

February 25 2005

Senator Moore
Chair
Senate Select Committee on the
Administration of Indigenous Affairs
Parliament House
Canberra, ACT, 2600

Dear Senator Moore,

Tabling of letter from the Australian Government to ANTaR, dated 12 July 2004

Thank you once again for the opportunity to provide evidence to the Select Committee on this vital issue.

During our evidence to the Committee in Sydney on 2 February 2005, you asked if I could table a letter from the Government referred to in ANTaR's written submission. The relevant section on page 9 of our submission reads:

"The Government recently put to ANTaR that the current Senate estimates process provides sufficient opportunity for Indigenous people to hold government's accountable, stating that "...Indigenous people can have their concerns addressed through contacting the relevant Minister or members of the [Estimates] Committee should they have issues or questions"."

Accordingly, I provide as a separate enclosure a copy of the Government's letter, dated 12 July 2004, outlining the Australian Government's position with respect to a number of questions raised by ANTaR. The section we quoted in our submission is on page 5 of the letter, in response to the question:

"c. Will you/your party undertake to support specific formal measures, such as a Indigenous "estimates" process, whereby Indigenous representatives are able to question governments and mainstream departments on Indigenous policy and program delivery outcomes?"

I hope this information is of assistance to the Committee and I would be happy to provide additional information if required.

I apologise for the delay in forwarding this information to the Committee.

Yours sincerely,



Dr David Cooper
National Director

SELECT COMMITTEE ON THE
ADMINISTRATION OF INDIGENOUS AFFAIRS

REC'D:

FROM: ANTaR

RECOMMENDED FOR PUBLICATION:

SECRETARY:

Office of the Minister

for Immigration and Multicultural
and Indigenous Affairs

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12 JUL 2004

Dear Correspondent

I refer to the unsigned facsimile of 10 May 2004 to the Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon Amanda Vanstone, seeking responses to a range of questions relating to issues in Indigenous affairs. The Minister has asked that I respond on her behalf.

The Australian Government's position on each of the questions you raised is as follows:

1. Reconciliation

a. Do you/does your party support the full implementation of the final recommendations of the Council for Aboriginal Reconciliation (CAR)?

No. See the Australian Government Response to the final report of CAR.

The Australian Government remains strongly committed to the ongoing process of reconciliation and continues to see it as an important national priority. The Government's approach to Indigenous issues is multifaceted, based on partnerships and shared responsibilities with state and territory governments, Indigenous communities and all Australians. It combines practical initiatives to address Indigenous disadvantage in the areas of health, housing, employment and education with program flexibility and coordination between Government agencies, and symbolic acts to encourage all Australians to embrace reconciliation.

The Australian Government believes the best contribution that all levels of government can make to reconciliation is by addressing Indigenous social and economic disadvantage, including life expectancy, and improving governance and service delivery arrangements for Indigenous Australians. Indigenous-specific expenditure by the Australian Government in 2004-05 is estimated at around \$2.9 billion, a 39 per cent real increase on 1995-96 expenditure levels. You may be interested to read the enclosed 2004-05 Indigenous Affairs Budget Kit, which gives details of the 2004-05 budget initiatives and estimated Indigenous specific expenditure in 2004-05.

The Australian Government's approach to reconciliation acknowledges that reconciliation means different things to different people. It is supportive of symbolic acts to encourage all Australians to embrace reconciliation. Some of the symbolic acts of reconciliation undertaken by the Australian Government include:

The Motion of Reconciliation

The Prime Minister moved the Motion of Reconciliation in parliament on 26 August 1999. The motion was passed by both houses of parliament. Through the motion, parliament expressed 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 these practices. The motion reaffirmed a whole-hearted commitment to the process of reconciliation as an important national priority for the government and for all Australians.

Reconciliation Place

The Australian Government has allocated \$6.05 million for the design and construction of Reconciliation Place, in the parliamentary triangle in Canberra as a significant contribution to progressing symbolic reconciliation.

Reconciliation Place, as a national place of reflection, portrays Australia's shared journey of reconciliation. It is a prominent public symbol of the nation's commitment to healing the wounds of the past and of our desire as a nation to move forward together and share a harmonious future.

Acknowledgment of country

The Prime Minister and members of the government have adopted the practice of 'acknowledging country' at ceremonial occasions and appropriate public events.

This practice involves acknowledgment that the event is taking place in the country of the traditional Indigenous people. It shows respect for Aboriginal and Torres Strait Islander protocol and the ongoing relationship of the Indigenous people of the area with that land and/or waters.

