

The Senate

Legal and Constitutional
References Committee

Reconciliation: Off track

October 2003

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ISBN 0 642 71324 3

This document was printed by the Senate Printing Unit, Department of the Senate,
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FOREWORD

*What is reconciliation to us? Nothing much has changed in Gove where I live ... I don't understand your law. It always changes. The only thing that stays the same for the white man is that he never listens to our law, and our kids keep getting locked up with that mandatory sentencing. I don't understand your reconciliation.*¹

This inquiry has clearly established that the Commonwealth Government's 'practical reconciliation' approach is failing Indigenous people. Indicators of Indigenous disadvantage are not improving in many areas. There has been a very minimal response to the symbolic issues outlined by the Council for Aboriginal Reconciliation. There is no legislation to enact a treaty process and no timeframe or process to resolve 'unfinished business'. The Government's emphasis on areas of perceived agreement leaves many important issues off the agenda, to the detriment of Indigenous people. In short, there is a failure of national leadership on this, one of the most critical issues in the definition of the nation.

This is not to say that there has not been progress in recent years, by all levels of government. The Committee welcomes initiatives through the Council of Australian Governments aimed at better coordinating, implementing and monitoring programs in Indigenous communities. Collection of comparative data has also improved in recent years. However, there seems to be very slow progress in terms of setting appropriate targets, benchmarks and evaluation mechanisms that will help to reveal a truer picture of how effectively Indigenous disadvantage is being addressed, let alone the other aspects of reconciliation.

Like many of the individuals and organisations who contributed to this inquiry, the Committee considers that true reconciliation involves not just measures to address disadvantage, but all of the matters contained in the Council for Aboriginal Reconciliation's *Roadmap for Reconciliation* and the four National Strategies. The Government's half-hearted response and lack of recognition of the broader agenda undermine the entire process of reconciliation.

The Council acknowledged in 2000 that reconciliation was 'a long, winding and corrugated road, not a broad, paved highway'. The process was always going to be slow and the need for discussion at local, regional and national levels was acknowledged.

However, the Committee believes the process is now off track. There is a sense that momentum is being lost. People are becoming disheartened and reconciliation is slipping off the national agenda. While the 'people's movement' is an important part of reconciliation in Australia, as indeed the Council emphasised more than a decade

1 Northern Territory Aboriginal Justice Advocacy Committee *Submission 10*, citing Mr. Barnamby Wunungmurra.

ago, national leadership is equally important. The people need more support, and the Committee has made a series of recommendations to ensure that more assistance is forthcoming, including by funding Reconciliation Australia, the successor to the Council which is facing severe financial difficulties in carrying out its very important work.

Senator the Hon Nick Bolkus

Chair

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RECOMMENDATIONS

Recommendation 1

The Committee recommends that the Commonwealth Government accept responsibility for providing national leadership on reconciliation and adopt all of the recommendations contained in the Final Report of the CAR. The Committee is of the view that reconciliation encompasses far more than the current ‘practical reconciliation’ approach, and that the Commonwealth Government has a duty to engage with and to lead the nation on this vital and important issue.

Recommendation 2

The Committee recommends that the Commonwealth Government support the establishment of a National Reconciliation Convention (as proposed by clauses 6 and 7 of the Reconciliation Bill) that would identify and prioritise issues and recommend action, to be held every four years.

Recommendation 3

The Committee urges State and Territory governments to continue to progress reconciliation by implementing all of the CAR’s recommendations, and also urges the Commonwealth Government to take a greater leadership role through the COAG process.

Recommendation 4

The Committee recommends that the Commonwealth Government encourage COAG to incorporate the unresolved issues of reconciliation into COAG’s reconciliation framework and to develop appropriate benchmarks and action plans.

Recommendation 5

The Committee stresses the importance of developing effective performance monitoring regimes, and recommends that MCATSIA:

- rigorously pursue the development of action plans, performance reporting strategies and benchmarks by Ministerial Councils,
- provide regular updates on progress, and
- publish those updates in a widely available form, including on the Internet.

Recommendation 6

The Committee recommends that the Commonwealth Government take steps to increase its monitoring and reporting of data on outputs and outcomes of

government funding for Indigenous related programs. These requirements include:

- incorporating reporting on outcomes of Indigenous-related programs into performance agreements for CEOs of Commonwealth departments and agencies;
- amending the guidelines issued under subsection 63(2) of the *Public Service Act 1999* to require Government agencies to give detailed information relating to Indigenous focused outputs and outcomes in their annual reports (noting that guidelines are subject to approval by the Joint Committee of Public Accounts and Audit); and
- continuing to incorporate further data collection and reporting requirements into the conditions of Specific Purpose Payments when Commonwealth/State agreements are renewed.

Recommendation 7

The Committee recommends that the Aboriginal and Torres Strait Islander Social Justice Commissioner be required by statute to report publicly on progress towards reconciliation (as proposed by clause 10 of the Reconciliation Bill).

Recommendation 8

The Committee recommends that the Minister be required by statute to appoint an independent body to report on progress towards national reconciliation (as proposed by clause 11 of the Reconciliation Bill), and that in determining the membership of the taskforce, the Minister be required to consult with relevant stakeholders, including the established parliamentary parties.

Recommendation 9

The Committee recommends that the Government should be required by statute to respond to the reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner and the proposed ministerial taskforce.

Recommendation 10

The Committee recommends that legislation be enacted to give to a Parliamentary Joint Committee the functions (consulting, reporting and examining public reports and Government responses in relation to reconciliation) proposed by clauses 13, 14 and 15 of the Reconciliation Bill. If the Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund does not continue beyond March 2004, these functions should be given to a separate Joint Parliamentary Committee.

Recommendation 11

The Committee recommends that the Government embark on a broad consultation process before preparing legislation for a referendum that would insert a preamble to the Constitution recognising the status of Indigenous peoples as Australia's first peoples.

Recommendation 12

The Committee recommends that the Government immediately prepare an amendment to remove section 25 from the Constitution, conduct an information campaign to inform the Australian people of the desirability of such reform and put the amendment to a referendum at the next election.

Recommendation 13

The Committee recommends that the Government immediately prepare an amendment to paragraph 51(xxvi) of the Constitution that provides the Commonwealth Parliament with power to make special laws only for the *benefit* of any particular race, conduct an information campaign to inform the Australian people of the desirability of such reform and put the amendment to a referendum at the next election.

Recommendation 14

The Committee recommends that the Government implement its commitment to addressing Indigenous intellectual property issues by introducing relevant legislation in the near future.

Recommendation 15

The Committee recommends that the Government progress the implementation of resale royalty rights arrangements for Indigenous artists as part of its broader review.

Recommendation 16

The Committee recommends that the recognition of customary law, such as cultural protection and environmental protection, form part of the matters for ongoing negotiations between governments and Indigenous peoples.

Recommendation 17

The Committee recommends that the Commonwealth Government provide funding to support local and community-based reconciliation groups, through ongoing funding to Reconciliation Australia and through grants to peak reconciliation bodies in each State and Territory.

Recommendation 18

The Committee recommends that the Government provide ongoing funding to Reconciliation Australia, sufficient for it to meet its diverse range of responsibilities.

Recommendation 19

The Committee recommends that the Commonwealth Government fund on an ongoing basis a national clearing house of research, data and publications about Indigenous issues.

Recommendation 20

The Committee recommends that during the Spring sittings 2004 the Senate refer to it an inquiry on progress in addressing the problems surrounding petrol sniffing in the Anangu Pitjantjatjara Lands, including progress as it relates to the COAG whole of government trial being conducted there.

ABBREVIATIONS

ABS	Australian Bureau of Statistics
AIATSIS	Australian Institute for Aboriginal and Torres Strait Islander Studies
AJAC	Aboriginal Justice Advocacy Committee
ALGA	Australian Local Government Association
ALRC	Australian Law Reform Commission
ANAO	Australian National Audit Office
ANTA	Australian National Training Authority
ANTaR	Australians for Native Title and Reconciliation
ATSIC	Aboriginal and Torres Strait Islander Commission
ATSIS	Aboriginal and Torres Strait Islander Services
CAEPR	Centre for Aboriginal Economic Policy Research
CAR or Council	Council for Aboriginal Reconciliation
CAR's Final Report	Council for Aboriginal Reconciliation <i>Reconciliation: Australia's Challenge</i> , (2000)
CDEP	Community Development Employment Projects
CERD	Committee on the Elimination of Racial Discrimination
CHIP	Community Housing and Infrastructure Program
COAG	Council of Australian Governments
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs (
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

IES	Indigenous Enumeration Survey
IESIP	Indigenous Education Strategic Initiatives Program
IHANT	Indigenous Housing Authority of the Northern Territory
IHS	Indigenous Health Survey
ILUAs	Indigenous Land Use Agreements
ISS	Indigenous Social Survey
lrgs	local reconciliation groups
MCATSIA	Ministerial Council on Aboriginal and Torres Strait Islander Affairs
MCEETYA	Ministerial Council for Education Employment Training and Youth Affairs
NCATSIS	National Centre for Aboriginal and Torres Strait Islander Statistics
NSWRC	New South Wales Reconciliation Council
OATSIA	Office of Aboriginal and Torres Strait Islander Affairs
<i>Roadmap</i>	Council for Aboriginal Reconciliation <i>Roadmap for Reconciliation</i> , (2000)
Social Justice Commissioner	Aboriginal and Torres Strait Islander Social Justice Commissioner
SPPs	Specific Purpose Payments
Steering Committee	Steering Committee for the Review of Commonwealth/State Service Provision (part of the Productivity Commission)

CHAPTER 1

INTRODUCTION

1.1 On 27 August 2002, the Senate referred the matters set out in the terms of reference to the Senate Legal and Constitutional References Committee for inquiry and report by March 2003. On 6 February 2003, the Senate extended the reporting date to 17 June 2003 and there were three subsequent extensions to a final reporting date of 8 October 2003.

1.2 The genesis of the inquiry was a recommendation by the Aboriginal and Torres Strait Islander Social Justice Commissioner in the *Social Justice Report 2001* that such matters be referred to the Committee (see Appendix 7, Recommendation 11).

Conduct of the inquiry

1.3 The Committee advertised the inquiry in *The Australian* newspaper on 11 September, 25 September, 9 October and 23 October 2002, and wrote to over 269 organisations and individuals, inviting submissions by 15 November 2002.

1.4 The Committee received 86 submissions, including 18 supplementary submissions, and these are listed at Appendix 1. Submissions were placed on the Committee's website for ease of access by the public.

1.5 The Committee held hearings in Sydney on 4 April 2003, Melbourne on 19 May 2003, Canberra on 14 May, 15 May, 18 June, 24 June and 22 July 2003 and Darwin on 11 June 2003. Proof transcripts of these hearings were placed on the Hansard website as they became available. A list of witnesses who appeared at the hearings is at Appendix 2.

1.6 Documents relevant to the terms of reference are reproduced in Appendices 3 to 7.

Scope of the report

1.7 Chapter 2 outlines the history of reconciliation in Australian policy-making and the different interpretations of the term, including by reference to evidence the Committee received.

1.8 Chapter 3 outlines the evidence the Committee received on what is currently being done to advance reconciliation, including contributions by the Commonwealth, State, Territory and local governments, Reconciliation Australia, ATSIC and local reconciliation groups.

1.9 Chapter 4 discusses a particular area of interest for the Committee during this inquiry, that of benchmarking, monitoring and evaluation of progress towards reconciliation.

1.10 Chapter 5 considers ‘unfinished business’ in the context of the legal regime.

1.11 Chapter 6 presents a summary of the Committee’s conclusions and its recommendations as to where the reconciliation process might lead from here.

Acknowledgements

1.12 The Committee thanks all those organisations and individuals who made submissions and gave evidence at public hearings. The Committee also thanks Angela Pratt from the Department of the Parliamentary Library for her work on the history and meanings of reconciliation, such work having formed the foundation for Chapter 2.

Note on references

1.13 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Hansard transcript are to the proof Hansard. Page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

WHAT RECONCILIATION MEANS

2.1 This chapter briefly summarises the history of reconciliation in Australian policy-making, and different perspectives about what the term means:

- reconciliation as unity, equity and justice;
- reconciliation as a 'people's movement';
- 'practical reconciliation';
- reconciliation as the recognition of Indigenous peoples' rights; and
- critiques of the concept.

2.2 The discussion includes a brief summary of the recommendations of the Council for Aboriginal Reconciliation (CAR) and the Aboriginal and Torres Strait Islander Social Justice Commissioner, whose reports are specifically included in the terms of reference for this inquiry. The chapter concludes with a summary of common themes in the understanding of 'reconciliation'.

The history of 'reconciliation' in Australian policy-making

2.3 Following is a brief review of the history of the introduction of the concept of 'reconciliation' into Australian public policy-making, including consideration of what the architects of the reconciliation process hoped it would achieve.

The Council for Aboriginal Reconciliation

2.4 The reconciliation process formally began with the passage of the *Council for Aboriginal Reconciliation Act 1991*, legislation which had cross-party support. Its introduction followed the report of the Royal Commission into Aboriginal Deaths in Custody, which had recommended the establishment of a formal process of reconciliation and described it as 'the fundamental backdrop to reform and change'.¹

2.5 There had been wide debate in the late 1980s about the concept of a treaty between Indigenous people and the Commonwealth Government. While the Hawke Labor government had signalled at one point that it would pursue the idea of a treaty or 'compact', there had been strong opposition by the then Opposition as well as other

1 Elliot Johnston, *Royal Commission into Aboriginal Deaths in Custody National Report* vol 5, AGPS, 1991.

parts of the community. The development of a 'process of reconciliation' was seen as a way of achieving greater cross-party unity on Aboriginal affairs.²

2.6 The *Council for Aboriginal Reconciliation Act 1991* established the CAR to promote, guide and oversee the reconciliation process over the following decade (the Council's term expiring at the end of 2000). The Act defined the purpose of the Council's establishment as:

... to promote a process of reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community, based on an appreciation by the Australian community as a whole of Aboriginal and Torres Strait Islander cultures and achievements and of the unique position of Aborigines and Torres Strait Islanders as the indigenous peoples of Australia, and by means that include the fostering of an ongoing national commitment to co-operate to address Aboriginal and Torres Strait Islander disadvantage.³

2.7 When introducing the legislation into the Parliament, then Minister for Aboriginal Affairs Robert Tickner said:

[The] formal process of reconciliation initiated by the [legislation] will signal the beginning of a decade of reform and social justice for Aboriginal and Torres Strait Islander people and building bridges of understanding between Aboriginal and non-Aboriginal Australians.⁴

2.8 Thus, at the time that the process of reconciliation formally commenced, reconciliation was seen as a process aimed at:

- achieving a better relationship between Indigenous and non-Indigenous Australia, through education, attitude change and fostering appreciation of Indigenous cultures;
- overcoming Indigenous disadvantage;
- achieving social justice for Indigenous people; and
- fostering a sense of national unity in the lead-up to the centenary of Australian federation in 2001.⁵

2.9 As noted, the legislation was given cross-party support.

2 Department of the Prime Minister and Cabinet, *Aboriginal Reconciliation: An Historical Perspective*, AGPS, 1991, pp. 18-19.

3 *Council for Aboriginal Reconciliation Act 1991*, section 5.

4 The Hon. Robert Tickner, Council for Aboriginal Reconciliation Bill 1991: Second Reading Speech, House of Representatives *Hansard*, 30 May 1991, p. 4498.

5 *ibid.*

Reconciliation as unity, equity, justice

2.10 The CAR's vision statement, adopted early in the Council's term, defined the aim of the reconciliation process as:

A united Australia which respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all.⁶

2.11 In its final report to the Parliament, *Reconciliation: Australia's Challenge*, tabled on 7 December 2000, the Council identified the challenge for the future as being:

... to continue our journey along the reconciliation road to its intended destination: true and lasting reconciliation between Aboriginal and Torres Strait Islander peoples and the wider Australian community.⁷

2.12 The Council did not define precisely what 'true and lasting reconciliation' meant, acknowledging that views differed and that it was important 'to establish an agreed framework for this healthy diversity'.⁸ However, the Council's vision statement and *Roadmap for Reconciliation*,⁹ the document which accompanied the Council's Final Report, reflected a view of reconciliation where the emphasis is on process rather than an end result, even though there is a vision of what the 'journey along the reconciliation road' would lead to.¹⁰ Secondly, the Council emphasised national unity, justice and equity as key elements of reconciliation, a conceptualisation that closely reflects its enabling legislation.

The National Strategies

2.13 The four National Strategies contained in the Council's *Roadmap* outline the means by which the Council considered that reconciliation would be achieved. These strategies, set out in Appendix 4, are:

- the national strategy to sustain the reconciliation process;

6 Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge – Final report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament*, Commonwealth of Australia, 2000, p. i. Achievement of these same goals was included as the definition of reconciliation in the Council's draft legislation appended to its report (Appendix 3, Reconciliation Bill 2001).

7 CAR's Final Report, p.xiii. The CAR noted that reconciliation was 'a long, winding and corrugated road, not a broad, paved highway' (p. 101).

8 *ibid*, p. 100. The CAR noted that 'the tasks of reconciliation will vary according to local needs and circumstances.

9 Council for Aboriginal Reconciliation, *Roadmap for Reconciliation*, Commonwealth of Australia, 2000

10 As noted by L. Behrendt, 'What Path Forward for Reconciliation? The Challenges of a New Relationship with Indigenous People', *Public Law Review*, vol.12, no.4, 2001, p. 79.

- the national strategy to promote recognition of Aboriginal and Torres Strait Islander rights;
- the national strategy to overcome disadvantage; and
- the national strategy for economic independence.¹¹

The Council's recommendations

2.14 The Council's Final Report contained six recommendations focused on the processes necessary to implement reconciliation (the text of which is in Appendix 3):

- the Council of Australian Governments to implement a national framework for all governments and ATSIC to overcome Indigenous disadvantage through setting measurable and publicly reported benchmarks;
- all parliaments and local governments to pass formal motions of support for the *Declaration*¹² and the *Roadmap*;
- amendment of the Constitution, including preparation of legislation for a referendum to recognise Indigenous people as first peoples in a constitutional preamble; the removal of section 25; and a constitutional prohibition of racial discrimination;
- all sectors of society to take action under the *Roadmap* and to provide resources for reconciliation and promote awareness;
- each government and parliament to recognise that settlement took place without treaty or consent, and to enter negotiations to establish a process for negotiation of treaties or agreements to progress reconciliation; and
- the federal Parliament to enact legislation (a draft Bill being included in the Council's Final Report) to put into place a process to unite Australians by way of an agreement or treaty, through which unresolved issues of reconciliation could be resolved.

Reconciliation Australia

2.15 Reconciliation Australia, the independent foundation established by the Council to provide a continuing national focus for reconciliation after the Council's term ended in December 2000, holds a similar view to that of the Council. Reconciliation Australia has adopted the Council's vision statement,¹³ and its work to date has been directed towards sustaining the sense of momentum for the

11 *Roadmap*, passim.

12 The *Australian Declaration for Reconciliation* was presented with the *Roadmap* to the Australian people at Corroboree 2000.

13 See Reconciliation Australia website: <http://www.reconciliationaustralia.org>.

reconciliation process created by the Council, as well as pursuing the Council's national strategies for reconciliation.¹⁴

Reconciliation as a 'people's movement'

2.16 One of the central ideas to emerge from the CAR was the idea of reconciliation as a 'people's movement'. This is the idea that for the reconciliation process to be successful, and thus for the Council's vision to be achieved, reconciliation must be supported and promoted at a grass-roots level.¹⁵

2.17 The CAR fostered the people's movement for reconciliation during its nine-year life by encouraging and providing support for reconciliation initiatives in local communities, including the establishment of local reconciliation groups.¹⁶ The estimated turnout of 250,000 people for the People's Walk for Reconciliation across the Sydney Harbour Bridge in May 2000 and large crowds at similar events around the country in the following weeks are widely seen as the culmination of the people's movement for reconciliation.

2.18 Reconciliation Australia's stated aim also highlights the importance of the people's movement:

To deliver tangible outcomes for Reconciliation by forging innovative partnerships to: achieve social and economic equity for Indigenous Australians; strengthen the people's movement for Reconciliation; and acknowledge the past and build a framework for a shared future.¹⁷

2.19 The concept of reconciliation as a people's movement appears to be supported by the Commonwealth Government.¹⁸ The Prime Minister has described reconciliation as an 'unstoppable force', noting 'there can be no doubt that the mood of the Australian community is overwhelmingly in favour of reconciliation'.¹⁹ The Committee notes, however, that the Government submission to this inquiry focused on

14 Reconciliation Australia *Submission 64*.

15 CAR's Final Report, p. 61.

16 *ibid.*

17 See its website at <http://www.reconciliationaustralia.org>

18 The Commonwealth Government Response to CAR's Final Report (2002, p. 2) described the growth of the movement as one of 'the achievements of the past decade ... which harnessed and increased community awareness of, and enthusiasm for reconciliation'.

19 The Hon. John Howard, 'Perspectives on Aboriginal and Torres Strait Islander Issues', *Menzies Lecture Series*, 13 December 2000. Similarly, Minister for Indigenous Affairs the Hon Philip Ruddock has said that for him, 'reconciliation has always been about hearts and minds and bringing people together' ('The hearts and minds of reconciliation', *On Line Opinion*, 2002).

overcoming Indigenous disadvantage (discussed further below) and did not elaborate on the importance of the people's movement.²⁰

2.20 During this inquiry, the Committee found considerable support for the idea of reconciliation as a people's movement in the numerous submissions from community organisations and local community groups. Those submissions, however, criticised the lack of government leadership in sustaining the reconciliation process. A selection of their views is quoted below.

... working in our local communities we do not feel supported by the present government.²¹

... two years after the winding up of CAR, the Reconciliation agenda appears frozen at a federal Government level; there is no formal process and, despite CAR's recommendations, no monitoring and accountability at a national level. The net result is that at a community level, even with the continuing activity of the [local reconciliation groups], Reconciliation is vulnerable to the prevailing apathy and ignorance CAR identified in its various social research initiatives.²²

Our work we feel has established and built on a community commitment to the principles of reconciliation but this has been achieved in an environment of lack of leadership, support and resourcing from government.²³

The Government has attempted to shift the onus for progressing the reconciliation movement further onto the community ... It is washing its hands of any responsibility to lead the process and is cutting reconciliation adrift as a national priority.²⁴

2.21 Reconciliation Australia supported those views:

20 Commonwealth Government *Submission 75*, p. 2, where it was stated 'If this inquiry is to serve a useful purpose, its main scrutiny should be on what will really make a difference for Indigenous people in terms of overcoming the legacy of social and economic disadvantage they live with every day ... This submission is therefore framed in this context.'

21 Blue Mountains Australians for Native Title and Reconciliation *Submission 69*. Criticisms of the lack of government action were also expressed by other reconciliation and community groups, including Reconciliation for Western Sydney *Submission 13*; Blue Mountains Community Interagency *Submission 20*; former Australians for Reconciliation coordinators *Submission 29*; Holdfast Bay Reconciliation Group *Submission 33*; Northern Sydney Reconciliation Network *Submission 37*; Australians for Native Title and Reconciliation (ANTaR) Inc *Submission 40*; the New South Wales Reconciliation Council *Submission 42*; Sunshine Coast Reconciliation Group (Caloundra) *Submission 62*; Eurobodalla Walking Together Group *Submission 70*; Women's Reconciliation Network NSW *Submission 72*.

22 Women's Reconciliation Network NSW, *Submission 72*, pp. 6-7.

23 Blue Mountains Community Interagency, *Submission 20*, p. 1.

24 Australians for Native Title and Reconciliation (ANTaR) Inc *Submission 40*, p. 6.

The people's movement for reconciliation is alive and well. However, in this time of pressing social concerns ... the movement does need support and recognition. We welcome the fact that several governments have provided some funding to assist reconciliation for peak bodies. At the same time political leadership is essential for the morale of dedicated, hard-working people ... Our leaders need to be more visible and vocal in keeping reconciliation on the national agenda.²⁵

Reconciliation as 'practical' improvements to Indigenous peoples' lives

2.22 Since the current Commonwealth Government came to office in 1996, an alternative view of what reconciliation means has emerged, namely, 'practical reconciliation'. This is the idea that reconciliation means improving Indigenous peoples' life chances, by improving their health status, access to education, employment prospects, access to decent housing and access to government services.

2.23 In its submission to this inquiry, the Commonwealth Government explained its 'practical reconciliation' approach as follows:

The Government's key objective is to provide Indigenous people with access to social and economic opportunities that the vast majority of Australians take for granted. The challenge of ensuring that Indigenous people are effectively able to access their basic citizenship rights is one that faces all governments. It is a litmus test of reconciliation.²⁶

2.24 The Committee notes that there is widespread agreement on the need for practical improvements to Indigenous health, housing, education, employment prospects and so on. The importance of this was emphasised in the debates leading up to the CAR's establishment and by the CAR itself.²⁷

2.25 That view is reinforced by current statistics. By any measure, Aboriginal and Torres Strait Islanders are the most disadvantaged group within the Australian community. Relevant statistics are oft-quoted, but some key figures bear repeating:

- Life expectancy for Indigenous males is approximately 21 years less than for non-Indigenous males; for females the difference is 19 years.²⁸

25 Reconciliation Australia *Submission 64*, Appendix A: *Words, symbols and actions: reconciliation report card 2002*, pp. 23-24.

26 Commonwealth Government *Submission 75*, p. 2.

27 For example, 'Addressing Disadvantage' was one of the eight key issues for reconciliation outlined by the Council in its *Key Issues Papers* series, produced between 1993-1994.

28 Dennis Trewin & Richard Madden, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, Australian Bureau of Statistics & Australian Institute of Health and Welfare, Canberra, 2003, p. 182. "In the period 1999-2001 ... the life expectancy at birth for Indigenous Australians was estimated to be 56 years for males and 63 years for females. In

- The Indigenous infant mortality rate is two and a half times the rate of the total population.²⁹
- The Year 12 retention rate for Indigenous students is 32% less than the rate of the total population.³⁰
- The incarceration rate for Indigenous people is 15 times the rate for non-Indigenous people.³¹
- The unemployment rate for Indigenous people is about two and a half times the national average of less than seven per cent.³²

2.26 A key issue that the Commonwealth Government's 'practical reconciliation' approach has helped to highlight is the lack of standardised targets and benchmarks, as well as monitoring and evaluation mechanisms to measure and address Indigenous disadvantage. The need for such mechanisms was emphasised in the CAR's *Roadmap* and in reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner,³³ and is one of the key issues the Committee has explored during this inquiry.

2.27 However, the Government's 'practical reconciliation' approach has been widely criticised. ANTaR Inc. was one of several groups that argued that 'practical reconciliation' focused on basic citizenship rights:

Quite simply, health, education and welfare concerns for Indigenous people are those people's rights as citizens, not just because they are Indigenous people ...³⁴

2.28 Professor Mick Dodson made a similar point:

contrast, the life expectancy at birth for all Australians was 77 years for males and 82 years for females.”

29 Ibid, p. 184.

30 *Report on Government Services 2003: Indigenous Compendium*, Steering Committee for the Review of Commonwealth/State Service Provision, Productivity Commission, May 2003, p. 26. Figure refers to retention rate from year 10 to year 12.

31 Australian Bureau of Statistics, *Prisoners in Australia*, Catalogue No. 4517.0. As at 30 June 2002, Indigenous incarceration rate = 1,806.3 per '000,000 adult population; Non-indigenous incarceration rate = 118.7 per '000,000 adult population.

32 Office of Aboriginal and Torres Strait Islander Affairs, Department of Immigration and Multicultural and Indigenous Affairs, *Indigenous Employment* Fact Sheet, August 2002.

33 *Social Justice Report 2000*, Recommendations 1-10. The report made a series of recommendations aimed at improving data collection and monitoring and evaluation mechanisms, including that all levels of government and ATSIC, service delivery agencies and Indigenous organisations agree on benchmarks for Indigenous service delivery at the national, regional and local levels (Recommendation 3). Also *Social Justice Report 2002* Chapter 4.

34 Mr Philip Glendenning, *Committee Hansard*, 24 June 2003, p. 237.

There is this minimalist and myopic approach to reconciliation that concentrates on what I think most other Australians regard as basic rights and entitlements as citizens of this country ... There is nothing to persuade me that there is a commitment to broader issues of reconciliation, particularly outstanding issues that are identified by the Council for Aboriginal Reconciliation report ... Can someone point out to me where the government's commitment to and direction regarding reconciliation is? I cannot identify it, apart from delivering welfare as some magical way of achieving reconciliation. It is an absolute nonsense. It is not going to be achieved through welfare.³⁵

2.29 Critics have also argued that the focus on Indigenous peoples' basic citizenship rights obscures other issues, such as the recognition of political rights.³⁶ As Dr William Jonas, the Aboriginal and Torres Strait Islander Social Justice Commissioner, explained:

... reconciliation must go beyond simply providing equality of opportunity in terms of 'sameness'. It must provide for the acceptance, recognition and celebration of the unique, distinct societies and cultural characteristics of first Australians. Consequently, an approach such as 'practical reconciliation', that does not extend past the realisation of measures that allow for citizenship participation in society, is deficient.³⁷

2.30 Professor Dodson also told the Committee that the Government's approach of focusing on the things that 'unify us, not the things that ... divide us' excludes discussion about issues that many Indigenous people view as fundamental:

In other words, we should concentrate on the things we agree on and not the things we disagree on, to put it another way. That is all very well, but when are we ever going to deal with the things we disagree on? By saying, 'We will not deal with the things we disagree on,' you take us out of the agenda entirely. The key things outside practical reconciliation that we want addressed are the things we disagree on. Where is the timetable to deal with that? That is my problem with the government's approach.³⁸

2.31 Many other groups and individuals voiced similar views, including Reconciliation Australia, which argued:

The 'practical reconciliation' issues are vitally important but they do not, on their own, constitute '*the* true test of reconciliation'. The true test requires actions on all elements of reconciliation, including recognition of the rights

35 *Committee Hansard*, 14 May 2003, p.

36 See, for example, Greg Crough, 'A Practical Critique of Practical Reconciliation or what is the reality of Indigenous funding', Paper prepared for ACOSS and ANTaR Seminar, Canberra, 25 July 2001.

37 *Submission 65*, p. 21.

38 *Committee Hansard*, 14 May 2003, p. 90.

of Aboriginal and Torres Strait Islander peoples that are theirs and theirs alone as the first peoples of this country.³⁹

Reconciliation as the recognition of Indigenous peoples' rights

2.32 The view that reconciliation includes recognition of the specific rights that Indigenous peoples have as Indigenous peoples encompasses recognition of rights to land, to self-determination and to the practice of Indigenous culture.

2.33 Speeches to the Parliament by Government members when the reconciliation legislation was being debated in 1991 support this view of reconciliation.⁴⁰ Likewise, the CAR linked reconciliation to justice, both in its vision statement (discussed above) and in other documents.⁴¹ One of the CAR's four National Strategies for reconciliation is the national strategy to promote recognition of Aboriginal and Torres Strait Islander rights, including through constitutional reform, protection of Indigenous intellectual property and observance of international Indigenous and human rights obligations.⁴²

2.34 Other prominent proponents of the 'reconciliation as rights' view include the Social Justice Commissioner, Dr William Jonas, and the Aboriginal and Torres Strait Islander Commission (ATSIC). In both his recent *Social Justice* and *Native Title* reports⁴³ and in evidence to this inquiry, Dr Jonas emphasised the importance of Indigenous rights to the reconciliation process:

Basically, practical reconciliation is aimed at overcoming Indigenous disadvantage by putting money into projects which aim to bring the Indigenous population up to a standard of socioeconomic wellbeing similar to that of the rest of the population. It does not take into account any of the inherent rights of Indigenous people. It does not take into account the way in which native title could properly be used to recognise people's cultural relationships to land. It does not take into account a whole range of other

39 *Submission 64*, p. 5.

40 Second Reading Speech, The Hon. Robert Tickner, *Council for Aboriginal Reconciliation Bill 1991*: House of Representatives *Hansard*, 30 May 1991, p. 4498, where he said that 'there can be no reconciliation without justice'.

41 For example: ATSIC, CAR & Aboriginal and Torres Strait Islander Social Justice Commissioner, *Towards Social Justice? An issues paper: commencing the process of consultation*, ATSIC, 1994; CAR, *Justice and Equity: Resources on the reconciliation process and social justice for indigenous Australians* [CDRom], AGPS, 1995; CAR, *Going Forward: Social Justice for the First Australians*, AGPS, 1995.

42 See Appendix 4 for further detail.

43 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, HREOC, 2000; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, HREOC, 2001; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, HREOC, 2003; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, HREOC, 2002.

issues which are sidelined as being simply symbolic — such as when Aboriginal people talk about having unfinished business finished or talk about agreements which might ultimately lead to a treaty being developed. And it certainly fails to recognise the inherent rights of Indigenous people as the first people of Australia.⁴⁴

2.35 In recent years, ATSIC has also taken a leading role in the campaign to put the issue of a treaty – which would be a vehicle for recognising Indigenous peoples' legal and political rights – back on the agenda.⁴⁵ Many other commentators have argued that reconciliation must be linked to rights if it is to be meaningful and successful.⁴⁶

2.36 During this inquiry the Committee heard similar views. For example, Professor George Williams, Sean Brennan and Vanessa Bosnjak from the Gilbert & Tobin Centre of Public Law argued that the CAR's emphasis that reconciliation meant both addressing disadvantage and recognising Indigenous rights was correct for two reasons:

First, the so-called 'practical reconciliation' and rights agenda are not mutually exclusive. Steps to improve service delivery and government performance through the COAG process are welcome and important, but there is no reason why legal and constitutional reform should not proceed at the same time ... Second, the two agendas are inextricably linked. The Government has said that self-determination for Indigenous peoples would mean government relinquishing responsibility and control. The implication is that this would not be good for Indigenous peoples. More than 200 years of history, a room full of reports and inquiries and the everyday comments of Indigenous people all send a contrary message.⁴⁷

Critiques of the concept of 'reconciliation'

2.37 In discussing what 'reconciliation' means, the Committee notes that the lack of a precise agreed definition has been the basis of some broader critiques of the reconciliation process.

44 *Committee Hansard*, 4 April 2003, pp. 26-27. See also Dr William Jonas, *Submission 65*, especially section one.

45 For example, ATSIC has established a National Treaty Support Group with its own website: <http://www.treatynow.org>. ATSIC also convened a national treaty conference in August 2002, and with the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) commissioned a collection of essays on treaties, released on 28 August 2003 (*Treaty – let's get it right!*).

46 See, for example, L Behrendt, 'Self-determination and Indigenous Policy: The Rights Framework and Practical Outcomes', *Journal of Indigenous Policy*, Issue 1, 2002, pp. 43-58.

47 *Submission 4*, p. 1.

2.38 Indigenous academic Professor Larissa Behrendt, for example, has pointed out that the CAR's reluctance to define the term precisely 'has created a set of difficulties for the process'. These difficulties include suspicion in some parts of the Indigenous community 'of any process that might mean the concession of rights and entitlements'.⁴⁸ Other commentators have suggested that the somewhat ambiguous and rhetorical nature of the concept directs attention towards a 'vague and indefinable objective', and away from more difficult and confronting issues such as land rights, compensation, and deaths in custody.⁴⁹

2.39 A submission to the Committee expressed such concerns more bluntly:

What is reconciliation to us? Nothing much has changed in Gove where I live. Reconciliation is a big white fella word. What does it mean? People ask me that and I don't know what to say. I was on Sydney Harbour Bridge when everybody walk across and they did that for 'reconciliation'. I been grow up in the bush and I know our law. Our law never changes ... I don't understand your law. It always changes. The only thing that stays the same for the white man is that he never listens to our law, and our kids keep getting locked up with that mandatory sentencing. I don't understand your reconciliation.⁵⁰

Summary of common themes

2.40 There are clearly areas of disagreement over what the term 'reconciliation' means. In the course of this inquiry, the Committee has not sought to define the term, noting the CAR's view that what reconciliation means will vary with local needs and circumstances and that what is important is an agreed framework for a 'healthy diversity' of views.

2.41 However, a number of common themes have emerged:

- **Reconciliation is now widely seen as a process**, rather than simply a destination.⁵¹ The importance of this perspective was emphasised to the Committee in submissions

48 L Behrendt, 'What Path Forward for Reconciliation? The Challenges of a New Relationship with Indigenous People', *Public Law Review*, vol. 12, no. 4, 2001, p. 79, where she states "'What have we got to reconcile?" was a usual response'.

49 A Pratt, C Elder & C Ellis, "'Papering over the Differences": Australian nationhood and the normative discourse of reconciliation' in M Kalantzis & B Cope (eds) *Reconciliation, Multiculturalism, Identities: Difficult Dialogues, Sensible Solutions*, Common Ground Publishing, 2001, pp.135-148. See also R de Costa, 'Reconciliation as Abdication', *Australian Journal of Social Issues*, vol. 37, no. 4, November 2002, pp. 397-408.

