FORGING NEW RELATIONSHIPS: SOME OBSERVATIONS ON THE PROCESSES OF REACHING AGREEMENT ON A DOCUMENT/DOCUMENTS OF RECONCILIATION

SARAH PRITCHARD*

I. INTRODUCTION

In these comments I do not address the substantive content of the Draft National Declaration of Reconciliation, launched by the Council for Aboriginal Reconciliation on 3 June 1999. Rather, I focus on questions arising from the processes of debating the Draft Declaration and forging genuine reconciliation over the coming period. My comments are divided into two parts. First, I provide an overview of international standards relevant to the 'process' aspect of advancing new relationships, and second, I offer some practical suggestions as to how non-Indigenous Australians might support this endeavour.

II. INTERNATIONAL PROCESS RIGHTS

A. Self-Determination

The cardinal right relevant to the process of forging new relationships is that of self-determination. It is well-known that both in Australia and in the context of the United Nations standard-setting activities, Indigenous peoples have insisted upon recognition of their right of self-determination. In the development of a UN Declaration on the Rights of Indigenous Peoples, and in dialogue with policy-makers in Australia, Indigenous representatives have stipulated recognition of their right of self-determination as the *sine qua non* of their participation. For Indigenous peoples who, like the now independent peoples of Europe's former African, Asian and Caribbean possessions, have experienced

* Dr Sarah Pritchard is a Sydney barrister and Senior Lecturer in the Faculty of Law at the University of New South Wales. A version of this paper was delivered at a forum organised by Australians for Native Title and Reconciliation in Sydney on 2 June 1999.

processes of European colonisation in their own territories, it is clear that the concept of self-determination has particular resonance.[1]

I do not propose to provide detailed analysis of the difficult jurisprudential and philosophical questions relating to the right to self-determination. I merely offer two comments. First, it is noteworthy that from 1972 until a decision of Federal Cabinet in August last year (that is, for more than 26 years), self-determination has been the policy of successive Australian governments in the area of Indigenous affairs. Second, in current international practice the contours of the internal aspects of self-determination are undergoing refinement and elaboration. In a General Recommendation adopted on 8 March 1996, the body charged with supervision of the International Convention on the Elimination of All Forms of Racial Discrimination, the so-called "CERD Committee", affirmed that self-determination has an internal as well as external aspect. The Committee stated that governments should consider:

> within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.[2]

Significant conclusions were reached at a UNESCO Expert International Conference on The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention held in Barcelona from 12 to 17 November 1998. The participants concluded that:

> [t]he principle and fundamental right to self-determination of all peoples is firmly established in international law, including human rights law, and must be applied equally and universally.[3]

The participants described self-determination as an "ongoing process of choice" with "a broad scope of possible outcomes and expression suited to different specific situations". Possible outcomes included guarantees of cultural security, forms of self-governance and autonomy, effective participation at the international level and land rights.

B. Minority Rights

A second international standard relevant to processes of advancing new relationships is article 27 of the International Covenant on Civil and Political

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1 See S Pritchard, *Setting Intenrational Standards: An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, Aboriginal and Torres Strait Islander Commission Canberra (2nd ed, 1998) pp 35-55.

2 "General Recommendation XX", Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc A/51/18 (1996) at 125-6. See generally United Nations, *Compilation of General Comments and Recommendations adopted by the Human Rights Treaty Bodies*, UN Doc HR1/GEN/1/Rev 6 (1998).