Recognition and respect of Indigenous cultures and heritage

There have also been a range of other symbolic initiatives undertaken that recognise the importance of Indigenous culture and heritage to Australia. The Australian Government is finalising new legislation for the protection of Indigenous heritage which will set minimum standards for State and Territory Indigenous heritage protection legislation. A significant gesture of the respect accorded Indigenous Australians is the practice of flying both the Aboriginal and Torres Strait Islander flags on Australian Government buildings at times of significance.

- b. Will you/your party support enacting 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" (CAR Final Recommendation 6)?**

No. The Australian Government does not support the notion of a treaty with Indigenous Australians. Both the previous and current Australian governments have rejected the concept of a treaty as divisive and lacking the support of the general population. See also response to Question 3(b).

2. Self-determination

a. Do you/does your party recognise the right of Aboriginal and Torres Strait Islander peoples to self-determination?

No. The Government has indicated in a number of forums, including the Permanent Forum on Indigenous Issues and the Working Group on the Draft Declaration on the Rights of Indigenous Peoples, that it does not support use of the term "self-determination" in relation to Indigenous peoples, because the term has no settled meaning in international law, and implies separate systems of government or laws within a nation-state. Most other states involved in these fora, including the USA, Canada and New Zealand, have also expressed concerns about an unqualified right of self-determination.

The Government has indicated in forums such as the Permanent Forum and the Working Group that it supports alternative terms such as "self-management" and "self-government" because they are more meaningful expressions of the principle of Indigenous people exercising greater control over aspects of their affairs, in consultation with Government, which is responsible for the ultimate outcomes.

The Government encourages greater self-reliance for Indigenous Australians by promoting opportunities for economic development, and by improving services in the area of health, housing, education and employment.

Indigenous people are involved in the planning and implementation of Government policies and programmes which affect them. For example, a large number of Indigenous-controlled organisations are involved in the planning and delivery of government-funded services in areas such as health, housing and employment. Also, most discrete Indigenous communities own their own land and manage their own local government functions.

b. Will you/your party undertake to support, as a replacement for ATSIC, the development of a national representative Indigenous body in which Indigenous people have control over their own affairs and not just an advisory role.

No. The Government announced on 15 April 2004 that it will be establishing a National Indigenous Council (NIC) which will advise Government directly. The Council will include Indigenous leaders with expertise and knowledge in priority areas such as substance abuse, education, health, employment, law and housing to complement arrangements at the local and regional level and to help monitor performance. This would be an expert advisory body and would not prevent Indigenous people forming their own peak national advocacy organisation. The NIC would not be the only source of advice and the Government would talk with and listen to other peak organisations and elected Indigenous people.

3. Indigenous disadvantage

a. Will your party undertake to support the provision of funding and resources *on the basis of need* to address Indigenous disadvantage, in particular in areas such as health, housing, education and employment opportunities, and community infrastructure?

Yes. The Commonwealth Government has already committed to supporting the provision of funding and resources *on the basis of need* to address Indigenous disadvantage. This was an election commitment in 1998 and reaffirmed in 2001. Also in 2001, the Commonwealth Government committed to continuing to develop new ways of doing business, drawing on the COAG response to reconciliation and on the outcomes of the Commonwealth Grants Commission (CGC) Report on Indigenous funding that focussed on the priority areas of health, housing, infrastructure, education, training and employment.

A key element of the Commonwealth's 2001 election commitment was to improve the access of Indigenous Australians to mainstream programs and services at both the State and Territory and Commonwealth levels, particularly in urban and regional centres, with a view to better targeting Indigenous-specific programs to areas of greatest need, including rural and remote locations.

b. Will you/your party undertake to support development of a Social Justice Package, which is the third (undelivered) component of the agreement struck between Indigenous representatives and the Commonwealth Government which resulted in the *Native Title Act 1993*?

The agreement to support the development of a Social Justice Package referred to above was made between Indigenous representatives and the then Keating Government in 1993, in the context of negotiations on the development of the *Native Title Act 1993*. The proposed Social Justice Package comprised two elements, a land acquisition fund and measures to address Indigenous disadvantage. The land acquisition fund was established in 1995 by legislation, and since then some \$1.4 billion in funds has been made available for its purposes. On the second element, funding by the Australian Government for Indigenous specific programmes to address Indigenous disadvantage has increased by 70% in real terms since 1993-94 (from \$1,361 million in 1993-94 to \$2,918 million in 2004-05). In these circumstances, the Australian Government considers that any reasonable expectations of a social justice package in 1993 would in retrospect have been exceeded. Since 1996 the Howard Government has developed a range of policies and programs to improve Indigenous people's access to services - particularly in the areas of health, housing, education and employment. This has included significant increases in Indigenous specific funding and agreements with State and Territory Governments to improve Indigenous people's access to mainstream services.

