology to the Stolen Generations. The game mobilised huge public support, with over 1.2 million people watching the game around the country. The week leading into the game was a celebration of Rugby League's commitment to Indigenous Australia and to the broader Rugby League community, with the NRL players undertaking a calendar of public events, talks and community engagement activities that focused on developing understanding, embracing Aboriginal and Torres Strait Islander peoples' heritage and raising awareness of reconciliation issues in Australia.

In addition, the All Stars match provided funding for community programs with all funds raised being invested into Indigenous programs at NRL Clubs. In 2010, the game raised \$1.5 million.

ANTaR's Respect Campaign

In 2009, the findings of the Reconciliation Australia Barometer – a regular report of attitudes on reconciliation and Aboriginal rights – found that only 20 per cent of surveyed Australians know what they can do to help disadvantaged Indigenous peoples. The findings also highlighted that there is little trust and respect between Indigenous and non-Indigenous Australians.

ANTaR's *Respect* campaign worked to change these attitudes and behaviours. The campaign was designed to follow on from the Apology to the Stolen Generations, where Prime Minister Kevin Rudd stated:

*....Today's apology, however inadequate, is aimed at righting past wrongs. It is also aimed at building a bridge between Indigenous and non-Indigenous Australians – a bridge based on real respect rather than a thinly veiled contempt. Our challenge for the future is now to cross that bridge and, in so doing, embrace a new partnership between Indigenous and non-Indigenous Australians ...*⁶⁴

ANTaR's aim was to engage individuals in the process of achieving justice, rights and mutual respect between Indigenous and non-Indigenous Australians. Core to engaging individuals from across the spectrum was the importance of partnering with other organisations. ANTaR partnered with The Body Shop, and as a result engaged with a range of consumers and staff as well as ANTaR supporters.

The aim of the campaign was to collect more than 15,000 signatures supporting the pledge – 'I believe in a new partnership between Indigenous and non-Indigenous Australians based on mutual respect'. Supporters were then sent a series of emails about ways they can go about achieving this that included:

1) Understanding

People were encouraged to learn the basics regarding reconciliation and Aboriginal rights through reading a series of resources, participating in and attending cultural events or museums and understanding cultural differences by undertaking cultural awareness training.

2) Acknowledging

Supporters were encouraged to acknowledge Traditional Owners of the land on which they lived and worked. Supporters were asked to do this in their email signatures, on their websites and on letterheads. They were also asked to undertake proper Acknowledgements of Country at meetings as well as undertaking Welcome to Countries and Smoking Ceremonies at events.

3) Being Supportive

The third step was aimed at building respect between Indigenous peoples and other Australians by encouraging people to support Indigenous Australians in their fight for justice, rights and social equity. Tangible actions for people to undertake included supporting Indigenous business by buying their products and employing services, joining local reconciliation groups and supporting campaigns that support Indigenous Australians, like the Close The Gap campaign.

⁶⁴ Rudd 2008.

4) Speaking Up

People were encouraged to carry out a number of actions including telling friends and family about their commitments to Indigenous rights both in person and online, being proactive and persuading workplaces to develop a Reconciliation Action Plan, responding to inaccuracies that are voiced in the media regarding Indigenous Australians and standing up against racism.

ANTaR's campaign, in collaboration with the Body Shop, introduced people who were not engaged in the people's movement for reconciliation to concepts of reconciliation, Indigenous rights and respect. The broad public engagement strategies employed in this campaign, including providing campaigning information in a number of ways (online, in hardcopy and face-to-face and on social networking sites), are important tools to use in mobilising support for broader reconciliation and Constitutional reform campaigns.

For reconciliation to be achieved, and for the Council's recommendations to be honoured by government, the people's movement must be re-energised and re-mobilised.

Appendix 1

Australian Declaration Towards Reconciliation

We, the peoples of Australia, of many origins as we are, make a commitment to go on together in a spirit of reconciliation.

We value the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of lands and waters.

We recognise this land and its waters were settled as colonies without treaty or consent.

Reaffirming the human rights of all Australians, we respect and recognise continuing customary laws, beliefs and traditions.

Through understanding the spiritual relationship between the land and its first peoples, we share our future and live in harmony.

Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.

Reconciliation must live in the hearts and minds of all Australians. Many steps have been taken, many steps remain as we learn our shared histories.

As we walk the journey of healing, one part of the nation apologises and expresses its sorrow and sincere regret for the injustices of the past, so the other part accepts the apologies and forgives.

We desire a future where all Australians enjoy their rights, accept their responsibilities, and have the opportunity to achieve their full potential.

And so, we pledge ourselves to stop injustice, overcome disadvantage, and respect that Aboriginal and Torres Strait Islander peoples have the right to self-determination within the life of the nation.

Our hope is for a united Australia that respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all.⁶⁵

⁶⁵ The Council for Aboriginal Reconciliation, *Declaration*, 2000.

Appendix 2

Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament

Recommendations:

1. *The Council of Australian Governments (COAG) agree to implement and monitor a national framework whereby all governments and the Aboriginal and Torres Strait Islander Commission (ATSIC) work to overcome Aboriginal and Torres Strait Islander peoples' disadvantage through setting program performance benchmarks that are measurable (including timelines), are agreed in partnership with Aboriginal and Torres Strait Islander peoples and communities, and are publicly reported.*
2. *All parliaments and local governments pass formal motions of support for the Australian Declaration Towards Reconciliation and the Roadmap for Reconciliation, enshrine their basic principles in appropriate legislation, and determine how their key recommendations can best be implemented in their jurisdictions.*
3. *The Commonwealth Parliament prepare legislation for a referendum which seeks to:*
 - a. *recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution; and*
 - b. *remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.*
4. *Recognising that the formal reconciliation process over the last decade has achieved much and has helped bring Australians together, all levels of government, non-government, business, peak bodies, communities and individuals commit themselves to continuing the process and sustaining it by:*
 - a. *affirming the Australian Declaration Towards Reconciliation and actioning the Roadmap for Reconciliation;*
 - b. *providing resources for reconciliation activities and involving Aboriginal and Torres Strait Islander peoples in their work;*
 - c. *undertaking educational and public-awareness activities to help improve understanding and relations between Aboriginal and Torres Strait Islander peoples and the wider community; and*
 - d. *supporting Reconciliation Australia, the foundation which has been established to maintain a national leadership focus for reconciliation, report on progress, provide information and raise funds to promote and support reconciliation.*
5. *Each government and parliament:*
 - a. *recognise that this land and its waters were settled as colonies without treaty or consent and that to advance reconciliation it would be most desirable if there were agreements or treaties; and*
 - b. *negotiate a process through which this might be achieved that protects the political, legal, cultural and economic position of Aboriginal and Torres Strait Islander peoples.*
6. *That the Commonwealth Parliament enact legislation (for which the Council has provided a draft in this report) to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved⁶⁶*

⁶⁶ Council for Aboriginal Reconciliation, *Roadmap*, 2000.

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