3 On file with the author.

Rights. Article 27 provides that persons belonging to ethnic, religious or linguistic minorities must not be denied the right, in community with other members of the group, to enjoy their own culture, profess and practice their own religion or use their own language. The Human Rights Committee's General Comment on article 27 affirms the relevance of article 27 for Indigenous peoples:

> [T]he Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of Indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[4]

C. Equality Rights

The third cluster of rights which bears upon consideration of processes of advancing new relationships are those relating to the prohibition against racial discrimination and the guarantee of racial equality. On 18 August 1997, the CERD Committee adopted a far-ranging and ground-breaking General Recommendation Concerning Indigenous Peoples, which called upon States to take a series of measures, including:

- to provide Indigenous peoples with conditions allowing for sustainable economic and social development compatible with their cultural characteristics;
- to ensure that members of Indigenous peoples have equal rights in respect to effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent; and
- to ensure that Indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs, and to preserve and practice their languages.

Of particular significance is Paragraph 5 in which:

> The Committee especially calls upon States parties to recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.[5]

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4 "General Comment No 23", UN Doc CCPR/C/21/Rev 1/Add 5 (1994), para 7. See generally United Nations, *Compilation of General Comments and Recommendations adopted by the Human Rights Treaty Bodies*, note 2 *supra*.

5 "General Recommendation XXIII", UN Doc CERD/C/51/Misc 13/Rev 4 (1997). See generally United Nations, *Compilation of General Comments and Recommendations adopted by the Human Rights Treaty Bodies*, note 2 *supra*.

Australia was recently called upon by the CERD Committee pursuant to its urgent measures and early warning procedure. The Federal Government was asked to explain, inter alia, how the recent amendments to the NTA are consistent with Australia's obligations under the Racial Discrimination Convention.[6] What is particularly striking about the Committee's examination of Australia's performance is the extent to which it was troubled by the processes which attended the changes to the NTA. The Committee considered Australia's report on 12 and 15 March 1999. In her opening remarks, Committee Rapporteur Gay McDougall noted that the consent of Indigenous people had been "a critical factor in the legitimation of the original 1993 Act". In its concluding observations, delivered on 18 March 1999, the Committee observed inter alia:

> 6. ... While the original 1993 Native Title Act was delicately balanced between the rights of Indigenous and non-Indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of Indigenous title...
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> 9. The lack of effective participation by Indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention ...
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> 11... [I]n conformity with the Committee's General Recommendation XXIII concerning Indigenous Peoples, the committee urges the State Party to suspend implementation of the 1998 amendments and re-open discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the Indigenous peoples and which would comply with Australia's obligations under the Convention.[7]

D. Indigenous Rights

A final cluster of rights are those concerned specifically with the rights of Indigenous peoples, in particular the UN Draft Declaration on the Rights of Indigenous Peoples. Article 3 of the UN Draft Declaration provides that:

> Indigenous 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.

In addition, the Declaration specifies the right of Indigenous peoples to participate in decision-making through representatives chosen by them, as well as to develop their own decision-making institutions. For example, article 20 of the UN Draft Declaration provides that:

> Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

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6 UN Doc CERD/C/53/Misc 17/Rev 2 (1998).

7 UN Doc CERD/C/54/Misc 40/Rev 2 (1999).

> States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 36 is specifically concerned with the implementation and negotiation of agreements between Indigenous peoples and States. It provides:

> Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.[8]

The Draft Declaration is the result of standard-setting undertaken in the Working Group on Indigenous Populations ("WGIP"), an independent, non-governmental body within the UN. It has not been adopted by the UN General Assembly, so its formal status is not that of a treaty or even of a declaration of the General Assembly. Whether the Draft Declaration as presently drafted will eventually be adopted by the UN General Assembly is far from certain. Irrespective of its formal status, the Draft Declaration possesses exceptional legitimacy in the eyes of the world's Indigenous peoples. The WGIP has provided previously unavailable formally structured opportunities for open dialogue and encounter between Indigenous peoples and States. In the WGIP's efforts in elaborating the Draft Declaration, Indigenous peoples' own stories played a central role.