50 Northern Territory Aboriginal Justice Advocacy Committee *Submission 10*, citing Mr. Barnamby Wunungmurra.

51 Academic Will Sanders describes reconciliation as a 'journey without end' (W Sanders, *Journey without end: Reconciliation between Australia's Indigenous and settler peoples*, Centre for Aboriginal Economic Policy Research (CAEPR) Discussion Paper No. 237, 2002).

and public hearings. For example, speaking about the question of balancing the so-called 'practical' and 'rights' agendas, Professor Mick Dodson said:

We have to try to reconcile those disagreements. After all, that is what fundamentally underpins the whole reconciliation process ... From our point of view, it may not be a solution that achieves the reconciliation. What might achieve the reconciliation is having together gone through the process.⁵²

- There seems to be broad consensus that the reconciliation process is, at least on some level, about **nation-building and national unity**. However, there is disagreement about how 'national unity' should be defined and how it will be achieved. For example, the Prime Minister has talked about the need to focus on the issues and achievements that unite Indigenous and non-Indigenous Australians, rather than those that divide.⁵³ As discussed above, however, some argue that defining national unity in this way obscures discussion about issues that Indigenous people see as important.
- There also seems to be broad agreement that reconciliation is about **recognition of Indigenous peoples**. Again, however, there is disagreement about what should be recognised and how this should be achieved. Most groups involved in the process, including the Commonwealth Government, agree that Indigenous peoples should be recognised as having distinct and valuable cultures, but there is disagreement about the extent to which this recognition should translate to recognition of distinct legal or political rights. Chapter 5 considers a range of rights-based issues in more detail.
- Most agree that **overcoming Indigenous disadvantage** in areas such as health, education, employment and housing is an important part of the reconciliation process, and that overcoming this disadvantage is an important national priority. The key difference is whether this should be the primary or indeed sole focus of the reconciliation process, as the Commonwealth Government maintains. The Committee has heard widespread criticism of the 'practical reconciliation' approach during this inquiry. How to measure progress towards overcoming Indigenous disadvantage is one of the key issues in the Committee's terms of reference, addressed in more detail in Chapter 4.

52 *Committee Hansard*, 14 May 2003, p. 90.

53 The Hon. John Howard, 'Perspectives on Aboriginal and Torres Strait Islander Issues', Menzies Lecture Series, 13 December 2000.

CHAPTER 3

WHAT IS BEING DONE

3.1 One of the main themes in the CAR's Final Report was that continued progress towards reconciliation would involve a commitment from all levels of government, non-government, business, peak bodies, communities and individuals.

3.2 This chapter examines evidence the Committee heard as to what the different sectors of society are currently doing in terms of progressing reconciliation. It discusses:

- Reconciliation Australia;
- the Commonwealth Government;
- State and Territory governments;
- ATSIC;
- local governments; and
- local and community-based reconciliation groups.

Reconciliation Australia

3.3 The CAR established Reconciliation Australia as an independent non-profit organisation to provide a continuing national leadership focus for reconciliation, report on progress, provide information and raise funds to promote and support reconciliation after the CAR ended on 31 December 2000.

3.4 The Commonwealth Government provided one-off seed funding of \$5.6 million (including GST) for the organisation's establishment, and gave full tax deductibility for all donations to it. The Government stated that this maintained its commitment to the reconciliation process demonstrated by the Motion of Reconciliation moved by the Prime Minister in the Parliament in 1999.¹

3.5 In its response to the CAR's Final Report, the Government stated that it saw Reconciliation Australia as having three priority areas:

work towards social and economic equity for Indigenous Australians; strengthen the people's movement for reconciliation; and acknowledge the past and build a framework for a shared future by amongst other things, facilitating constructive discussion on all aspects of the rights agenda.²

1 Commonwealth Government Response to The CAR Final Report – *Reconciliation: Australia's Challenge*, September 2002, p. 3.

2 *ibid*, p. 15.

3.6 Reconciliation Australia's *Strategic Plan 2001-2003* states that its mission is:

To deliver tangible outcomes for reconciliation by forging innovative partnerships to:

- achieve social and economic equity for Indigenous Australians;
- strengthen the people's movement for reconciliation; and
- acknowledge the past and build a framework for a shared future.³

3.7 The Strategic Plan also sets out Reconciliation Australia's goals for its first three years and strategies and actions for achieving these goals. It emphasises that it is essential to establish meaningful and strategically targeted partnerships with governments, organizations and individuals who not only share the organisation's values but can help extend its work of reconciliation throughout Australia.⁴

3.8 As part of its role in monitoring progress on reconciliation, Reconciliation Australia presents a report card each year as a summary of national progress towards reconciliation.⁵

3.9 In evidence to the Committee, representatives of the Office of Aboriginal and Torres Strait Islander Affairs (OATSIA) in the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) stated that production and dissemination of reconciliation material throughout the Australian community was 'intended or contemplated' to be taken over by Reconciliation Australia after the CAR ended.⁶

Factors inhibiting Reconciliation Australia

3.10 During the inquiry, the Committee heard various concerns about limitations on Reconciliation Australia's role due to:

- its lack of statutory authority; and
- its inadequate resources.

Lack of statutory authority

3.11 The Social Justice Commissioner in his 2001 *Social Justice Report* stated that:

Reconciliation Australia has been presented by the federal government as the 'successor' to the CAR. There are, however, significant differences

3 Reconciliation Australia Strategic Plan 2001-2003.

4 *ibid.*

5 See Reconciliation Australia *Words symbols and actions: Reconciliation report card 2002*, 2002.

6 *Committee Hansard*, 15 May 2003, p. 104.

between the Council and Reconciliation Australia. As stated, Reconciliation Australia is a not-for-profit company. It is not a government authority and its operation and objectives have not been mandated by Parliament. Its relationship with government at all levels is accordingly based on goodwill rather than any mandatory requirements.⁷

3.12 Many other organisations, groups and individuals expressed similar doubts on the ability of Reconciliation Australia to accurately monitor and report on the progress of reconciliation in the absence of any statutory authority to require reporting by governments.⁸

3.13 When questioned by the Committee, Reconciliation Australia stated that while there were ‘real advantages’ in being independent, this could also give rise to ‘real difficulties in calling governments to account’.⁹ When asked whether the organisation could be more effective by becoming ‘a statutory authority or some other, more permanent sort of entity’,¹⁰ the Hon Fred Chaney, Co-chair of Reconciliation Australia stated:

we find ourselves operating in a much more limited framework than was envisaged by the Council. We think that is a significant disadvantage to maintaining the impetus of the reconciliation movement.¹¹

3.14 Mr Chaney told the Committee that Reconciliation Australia, while supporting the CAR’s recommendations, considered there were:

... a range of statutory possibilities, which would include independently vesting certain statutory authority in and resourcing the existing body, allowing it to deal with things such as monitoring, education and so on. We would personally welcome any move by governments to formalise and build into law the maintenance of the reconciliation process.

In terms of demanding a response, I believe the reality is that while you had a statutory authority process all governments felt it was necessary for them to respond to that process. State premiers and prime ministers of all political colours were prepared to respond to the process. They unanimously joined in the responses to the council and, remember, unanimously took the view that this process was incomplete. The present Prime Minister led the way in

7 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, p. 203.

8 For example, Oxfam Community Aid Abroad *Submission 19*; Reconciliation Victoria Inc *Submission 30*, p. 4; Holdfast Bay Reconciliation Group *Submission 33*; ANTaR Inc *Submission 40*, p.15; New South Wales Reconciliation Council *Submission 42*; ATSIC *Submission 80*.

9 *Committee Hansard*, 19 May 2003, p. 155.

10 *ibid*, p. 156.

11 *ibid*, p. 157.

making it clear that reconciliation was not accomplished in 2000 and that there was a need for ongoing action.¹²

Inadequate resources

3.15 As previously noted, Reconciliation Australia received a one-off seed funding government grant of \$5.6 million, including GST. It has subsequently been granted rent free accommodation by the Government. Reconciliation Australia relies on community and corporate support to enable it to carry out its role.

3.16 In his 2001 report, the Social Justice Commissioner said he did not consider Reconciliation Australia to be adequately funded to be the national coordinator of reconciliation:

As a result of its funding, Reconciliation Australia clearly will not have the capacity that the CAR did to provide ongoing, nationally significant public awareness activities regarding reconciliation. There is a danger that the reconciliation walks from last year will be the high watermark of support for reconciliation, as national attention (necessarily related to the ability of Reconciliation Australia and the government to keep a national profile for reconciliation) slowly dissipates.¹³

3.17 Reconciliation Australia submitted that:

as part of its leadership role, government must adequately resource the ongoing reconciliation process. The people's movement must be sustained. Young Australians must be educated. The funding responsibility is government's. The resources required are beyond the ambit of private organisations or individuals.¹⁴

3.18 It is Reconciliation Australia's view that if a national focus on the reconciliation process is to be maintained, there needs to be a major education program throughout the community. It acknowledges that one of its roles is to educate the Australian community on reconciliation matters, and accepts that it is ideally placed to take on the production and dissemination of reconciliation materials. However, due to its lack of resources it is limited in the amount of work it can do.

3.19 Many submissions commented that Reconciliation Australia's lack of resources severely restricted the leadership role it was seen as having on its establishment.¹⁵

12 *Committee Hansard*, 19 May 2003, pp. 156-157.

13 *Social Justice Report 2001*, p. 203.

14 *Committee Hansard*, 19 May 2003, p. 155.

15 Oxfam Community Aid Abroad *Submission 19*; Australian Catholic Social Justice Council *Submission 24*; Reconciliation Victoria Inc *Submission 30*, p. 4; New South Wales Reconciliation Council *Submission 42*; Aboriginal and Torres Strait Islander Social Justice

3.20 In evidence Mr Chaney advised that:

we are conscious that during the first year of our operation we were not able to give priority to networking with state peak bodies and local reconciliation groups. Also, in the absence of available funding from Reconciliation Australia we realised that time was required for those bodies to establish relationships with their own governments. Most are still pursuing real support from their respective state governments, although in a majority of states some support is given. Despite this lack of resources, the state peak bodies and Reconciliation Australia have agreed to work together to create a national framework for our complementary activities and to support each other as much as possible. The state peak bodies and the local reconciliation groups are an integral part of the people's movement and it is vital they be sustained. Subject only to having the necessary financial resources, Reconciliation Australia is perfectly placed to provide them with coordinated support.¹⁶

3.21 The Social Justice Bodies of the Catholic, Uniting and Anglican Churches in Western Australia commented that:

Reconciliation Australia had focused its limited resources on promoting reconciliation at the institutional level of government and business – a vital role. But it apparently lacks the financial resources to generate more energy in the 'people's movement'.¹⁷

3.22 The Aboriginal and Torres Strait Islander Social Justice Commissioner stated that:

While one of Reconciliation Australia's primary functions is to provide wider community education, the pittance of a budget on which it is obliged to operate is inadequate to support a comprehensive educative process of this nature.¹⁸

3.23 In an attempt to increase its resources Reconciliation Australia has sought sponsorship from various agencies and organizations, as well as seeking donations from the general public. In its first full year of operation it received in the order of \$800,000 in sponsorship, including sponsorship from government funded agencies.¹⁹

3.24 Mr Chaney told the Committee that a substantial additional financial commitment by governments was required if Reconciliation Australia was to fulfil its

Commissioner, Human Rights and Equal Opportunity Commission *Submission 65*, p. 75; ATSIIC *Submission 80*, p. 24.

16 *Committee Hansard*, 19 May 2003, p. 156.

17 *Submission 22*, p. 12.

18 *Submission 65*, p. 75.

19 *Committee Hansard*, 19 May 2003, p. 161.

role in education and communication and in monitoring progress.²⁰ He added that the one-off seed funding in 2001 of \$5.6 million enabled Reconciliation Australia to operate at around \$1 million a year, but:

with the risk of a cliff in a year and a half if we do not do better at fundraising.²¹

3.25 Reconciliation Australia has advised the Committee that:

In addition to potential corporate partnership and sponsorship funding, and after including administration costs, the annual budget required to meet our obligations ... is \$5.75 million.²²

3.26 In its *Reconciliation Report Card 2002*, Reconciliation Australia reported on two projects that it was involved in with government and business sectors:

- co-convening a workshop with ATSIC and Indigenous Business Australia aimed at improving banking and financial services for Indigenous Australians. Resources are being devoted to ‘ongoing work which will bring key stakeholders together and build on the outcomes of the workshop’;²³ and
- entering into a formal relationship with BHP Billiton to work together over a three-year period to progress Indigenous governance. The focus is establishment of a program aimed at working with Indigenous organisations and communities, and where appropriate with governments, to tackle Indigenous governance issues through specific initiatives.²⁴

3.27 Reconciliation Australia advised the Committee that it believed that reconciliation in Australia would be progressed by:

A commitment from the federal government to the reconciliation process, as outlined by the CAR; ongoing government funding to Reconciliation Australia to enable it to maintain and extend its strategic priorities; and greater authority by statute for Reconciliation Australia and for the reconciliation process generally.²⁵

The Commonwealth Government’s role

3.28 The Commonwealth Government finally responded to the CAR’s recommendations in September 2002, after this inquiry commenced. As many have

20 *ibid*, p. 157.

21 *ibid*.

22 *Submission 64B*, p. 1.

23 Reconciliation Australia, *Reconciliation Report Card 2002, ‘Words, symbols and action’*, p. 17.

24 *ibid*, p. 18.

25 *Committee Hansard* 19 May 2003, p. 156.

commented, that was nearly two years after the CAR presented its final report and even longer since the release of CAR's National Strategies.²⁶

3.29 In its response to the CAR's Final Report the Commonwealth Government stated that it is:

... committed to reconciliation as an ongoing process with practical, cultural and spiritual dimensions.²⁷

3.30 However, the Government stressed that it was 'only one entity to which the Council's recommended strategy is addressed':

It is also directed towards parliaments and political parties, state, territory and local governments and their agencies, reconciliation organisations at national, state and local level, private sector organisations, voluntary and community organisations, Indigenous organisations, and Indigenous and non-Indigenous individuals. The Government views the Commonwealth's role primarily as a practical one in which it makes a substantial (but not exclusive) contribution of the resources necessary to meet the practical needs of Indigenous Australians.²⁸

3.31 In its submission to this inquiry, the Government confirmed that it saw its role in the reconciliation process as being primarily a practical one by providing and monitoring programs to overcome Indigenous disadvantage. It stated that its key objective :

... is to provide Indigenous people with access to social and economic opportunities that the vast majority of Australians take for granted. The challenge of ensuring that Indigenous people are able to effectively access their basic citizenship rights is one that faces all governments. It is the litmus test of reconciliation.²⁹

3.32 The Commonwealth Government argued that this inquiry's main focus:

... should be on what will really make a difference for Indigenous people in terms of overcoming the legacy of social and economic disadvantage they live with every day.³⁰

3.33 Responding to criticism that "practical reconciliation" 'does not acknowledge the consequences of history', the Government stated:

26 See Reconciliation Australia *Words, symbols and action: Reconciliation report card 2002*, 2002, pp. 5, 7; *Social Justice Report 2002*, 2002, p. 33.

27 Commonwealth Government Response to The CAR Final Report – *Reconciliation: Australia's Challenge*, September 2002, p. 15.

28 *ibid.*

29 *Submission 75*, p. 2.

30 *ibid.*

This is incorrect. Quite the contrary, its policies are designed as a direct response to the legacy of disadvantage that flows from that history. These policies are also designed to recognise that in addition to its historical origins, contemporary issues such as substance abuse and welfare dependency affect Indigenous disadvantage.³¹

3.34 The Government also argued that it supported the pursuit of Indigenous rights ‘in a range of areas’:

For example, the Government provides substantial resources to assist Indigenous people to have their native title rights determined, while significant resources are also provided through Aboriginal legal aid funding for the defence and pursuit of rights, including through test cases. The Government is also currently reviewing the National Indigenous Justice Strategy, which addresses concerns raised by Senator Aden Ridgeway in relation to Indigenous justice issues. The current focus on making mainstream services more accessible and responsive to the needs of Indigenous people is grounded in a recognition that access to such services is a practically focused right that requires more attention if disadvantage is to be overcome.³²

3.35 The Government went on to say that:

What [it] has been concerned to achieve is a better balance between the pursuit of Indigenous rights and the pursuit of better social outcomes for Indigenous people. The Government’s view is that over the past decade or so the pendulum had swung too far towards the pursuit of rights at the expense of making a difference, now, in the day to day lives of Indigenous people.³³

3.36 The Government referred to the following key elements in its approach in reducing Indigenous disadvantage:

- working through the Council of Australian Governments (COAG) Framework to advance reconciliation, to ensure Indigenous disadvantage is addressed as a key aspect of policy development, planning and program delivery at all levels of government, particularly through developing Ministerial Council Action Plans and including Indigenous outcomes and performance monitoring arrangements

31 *ibid.*

32 *ibid.*, pp. 2-3. Separately, Professor Larissa Behrendt has noted that part of the funds claimed to be spent on ‘Indigenous-specific programs’ have gone towards defending the Stolen Generations test case (*Cubillo v Commonwealth* (2000) 174 ALR 97) and to ‘the various government arms that were actively trying to defeat native title claims. In other words, money spent preventing the recognition and protection of Indigenous rights was counted as money allocated for specific policy areas of practical reconciliation.’ See L Behrendt, *Achieving Social Justice: Indigenous Rights and Australia’s Future*, The Federation Press, 2003, p. 10.

33 *Submission 75*, p. 3.

in Specific Purpose Payment agreements with the States and Territories as they come up for renegotiation;

- focusing on improving reporting, addressing key data deficiencies and developing more sophisticated reporting tools for measuring progress in addressing Indigenous disadvantage; and
- ‘examining opportunities’ within the Commonwealth to improve service delivery and better target both Indigenous-specific and mainstream programs to meet Indigenous needs.³⁴

3.37 Another key element of the Government’s approach was stated as:

respecting Indigenous people’s desire for greater control over their own future by working with Indigenous leaders, communities and organisations to build their capacity to make decisions and exert greater influence in the decision-making processes of the Government, within a partnership framework of shared responsibility, including the increasing use of negotiated agreements.³⁵

3.38 Some examples of agreements are:

- Indigenous Land Use Agreements, frameworks for which were established under 1998 amendments to the *Native Title Act 1993*. An example given by ANTaR was the agreement between the Bundjalung people of Byron Bay and the NSW State Government “providing freehold titles to some land and facilitating the establishment of a national park in which the Aarkawal people have a significant management input.”³⁶
- Agreements to pool funds, such as for the Indigenous Housing Authority of the Northern Territory (IHANT) where funding for housing from the Commonwealth, the Northern Territory Government and ATSIC has been pooled. Pooled funds are then allocated by IHANT which has representatives from each of these levels of government.³⁷ Another example is the Aboriginal-controlled Katherine-West Health Board, which has been given the responsibility to directly manage Indigenous health services for the entire region;³⁸
- Western Cape Communities Coexistence agreement, which according to ANTaR is “a landmark agreement between Aboriginal groups in Western Cape York, the Queensland State Government and Comalco. The agreement covers native title

34 *Submission 75*, pp. 3-4.

35 *ibid*, pp. 3-4.

36 *Submission 40*, p. 13.

37 *Committee Hansard*, 11 June 2003, p. 211.

38 *Submission 40*, p. 12.

rights and mining interests, employment and training, cultural heritage, environmental protection and land management issues³⁹; and

- Agreements to COAG whole-of-government trials in ten pilot communities (referred to in more detail below).

The COAG framework

3.39 COAG comprises the Prime Minister, Premiers and Chief Ministers of States and Territories and the President of the Australian Local Government Association (ALGA). Formed in 1992 and chaired by the Prime Minister, COAG's role is to initiate, develop and monitor the implementation of policy reforms which are of national significance and which require cooperative action by Australian governments.⁴⁰ There are over 40 Commonwealth-State Ministerial Councils and fora on specific policy areas, supported by officers' groups.

3.40 The COAG communiqué on reconciliation of 3 November 2000 was described by the Social Justice Commissioner as 'an important response' to the CAR's recommendations.⁴¹ The communiqué commits COAG to advancing reconciliation in relation to social and economic disadvantage through a nationally coordinated framework. Its three agreed priority areas are community leadership; reviewing and re-engineering programs and services to achieve better outcomes for Indigenous people; and building links between business and Indigenous communities to advance economic independence.

3.41 Under the framework, the Ministerial Council on Aboriginal and Torres Strait Islander Affairs (MCATSIA) is to coordinate and monitor action by the various Commonwealth/State Ministerial Councils in developing action plans, benchmarks and reporting strategies. The communiqué does not, however, address the recognition of Indigenous rights or some of the symbolic issues in the CAR's recommendations.

3.42 The Government noted that the CAR's Final Report had described the implementation of the COAG agreement 'as a key plank in sustaining the reconciliation process into the future' and had commented favourably on the decision that Ministerial Councils would develop action plans, strategies for improved performance reporting and benchmarks.⁴²

3.43 In its communiqué of 5 April 2002, COAG produced a report on progress in 2001. Two important initiatives were the commissioning from the Steering Committee for the Review of Commonwealth/State Service Provision of a regular report against

39 *ibid*, p. 13.

40 See http://www.pmc.gov.au/docs/coag_framework.cfm.

41 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, p. 200.

42 *Submission 75*, p. 4.

key indicators on Indigenous disadvantage (discussed further in Chapter 4); and the announcement that the Commonwealth Government would work closely with State and Territory governments in up to ten Indigenous communities in a ‘whole-of-government’ trial approach to better coordinating service delivery and to improve outcomes. Two communities were initially identified for the trials: Wadeye in the Northern Territory and Cape York in Queensland. Since then the Committee is aware that four other sites have been announced: the Anangu Pitjantjatjara (AP) Lands in South Australia, the Tjurabalan region in the east Kimberley of Western Australia, Shepparton in Victoria and the Murdi Paaki region in far north-west New South Wales.

3.44 Linked to the COAG whole-of-government initiative is the establishment of a Secretaries Group involving a number of Departmental Secretaries and the ATSI CEO, and the establishment of the Indigenous Communities Coordination Taskforce, which leads joint activity across Commonwealth agencies and works with Indigenous communities.⁴³

3.45 The Committee supports the whole-of-government trials and the establishment of the Taskforce, but notes concerns raised about the processes for selecting communities for the trials. Mr Jason Glanville of Reconciliation Australia told the Committee:

... there is ... a lot of concern that the communities that have been chosen might not necessarily be the best ones or the most deserving of this kind of attention. ... There is an equally serious concern about the level of engagement with those communities in the lead-up to them being selected or announced as part of the trial. I think there have been—certainly in the communications put out by the 10 communities task force—statements about communities being seen as equal partners in the process, but there is real concern that that has not been the case to date.⁴⁴

3.46 The Committee notes that the majority of trials announced so far are in remote locations. It looks forward to further trials being undertaken in urban and regional locations, given that the majority of Indigenous people do not live in remote locations, yet still experience significant disadvantage.⁴⁵

3.47 The COAG communiqué of 5 April 2002 also stated that the next review of progress under the reconciliation framework would be provided by ‘no later than the end of 2003’. No such review appears to have been finalised as at the time of reporting.

43 *ibid*, p. 7.

44 *Committee Hansard* 19 May 2003, p. 159.

45 One in four Indigenous Australians lives in remote or very remote areas, as defined by the Australian Bureau of Statistics. See Dennis Trewin & Richard Madden, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, Australian Bureau of Statistics & Australian Institute of Health and Welfare, Canberra, 2003, p. 17.

Evidence to the inquiry

3.48 The great majority of submissions received by the Committee emphasised that, while reconciliation was not solely the Commonwealth's responsibility, the Commonwealth needed to provide national leadership. Many considered that the Commonwealth had clearly failed to demonstrate such leadership and that the impetus towards reconciliation generated during the life of the CAR had stalled.

3.49 Some considered that in the absence of national leadership by the federal Government there is a risk that progress towards enduring reconciliation may not be merely slowed but in fact may never be achieved.⁴⁶ For example, Professor Mick Dodson told the Committee that:

You need the national government to give [reconciliation] leadership and direction. There was a time when this was happening under the CAR. That is not there. It is as if it has nothing to do with the government; it is the people's movement. The people are not going to move if the government does not. There is nothing to compel anybody to do anything.⁴⁷

3.50 He went on to say that unless the Commonwealth Government led the reconciliation process and provided direction and support 'it is going to go nowhere'.⁴⁸

3.51 A group of former co-ordinators of Australians for Reconciliation submitted that there:

... has been a reduction of interest and slowing of local efforts by government formally and also, at a community level, informally. The momentum generated by the Reconciliation process under the auspices of the CAR was such that it provided many with the support and knowledge to become and remain involved. The process was one which led to a profound sense of place for many people in Australia, but who now feel despondent because of this reduction in effort.⁴⁹

3.52 The submission was particularly critical of what it described as the Commonwealth's 'preparedness ... to play a divisive role in its approach to key

46 Sisters of St Joseph, *Submission 7*, p. 8; Uniting Church in Australia - National Assembly, *Submission 15*, p. 4; Social Justice Bodies of the Catholic, Uniting and Anglican Churches WA, *Submission 22*, p. 14; Australian Catholic Social Justice Council, *Submission 24*; The Australian Council of Social Service, *Submission 27*; Reconciliation Victoria Inc, *Submission 30*; Mountains Outreach Community Service Inc, *Submission 36*; Australians for Native Title and Reconciliation (ANTaR) Inc, *Submission 40*, p. 3; National Aboriginal and Torres Strait Islander Ecumenical Commission of the National Council of Churches in Australia, *Submission 41*, p. 5; National Union of Students, *Submission 78*; Aboriginal and Torres Strait Islander Commission, *Submission 80*, p. 3.

47 *Committee Hansard*, 14 May 2003, p. 85.

48 *ibid*, p. 88.

49 *Submission 29*, p. 5.

Indigenous affairs policy issues'. This divisiveness contrasted with 'any notion of reconciliation, where the emphasis is upon inclusiveness'.⁵⁰

3.53 The Committee notes that although there is general support for the COAG reconciliation framework in its approach to improving program delivery, some question COAG's ability to achieve positive outcomes. Mr Rick Farley of the NSW Reconciliation Council told the Committee:

COAG is logjammed by politics and, to some extent, bureaucratic inertia. COAG needs to be made a much more effective tool for a whole of government approach to a range of issues.⁵¹

The impact on the 'people's movement'

3.54 The Social Justice Commissioner told the Committee that:

The lack of leadership demonstrated by the federal government leaves reconciliation without focus and without cohesion. As important as the people's movement for reconciliation is, it will surely dissipate if not accompanied by real commitments to real outcomes by governments.⁵²

3.55 The New South Wales Reconciliation Council was even more critical:

[T]he federal government has walked away from reconciliation. They are not supporting grassroots organizations, and that is what reconciliation is – a movement of grassroots people throughout this country.⁵³

3.56 The Council submitted that:

The government's response should articulate a way forward for the country and for supporters of the reconciliation movement. Instead, the response is evasive, general and negative.

...

The federal government's response provides no national leadership on reconciliation and no collective vision. This leaves state Councils and [local reconciliation groups] with the difficult task of defining and working toward an unarticulated and indeed, disputed goal.⁵⁴

3.57 Of particular significance to the former co-ordinators of Australians for Reconciliation was the Commonwealth's position on key CAR recommendations:

50 *ibid.*

51 *Committee Hansard*, 4 April 2003, p. 17.

52 *Submission 65*, p. 76.

53 *Committee Hansard*, 4 April 2003, p. 15.

54 *Submission 42*, p. 1.

Our view is that Government policy and practice has actively sought to turn public opinion against key goals and standards identified by CAR. It needs to be remembered that the recommendations of the CAR report [are] the result of extensive consultation with both Indigenous and non-Indigenous Australians.

A particular example where the Government's position or role has been an impediment to engender understanding and respect is in the fact of not involving the broader community and by so doing ensuring reconciliation becomes less of a real issue for ordinary Australians. With the infrastructure support that the CAR program developed, this particular issue was considered very significant. There were mechanisms to both respond to interest from Australians across a wide spectrum of our community and to foster interest where otherwise it might have lain dormant.⁵⁵

3.58 Further criticisms of the impact of the lack of Commonwealth leadership on the 'people's movement' are contained in the previous chapter.

Criticism of 'practical reconciliation'

3.59 The Social Justice Commissioner stated that the problem with the Government's 'practical reconciliation' approach:

... is the simplistic, arbitrary and extremely artificial division it creates between measures which are described as practical as opposed to symbolic. No such clear distinction exists – there is a clear interrelationship between different issues and approaches which require multi-dimensional solutions. The focus solely on practical measures to address disadvantage within key priority areas is simply too narrow. It is also not accompanied with sufficient accountability for government performance – with inadequate monitoring and evaluation mechanisms, and a lack of sufficient benchmarks, targets and an insufficient basis of program delivery on outcomes. Similarly, it does not provide Indigenous people with a central role in determining priorities and it dismisses human rights as irrelevant.⁵⁶

3.60 He went on to say that:

Practical reconciliation seeks to address Indigenous people on a restrictive basis of equality. Ultimately it is assimilationist in approach, aiming for formal equality with only limited recognition of cultural differences. It seeks to maintain rather than transform the relationship of Indigenous people to the mainstream society.⁵⁷

3.61 Others' criticisms of the 'practical reconciliation' approach were outlined in Chapter 2 and are discussed further in the context of legal rights in Chapter 5.

55 *Submission 29*, pp. 5-6.

56 *Submission 65*, p. 49.

57 *ibid*, pp. 55-56.

State and Territory governments

3.62 As previously noted, the CAR saw State and Territory governments as having an important role in the reconciliation process. Many of its recommendations, details of which are set out in Appendix 3, are directed at all levels of government and all parliaments:

- COAG should implement and monitor a national framework whereby all governments and ATSIC work to overcome Indigenous disadvantage;
- all parliaments and local governments should 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; and
- each government and parliament should negotiate a process through which treaties or agreements might be achieved that protect the political, legal, cultural and economic position of Aboriginal and Torres Strait Islander peoples.⁵⁸

3.63 Other recommendations addressed to all levels of government (as well as other sectors of society) were to commit to sustaining the reconciliation process by:

- affirming the *Australian Declaration Towards Reconciliation* and actioning the *Roadmap for Reconciliation*;
- providing resources for reconciliation activities and involving Aboriginal and Torres Strait Islander peoples in their work;
- undertaking educational and public-awareness activities; and
- supporting Reconciliation Australia.

3.64 At the start of this inquiry, the Committee wrote to all State and Territory governments, and received submissions from all except for New South Wales. Some responses were far more detailed than others; only one (the Australian Capital Territory) addressed each of CAR's recommendations.

3.65 Following is a brief outline of some of the initiatives being undertaken by State and Territory governments: more detail is available in the respective submissions. The Social Justice Commissioner has also given an overview of the main framework agreements and partnerships between Indigenous organisations, ATSIC and State and Territory governments in his 2002 report.⁵⁹

58 CAR's Final Report, pp. 105-106

59 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Appendix 1.

Queensland

3.66 The Queensland Government advised that as part of its Reconciliation Action Plan it had consolidated COAG's three reporting categories, the CAR's four national strategies and its 'Ten Year Partnership's Key Outcomes for Reconciliation' into the following five fundamental areas of activity:

- equality of opportunity and quality of life;
- economic independence;
- new ways of doing business with government;
- maintaining the momentum for reconciliation; and
- leadership.

3.67 Under this plan the following initiatives had taken place:

- a communication campaign to elevate the status of reconciliation across the State;
- the development of the Premier's Reconciliation Awards for Business and Tourism;
- a Reconciliation Business Forum to facilitate the implementation of various partnership initiatives; and
- the establishment of an Indigenous leadership program.

3.68 In addition, the Queensland Government had funded the Secretariat for Reconciliation Queensland Inc in 2002-03 and had taken steps to address past injustices through compensation for under award wages and a reparations offer for wages and savings.⁶⁰ The offer includes a written apology from the Government to all living persons who had their wages and savings controlled and who are eligible to make a claim, parliamentary acknowledgment, new Government protocols for acknowledging traditional owners, and the progressive distribution of remaining monies in the Aboriginal Welfare Fund.⁶¹

Western Australia

3.69 The Western Australian Government's submission focused on those matters in which it has been closely involved with the Commonwealth, particularly those

60 But see Reconciliation Australia's *Submission 64*, attachment, *Words, symbols and actions – Reconciliation Report Card 2002*, p. 21 which states that “The amount offered as compensation to Indigenous individuals who laboured but went without wages is woefully inadequate.” ANTaR states that the offer has “onerous conditions attached which further deprive Indigenous workers of their right to pursue justice through the legal system.” See ANTaR media release of 8 August 2002, at <http://www.antar.org.au/mr080803.htm> accessed 1/09/03

61 *Submission 1*, pp. 1-2.

relating to outcomes of COAG and the Ministerial Council on Aboriginal and Torres Strait Islander Affairs (MCATSIA).

3.70 The Western Australian Government expressed its support for the development of the draft COAG Indigenous indicator framework (discussed in more detail in the next chapter), but cautioned that:

Unless there is common understanding of causes and agreement about policies to address the issues, the agreement on strategic areas will remain a largely symbolic one.

At present there is agreement on which areas require action but there is no agreement as to how to progress action in those areas.

...

The agreement remains at the higher level and has not been embedded in the policies and practices of departments and agencies within the jurisdictions. In this regard, the WA State Government agrees with the criticism of the Aboriginal Social Justice Commissioner.⁶²

3.71 The Government welcomed the focus of the COAG trial projects of developing new ways of working in a coordinated fashion around specific locations. While the project at Tjurabalan (in the East Kimberley) was still at an early stage, the Western Australian Government was keen to ensure that mechanisms were put into place so that successful strategies could be replicated in other areas and thus avoid future pitfalls. The Government went on to say:

In the long term, the aim of such a strategy should be to transform the relationship between Government and the Indigenous community as well as improving the effectiveness of Government's service provision. At present, there is no such long term strategy in place.

The priority projects are an example of the rhetoric of collaboration being put into practice. In other contexts such as the bilateral agreements between State and Commonwealth the commitment to collaboration is there in the agreement but in many cases significant obstacles to collaboration in practise remain.⁶³

3.72 The Government had entered an agreement on 10 October 2001, known as *Statement of Commitment to a New and Just Relationship*, with the Western Australian ATSIC State Council, supported by the Western Australian Aboriginal Native Title Working Group, Western Australian Aboriginal Community Controlled Health Organisation and the Aboriginal Legal Service of Western Australia. The agreement committed the parties to work together to build a new and just relationship

62 *Submission 77*, pp.2-3.

63 *ibid*, p. 4.

between the Aboriginal people of Western Australia and the Government of Western Australia.⁶⁴ The agreement states that:

The purpose of this statement is to agree on a set of principles and a process for the parties to negotiate a State-wide framework that can facilitate negotiated agreements at the local and regional level.

The shared objective is to negotiate a new approach in Aboriginal affairs policy and administration in Western Australia based on regional agreements.

The partnership framework aims to enhance negotiated outcomes that protect and respect the inherent rights of Aboriginal people and to significantly improve the health, education, living standards, and wealth of Aboriginal people.⁶⁵

Northern Territory

3.73 The Northern Territory Government advised that it had not formally responded to the CAR's final recommendations because many of the policies and program activities presently being pursued by the Government are consistent with the directions identified by the CAR and its successor Reconciliation Australia.⁶⁶

3.74 The Government stated that it had been an 'active participant' in COAG in developing the indicators framework, as well as taking part in the whole of government trial in Thamarrurr (Wadeye).⁶⁷ It stated that it:

is committed to greater inclusion of Indigenous people in all forms of decision making in the Territory. In its policy document "Labor's Plan 2001 – A Framework for Partnership with Indigenous Territorians", the government committed to establishing and pursuing processes through which to negotiate local and regional framework agreements with Indigenous groups. Such agreements will define appropriate levels of self-governance and arrangements for indigenous participation.⁶⁸

3.75 The Government advised the Committee of its recently released *Building Stronger Regions – Stronger Futures* strategy, which has two major themes:

strengthening the capacity of Aboriginal communities in governance and the acceleration of regional development. A cornerstone of the approach is the development of regional partnership agreements with regional authorities.⁶⁹

64 *ibid*, pp. 17-24.

65 *ibid*, p. 19.

66 *Submission 81*, p. 42.

67 *ibid*, p. 34.

68 *ibid*, p. 1.

69 *ibid*, p. 3.

