

Submission to the Senate Legal and Constitutional References Committee  
inquiry on progress towards national reconciliation, including the  
adequacy and effectiveness of the Commonwealth's response.

Oxfam Community Aid Abroad

November 2002.

355

## Terms of Reference.

(1) That the following matter be referred to the Legal and Constitutional References Committee for inquiry and report by March 2003:

Progress towards national reconciliation, including an examination of the adequacy and effectiveness of the Commonwealth Government's response to, and implementation of, the recommendations contained in the following documents:

- (a) Reconciliation: Australia's Challenge: Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament;
- (b) the Council for Aboriginal Reconciliation's Roadmap for Reconciliation and the associated National Strategies to Advance Reconciliation; and
- (c) the Aboriginal and Torres Strait Islander Social Justice Commissioner's social justice reports in 2000 and 2001 relating to reconciliation.

(2) That, in examining this matter, the committee have regard to the following:

- (a) whether processes have been developed to enable and require government agencies to review their policies and programs against the documents referred to above;
- (b) effective ways of implementing the recommendations of the documents referred to above, including an examination of funding arrangements;
- (c) 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, with particular reference to the consistency of these responses with the documents referred to above; and
- (d) the consistency of the Government's responses to the recommendations contained in the documents referred to above with the needs and aspirations of Indigenous Australians as Australian citizens and First Nation Peoples.

### 1. Introduction.

Oxfam Community Aid Abroad works with indigenous peoples in approximately 21 countries, including Australia where we have run community development programs for many years. It is important to emphasise that Oxfam Community Aid Abroad does not in this submission purport to represent the views of indigenous Australians. Instead, Oxfam Community Aid Abroad's primary interest is in maintaining and enhancing the basic rights of indigenous peoples with whom we work - including indigenous Australians - and as such seeks in this submission to comment from this rights based perspective.

Oxfam Community Aid Abroad takes a rights based approach to our work on poverty, injustice and suffering. This approach reflects our view that poverty and suffering are primarily caused and perpetuated by injustice between and within nations, resulting in the exploitation and oppression of marginalised peoples.

Our rights based approach to development further implies that States have obligations and citizens have rights, expressed through international covenants, agreements and commitments. These include the United Nations Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and more specific commitments made by Governments at a series of international conferences in the first half of the 1990's.

Given the breadth of our international experience, what is striking to Oxfam Community Aid Abroad is the similarity of underlying problems that confront indigenous peoples; usually they are the most marginalised of the poor, have the least political power and, because of their prior ownership of land, find themselves in conflict with commercial interests wishing to exploit their natural resources. Indigenous communities, whether in Indonesia, India, Guatemala or Australia suffer because their law, their culture, their rights and their ownership of land have all been sacrificed for the economic interests of the dominant culture. Reluctance by dominant cultures to acknowledge often complex indigenous land ownership systems is nearly universal, and Australia is no exception.

It is Oxfam Community Aid Abroad's view that the Australian Government's failure to adequately address a range of indigenous rights issues has created the single greatest barrier to the achievement of reconciliation. The following unresolved indigenous rights issues are of particular concern to Oxfam Community Aid Abroad;

- The Australian Government's failure to respond to the United Nations Committee on the Elimination of Racial Discrimination decision that elements of the Native Title Amendment Act 1998 are inconsistent with Australia's obligations under the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD).
- The Australian Government's formal opposition to self determination for indigenous peoples as proposed in the United Nations Draft Declaration on the Rights of Indigenous peoples.
- The Australian Government's failure to offer a formal apology to and address compensation for victims of the Stolen Generation as proposed in the Bringing Them Home report.
- Continuing uncertainty over aspects of the Racial Discrimination Act 1975, particularly whether section 51(26) – which allows the Commonwealth to make laws with respect to any race for who it considers necessary to make special laws - can be used to discriminate against people of a particular race.
- The Australian Government's failure to propose recognition of prior indigenous ownership of Australia in the Commonwealth Constitution.

It is primarily due to the Australian Government's failure to address these and a wide range of other outstanding indigenous rights issues that meaningful reconciliation was not achieved by the Centenary of Federation in 2001 and therefore within the lifetime of the Council for Aboriginal Reconciliation.

Oxfam Community Aid Abroad has previously congratulated the Council for Aboriginal Reconciliation for its recognition that reconciliation cannot be achieved within an arbitrary

timeframe in the current Australian environment where so many indigenous rights issues remain unresolved.

Further, Oxfam Community Aid Abroad broadly endorsed the Council's proposed National Strategies to Advance Reconciliation as a considered and appropriate framework to present to the Australian Government for the advancement of reconciliation beyond the Centenary of Federation.