Submissions prepared by ATSIC, the Council for Aboriginal Reconciliation and the HREOC Social Justice Commissioner in 1995 had two key themes – the need to address widespread Indigenous disadvantage, and the desire for a formal recognition of Indigenous rights, including through agreements. In addition to the substantial increase in resources noted above, the Australian government has progressed the issue of rights recognition in a number of areas. These include:

- heritage protection;
- land use (through the Indigenous Land Use Agreement provisions of the *Native Title Act 1993*);
- the adoption of acknowledgement of country ceremonies;
- development of legislation to address Indigenous intellectual property concerns;
- ratification of the International Convention on the Elimination of All Forms of Racial Discrimination;
- ratification of International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights;

- acceptance of the Universal Declaration of Human Rights;
- the Australian Government put forward a proposed preamble to the Constitution at a referendum in November 1999 which, among other things, honoured Aboriginal and Torres Strait Islanders as "the nation's first people, for their deep kinship with their lands and for the ancient and continuing cultures which enrich the life of our country";
- The Australian Government has affirmed that Indigenous people were the original custodians of this land and its waters, and that they were settled as colonies without treaty or consent. The Australian Government acknowledged this through its Revised Declaration Towards Reconciliation, presented on 11 May 2000;
- The Australian Government has committed to further the process of reconciliation, through a range of activities – including the provision of \$15 million to Reconciliation Australia in 2003-04;
- the development of agreements with individual communities to improve service delivery arrangements and outcomes (for example, Shared Responsibility Agreements in the COAG trial sites);
- the implementation of new administrative arrangements for Australian Government service delivery in Indigenous Affairs with a major focus on collaboration and agreement between all tiers of government and Indigenous communities;

In light of the above, the Australian Government believes that it has been responsive to the needs of Indigenous people. The Australian Government does not, however, accept the notion that there be a negotiated treaty between Indigenous Australians and other Australians. The Australian Government rejects the notion of such a treaty. Such a proposal implies that there are two sovereign nations or groups within Australia, and has a divisive, deleterious impact on the nation as a whole. Public opinion research by the former Council for Aboriginal Reconciliation clearly revealed majority community opposition to the concept of a legally enforceable agreement of such a kind. The Australian Government is firmly of the view that Australia is a single nation with all people equal and subject to the same framework of rights and obligations.

c. Will you/your party undertake to support specific formal measures, such as Indigenous "estimates" process, whereby Indigenous representatives are able to question governments and mainstream departments on Indigenous policy and program delivery outcomes?

There is already a formal "estimates" process, through the Senate Legal and Constitutional Committee, which provides the opportunity for both Indigenous and non-Indigenous people to directly or indirectly question governments and mainstream departments on appropriations and policy and program delivery outcomes. Indigenous people are not excluded from Senate Estimate Committees. In the event that there is no Indigenous representation on such a Committee, Indigenous people can have their concerns addressed through contacting the relevant Minister or members of the Committee should they have issues or questions.

Under the recently announced changes to the administration of Australian government funding in Indigenous Affairs, a National Indigenous Council will be established to:-

- advise government on priorities in areas such as education, health, employment, law and justice etc; and
- monitor performance in these areas.

4. Native Title

- a. **Will your party undertake to amend the *Native Title Act* so as to remove racially discriminatory elements introduced by the Howard Government's 1998 Native Title Amendments?**

The 1998 amendments to the Native Title Act were the subject of a major inquiry by the Parliamentary Joint Committee on Native Title and the Aboriginal Torres Strait Islander Fund, dealing specifically with the consistency of the Native Title Amendment Act with Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination. The majority report of the Committee, tabled in June 2000, concluded that the amended Act is consistent with Australia's international obligations under the convention and that no further amendments were necessary in order to ensure that Australia's international obligations are complied with. The Committee found that the amended Act achieves an equitable balance between the rights of Indigenous and non-Indigenous Australians and also provides native title holders with many beneficial measures designed to take account of the special nature of native title, and which are not generally available to non-Indigenous interest holders. The Government welcomed the findings of the report - see press release:

<http://www.law.gov.au/www/attorneygeneralHome.nsf/0/0AB763B991E0D89CCA256B6500829B13?OpenDocument>

- b. **Will you/your party undertake to support the restoration of 'right to negotiate' provisions equivalent to those in the original *Native Title Act* 1992?**