3.76 The COAG trial being undertaken at Thamarrurr (Wadeye) was an example of this strategy. The Government envisaged that this trial would form a model for extension to other areas and would have as its core the establishment of effective governance arrangements and pooled funding.⁷⁰

3.77 The Government outlined other measures taken as part of the reconciliation process, particularly in education. The Northern Territory Curriculum Framework supports the inclusion of Indigenous Language and Culture programs in the school curriculum. The document was developed in conjunction with a wide range of teachers, Indigenous leaders and community members, tertiary institutions and employer bodies to ensure complete coverage of issues.⁷¹ Whilst it is not mandatory, many individual schools include significant events relevant to reconciliation in their school calendars and include appropriate Indigenous ceremony and protocol in official events. At the individual school level, particularly in remote Indigenous communities, school councils and Indigenous leaders organise suitable ceremonies for traditional or official occasions.⁷²

3.78 The Government advised that there is increasing recognition of reconciliation within the parliament as evidenced by the following matters:

- a traditional Aboriginal welcome at the opening of 9th Assembly;
- an apology to the Stolen Generations on 24 October 2001;
- acknowledgement of Traditional Owners by Legislative Assembly Members in their speeches;
- the first Community Cabinet in an Aboriginal community at Port Keats/Wadeye, with two of eleven Community Cabinets in 2002 held in Aboriginal communities; and
- agreement to examining issues relating to the implementation and a re-commitment to implementing the recommendations of the Royal Commission into Aboriginal Deaths in Custody.⁷³

South Australia

3.79 The South Australian Government advised that reconciliation was a ‘key component’ of its Social Inclusion and Community Development policies:

The South Australian Government is committed to fostering and building partnerships between community and government to further enhance service delivery to identified areas of need.⁷⁴

70 *ibid*, p. 17.

71 *ibid*, p. 34.

72 *ibid*, pp. 34-35.

73 *ibid*, pp. 34-35.

74 *Submission 83*.

3.80 As a member of COAG, the Government advised that it:

... is committed to progressing reconciliation with the aim of achieving a lasting settlement between Aboriginal people and other South Australians through fostering a greater degree of understanding and respect for different individual and community histories and cultures.

The South Australian Government is committed to work with all sectors of government and the community to address past wrongs and the disadvantages they have caused to Aboriginal people. It is recognised that much work is yet to be done to overcome any misunderstanding in the broader community as to the root causes of disadvantages endured by Aboriginal people. That misunderstanding is among the most significant barriers to reconciliation.⁷⁵

3.81 The Government said that fundamental to any progress in reconciliation was the need for the wider community to recognise that Aboriginal people were the original owners and occupiers of the land; that they were dispossessed without adequate benefit of treaty, agreement or compensation; and that they have a special relationship to their lands. The Government had commenced the process of handing back to traditional owners the Maralinga Tjarutja Lands in the far west of South Australia.⁷⁶

3.82 The South Australian Government has agreed to participate in a trial of whole-of-government approach in the Anangu communities. In addition to a partnering agreement with ATSIC, initiatives include:

- **Port Augusta Social Vision and Action Plan.** The City of Port Augusta prepared a report, *Shaping the Future*, following extensive community consultations. The report listed more than 140 recommendations (of which about one quarter were of specific significance to the Aboriginal community) to improve social wellbeing and reduce social problems in the city. The Department of State Aboriginal Affairs has undertaken a lead role in the development and implementation of the report, particularly in areas relevant to the Aboriginal community.⁷⁷
- **Rekindling Family Relationships.** Following a forum in April 2001, a Framework for Action was developed to provide a basis for the development and implementation of local community family violence action plans. The plans are developed and implemented through a community development approach. The framework 'outlines the principles upon which a government in partnership with the Aboriginal community can move forward in a commitment to provide

75 *ibid*, p. 1.

76 *ibid*, pp. 1-2.

77 *ibid*, p. 6.

holistic, collaborative support for Indigenous communities, determining and implementing local strategies to promote collective healing'.⁷⁸

- **Framework for Governance;** A project aimed at assisting local Aboriginal governing authorities to fulfill their governance role relating to 'local government-type services' by having regard to the nature of these services, the principles of good governance and relevant cultural issues.⁷⁹
- **South Australia Aboriginal Health Framework Agreement.** In 1996 the State Government entered into a Health Framework Agreement with the Commonwealth Department of Health and Ageing, the Aboriginal Health Council of South Australia and ATSIC to address the health inequalities of Aboriginal people in South Australia. This agreement enabled the Government to attract significant Commonwealth funding and was extended in 2001 for another three years. The reporting process under the agreement 'presents an inclusive response to the health priorities of Aboriginal people, ranging from the Department of Human Services advancing reconciliation to the Aboriginal health advisory committees supporting and promoting regional planning for health services'.⁸⁰
- **The Department of Human Services Reconciliation Plan 2002-2003;** The plan makes a commitment to the reconciliation agenda and incorporates the following Iga Warta principles into planning, policy and strategic development:
 - must be sustainable;
 - must be productive/preventative;
 - must address environmental health;
 - must encompass an Aboriginal community/family approach;
 - must respect Aboriginal space and time; and
 - must address the need for coordination/continuity between regions.⁸¹
- **Access to records** State Records of South Australia provides a service to Aboriginal people seeking access to state government records for the purpose of family reunification or 'rekindling of family relationships'. While the service began before the *Bringing Them Home* report was released⁸², it has since been given increased funding, and specific products to meet the needs identified in the report have been developed. Initiatives include the engagement of a second Aboriginal Access Officer; a video to inform the community of the service's existence; an outreach program; an administrative history and guide to records

78 *ibid*, p. 7.

79 *ibid*, pp. 7-8.

80 *ibid*, p. 8.

81 *ibid*, pp. 8-9.

82 Human Rights and Equal Opportunity Commission, *Bringing them home*, HREOC, Sydney, 1997 (into the policies of forced removal of Indigenous children).

relating to Aboriginal people; the signing of a Memorandum of Understanding with SA Link-Up to assist in providing information to clients; and the development of a name index with 70,000 entries drawn from the records of the Department of State Aboriginal Affairs.

Australian Capital Territory

3.83 In a very comprehensive submission, the Australian Capital Territory (ACT) Government advised that it was ‘working within the COAG framework to help develop a framework for reporting against key indicators of Indigenous disadvantage’.⁸³

3.84 The Government advised that about 65 separate Indigenous-specific programs are funded in the ACT. A Working Group on Optimising Service Delivery and Funding on Aboriginal and Torres Strait Islander Affairs has been established ‘to determine what the priority areas of expenditure should be, how the programs that are in place are operating, and how effective they are’. Further, ‘ACT agencies have been directed at the highest level to work directly with Aboriginal and Torres Strait Islander people in setting funding priorities and in developing policies and programs on a whole of government level’.⁸⁴

3.85 In relation to formal motions of support for documents of reconciliation, the Government advised that the ACT Legislative Assembly was the first Australian parliament to pass a formal motion of apology to the stolen generations on 17 June 1997.⁸⁵ On 24 May 2000, the Legislative Assembly resolved that the Chief Minister should notify the Prime Minister that the Assembly supported the adoption of the CAR’s Declaration Towards Reconciliation.⁸⁶

3.86 In February 2002, the ATSIC Board of Commissioners and the ACT Legislative Assembly signed a joint Statement of Intent. The meeting reaffirmed a commitment to:

- The National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders, an agreement signed by Heads of Government in 1992; and
- The outcomes of the November 2000 COAG communiqué on the matters of Aboriginal Reconciliation.

3.87 ATSIC and the ACT Government agreed to develop a partnering agreement (the Regional Agreement). Its purpose is ‘to improve social, economic and cultural outcomes for Aboriginal and Torres Strait Islander peoples’ in the ACT through greater coordination and collaboration between the two parties. Its vision is ‘that

83 *Submission 85*, p. 2.

84 *ibid*, p. 3.

85 *ibid*, p. 14.

86 *ibid*, p. 15.

Aboriginal and Torres Strait Islander peoples in their own communities and through their representative bodies will play the lead role setting directions and developing solutions and approaches to address issues affecting Aboriginal and Torres Strait Islander communities.⁸⁷

3.88 The ACT Government stated that it would support another attempt to introduce a preamble to the Constitution recognising Aboriginal and Torres Strait Islander peoples as the first peoples of Australia. It also supported the removal of section 25 of the Constitution which it considered to be ‘offensive, in that it implies that it would be valid for a State to exclude people from voting at elections on the basis of their race’.⁸⁸

3.89 The Government also advised that it ‘includes input from Aboriginal and Torres Strait Islander peoples into its decision making’ through various consultative mechanisms such as the United Ngunnawal Elders Council; the Working Group On Optimising Service Delivery and Funding on Aboriginal and Torres Strait Islander Affairs; the ACT Aboriginal and Torres Strait Islander Consultative Council; the Indigenous Education Consultative Body; the Aboriginal Justice Advisory Committee; and the Aboriginal and Torres Strait Islander Health Forum.⁸⁹

Victoria

3.90 The Victorian Government advised the Committee that it had been ‘actively pursuing and promoting reconciliation through a broad range of activities and initiatives, both symbolic and material’ since 1999:

In essence we believe the way forward requires a new approach that involves Aboriginal people defining their own issues and aspirations and working closely with Government to develop solutions. Government action to advance reconciliation needs to be responsive to these community-identified needs and should support community processes, build community capacity and develop Indigenous leadership.⁹⁰

3.91 The Government referred the Committee to *The Victorian Government Indigenous Affairs Report November 1999 - October 2002*. The report outlines a range of mechanisms to involve Indigenous Victorians in policy, strategy development and planning and the initiatives that have flowed from these mechanisms. The Government stated that the report is part of its commitment to report publicly on progress in Indigenous affairs and to provide a detailed account of the initiatives and expenditure in pursuing reconciliation. The Report contains an overview of the government’s progress on implementation of the recommendations in the CAR’s *Roadmap for Reconciliation*.

87 *ibid*, pp. 3-4.

88 *ibid*, p. 4.

89 *ibid*, p. 10.

90 *ibid*, p. 1.

3.92 On 31 May 2000, the Victorian Parliament held a special sitting on reconciliation at which Indigenous Victorians addressed the Parliament for the first time in the State's history. The Parliament unanimously passed a motion agreeing:

That this house –

- (1) welcomes and acknowledges this historic occasion where elders and other members of the Indigenous communities in Victoria have spoken about their history and the importance of achieving Reconciliation;
- (2) recognises the need for ongoing effort across all levels of government and the community to further progress the aims and objectives of reconciliation;
- (3) acknowledge the work and achievements of the CAR including its release of the Australian Declaration Towards Reconciliation, Corroboree 2000– Towards Reconciliation and Roadmap for Reconciliation; and
- (4) commits to respond to the Council's Corroboree 2000 – Towards Reconciliation and the Roadmap for Reconciliation on behalf of the people of Victoria.⁹¹

3.93 The Government advised that the Premier's Aboriginal Advisory Council has been established as the state's peak Indigenous advisory body to government and has played a key role in the negotiation and development of Victoria's reconciliation approach.

3.94 In *Growing Victoria Together* (September 2001), the Government set out its vision and key statement of priorities for the next decade. The document sets reconciliation between Indigenous and non-Indigenous Victorians as one of the Government's ten key challenges. The Government stated that by:

including and giving prominence to Reconciliation as a key challenge within the Growing Victoria Together framework, the Victorian Government has ensured that all areas of government are committed to contribute to the Government's overall objective of building positive links with Victorian Indigenous communities and working towards Reconciliation.⁹²

3.95 A two year grant of \$340,000 had been provided to establish Reconciliation Victoria, which would continue the work of the former Victorian State Reconciliation

91 Government of Victoria, Department of Natural Resources and Environment, *The Victorian Government Indigenous Affairs Report November 1999-October 2002*, p. 86.

92 *ibid*, pp. 87-88.

Committee by coordinating grassroots reconciliation activities and providing support to community based reconciliation groups across Victoria.⁹³

3.96 In relation to the CAR's national strategy to overcome Indigenous disadvantage, the Government advised that it was working at building partnerships with Indigenous communities with a new approach to policy development and program delivery that focuses on community led processes.⁹⁴

3.97 In relation to the economic development of Indigenous people, the Victorian Government said that while policy in this area has traditionally been led by Commonwealth agencies such as ATSIC, Indigenous Business Australia and the Department of Work Place Relations and Small Business, the Government 'has become progressively engaged in developing strategies for promoting Indigenous economic development and participation at a State level'.⁹⁵ Examples of its involvement in Indigenous economic development include the Koori Business Network, First Nations Credit Union and the Victorian Public Sector Indigenous Employment Strategy, known as Wur-cum barra:

'Wur-cum barra' addresses the Victorian Public Sector's goals dealing with systematic discrimination and promoting diversity within its workforce. Through this Strategy, Government will identify and respond to barriers to Indigenous employment and achieve targets for expanding the representation of Indigenous people throughout its workforce.

The key outcomes of this Strategy, such as a larger, more senior, more diverse skilled and representative Indigenous Victorian Public Sector staff and will strengthen the capacity of the Victorian Public Sector to work in partnership with Indigenous communities at all levels. In this sense, Government sees 'Wur-cum barra' as underpinning the achievements of its broader goals of providing services and support that strengthen Victorian Indigenous communities and culture'.⁹⁶

3.98 In relation to promoting recognition of Aboriginal and Torres Strait Islander rights, the Government stated that its Indigenous Affairs Policy, *Reconciliation and Respect* (September 1999), has a strong focus on acknowledging and protecting the rights of Indigenous people. Some key initiatives undertaken are:

- ***Racial and Religious Tolerance Act 2001***. In developing this Act, consultations took place between the Premier's Aboriginal Advisory Council and the Indigenous community.
- **Native Title Policy**. During 2000-2001 the Government released a Native Title Policy which gives priority to mediating the settlement of native title claims. The

93 *ibid*, p. 88.

94 *ibid*, p. 89.

95 *ibid*, p. 90.

96 *ibid*, p. 91.

Native Title Unit of the Department of Justice developed the Guidelines for Native Title Proof for Victoria, which provides information to claimant groups about the nature of evidence required to progress a native title claim through negotiation.

- **VicHealth – Indigenous Leadership Programs.** In late 2000 the *Promotion of Emotional and Spiritual Wellbeing in Koori Communities Program* was developed following comprehensive consultations with key Indigenous leaders and academics. The development of the program was based on the following four crucial principles:
 - the acknowledging of history and strengthening of culture;
 - the importance of community control of initiatives;
 - the work of communities towards self determination; and
 - the need to address the underlying determinates of emotional and spiritual well-being within the long term framework, avoiding a short term ‘band aid’ response.⁹⁷

3.99 Representatives of the National Sorry Day Committee also praised Victoria’s efforts in relation to the ‘stolen generations’:

The Victorian government has presided over the establishment of a stolen generations association in Victoria. That is the first time that there has been a dealing with the stolen generations as a group of people who need to be addressed and who need to be heard. That has been a great plus.⁹⁸

Tasmania

3.100 The Tasmanian Government advised that it has a ‘strong commitment to Aboriginal reconciliation and has been actively promoting the reconciliation process both within Tasmania and nationally’. Part of this commitment has been its support for the objectives of the COAG Framework on Aboriginal Reconciliation.⁹⁹

3.101 Initiatives being undertaken in Tasmania in support of Aboriginal reconciliation include the development of a “whole-of-government policy framework to guide the future provision of services to Indigenous Tasmanians,”¹⁰⁰ which aims to enhance access by the Tasmanian Aboriginal community to services provided by the State Government. A Partnership Agreement between ATSIC and the Tasmanian Government in 2001 focuses on practical measures to reduce disadvantage, and Local

97 *ibid*, pp. 92-93.

98 Reverend John Brown, Co-chair, National Sorry Day Committee, *Committee Hansard*, 15 May 2003, p. 111.

99 *Submission 73*, pp.1-2.

100 *Submission 73A*, p. 1.

Government Partnership Agreements are being negotiated which will work to address issues such as employment opportunities at the regional and local level.¹⁰¹

3.102 The Tasmanian Government submission indicated several other initiatives, and gave details about the “Tasmania Together” plan, which includes goals and benchmarks specifically targeted at improved outcomes for Indigenous Tasmanians.¹⁰²

New South Wales

3.103 No submission was received from the New South Wales government, despite repeated contact. The Committee notes its strong disappointment at the lack of response.

3.104 The New South Wales Reconciliation Council told the Committee that the NSW State Government had provided it with \$114,000 for annual running costs, and had allocated to the Council in the 2001-02 budget ‘another \$100,000 each year for the next four years to put in place some specific programs’.¹⁰³

Aboriginal and Torres Strait Islander Commission

3.105 The Aboriginal and Torres Strait Islander Commission (ATSIC) is Australia's peak Indigenous body. It was established by the *Aboriginal and Torres Strait Islander Commission ACT 1989*, and its functions are:

- to formulate and implement programs for Aboriginal and Torres Strait Islander people;
- to monitor the effectiveness of programs, including those conducted by other agencies;
- to develop policy proposals to meet Indigenous needs and priorities;
- to assist, advise and cooperate with Indigenous communities, organisations and individuals; and
- to advise the Minister on Indigenous matters, including the administration of legislation and the coordination of activities undertaken by other Commonwealth agencies that affect Indigenous Australians.¹⁰⁴

3.106 ATSIC has been an integral part of partnerships and agreements developed between governments and Indigenous people, including the COAG whole-of-government trials in Indigenous communities around Australia.

3.107 Administrative changes in June 2003 separated ATSIC’s administrative arm from its policy development arm, and created a new agency — Aboriginal and Torres

101 *Submission 73A*, p. 2-3.

102 *Submission 73A*, p. 1.

103 *Committee Hansard*, 4 April 2003, p. 15.

104 Aboriginal and Torres Strait Islander Commission *Annual Report 2001-2002*, p. 3.

Strait Islander Services (ATSIS) — to administer ATSIC's programs and make decisions about the allocation of ATSIC grants.¹⁰⁵ At the time of this report, a Government review of ATSIC is underway, exploring a number of issues and options for the future of ATSIC.¹⁰⁶ Comments made in this report reflect evidence received by the Committee prior to the June 2003 administrative changes.

3.108 ATSIC's annual budget is approximately \$1.2 billion¹⁰⁷, of which a high proportion (approximately 82 per cent) is earmarked for two specific areas. The first is economic development and includes the Community Development Employment Projects (CDEP), an employment, training and community-development program that began in 1977. The second area of expenditure is geared towards the improvement of Indigenous people's social and physical wellbeing, and includes the Community Housing and Infrastructure Program (CHIP).¹⁰⁸ The remaining expenditure is allocated to a range of programs, including grants to local Indigenous groups to resource specific local needs.

3.109 ATSIC's budget represents about half the Commonwealth's allocation for Indigenous-specific expenditure,¹⁰⁹ with Commonwealth agencies making up the remainder in areas such as primary health care (the Department of Health and Aged Care), and public housing via the Aboriginal Rental Housing Program (Department of Family and Community Services). Despite having responsibility for only half the total expenditure, and despite the quarantining of most of ATSIC's budget for economic development projects like CDEP and CHIP, ATSIC finds itself defending claims of irresponsible expenditure. As one commentator has pointed out, ATSIC:

... is hampered by its media image as a wasteful billion dollar organisation that is not contributing to improvements in the lives of Indigenous people.¹¹⁰

105 Angela Pratt, Department Of The Parliamentary Library Current Issues Brief No. 29 2002–03, "Make or Break? A Background to the ATSIC Changes and the ATSIC Review", p. 1.

106 See *Review of the Aboriginal and Torres Strait Islander Commission: Public Discussion Paper*, June 2003. The Review Panel members are the Hon John Hannaford, the Hon Bob Collins and Ms Jackie Huggins AM.

107 This is the projected expenditure for 2002-03 according to 'Identifiable Commonwealth Indigenous Expenditure', *Indigenous Affairs Budget 2003*, Office of Aboriginal and Torres Strait Islander Affairs, Department of Immigration and Multicultural and Indigenous Affairs, p. 1.

108 A third portion of the ATSIC budget is allocated to the 'Advancement of Indigenous Rights and Equity' output group, and is largely related to native title activities. See Angela Pratt, Department Of The Parliamentary Library *Current Issues Brief* No. 29 2002–03, "Make or Break? A Background to the ATSIC Changes and the ATSIC Review" p. 12.

109 ATSIC fact Sheet 'Where has the Money Gone', at http://www.atsic.gov.au/news_room/fact_sheets/money.asp accessed 16/09/03.

110 Crough, Greg, 'A Practical Critique of Practical Reconciliation', *Australian Universities Review*, Vol. 45, No. 1, 2002, p. 7.

3.110 The Committee considers that ATSIC's role in advocating and representing the views of Indigenous people means that it has a significant part to play in the reconciliation process. In its *Annual Report 2001-2002* the then Chairman stated that ATSIC has pursued an Indigenous rights agenda since its inception, and advocates Indigenous rights both nationally and internationally.¹¹¹ In his report the Chairman stated that he believed 'the principal challenge for the next ATSIC Board and all who have the sincere desire to see real progress for Indigenous Australians' was to reconcile the goals of eliminating disadvantage of Indigenous people and the need to recognise Indigenous rights.¹¹² ATSIC has been an advocate of a treaty as a key part of the reconciliation process, and has described the rejection of a treaty as one of the major deficiencies of the Commonwealth Government's response to the CARs Final Report.¹¹³

3.111 Despite the scrutiny ATSIC was under due to the current review, the then ATSIC Deputy Chair told the Committee that:

ATSIC is willing to continue to work with the Commonwealth on practical reconciliation. However we note that these measures alone will not result in true or full reconciliation. There also needs to be a focus on the fundamental rights of Aboriginal and Torres Strait Islander people in order to develop an inclusive Australia that acknowledges the mistakes of the past and is proud of its heritage.¹¹⁴

3.112 The Government has indicated it 'believes it is important for ATSIC to share the leadership on agreement-making as a vehicle for self-empowerment' but that

it does not believe ATSIC should be handed or expected to take on sole-responsibility. This is because agreement-making requires the willing participation of governments under the rubric of partnership of shared responsibility.¹¹⁵

3.113 With regard to monitoring Indigenous programs, the Government has argued that:

ATSIC has as one of its legislative functions a responsibility to monitor the effectiveness of programmes for Aboriginal persons and Torres Strait Islanders, including programmes conducted by bodies other than the

111 *ATSIC Annual Report 2001-2002*, pp. 26-27.

112 *ibid*, p. 34.

113 *Submission 80*, p. 3. The Committee notes there are different views within ATSIC on this issue. Acting Chairman Lionel Quartermaine has been reported as saying that a treaty was not on his agenda, but Tasmanian Commissioner Rod Dillon is quoted to have said there are "a lot of commissioners who are terribly interested in having a treaty... and... a lot of Aboriginal people who are interested too." See "Treaty still on agenda: ATSIC", *The Canberra Times* 30 August 2003, p. 16.

114 *Committee Hansard*, 15 May 2003, p. 115.

115 *Submission 75*, p. 8.

Commission. The Government therefore considers that ATSIC has an existing and fundamental role in relation to monitoring disadvantage.¹¹⁶

3.114 However, one submission to the inquiry pointed out that:

ATSIC does not have powers to compel other agencies of government to report, in a meaningful way, on outcomes that Indigenous Programs and services are designed to deliver.¹¹⁷

3.115 ATSIC representatives were also generally critical of the extent to which the organisation had been asked to be involved in terms of progressing reconciliation, then Deputy Chairman Mr Ray Robinson stating:

... I think we are only a minor player so far in this reconciliation process. There has not been much negotiation or contact with us at all in this regard ... I think we should play a major role, as we should play a major role in all government agencies that have some responsibility for the lives of Indigenous people. But that is not the case at the moment, and the minister has not helped ATSIC achieve those aims of moving us down that line.¹¹⁸

3.116 Commissioner Cliff Foley expressed similar views:

We are a national statutory body fully elected from all communities throughout Australia. Our networks have community based connections. We can draw on that and we can report on that. We have a better handle probably than all the other Commonwealth and state agencies. Given that responsibility ... we need to be able to report on that properly. Our funds are supplementary. The major program deliverers are the other major departments around the place and they do not have to consult ATSIC and they should do because we believe, in terms of our submission to the review, that we have a role to play—and a major role if this government wants to pursue reconciliation.¹¹⁹

Local government

3.117 The CAR's Final Report stated that local governments were critically important 'because of their on-the-ground presence, their potential for local leadership and their role as managers of social and physical infrastructure'.¹²⁰

3.118 In his *Social Justice Report 2001*, the Social Justice Commissioner reported that the national representative body for Australia's 698 local authorities, the ALGA,

116 Commonwealth Government Response to CAR's Final Report, September 2002, p. 14.

117 *Submission 27* from ACOSS, p. 5, quoting Perkins, C. et. al. (1995) *Recognition Rights and Reform: A report to Government on Native Title Social Justice Measures*, Council for Aboriginal Reconciliation and ATSIC, Canberra.

118 *Committee Hansard*, 15 May 2003, p. 122.

119 *ibid.*

120 CAR's Final Report, p. 39.

had made a range of commitments to reconciliation and native title in its National Agenda for Australian Local Government of October 2001:

- endorsement and support for CAR's vision of 'a united Australia which respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all';
- support for recognition of Aboriginal and Torres Strait Islander cultures in the Australian Constitution;
- recognition of the Aboriginal flag and Torres Strait Islander flag;
- acknowledgement at civic events that Aboriginal peoples and Torres Strait Islanders are the original occupants of Australia;
- commitments for local government to achieve by 2010 the implementation of the National Strategies to Address Aboriginal and Torres Strait Islanders Disadvantage and the National Strategy to Sustain the Reconciliation Process; a review of tourism literature to ensure the inclusion of local Aboriginal and Torres Strait Islander history; and a review of all public library collections to ensure that Indigenous issues are portrayed in a culturally appropriate and accurate manner;
- expression of deep and sincere regret at the hurt and distress caused by policies which forcibly removed Aboriginal children from their families and homes and a commitment to making all necessary records and assistance available to aid the victims of these policies;
- ensuring that local Aboriginal and Torres Strait Islanders' needs, aspirations and cultural and spiritual values are taken into account in planning processes;
- ensuring that the traditional owners of land are consulted and actively involved in environmental planning and management processes; and
- recognition of the validity of native title in a variety of ways.¹²¹

3.119 The Social Justice Commissioner also identified 38 Councils that had made national statements of commitment, and in some cases, apologies.¹²²

3.120 Unfortunately the Committee received little evidence during this inquiry on local council activities. However, the Committee agrees with the CAR's assessment that local governments have an important and valued role to play in the reconciliation process. The Committee is pleased to see that many councils have already taken steps and would encourage them to continue. For those councils that have not yet commenced the journey, the Committee strongly urges them to do so.

121 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, pp. 242-243.

122 *ibid*, pp. 243-244.

Local and community-based reconciliation groups

3.121 In its Final Report, the CAR described the people's movement as 'one of the most celebrated outcomes' of its work:

Reconciliation has begun to enter the hearts and minds of the Australian people creating one of the most determined and vibrant people's movements ever seen in the history of the nation ...

The people's movement is committed to building better relations between Aboriginal and Torres Strait Islander peoples and the wider Australian community. Achieving this through local communities is one of the main objectives of reconciliation.

Since its early days the Council has encouraged local activity including the establishment and development of local reconciliation groups. These groups have been tremendous sources of community information. They partly formed as a response to Council's Study Circles that were introduced across the country with the assistance of the Australian Association of Adult and Community Education ...¹²³

3.122 The Committee was pleased to receive many submissions from community groups detailing their participation in the reconciliation process. As discussed in more detail in Chapter 2, while some submissions were enthusiastic about what they have been able to achieve, others expressed doubts about the future of the reconciliation process due to the Government's approach. In particular, the lack of financial support for local and community reconciliation groups has greatly affected their ability to provide educative materials, carry out research and publish results.

3.123 A submission from former coordinators of Australians for Reconciliation stated that they were the grassroots community resource which provided the initial support and catalyst for change.¹²⁴ However, the formal structures that were once in place no longer existed and their work now is as ordinary members of the community.

3.124 The submission went on to say that:

The pathway provided by the CAR is still being followed but it is not being supported.

Currently the work is undertaken by under-resourced and supportive volunteers, many of which are losing their spirit due to lack of State and Federal leadership.¹²⁵

123 CAR's Final Report, pp. 60-61.

124 *Submission 29*, p. 2. They stated that the CAR had set them up as 'a key tool by which to build community understanding of the key issues needing to be addressed through the reconciliation process.'

125 *ibid*, p. 7.

3.125 The former coordinators argued that the lack of Commonwealth leadership was adversely affecting change on an individual level:

In a number of states and territories where we previously worked, we can show that the governments have taken up important issues. These actions however, have been undertaken in such a way that the notion of individual self awareness and personal understanding of Indigenous culture, issues and practice no longer is one for which there is any personal responsibility. It is easy to lapse into a way of behaviour which leaves the key matters to do with Indigenous people 'in the hands of government'. It is a key outcome of the previous 10 years of effort by the CAR that this significant trap was avoided. The efforts of the CAR and associated infrastructure resulted in many individuals willing to learn about their local community and the Indigenous history in their back yard. This is a side of reconciliation that appears to be most at risk because of the present policies.¹²⁶

3.126 They recommended that Reconciliation Australia and state reconciliation bodies be resourced and adequately supported to provide the required proactive leadership.¹²⁷

3.127 Professor Mick Dodson, while agreeing that 'what is missing is any direction or leadership at the federal government level', had a somewhat more optimistic view on the progress of reconciliation within the community:

... there is still a lot happening out there at all sorts of levels, particularly at a local community level. I have been involved in many of these things. No week goes past without at least one request to be involved in a community reconciliation group of one sort or another. People are pursuing this dream of ours that the nation ought to come to some sort of reconciliation, that they ought to address outstanding issues that are of particular concern to Indigenous Australians but which are of concern to many other Australians as well.¹²⁸

3.128 The national body ANTaR was another of the catalysts of the people's movement for reconciliation, particularly through the *Sea of Hands* activities and through ongoing community education work.¹²⁹ ANTaR argued:

Ironically, the people's movement is one of the few areas in which the Government has (unintentionally) helped advance the reconciliation process. This is because the outrage and despair about the backward-looking agenda of the Government has helped galvanise individual Australians on the need to personally support the reconciliation process.¹³⁰

126 *ibid*, p. 6

127 *ibid*, p. 7.

128 *Committee Hansard* 14 May 2003, p. 84.

129 *Submission 40*, p. 2.

130 *ibid*, p. 12.

3.129 ANTaR's National President, Mr Philip Glendenning, told the Committee that:

ANTaR receives no government funding, and is funded instead from donations from ordinary Australian people. This is a significant achievement, given that ANTaR is a mainly voluntary organisation and does not have tax-deductible donation status.¹³¹

3.130 However, ANTaR expressed concern at the 'de-funding of reconciliation':

It is hard to imagine that the reconciliation process could have progressed as far as it has without what has been termed the people's movement for reconciliation. Events such as the bridge walks of 2000, the Sea of Hands and the estimated million people who signed the Sorry Books have been unprecedented in Australia's history. The people's movement has led many, including the Prime Minister, to conclude that reconciliation is now an unstoppable force.

Whether or not that's the case, even a force as great as the people's movement needs to be nurtured, and this requires both long-term commitment and adequate resources. It needs milestones, such as Corroboree 2000, to celebrate and mark progress along the road. ANTaR is concerned that both the massive de-funding of reconciliation and the abandonment of a formal reconciliation process under the current Government will impede the spread of the message of the people's movement further into the general community.¹³²

3.131 One local reconciliation group, the Eurobodalla Walking Together Group, considered that:

... an emphasis on community engagement is important in ensuring that local issues are realistically taken into account in carrying out [CARs] recommended actions. Local social justice and reconciliation groups have in the past, and should in the future, make a significant role contribution to the community changes that are called for in the 'Roadmap for Reconciliation'. Building on the network of Local Reconciliation Groups would be valuable in using the Peoples' Movement and its links with the Aboriginal community in a very positive way.¹³³

3.132 The New South Wales Reconciliation Council (NSWRC), which is the peak body for reconciliation in New South Wales and comprises some 58 local reconciliation groups (lrgs), told the Committee that the demise of the CAR and its 'substantial education, resources and project budget' has had a profound effect on the

131 *Committee Hansard* 24 June 2003, p.236. Mr Glendenning described ANTaR as 'a fiercely independent organisation, free from political, governmental and corporate influence'.

132 *Submission 40*, p. 12.

133 *Submission 70*, p. 2.

NSWRC and local reconciliation groups in that State, as the NSWRC receives no federal funding and no resources from Reconciliation Australia:

The NSWRC is unable to provide funding for lrg projects, cannot sustain a resources/promotions budget, and does not have funds to conduct research and publish its findings.

[Reconciliation Australia] is unable to provide state Councils and lrgs with publications and resources to promote reconciliation. There are no educational materials that deal directly with reconciliation available for distribution in the community; no national monthly publication outlining reconciliation initiatives and Learning Circle Kits are out of print. The NSWRC has a limited budget for promotional material that is clearly inadequate to meet community demand.

This means lrgs and other volunteers are unable to work effectively for reconciliation in their communities. The consequences are stark at the local level - loss of volunteers, loss of community understanding, loss of community well being.¹³⁴

3.133 The NSWRC said that a one-off grant to Reconciliation Australia ‘and the creation of Reconciliation Place will do nothing to sustain and little to enhance and further the national reconciliation process’:

The NSWRC and lrgs rely on information from [Reconciliation Australia] about monitoring of federal government processes and responses and implementation of recommendations. [Reconciliation Australia] is inadequately funded and ill equipped to carry out this task and it carries no legislative power. Therefore NSW state bodies and lrgs are no longer reliably or effectively informed of federal government action.¹³⁵

3.134 The Committee recognises the importance of local and community-based groups in the reconciliation process. It is clear that these groups need resources to assist them in their work, particularly in their educative role. While this support was available under the CAR, through its distribution of booklets and general information, this is no longer the case. The Committee believes that the Commonwealth Government should provide adequate funding to meet the needs of community reconciliation groups if reconciliation is to progress.

The ‘stolen generations’

3.135 The report of the Human Rights and Equal Opportunity Commission’s national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families, *Bringing them home*, was not part of the Committee’s terms of reference. However, the Committee received several submissions on the report’s recommendations and the response to them.

134 *Submission 42*, p. 2.

135 *ibid.*

3.136 The Committee has previously examined in some depth the Commonwealth Government's implementation of those recommendations¹³⁶ and made a series of recommendations, including that the Commonwealth and State and Territory governments should commission an independent evaluation of the progress of initiatives implemented in response to the report.¹³⁷ Consequently the Committee has not re-examined those issues in detail during this inquiry.

3.137 Nevertheless, the Committee acknowledges the submissions that argued that there was still much to do for the 'stolen generations' as part of the process of reconciliation, including the following:

The failure of the Federal Government to respond to so many of the recommendations has been a serious disappointment. While welcoming the response that has been made, members of the stolen generations remain bewildered and hurt at the lack of commitment which they believe indicates a reluctance to accept as truth what they have revealed of their experiences.¹³⁸

Many members of the Stolen Generations are sceptical of the national reconciliation process and say that justice has to occur before reconciliation can begin ... there has to be a formal apology by the Federal Parliament and a proper acknowledgement of the past ...¹³⁹

3.138 Those sentiments echo the more general concerns that the focus on 'practical reconciliation' ignores other important parts of the picture.

The Committee's conclusions

3.139 Although the Committee supports the Commonwealth, State and Territory governments' initiatives to reduce Indigenous disadvantage (particularly those under the COAG framework), it is concerned that progress is slow.

3.140 Further, the Committee agrees with the strong views expressed in many submissions and by many witnesses who appeared before it that true reconciliation involves much more than the Commonwealth Government's 'practical reconciliation' approach allows. It involves all of the matters contained in the CAR's *Australian Declaration Towards Reconciliation* and *Roadmap for Reconciliation* and its six

136 Senate Legal and Constitutional References Committee *Healing: A legacy of generations*, November 2000.

137 *ibid*, Recommendation 1. The Commonwealth Government response to the Committee's report supported the recommendation but noted that MCATSIA was responsible for monitoring progress of all jurisdictions in implementing responses to the *Bringing them home* report (*Federal Government Response to Healing: A legacy of generations*).

138 National Sorry Day Committee *Submission 8*, p. 14. The submission provides a detailed summary of progress towards implementing the recommendations of the *Bringing them home* report.

139 Bringing Them Home Committee (WA) Inc, *Submission 57*, p. 2.

recommendations on how to give effect to these matters. These have been variously referred to as ‘unfinished business’. In Chapter 5 the Committee considers in more detail evidence as to how that unfinished business might be addressed.

3.141 The Committee agrees with the CAR that ‘True reconciliation will require concerted efforts in all spheres of our nation’s life’. This not only includes governments at all levels, be it federal, state, territory or local, but also business organisations, local community groups and individuals. However, it is clear from the evidence received by the Committee that, unless there is commitment and support for reconciliation at the national level, the prospects of achieving ‘true reconciliation’ will be greatly diminished if not extinguished. The Committee considers that there is clear evidence of a strong desire for, and demonstrated need for, greater national leadership. The only body that can effectively do that is the Commonwealth Government.

3.142 In the next chapter, the Committee considers in more detail evidence it received about the need for adequate benchmarking, monitoring and evaluation. However, as the CAR pointed out in its *Roadmap for Reconciliation* and *National Strategies to Advance Reconciliation*, reconciliation involves much more than practical matters: it also involves cultural and spiritual matters. The Committee considers that it is essential that the Government recognise the importance of these matters to Indigenous people, and take the necessary steps to ensure that they are addressed and given as much prominence as ‘practical’ matters in the overall reconciliation process.