#### 1. The Commonwealth Government's response to the Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament.

The Federal Government finally released its formal response to the Council for Aboriginal Reconciliation's Final Report in September 2002 – almost two years after the report was handed to the Government. Both its tardiness in responding, and the incomplete and inadequate nature of the response signal the Government's lack of priority on reconciliation. Further, the Commonwealth Government has provided no detailed program of implementation for reconciliation and has no long-term strategy, targets, benchmarks or performance monitoring frameworks which Oxfam Community Aid Abroad is aware of. Following the legislative expiry of the Council for Aboriginal Reconciliation, Australia no longer has any formal process of reconciliation with mandated objectives, monitoring powers and accountability.

#### 1. The Commonwealth Government's response to the Council for Aboriginal Reconciliation National Strategies to Advance the Reconciliation Process.

Oxfam Community Aid Abroad offers the following observations on the Commonwealth Government's progress in advancing many of the recommendations of the Council for Aboriginal Reconciliation outlined in the National Strategies to Advance the Reconciliation Process.

##### *3.1 Council of Australian Governments (COAG) performance measurement and reporting.*

Oxfam Community Aid Abroad welcomes the Council of Australian Governments' initiatives in addressing disadvantage, including initiatives for trialing whole of government approaches in ten sample communities around Australia. However, it is concerning that the performance benchmarks and time-lines that COAG and the Ministerial Council on Aboriginal and Torres Strait Islander Affairs are developing are not yet in place.

##### *3.2 Legislative processes to deal with the unfinished business of reconciliation.*

Oxfam Community Aid Abroad is concerned that there remains no Commonwealth legislative process for dealing with important unresolved issues associated with the reconciliation process including indigenous rights, self determination and constitutional reform.

The Commonwealth Government has failed to respond to recommendation 6 of the Council for Aboriginal Reconciliation to enact a legislative process towards an agreement or treaty. Oxfam Community Aid Abroad disagrees with the Commonwealth Government's argument that a treaty process would undermine the concept of a single Australian nation and that a treaty would in any way undermine national sovereignty and land ownership issues. There are many examples of

Submission to Senate Legal and Constitutional References Committee inquiry on progress towards reconciliation. Oxfam Community Aid Abroad. November 2002.

successful treaty processes between sovereign states and Indigenous peoples. Moreover treaties are about reaching agreement, not division, and can help to provide legal certainty and dispute resolution mechanisms – conditions which clearly do not pertain in the current climate of uncertainty and conflict concerning the many matters of ‘unfinished business’.

The Commonwealth Government has also rejected the Council’s draft legislation, claiming it to be a potentially divisive, protracted and inconclusive process for the nation. However, the Commonwealth Government has failed to propose or implement an alternative process of its own to resolve the unfinished business of reconciliation.

### *3.3 Failure to ensure Government policies and practices comply with Australia’s international human rights obligations.*

The Commonwealth Government has failed to respond to the United Nations Committee on the Elimination of Racial Discrimination decision that elements of the Native Title Amendment Act 1998 are inconsistent with Australia’s obligations under the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD).

On two occasions during 1999 the United Nations Committee on the Elimination of Racial Discrimination found that the Australian Government’s 1998 amendments to the Native Title Act 1993 are inconsistent with Australia’s obligations under the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD).

Accordingly, the Committee requested the Australian Government to immediately suspend the Native Title Amendment Act 1998 and re-open negotiations with Aboriginal people with a view to finding solutions which comply with Australia’s international obligations. The Committee’s request that the Australian Government suspend implementation of the 1998 amendments due to inconsistencies with Articles 2 and 5 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination has not been adopted by the Australian Government.

Further, the four particular provisions of the 1998 amendments which the Committee found to discriminate against indigenous title-holders - namely the Act’s ‘validation’ provisions, the ‘confirmation of extinguishment’ provisions, the primary production upgrade provisions and restrictions concerning the right of indigenous title holders to negotiate non-indigenous land uses - remain in place in the Act.

Oxfam Community Aid Abroad’s international experience of these matters has shown clearly and repeatedly that reconciliation of dominant cultures with indigenous peoples cannot be realised without addressing the fundamental issues of concern to indigenous peoples, which almost always include recognition of rights to land.

Accordingly, Community Aid Abroad believes that reconciliation will not be achievable until such time as the Australian Government further amends the Native Title Amendment Act 1998 such that the Act is no longer inconsistent with Australia’s obligations under the United Nations Convention on the Elimination of Racial Discrimination.

### 3.4 Motions of Support for the Documents of Reconciliation.

The Commonwealth Government has failed to pass formal motions of support for the key documents of reconciliation as proposed by the Council for Aboriginal Reconciliation. Despite being developed by the Council as a result of extensive community consultation, the Australian Declaration Towards Reconciliation was substantially revised by the Commonwealth Government to remove references to key issues such as the recognition of customary law, self-determination and a formal apology to the stolen generations. The recognition of past injustices was acknowledged by the Council for Aboriginal Reconciliation as a fundamental requirement for the reconciliation process to move forward and the lack of adequate and specific recognition of past injustices in the Motion of Reconciliation has increased conflict and polarisation in community debate.