No. The right to negotiate provisions were the subject of substantial changes in the 1998 amendments. The Explanatory Memoranda relevantly stated that: "The purpose of the amendments to the right to negotiate provisions is to streamline the right to negotiate processes so that unnecessary delays are eliminated while maintaining the protection of the legitimate interests of native title representatives and claimants." In the second reading Speech for the original amendment Bill (1998), the then Attorney-General stated that: "Among the many shortcomings of the current Act, it has become apparent that the 'right to negotiate' procedures, which apply to mining and certain compulsory acquisitions, have failed to deliver the outcomes that were expected. Not only have these procedures impeded resource and commercial development, but they have done so without giving indigenous peoples substantial benefits in return. Both development interests and indigenous groups - and the two are not always mutually exclusive - have every right to be disappointed." In a speech to the Native Title Forum in Brisbane in 2001, the then Attorney noted that the 1998 amendments changed the right to negotiate procedures, "to encourage parties to participate in that process in a more constructive way."

- c. **Will you/your party ensure that increased and sufficient funding is available to support negotiation processes under the *Native Title Act* to expedite the achievement of native title outcomes based on the principles of co-existence?**

The Australian Government monitors the performance of the native title system on an ongoing basis. The Government allocated additional funding of \$86 million for the native title system over four years in the 2001-2002 budget. The additional funding was 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.

The Australian Government funds most of the activity in the native title system, including the National Native Title Tribunal and Federal Court, native title parties through the Native Title Representative Bodies funding program, the financial assistance program for non-native title parties, and its own participation in specific native title cases where it has an interest.

The additional funding has helped the native title system resolve claims more quickly. In the two years before the injection of this additional funding, there were only 11 determinations of native title. By contrast, in the two years after that Budget announcement, more than 20 determinations of native title were made. The National Native Title Tribunal recently announced that 50 determinations of native title have now been concluded, 26 of which have been by consent. Similarly, in the two years before the additional funding, some 22 Indigenous Land Use agreements had been registered in comparison to the 70 agreements registered in the two years after the additional funding was provided. As at 14 May 2004, 121 Indigenous Land Use Agreements had been registered in Australia.

d. Will your party increase funding to Native Title Representative Bodies to enable them to properly fulfil their statutory functions under the *Native Title Act*?

The Australian Government will provide approximately \$114 million to the native title system in 2004-05. The system includes native title representative bodies, the National Native Title Tribunal, the Federal Court and the Attorney-General's Department. The Government will provide approximately \$54 million for native title representative bodies in 2004-05, which is almost half of the total amount of Australian Government native title funding. Funding levels are regularly reviewed.

As noted in response to Question 4(c), in the 2001-02 Budget, the Australian Government provided additional funding of \$86 million over four years for the native title system. This included \$11.4 million over four years to assist in building the capacity of native title representative bodies to provide professional services to native title claimants and \$6 million over four years to resolve priority native title claims.

5. Stolen generations

a. Do you/does your party support the recommendations of the *Bringing Them Home Report*?

In part – see the Australian Government's Response to the recommendations of the BTH Report. The Australian Government's response to the Report included a \$63 million package of measures over four years which focused on the Human Rights and Equal Opportunity Commissions central finding that "Assisting family reunions is the most significant and urgent need of separated families." The Australian Government's response concentrated on initiatives to assist with family reunion and to provide health and parenting services for those affected by past separation practices, including funding for family tracing and reunion services, counselling services, and parenting programmes. Measures were also introduced to allow families to access their records and tell their stories, along with culture and language maintenance programs.

The Australian Government allocated a further \$54 million over four years in 2001 to continue and expand the parenting programs, counselling services, support and training for mental health counsellors, and family reunion services which were originally funded under its 1997 response, bringing the total funding to \$117 million.

b. If elected to Government, do you/does your party intend to offer an apology to the Stolen Generations on behalf of the nation or, if not elected to government, to support any proposals for such an apology?

No. In 1999 both Houses of Parliament endorsed the Motion of Reconciliation. Through this motion the National Parliament expressed 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 these practices. The Australian Government does not support a formal apology to Indigenous people. Such an apology could imply that present generations are, in some way, responsible and accountable for the actions of earlier generations – actions that were sanctioned by the laws of the time and that were believed to be in the best interests of the children concerned. On 26 August 1999, both Houses of Parliament endorsed the Australian Government's historic motion of Reconciliation. Through this motion, the National Parliament:

- Expressed its deep and sincere regret that Indigenous Australians suffered injustice under the practices of past generations, and for the hurt and trauma that many Indigenous people continue to feel as a consequence of these practices; and
- Reaffirmed a whole-hearted commitment to the cause of reconciliation between Indigenous and non-Indigenous Australians as an important national priority for all Australians.