3.143 The Committee accepts that not all matters identified by the CAR can be achieved overnight. However, if these matters are to be progressed and true reconciliation achieved there must be leadership at the national level. If not, it will surely fail.

CHAPTER 4

BENCHMARKING, MONITORING AND EVALUATION

..... it appears to be just talk at a higher level, but nothing is in place to make sure that [reconciliation] is actually being progressed.¹

Introduction

4.1 A particular area of interest to the Committee during this inquiry was the adequacy and effectiveness of any targets, benchmarks, monitoring and evaluation mechanisms that have been put in place to address Indigenous disadvantage and promote reconciliation (term of reference 2(c)).

4.2 Many submissions pointed to the need to measure systematically the performance of the many programs aimed at addressing Indigenous disadvantage. Reconciliation Australia pointed out that:

.... it is crucial to both recognise the contribution of and distinguish between:

- good intentions;
- frameworks and policies for implementing those intentions;
- programs developed and delivered within those frameworks and policies; and
- actual outcomes achieved resulting from the implementation of programs.²

4.3 This chapter looks at the progressing and benchmarking of reconciliation. It considers:

- what should be benchmarked;
- criticisms of current service delivery and funding arrangements; and
- initiatives being undertaken to put in place monitoring and evaluation mechanisms.

What is benchmarking and what should be benchmarked?

4.4 The CAR defined a benchmark as ‘an agreed standard or target which reflects community aspirations that either have been met or are desirable to be met’.³ Another definition is ‘an example of a “state of affairs” (a practice, process, or output) that is

1 Ms Lynette Riley-Mundine, Chairperson, NSW Reconciliation Council, *Committee Hansard*, 4 April 2003, p. 21.

2 *Submission 64*, p. 8.

3 Council for Aboriginal Reconciliation, *Towards a benchmarking framework for service delivery to Indigenous Australians*, CAR and Centre for Aboriginal Economic Policy Research, ANU Canberra, 1998, p. 16.

demonstrably among the best of its type'.⁴ Benchmarking itself can be defined as 'a systematic process for implementing improvements based on learning from examples of good practice'. 'Improvements' can encompass 'incremental change, major steps and innovations'.⁵

4.5 In the debate over benchmarking progress towards reconciliation, discussion has centred on progress towards addressing Indigenous disadvantage, that is, the measurement and evaluation of outcomes in areas such as health, housing, employment and education.

4.6 Several submissions to the inquiry emphasised that it was impossible to address Indigenous disadvantage without looking at the wider rights issues. Some have argued that Indigenous Australians will have little chance of overcoming the high levels of poverty, unemployment and poor health if they are not empowered to control their own destinies, through capacity-building and self-governance. Reference was made to the Harvard Project in Northern America, which has found strong links between self-governance and self determination, and the capacity to achieve long-term positive outcomes for Indigenous people.⁶

4.7 Most of the work being done at present is on benchmarking of service delivery aimed at addressing Indigenous disadvantage, and that is the focus of this chapter. Benchmarking of non-service delivery aspects of reconciliation is briefly discussed at the end of the chapter.

Background to service delivery

4.8 The severe disadvantage experienced by many Indigenous Australians in areas such as health, housing, employment and education is outlined elsewhere in this report.⁷ Services are provided to Indigenous people through a multitude of programs, provided by all levels of government (Commonwealth, State/Territory and local), and funded in a variety of ways. As indicated in Chapter 3, the primary service providers are the States and Territories, but many services are provided through pooling of funding from some or all spheres of government including ATSIC. Some services are provided through mainstream programs, and others through Indigenous-specific programs.

Commonwealth Grants Commission Report on Indigenous Funding

4.9 Submissions to this inquiry generally did not address in great detail the arrangements for funding of Indigenous programs. However, funding for Indigenous

4 Royal Melbourne Institute of Technology website <http://www.planning-quality.rmit.edu.au/benchmarking.htm> accessed 16 April 2003.

5 *ibid.*

6 *Submission 4*, Gilbert and Tobin Centre of Public Law; *Submission 64A*, Reconciliation Australia.

7 See Chapter 2.

needs was the subject of a comprehensive inquiry by the Commonwealth Grants Commission ('the Commission') which reported in 2001 and which has been a valuable source of information for the Committee.⁸ This inquiry has not attempted to cover Indigenous funding arrangements in depth, but has drawn on information in the Grants Commission report.

4.10 The report outlined the primary sources of funds for Indigenous service delivery:

- Mainstream programs
 - Commonwealth mainstream programs — includes direct payments to individuals and specific purpose payments (SPPs)⁹ to the States or local government.
 - State and local government mainstream programs — funded from their own revenues and untied funding from the Commonwealth.
- Indigenous-specific programs
 - Commonwealth Indigenous-specific programs — funded partly through Commonwealth own-purpose outlays and partly through SPPs; includes all ATSIC programs.
 - State and local government Indigenous-specific programs — funded from their own revenues and untied funding from the Commonwealth.

4.11 One of the key findings of the Commission's inquiry was that Indigenous people experience entrenched levels of disadvantage compared to non-Indigenous people, but that despite this, Indigenous Australians do not access mainstream services at a higher level than non-Indigenous Australians. In fact, they access mainstream services at very much lower rates than non-Indigenous people, and certainly at much lower rates than would be expected for a group with such high levels of disadvantage. This was true for all regions of Australia.¹⁰

4.12 The Commission also found that:

8 Commonwealth Grants Commission, *Report on Indigenous Funding*, Canberra, 2001.

9 Specific Purpose Payments or SPPs are made under section 96 of the Constitution, whereby the Parliament may grant financial assistance to any State on such terms and conditions as it sees fit. Most SPPs are paid to the States on the condition that certain policy objectives are met. Those policy objectives are sometimes set by the Commonwealth, and sometimes agreed between the Commonwealth and the States. It is because of the conditions attached to SPPs that they are sometimes called 'tied grants'. The conditions imposed on individual SPPs vary considerably in both degree and form. They may involve a requirement that the payment be expended for a specified activity. The Commonwealth has the capacity to impose conditions ranging from reporting requirements to fund-matching requirements.

10 Commonwealth Grants Commission, *Report on Indigenous Funding*, Canberra, 2001, pp. xv and xvii.

The mainstream programs provided by the Commonwealth do not adequately meet the needs of Indigenous people because of barriers to access. These barriers include the way programs are designed, how they are funded, how they are presented and their cost to users.¹¹

4.13 The Commission pointed out that Commonwealth Indigenous-specific programs:

... are intended to provide targeted assistance to Indigenous people to supplement the delivery of services through mainstream programs. These programs are a recognition of the special needs of Indigenous people associated with, and in response to, their levels of disadvantage.¹²

4.14 Despite this, the Commission found that:

The failure of mainstream programs to effectively address needs of Indigenous people means that Indigenous-specific programs are expected to do more than they were designed for and, as a consequence, focus less on the disadvantaged.¹³

4.15 The Commission acknowledged the complexity of issues surrounding the allocation of funds to meet Indigenous need. Several important principles were identified to better align funding with needs, including:

the full and effective participation of Indigenous people in decisions affecting funding distribution and service delivery

ensuring a long term perspective to the design and implementation of programs and services, thus providing a secure context for setting goals

improving the collection and availability of data to support informed decision making, monitoring of achievements and program evaluation

recognising the importance of capacity building within Indigenous communities.¹⁴

Specific Purpose Payments

4.16 The Grants Commission noted the major role played by States and Territories in service delivery, and explored the role of the Commonwealth in influencing relevant State programs, including through specific purpose payments (SPPs). The Commission suggested that the Commonwealth should be:

11 *ibid*, p. xvii.

12 *ibid*.

13 *ibid*.

14 *ibid*, pp. xviii-xix.

... introducing and enforcing additional conditions for both mainstream and Indigenous-specific SPPs, such as data collection, mandating performance reporting, Indigenous-specific performance criteria and greater Indigenous involvement in decision making; and

seeking extra conditions that target some of the expenditure of mainstream SPPs to aspects of the services that are important to Indigenous people.¹⁵

4.17 The Committee notes that the Commonwealth Government has responded positively to these suggestions, agreeing that:

... as the current SPPs are renegotiated where practicable the renewed SPPs will seek to include clear Commonwealth objectives and associated reporting requirements in respect of inputs and regional outcomes for Indigenous Australians.¹⁶

4.18 Some findings of the Commission do suggest, however, that SPPs are an imperfect tool for influencing the effectiveness of Indigenous funding. For example, it found:

Once in the hands of the States, the Commonwealth has limited influence over the regional allocation of mainstream SPP funds, apart from the effects of any conditions it has attached to the payments under the agreements negotiated with the States.¹⁷

4.19 The Commission also found that stakeholders had concerns with arrangements for SPPs. Indigenous organisations argued:

that the purposes for which SPPs are paid are often too restrictive and, because of the different circumstances faced by Indigenous communities, not always equally relevant in all regions.¹⁸

4.20 The States had argued:

that SPPs should be based on agreed objectives and require outcome-based reporting. They have a strong wish to move away from what they see as the narrow and inefficient conditions on how they should spend the funds.¹⁹

15 *ibid*, p. xx.

16 Government response to Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, June 2002.

17 Commonwealth Grants Commission, *Report on Indigenous Funding*, Canberra, 2001, p. 71.

18 *ibid*, p. 66.

19 *ibid*, p. 67.

Other funding issues

4.21 The Grants Commission inquiry identified shortcomings in the funding of Indigenous-specific programs. It found that arrangements were often ineffective because programs were funded:

- for short periods;
- in small components;
- subject to changing priorities;
- under inflexible conditions; and
- with reporting and administrative requirements that were burdensome and not funded.²⁰

4.22 The lack of coordination between different levels of government in funding of programs was another issue recognised by the Committee. A recent performance audit by the Australian National Audit Office (ANAO) supported the Grants Commission's finding that Indigenous-specific programs are expected to do more than they were designed for. The ANAO report stated that:

Throughout the course of the audit, the ANAO found limited evidence that the ATSIC grants program upholds ATSIC's role as a supplementary funder. That is, ATSIC programs often substitute rather than supplement funding from other agencies.²¹

4.23 This finding was supported by evidence during this inquiry. A submission from ATSIC Commissioner Mr Kim Hill of the Northern Territory pointed out that ATSIC's Municipal Services Program 'is accessed by many local governing bodies in the Territory simply because funding from the Northern Territory and Commonwealth Governments is not sufficient to carry out essential community services,' such as maintenance of rubbish tips and landscaping of community parks.²² The Commissioner added:

This not only burdens ATSIC's already limited resources but also masks governments' responsibilities in supporting the provision of local government services.²³

Criticism of current approaches to program delivery

4.24 Several criticisms of current approaches to program delivery were made during the course of the inquiry, including:

20 *ibid*, p. 68.

21 Australian National Audit Office Audit Report No. 2 2002-2003, *Grants Management: Aboriginal and Torres Strait Islander Commission*, p. 30.

22 *Submission 05A*, p. 5.

23 *ibid*.

- misleading claims of levels of government expenditure;
- the need for a long-term outlook and for progressive realisation of rights;
- a lack of coordination between and within governments; and
- the need for a sustainable approach.

Misleading claims of levels of government expenditure

4.25 Criticism was leveled at what were seen as misleading claims by the Commonwealth Government of large budgetary outlays on Indigenous programs. ANTaR submitted that:

The Government's claim of record Indigenous-specific funding levels as a measure of its record in addressing Indigenous disadvantage is misleading... it has included in that figure all expenditure in any way related to Indigenous affairs, whether relevant to disadvantage or not, and including expenditure of detrimental impact. Thus it includes funding of broad community benefit (such as museums, reconciliation etc) and funding clearly detrimental to Indigenous interests (such as funding for pastoralists and governments opposing native title claims).²⁴

4.26 The Social Justice Commissioner in his 2000 report stated:

It is insufficient to measure achievement in redressing Indigenous disadvantage according to the level of government expenditure on specialist programs for Indigenous people. Aside from creating resentment among other parts of society about 'special treatment', such an approach lacks comparative and evaluative components.²⁵

The need for a long-term outlook and for progressive realisation of rights

4.27 The Social Justice Commissioner has stressed the need for an equality approach to addressing Indigenous disadvantage, through progressive realisation of rights. In evidence to the Committee, the Social Justice Commissioner stated:

[There is an] obligation to take steps to ensure positive progress in addressing inequalities in the enjoyment of rights. This essentially requires the identification of a situation of inequality, the prioritisation of actions to address that inequality through the commitment of sufficient resources and

24 *Submission 40*, p. 14. Academic Larissa Behrendt has also noted this, and pointed out that "money spent preventing the recognition and protection of Indigenous rights [defending a Stolen Generation damages case] was counted as money allocated for specific policy areas of practical reconciliation." See Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future*, Federation Press, Sydney, 2003, p. 10.

25 Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2000*, Canberra, 2000, p. 91.

well-targeted programs aimed at reducing the level of inequality progressively but also within the shortest time frame that is possible.

A framework that incorporates the progressive realisation principle with public commitments and processes for monitoring would allow greater ease in asking questions such as: 'Is enough being done? Is there sufficient urgency? And, indeed, is there a plan?'²⁶

4.28 Integral to the concept of progressive realisation is the recognition that a long-term outlook is necessary. The 2002 report of the Social Justice Commissioner pointed out the difficulty of overcoming Indigenous disadvantage within short term timeframes, and the need to develop longer term funding cycles:

... long term objectives cannot run in parallel with an approach focused only on short term projects, trials etc. Short and medium term objectives should be consistent with and build towards long term objectives. Governmental perspectives need to be longer than the electoral cycle. Many areas of disadvantage, for example education, are simply not susceptible to short term solutions.²⁷

A lack of coordination between and within governments

4.29 As mentioned above, difficulties can be created by lack of coordination between different levels of government: local, state and federal (including ATSI). These difficulties are well-recognised, and the Committee received evidence of growing appreciation that partnerships and agreements aimed at pooling of funds and resources were beneficial. Some of these partnerships have been mentioned in Chapter 3. One of the aims of the COAG whole-of-government trials (also mentioned in Chapter 3) is to improve coordination between different levels of government.

4.30 Coordination across portfolios within the same level of government can also be an issue. In the area of health for example, it has been pointed out in the publication *National Strategic Framework for Aboriginal and Torres Strait Islander Health* that:

Successive governments in each jurisdiction [across Australia] and through a variety of portfolio-specific responses have tried to improve the health status of Aboriginal and Torres Strait Islander peoples. From their efforts we have learned that independent approaches by individual portfolios within governments, operating without the support and partnership of Aboriginal and Torres Strait Islander communities, have little positive impact.

Whilst some significant successes have been realised, the ad hoc approaches of the past have resulted in many examples of unsustainable programs and,

26 *Committee Hansard* 4 April 2003, p. 24.

27 Aboriginal and Torres Strait Islander Social Justice Commissioner Social Justice Report 2002, p. 126.

with little coordinated activity, gaps and duplication and inefficient use of resources.²⁸

4.31 The Victorian Government identified in its submission the shortcomings of this ‘silo effect’, where policy approaches to Indigenous affairs were too often developed within single departments, in isolation from other departments. This lack of coordination can affect government and community stakeholders:

... by limiting their capacity to set broad policy directions, combine and coordinate resources or monitor the effectiveness of programs in achieving outcomes.²⁹

4.32 The Victorian Government submitted that it is addressing these issues, and is committed to the development of holistic, ‘whole of government’ approaches as the key mechanism for progressing Reconciliation and working in partnership with Indigenous communities.³⁰

The need for a sustainable approach

4.33 Some have questioned whether current approaches are sustainable. One commentator has put forward that spending on Indigenous programs has led to improvements in some areas, but:

... viewed as a whole the program of spending on “practical reconciliation” is really only chipping away at the housing, educational and other social problems affecting significant numbers of Indigenous people.³¹

4.34 Some have pointed to the challenges presented by changing demographics of the Indigenous population: it is comparatively young (the proportion under 15 years old is almost double the proportion for Australia’s total population), and is growing at double the rate of the non-Indigenous population.³² If previous approaches have been less than successful, a growing Indigenous population means that the problems may only get worse. Mr Rick Farley, a former member of the CAR told the Committee:

28 *National Strategic Framework for Aboriginal and Torres Strait Islander Health: Framework for action by Governments*, National Aboriginal and Torres Strait Islander Health Council (NATSIHC), Canberra, July 2003, p. 1.

29 Government of Victoria, Department of Natural Resources and Environment, *The Victorian Government Indigenous Affairs Report November 1999 – October 2002*, p. 11.

30 *ibid.*

31 Crough, Greg, ‘A Practical Critique of Practical Reconciliation’, *Australian Universities Review*, Vo. 45, No. 1, 2002, p. 6.

32 Office of Aboriginal and Torres Strait Islander Affairs, Department of Immigration and Multicultural and Indigenous Affairs, *Indigenous People in Australia*, Fact Sheet Series, August 2002.

...in the last analysis, the issues are not going to go away.³³

A case study: Petrol sniffing in the Anangu Pitjantjatjara Lands of South Australia

4.35 In the course of the inquiry the Committee received evidence about the dire situation of the people of the Anangu Pitjantjatjara Lands (AP Lands) in the north-east of South Australia,³⁴ who face serious problems associated with petrol-sniffing in their communities. Experiences in addressing this issue illustrate some of the problems of a lack of coordination between and within governments, and of the need for monitoring the performance of programs designed to address the problem.

4.36 A submission to the inquiry from the Aboriginal Legal Rights Movement³⁵ included the official reports of a coronial inquest in 2002 into the deaths of three petrol sniffers. Coroner Wayne Chivell found that:

Petrol sniffing is endemic on the Anangu Pitjantjatjara Lands. It has caused and continues to cause devastating harm to the community, including approximately 35 deaths in the last 20 years in a population of between 2,000 and 2,500. Serious disability, crime, cultural breakdown and general grief and misery are also consequences.³⁶

4.37 Mr Chivell identified that poverty, illness, low education levels, boredom, feelings of hopelessness and almost total unemployment played a part in forming the environment in which such self-destructive behaviour took place. He commented:

That such conditions should exist among a group of people defined by race in the 21st century in a developed nation like Australia is a disgrace and should shame us all.³⁷

4.38 Governments have attempted to address the problems of petrol sniffing. Although the submission from the South Australian Government did not specifically address this issue, the Committee is aware that a Petrol Sniffing Taskforce has been established comprising senior officials from State and Commonwealth governments, with the objective of identifying a range of solutions. The South Australian Government states that the Taskforce will place emphasis on:

ensuring that sustainable programs are developed which are designed from the outset to be managed by the affected communities. Programs established will seek to assist in restoring the cultural and social pride and

33 *Committee Hansard* 4 April 2003, p. 18.

34 The AP Lands are primarily in South Australia, but also straddle the borders of the Northern Territory and Western Australia.

35 *Submission 17*.

36 South Australia, Finding of Inquest, Coroner's Reports into the deaths of [KT, KH and KK] September 2002, p.ii.

37 *ibid*.

well being of communities through community ownership of the strategies developed and implemented.³⁸

4.39 The Committee supports this approach, but notes that the Coroner was critical of the Taskforce and of other attempts to tackle the problem for taking ‘far too long to act’. What was missing, Mr Chivell stated, was ‘prompt, forthright, properly planned, properly funded action’.³⁹ He recommended that in finding solutions to the problems, it was important that:

... inter-Governmental coordination of approach be a high priority in order to avoid the fragmentation of effort and confusion and alienation of service-providers which are features of current service delivery to Anangu communities.⁴⁰

4.40 Findings of the coronial inquiry included recommendations for the establishment of secure care facilities for detention, detoxification, treatment and rehabilitation, and for the establishment of an effective police presence. There has been recent criticism that the South Australian Government has failed to implement the coronial recommendations,⁴¹ and the Aboriginal Legal Rights Movement submitted to the inquiry that there needs to be effective monitoring of the complex government processes involved in dealing with the problems on the AP Lands.⁴²

4.41 The Committee notes that the South Australian Government has declared its dedication to tackling the issue of petrol sniffing, and has earmarked \$12 million over four years to address the problem and the recommendations of the coronial inquiry.⁴³ As noted in Chapter 3, the AP Lands are one of the ten communities where the COAG whole of government approach is being trialled. The Committee will be maintaining an ongoing interest in the COAG process and the results of the trials in communities including the AP Lands.

4.42 The Committee also notes that different strategies to address the problem have been tried, and is aware of programs where communities use outstations as a way of diverting young people from the practice of petrol sniffing. The Mount Theo Petrol Sniffer Program has had considerable success in reducing the number of petrol

38 South Australian Department for Aboriginal Affairs and Reconciliation, Key achievements 2001/2002 <http://www.dosaa.sa.gov.au/achievements.jsp>

39 South Australia, Finding of Inquest, Coroner’s Reports into the deaths of [KT, KH and KK], September 2002, p. iii.

40 *ibid*, p. 74.

41 ‘Group airs frustration over petrol sniffing deaths’, *Message Stick*, ABC online, http://www.abc.net.au/message/news/stories/ms_news_909838.htm, 25 July 2003. Reporting that an Adelaide magistrate (Garry Hiskey) had “criticised the South Australian Government for failing to implement the findings of last year’s inquest into the three deaths.”

42 *Submission 17A*, p. 16.

43 ‘State government action on petrol sniffing’, *News Release*, Hon Terry Roberts MLC, South Australian Minister for Aboriginal Affairs and Reconciliation, 23 July 2003.

sniffers in the Yuendumu community north-west of Alice Springs by taking them out of their normal surroundings to a remote location, giving them the opportunity to “dry out” and reconnect with a traditional way of life.⁴⁴

4.43 Monitoring and evaluating progress of programs is important. A recent study reveals that interventions that have been used to address Aboriginal petrol sniffing are rarely evaluated, and as a result the opportunity is lost to accumulate a body of shared knowledge about the effectiveness of preventative measures and treatment.⁴⁵ The researchers recommended that when funding grants for interventions, government agencies insist upon and *provide resources for* evaluations as a condition of those grants.⁴⁶

4.44 The Committee recognises the complexity of the problem of petrol sniffing and its consequences, but is nevertheless concerned that progress is slow, and considers that every possible avenue to find solutions should be explored. This is a very serious issue which the Committee would like to revisit in the future.

Government initiatives

4.45 The Commonwealth Government’s submission outlined the establishment of a ‘comprehensive regime of performance monitoring and reporting’ by all Australian governments under COAG. Its objective is to provide ‘a systemic, coordinated, whole of government approach to reducing Indigenous disadvantage in absolute and relative terms’.⁴⁷ The regime has two key elements:

- a regular national report on Indigenous disadvantage; and
- a series of sectoral performance monitoring strategies and benchmarks oversights by the responsible Commonwealth/State Ministerial Council.⁴⁸

4.46 The two elements are separate but closely linked. The data provided in the regular report will feed into performance monitoring mechanisms and the setting of benchmarks aimed at improving performance.

44 Maclean, S.J., D’Abbs, P. H. N., ‘Petrol sniffing in Aboriginal communities: a review of interventions,’ *Drug and Alcohol Review* (2002) 21, pp. 65-72; ‘National Drug Strategy: Aboriginal and Torres Strait Islander Peoples Complementary Action Plan 2003-2006, Ministerial Council on Drug Strategy, Background Paper; Speech by Mr Warren Snowdon MP, House of Representatives *Hansard*, 23 September 2002, p. 7000.

45 Maclean, S.J., D’Abbs, P. H. N., “Petrol sniffing in Aboriginal communities: a review of interventions,” *Drug and Alcohol Review* (2002) 21, pp. 65-72.

46 *ibid*, p. 70.

47 *Submission* 75, p. 10.

48 *ibid*.

A regular national report on Indigenous disadvantage

4.47 As outlined in Chapter 3, in April 2002 COAG commissioned the Steering Committee for the Review of Commonwealth/State Service Provision (the Steering Committee) to develop and publish a regular national report on key indicators of Indigenous disadvantage. The Prime Minister advised the Steering Committee at the time that its key task would be ‘to identify indicators that are of relevance to all governments and Indigenous stakeholders and that can demonstrate the impact of program and policy interventions’.⁴⁹

4.48 Progress has been made on this initiative during the course of the Committee’s inquiry. The Steering Committee (part of the Productivity Commission) developed a draft reporting framework which it used as a model in consultations during 2002 and early 2003 with Indigenous leaders, organisations and communities, and with academic researchers, governments and other key bodies. The Steering Committee subsequently produced a *Report on Consultations*, and believes the consultation process has led to significant improvements in the reporting framework.⁵⁰ The Committee understands that the framework has been endorsed by COAG, and the Steering Committee intends to produce a first report for public release late in 2003. As a separate exercise, the Steering Committee has produced an Indigenous Compendium version of its annual *Report on Government Services* (also known as the “Blue Book”).⁵¹

4.49 The development of the indicator framework has in general been positively received by stakeholders. However, some concerns have been raised, and these are addressed in a later section of this chapter.

Strategies and benchmarks overseen by Ministerial Councils

4.50 The second key element of the Government’s regime is the development by Commonwealth/State Ministerial Councils of action plans, performance monitoring strategies and benchmarks on specific areas of Indigenous disadvantage. The action plans were commissioned by COAG in November 2000. The Ministerial Council on Aboriginal and Torres Strait Islander Affairs (MCATSIA) has an “overarching coordination and performance monitoring role”.⁵²

4.51 The Commonwealth Government submission stated:

49 Quoted in “Draft framework for reporting on Indigenous disadvantage: request for comment”, Steering Committee for the Review of Commonwealth/State Service Provision, 2002, p. 2.

50 Steering Committee for the Review of Commonwealth/State Service Provision, Draft Framework for reporting on Indigenous disadvantage: report on Consultations, May 2003, p. iii.

51 *Report on Government Services 2003: Indigenous Compendium*, Steering Committee for the Review of Commonwealth/State Service Provision, May 2003.

52 Council of Australian Governments Communiqué, 3 November 2000, Canberra

The individual performance monitoring strategies of Ministerial Councils will ensure that the Ministers responsible for policy areas across all the various aspects of government are regularly informed about the way in which their work is impacting on Indigenous people.⁵³

4.52 The Committee received evidence suggesting that progress in establishing action plans, performance monitoring strategies and benchmarks has been slow. This is discussed in a later section of this chapter.

Performance monitoring in the States and Territories

4.53 As noted in Chapter 3, the Committee received submissions from all States and Territories except New South Wales. In the latter stages of the inquiry, the Committee wrote again to those governments seeking further details of performance monitoring. Again New South Wales failed to respond.

4.54 While some responses were much more detailed than others, all referred to the national indicators framework developed by the Steering Committee. All were involved in and supported the development of the framework and of Commonwealth/State Ministerial Council action plans. The information they provided regarding performance monitoring in their jurisdictions is outlined below.

Western Australia

4.55 The submission from the Western Australian Government described the indicator framework as ‘a useful tool to trial the changes in policy settings and service delivery systems which are necessary to improve Indigenous outcomes.’⁵⁴ A follow-up submission stated that:

Realistic targets and benchmarks and effective indicators, including coordinated planning, performance monitoring and evaluation frameworks and mechanisms are indeed vital, not only to government accountability but also to the Nation’s pursuit of a progressive realisation of equitable outcomes for, and reconciliation with, its Aboriginal citizens.⁵⁵

4.56 The Western Australian submission went on:

The development of an integrated interpretive framework for Western Australia’s targets, benchmarks and indicators, including planning, performance monitoring, reporting and evaluation, to measure, drive changes and report on overcoming Indigenous disadvantage is at an early stage.

Western Australia is using the COAG framework at the State, regional and local levels as a basis towards arriving at agreed benchmarks and targets that

53 *Submission 75*, p. 13.

54 *Submission 77*, p. 2.

55 *Submission 86*, p. 1.

will set a clear strategic direction; drive changes and measure progress of action by State, Commonwealth, ATSI and local government at the local level.⁵⁶

Northern Territory

4.57 The submission from the Northern Territory Government advised that it has been an active participant in the development of the COAG reporting framework.

4.58 The Committee notes that the pilot partnership agreement between the Commonwealth, the Northern Territory Government and the Indigenous community at Wadeye contains provision for benchmarks:

6 PERFORMANCE MEASUREMENT AND EVALUATION
The Governments agree to monitor and evaluate programs against agreed benchmarks and milestones as well as agree to make performance information available for national evaluations. Benchmarks, milestones and performance information are being developed and when agreed on will be attached at a later date.⁵⁷

4.59 As noted previously in this report, the Committee supports the ten COAG whole-of-government trials around Australia, and looks forward to seeing the benchmarks for the Wadeye trial and for other pilot sites.

Queensland

4.60 The Queensland Government referred to its “Meeting Challenges, Making Choices” program, and advised that a monitoring and evaluation strategy has been developed for this program, including a performance monitoring framework and an evaluation project. The Premier also referred to Queensland participation in the development of the indicator framework for reporting on Indigenous disadvantage.⁵⁸ However, no details were given.

Victoria

4.61 The Victorian Government provided the Committee with a copy of its *Indigenous Affairs Report November 1999 – October 2002*. The report indicates that the Victorian Government has been actively involved in the development of the Indigenous reporting framework under COAG, and will incorporate the framework into future reporting on Indigenous outcomes.⁵⁹

56 *Submission 86*, Attachment 1.

57 Shared Responsibility Agreement between the Commonwealth of Australia, the Northern Territory Government and the Tharrar Regional Council, 21 March 2003.

58 *Submission 01A*, p. 2.

59 Government of Victoria, Department of Natural Resources and Environment, *The Victorian Government Indigenous Affairs Report November 1999 – October 2002*, p. 3 and p. 89.

4.62 The report gives details of initiatives taken in Indigenous affairs, including details of a Koorie Education Strategic Plan and related reporting and accountability mechanisms to monitor outcomes in education.⁶⁰

Tasmania

4.63 The submission from the Premier of Tasmania expressed support for the COAG approach, and advised that Tasmania:

... is well advanced in developing its own framework for improved service delivery to Indigenous communities [which] will be consistent with the objectives and principles of the COAG approach.⁶¹

4.64 The Premier also advised of Tasmania's 20-year *Tasmania Together* plan which:

... contains 24 goals supported by 212 agreed benchmarks that provide the framework for both government and non-government decision-making ...

One of these goals (Goal 10) is specifically targeted at improved outcomes for the State's Aboriginal community. This goal includes 14 benchmarks that directly contribute to the reconciliation process.⁶²

4.65 The 14 benchmarks in the *Tasmania Together* plan include indicators such as the number of schools integrating Aboriginal perspectives, public awareness of Aboriginal culture, the number of Aboriginal people involved in boards and other decision-making bodies, the number of Aboriginal people employed in the Tasmanian public service, and hectares of land owned or managed by the Aboriginal community. An example of one of the benchmarks from the plan is shown below.⁶³

Goal 10	Acknowledge and respect the contribution that the Aboriginal community and its culture have made and continue to make to Tasmania and its identity.
Standard 1	To recognise, promote, share and celebrate Aboriginal culture and heritage, encouraging mutual recognition and respect between Aboriginal and non-Aboriginal people
Indicator 1.1	Percentage of teaching staff who have received professional development specifically related to their role as teachers of indigenous studies (1) 2000: 26% Source: Education Dept

60 *ibid*, p. 135.

61 *Submission 73*, p. 1

62 *ibid* pp. 1-2.

63 Full details of the plan and details of other benchmarks can be found at <http://www.tasmaniatogether.tas.gov.au/>

Targets	2005: 40% 2010: 60% 2015: 80% 2020: 100%
Rationale	If teachers are educated about Aboriginal culture it will enable and encourage them to communicate this to students.

4.66 The Committee commends the Tasmanian Government for its initiatives in formulating benchmarks.

South Australia

4.67 The South Australian Minister for Aboriginal Affairs and Reconciliation advised the Committee that his government fully supported the development of the indicator framework, stating that the indicators would ‘assist governments in the development of good cross-portfolio policy that will be of advantage to the Indigenous population.’⁶⁴

4.68 The submission described the Partnering Agreement with ATSIC and advised that the Agreement includes provision for ‘the monitoring of progress and for reporting on outcomes at the most senior levels of the South Australian Government and ATSIC.’⁶⁵

Australian Capital Territory

4.69 The submission from the Australian Capital Territory pointed out that the national framework to report on Indigenous disadvantage must:

be sufficiently flexible and general to accommodate different characteristics between jurisdictions

be managed by the Commonwealth

be incorporated if possible with existing mechanisms, such as reports on the implementation on the recommendations of the Royal Commission into Aboriginal Deaths in Custody or the Bringing Them Home report.⁶⁶

4.70 The Chief Minister advised that:

The ACT Government has established a Working Group on Optimising Service Delivery and Funding on Aboriginal and Torres Strait Islander

64 *Submission 83*, p. 3.

65 *ibid*, p. 5.

66 *Submission 85*, p. 18.

Affairs to determine what the priority areas of expenditure should be, how the programs that are in place are operating, and how effective they are.⁶⁷

4.71 The Working Group has undertaken an audit of all services and programs for Aboriginal and Torres Strait islander people, and analysis of the information is underway. The submission advised that:

This analysis will provide a platform for the Working Group to review and re-engineer ... programs and services for more effective outcomes in the ACT.⁶⁸

Status of progress on benchmarking

4.72 Evidence from the States and Territories indicated to the Committee that all jurisdictions are supportive of the COAG indicator framework and have been involved in its development. However, the Committee notes that there seems to be little evidence of progress towards developing a comprehensive benchmarking regime as recommended by the CAR, that is:

... 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.⁶⁹

4.73 The indicator framework is seen as a useful tool, but as pointed out by the Western Australian Premier, the indicators:

... will only assist with identifying what has already happened. For this to be of value there will also need to be agreed benchmarks against which to measure progress and agreed targets set for improvements in the indicators.⁷⁰

4.74 ANTaR supported this view:

... the only appropriate measure of progress is the outcomes achieved ... In this respect the Government's lack of strategies and benchmarks means that there are no baseline data or targets against which to measure progress, and therefore also no means of keeping the Government accountable.⁷¹

4.75 The setting of benchmarks is a separate exercise from the indicator framework. As representatives of the Steering Committee told the Committee:

... the report [on Indigenous disadvantage, based on the indicator framework] is not really about setting particular benchmarks, other than

67 *ibid*, pp. 2-3.

68 *ibid*, p. 3.

69 Recommendation 1, *CAR's Final Report*, p. 10.

70 *Submission 77*, p. 2.

71 *Submission 40*, p. 14.

demonstrating the disparities that will occur in the outcomes for Indigenous people relative to other members of the community.⁷²

4.76 It is the Ministerial Councils that have been given the task of setting benchmarks and developing action plans. These benchmarks and action plans, in combination with the indicator framework, form the basis of the Government's approach to performance monitoring.

4.77 However, the Committee notes that progress in developing these benchmarks and action plans has been slow. It was in November 2000 that COAG resolved to develop the action plans. The COAG communiqué following its meeting of 3 November 2000 stated that:

Where they have not already done so, Ministerial Councils will develop action plans, performance reporting strategies and benchmarks.⁷³

4.78 One and a half years later, progress in developing action plans and performance reporting strategies appeared to be delayed. The communiqué from the COAG meeting of 5 April 2002 stated that progress 'has been slower than expected'.⁷⁴ The Committee is not aware of any report from COAG since April 2002 providing an update. A review of progress under the reconciliation framework was to be provided 'no later than the end of 2003',⁷⁵ but at the time of reporting no such review was apparently available.

4.79 Some submissions criticised the time taken to produce the action plans, including one from the Western Australian Minister for Indigenous Affairs who stated 'It is disappointing that there has been very slow progress in completing these plans'.⁷⁶ The Social Justice Commissioner told the Committee:

[The action plans are] seen as a supporting level of commitment and action to the steering committee framework, yet most of these action plans have still not appeared after two years. The delay in this is a significant issue for this committee.⁷⁷

4.80 The submission from the Commonwealth Government (dated December 2002) stated that a number of Ministerial Councils already had performance monitoring strategies and benchmarks in place, and that the plans that had been

72 *Committee Hansard* 22 July 2003, p. 250.

73 COAG Meeting, 3 November 2000, Communiqué, p. 7.

74 COAG Meeting, 5 April 2002, Communiqué, p. 4.

75 COAG Communiqué April 2002, Attachment 1: COAG Reconciliation Framework: Report on Progress in 2001, p. 3.

76 *Submission 77*, p. 4.

77 *Committee Hansard*, 4 April 2003, p. 25.

developed ‘vary in their sophistication’.⁷⁸ Some information regarding the plans was provided.⁷⁹

- *Education.* Benchmarking in the area of education appears to be the most developed. The Commonwealth submission describes the Indigenous Education Strategic Initiatives Program (IESIP), under which education providers have an Indigenous Education Agreement with the Commonwealth that requires them to set targets for improved outcomes in eight priority areas identified by the Ministerial Council for Education Employment Training and Youth Affairs (MCEETYA). Each year, providers must submit performance reports against yearly targets. Generally, targets (in literacy and numeracy for example) aim at half closing the gaps between Indigenous and non-Indigenous students by 2004 (based on agreed benchmarks).⁸⁰ Annual tabling in Parliament of information gathered through the IESIP is required by the legislation that established the IESIP.⁸¹

The submission indicates that performance measures are used for vocational education and training. Supplementary information provided to the Committee in July 2003 indicated that the Australian National Training Authority (ANTA) agreement (under negotiation) would include a range of targeted outcomes for Indigenous people.