The Motion of Reconciliation made in the House of Representatives ignored Council's broad community consultation process in which the Council spent years on careful and extensive community consultation in producing its *Draft Declaration Towards Reconciliation*. The deficiencies of the resulting motion resulted in it being opposed by many Indigenous and non-Indigenous Australians, lessening its value as a meaningful reconciliation initiative. As a result, Australia has no nationally agreed aspirational and guiding document on reconciliation.

### 3.5 Leadership of the Reconciliation Process.

The Commonwealth Government has failed to demonstrate a commitment to leadership of the ongoing reconciliation process in accordance with the Council for Aboriginal Reconciliation's national strategy for sustaining the reconciliation process.

The success of the work of the Council for Aboriginal Reconciliation over its lifespan owed much to the fact that it operated in the context of an adequately resourced, formal reconciliation process with its functions mandated by Parliament; and because the Council and the reconciliation process received unanimous cross-party support.

None of these conditions apply today. Although the Commonwealth has provided one-off funding for Reconciliation Australia of \$5.6 million and provided it with tax deductibility status, this in fact represents a significant reduction of Commonwealth financial support for the reconciliation process in comparison to previous Commonwealth commitments to the work of the Council for Aboriginal Reconciliation. It is inappropriate for the Commonwealth to transfer responsibility for the reconciliation process to Reconciliation Australia. Reconciliation Australia is not an appropriate body for this role as it has no legislated mandate, no formal powers for implementation and monitoring and grossly insufficient funding.

In addition, a number of the Commonwealth Government's policy positions continue to retard the reconciliation process. These include the Commonwealth Government's opposition to the issue of a national apology to the stolen generations as recommended in the *Bringing Them Home* Report, which has engendered community division over the issue. Oxfam Community Aid Abroad believes that it is a misrepresentation for the Commonwealth Government to suggest that a national apology would imply the guilt of current generations not involved in the policies of forced removals. This was never suggested in *Bringing Them Home* and has not been an issue in apologies subsequently made by every state and territory parliament in Australia.

The Commonwealth Government's 'practical reconciliation' policy has also served to retard the reconciliation process by artificially separating 'practical' and so-called 'symbolic' acts of reconciliation, suggesting that the reconciliation process focus on bestowing health, housing and education services for indigenous Australians which should in fact constitute basic rights for all Australian citizens. In doing so, the Commonwealth Government appears to have rejected the notion of substantive equality, instead vigorously promoting formal equality by not being prepared to support "any action which would entrench additional, special or different rights for one part of the community"<sup>1</sup>. This position has served to undermine community understanding of and support for the recognition of Indigenous cultural rights. Recognition of difference, enshrined in the internationally-accepted standard of 'substantive equality' (ie, that sometimes 'special rights' are necessary to deliver an equality of outcomes for differently-situated sections of the community, such as Indigenous groups), is necessary for genuine reconciliation and justice for Indigenous Australians.

Finally, the Commonwealth Government's opposition to the right of self-determination for Indigenous peoples has retarded the reconciliation process. The Commonwealth has wrongly portrayed self determination as equating to the creation of a separate Indigenous state and has argued for the removal of the term from the United Nations Draft Declaration on the Rights of Indigenous Peoples. However, the creation of a separate Indigenous state is not part of the term's meaning under international law, nor is it a political objective of Indigenous Australians.

### 3.6 *Constitutional Reform.*

Insufficient progress has been made in implementing the Council's recommendations for Constitutional reform through the removal of Section 25 from the Constitution, introducing a new section making it unlawful to adversely discriminate against any people on the grounds of race and inserting a new preamble to the Constitution recognising the status of the first Australians.

In handling the proposal for a Preamble to the Constitution, the Commonwealth Government ignored proper consultation processes, particularly with Indigenous interests, and imposed its own wording in committing the initiative to a referendum. Further, the Commonwealth Government adopted an intransigent approach to any suggested changes to the wording. This fostered a divisive environment in which the issue was debated in the community. Considering the difficulty of passing referenda in Australia, this approach effectively ensured the referendum would fail

While the Commonwealth Government's support for removal of the racially-discriminatory section 25 of the Constitution is welcome, it's lack of a plan or time-line for a referendum to remove section 25 is disappointing.

ENDS.

---

<sup>1</sup> *Commonwealth Response to The Council for Aboriginal Reconciliation Final Report, September 2002*  
Submission to Senate Legal and Constitutional References Committee inquiry on progress towards reconciliation.  
Oxfam Community Aid Abroad. November 2002.