The Senate Legal and Constitutional Reference Committee tabled its report on the Government's implementation of the recommendations of *Bringing Them Home* Report on 30 November 2000.

The Ministerial Council for Aboriginal and Torres Strait Islander Affairs (MCATSI), in response to a Senate Inquiry recommendation, agreed to sponsor an independent evaluation of government and non-government responses to '*Bringing Them Home*'. The purpose of '*The Evaluation of Responses to Bringing Them Home Report*' has been to review and evaluate progress to date, made by governments and non-government organisations against their response objectives.

The evaluation report demonstrated that all governments have made substantial contributions to address the needs of separated children, both through direct *Bringing Them Home* responses and through other associated policies and programmes. The evaluation report is available on the New South Wales Department of Aboriginal Affairs website at www.daa.nsw.gov.au.

c. Do you/does your party support the establishment of a Reparations Tribunal to provide a mechanism for compensating Indigenous Australians who suffered from the policies of forced removal from their families?

No. The Australian Government considers that there is no equitable way to financially compensate people affected by the removal policies, and that it is more important to provide

practical assistance such as facilities for family reunion and emotional health and wellbeing. To this end it has invested a total of \$117million in Bringing Them Home initiatives.

6. Stolen wages

Will you/your party support the investigation of all unpaid wages and entitlements to Indigenous people and, in consultation with those affected, provide acknowledgment and restitution of unpaid monies?

The question of "stolen wages" is being addressed by the States and Territories.

While the Commonwealth was responsible for the Northern Territory and the Australian Capital Territory for certain periods before self-government, the Government does not have any knowledge that the Commonwealth ever acted in breach of its legal obligations toward Indigenous people. The Court findings in *Cubillo and Gunner* and *Kruger and Bray* separated children cases, for example, were that the Commonwealth acted lawfully.

7. Indigenous heritage

a. Do you/does your party support access to Commonwealth heritage legislation as a 'last resort' option in all cases where State regimes fail to protect Indigenous heritage?

The Aboriginal and Torres Strait Islander Heritage Protection Bill is soon to be reintroduced into Parliament. This Bill provides for the replacement of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. It provides for Indigenous people to seek protection of their heritage as a 'last resort' option where they believe that State/Territory regimes have failed to protect it. The replacement Bill provides for accreditation of State/Territory regimes. Where a State/Territory regime has been accredited, the Bill provides that long term protection will be granted if this is in the national interest.

Current Australian Government legislation also protects Indigenous heritage where:

- i. the place has one or more Indigenous National Heritage values as defined under the *Environment Protection and Biodiversity Conservation Act 1999*; or,
- ii. the place has one or more Indigenous Commonwealth Heritage values as defined under the *Environment Protection and Biodiversity Conservation Act 1999*.

b. Do you/does your party support the provision of strong minimum standards for state/territory heritage regimes (as recommended by the 1996 Evatt Report)?

The Australian Government supports the provision of strong minimum standards for State/Territory Indigenous heritage regimes and has been engaged in discussion with Indigenous people to develop those standards. Its position will be incorporated in the Aboriginal and Torres Strait Islander Heritage Protection Bill, which is soon to be reintroduced into Parliament.

c. Do you/does your party support the provision of Indigenous involvement in decision-making at all levels in heritage protection?

The Australian Government supports the provision of Indigenous involvement in decision-making at all levels in Indigenous heritage protection, recognizing that this is appropriate even in circumstances where the final decision may need to be taken by a Minister or statutory authority. In particular, the Australian Government recognizes that Indigenous people are the primary source of information about the significance of their cultural heritage and its management.

d. Do you/does your party support provision for an independent Indigenous-controlled heritage body at the Commonwealth level?

The Australian Government has provided for Indigenous membership of its principal heritage advisory body: the Australian Heritage Council. It is a requirement of the *Australian Heritage Council Act 2003* that two of the six members other than the Chair of the Council must be Indigenous persons with substantial experience or expertise concerning Indigenous heritage.

The Government's replacement Bill for the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* will establish the statutory position of Director of Indigenous Heritage Protection and an Indigenous Heritage Advisory Committee to advise the Minister and the Director of Indigenous Heritage Protection on the operation of the Act.

Thank you for writing on these matters.

Yours sincerely



RUSSELL PATTERSON
Senior Advisor