- *Community Services.* The submission advises of principles adopted that aimed to enhance the quality of Indigenous data in the community services sector, including in the areas of child protection and welfare services and in juvenile justice. There was no information provided regarding the setting of targets or benchmarks.
- *Health.* Indicators to measure health outcomes are agreed, but data required to report on some of the indicators are unavailable or of poor quality or require substantial development. Agreements on Aboriginal and Torres Strait Islander Health include a requirement for annual reporting on progress to the Australian Health Minister’s Conference. Supplementary information provided to the Committee in July 2003 advised that negotiations for the 2003-2008 Commonwealth/State Australian Health Care Agreements seek to include the requirement that states provide information annually on hospital separations and psychiatric care for Indigenous and non-Indigenous people.⁸² No information was provided regarding the setting of targets or benchmarks.

The Committee notes the release in July 2003 of the National Strategic

78 *Submission 75*, p. 13.

79 Full details are provided in pp. 13-17 of *Submission 75*.

80 Commonwealth of Australia, *National Report to Parliament on Indigenous Education and Training, 2001, 2002*, p. xviii and p. 5.

81 *Indigenous Education (Targeted Assistance) Act 2000*.

82 *Submission 75A*.

Framework for Aboriginal and Torres Strait Islander Health, which is signed by all health ministers and includes as a base principle the accountability of governments in effective service delivery.⁸³

- *Housing.* Under national agreements all jurisdictions have agreed to develop performance monitoring through improving the availability of data and through implementing reporting systems. All housing ministers in 2001 approved the *Building a Better Future: Indigenous Housing to 2010*, a statement of new directions. Supplementary information provided to the Committee in July 2003 advised that the Commonwealth is proposing that the bilateral agreements under the Commonwealth State Housing Agreement for 2003 (yet to be finalised) would be the main vehicle for articulating performance reporting arrangements. No information was given regarding the development of benchmarks.
- *Employment.* Data on Indigenous-specific employment is collected at the national level and quarterly reports are produced. No information was given regarding the development of benchmarks.
- *Justice.* The Standing Committee of Attorneys General has in its action plan an agreed set of performance indicators against five key objectives, which include improved access to justice services and to diversionary programs. National performance indicators are being developed for juvenile justice. The Australasian Police Ministers Council produces reports on programs being undertaken across the country, and performance monitoring strategies and benchmarks are being produced. A working group established by the Corrective Services Ministerial Conference to progress the development of its action plan is refining its framework and developing performance monitoring strategies and benchmarks.

4.81 The Committee notes the efforts being made through Ministerial Councils to improve the availability and quality of data relating to Indigenous Australians, but remains concerned about the apparent lack of targets and benchmarks being set, and questions whether action plans are sufficiently comprehensive.

4.82 In its overarching coordination role, MCATSIA is responsible for reviewing Ministerial Council action plans and benchmarks and identifying gaps to COAG.⁸⁴ The Committee has been advised that MCATSIA provided its initial report on the action plans to the Prime Minister (in his capacity as the Chair of COAG) in June 2003.⁸⁵ However, the Committee did not receive any further information.

83 National Strategic Framework for Aboriginal and Torres Strait Islander Health: Framework for action by Governments, NATSIHC, Canberra, July 2003, p. 3.

84 COAG Reconciliation framework: Report on Progress in 2001, (Attachment 1 to COAG Communiqué form April 2002 COAG Meeting), p. 18.

85 *Submission 75A*, p.7.

Other concerns about performance monitoring

4.83 In addition to concerns about the tardiness of progress in developing a comprehensive benchmarking framework, the Committee became aware of some other areas of concern relating to performance monitoring. The Committee notes that a workshop to discuss benchmarking issues was convened in November 2002 by the Social Justice Commissioner, and was attended by Indigenous groups, representatives of the Steering Committee, government officials, academics, and interested parties. This section discusses concerns in the following areas:

- data collection;
- urban/rural/remote differences;
- consultation; and
- accountability of government agencies.

Data collection

4.84 Concerns have been raised about the quality of the data being collected which will feed into the indicator framework. The 2002 *Social Justice Report* stated that:

There are significant deficiencies in data collections, including the lack of consistent data over a sufficient time period to enable adequate comparison. These deficiencies need to be addressed as a matter of priority to ensure validity and credibility in the development and use of indicators.⁸⁶

4.85 In its consultation process, the Steering Committee found that:

Several government agencies and Indigenous organisations warned of difficulties with data availability and data quality. They emphasised the need for ensuring consistency across jurisdictions and suggested that caveats may be needed for some data.⁸⁷

4.86 The Committee notes that the Australian Bureau of Statistics (ABS), which collects much of the data on Indigenous people, is playing an important role in improving Indigenous data collections. Representatives of the ABS gave the Committee a briefing on the Indigenous statistics work program being undertaken, and on the process of consultation with stakeholders and users during the development of the program.⁸⁸

86 Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2002*, p. 127.

87 Steering Committee for the Review of Commonwealth/State Service Provision, *Draft framework for reporting on Indigenous disadvantage: Report on Consultations*, May 2003, p. 25.

88 *Submission 82*.

4.87 Included in the program (led by the National Centre for Aboriginal and Torres Strait Islander Statistics (NCATSIS) are the Indigenous Social Survey (ISS) which collects information in a range of areas of social concern, and the Indigenous Health Survey (IHS), which monitors changes in the health of Indigenous people and aims (amongst other things) to enable comparisons to be made between the health status of Indigenous and non-Indigenous Australians. The ABS has developed a Census Indigenous Enumeration Survey (IES) which recognises the need for special collection procedures and census awareness activities for the Indigenous population. Wherever possible, Indigenous staff are recruited to assist with collection of census data.⁸⁹

4.88 The representatives indicated their awareness of the issues surrounding Indigenous data collection, and told the Committee:

We think that the statistics work program that we have now embarked upon for a number of years will progressively provide a richer source of information for people to analyse and on which they can make decisions. We think that in the longer term we will have a good dataset that will provide for the measurement of change in a number of areas of disadvantage facing Indigenous Australians.⁹⁰

Urban/rural/remote differences

4.89 In its submission, the Northern Land Council argued that the draft indicator framework:

... appears to be a 'one size-fits all' and does not recognise fundamental differences, in terms of economic development, between Indigenous people living on and having title to their land, and those who are urban based.⁹¹

4.90 The Steering Committee recognised this issue, and found during the consultation process that there was support for disaggregating data collected as part of the indicator framework on a geographical basis, to take into account different outcomes in different environments, such as urban, rural and remote communities.⁹²

Consultation

4.91 The Committee notes that the *Report on Consultations* by the Steering Committee listed the parties consulted in the development of the indicator framework,⁹³ and recognises the wide-ranging nature of the consultations and the

89 *ibid.*

90 *Committee Hansard* 14 May 2003, p. 73.

91 *Submission 38*, p. 1.

92 Steering Committee for the Review of Commonwealth/State Service Provision, *Draft framework for reporting on Indigenous disadvantage: Report on Consultations*, May 2003, p. 24.

93 *ibid*, Appendix B.

cross-section of viewpoints. The Steering Committee noted that some of those consulted felt there was insufficient time allowed for proper consultation. The Steering Committee also noted that there was no one voice or view for Indigenous people.⁹⁴

Accountability of government agencies

4.92 The Committee heard concerns that there were insufficient mechanisms to press for accountability of government agencies. It was suggested to the Committee that government agencies should be required through legislation to include details in their annual reports of progress being made in addressing Indigenous disadvantage. Mr Chris Howse of the Northern Territory Aboriginal Justice Advocacy Committee (AJAC) (speaking with regard to the Northern Territory) told the Committee that legislation could be amended:

to require each government department to report on Indigenous disadvantage so that information would be available not just for parliament but for the public in the annual reports so that everybody could gauge how things are going.. If it continues to be bad ... then everybody would know about it and something perhaps could be done. At least the embarrassment factor would weigh in as a good consideration.⁹⁵

4.93 The Committee heard evidence of another approach to the monitoring of performance that it believes merits attention. It was put to the Committee that:

... performance indicators on reconciliation should be built into the contracts of the chief executive officers of all agencies and into the personal contracts of the director-generals.⁹⁶

4.94 The Committee supports these approaches as a method of improving the accountability of governments in the reconciliation process.

Performance monitoring of other aspects of reconciliation

4.95 Recommendation 1 of the CAR's Final Report focussed on overcoming Aboriginal and Torres Strait Islander disadvantage and the need for performance monitoring of programs with this aim. There has been widespread support for the indicator framework developed by the Steering Committee as a tool for reporting on Indigenous disadvantage, however the Committee heard evidence that there are other areas of concern. These areas do not fall into the standard health/housing/education socio-economic framework but they do require the attention of governments if further progress towards reconciliation is to be made. They include self-governance, recognition of land and culture, capacity building and public education and awareness.

94 *ibid*, p. 26.

95 *Committee Hansard*, 11 June 2003, p. 195.

96 *Committee Hansard* 4 April 2003, p. 21, Mr Rick Farley, Former Joint Chair, NSW Reconciliation Council.

4.96 One concern is the narrow approach to reconciliation. The Social Justice Commissioner has described the indicator framework as ‘a significant institutional development’, but told the Committee:

The negative is that this framework ... is constructed and too narrowly focused on practical reconciliation to the exclusion of other important factors and could be coopted as a political tool for reinforcing and legitimising what is ultimately a limited approach to Indigenous issues.⁹⁷

4.97 The Social Justice Commissioner stressed the importance of developing measures such as:

... measurements of progress in strengthening Indigenous governance and community capacity; progress in recognising and protecting Indigenous culture and identity; as well as processes for involving Indigenous peoples and communities in decision-making processes and service design and delivery.⁹⁸

4.98 The Social Justice Commissioner suggested that

Indigenous peoples’ own perceptions of how these issues are being addressed could form a useful measurement ...

Measurements could be developed relating to issues such as whether Indigenous people continue to maintain a traditional relationship to land, whether they are able to exercise this traditional relationship and so on.⁹⁹

4.99 The Committee notes that in the process of developing the indicator framework, the Steering Committee explored the measurement of the less tangible aspects of reconciliation, and during the consultation process received many comments and suggestions. For example, in the topic of ‘decision making/self-determination/autonomy’, the Steering Committee noted in its *Report on Consultations* that:

Many Indigenous organisations and individuals commented on the absence of governance indicators from the lists of headline and strategic change indicators and supported their inclusion in the framework.¹⁰⁰

4.100 Indicators suggested for measuring governance within Indigenous communities included the number and roles of community leaders and elders, and culturally appropriate dispute resolution.¹⁰¹ Governance indicators could also relate to

97 *Committee Hansard*, 4 April 2003, p. 25.

98 *Submission 65A*, answer to question 2.

99 *Submission 65A*, answer to question 2.

100 Steering Committee for the Review of Commonwealth/State Service Provision, *Draft framework for reporting on Indigenous disadvantage: Report on Consultations*, May 2003, p.20.

101 *ibid*, pp. 22-23.

involvement of Indigenous people in the broader processes of government, and could include measures such as the number of elected representatives at all levels of government, and the number of senior executive level positions held in government. The Committee notes the complexities encountered by the Steering Committee in developing suitable measures in such areas.

4.101 The Committee notes that at least one state has attempted to set targets in areas other than program delivery. The West Australian Government submission described its Indigenous Affairs policy as having three goals:

- Recognition of citizenship rights;
- Recognition of citizenship equality; and
- Recognition of unique citizenship status (with three key outcome areas of: an ‘agreement not argument’ approach to resolving native title issues, the handing back of the Aboriginal Lands Trust estate, and the protection and promotion of Aboriginal heritage and culture).¹⁰²

4.102 Of these goals, the Western Australian Minister for Indigenous Affairs stated that:

In my view, these are appropriate, adequate, clear, measurable and effective targets towards achieving the State’s overarching goal of *rights recognition* for its Indigenous citizens. ... The development of further targets, benchmarks and indicators that will relate to lower level outcomes to support the abovementioned higher order outcomes is envisaged.¹⁰³

4.103 In the course of the inquiry the Committee also considered the matter of education and public awareness of Indigenous issues. As discussed elsewhere in this report, the Committee received evidence that since the disbanding of the CAR, there has been a marked slow-down in the dissemination of educational and other material aimed at increasing community awareness of Indigenous issues.

4.104 Representatives of DIMIA suggested to the Committee that one method of measuring community awareness and attitudes would be to follow up on research conducted by the CAR in its last year in surveying community attitudes towards Indigenous issues and reconciliation.¹⁰⁴ Reconciliation Australia indicated its willingness to conduct this research, but pointed out that it was not resourced to do so.¹⁰⁵

4.105 The Committee also heard evidence that performance indicators and benchmarks could be used to assess progress in the development of public law structures that advance reconciliation. Representatives of the Gilbert and Tobin Centre

102 *Submission 86*, p. 2

103 *ibid.*

104 *Committee Hansard* 15 May 2003, p. 105.

105 *Committee Hansard* 19 May 2003, p. 156.

for Public Law outlined the Treaty Project (discussed further in Chapter 5), and told the Committee that the Treaty Project had identified benchmarks for progress in public law structures. They are acknowledgement, process and outcomes (that is, rights and opportunities for Indigenous people). One benchmark signifying acknowledgement would be the removal of section 25 of the Constitution (discussed further in Chapter 5.) The Treaty Project also identified the achievement of self-governance and self-determination, and the establishment of a process for negotiation and discussion with Indigenous people, as benchmarks to assess progress.¹⁰⁶

4.106 Such issues have been identified as part of the ‘unfinished business’ of reconciliation. The next chapter considers those matters.

106 *Committee Hansard* 4 April 2003, p. 3, Professor George Williams.

CHAPTER 5

UNFINISHED BUSINESS: THE LEGAL REGIME

5.1 This chapter discusses the issues raised by submissions and witnesses in relation to:

- the need for a formal process for resolving the unresolved issues of reconciliation; and
- the recognition of Indigenous rights more generally, including a discussion of evidence the Committee heard about why the “rights agenda” is an important but unresolved part of the reconciliation process.

Formal process for resolving unresolved issues of reconciliation

5.2 Australia is the only Commonwealth country with an Indigenous population that does not have a treaty with its Indigenous peoples.¹ The CAR’s Final Report concluded that reconciliation ‘requires a formal resolution of issues which were never addressed when this land and its waters were settled as colonies without treaty or consent’.² The report recommended that the Commonwealth Parliament enact legislation:

... 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.³

The Reconciliation Bill 2000

5.3 The CAR’s Final Report included a draft bill, the Reconciliation Bill 2000. Clauses 8 and 9 of the Bill outline a legislative process to deal with the unresolved issues of reconciliation. Subclause 8(1) proposes:

The Prime Minister must immediately begin negotiations with ATSIC to develop a process which will unite all Australians by way of an agreement or treaty through which the unresolved issues for reconciliation can be resolved.

5.4 Subclause 8(2) and clause 9 propose the means by which the process is to be carried out: identification of parties, commencement date of negotiations, matters to which the negotiations are to have regard and the protocols under which the

1 Professor George Williams, Mr Sean Brennan and Ms Vanessa Bosnjak, Gilbert & Tobin Centre of Public Law, *Submission 4*, p. 7.

2 CAR’s Final Report, p. 103.

3 CAR’s Final Report, p. 106, Recommendation 6.

negotiations are to be carried out. The CAR intended that clauses 8 and 9 would provide a framework and model for negotiations not only at the national level but also at other levels.⁴

5.5 The Social Justice Commissioner also recommended:

That the federal government introduce framework legislation providing legislative support for the negotiation of agreements with Indigenous peoples at the national, regional and local levels.⁵

5.6 The Social Justice Commissioner endorsed the CAR's model as 'an appropriate legislative model'.⁶

5.7 Clauses 6 and 7 of the Bill propose a means to identify issues for reconciliation. ATSIC would be responsible for ensuring a National Reconciliation Convention within a year of the Bill's enactment and every three years afterwards. Participation in, and the agenda of, the Convention would be determined by the Minister, ATSIC, and a representative body (chosen by the Minister). Attendees would comprise 50 percent of Indigenous peoples and would overall show a fair representation by gender and geographical location. The functions of the Convention include identifying and prioritising unresolved issues for reconciliation and recommending appropriate action.

5.8 Clauses 10 to 15 provide a means to monitor and report on progress towards national reconciliation. Clause 10 requires the Social Justice Commissioner to include in his annual report, amongst other things, the national progress towards reconciliation in relation to the exercise and enjoyment of human rights of Indigenous peoples. Subclause 11(1) requires the Minister, every three years, to appoint an independent body or taskforce to prepare and submit to the Minister a national progress report. Clause 12 requires the Minister to table that report in Parliament. Clause 13 establishes a Parliamentary Joint Committee on Reconciliation which, under clause 15, is to examine the Social Justice Commissioner's report, the national progress report and the National Reconciliation Convention's recommendations and is to inquire into and report to the Parliament on the progress towards reconciliation. The Bill also recognises Indigenous peoples' as the first peoples of Australia and acknowledges the CAR's *Australian Declaration Towards Reconciliation*.

5.9 ATSIC told the Committee that it strongly supported the Bill:

... which specifically called for the Prime Minister to begin negotiations with us to develop a process to unite all Australians by way of an agreement or a treaty. Through this process, unresolved issues of reconciliation may be

4 CAR's Final Report, p. 80.

5 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000, Report No. 2/2001*, p. 132, Recommendation 11.

6 *ibid.*

progressed and ultimately resolved. A properly negotiated agreement would establish a framework between Aboriginal and Torres Strait Islander people and the Australian government. It could cover relevant issues such as the legal and constitutional recognition of our people's inherent rights; recognition and protection of our unique cultural heritage; and control over our lands, seas and resources. The issue of a treaty or a formal negotiated agreement remains high on ATSIC's agenda. We have undertaken an extensive consultative process with the Aboriginal and Torres Strait Islander community to obtain its views and to seek their support to advance this matter.⁷

5.10 On 5 April 2001, Senator Aden Ridgeway introduced a substantially similar bill into the Senate.⁸ It differs from the CAR's proposed legislation only in that it corrects some technical errors in the draft.

The Commonwealth Government's response

5.11 The Government agreed that negotiated outcomes on the unresolved issues of reconciliation should be achieved.⁹ However, it stated that these negotiations should be achieved outside of a legislated process¹⁰ and on a 'progressive, issue by issue basis rather than through a once and for all global process.'¹¹ The Government emphasised its preference for community partnership at the local level to tackle issues of immediate concern and stated that a 'national agreement — a 'top down' policy response — is not appropriate to local circumstances.'¹² Further, it commented that 'ongoing community debate and education must occur prior to being able to clearly identify, agree and resolve issues'.¹³

5.12 In support of its view, the Government pointed to examples of agreements negotiated outside of a legislated process,¹⁴ stating that the existing reconciliation process allowed for state, regional and local agreements¹⁵ and that ATSIC ensures the

7 Mr Ray Robinson *Committee Hansard*, 15 May 2003, pp. 115-116.

8 The Bill was restored to the Senate Notice Paper on 13 February 2002.

9 Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge, September 2002, pp. 18-19; see also Commonwealth Government, *Submission 75*, pp. 4-5.

10 *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge*, September 2002, pp. 18-19.

11 *ibid*, pp. 22-23.

12 *ibid*, p. 23.

13 *ibid*, p. 22.

14 *ibid*, p. 23; *Submission 75*, pp. 5-9.

15 *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge*, September 2002, p. 23.

maximum participation for Indigenous peoples in the formulation and implementation of programs.¹⁶

5.13 The Government rejected the CAR's draft legislation on the basis that it would encourage disputes, was not supported by public opinion and was unnecessary to achieve reconciliation.¹⁷ The Government added that a treaty as a legally enforceable instrument between sovereign states:

... would be divisive, would undermine the concept of a single Australian nation, would create legal uncertainty and future disputation and would not best harness the positive environment that now exists in relation to reconciliation.¹⁸

5.14 The Government rejected other aspects of the Bill:

... given the divergence on the Council's Declaration, the Government does not believe it is appropriate to pursue legislation that would enshrine the principles in the Council's Declaration and the Roadmap for Reconciliation.¹⁹

Issues raised in the inquiry

5.15 Submissions discussed national and local approaches to agreements and the effect that federal legislation might have on the reconciliation process. Others also suggested that education was also important to inform the debate about the process for resolving issues, as well as other aspects of reconciliation.

National and local approaches

5.16 On first glance, clauses 8 and 9 of the Reconciliation Bill appear to propose a 'once and for all' process as the Government maintains. However, the CAR Final Report makes it clear that the Bill proposes a 'process that will facilitate' agreement making at all levels.²⁰ The *Social Justice Report 2000*²¹ and ATSIC²² support this view. The CAR Final Report also acknowledges that the Bill did not have benefit of the Office of Parliamentary Counsel's drafting expertise.²³

16 *ibid*, pp. 18-19.

17 *ibid*.

18 *ibid*, p. 23.

19 *ibid*, p. 10.

20 CAR's Final Report, p. 80.

21 Recommendation 11.

22 Aboriginal and Torres Strait Islander Commission, *Submission 80*, pp. 25-26; see also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission 65*, pp. 37-38.

23 CAR's Final Report, p. 79.

5.17 While some submissions supported a ‘treaty’ that included substantive issues, submissions did not argue for a document that would settle all the unresolved issues of reconciliation in a ‘once and for all’ national process.²⁴ Some such as ANTaR saw the benefit in a multitude of agreements, and pointed to the need for a framework in which negotiations for these agreements can take place:

Agreements are the big hope for progress on reconciliation. ...

ANTaR believes that over time, agreements will, by increment, flesh out the skeleton of Indigenous self-determination and provide the best proof that the attainment of Indigenous justice, the addressing of Indigenous disadvantage and indeed, the future of reconciliation, lies in developing frameworks for negotiating outcomes at all levels.²⁵

5.18 The Gilbert & Tobin Centre of Public Law pointed to its preliminary work on its ‘Treaty Project’:

This project will combine academic research with community engagement and the Centre will provide a platform for informed public debate about the idea of a treaty, comprehensive settlements and framework agreements.²⁶

5.19 This project involves the Gilbert & Tobin Centre working in partnership with:

- Jumbunna Indigenous House of Learning at the University of Technology of Sydney and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AITATSIS) under a Australian Research Council grant; and
- Reconciliation Australia under the support of the Myer Foundation.

5.20 The project is intended to finish in mid-2005 with a report that includes potential public law models for achieving a treaty, comprehensive settlements or framework agreements. Professor George Williams said that this report:

... might be useful to committees such as this, to leaders and to the community in assessing where we stand and what the options are so that there can be an intelligent, informed debate in moving forward.²⁷

24 For example, Aboriginal and Torres Strait Islander Commission, *Submission 80*, p. 26; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission 65*, p. 39; Edmund Rice Centre for Justice and Community Education, *Submission 44*, p. 3; National Assembly of the Uniting Church in Australia, *Submission 15*, p. 10; and Dr Val Haynes, *Submission 43*, p. 7.

25 Australians for Native Title and Reconciliation Inc, *Submission 40*, p. 12; see also *Committee Hansard*, 15 May 2003, p. 99.

26 Professor George Williams, Mr Sean Brennan and Ms Vanessa Bosnjak, Gilbert & Tobin Centre of Public Law, *Submission 4*, Attachment, Gilbert & Tobin Centre of Public Law – *Treaty Project – Discussion Paper No. 1*, p. 1.

27 *Committee Hansard*, 4 April 2003, p. 6.

Effect of Commonwealth legislation

5.21 Witnesses and submissions supported a legislated framework for several reasons: to protect Indigenous interests and rights; provide a mandate for negotiations; promote a culture of negotiation; and coordinate and lead local, regional and state communities' activities.

5.22 The Gilbert & Tobin Centre of Public Law argued that federal legislation was needed 'for at least two reasons':

First, agreements can be made with local and state governments and with private interests as the Government Response points out, but only the Commonwealth can deal with the national and constitutional position of Indigenous people in Australia. Secondly, the successful agreements the Government points to, the ILUAs [Indigenous Land Use Agreements] made under the Native Title Act, are a perfect example of the need to legislate intelligently for negotiation processes. One reason so few native title agreements were reached before 1998 was the consensus on all sides that the agreement-making provisions of the original Act simply did not provide the requisite legal support.²⁸

5.23 In relation to negotiation without legislative backing, the Social Justice Commissioner commented that:

While the use of agreement-making has strong Indigenous support, it is important to realise that these initiatives do not of themselves guarantee protection of Indigenous peoples' rights and interests. In the case of native title, the difficulty is in convincing developers, mining and resource companies, pastoralists, and local and state governments to enter into agreements which deliver real outcomes to Indigenous peoples when the legislation does not necessarily require this of them.²⁹

5.24 Mr Sean Brennan observed that public law can make a significant contribution to achieving reconciliation:

Just as law has been a very effective tool in the past for non-Indigenous Australia to lock Indigenous people out of the system—to deny them a place in our Constitution, in our system of land law, in our system of representative government—we say that we can use the same tool to achieve the opposite result: to create space for Indigenous people in our public sphere, in our system of law and government; to recognise meaningful rights; to sum up and express on behalf of the nation in the law of the land

28 *Submission 4*, p. 7; note also the Gilbert & Tobin Centre's *Treaty Project – Discussion Paper No.1* attached to *Submission 4*.

29 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, p. 81.

not discrimination, not exclusion, as in the past, but inclusion, non-discrimination and a unique and honoured place in the nation.³⁰

5.25 He gave examples of where Commonwealth legislation had provided this space in the past: the 1967 amendments to the Constitution (allowing Aboriginal people to be counted) and the *Council for Aboriginal Reconciliation Act 1991* (which provided a formal process to advance reconciliation). Mr Brennan also expanded on the view that legislation can promote a negotiation culture:

What has clearly emerged from the native title era, for all its flaws, is a greater culture of negotiation between Indigenous groups and all kinds of sectors within society—notably with state governments; very notably with business interests, resource companies; and with local governments, community groups and the Commonwealth government.

Native title has generated a culture of agreement making which is a genie out of the bottle and has given people experience with a process of negotiation.³¹

5.26 Other submissions also pointed to this increased agreement-making as a positive sign,³² although not all agreed.³³

5.27 As discussed in Chapter 3, the States and Territories have entered various partnership agreements with ATSIC and Indigenous representative organisations. While some of those agreements focus on addressing Indigenous disadvantage, the Western Australian Government provided the Committee with a copy of its agreement with ATSIC. This agreement provides a framework to facilitate local and regional agreements and includes principles under which negotiations may take place.³⁴ However, the agreement is not formalised in legislation.

5.28 Submissions also pointed out that a legislative framework for negotiations would ensure that any short term focus would be avoided,³⁵ and referred to a wide range of parties who should negotiate agreements.³⁶

30 *Committee Hansard*, 4 April 2003, p. 4.

31 *Committee Hansard*, 4 April 2003, p. 8.

32 For example, Commonwealth Government, *Submission 75*, p. 3; Queensland Government, *Submission 1*; Aboriginal and Torres Strait Islander Commission, *Submission 80*, p. 26; Reconciliation Australia, *Submission 64*, attachment, *Words, symbols and actions – Reconciliation Report Card 2002*, p. 13 and Women’s International League for Peace and Freedom, *Submission 51*, p. 1.

33 AgForce Queensland *Submission 61*, pp. 3-4.

34 *Submission 77*, p. 19.

35 For example, Australian Federal Police Association, *Submission 53*, p. 4.

36 For example, Aboriginal and Torres Strait Islander Commission, *Submission 80*, pp. 21-22.

5.29 Since the CAR ended, there has been no Commonwealth legislative process for reconciliation more generally. Many submissions argued that legislation is needed to maintain the momentum towards reconciliation.³⁷ Their reasons included that Commonwealth legislation would help to de-politicise the issue,³⁸ unify Australians,³⁹ provide certainty⁴⁰ and provide Commonwealth leadership and coordination to maintain the momentum in the rest of the community⁴¹.

5.30 The Social Justice Commissioner stated:

While it is undoubtedly true that all levels of government and all members of the community have a responsibility toward achieving reconciliation with Australia's Indigenous peoples, the Government is not only an important piece in the mosaic: it is an integral one. It is after all the role of federal Government to drive policy and enact legislation at a national level. A lack of effective coordination or participation at a national level can mean that opportunities to make a change at state and local levels can be stymied or even lost.⁴²

Need for education

5.31 Some submissions also argued that education was an important factor in helping to address the unresolved issues for reconciliation. Suggestions included:

- sustained and sophisticated public awareness campaigns to combat institutionalised racism and discrimination;⁴³
- greater public understanding of what Indigenous culture can offer and its potential contribution to enriching the quality of life of all Australians;⁴⁴

37 For example, Australians for Native Title and Reconciliation Victoria, *Submission 31*, p. 4; Mountains Outreach Community Service Inc, *Submission 36*, p. 2; Social Justice Bodies of the Catholic Uniting and Archdiocesan Churches WA, *Submission 22*, p. 1.

38 For example, Australian Federal Police Association, *Submission 53*, p. 4; Australians for Native Title and Reconciliation Victoria, *Submission 31*, p. 9.

39 For example, Oxfam Community Aid Abroad, *Submission 19*, p. 5; Australian Council of Social Service, *Submission 27*, Attachment, p. 1 and National Aboriginal and Torres Strait Islander Catholic Council, *Submission 71*, p. 5.

40 For example, Aboriginal and Torres Strait Islander Commission Northern Territory, *Submission 5*, p. 12; Australians for Native Title and Reconciliation Inc, *Submission 40*, p. 16 and National Assembly of the Uniting Church, *Submission 15*, p. 10.

41 For example, Reconciliation Australia, *Submission 64*, Attachment, *Words, symbols and actions – Reconciliation Report Card 2002*, p. 8.

42 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002, Report No. 2/2003*, p. 78.

43 Equal Opportunity Commission of Victoria, *Submission 56*, p. 5.

44 Ms Lynn Pollack, *Submission 9*, pp. 4-5.

- research into the history of interactions between Indigenous and non-Indigenous peoples to avoid disagreements of historical fact when considering compensation, reparations and restitution;⁴⁵ and
- making past injustices ‘visible’ and not allowing the consequences of those past injustices to go unaddressed.⁴⁶

Reconciliation and human rights

5.32 Term of reference 2(d) for this inquiry is the consistency of the Government's responses to the recommendations of the CAR and the Social Justice Commissioner with regard to the needs and aspirations of Indigenous Australians as Australian citizens and First Nation Peoples.

5.33 In his *Social Justice Report 2000*, the Social Justice Commissioner proposed that reconciliation be based on full respect for human rights.⁴⁷ Human rights are broadly those rights flowing from Australia's obligations under international human rights instruments, for example, the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights.⁴⁸

5.34 In his *Social Justice Report 2001* report, the Social Justice Commissioner classified human rights into two categories:

- citizenship rights — those to which every Australian is entitled, for example, the right to basic services and the right not to be discriminated against on the basis of race; and
- inherent rights — those rights inherent to Indigenous peoples that flow from their prior occupation and their culture, for example, the right to native title.⁴⁹

5.35 The CAR's Final Report also adopts this categorisation of rights⁵⁰ and the Committee has framed its discussion in the following sections in the same way.

45 Herbert and Valmae Freilich Foundation Humanities Research Centre, The Australian National University, *Submission 63*, pp. 2-3.

46 Minoru Hokari, Humanities Research Centre, Australian National University, *Submission 3*.

47 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, p. 18.

48 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1999*, pp. 54-56.

49 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000, Report No. 2/2001*, p. 217.

50 CAR's Final Report, p. 77.

Citizenship rights

5.36 The CAR's Final Report and Social Justice Commissioner's reports recommended various actions in relation to the citizenship rights of Indigenous peoples. Generally, these actions are aimed at overcoming differences in social and economic outcomes between Indigenous peoples and other Australians.

5.37 The Government's response to the CAR's Final Report limited the Government's commitment to 'common rights for all Australians'.⁵¹ It stated that it would 'maintain its commitment to the implementation of practical and symbolic measures which have a positive effect on the everyday lives of Indigenous Australians'.⁵² The Government rejected the recommendations concerning other rights:

[n]either the government nor the general community ... is prepared to support any action which would entrench additional, special or different rights for one part of the community.⁵³

5.38 ATSIC Northern Territory acknowledged that while some of the Social Justice Commissioner's recommendations have been implemented,

Still, those recommendations relating to human rights were clearly 'off the agenda'.⁵⁴

5.39 It is important to note that the Social Justice Commissioner also argued for the 'substantive' equality, as opposed to 'formal' equality, of Indigenous peoples. Briefly, formal equality means that everyone is treated the same. The principle of substantive equality recognises that not all people are the same and therefore they need to be treated differently to enjoy the same opportunities.⁵⁵

5.40 In his *Social Justice Report 2000*, the Social Justice Commissioner argued that treating Indigenous peoples the same as non-Indigenous peoples was inadequate. Because Indigenous peoples have not been treated the same as non-Indigenous Australians throughout history, they have been 'dispossessed, marginalised and excluded from mainstream society'. He concluded that:

The *failure* to provide us with the same opportunities as the rest of society in the past means that to now insist on identical treatment will simply confirm

51 Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge, September 2002, p. 17.

52 *ibid*, p. 3.

53 *ibid*, p. 17.

54 *Submission 5*, p. 13.

55 For examples of the disproportionate impact of 'neutral' laws on Indigenous peoples, see L Behrendt, *Achieving Social Justice – Indigenous Rights and Australia's Future*, Federation Press, 2003, chapter 2.

the position of Indigenous people at the lowest rungs of Australian society. Demands for identical or ‘sameness’ of treatment are tantamount to ‘keeping us in our place’.⁵⁶

5.41 He suggested two factors would facilitate the equal participation of Indigenous peoples in Australian society:

- acknowledgement of the historically derived nature of Indigenous disadvantage and adoption of remedial measures so that Indigenous peoples can ‘catch up’; and
- Indigenous peoples’ ability to live their lives free from assumptions by others about what is best for them.⁵⁷

5.42 In his submission to this inquiry, the Social Justice Commissioner expressed similar views:

... reconciliation must go beyond simply providing equality of opportunity in terms of ‘sameness’. It must provide for the acceptance, recognition and celebration of the unique, distinct societies and cultural characteristics of first Australians. Consequently, an approach such as ‘practical reconciliation’, that does not extend past the realisation of measures that allow for citizenship participation in society, is deficient.⁵⁸

Issues raised in the inquiry

5.43 The issues raised with the Committee which are relevant to any discussion of Indigenous people’s enjoyment of citizenship rights included:

- Indigenous peoples’ disadvantage in relation to their enjoyment of their economic and social rights (discussed in previous chapters);
- the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, over-representation of Indigenous people in the criminal justice system and the discriminatory effect of mandatory sentencing laws in the Northern Territory and Western Australia.⁵⁹ As the Royal Commission into Aboriginal Deaths in Custody made clear, Indigenous peoples’ over-representation in the criminal justice system is a significant issue in and of

56 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, p. 19; see also L Behrendt, *Achieving Social Justice – Indigenous Rights and Australia’s Future*, Federation Press, 2003, pp. 13-14 and chapter 2.

57 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, pp. 19-20.

58 *Submission 65*, p.21.

59 For example, Australian Baha’i Community, *Submission 23*, p. 4; for further discussion see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001, Report No. 2/2002*, pp. 103-133.

itself, but also impacts on Indigenous peoples' life chances in areas such as education, employment and health;

- the need to address the high level of substance abuse in Indigenous communities compared with non-Indigenous communities;⁶⁰
- the implementation of the recommendations of the *Bringing them home* report, including the Government's refusal to apologise or make reparation.⁶¹ Like the Royal Commission into Aboriginal Deaths in Custody, *Bringing them home* made clear the close relationship between the policies of removal and present experiences of health, education etc;⁶²
- the Government's action in relation to ensuring the States and Territories' compliance with the International Convention on the Elimination of All Forms of Racism and the Government's response to United Nations Committees' findings of March 1999 and August 1999;⁶³
- the adequacy of civil remedies where the common law and human rights are in conflict (for example, a complainant's inability to return to the workplace following discrimination claims);⁶⁴ and
- the non-payment of Indigenous people's full entitlement to wages.⁶⁵

5.44 These issues have been canvassed elsewhere and a detailed examination of each has not been possible during this inquiry. Discussion of these issues generally referred to public discussions of the observations on 24 March 2000 of the United Nations Committee on the Elimination of Racial Discrimination (CERD) on Australia's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination.⁶⁶ Those observations expressed concern about

60 For example, Reconciliation Australia, *Submission 64*, Attachment, *Words, symbols and actions – Reconciliation Report Card 2002*, p. 21; Aboriginal Legal Rights Movement Inc, *Submission 17*.

61 For example, Sorry Day Committee, *Submission 8*; for a further discussion see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000, Report No. 2/2001*, pp. 133-153.