In Australia the Draft Declaration has had some impact on debate about Indigenous issues. This is evident, for example, in ATSIC's 1995 *Report to Government on Native Title Social Justice Measures: Recognition, Rights and Reform*, which notes that recognition of the particular rights of Indigenous peoples is gathering momentum through the Draft Declaration, as well as in ILO Convention No 169. *Recognition, Rights and Reform* recommends that the Commonwealth government commit itself to the "principles contained in existing and emerging international instruments as the basis for developing a comprehensive approach to the protection of Indigenous rights".[9] Similarly, participants at the Australian Reconciliation Convention in May 1997 supported the principles contained in existing and emerging international instruments such as the Draft Declaration as the basis for developing a comprehensive approach to the protection of Indigenous rights in Australia.

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8 See UN Doc E/CN 4/Sub 2/1993/26.

9 Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: Report to Government of Native Title Society Justice Measures*, (1995) recommendation 11.

III. THE ENDEAVOUR OF FORGING NEW RELATIONSHIPS

Having identified a range of international standards which bear on the legitimacy of processes of constructing new relationships, I offer some practical suggestions as to how non-Indigenous constituencies might support this endeavour.

A. A Sense of History

First, might I suggest the importance of approaching the venture with a sense of the history of Aboriginal political activism in Australia. Current discussion of new relationships is not occurring in an ahistorical vacuum, but as a result of a struggle for rights for Aborigines which has been waged for more than 150 years. Critical events have included:

- the establishment of a tent embassy outside Parliament House in January 1972;
- the 1979 proposal by the National Aboriginal Congress for a Makarrata or treaty, to be negotiated between the Commonwealth and Aboriginal peoples of Australia, and in which sovereign Aboriginal nations are recognised as equal in status as the Commonwealth of Australia;
- Kevin Gilbert's 1987 draft treaty written in consultation with the Sovereign Aboriginal Coalition;
- the 1988 Barunga Statement presented to Bob Hawke by the Chairpersons of the Northern Territory Land Councils calling on the "Commonwealth Parliament to negotiate with us a treaty or compact recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedoms"; and
- the founding of the Aboriginal Provisional Government by Michael Mansell in 1990.[10]

It was with reference to such calls for a settlement of outstanding historical questions that in early 1994 the Commonwealth Government asked the Council for Reconciliation to consider, amongst other matters, whether there should be a formal place within the reconciliation process for "a document or documents of reconciliation".

B. Acceptance that the Process is Difficult

A second comment relates to the importance of accepting that reaching agreement will be difficult and will require patience. The process involves turning around two centuries of colonial relationships, recasting the political and legal landscape of Australia, and realigning the political position and legal status of Indigenous peoples. That such a process will encounter a lack of comprehension and some resistance should not be surprising.

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10 See generally B Atwood and A Markus, *The Struggle for Aboriginal Rights: A Documentary History*, Allen and Unwin (1999).

C. Distinctiveness of Indigenous Peoples' Rights

A third comment refers to the indispensability of embracing a substantive concept of equality. New relationships cannot only be about equity in the delivery of infrastructure and services, and economic and social outcomes, although these are important. Indigenous peoples posses distinct rights arising from their status as first peoples: from their relationship with their territories and waters, from their own systems of law and governance.

D. Centrality of the Principle of Self-determination

Related to the recognition of Indigenous peoples' distinctive rights is the centrality of the principle of self-determination, both in its procedural and substantive dimensions. Any document which denies the principle of self-determination must have rather limited prospects of gaining any support amongst Indigenous constituencies. As noted above, until August last year the principle of self-determination had informed Indigenous affairs policy in this country for some 26 years. The Council for Aboriginal Reconciliation has supported recognition of the rights of Indigenous peoples to self-determination, within the rule of law. A seminar at the Melbourne Reconciliation Convention in June 1997 also supported the principle of self-determination as an international and domestic human right. Similarly, a significant proportion of Aboriginal people in Australia continue to assert their unextinguished sovereignty. It is reasonably clear that they will not agree to any document or documents of reconciliation which compromise their assertions of sovereignty.