62 Human Rights and Equal Opportunity Commission, *Bringing them home*, HREOC, Sydney, 1997.

63 For example, Oxfam Community Aid Abroad, *Submission 19*, p. 3; for further discussion see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000, Report No. 2/2001*, pp. 35-47.

64 For example, Aboriginal Legal Rights Movement Inc, *Submission 17*, p. 5.

65 For example, Social Justice Commission Catholic Diocese of Toowoomba, *Submission 16*, p. 6 and Queensland Government, *Submission 1*, p. 2.

66 The CERD is a United Nations Committee that reviews the legal, judicial, administrative and other steps taken by individual States to fulfill their obligations to combat racial discrimination. See Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc: CERD/C/304/Add.101, 19/4/2000.

Australia's compliance with the Convention in relation to a number of Indigenous issues. The Social Justice Commissioner attached these observations to his *Social Justice Report 2000*.⁶⁷

5.45 The Committee stresses the need to ensure that the basic citizenship rights of Indigenous people are fully respected, and urges the Commonwealth Government to take immediate steps to improve progress in each of these areas. Certain specific issues are discussed in more detail below.

Specific legal issues

5.46 The CAR's Final Report recommended the recognition of certain rights through 'actioning of the *Roadmap for Reconciliation*'.⁶⁸ As outlined in Chapter 2, the *Roadmap* contains four strategies, all of which raise rights. However, one strategy — *The National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights* — deals particularly with the issue of rights, and it refers to some specific reforms that the Committee considered:

- section 25 of the Constitution;
- paragraph 51(xxvi) of the Constitution; and
- a Bill of Rights.

5.47 Two others were raised in the Social Justice Commissioner's reports:

- the National Action Plan on Human Rights; and
- the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.

Section 25 of the Constitution

5.48 The CAR's Final Report recommended that the Commonwealth Parliament prepare legislation for a referendum to:

... 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.⁶⁹

5.49 Section 25 of the Constitution provides:

For the purposes of [determining the number of Members in the House of Representatives], if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the

67 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, appendix 2, pp. 181-184.

68 CAR's Final Report p. 106, Recommendation 4.

69 *ibid*, p. 105, Recommendation 3.

Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

5.50 The Government was generally supportive of the proposal to remove section 25 and stated that it would put the matter to a referendum ‘at an appropriate time’. However, it added that:

... section 25 does not have any practical effect in the governance of the nation. No state has a racially discriminatory voting provision in place and any such provision would contravene the *Racial Discrimination Act* and would be rendered inoperative by virtue of section 109 of the Constitution.⁷⁰

5.51 The Gilbert & Tobin Centre of Public Law, however, commented that it was uncertain whether section 109 of the Constitution would achieve the result the Government claimed:

The High Court may find that that the Racial Discrimination Act cannot apply to State voting laws because the States have an implied immunity from Commonwealth laws that inhibit or impair their capacity to function as a constitutional system. In *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, the High Court split and did not determine whether, under this principle, a Commonwealth law could validly regulate political advertising in State elections.⁷¹

5.52 No submission opposed the recommendation to remove section 25. Some expressed concern that the Government had not indicated a time period in which it would initiate action.⁷²

5.53 The Committee considers that a constitutional provision which allows a State law to disqualify people from voting on the basis of race is inappropriate in Australia’s democracy. The Committee is concerned with the Government’s lack of commitment to a timeframe for implementing the recommendation.

Paragraph 51(xxvi) of the Constitution

5.54 Paragraph 51(xxvi) provides the Commonwealth Parliament with power to make laws with respect to ‘the people of any race with whom it is deemed necessary to make special laws’.

70 *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia’s Challenge*, September 2002, p. 20.

71 *Submission 4*, p. 4.

72 For example, Northern Sydney Region Reconciliation Network, *Submission 37*, p. 3; Conference of Leaders of Religious Institutes Social Justice Committee, *Submission 66*, p. 5; Oxfam Community Aid Abroad, *Submission 19*, p. 8.

5.55 The companion booklet to the CAR's National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights, *Recognising Aboriginal and Torres Strait Islander Rights*,⁷³ suggests that, amongst other actions, the Commonwealth Parliament should initiate and support a referendum

... [to] amend section 51(26) of the Constitution to authorise the Commonwealth to make special laws only for the benefit of any particular race.⁷⁴

5.56 The Gilbert & Tobin Centre of Public Law observed that paragraph 51(xxvi) provided the Commonwealth with the capacity to make adversely discriminatory laws.

... as the history of section 51(xxvi) shows, the [1967] referendum also ensured that a power designed to enable racial discrimination came to apply to Indigenous peoples. In *Kartinyeri v Commonwealth* (Hindmarsh Island Bridge Case) (1998) 195 CLR 337, the High Court split on whether the power could still be used in this way. The issue remains unresolved ...⁷⁵

5.57 The Government acknowledged that although paragraph 51(xxvi) provided the capacity to discriminate against Indigenous peoples:

... the Government considers that Australia's robust parliamentary system mitigates against such a possibility. The Government remains of the view that this legislative power is necessary to advance the interests of Indigenous Australians and does not propose to seek its amendment.⁷⁶

5.58 In response, the Gilbert & Tobin Centre recommended:

To meet this concern, section 51(xxvi) should be deleted and replaced by a power that enables the making of laws for the advancement of Indigenous peoples. At the very least, the potentially discriminatory power conferred by section 51(xxvi) should be limited by a separate provision that prohibits racial discrimination.⁷⁷

5.59 The Committee supports the recommendation to amend paragraph 51(xxvi) of the Constitution.

73 Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander Rights – Ways to Implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights*, one of four *National Strategies in the Roadmap for Reconciliation*, (available at http://www.reconciliation.org.au/recognising_rights/)

74 *ibid*, Constitutional Changes – Actions for Implementation (available at http://www.reconciliation.org.au/recognising_rights/pg7.htm)

75 *Submission 4*, p. 5; see also, *Committee Hansard*, 4 April 2003, p. 3.

76 Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge, September 2002, p. 21.

77 *Submission 4*, p. 5; see also, *Committee Hansard*, 4 April 2003, p. 3.

Bill of Rights

5.60 The CAR companion booklet, *Recognising Aboriginal and Torres Strait Islander Rights*,⁷⁸ also recommended that the Commonwealth Government should initiate a parliamentary inquiry into options for a legislated Bill of Rights.⁷⁹

5.61 The Government opposed a Bill of Rights either enshrined in the Constitution or enacted in discrete legislation because:

The Government strongly believes that the best guarantee of fundamental human rights in this country is to have a vigorous and open political system, an incorruptible judicial system, and a free press.⁸⁰

5.62 The Government pointed to the *Racial Discrimination Act 1975*, the complaint process administered by the Human Rights and Equal Opportunities Commission, and the Courts and State and Territory laws as an effective system in place to prevent discrimination on the basis of race. It concluded that '[n]othing practical would be gained by the changes suggested by the Council'.⁸¹

5.63 Australia is the only Western country without a Bill of Rights.⁸² The submission from the Social Justice Commissioner noted that while Commonwealth legislation may invalidate State and Territory discriminatory laws, it would not prevent the Commonwealth from introducing discriminatory laws.⁸³ He pointed to the 1998 amendments to the *Native Title Act 1993* as support for his view that the current system is not providing adequate protection.⁸⁴ The Equal Opportunity Commission of Victoria also commented that:

Addressing issues of discrimination familiar to Indigenous Australians through the mechanical investigation and resolution of complaints offers no goal towards which to move in the recognition of the rights of Indigenous

78 Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander Rights – Ways to Implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights, one of four National Strategies in the Roadmap for Reconciliation*, (available at http://www.reconciliation.org.au/recognising_rights/)

79 *ibid*, A Legislated Bill of Rights – Actions for Implementation (available at http://www.reconciliation.org.au/recognising_rights/pg7.htm)

80 Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge, September 2002, p. 21.

81 *ibid*.

82 Professor George Williams, Mr Sean Brennan and Ms Vanessa Bosnjak, Gilbert & Tobin Centre of Public Law, *Submission 4*, p. 6.

83 *Submission 65*, p. 35.

84 *Ibid*, pp. 69-70.

Australians to equal participation in Australian social and economic life; instead, it only offers the status quo.⁸⁵

5.64 Additionally, the Social Justice Commissioner asked whether it is appropriate for human rights to be resolved through public fora rather than legislation.⁸⁶

5.65 The Committee notes these concerns. However, the Committee considers debate over a possible Bill of Rights raises larger issues, the details of which are outside the scope of this inquiry. Consequently the Committee makes no recommendation on this issue.

Updating the National Action Plan and ratifying the Optional Protocol

5.66 Recommendation 5 of the *Social Justice Report 2000* was that the Government should update Australia's National Action Plan on Human Rights, a document which is lodged with the United Nations Commission on Human Rights:

[It is] a statement to the rest of the world of how a country is progressing in implementing its human rights obligations in a practical sense. National Action Plans serve as an evaluation tool for a country's vision on human rights; an instrument for evaluating a country's performance in relation to their human rights obligations; a record of a government's performance with regard to the protection and promotion of human rights; a tool for setting human rights goals and priorities within achievable time frames, and for planning the management of resources for the promotion and protection of human rights; and as a statement of strategies and measurable targets with regard to the promotion and protection of human rights.⁸⁷

5.67 The Social Justice Commissioner argued that:

The government should also identify overcoming Indigenous disadvantage as a key national priority for improving compliance with our international human rights treaty obligations. Accordingly, it should be prominently reflected in Australia's National Action Plan on Human Rights.⁸⁸

5.68 The *Social Justice Report 2000* also recommended that the Commonwealth Government ratify the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.⁸⁹ Although this protocol is not a specific Indigenous issue, concerns were raised by the Social Justice Commissioner over the

85 *Submission 56*, p. 3; see also *Committee Hansard*, 19 May 2003, pp. 136-137.

86 *Submission 65*, pp. 69-70.

87 See Department of Foreign Affairs and Trade, National Action Plan on Human Rights, www.dfat.gov.au/hr/nap/natact_plan.html.

88 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000, Report No. 2/2001*, p. 101.

89 *ibid*, Recommendation 14.

Government's response to the CERD's scrutiny of Australia's compliance with its human rights obligations towards Indigenous peoples, as discussed above. The Social Justice Commissioner commented that ratification of individual communication mechanisms provided by the protocol demonstrates a country's willingness to be fully accountable and open to international scrutiny:

It reflects a confidence that a country has a good human rights record, by demonstrating a preparedness to be scrutinised.⁹⁰

5.69 While the Committee considers these issues to be important, this inquiry has not enabled it to look at them in detail. Nevertheless, the Committee considers that the Government should give full weight to the importance of reconciliation in the National Action Plan. The Committee is also concerned that, although the Government announced in 1998 that it would update the National Action Plan, it has not yet done so.⁹¹

Rights unique to Indigenous peoples

5.70 In a general response to the issue of Indigenous rights, the Government stated:

The Government is committed to common rights for all Australians ... The Government supports additional measures to ensure equality of opportunity where such measures are necessary to overcome specific disadvantages experienced by Indigenous people. Neither the Government nor the general community, however, is prepared to support any action which would entrench additional, special or different rights for one part of the community.⁹²

5.71 Submissions and witnesses raised a range of issues in relation to rights that are unique to Indigenous peoples:

- recognition of Indigenous peoples' status in the Constitution;
- international obligations;
- self-determination;
- customary law;
- communal and unending intellectual property;
- native title;
- cultural protection—for example, ancestral remains and sacred sites;

90 *Submission 65*, p. 37.

91 See Senate Legal and Constitutional Legislation Committee, *Consideration of Budget Estimates Hansard*, 26 May 2003, pp. 7-12.

92 Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge, September 2002, p. 17.

- environmental protection; and
- the criteria for belonging to an Indigenous group.

5.72 With the exception of the last four issues, the issues above are discussed in turn below. While the Committee is not suggesting that the last four issues are unimportant to Indigenous people and therefore to progress towards reconciliation - particularly native title - this inquiry did not allow the Committee to look at these complex issues in detail, particularly given the lack of comprehensive evidence presented.

Preamble to the Constitution

5.73 The Gilbert & Tobin Centre of Public Law observed that since 1967 the Constitution has been devoid of any reference to Indigenous peoples.⁹³ The CAR's Final Report recommended that the Commonwealth Parliament prepare for referendum a new preamble to the Constitution that recognises Indigenous peoples as the first peoples of Australia.⁹⁴

5.74 The Government stated that it had sought to have this special status recognised in the November 1999 referendum, but it would not pursue a new preamble because the Australian people had not supported that proposal.⁹⁵

5.75 Several submissions disagreed with the Government's response, including Caritas Australia:

Although the referendum dealing with the Australian Republic and amendments to the preamble of the Constitution was not successful, it is not accurate to say that the people dismissed the issue. The process of

93 *Submission 4*, p. 2.

94 CAR's Final Report, p.105, Recommendation 3.

95 Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge, September 2002, pp. 17 and 20. The text of that proposed preamble was: 'With hope in God, the Commonwealth of Australia is constituted by the equal sovereignty of all its citizens. The Australian nation is woven together of people from many ancestries and arrivals. Our vast island continent has helped to shape the destiny of our Commonwealth and the spirit of its people. Since time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures. In every generation immigrants have brought great enrichment to our nation's life. Australians are free to be proud of their country and heritage, free to realise themselves as individuals, and free to pursue their hopes and ideals. We value excellence as well as fairness, independence as dearly as mateship. Australia's democratic and federal system of government exists under law to preserve and protect all Australians in an equal dignity which may never be infringed by prejudice or fashion or ideology nor invoked against achievement. In this spirit we, the Australian people, commit ourselves to this Constitution.'

consultation to discuss the objectives of amending the Constitution prior to referendum was limited and became confused with other proposals.⁹⁶

5.76 The National Assembly of the Uniting Church in Australia commented that the lack of recognition of Indigenous people was ‘an indication of our national immaturity and racist foundation’ and that because of this lack of recognition the Constitution ‘continues to be a creature of terra nullius and not modern nationhood’.⁹⁷

5.77 The Committee considers recognition of Indigenous peoples’ status in a preamble to be a very important symbolic step. While acknowledging that the proposed preamble was not adopted in the 1999 referendum, the Committee notes that this matter was enmeshed with other issues and that the preamble was drafted without wide consultation. The Committee also notes that successful referenda have had long lead times for public discussion and debate on proposals.

International Indigenous obligations

5.78 The national strategy, *Recognising Aboriginal and Torres Strait Islander Rights*, recommended, as an ‘action for implementation’, that:

All governments ensure that their policies and practices observe Australia’s international Indigenous and human rights obligations.⁹⁸

5.79 Neither the CAR Final Report, the attached National Strategies nor the companion booklets expressly describes how ‘international Indigenous rights’ are different from ‘international human rights obligations’, or whether one is part of the other. However, the booklet, *Recognising Aboriginal and Torres Strait Islander Rights*, does indicate that the reference to international Indigenous obligations is the right to self-determination as expressed in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). These articles both state:

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

5.80 ATSIC also argued that international instruments recognise the ‘right of Indigenous peoples to have their customary law accommodated within the laws of the state in which they live’.⁹⁹

96 *Submission 68*, p. 11. See also Professor George Williams, Mr Sean Brennan and Ms Vanessa Bosnjak, Gilbert & Tobin Centre of Public Law, *Submission 4*, p. 3; Mr Dale Shaddick, *Submission 58*, p. 2; Reconciliation Renewing Relationships Catholic Archdiocesan Committee Sydney, *Submission 21*, p. 2.

97 *Submission 15*, p. 6.

98 CAR’s Final Report, p. 111.

5.81 In relation to Australia's compliance with its internal Indigenous obligations, the Government pointed to its ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and other standard-setting instruments such as the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, and its acceptance of the Universal Declaration of Human Rights.¹⁰⁰

Self-determination

5.82 The companion booklet to the strategy, *Recognising Aboriginal and Torres Strait Islander Rights*, also recommended that:

A. Governments at all levels acknowledge Aboriginal and Torres Strait Islander peoples right to self-determination as the basis for policy on Aboriginal and Torres Strait Islander affairs.

B. Governments at all levels enter into negotiations with Aboriginal and Torres Strait Islander peoples in order to realise self-determination goals.¹⁰¹

5.83 The booklet explained what is meant by self-determination, distinguishing it from 'secession and separate statehood' with which it was sometimes equated:

... such references are unfairly inflammatory and do not reflect Aboriginal and Torres Strait Islander aspirations. Self-determination is much more about the process of decision-making. It reflects the need for Aboriginal and Torres Strait Islander peoples to negotiate a relationship with the Australian government, which may lead to many outcomes that have the potential to enhance rather than undermine our sense of national unity. It also reflects the kind of autonomy and decision-making that is already being exercised by communities who take responsibility for the delivery of services or programs. That is, self-determination is reflected in the recognition by governments of Aboriginal and Torres Strait Islander peoples' right to exercise a sphere of authority and responsibility and the communities' exercise of that right.¹⁰²

5.84 ATSIC described self-determination in similar terms:

99 *Submission 80*, p. 18, referring to Articles 1 of the ICCPR and ICESCR, Article 8 of the International Labour Convention 169 and Article 35 of Draft Declaration on Rights of Indigenous Peoples.

100 Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge, September 2002, p. 18.

101 Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander Rights – Ways to Implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights*, one of four *National Strategies in the Roadmap for Reconciliation* - 3. Self-determination and Political Participation (available at http://www.reconciliation.org.au/recognising_rights/pg6.htm).

102 *ibid.*

Self-determination means the ability and the right of Aboriginal and Torres Strait Islander peoples to determine our own future and chart our own development. Protecting, practising and passing on cultural traditions, customs and languages to our children goes hand in hand with the right to make our own decisions about policies, programs, institutions and structures to meet our aspirations.¹⁰³

5.85 However the Government's response to the CAR's Final Report stated its strong opposition to self-determination, stating that the term 'implies the possibility of a separate Indigenous state or states'. The Government stated, however, that:

... it unequivocally supports the principle of Indigenous people having opportunities to exercise control over aspects of their affairs (as reflected in the establishment and operation of ATSIC for example) ...¹⁰⁴

5.86 Instead, the Government preferred the terms 'self-management' or 'self empowerment', on the basis that :

... these terms are consistent with a situation in which Indigenous people exercise meaningful control over aspects of their affairs in active partnership and consultation with government.¹⁰⁵

5.87 The Government was concerned that:

... self-determination implies that a government must in some way relinquish responsibility for and control over those aspects of Indigenous well being over which it rightly has jurisdiction in common with its responsibilities to all Australian citizens. The Commonwealth Government remains accountable for outcomes in Indigenous affairs when making fiscal commitments. The Government has demonstrated its strong and continuing commitment to outcomes in addressing disadvantage in the areas of health, housing, education and employment and is continuing to provide funds where most needed ... Very importantly, the Government is committed to ensuring that in the process of meeting its responsibilities to Indigenous people, they are engaged to the maximum extent possible as partners in the design and delivery of services.¹⁰⁶

5.88 In his submission to the Committee, the Social Justice Commissioner stated that Indigenous self-determination in Australia was a 'matter of practical reality' and

103 *Submission 80*, p. 18.

104 Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge, September 2002, p. 10.

105 *ibid*, pp. 19-20.

106 *ibid*.

was supported by the recent practice of the United Nations Human Rights Committee and the United Nations Committee on Economic, Social and Cultural Rights.¹⁰⁷

5.89 A submission from Dr Val Haynes, Senior Lecturer at the University of Tasmania, discussed Indigenous peoples' aspirations for self-government and regional autonomy and argued that:

Self-government is a right which must be restored to enable Aboriginal people to regain their cultural dignity and autonomy. Restoration of such a right is in accordance with Australia's obligations under international law.¹⁰⁸

5.90 Submissions also raised:

- the economic and administrative benefits that self-determination may bring; and
- the issue of sovereignty.

Economic and administrative benefits of self-determination

5.91 Both Dr Haynes and the Gilbert & Tobin Centre of Public Law drew the Committee's attention to the Harvard Project on American Indian Economic Development. This study looked at the reasons behind sustainable economic development in American Indian communities and found that the economically successful communities had a common feature: '[t]hey assert the right to govern themselves and they exercise that right effectively by building capable governing institutions that match their culture'.¹⁰⁹ The Harvard Project found that the critical elements for building their sustainable self-determined economies in American Indian communities were:

- genuine decision making power—ensuring that the decision-maker absorbs the consequences for decisions;
- governing institutions that have stable decision-making patterns, separate politics from business and program management, effectively achieve results and effectively and non-politically resolve disputes—sending messages to non-community members that encourage interaction with and investment in the community;
- governing institutions that match the community's expectations of how authority should be organised and exercised but which can also perform effectively in the

107 *Submission 65*, pp. 40-41. Details of the United Nations Committees' observations and communications are included.

108 *Submission 43*, p. 1.

109 Dr Stephen Cornell, 'The Harvard Project Findings on Good Governance' delivered at *Self-Government: Options and Opportunities, Speaking Truth to Power III*, BC Treaty Commission, March 14-15 2002 (available at http://www.bctreaty.net/files_2/pdf_documents/truth_3_book.pdf), p. 8.

face of current challenges—effective institutions that are so deeply embedded in the community’s culture that their own legitimacy is never challenged; and

- long-term thinking in the community—proving appropriate criteria by which to make decisions and encouraging representatives to serve the community instead of themselves.¹¹⁰

5.92 Several submissions supported elements of the Harvard Project’s findings.¹¹¹

5.93 While as far as the Committee is aware the Government has not publicly commented on the Harvard Project findings, it has stated that it does support ‘the principle that Indigenous people should have meaningful opportunities to exercise control over their own affairs’. A ‘practical illustration’ of that commitment is its ‘continuing support’ for the operations of ATSIC:

... which ensures the maximum participation of Aboriginal and Torres Strait Islander people in the formulation and implementation of programmes which affect them ... ATSIC was established by the Parliament to pursue its objectives in a manner that is consistent with the aims of self-management, self-sufficiency and economic independence for Aboriginal and Torres Strait Islander peoples.¹¹²

5.94 As already noted, however, a government review of ATSIC is currently underway.

5.95 Dr Haynes observed that:

... at Commonwealth level we have the Aboriginal Councils and Corporations Act 1975, the NT Aboriginal Land Rights Act 1975 with its “Land Councils” and “Land Trusts” and, of course, the ATSIC Act 1989 with its national “Commission” and “Regional Councils”. At State level we have the Land Councils under NSW and Tasmanian land rights legislation.

However, all these bodies have very restricted governing powers defined by particular subject matter, that is, either the administration of funds as in the case of ATSIC and in the other cases circumscribed by artificial land boundaries and other legislation of general application.¹¹³

5.96 Dr Haynes also noted that local and State laws govern many matters on Indigenous lands, such as building, environment and public health laws. He

110 *ibid*, pp. 5-8.

111 For example, Reconciliation Australia, *Submission 64*, attachment, *Words, symbols and actions – Reconciliation Report Card 2002*, p. 8 and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission 65*, p. 28.

112 Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia’s Challenge, September 2002, p. 19.

113 *Submission 43*, p. 3; see *Submission 43* pp. 6-7 for an example of legislation of general application.

commented that there is little ‘cultural match’ between the legislative entities and Aboriginal social, political and economic institutions — for example, the mismatch between ATSIC governing structures and the geographic location of Aboriginal communities. He concluded that:

The effect of all this is that there is little space left for the exercise of self-government by Aboriginal communities in accordance with their own laws, norms and practices.¹¹⁴

5.97 ANTaR argued that the Government misunderstood the issue and commented that:

The Government also opposes self-determination on the basis that it “implies that a government must in some way relinquish responsibility for and control over those aspects of Indigenous well-being over which it rightly has a jurisdiction in common with its responsibilities to all Australian citizens”. This again represents a deliberate misunderstanding of the term’s meaning under international law. As the Government itself points out, it is involved in a number of agreements conferring Indigenous control over the delivery of health and other services. The Katherine West Health Board agreement is a good example of a successful application of local self-determination negotiated with the Commonwealth and Territory governments.¹¹⁵

5.98 Caritas Australia supported this view, observing that there were a number of examples where Indigenous organisations work alongside, but separately from, formal governance arrangements:

The Tangentyere Council, for example, in Alice Springs, operates within the same area as the formal local government structure, but with Aboriginal people. This organisation is recognised widely for its work, currently receiving Commonwealth funds for some of its operations.¹¹⁶

Sovereignty

5.99 Dr Haynes commented that ‘the right to self-government is usually seen as arising out of the notion of “sovereignty”’.¹¹⁷ He pointed to the High Court judgments of Gibbs CJ and Brennan J in *Coe v Commonwealth*¹¹⁸ and Brennan J in *Mabo v Queensland*¹¹⁹ and *Coe (on behalf of Wiradjuri tribe) v Commonwealth*¹²⁰ These

114 *Submission 43*, p. 3.

115 *Submission 40*, p. 11.

116 *Submission 68*, p. 10.

117 *Submission 43*, p. 2.

118 (1978) 24 ALR 118 at 128.

119 (1992) 107 ALR 1 at 20.

120 (1993) 118 ALR 193 at 198.

judgments indicate that the ‘Australian courts have refused to recognise that Aboriginal people are able to exercise sovereignty’ outside of that conferred upon the Aboriginal people by legislation. Dr Haynes contrasted this position with other countries:

... it has never been the position in the US. There the Indian tribes are recognised as having limited sovereignty as “domestic dependent nations”. The idea that the First Nations have a constitutionally protected, inherent right of self-government is gaining ground in Canada at the same time as self-government to varying degrees is being attained by Indians and Inuit by agreement. In New Zealand the increasing regard paid to the Maori version of the Waitangi Treaty has meant a recognition that the Maori’s did not cede their sovereignty to the British Crown in that treaty. The signatory chiefs reserved for their tino rangatiranga, that is, their “absolute chieftainship”.¹²¹

5.100 The Social Justice Commissioner concluded that a fear of secession was unfounded. He cited the United Nations General Assembly Resolution 2625 (XXV) that the principle of self-determination should not be construed:

... as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.¹²²

5.101 Like Dr Haynes, he noted that limited forms of Indigenous sovereignty are recognised in the United States of America, Canada and New Zealand.¹²³

Traditional or customary law

5.102 ‘Traditional law’ or ‘customary law’ generally refers to the body of rules which Indigenous people consider binding on themselves. Customary law may differ according to the particular Indigenous group.

5.103 The CAR’s *National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights* recommended that:

State and Territory governments consider giving magistrates and judges the discretion to take account of traditional laws in sentencing, as already occurs in some circumstances in the Northern Territory.¹²⁴

121 *Submission 43*, p. 2.

122 *Submission 65*, p. 42.

123 *ibid*, p. 26.

124 CAR’s Final Report, p. 111.

5.104 The companion booklet, *Recognising Aboriginal and Torres Strait Islander Rights*, suggests that:

The Legal and Constitutional Affairs Committee of the House of Representatives re-visit the Australian Law Reform Commission report (1986) in light of developments in the recognition and protection of the rights of Aboriginal and Torres Strait Islander peoples under Australian common law. The objective is to examine the extent to which that report can be implemented and make new recommendations for the recognition of customary law.¹²⁵

5.105 The Australian Law Reform Commission's (ALRC) 1986 report recommended a range of ways in which the Australian legal system might recognise customary law, including by taking customary law into account in sentencing offenders. The ALRC also stated that:

As far as possible, Aboriginal customary laws should be recognised by existing judicial and administrative authorities, avoiding the creation of new and separate legal structures, unless the need for these is clearly demonstrated.¹²⁶

5.106 The Government has said:

Neither the Government nor the general community ... is prepared to support any action which would entrench additional, special or different rights for one part of the community.¹²⁷

5.107 AgForce Queensland strongly supported the view that all Australians should be equally subject to a common set of laws:

AgForce cautions against initiatives that might have the effect of creating separate legal and social regimes that will apply in perpetuity for Aboriginal people. Such measures will ultimately lead to friction and division. AgForce believes that Australia is a secular and democratic country where all citizens must be treated equally under the law. There should be no hereditary or preferential rights.¹²⁸

125 Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander Rights – Ways to Implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights, one of four National Strategies in the Roadmap for Reconciliation - 3. Land, Culture and Heritage – Customary Law* (available at http://www.reconciliation.org.au/recognising_rights/pg5.htm)

126 ALRC, *Recognition of Aboriginal Customary Law*, Report No. 31, 1986, available at <http://www.alrc.gov.au/inquiries/title/alrc31/recommendations.htm>.

127 *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge*, September 2002, p. 17.

128 *Submission 61*, p. 3.

5.108 However, other submissions observed that the Government's view on this issue was inconsistent not only with Indigenous peoples' aspirations but also with existing special recognition of Indigenous peoples' rights. For example, the common law recognises some forms of customary law for certain purposes, and legislation has established native title rights, cultural heritage protection and bodies such as ATSIC.¹²⁹

5.109 In relation to taking into account customary law in sentencing, the Aboriginal Legal Rights Movement Inc best summarised the issues:

Recognition of customary law in sentencing always assumes the primacy of the jurisdiction of the criminal courts and raises the question of double jeopardy and the "two punishments problem". It leaves the courts in the uncertain position of appearing to condone customary law sanctioned violence. That inevitably leaves the common law courts in a position of having to decide what customary law is and whether the instant case was a "genuine case" of customary law. It is always decided *ex post facto*, it is always decided as a result of police intervention and it is with great respect, a form of recognition, in mitigation of punishment after the horse has bolted. By that we mean that contemporary Traditional Society has not been able to deal with introduced substances like petrol sniffing, so social and cultural change has meant that full recognition of customary law may no longer be feasible. In some ways the opportunity for recognition has passed, the Roadmap recommendations are a realistic concession to what can now be achieved in the recognition of customary law in the criminal jurisdictions and to the reality of law and order maintenance in contemporary traditional societies.¹³⁰

5.110 The Aboriginal Legal Rights Movement also supported the ALRC's recommendations of incorporating recognition of the extended family's care of children in cases of family breakdown and violence, and supported alternative care recognition of kinship system in awarding compensation.¹³¹

5.111 Other submissions referred to the use of customary law in developing techniques for dispute resolution,¹³² and accommodating the 'Doombuk' smoke ceremony within the *Country Fire Authority Act 1958* (Vic).¹³³

5.112 The Committee considers that there is potential to accommodate customary law within Australia's existing legal system. Although the ALRC identified specific

129 For example, Dr Val Haynes, *Submission 43*, pp. 6-7 and Reconciliation Australia, *Submission 64*, Attachment, *Words, symbols and actions – Reconciliation Report Card 2002*, p. 8.

130 *Submission 17*, p. 2.

131 *ibid*, p. 3.

132 Reconciliation Australia, *Submission 64*, attachment, *Words, symbols and actions – Reconciliation Report Card 2002*, p. 16.

133 *ibid*, p. 22.

customary laws that could be accommodated in Australian law in 1986, significant changes in the application of common law to Indigenous rights have since taken place (for example, the *Mabo* case¹³⁴). The Committee considers that these may warrant further investigation and that issues relating to customary law should be given high priority in future discussions between all levels of government and Indigenous people.

Communal and unending intellectual property

5.113 The national strategy, *Recognising Aboriginal and Torres Strait Islander Rights*, recommended that:

All governments take steps to ensure the recognition and protection of Indigenous intellectual property as already occurs in some Commonwealth legislation.¹³⁵

5.114 The companion booklet, *Recognising Aboriginal and Torres Strait Islander Rights*, stated that the current intellectual property protections do not sufficiently protect Indigenous intellectual property:

Presently, the law contemplates a single author/owner and considers the protection in a commercial context, which gives a limited life to the protection.

5.115 The booklet recommended that:

Commonwealth, State and Territory governments work with Aboriginal and Torres Strait Islander representatives to develop legislation to protect the unique aspects of Aboriginal and Torres Strait Islander intellectual property, informed by the recommendations of the [ATSIC] report *Our Culture: Our Future*.¹³⁶

5.116 On this issue, the Government pointed to examples of existing intellectual property protections and stated that:

The Government is committed to addressing Indigenous intellectual property concerns and enhancing the protection of the expression of Indigenous culture ...

134 *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1.

135 CAR's Final Report, p. 111.

136 Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander Rights – Ways to Implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights, one of four National Strategies in the Roadmap for Reconciliation* - 3. Land, Culture and Heritage – ATSI Peoples' Intellectual Property (available at http://www.reconciliation.org.au/recognising_rights/pg5.htm).

The Government is actively involved in international fora which are considering Indigenous traditional knowledge and its interaction with intellectual property protection schemes.¹³⁷

5.117 The Government has since announced that it will introduce legislation to protect Indigenous communities' moral rights in intellectual property.¹³⁸ The Committee welcomes that development.

Conclusion

5.118 The Committee is deeply concerned that the Commonwealth Government has chosen to focus on the limited scope of 'practical reconciliation' to the exclusion of the broader structural causes for Indigenous disadvantage. Reconciliation cannot be achieved without addressing these broader structural causes. Previous beneficial changes to these broader structural causes have made substantial practical improvements in Indigenous people's well-being—for example, the 1967 amendments to the Constitution, the recognition of native title and the establishment of the CAR.

5.119 There is ample evidence to suggest that previous structural changes which have helped to address Indigenous disadvantage only took place because of Commonwealth Government leadership.

5.120 In the final chapter of this report, the Committee presents its conclusions and recommendations on these and other issues.

137 Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge, September 2002, p. 18.

138 Senator Richard Alston and the Hon Daryl Williams, *Media release – Indigenous communities to get better protection for creative works*, 19 May 2003 (available at: <http://www.minister.immi.gov.au/atsia/meida/media03/r03031.htm>).

CHAPTER 6

WHERE TO FROM HERE?

Progress to date

6.1 The Committee is most concerned that the Commonwealth Government has fully agreed to only the first of the CAR's six recommendations, namely, that COAG should implement and monitor a national framework to overcome Indigenous disadvantage. This is despite the fact that the CAR engaged in a lengthy and comprehensive consultation process over nearly a decade in order to recommend changes that it believed were necessary.

6.2 As has been noted by many witnesses and submissions to this inquiry, the Commonwealth Government's approach to reconciliation is effectively limited to 'practical reconciliation'. There has been a very minimal response to symbolic issues. There is no legislation to enact a treaty process. As Professor Mick Dodson pointed out, the Government's emphasis on areas of perceived agreement leaves many important issues off the agenda, to the detriment of Indigenous people. Moreover, there is no timeframe or process to resolve 'unfinished business', and the Government has rejected Indigenous self-determination, equating it, quite erroneously, to the notion of separate statehood. The Committee considers that true reconciliation involves all of the matters contained in the CAR's *Australian Declaration Towards Reconciliation* and *Roadmap for Reconciliation* and its six recommendations on how to give effect to these matters.

6.3 Even if the discussion of reconciliation is confined to 'practical reconciliation', it is clear that efforts to date have not adequately addressed Indigenous disadvantage, as key indicators in Chapter 2 clearly demonstrate.

6.4 The Committee acknowledges that there have been some useful initiatives in recent years, particularly since the Senate first referred this inquiry to the Committee in 2002. The Commonwealth Government has finally released its response to the CAR's recommendations. The Steering Committee for the Review of Commonwealth/State Service Provision has produced an Indigenous compendium to its report on government services and has developed a national framework on benchmarking Indigenous disadvantage. COAG's 'whole of government' trials in Indigenous communities are at various stages around Australia. However, the Committee notes evidence that potential problems with those initiatives remain, including the need to incorporate human rights into benchmarking, and the need to support Indigenous self-governance and build capacity in Indigenous communities. The Committee notes that a separate parliamentary inquiry into capacity-building in

Indigenous communities is currently underway¹ and looks forward to the findings of that process.

6.5 It is clear that reconciliation between Indigenous and non-Indigenous Australians is not going to be achieved overnight. However, the Committee considers that there is clear evidence of a widespread feeling that the momentum present during the CAR's decade of existence is being lost. Grassroots movements are feeling unsupported. Indicators of disadvantage are not improving. More is needed: there needs to be a demonstrated commitment to a national approach.

6.6 This should not be difficult to achieve. Throughout this inquiry there has been strong evidence of continuing goodwill in the community towards progressing reconciliation. The Committee notes that the legislation establishing the CAR attracted cross-party support in 1991, and that State and Territory governments have demonstrated continuing commitment to taking measures, despite differing interpretations as to what reconciliation means in practice.

6.7 There is room for a range of responses, but an overarching national framework and commitment to continue dialogue with Indigenous people are essential.

What is needed

6.8 The Committee considers that certain key issues must be addressed to increase and sustain national progress towards reconciliation:

- greater national leadership;
- developing a national policy framework that amongst other things encourages consultation with, and the use of partnerships and agreements with, Indigenous communities;
- encouraging COAG's involvement in the policy framework that extends beyond 'practical reconciliation';
- establishing effective monitoring, evaluation and scrutiny of activities;
- addressing specific legal issues, including Constitutional change;
- providing more support for the 'people's movement' and for Reconciliation Australia; and
- improving the research and knowledge base on relevant issues.

1 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' inquiry into capacity building in Indigenous communities, referred in June 2002.

Greater national leadership

6.9 The CAR stated that ‘True reconciliation will require concerted efforts in all spheres of our nation’s life’, and the Committee endorses that view. Governments at all levels, be it federal, state, territory or local, as well as businesses, community organisations and individuals all have important parts to play.

6.10 However, to cast reconciliation in terms of ‘everyone’s responsibility’, as the Commonwealth Government has done, is misleading. The Commonwealth Government’s responsibility is significantly greater than others’ because it dictates national policy and controls the allocation of federal resources. These factors influence the actions of a wide range of bodies, who in turn help to determine the rate and extent of national progress towards reconciliation.

6.11 It is clear from evidence during this inquiry that, unless there is commitment and support for reconciliation at the national level, the prospects of achieving reconciliation will be greatly diminished, if not extinguished. The Committee has heard clear evidence of a strong desire and demonstrated need for greater national leadership. The only body that can effectively do that is the Commonwealth Government.

Recommendation 1

The Committee recommends that the Commonwealth Government accept responsibility for providing national leadership on reconciliation and adopt all of the recommendations contained in the Final Report of the CAR. The Committee is of the view that reconciliation encompasses far more than the current ‘practical reconciliation’ approach, and that the Commonwealth Government has a duty to engage with and to lead the nation on this vital and important issue.

National policy framework

6.12 The Committee considers that real benefits could be achieved by governments and bodies adopting an integrated and coordinated approach to policy development, program design and program implementation. These policies and programs rely on the appropriate identification of the issues, setting of targets and development of action plans. The Committee is encouraged by COAG’s intention to integrate State and federal approaches to reconciliation, but is concerned at the slow pace of progress, as well as COAG’s focus on one aspect of reconciliation – so-called ‘practical reconciliation’ – without addressing important wider issues. It is essential that governments recognise the importance of cultural, spiritual and human rights issues to Indigenous people and ensure that they are given prominence in the reconciliation process.

6.13 The Committee supports the principles of the Commonwealth Grants Commission Inquiry into Indigenous Funding, aimed at better aligning funding with Indigenous needs. In particular the Committee notes the Commission’s recognition that the Commonwealth can influence providers of services to Indigenous people

through developing partnerships and attaching conditions to grants to the States. A continuing commitment to such efforts is important.

6.14 The Committee also sees significant benefits in open community involvement in identifying unresolved issues and prioritising them for action. Benefits include the minimisation of long-term community division, the effective reduction of Indigenous disadvantage by addressing the root causes identified by Indigenous peoples and reinforcing community responsibility for reconciliation.

6.15 The Committee notes that the Commonwealth Government has focused on those issues on which there is general agreement and has refused to take action in relation to those areas where it considers there is no general agreement. As many submissions and witnesses have pointed out during this inquiry, this approach effectively leaves many important issues off the agenda. The Committee considers that this approach is flawed, and that there should be at the very least a commitment to a process for identifying the issues.

6.16 Amongst other things, the CAR recommended that a National Reconciliation Convention should be held every three years. This convention would provide an ongoing forum for the unresolved issues of reconciliation and maintain public visibility of these issues. The Committee agrees that such a convention would provide a valuable national opportunity for discussion and supports this proposal, but considers that a four year interval between conventions is more appropriate. A longer interval would avoid coinciding with the election cycle and would provide more time in which the implementation of previous recommendations could be assessed.

Recommendation 2

The Committee recommends that the Commonwealth Government support the establishment of a National Reconciliation Convention (as proposed by clauses 6 and 7 of the Reconciliation Bill) that would identify and prioritise issues and recommend action, to be held every four years.

6.17 The Committee also urges State and Territory governments to continue their efforts to progress reconciliation within their jurisdictions. Amongst the criticisms the Committee heard were that the States and Territories, while responding to some of the recommendations such as moving motions of support for the *Australian Declaration Towards Reconciliation* and endorsing the COAG reconciliation framework, had not provided formal responses to the CAR's recommendations or its National Strategies.

Recommendation 3

The Committee urges State and Territory governments to continue to progress reconciliation by implementing all of the CAR's recommendations, and also urges the Commonwealth Government to take a greater leadership role through the COAG process.

National framework for agreement making

6.18 The Committee considers that agreements that address unresolved issues are critical to progress towards reconciliation. In addition, the increased coordination of programs through partnerships and agreements assists in pooling funding and resources to target areas of particular need.

6.19 The Committee is encouraged by the increased consultation generated by a growing culture of negotiation, but notes the arguments that such agreements without a legislative framework may not adequately protect Indigenous peoples' rights and interests. A legislative framework for negotiations would also counteract the tendency towards a short term focus. However, the Committee considers that the effects of such legislation need to be explored further, and consequently recommends that the Commonwealth Government should commit to opening up discussions with Indigenous people about the process for resolving unfinished business.

Council of Australian Governments (COAG)

6.20 The Committee supports the Commonwealth, State and Territory government's initiatives to reduce Indigenous disadvantage under the COAG framework. The Committee is encouraged by the commitment to monitoring of and reporting on Indigenous disadvantage, including the work that is being done on the indicator framework and the MCATSIA's monitoring of Ministerial Councils' benchmarks and action plans. The COAG 'whole of government' trials in Indigenous communities may assist in developing long-term national integrated and coordinated approaches to certain aspects of reconciliation.

6.21 However, the Committee is concerned that MCATSIA is putting insufficient effort into driving the agenda. As the peak intergovernmental forum of Commonwealth, State and Territory Ministers with responsibility for Aboriginal and Torres Strait Islander Affairs, MCATSIA should be taking a more active and more visible role.

6.22 The Committee is further concerned that COAG's approach is effectively limited to addressing Indigenous disadvantage and ignores the wider issues of reconciliation, such as the recognition of Indigenous rights. Those wider issues are integral to achieving reconciliation. During this inquiry, the Committee also heard significant concerns about COAG's lack of progress in developing action plans, performance reporting strategies and benchmarks. While progress has been made by some Ministerial councils, others appear to have made little headway to date.

Recommendation 4

The Committee recommends that the Commonwealth Government encourage COAG to incorporate the unresolved issues of reconciliation into COAG's reconciliation framework and to develop appropriate benchmarks and action plans.

Monitoring and evaluation of progress

6.23 One of the particular areas of interest to the Committee during this inquiry was the adequacy and effectiveness of targets, benchmarking, monitoring and evaluation in promoting reconciliation.

6.24 The Committee acknowledges the progress that has been made in the last two years in this area, particularly through COAG's commissioning of the Steering Committee for the Review of Commonwealth/State Service Provision to develop an indicator framework to assess Indigenous disadvantage. The Committee understands that the Steering Committee will be producing an annual report on Indigenous disadvantage based on this data, and welcomes that initiative, but is concerned at the time taken in developing the framework. Further, the Committee is strongly of the view that beyond the framework and the annual report, the focus should be on setting goals and benchmarks to work towards achieving improved outcomes, and is concerned that this latter process is less visible. The Committee considers that increased publication of performance and scrutiny of activities would increase accountability and effectiveness of activities towards reconciliation.

Developing benchmarks

6.25 The Committee acknowledges the ongoing development by Commonwealth/State Ministerial Councils of action plans, performance monitoring strategies and benchmarks on specific areas of Indigenous disadvantage. The Committee strongly endorses a focus on outcomes and on looking forward rather than looking backward. The setting of targets and benchmarks and a focus on continual assessment of progress towards meeting those benchmarks is crucial.

6.26 The Committee is concerned that progress in developing benchmarks appears to be slow and uneven. The Committee notes that MCATSIA is responsible for overseeing the development of action plans, performance reporting strategies and benchmarks, as well as identifying any gaps in the action plans. However, the Committee had difficulty during this inquiry in obtaining information on what benchmarks are in place and what data MCATSIA has gathered and made available to the public. Such information should be widely reported.

Recommendation 5

The Committee stresses the importance of developing effective performance monitoring regimes, and recommends that MCATSIA:

- **rigorously pursue the development of action plans, performance reporting strategies and benchmarks by Ministerial Councils,**
- **provide regular updates on progress, and**
- **publish those updates in a widely available form, including on the Internet.**

Improving data collection and reporting

6.27 The Committee is disappointed with the lack of information demonstrating the effectiveness and efficiency of government programs. National requirements for reporting on certain Indigenous issues exist, for example, under the *Indigenous Education (Supplementary Assistance) Act 1989*. The Committee considers that government agencies should be required to collect and publicly report data about the effect of programs on reconciliation and that such information must be accessible and easily understood.

6.28 The Committee notes the Commonwealth Government's statement that as Commonwealth/State agreements are renewed, further data collection and reporting requirements are to be incorporated into the conditions of Specific Purpose Payments. The Committee endorses and encourages this approach.

6.29 Some submissions to this inquiry expressed concern that data collection and reporting increases administrative costs. However, there is a risk that reconciliation will be impeded since without this data the public cannot judge the effectiveness of programs nor hold to account the bodies delivering those programs. The Committee considers that this risk is too great not to incur the administrative costs in collecting relevant data and reporting publicly.

6.30 In order to achieve greater accountability of federal government agencies in achieving progress, the Committee proposes two practical measures: requiring relevant agencies to include in their annual reports more detailed information about programs and services related to Indigenous issues; and requiring heads of relevant agencies to include reporting on such matters as an indicator in their performance agreements.

6.31 In addition, the Committee considers that State and Territory governments should be encouraged to report progress against agreed benchmarks and targets. Reporting through the Ministerial Councils under COAG would seem to be an appropriate means of doing so, and the Committee considers that the Commonwealth Government should take the lead in encouraging this approach.

Recommendation 6

The Committee recommends that the Commonwealth Government take steps to increase its monitoring and reporting of data on outputs and outcomes of government funding for Indigenous related programs. These requirements include:

- **incorporating reporting on outcomes of Indigenous-related programs into performance agreements for CEOs of Commonwealth departments and agencies;**
- **amending the guidelines issued under subsection 63(2) of the *Public Service Act 1999* to require Government agencies to give detailed information**

relating to Indigenous focused outputs and outcomes in their annual reports (noting that guidelines are subject to approval by the Joint Committee of Public Accounts and Audit); and

- **continuing to incorporate further data collection and reporting requirements into the conditions of Specific Purpose Payments when Commonwealth/State agreements are renewed.**

Other means of improving accountability

6.32 The Committee considers that progress towards reconciliation would be greatly improved if an independent body scrutinised that progress on an ongoing basis.

6.33 While some suggested that Reconciliation Australia should perform this role, opinions on this issue were mixed. The Committee considers that Reconciliation Australia, while fulfilling valuable functions in terms of establishing partnerships with organisations and individuals to promote reconciliation and community awareness, is not designed to be a monitoring body. Moreover, it has no statutory powers to enforce compliance.

6.34 The Committee notes that the Reconciliation Bill proposes several measures to promote reporting on reconciliation: annual reporting by the Social Justice Commissioner; a ministerially appointed independent body to provide a report to the Minister every three years; and a joint Parliamentary Committee to monitor progress.

6.35 While the Social Justice Commissioner already includes reporting on reconciliation in his annual *Social Justice Reports*, the Committee notes that the Government's Australian Human Rights Commission Bill 2003 proposes the abolition of this specialist position. Earlier this year the Senate Legal and Constitutional Legislation Committee unanimously opposed the abolition of the position,² and the Committee endorses that position most strongly. The Committee also considers that a statutory reference to reporting on progress towards reconciliation would be desirable, and that the Government should be obliged to respond to the Social Justice Commissioner's reports, as recommended in the *Social Justice Report 2001*.

6.36 Moreover, the Committee considers that the Commonwealth Government through COAG should encourage States and Territories to report against agreed benchmarks and targets, so that the Social Justice Commissioner can include such reporting in his annual reports.

6.37 A ministerially appointed independent taskforce would be a means of ascertaining the Government's view of the progress towards reconciliation on an annual basis. The Committee considers that such a taskforce should only be appointed

2 Senate Legal and Constitutional Legislation Committee *Inquiry into the provisions of the Australian Human Rights Commission Legislation Amendment Bill 2003*, May 2003, Recommendation 1.

after consultation with relevant stakeholders so as to ensure that it is broadly representative of relevant interests, perhaps even with Parliamentary involvement in the appointment of members.

6.38 The Committee also considers that the Government should be required to table its response to those reports.

Recommendation 7

The Committee recommends that the Aboriginal and Torres Strait Islander Social Justice Commissioner be required by statute to report publicly on progress towards reconciliation (as proposed by clause 10 of the Reconciliation Bill).

Recommendation 8

The Committee recommends that the Minister be required by statute to appoint an independent body to report on progress towards national reconciliation (as proposed by clause 11 of the Reconciliation Bill), and that in determining the membership of the taskforce, the Minister be required to consult with relevant stakeholders, including the established parliamentary parties.

Recommendation 9

The Committee recommends that the Government should be required by statute to respond to the reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner and the proposed ministerial taskforce.

6.39 The Committee also supports ongoing monitoring by Parliament of progress towards reconciliation. Raising the prominence of such important issues might be greatly assisted by giving specific responsibilities to a parliamentary committee, as envisaged in the CAR's draft legislation. While that Bill proposed a new Parliamentary Joint Committee, the Committee considers that the existing Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund would be an appropriate committee to have the additional functions and powers recommended by the CAR because of the intersection of issues and the expertise of that committee. However, the Committee notes that this existing Joint Committee has a limited life. It was established under the *Native Title Act 1993*, and a sunset provision of that Act (section 207) deems that the Joint Committee ceases to exist on 24 March 2004. Consequently the Committee recommends that if there is no move by the Government to continue the existing Joint Committee, a new Joint Parliamentary Committee on Reconciliation should be established.

Recommendation 10

The Committee recommends that legislation be enacted to give to a Parliamentary Joint Committee the functions (consulting, reporting and examining public reports and Government responses in relation to

reconciliation) proposed by clauses 13, 14 and 15 of the Reconciliation Bill. If the Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund does not continue beyond March 2004, these functions should be given to a separate Joint Parliamentary Committee.

Specific legal issues

6.40 Because of the wide range of matters that are relevant to reconciliation, it has not been possible for the Committee to consider in depth all the legal issues that were raised in submissions, during hearings or in relevant reports and articles. However, certain specific issues that were addressed in the CAR's final documents are discussed below:

- a preamble to the Constitution;
- amendment to section 25 of the Constitution;
- Indigenous intellectual property; and
- customary law.

Preamble to the Constitution

6.41 The CAR's third recommendation was that the Commonwealth Parliament should prepare legislation for a referendum to make various amendments to the Constitution, including by way of a new preamble that would recognise Indigenous people as the first peoples of Australia.

6.42 The Committee considers recognition of Indigenous peoples' status in a preamble to be a very important symbolic step. While acknowledging that the proposed preamble was not adopted in the 1999 referendum, the Committee notes that this matter was enmeshed with other issues and that the preamble was drafted without wide consultation. The Committee notes also that successful referenda have had long lead times for public discussion and debate. Accordingly the Committee recommends that the Government demonstrate its commitment to recognising the status of Indigenous people in Australia by facilitating that process in the near future.

Recommendation 11

The Committee recommends that the Government embark on a broad consultation process before preparing legislation for a referendum that would insert a preamble to the Constitution recognising the status of Indigenous peoples as Australia's first peoples.

Removal of section 25 from the Constitution

6.43 The Committee supports the CAR's recommendation to remove section 25 from the Constitution. In the Committee's view, any provision that contemplates disqualifying people from voting in State elections on the basis of their race has no place in a modern democracy. Symbolic issues are important, and the Committee is

concerned about the Government's lack of commitment to a timeframe for implementing the recommendation.

Recommendation 12

The Committee recommends that the Government immediately prepare an amendment to remove section 25 from the Constitution, conduct an information campaign to inform the Australian people of the desirability of such reform and put the amendment to a referendum at the next election.

Amendment of paragraph 51(xxvi) of the Constitution

6.44 The Committee supports the CAR's suggestion to amend paragraph 51(xxvi) of the Constitution to authorise the Commonwealth to make special laws only for the *benefit* of any race. The Committee considers that constitutional provisions which can be used to support discriminatory laws have no place in a modern democracy.

Recommendation 13

The Committee recommends that the Government immediately prepare an amendment to paragraph 51(xxvi) of the Constitution that provides the Commonwealth Parliament with power to make special laws only for the *benefit* of any particular race, conduct an information campaign to inform the Australian people of the desirability of such reform and put the amendment to a referendum at the next election.

Intellectual property

6.45 The recognition and protection of Indigenous intellectual property was one of the specific matters mentioned in the CAR's National Strategy to promote recognition of Aboriginal and Torres Strait Islander rights. While the Committee received little evidence on this issue, it acknowledges:

- that ATSIC has given substantial consideration to this matter;
- that the Government has announced it will develop legislation to protect the moral rights of Indigenous communities' intellectual property; and
- that the Government is considering the Myer Report's recommendation³ to introduce royalty resale arrangements to further protect the rights of artists.⁴

6.46 The Committee urges the Government to introduce its proposed moral rights legislation as soon as possible. The Committee endorses royalty resale rights

3 Recommendation 5 contained in the Department of Communications, Information Technology and the Arts' report, *Report of the Contemporary Visual Arts and Craft Inquiry*, 2002, (available at http://www.dcita.gov.au/Article/0,,0_1-2_2-3_163-4_111225,00.html).

4 Senator Alston, Senate Hansard, 13 August 2003, p. 13506.

arrangements in principle and urges the Government to progress implementation of those rights.

Recommendation 14

The Committee recommends that the Government implement its commitment to addressing Indigenous intellectual property issues by introducing relevant legislation in the near future.

Recommendation 15

The Committee recommends that the Government progress the implementation of resale royalty rights arrangements for Indigenous artists as part of its broader review.

Customary law

6.47 The Committee considers that the recognition of customary law and other Indigenous rights within the existing Australian legal system is important to progress towards reconciliation. This inquiry did not enable it to look at these complex issues in detail, but the Committee rejects the Government's position that all Australians should have 'common rights' and that any measure that 'entrenches additional, special or different rights for one part of the community' should be rejected. As Mr Brennan stated:

Just as law has been a very effective tool in the past for non-Indigenous Australia to lock Indigenous people out of the system ... we say that we can use the same tool to achieve the opposite result: to create space for Indigenous people in our ... system of law; to sum up and express on behalf of the nation in the law of the land not discrimination, not exclusion, as in the past, but inclusion, non-discrimination and a unique and honoured place in the nation.⁵

6.48 The Committee acknowledges the significant work that the Australian Law Reform Commission completed in 1986.⁶ However, most of those recommendations have never been implemented, and there have been significant changes in the application of common law to Indigenous rights (for example, the *Mabo* case⁷). Consequently, the Committee considers that the issues relating to customary law should be given high priority in future discussions between all levels of government and Indigenous people.

5 Committee Hansard, 4 April 2003, p. 2.

6 ALRC, *Recognition of Aboriginal Customary Law*, Report No. 31, 1986.

7 *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1.

Recommendation 16

The Committee recommends that the recognition of customary law, such as cultural protection and environmental protection, form part of the matters for ongoing negotiations between governments and Indigenous peoples.

Enhancing the people's movement

6.49 As the CAR recognised and the Commonwealth Government has agreed, the people's movement is a critical part of reconciliation. The Committee considers that this inquiry has clearly demonstrated that the people's movement needs to be fostered. Local and community-based groups need resources to assist them in their work, particularly in their educative role. While this support was available under the CAR through its distribution of booklets and general information, the Committee has heard compelling evidence that these groups are suffering from a lack of funding and educational resources. As Ms Audrey Kinnear told the Committee very succinctly:

The people are very generous with their time and want to learn and want to heal, but the failure is in the leadership of the government.⁸

6.50 The Committee notes that unlike its predecessor, Reconciliation Australia receives no ongoing funding and needs to divert some of its resources to seeking donations. While some States have provided funding to peak reconciliation bodies, there is no ongoing support from the Commonwealth Government.

6.51 The Committee believes that the Commonwealth Government should provide adequate funding to meet the needs of community reconciliation groups if reconciliation is to progress.

Recommendation 17

The Committee recommends that the Commonwealth Government provide funding to support local and community-based reconciliation groups, through ongoing funding to Reconciliation Australia and through grants to peak reconciliation bodies in each State and Territory.

Funding for Reconciliation Australia

6.52 The Committee is concerned that Reconciliation Australia receives no ongoing funding. While the Government has provided seed funding of \$5.6 million and given tax-free status for donations to Reconciliation Australia, the Committee heard evidence that the organisation faces grave financial difficulties in the near future if it cannot achieve more sponsorship.

8 Ms Audrey Kinnear, National Sorry Day Committee, *Committee Hansard*, 15 May 2003, p. 111.

6.53 The Committee considers that such a key and visible part of an effective national response to reconciliation should not have to go cap in hand to seek donations at the same time as it is trying to encourage the public to view reconciliation in a positive light. Reconciliation is not a charity: it is a national need.

Recommendation 18

The Committee recommends that the Government provide ongoing funding to Reconciliation Australia, sufficient for it to meet its diverse range of responsibilities.

Improving research and knowledge base

6.54 While there was compelling criticism during this inquiry of the lack of monitoring and evaluation of relevant matters, the Committee also heard evidence of significant research and analysis by bodies such as the ABS, the Productivity Commission and the Centre for Aboriginal Economic Policy Research (CAEPR).

6.55 Such bodies contribute to the pool of knowledge about issues facing Indigenous people: CAEPR, for example, is a social sciences research centre at the Australian National University that focuses on Indigenous economic policy and economic development issues, including native title and land rights, social justice and the socioeconomic status of Indigenous Australians. The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is a centre for research into Indigenous studies and administers a major research grant program.⁹ Universities around the country contain other well-regarded research centres for Indigenous studies, and national agencies such as the Australian Institute of Health and Welfare also provide significant data and analysis on specific issues.

6.56 While evidence has emerged during this inquiry that many efforts are being made around the country on different issues that are crucially important to the well-being and rights of Indigenous people, the Committee is concerned that the approach is fragmented. The Committee considers that consolidating information on the research, data collection and evaluations that are currently being carried out would be beneficial in promoting coordination and fostering a culture of learning from each other.

6.57 One example where the desirability of having a database of information and research has been recognised is Indigenous health. With its genesis in AIATSIS funding in the early 1980s and subsequent funding by the Office for Aboriginal and Torres Strait Islander Health in the Commonwealth Department of Health and Aged

9 AIATSIS is established under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989*. Its functions include undertaking, promoting and publishing Aboriginal and Torres Strait Islander studies; conducting and encouraging research; maintaining a cultural resource collection; encouraging understanding in the general community of Indigenous societies; and other functions conferred by the Act (s. 5).

Care, a National Aboriginal and Torres Strait Islander Health Clearinghouse was established. An Australian Indigenous Health *InfoNet* now operates largely from Edith Cowan University to provide research and clearinghouse functions.¹⁰ In 2000 the House of Representatives Standing Committee on Family and Community Affairs commended the initiative and concluded that it ‘could play a greater role with additional financial and technical support from the Commonwealth, States and Territories’.¹¹ The Committee agrees and considers that such initiatives should apply on a broader scale.¹²

6.58 Accordingly, the Committee recommends the establishment of a national clearinghouse for research on the range of issues affecting Indigenous people. Rather than duplicating existing services, that clearinghouse could, where relevant, provide links to more specific clearinghouses, such as that relating to Indigenous health. Its value lies in making information about knowledge and resources more widely available.

6.59 While the Committee considers that AIATSIS could be a suitable body to undertake that responsibility, there may need to be some amendment to its enabling legislation. In addition, the Commonwealth Government must ensure that the responsible body receives adequate funding to enable it to carry out this very important function.

Recommendation 19

The Committee recommends that the Commonwealth Government fund on an ongoing basis a national clearing house of research, data and publications about Indigenous issues.

A case study: petrol sniffing

6.60 As discussed in Chapter 3, in the course of the inquiry the Committee received evidence about the grave problems faced by the communities of the Anangu Pitjantjatjara Lands in the north-east of South Australia in relation to petrol sniffing.

6.61 Recognising the complexity of the problem and its ramifications for all aspects of community life, the Committee is nevertheless concerned that progress to

10 See <http://www.healthinfonet.ecu.edu.au>, where the stated mission is ‘to contribute to improving the health of Australia's Indigenous people by making relevant, high quality knowledge and information easily accessible’.

11 House of Representatives Standing Committee on Family and Community Affairs, *Health is Life: Report on the Inquiry into Indigenous Health*, 2000, p. 124.

12 Other initiatives include the Indigenous Law Centre (formerly the Aboriginal Law Centre - ALC) which develops and co-ordinates research, teaching and dissemination of information in the area of Indigenous peoples and the law (See <http://www.law.unsw.edu.au/centres/ilc/>) and the Indigenous Australian Alcohol and Other Drugs Databases website of the National Drug Research Institute at Curtin University Of Technology (see <http://www.db.ndri.curtin.edu.au/>).

combat the problem has been slow. The Committee would like to revisit this very serious issue in twelve months time to see what options have been tried and what progress has been made.

Recommendation 20

The Committee recommends that during the Spring sittings 2004 the Senate refer to it an inquiry on progress in addressing the problems surrounding petrol sniffing in the Anangu Pitjantjatjara Lands, including progress as it relates to the COAG whole of government trial being conducted there.

**Senator the Hon Nick Bolkus
Chair**

Dissenting Report by Government Senators

Introduction

1.1 Government Senators have concerns with the Chair's report in its rejection of the Government's position of allocating issues of 'practical reconciliation' nature a high priority. Government Senators agree that while it is important to resolve the many social issues that have been raised within the community, the Australian Government must of course direct resources towards addressing the areas of disadvantage that Indigenous Australians currently experience. As noted in the Government Senators' response to Recommendation 1, the national reconciliation approach should extend beyond the prioritised 'practical' reconciliation measures to include some of the 'symbolic' reconciliation issues.

1.2 While practical considerations are deservedly receiving higher Commonwealth priorities, issues of a more 'symbolic' nature are also being implemented as recommended by the Council for Aboriginal Reconciliation. The construction of Reconciliation Place in Canberra is a primary example where symbolic initiatives have been progressed.

1.3 The Commonwealth Government is committed to reconciliation as an ongoing process with practical, cultural and spiritual dimensions.¹ The Government also believes that national leadership is required to achieve reconciliation. They further believe that national leadership alone will not achieve the desired outcome. Full State and Territory government support is essential with strong community support also critical to achieving reconciliation.

1.4 The difficulty remains with the reconciliation process of a lack of definition as to what reconciliation is, and how we as a people will really know that we are advancing the issue and moving towards true reconciliation; that is blending the outstanding practical and symbolic reconciliation issues.

1.5 Notwithstanding the stated view of Opposition and other Committee members, the Committee discussion over how to benchmark progress towards reconciliation has still concentrated on evaluation of outcomes in the key government priorities of health, housing, employment, housing and education. These are priority areas of the Government's practical reconciliation agenda and outcomes will be measured and evaluated to measure improvement.

1 Commonwealth Government Response to the CAR final report.

1.6 This position is supported by the Council of Australian Governments (COAG) with all State and Territory leaders, (except NSW who disappointingly failed to make any submission to this enquiry), agreeing that the national indicator framework, based on these measures, are the important areas of greatest disadvantage for Indigenous people.

1.7 Government members of the committee record their disappointment in the COAG process through this report over the demonstrated lack of commitment to reconciliation issues within COAG.

1.8 All State and Territory leaders walked out of the latest COAG meeting in a blatant media stunt before the important Aboriginal reconciliation issues could be discussed. The Commonwealth Government placed a number of items on the agenda that were not discussed. This was an important opportunity lost in the reconciliation process.

Commonwealth Government commitment to the reconciliation process

1.9 The Commonwealth Government's commitment towards achieving true reconciliation is demonstrated through its whole of government approach to redress the social and economic disadvantage experienced by Indigenous Australians. Some examples of this are listed below.

COAG

1.10 \$6 million has been provided over two years from 2003-04 for a Flexible Funding Pool to support COAG's whole of government approach in up to 10 Indigenous communities. This pool will allow the Commonwealth to kick-start a more flexible response to priorities agreed with the communities.

Indigenous Affairs

1.11 Commonwealth spending on Indigenous Affairs has increased to a record level of \$2.7 billion in 2003-04, with a number of new measures focused on improving the future for young Indigenous Australians. The Government is now spending around one third more on Indigenous affairs, in real terms, than it did in 1996. The total cost of the new measures will be \$110.3 million over four years from 2003-04.

1.12 Funding for ATSIC was increased to \$1.24 billion in the 2003-04 budget, and is the highest in real terms since the establishment of ATSIC in 1990.

Arts

1.13 The Government has provided \$1.1 million for the development and installation of a further two public artworks at Reconciliation Place in Canberra. The Government has also adopted the proposal by the Myer Committee, particularly the international precedents of visual art copyright societies in managing resale royalties.

1.14 The Australian Government has also recently announced a major Australian Government strategy to support the Indigenous art sector.² The Australian Government's Indigenous art centre strategy and action plan is a major coordinated, whole-of-government approach designed to build a strong and sustainable Indigenous visual arts sector.

Education

1.15 The Commonwealth is committed to addressing this through the “Our Universities: Backing Australia's Future” package. As part of this package, which is subject to legislation, the Government has:

- provided an additional \$10.4 million from 2005 over three years to the Indigenous Support Fund;
- established the Indigenous Higher Education Advisory Council and provided \$260,000 per year for the council from 2004, and
- established Indigenous Staff Scholarships at a cost of around \$157,000 each year.

1.16 Two other elements of the package will be of particular assistance to Indigenous students. Commonwealth Education Costs Scholarships and Commonwealth Accommodation Scholarships will provide financial assistance to students from low income and Indigenous backgrounds undertaking higher education.

Attorney-General

1.17 The Government is spending an extra \$24 million in 2003-04 to promote faster and more effective resolution of native title issues. The extra funding is shared between the National Native Title Tribunal, the Federal Court, the Aboriginal and Torres Strait Islander Commission and the Attorney-General's Department. It is designed to create better, more sustainable native title outcomes and, in particular, to meet two objectives: the establishment of instructive legal precedents; and speedier resolution of native title applications.

2 Joint Media Release Senator the Hon Richard Alston, the Hon Gary Hardgraves and the Hon Tony Abbott dated 3 October 2003.

The Department of Family and Community Services (FACS)

1.18 Australia's first ever Longitudinal Study of Indigenous Children will be funded with \$8.6 million over the first four years. The study will focus on the links between early childhood experiences and later life outcomes for Indigenous children.

1.19 FaCS will also ensure funding to the Centre for Aboriginal Economic and Policy Research (CAEPR) so it can continue to carry out research relevant to Indigenous policy.

1.20 Indigenous Australians in rural and remote communities will gain better access to Centrelink services through funding of \$8.2 million over four years to expand Centrelink's Agent and Access Point Network. The funding will help Centrelink expand its network in remote communities by the opening of 50 new Agent sites to ensure that people living in remote locations gain access to a trained Agent, supported by Centrelink.

Employment and Workplace Relations

1.21 Funding of up to \$10.5 million over four years from 2003-04 has been allocated for an Indigenous Capital Assistance initiative under the Indigenous Employment Policy (IEP). Indigenous Capital Assistance aims to increase employment opportunities, including self employment, for Aboriginal and Torres Strait Islander people by: engaging the private financial sector to help to kick-start Indigenous businesses; and promoting economic independence for Indigenous people by encouraging the private financial sector to provide business and financial advice prior to and during the early stages of a loan period.

Health and Ageing

1.22 As part of the Howard Government's commitment to Aboriginal and Torres Strait Islander health, total spending on specific Indigenous health services will rise to more than \$258 million per annum in 2003-04. This is a real increase of nearly 90 per cent since the Government took office in 1996. \$55 million per annum of this funding is committed to the continuation and expansion of the Primary Health Care Access Program.

1.23 Government Senators believe that the State and Territory Governments must also further embrace the reconciliation process by providing additional funding to the identified areas of greatest need and raising the standards in these areas to an equitable level.

1.24 Additional funding to Reconciliation Australia, or an equivalent entity, must also be provided by both the Commonwealth and State and Territory governments in order to raise community awareness and acceptance of the reconciliation process.

1.25 The Commonwealth Government maintains the position that true reconciliation will only be achieved with full community support. Reconciliation

Australia was initially set up with the goal to secure community support and commitment. This was not successfully achieved. Government members believe that this important outcome is still vital to the process but do not support the continued funding of Reconciliation Australia in this role without a detailed proposal being submitted to government proposing strategies and initiatives that would achieve such support.

Comments on report recommendations

1.26 Government Senators provide the following comments on particular recommendations in the Chair's report.

Recommendation 1

Government Senators recommend that the Commonwealth Government maintain responsibility for providing national leadership on reconciliation and continue to advance the recommendations of CAR with priority given to the areas of greatest social and economic need. This approach should extend beyond the prioritised 'practical reconciliation' measures to include some of the 'symbolic reconciliation' issues.

Government Senators believe that priority must be given to the areas of greatest need and disadvantage and that the State and Territory governments must also equally support this process.

Recommendation 2

Government Senators do not support the proposal to hold a national reconciliation convention prescribed to be held every four years. While conventions may be held from time to time as necessary, a formal four year timeframe may be neither productive nor timely. This could be a role for Reconciliation Australia. Such a convention could be held once sufficient issues have been developed to a stage where national endorsement is required.

Recommendation 3

Government Senators urge State and Territory governments to continue to progress reconciliation by further developing the CAR recommendations with the Commonwealth Government maintaining the coordinating leadership role through COAG.

Recommendations 4, 5 and 6

Government Senators endorse these recommendations.

Recommendation 7

Government Senators support this recommendation but with the reservation that in the absence of any definition of reconciliation it would be difficult to measure progress.

Recommendation 8

Government Senators do not support this recommendation, as this is a role for Reconciliation Australia and the ATSI Social Justice Commissioner.

Recommendation 9

Government Senators do not support this recommendation due to reasons given in relation to recommendations 7 and 8.

Recommendation 10

Government Senators do not support this recommendation. These functions should be performed by COAG and a community supported and endorsed Reconciliation Australia. These two bodies would provide both the highest level government and community endorsement and impetus.

Recommendation 11

Government Senators fully support this recommendation.

Recommendation 12

Government Senators recommend that the recommendation be amended to provide that the Government prepare an amendment to remove section 25 from the Constitution, conduct an information campaign to inform the Australian people of the desirability of such reform and put the amendment to a referendum at a suitable time after the successful completion of the educational campaign.

Government Senators note the historical difficulty in holding successful referenda in Australia. This should only be put to the Australian people once there is strong support for the referendum question.

Recommendation 13

Government Senators do not support this recommendation. Government Senators believe that there should be one law that applies to all Australians.

Recommendations 14 and 15

Government Senators fully support these recommendations. It should be noted that the Minister has recently announced that the Government is considering residual royalty rights for Aboriginal artists.

Recommendation 16

Government Senators recommend that the recommendation be amended to provide that customary law, such as cultural protection and environmental protection, is recognised as a source of law and forms part of the matters for on-going negotiations between governments and Indigenous peoples.

Government Senators believe that there should be one law that applies to all Australians. Customary law should be a source of law as it would add to Australian laws by introducing significant and meaningful aspects to our cultural and environmental, among other issues, appreciation.

Recommendation 17

Government Senators recommend that the recommendation be amended to provide that the Commonwealth Government in partnership with State and Territory governments provides funding to support local reconciliation groups through continued funding of Reconciliation Australia or peak reconciliation bodies in each State and Territory.

Government Senators maintain that State and Territory governments have an obligation to provide support to the reconciliation process.

Recommendation 18

Government Senators recommend that the recommendation be amended to provide that the Government contribute core funding to Reconciliation Australia, and jointly fund programs and initiatives proposed by Reconciliation Australia that have COAG endorsement and meet Commonwealth, State and Territory funding criteria.

Funding could be provided to Reconciliation Australia provided that they have a detailed proposal containing initiatives and strategies to achieve desired outcomes.

Recommendation 19

Government Senators recommend that the recommendation be amended to provide that the Commonwealth Government fund and monitor on an ongoing basis a national clearing house of research, data and publications about Indigenous issues as provided by AIATSIS.

This role is presently being performed and AIATSIS should be adequately resourced to fulfil the role. Establishing another body would simply be duplicating the role.

Recommendation 20

Government Senators recommend that the recommendation be amended to provide that at a later date the Senate refer to it an inquiry on progress in addressing the problems surrounding petrol sniffing in remote Aboriginal communities.

Government members believe that petrol sniffing is a problem in many regions of Australia and any inquiry should be able to review strategies employed in different regions to assess their effectiveness.