E. Need for Constitutional Protection

A fifth point relates to the need for concrete, constitutional reform to ensure the protection and justiciability of Indigenous rights. The passage last year of discriminatory amendments to the NTA shows just how vulnerable Indigenous rights can be to parliamentary majorities, how tenuous the commitment to the principle of non-discrimination. Constitutional reform can not be simply about removing from the Constitution any remaining provisions, such as s 25, which discriminate against people on the basis of race. Nor can it be limited to preambular statements. It must be about securing protection of those rights which are now recognised, such as native title rights; as well as rights which are negotiated and recognised in the future - for example, through regional agreements and decisions of courts amplifying the High Court's decision in *Mabo [No 2]*.

F. Authenticity of Indigenous Voices/Multiplicity of Indigenous Voices

In the endeavour of forging new relationships, it will be critical to ensure that Indigenous people regain control of the process, and hence can claim ownership of the outcomes. Perhaps the most remarkable aspect of *Bringing Them Home*, the report of the Stolen Generations Inquiry, and hence its ownership by Indigenous Australians, is the centrality of the stories told by survivors about the

impact of government policies on their lives and about their needs for healing. It will also be important to recognise the multiplicity of Indigenous voices and to avoid essentialising historical and contemporary Indigenous experiences.

G. Reference to International Best Practice

No country can survive in today's complex world by trivialising difficult policy issues which are the subject of serious study, debate and emerging consensus in the international arena. Discussion of new relationships is not occurring in a vacuum, but within a framework of international standards and expectations. This has as its foundation a body of well-established international human rights jurisprudence, and includes more recent standard-setting efforts, reflected in documents such as the Draft Declaration on the Rights of Indigenous Peoples. Similarly, international advocacy by Indigenous Australians has led to a sophisticated level of knowledge of a range of comparative models which exist for reconciling Indigenous/non-Indigenous relationships. Non-Indigenous Australians, as well, need to become more knowledgeable about the processes involved in painstakingly negotiating constitutional changes in other countries.

H. Acknowledge What Is Already in Place

While recognising the need for more comprehensive settlement, it is important not to forget the struggles which have been waged, and the rights which have been recognised to date. Whilst piecemeal and in many respects inadequate, over the past two decades there has been gradually elaborated a framework of legislation and common law rights in the areas of land rights, heritage protection, and Indigenous law and governance. Nothing in the endeavour of seeking new relationships should be seen as too far-removed from the Australian experience or too far beyond our collective capabilities and imagination.

I. Engage with Governments

On 13 September 1998, during the course of the federal election campaign the Prime Minister rejected the possibility of a treaty with Indigenous Australians, stating: "We are all Australians before anything - one distinctive nation." Some have queried whether in this vision of an undivided, united polity, there is space for Indigenous Australians to determine their own futures and control their own development. At the same time, with the Prime Minister's promise on the eve of the re-election of his Government to work towards reconciliation, there is an opportunity to restore the much-needed bi-partisanship to reconciliation processes. Rather than hurl abuse, it might be more helpful to engage governments in dialogue to ensure that any document/s of reconciliation truly reflect the aspirations and rights of Indigenous Australians.

J. Lock in Ongoing Processes

At the same time, we need to be realistic about the feasibility of stitching up a document/s of reconciliation in the twelve months remaining to the Council for Aboriginal Reconciliation. With the best will in the world, the Draft Declaration

of Reconciliation launched on 3 June 1999 can not be characterised as an accurate reflection of the actual aspirations and entitlements of Indigenous Australians. Without preempting responses by Indigenous Australians to this document, it is likely that there will remain much unfinished business. It will be important to work to lock in mechanisms to keep the ten year statutory process begun in 1991 alive beyond 2001. And in the debate which is now occurring following the launch of the Draft Declaration of Reconciliation, we non-Indigenous Australians must take our cues from the Indigenous peoples with whom settlement is so essential for the integrity and wellbeing of our nation.