Senator Marise Payne
Liberal Party
Deputy Chair

Senator Nigel Scullion
Country Liberal Party

APPENDIX 1

ORGANISATIONS AND INDIVIDUALS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

- 01 Mr Peter Beattie MP, Premier of Queensland
- 01A Mr Peter Beattie MP, Premier of Queensland

- 02 The Law Society of New South Wales
- 03 Minoru Hokari, Humanities Research Centre, Australian National University
- 04 Professor George Williams, Mr Sean Brennan
and Ms Vanessa Bosnjak Gilbert & Tobin Centre of Public Law
- 05 Aboriginal and Torres Strait Islander Commission, Northern Territory
- 06 Australian Society of Archivists
- 07 Josephite Justice Network, Sisters of St Joseph
- 07A Josephite Justice Network, Sisters of St Joseph
- 08 National Sorry Day Committee
- 09 Ms Lynn Pollack
- 10 NT Aboriginal Justice Advocacy Committee
- 10A NT Aboriginal Justice Advocacy Committee
- 10B NT Aboriginal Justice Advocacy Committee
- 11 Ms Rosie Wagstaff
- 12 Ms Kate Oldaker, Whitehorse ANTAR
- 13 Reconciliation for Western Sydney Inc.
- 14 Ms Patmalar Ambikapthy, Commissioner for Children, Tasmania
- 14A Ms Patmalar Ambikapthy, Commissioner for Children, Tasmania
- 15 National Assembly of the Uniting Church in Australia
- 16 Catholic Diocese of Toowoomba
- 17 Aboriginal Legal Rights Movement Inc
- 18 The Law Society of South Australia
- 19 Oxfam Community Aid Abroad
- 20 Blue Mountains Community Interagency

- 21 Reconciliation Renewing Relationships, Catholic Archdiocesan Committee Sydney
- 22 Social Justice Bodies of the Catholic, Uniting and Anglican Churches WA
- 23 Australian Baha'i Community
- 24 Australian Catholic Social Justice Council
- 25 Social Justice Committee of the YWCA of Sydney
- 26 Mr Stanislaw Pelczynski
- 27 Australian Council of Social Service (ACOSS)
- 28 Anne and Frank Rasenberger
- 29 Mr Geoff Pryor, Mr John Telford, Mr Tim Muirhead, Mr Chip Morgan, Ms Charmaine Foley, Ms Shelley Reys
- 30 Reconciliation Victoria Inc
- 31 ANTaR Vic Inc
- 32 Ms Annie Elizabeth Bryce
- 33 Holdfast Bay Reconciliation Group
- 34 Mr Fred Leftwich
- 35 Ms Susan E Shore
- 36 Ms Lyn Bevington, Mountains Outreach Community Service Inc
- 37 Northern Sydney Region Reconciliation Network
- 38 Northern Land Council
- 39 The Social Responsibilities Commission, Anglican Province of WA
- 40 ANTaR Inc
- 41 NATSIEC of the National Council of Churches in Australia
- 42 The NSW Reconciliation Council
- 43 Val Haynes, University of Tasmania
- 44 Edmund Rice Centre for Justice and Community Education
- 45 Mr Phil Bradley and Ms Annie Nielsen
- 46 Ms Annie Bicer
- 47 Women's Electoral Lobby NSW Inc
- 48 Ms Carol O'Donnell, Faculty of Health Sciences, University of Sydney
- 49 Sue and Bob Lawton
- 50 The Institute of the Sisters of Mercy in Australia
- 50A The Institute of the Sisters of Mercy in Australia

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- 51 Women's International League for Peace and Freedom, Australian Section
- 52 Aboriginal Catholic Ministry Melbourne
- 53 Australian Federal Police Association
- 54 Queensland Police Service
- 55 Department of Transport and Regional Services
- 55A Department of Transport and Regional Services
- 56 Equal Opportunity Commission of Victoria
- 56A Equal Opportunity Commission of Victoria
- 57 Bringing Them Home Committee (WA) Inc
- 58 Dale Shaddick
- 59 Rev Christopher Noel Ridings
- 60 Chief Police Officer for the ACT, Australian Federal Police
- 61 AgForce Queensland
- 62 Sunshine Coast Reconciliation Group (Caloundra)
- 63 Herbert and Valmae Freilich Foundation
Humanities Research Centre, The Australian National University
- 64 Reconciliation Australia
- 64A Reconciliation Australia
- 64B Reconciliation Australia
- 65 Dr William Jonas AM, Aboriginal & Torres Strait Islander
Social Justice Commissioner, Human Rights & Equal Opportunity Commission
- 65A Dr William Jonas AM, Aboriginal & Torres Strait Islander
Social Justice Commissioner, Human Rights & Equal Opportunity Commission
- 66 Conference of Leaders of Religious Institutes in New South Wales
Social Justice Committee
- 67 The Hon Peter Howson
- 68 Caritas Australia
- 69 Blue Mountains Australians for Native Title and Reconciliation
- 70 Eurobodalla Walking Together Group
- 71 National Aboriginal & Torres Strait Islander Catholic Council (NATSICC)
- 72 Women's Reconciliation Network NSW
- 73 Mr Jim Bacon MLA, Premier of Tasmania
- 73A Mr Paul Lennon MLA, Acting Premier of Tasmania
- 74 Australians for Native Title and Reconciliation SA Inc
- 75 The Hon. Philip Ruddock MP, Minister for

- Immigration & Multicultural and Indigenous Affairs
and Minister Assisting the Prime Minister for Reconciliation
- 75A The Hon. Philip Ruddock MP, Minister for
Immigration & Multicultural and Indigenous Affairs
and Minister Assisting the Prime Minister for Reconciliation
- 76 Ms Penella Horner
- 77 Mr Alan Carpenter MLA, Minister for Education,
Sport and Recreation; Indigenous Affairs, Western Australia
- 78 National Union of Students Inc
- 79 NSW Police
- 80 Aboriginal and Torres Strait Islander Commission
- 81 Northern Territory Government
- 81A Northern Territory Government
- 81B Northern Territory Government
- 82 Australian Bureau of Statistics
- 82A Australian Bureau of Statistics
- 83 South Australian Government
- 84 Victorian Government
- 85 ACT Government
- 86 Western Australian Government

Additional information published by the Committee

Correspondence from the Ombudsman of the Northern Territory dated 21 July 2003

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Friday 4 April 2003

Gilbert & Tobin Centre of Public Law, UNSW

Professor George Williams

Mr Sean Brennan

NSW Reconciliation Council

Ms Lynette Riley-Mundine, Chairperson

Mr Colin Markham, Deputy Chair

Mr Rick Farley, Member

Aboriginal & Torres Strait Islander Social Justice Commissioner, HREOC

Dr William Jonas AM, Commissioner

Mr Darren Dick, Director, Social Justice Unit

Ms Margaret Donaldson, Director, Native Title Unit

Ms Eleanor Hogan, Senior Policy Officer, Social Justice Unit

Women's Reconciliation Network NSW

Ms Sally Fitzpatrick

Ms Elaine Telford

Ms Deborah Wall

Ms Lisa Jackson-Pulver

Institute of Sisters of Mercy of Australia

Sister Helen Owens

Sister Helen Nolen

Sister Janet Lowe

Sisters of St Joseph

Sister Annette Arnold

Sister Kath O'Connor

Sister Jan Barnett

NSW Aboriginal Land Council

Mr Phil Duncan, Manager, Strategic Policy & Planning Unit

Ms Danielle Redmond, Acting Media Manager

Australian Council of Social Service (ACOSS)

Mr Philip O'Donoghue, Deputy Director
Mr Ken Jurotte, Indigenous Policy Adviser

Canberra, Wednesday 14 May 2003

Australian Bureau of Statistics

Mr Bob McColl, Assistant Statistician, Social Conditions Statistics
Mr Dan Black, Director, National Centre for Aboriginal and Torres Strait Islander Statistics

Professor Mick Dodson

Canberra, Thursday 15 May 2003

Office of Aboriginal and Torres Strait Islander Affairs (OATSIA),

Department of Immigration and Multicultural and Indigenous Affairs

Mr Peter Vaughan, Executive Coordinator, Office of Aboriginal and Torres Strait Islander Affairs

Mr Stephen Oxley, Assistant Secretary, Social Programs and Reconciliation

Mr Bryan Palmer, Director, Service Delivery and Performance

National Sorry Day Committee

Reverend Dr John Brown

Ms Audrey Kinnear

Aboriginal and Torres Strait Islander Commission

Mr Cliff Foley, Commissioner

Mr Peter Schnirerer, Manager, Coordination and Review Policy

Melbourne, Monday 19 May 2003

Uniting Church National Assembly

Mr Peter Lewis, National Director

Mr Vince Ross, Deputy Chair, Uniting Aboriginal and Islander Christian Congress

Equal Opportunity Commission of Victoria

Ms Diane Sisely, Commissioner and Chief Executive Officer

Ms Joella Marron, Legal and Policy Officer

Catholic Commission for Justice, Development and Peace

Mr Marc Purcell

Aboriginal Catholic Ministry Melbourne

Ms Vicki Walker

Reconciliation Australia

Mr Fred Chaney, Co-Chair

Ms Jackie Huggins, Co-Chair

Ms Jenni Chandler, Chief Executive Officer

Mr Jason Glanville, Policy and Programs Director

Commissioner for Children, Tasmania (by teleconference)

Ms Patmalar Ambikapathy, Commissioner

Ms Marilyn Pitchford-Brown, Advisory Council Member

Aboriginal Legal Rights Movement (Adelaide)

Mr Christopher Charles, General Counsel

Dr Irene Watson, Solicitor

Oxfam Community Aid Abroad

Mr James Ensor, Director of Public Policy and Outreach

Ms Nicki McCoy, Coordinator, Indigenous Australia Program

Darwin, Wednesday 11 June 2003**Northern Territory Aboriginal Justice Advocacy Committee**

Mr Chris Howse, Executive Officer

Northern Territory Government

Mr Neil Westbury, Executive Director, Office of Indigenous Policy

Mr Mike Dillon, Chief Executive Officer, Department of Community Development Sport and Cultural Affairs

Mr Bill Ivory, Department of Community Development Sport and Cultural Affairs

Aboriginal and Torres Strait Islander Commission (Northern Territory)

Mr Kim Hill, Commissioner

Canberra, Wednesday 18 June 2003

The Honourable Mr Peter Howson, Private capacity

Canberra, Tuesday 24 June 2003

Australians for Native Title and Reconciliation (ANTaR)

Mr Phil Glendenning, President

Dr David Cooper, National Coordinator

Canberra, Tuesday 22 July 2003

Steering Committee for the Review of Commonwealth/State Service Provision

Mr Gary Banks, Chair, Productivity Commission

Dr Robyn Sheen, Commissioner

APPENDIX 3

Recommendations of Reconciliation: Australia's Challenge

(Extract from Chapter 10)

After a very extensive public consultation process, the Council drew up two documents of reconciliation: the *Australian Declaration Towards Reconciliation* and the *Roadmap for Reconciliation*. At Corroboree 2000 on 27 May 2000, it presented these to the Prime Minister, other national leaders, and the nation as a whole.

The Council earlier advised the Prime Minister that these documents represented its formal recommendations to him as Minister in relation to the 'nature and content' of documents of reconciliation under paragraph 6(1)(h) of the Act.

Paragraph 6(1)(h) of the Act also requires the Council to make recommendations to the Minister in relation to the 'manner of giving effect' to such documents. In relation to the 'manner of giving effect to' the above reconciliation documents, the Council presents the following recommendations.

Recommendation 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.

Recommendation 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.

Recommendation 3

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

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

Recommendation 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:

- affirming the Australian Declaration Towards Reconciliation and actioning the Roadmap for Reconciliation;
- providing resources for reconciliation activities and involving Aboriginal and Torres Strait Islander peoples in their work;
- undertaking educational and public-awareness activities to help improve understanding and relations between Aboriginal and Torres Strait Islander peoples and the wider community; and
- 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.

Recommendation 5

Each government and parliament:

- 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
- 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.

Recommendation 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 resolved.

APPENDIX 4

National Strategies from the *Roadmap for Reconciliation*

The *Roadmap for Reconciliation* developed by the Council for Aboriginal Reconciliation contains four national strategies:

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

The text of the National Strategies is set out below.

The National Strategy to Sustain the Reconciliation Process

The National Strategy to Sustain the Reconciliation Process sets out ways to build on progress towards reconciliation between Aboriginal and Torres Strait Islander peoples and the wider community after the Council for Aboriginal Reconciliation completes its term.

These measures address practical, cultural and spiritual dimensions of reconciliation.

Essential actions include:

LEADERSHIP FOR THE RECONCILIATION PROCESS

- All levels of government, the private sector, community and voluntary organisations publicly support the ongoing reconciliation process, provide resources and increasingly involve Aboriginal people and Torres Strait Islanders in their work.
- A foundation, Reconciliation Australia, is established to maintain a national leadership focus for reconciliation, report on progress, provide information and raise funds to promote and support reconciliation activities.
- State, Territory and local reconciliation groups, involving Aboriginal and Torres Strait Islander people and people from the wider community, lead and support action that promotes reconciliation.
- Australian parliaments and political parties address the low level of Indigenous representation in the political system.

EDUCATION FOR RECONCILIATION

- Schools, tertiary education institutions and employers require and support the culturally appropriate teaching of the truth of Australia's history that includes Indigenous perspectives and addresses racism.
- The media feature stories that promote reconciliation and challenge racist stereotyping.

PEOPLE'S MOVEMENT FOR RECONCILIATION

- Communities celebrate significant dates and events and take joint action to achieve agreed reconciliation goals.

PROTOCOL AND CEREMONY

- All parliaments, governments and organisations observe protocols and negotiate with local Aboriginal and Torres Strait Islander elders or representative bodies to include appropriate Indigenous ceremony into official events.

SYMBOLS OF RECONCILIATION

- Governments, organisations and communities negotiate to establish and promote symbols of reconciliation. This would include changing the date of Australia Day to a date that includes all Australians.

FORMAL RECOGNITION OF THE DOCUMENTS OF RECONCILIATION

- All parliaments and local governments pass formal motions of support for the documents of reconciliation.

The National Strategy to Promote Recognition of Aboriginal and Torres Strait Islander Rights

This strategy proposes a number of actions, including some constitutional and legislative processes, to assist the progressive resolution of outstanding issues for the recognition and enjoyment of Aboriginal and Torres Strait Islander rights. It aims to ensure:

- that all Australians enjoy, in daily life, a fundamental equality of rights, opportunities and acceptance of responsibilities; and
- the status and unique identities of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia, and achieve recognition, respect and understanding in the wider community.

Essential actions include:

EDUCATION

- Governments and their agencies, legal, cultural and educational institutions, Indigenous organisations, and the media work together to improve community awareness and appreciation of Aboriginal and Torres Strait Islander peoples as the first peoples with distinct cultures, rights and status.

LEGISLATION

- All governments take steps to ensure the recognition and protection of Indigenous intellectual property as already occurs in some Commonwealth legislation.
- All governments ensure their policies and practices observe Australia's international Indigenous and human rights obligations.
- State and Territory governments consider giving magistrates and judges the discretion to take account of traditional laws in sentencing, as already occurs in some circumstances in the Northern Territory.
- Governments establish legislative processes to deal with the 'unfinished business' of reconciliation, allowing for negotiated outcomes on matters such as Indigenous rights, self-determination within the life of the nation, and constitutional reform.

AUSTRALIAN CONSTITUTION

- Government agencies, legal institutions and educational organisations develop and promote community awareness about the Constitution and its application in protecting the rights of all Australians.
- Within the broader context of future constitutional reform, the Commonwealth Parliament enacts legislation for a 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 race.

The National Strategy to Overcome Disadvantage

The National Strategy to Overcome Disadvantage aims for a society where Aboriginal people and Torres Strait Islanders enjoy a similar standard of living to that of other Australians, without losing their cultural identity.

This strategy focuses on education, employment, health, housing, law and justice. Priority must be given to achieving comparable outcomes in health and education.

Improvement in these areas is critical to advancing reconciliation. It is important that no person is disadvantaged by the inability of governments and service providers to communicate and cooperate in the delivery of services.

Essential actions include:

PERFORMANCE MEASUREMENT AND REPORTING

- The Council of Australian Governments (COAG) evaluates and updates its National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders, agreeing on a framework for all governments and the Aboriginal and Torres Strait Islander Commission (ATSIC) to:
 - set program performance benchmarks that are measurable, include timelines and are agreed in partnership with Indigenous peoples and communities;
 - ensure they have the information systems necessary to monitor performance; and
 - annually report their performance to parliaments, councils and their constituents against these benchmarks.
- Every five years, the Human Rights and Equal Opportunity Commission works with ATSIC to prepare an independent report on the nation's progress in addressing disadvantage.

PARTNERSHIPS AND WORKING ARRANGEMENTS

- Peak business and community groups make commitments to overcome disadvantage, and encourage their members to make similar commitments.
- Services are designed and delivered in a way that is driven by local Indigenous people, strengthens local communities, and forges social coalitions and equal partnerships, drawing on and building the skills and resources of the community.
- Service providers, ATSIC and governments identify and eliminate systemic discrimination and racism, beginning with a review of their own practices.
- Governments adopt funding arrangements that are flexible and sufficient to meet local needs, and enable the pooling of funds across agencies and between the different levels of government.
- Employers link performance-based salaries in all sectors to improvements in Indigenous outcomes, where appropriate.

COMMUNITY AND PERSONAL RESPONSIBILITY

- Indigenous communities, families and individuals take more responsibility for addressing the causes and consequences of disadvantage within their control.

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- All Australians accept the responsibility to learn more about the causes and extent of disadvantage and reject racism and related behaviour.

The National Strategy for Economic Independence

The National Strategy for Economic Independence aims for a society where Aboriginal and Torres Strait Islander peoples and communities can share the same levels of economic independence as the wider community.

For most Australians, pathways to economic independence include getting a job and/or running a business.

In both of these cases, an education substantially improves the likelihood of success.

This strategy is not for everyone. For some, economic independence will be defined in terms of their traditional economy and lifestyle.

Essential actions include:

ACCESS TO JOBS AND RESOURCES

- All employers establish strategies for employing and training more Aboriginal people and Torres Strait Islanders.
- Banks and other financial institutions actively adopt culturally-responsive banking and financing regimes and facilitate better access to capital.
- Governments increase the value of Indigenous assets by legislating for Indigenous intellectual property and cultural rights and by working in partnership with Indigenous communities to protect biodiversity and rehabilitate and sustain lands and waters under the control of those communities.

EFFECTIVE BUSINESS PRACTICES

- Indigenous people and communities develop their existing competitive advantages in respect of their cultural assets and special knowledge of the land and the environment.
- Governments, ATSIC, and the private sector all research and develop successful business models that can be applied in regional and remote communities. Priority should be given to developing commercial activities on Indigenous-owned land.
- Private-sector organisations seek opportunities for joint ventures with Indigenous businesses. Governments promote such joint ventures.

- Governments and industry work in partnership with Indigenous communities to ensure their projects strengthen Indigenous communities by supporting the local economy and enhancing regional employment opportunities.

SKILLS DEVELOPMENT

- Schools, TAFEs, universities and other education providers, working with families, develop and implement flexible programs to improve student attendance, retention rates, academic results and career pathways.
- TAFEs and other vocational education providers target their programs to the employment opportunities in the local labour market, aiming for available jobs or business opportunities on the completion of training programs and schemes.
- With local community involvement, education providers, banks and other financial institutions develop money-management programs that increase the capacity of people to plan, save and invest in their future.
- Indigenous leaders actively encourage their people to equip themselves with the skills, knowledge and experiences that are valued in the local employment market.

APPENDIX 5

Executive Summary of the Commonwealth Government Response to the Final Report of the Council for Aboriginal Reconciliation

The Council's Final Report, which also contained the *Australian Declaration Towards Reconciliation* and the four national strategies from the *Roadmap for Reconciliation*, is a substantial document reflecting the enormous work undertaken by the Council for Aboriginal Reconciliation between its inception in 1991 and its formal conclusion on 7 December 2000 with the presentation of the Final Report.

The Council's work lives on in the growing body of community and bipartisan political support for reconciliation; support that has evolved into a national determination to right the wrongs of the past as Australians have come to understand the injustices of our colonial history. While most Australians do not have any direct experience of the substantial social and economic disadvantage suffered by Aboriginal and Torres Strait Islander people, there is an acceptance of it as regrettable fact and a sincere desire to see Indigenous people not just treated as equals, but to experience equity in all facets of Australian life. As a nation, we recognise and celebrate Indigenous people's special place as the first Australians.

The Government joins with the nation in its strong commitment to reconciliation as an ongoing process of overcoming the legacy of history. Reconciliation is and must remain an important national priority. In the past 18 months, the Government has made steady progress in addressing a number of the areas identified for action in the Council's final report. The Indigenous affairs agenda being pursued by the Government is laying a foundation for lasting improvements in the lives of Indigenous people; for those of current and future generations. This is the best contribution governments can make to reconciliation. We believe there can be no more powerful symbolism than building a society in which Indigenous people have not just a right to work, to good health, to a sound education and to a decent home, but a society in which this is the norm for Aboriginal people.

Australians are a practical people and they strongly support practical measures to redress disadvantage. This is the primary focus of the Government's contribution to reconciliation. The depth of the Government's commitment is demonstrated in this year's budget which includes record expenditure of \$2.5 billion to tackle the social and economic difficulties that beset our Indigenous communities. It is a record level of expenditure for the fourth consecutive year (and some 25 per cent higher in real terms than in the last year of the previous government).

The Government's response covers in detail current policy and program activity across a range of Commonwealth portfolios, providing examples of areas where solid

progress is being made. For example, more Indigenous children are staying on at school through to year 12, the number of Indigenous students enrolled in university degrees is at its highest level ever, while the number of Indigenous people participating in vocational education and training continues to rise. On the health front, many remote communities that have previously had little or no access to health services now do, infant death rates are falling, as are the rates of death caused by respiratory illness, and infectious and parasitic diseases. Our employment programs are opening the door to self sufficiency for thousands of Indigenous people who previously have been unemployed.

In drawing attention to these improvements, the Government is conscious that such outcomes represent a beginning albeit a good one and therefore acknowledges that a sustained effort will be required over many years in order to make lasting change. We also recognise that if our policies are to have traction, they must be designed and delivered through a genuine partnership of shared responsibility between all governments and Indigenous people. There are a number of priorities within our sights, both in the way we work and what we do. They are:

- taking a whole of government approach by involving all relevant portfolio Ministers and the states and territories, working within the reconciliation framework set down by the Council of Australian Governments (COAG) with the Commonwealth's leadership;
- increasing the focus on individuals and their families as the foundation of functional communities;
- encouraging and supporting self reliance and independence from welfare;
- strengthening leadership, capacity, and governance;
- addressing the debilitating effects of substance abuse and domestic violence;
- increasing opportunities for local and regional decision making by Indigenous people, and improving programme coordination and flexibility to respond to local needs; and
- improving access to mainstream programmes and services, so that Indigenous specific resources can be better targeted to areas of greatest need, particularly to areas where mainstream services do not reach.

These themes and related Government strategies are signs of our determination to address the underlying and contemporary causes of Indigenous disadvantage, not just its symptoms.

The Council called on COAG to implement and monitor a national framework whereby all governments and ATSIC work to overcome Indigenous disadvantage by setting program performance benchmarks that are measurable, agreed with Aboriginal and Torres Strait Islander people, and are publicly reported. Through COAG, all

Australian governments have agreed that reconciliation is a priority for them and that it requires a concerted and sustained effort over many years. COAG endorsed a framework to advance reconciliation based on partnerships and shared responsibilities with Indigenous communities, and programme flexibility and coordination between government agencies, with a focus on local communities and outcomes.

Commonwealth State Ministerial Councils are well advanced in their work to develop action plans that include performance monitoring strategies and benchmarks. In addition to this, the Commonwealth, under the auspices of COAG, is leading efforts to trial a whole of governments approach in up to 10 Indigenous communities or regions. The objective is to improve the way governments interact with each other and with communities to deliver more effective responses to the needs of Indigenous Australians. The Commonwealth has established an inter departmental taskforce to give substance and drive to this initiative.

In terms of the Council's call for public reporting, COAG has commissioned a regular report against key indicators of Indigenous disadvantage. The objective of this initiative is to help measure the impact of changes to policy setting and service delivery and to provide a concrete way to measure COAG's commitment to reconciliation. This undertaking is being strongly backed by the Ministerial Council for Aboriginal and Torres Strait Islander Affairs, which has developed a framework for this exercise. Together, these initiatives will ensure that Commonwealth, State and Territory governments have better information for policy planning and development. It will also better equip Indigenous people and communities to hold governments accountable where performance is less than satisfactory.

The Council's Final Report called for all levels of government, non government, peak bodies, business and communities to make a commitment to continuing and sustaining the reconciliation process through a number of measures. It is a recommendation the Commonwealth has embraced in large part, although its approach differs in some respects.

The Government agrees with the Council's recommendation that an independent body be established to maintain a national leadership focus on reconciliation. The Commonwealth acted on this recommendation by providing \$5.6 million towards the establishment of Reconciliation Australia, and has also provided tax deductibility status to the organisation. Since its establishment some 18 months ago, Reconciliation Australia has made a number of positive contributions to reconciliation policy and debate. It has also secured further financial support from a number of Commonwealth departments and agencies for important national reconciliation activities such as the Indigenous Governance Conference.

One of the most tangible symbols of the Government's support for sustaining the reconciliation process is the design and construction of Reconciliation Place in the Parliamentary Triangle. This important landmark, placing reconciliation at the heart of the national capital, was officially opened by the Prime Minister on 22 July 2002. Reconciliation Place provides an open public area for reflection on the reconciliation

process and the nation's shared history. The first stage includes artworks depicting some of the many milestones on Australia's path to reconciliation, namely: the 1967 referendum; the recognition of land and native title rights; and the achievement of Indigenous people in sports and in the defence of the nation. Very importantly, there is an artwork that recognises the Ngun(n)awal people as the traditional owners of the Canberra region. Reconciliation Place will develop over time as more artworks are added in recognition of the many stories and achievements in the process of reconciliation, and in the relationship between Indigenous and other Australians both past and present.

The Government recognises the importance of continuing to seek out opportunities to sustain the reconciliation process. The Government believes that responses to reconciliation which promote Indigenous heritage and culture at a public level can do much to improve and expand community understanding of and goodwill towards our Aboriginal and Torres Strait Islander peoples. Therefore the Government believes that acknowledgment of the special place of Indigenous people in the life and history of Australia is appropriate on certain occasions and in certain Commonwealth ceremonies, such as citizenship ceremonies. While the Government does not believe a prescriptive approach should be taken, it none the less feels that the cause of reconciliation is greatly aided by such acknowledgment.

Another of the Council's recommendations went to the question of incorporating a new preamble in the Constitution that recognises Aboriginal and Torres Strait Islander peoples as the first peoples of Australia. The Government does not support this recommendation for one very practical reason – Australians were asked at the referendum in 1998 to support such a preamble, but on that occasion chose not to despite bipartisan political support for it.

Another constitutional matter raised by the Council was its recommendation that Section 25 be removed and a new section introduced that makes it unlawful to adversely discriminate against any people on the grounds of race. Section 25 does not have practical effect in the governance of the nation today, having been designed originally to countervail the use of racially discriminatory voting provisions by the States, which today would contravene the Racial Discrimination Act. The Government, therefore, is generally supportive of the proposal to remove s.25 of the Constitution. Given adequate support for such a proposal, the Government would be disposed to put the matter to a referendum at an appropriate time.. In relation to the suggestion of including a section in the Constitution that makes it unlawful to discriminate on the grounds of race, the Government believes the Racial Discrimination Act meets this requirement.

The Government recognises there are widely divergent views in the community on issues such as making a treaty with Indigenous Australians and calls for a national apology, and is concerned that this demonstrates clearly the ever present risk that the community will be divided by placing undue emphasis on such sensitive issues. Australians are unsure about and wary of the treaty concept. An aspirational document, such as the Declaration, is one thing, but people are concerned about the

implications if it were to be legally binding (and thereby a basis for future litigation rather than closure). The suggestion of separation between Indigenous and other Australians is also a cause of concern. Legal frameworks aren't necessarily the answer to social issues. For these reasons, the Government will not give its support to those recommendations of the Council that seek to further prolong debate on the issue of treaty.

The Council called on all parliaments and local governments to pass formal motions of support for the Australian Declaration Towards Reconciliation and the Roadmap for Reconciliation, and to enshrine their basic principles in legislation. Many of the elements contained in the Roadmap represent core business for government and are being pursued through the normal policy processes. However, the Government does not see that legislative changes will advance this process effectively. The Government reaffirms its support for reconciliation expressed through its Motion of Reconciliation passed by both Houses of Federal Parliament on 26 August 1999. That motion was as follows:

That this House:

- (a) reaffirms its wholehearted commitment to the cause of reconciliation between indigenous and non indigenous Australians as an important national priority for Australians;
- (b) recognising the achievements of the Australian nation commits to work together to strengthen the bonds that unite us, to respect and appreciate our differences and to build a fair and prosperous future in which we can all share;
- (c) reaffirms the central importance of practical measures leading to practical results that address the profound economic and social disadvantage which continues to be experienced by many indigenous Australians;
- (d) recognises the importance of understanding the shared history of indigenous and non indigenous Australians and the need to acknowledge openly the wrongs and injustices of Australia's past;
- (e) acknowledges that the mistreatment of many indigenous Australians over a significant period represents the most blemished chapter in our international history;
- (f) expresses its deep and sincere regret that indigenous Australians suffered injustices under the practices of past generations, and for the hurt and trauma that many indigenous people continue to feel as a consequence of those practices; and
- (g) believes that we, having achieved so much as a nation, can now move forward together for the benefit of all Australians.

In relation to the *Declaration Towards Reconciliation*, the Government has proposed an alternative form of words that seeks to overcome some features of the Council's version that the Government is unable to support on behalf of the Australian people. It is important to emphasise, however, that there is vastly more common ground than difference between the Government's Revised Declaration and the Council's Declaration. Both documents make a commitment to the process of reconciliation and acknowledge the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of lands and waters. Both recognise that this land and its waters were settled as colonies without treaty or consent and reaffirm the human rights of all Australians. Both documents identify the importance of understanding the spiritual relationship between the land and its first peoples in sharing a future and living in harmony.

Also, both the Revised Declaration and the Council's Declaration affirm that our nation must have the courage to own the truth and to heal the wounds of its past so that we can move on together at peace with ourselves. They both affirm that reconciliation needs to live in the hearts and minds of all Australians and acknowledge that many steps have been taken and many remain as we learn our shared histories. Both encourage Australians to walk the journey of healing and express sorrow and regret for injustices of the past, and both pledge Australians to stopping injustice and overcoming disadvantage.

Both documents aspire to an improved future for all Australians, recognising our shared history and the unique role, contribution and cultural identity of indigenous Australians.

The Government believes reconciliation must and should take place on many levels and in many forms. It is reliant upon the work and commitment of government, communities, organisations and individual Australians. And, while reconciliation may manifest in different ways in different communities, we also believe that the hallmark of true reconciliation will be established, to paraphrase the Prime Minister, when indigenous Australians enjoy standards of opportunity and treatment which are the equal of their countrymen and women.

APPENDIX 6

Recommendations of the *Social Justice Report 2000*

National commitments to overcome Aboriginal and Torres Strait Islander disadvantage

Recommendation 1

That the federal government adopt, on a whole of government basis, long-term policies that identify overcoming Aboriginal and Torres Strait Islander disadvantage as a national priority. That the government take steps to target the progressive reduction of such disadvantage (from both a deprivation and inequality perspective) and negotiate with the opposition parties in the Parliament for cross-party support for a long-term strategy and commitment.

Recommendation 2

That the federal government, through the processes of the Council of Australian Governments (COAG), seek the agreement of the states, territories and local government to identify as a national priority measures to overcome Aboriginal and Torres Strait Islander disadvantage. That such agreement be formalised by COAG renewing the 1992 COAG National commitment to improved outcomes in the delivery of programs and services for Aboriginal peoples and Torres Strait Islanders, after negotiation with ATSIC.

Recommendation 3

That the federal government, through the processes of COAG, seek the agreement of the states, territories and local government, and ATSIC, service delivery agencies and Indigenous organizations on benchmarks for Indigenous service delivery at the national, regional and local levels.

Recommendation 4

That the Commonwealth, states and territory governments report by 30 September 2001 to COAG and publicly through Reconciliation Australia on their responses to:

- The recommendations of this report;
- The recommendations of the Council for Aboriginal Reconciliation's final report to Parliament; and
- The actions identified in the Council for Aboriginal Reconciliation's four national strategies for reconciliation.

Recommendation 5

That the federal government update Australia's National Action Plan on Human Rights so that it commits to addressing Aboriginal and Torres Strait Islander disadvantage (from both a deprivation and inequality perspective). To the maximum extent possible, the National Action Plan on Human Rights should identify benchmarks and targets for overcoming Aboriginal and Torres Strait Islander disadvantage, and monitoring and evaluative mechanisms.

Improved data collection**Recommendation 6**

The federal government request the Commonwealth Grants Commission, Australian Bureau of Statistics (ABS) and ATSIC to provide advice within three months of the finalisation of the Commonwealth Grants Commission's current inquiry into Indigenous funding on: Mechanisms for improving the sufficiency and quality of national data necessary to identifying Indigenous needs, on an absolute basis. This advice should consider

- the ABS' strategy for improved data collection as outlined in Directions in Australia's Aboriginal and Torres Strait Islander statistics (March 2000);
- the feasibility of the ABS repeating the National Aboriginal and Torres Strait Islander Survey of 1994 on a regular basis, or undertaking the Indigenous General Social Survey on a triennial basis;
- proposals for increased coordination and consistency of data collection at the national, state and territory level; and
- cost implications of improved data collection.

Recommendation 7

That the Australian Bureau of Statistics address deficiencies identified in national data collection processes relating to Aborigines and Torres Strait Islanders.

Recommendation 8

That the federal government coordinate the negotiation of framework agreements under the COAG National Commitment to improve coordination and standardisation of data collection between the federal, state and territory governments, ATSIC, Indigenous organisations and service delivery agencies.

Monitoring and evaluation mechanisms

Recommendation 9

That the federal government amend the *Commonwealth Grants Commission Act 1973* (Cth) to require:

- The Commonwealth Grants Commission to conduct a biennial inquiry into Indigenous funding (from an absolute needs perspective); and
- A joint committee of the federal Parliament to examine the Commission's report and, following consultation with Indigenous organizations, recommend any actions required to improve Commonwealth service delivery to Indigenous people.

Adequate funding should be provided to the Commission in order to undertake the inquiry. The scope of the CGC inquiry should include mechanisms for the Commonwealth to encourage states and territories to report on and meet benchmarks; and proposals for the direct funding of Indigenous organizations (in accordance with the fiscal equalisation principle).

Recommendation 10

That the Commonwealth, state and territory governments agree to report to their respective parliaments and COAG on a biennial basis as to progress in addressing Aboriginal and Torres Strait Islander disadvantage, and the measures taken to meet the commitments made in the COAG National Commitment. That governments report to the biennial Reconciliation Conventions proposed by the Council for Aboriginal Reconciliation in the Reconciliation Bill 2000.

Negotiating with Indigenous peoples

Recommendation 11

That the federal government introduce framework legislation providing legislative support for the negotiation of agreements with Indigenous peoples at the national, regional and local levels. The Council for Aboriginal Reconciliation's proposed Reconciliation Bill 2000 is an appropriate legislative model.

Recommendation 12

That the federal government and COAG adopt the Principles for Indigenous social justice and the development of relations between the Commonwealth government and Aboriginal and Torres Strait Islander Peoples as proposed by ATSIC in *Recognition, rights and reform*, as forming the framework for negotiations about service delivery arrangements, regional governance and unfinished business.

Protecting human rights

Recommendation 13

That the federal Parliament establish a joint parliamentary committee inquiry into an appropriate model for a Bill of Rights. The inquiry's terms of reference should include

- International models for a Bill of Rights;
- Appropriate ways to incorporate Australia's human rights obligations under all six United Nations human rights treaties to which we are a party; Any specific provisions required in a Bill of Rights to recognise and protect the unique status of Indigenous Australians;
- Processes for seeking constitutional endorsement of the Bill of Rights at a later stage; and
- The feasibility of seeking, within a four-year period, the entrenchment of a guarantee of equality before the law and non-discrimination in the Constitution.

Recommendation 14

That the Commonwealth government ensure universal ratification of individual communication processes under international human rights treaties by ratifying the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.

APPENDIX 7

Recommendations of the *Social Justice Report 2001*

Reconciliation

Recommendation 11

The Senate empower the Legal and Constitutional References Committee to conduct an inquiry into the implementation and response to the reconciliation process. The terms of reference of the inquiry should require the Committee to examine the recommendations contained within the Roadmap to Reconciliation, the final report of the Council for Aboriginal Reconciliation and the Social Justice Report 2000 as well as the adequacy of the response of the Federal Government to each of these. In determining the adequacy of the response, the Committee should be required to consider processes by which government agencies have reviewed their policies and programs against the documents of reconciliation; as well as the adequacy of targets and benchmarks adopted and monitoring and evaluation mechanisms.

Recommendation 12

At the time of tabling of the annual Social Justice Report in Parliament, or within 15 sitting days, the Government furnish a response to the report and its recommendations in Parliament. In the event that the Government does not furnish such a response in Parliament, the Senate consider the establishment of a parliamentary inquiry to consider matters that appear in or arise out of the report and its recommendations, and matters to which the Committee believes Parliament's attention should be directed.